

NOTES

FIRST AMENDMENT THEORY APPLIED TO THE RIGHT OF PUBLICITY

An individual's right of privacy and the freedom of the press have been in conflict since Samuel Warren, annoyed by constant press coverage of his wife's social affairs,¹ first proposed the right of privacy.² Believing that the press was "overstepping in every direction the obvious bounds of propriety and decency,"³ Warren and his former law associate Louis Brandeis argued for recognition of the right of an individual to be left alone.

As articulated by Warren and Brandeis, the right of privacy serves to protect the private details of a person's life from the relentless eye of the press. Since that time, the right of privacy has expanded beyond this original conception. Today, the tort broadly characterized as invasion of privacy has four analytically distinct categories:⁴ (1) unreasonable publicity given to the private details of a person's life (disclosure);⁵ (2) publicity unreasonably placing a person in a false light before the public (false light);⁶ (3) unreasonable intrusion upon a person's seclusion (intrusion);⁷ and (4) appropriation of a person's name or likeness (appropriation).⁸ These four categories are related only in their concern for an individual's right to lead a private life.⁹ As the Restatement (Second) of Torts observes, however, even "this nexus becomes quite tenuous in the case of the appropriation of name or likeness . . . , which appears rather to confer something analogous

¹ Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960).

² Warren & Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

³ *Id.* at 196.

⁴ See generally, W. PROSSER, *THE LAW OF TORTS* § 117 (4th ed. 1971) (hereinafter cited as PROSSER); RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (Tent. Draft No. 22, 1976).

⁵ See, e.g., *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) (see text at notes 16-20 *infra*); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (publication in a movie of incidents in the past life of a reformed prostitute along with her true name held to be actionable). *But cf.* *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (publication of a magazine article which described plaintiff as a person who had been a child prodigy and who had later sought to conceal his true identity held not to be actionable).

⁶ See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (see text at notes 12-15 and 97-102 *infra*); *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated and remanded per curiam*, 387 U.S. 239, *aff'd*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967) (publication of fictitious biography of well known baseball player held actionable).

⁷ See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (reporters held to have invaded plaintiff's privacy when they gained admittance to his home by subterfuge and photographed him without his consent); *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964) (landlord held to have invaded tenant's privacy when he installed a listening device in his bedroom).

⁸ See, e.g., *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (publication of the picture of plaintiff, without his consent, as part of an advertisement promoting the publisher's business, held actionable invasion of privacy); *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) (baseball players held to have right to control the use of their pictures on baseball cards).

⁹ RESTATEMENT (SECOND) OF TORTS § 652A, Comment b. Dean Prosser in explaining the differing interests protected by these four categories states:

Taking them in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not.

PROSSER, *supra* note 4, § 117 at 814.

to a property right upon the individual."¹⁰ Some courts and commentators have referred to this property interest as the "right of publicity."¹¹

The Supreme Court has considered the conflict between the freedom of the press and the right of privacy in only two of its four categories. In *Time, Inc. v. Hill*,¹² the Court discussed the false light category. The plaintiff in *Hill* sued for an invasion of privacy resulting from the defendant's publication of a magazine article which depicted him in a false light.¹³ Applying the same standard of liability which it had developed in the *New York Times Co. v. Sullivan* line of defamation cases,¹⁴ the Supreme Court held

¹⁰ RESTATEMENT (SECOND) OF TORTS § 652A, Comment b. See also *id.* at § 652C, Comment a.

¹¹ The suggestion has been made by several legal commentators that a conceptual distinction should be made between the "right of publicity" (injury to property interest) and the much broader branch of privacy known as "appropriation of name or likeness" (injury to feelings). Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U. L. REV. 553 (1960); Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954); Pember & Teeter, *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57 (1975); Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527 (1976). The first case to distinguish adequately between the two interests involved was Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868-69 (2d Cir.), cert. denied, 346 U.S. 816 (1953). Since that case, several other jurisdictions have recognized the right of publicity, either as being encompassed by the "appropriation" branch of privacy or as a separate tort. See, e.g., Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975) (recognizing right of publicity as a separate tort distinct from right of privacy); Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970) (seemingly recognizing the right of publicity as a separate tort); Canessa v. J. I. Kislak, Inc., 97 N.J. Super. 327, 235 A.2d 62 (1967) (recognizing right of publicity as constituting a branch of the right of privacy).

New York has a statute which provides a cause of action when an individual's name or likeness is commercially appropriated. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1948). The New York courts have strictly limited this statute as providing redress only for injury to feelings, and have not recognized a right of publicity as arising under the statute. *Gautier v. Pro-Football, Inc.*, 278 App. Div. 431, 438, 106 N.Y.S.2d 553, 560 (1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 450, 299 N.Y.S.2d 501, 508 (1968). New York's failure to recognize the right of publicity may have significantly retarded the growth of this tort. See Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 532 (1976). Recently, however, New York decisions have evidenced a willingness to recognize the right of publicity either independently of the statute, or as being encompassed by the statute's terms. See *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 App. Div. 2d 620, 396 N.Y.S.2d 661 (1977); *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144, *aff'd as modified*, 42 App. Div. 2d 544, 345 N.Y.S.2d 17 (1973). However, no Court of Appeals decision has yet embraced the right of publicity as arising independent of the privacy statute.

¹² 385 U.S. 374 (1967).

¹³ *Id.* at 377. Defendant Life Magazine published an account of a play and falsely described it as a re-enactment of an incident in plaintiff's life.

¹⁴ 376 U.S. 254 (1964). In *Sullivan*, the Supreme Court held that before a newspaper may be held liable to a "public official" for publication of defamatory falsehoods, the plaintiff must prove that the defamatory statement was published with knowledge that it was false or with reckless disregard of truth or falsity. *Id.* at 279-80. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court extended the application of the *Sullivan* standard to "public figures." *Id.* at 155. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the application of the *Sullivan* standard was further extended to apply to "private individuals" as long as the defamatory statements concerned matters of general or public interest. *Id.* at 52. However, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court overruled *Rosenbloom* and held that so long as the states did not impose liability without fault, they could choose for themselves the appropriate standard of liability for the protection of "private individuals." *Id.* at 346-48. Recently, in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court reaffirmed its holding in *Gertz*. *Id.* at 457.

that the first amendment shields the press from liability for publication of nondefamatory falsehoods unless the publication is made with knowledge of its falsity or in reckless disregard of its truth.¹⁵

The Court discussed the relationship between the first amendment and the disclosure category of privacy in *Cox Broadcasting Co. v. Cohn*.¹⁶ There, the plaintiff brought suit against a newspaper which had published the name of his daughter, a rape victim.¹⁷ The newspaper had obtained her name from public court records.¹⁸ Avoiding the broader question whether "the State may ever define and protect an area of privacy free from unwanted publicity in the press,"¹⁹ the Court narrowly held that the first amendment precludes media liability for truthful publication of information available from official court records.²⁰

Last Term, in *Zacchini v. Scripps-Howard Broadcasting Co.*,²¹ the Supreme Court considered for the first time the relationship between the appropriation category of the right of privacy and the first amendment.²² The Court held that the first amendment does not privilege the news media to televise a performer's entire act against his express objection.²³ In so doing, the Court considered the right of publicity to be analytically distinct for constitutional purposes from other branches of the right of privacy.²⁴ However, by narrowly limiting its decision to a rather unusual fact situation, the Court did not articulate a broad test for first amendment privilege in this category of privacy, as it had done for the false light category in *Hill*. This note will examine the basis of the result in *Zacchini* and the distinctions which the Court drew between the right of publicity and other branches of the right of privacy. In this light, the note will then seek to determine what test the Court is likely to require in the future to reconcile this aspect of an individual's right of privacy and the first amendment.

¹⁵ 385 U.S. at 388.

¹⁶ 420 U.S. 469 (1975).

¹⁷ *Id.* at 474.

¹⁸ *Id.* at 472-73.

¹⁹ *Id.* at 491.

²⁰ *Id.* By deciding the case on such narrow grounds, the Supreme Court left open the possibility that the first amendment does not preclude liability for the truthful publication of private details. Indeed, although the Supreme Court has not ruled on this issue, several other courts have taken the position that under certain circumstances the media may be liable for truthful publication of private details. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975), *cert. denied*, 425 U.S. 988, *on remand*, 424 F. Supp. 1286 (1976); *Briscoe v. Reader's Digest Ass'n, Inc.*, 4 Cal.3d 529, 540, 483 P.2d 34, 42, 93 Cal. Rptr. 866, 874 (1971). The court of appeals in *Virgil* ruled that unless the private facts were privileged or newsworthy, the publication of private facts is not protected by the first amendment. The court adopted the standard suggested by the Restatement (Second) of Torts § 652D (Tent. Draft No. 21, 1975), that liability may be imposed for an invasion of privacy stemming from the disclosure of embarrassing private facts only if the matter is not a legitimate, newsworthy concern of the public. 527 F.2d at 1129.

²¹ — U.S. —, 97 S. Ct. 2849 (1977).

²² The Supreme Court has not yet been faced with a case posing first amendment issues with respect to the remaining branch of privacy, "unreasonable intrusion upon a person's seclusion." For an excellent discussion of the nature of these first amendment issues, see *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

²³ 97 S. Ct. at 2857, 2859.

²⁴ *Id.* at 2855-56.

I. THE ZACCHINI DECISION

In 1972, The Great Zacchini was performing his human cannonball act at the Geauga County Fair in Burton, Ohio.²⁵ Lasting approximately fifteen seconds, Zacchini's act consisted of his being shot from a cannon into a net located two hundred feet away.²⁶ Ignoring Zacchini's express request that he not film the act, a reporter from a local television station videotaped an entire performance.²⁷ The station then broadcast this fifteen second film clip on its eleven o'clock news program, commenting favorably upon the performance.²⁸

Following this broadcast, Zacchini brought suit in the Ohio Court of Common Pleas against Scripps-Howard Broadcasting Company, the operator of the television station.²⁹ He alleged that Scripps-Howard unlawfully had appropriated his professional property by broadcasting his act without consent,³⁰ and requested damages of twenty-five thousand dollars.³¹ After the trial court granted the defendant's motion for summary judgment, Zacchini sought review by the Ohio Court of Appeals.³² The appellate court reversed the trial court's judgment,³³ holding that the first amendment does not privilege the media to appropriate a performer's entire act without his consent.³⁴

²⁵ *Id.* at 2851.

²⁶ *Id.* Zacchini's act was staged in an open area surrounded by grandstands, and members of the public were not charged a separate admission to watch it. *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2851 n.1. The script read by the news commentator was very favorable:

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

Id. (emphasis in original).

²⁹ *Id.* at 2851.

³⁰ *Id.* Specifically, plaintiff alleged that "the defendant showed and commercialized the film of his act without his consent and such conduct by the defendant was unlawful appropriation of plaintiff's professional property." Petitioner's Brief for Certiorari at App. p. 49, *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849 (1977).

It is important to note that plaintiff did not characterize his cause of action as one for invasion of privacy, but as one for damage to his professional property, or, as the Ohio Supreme Court chose to characterize it, his "right of publicity." *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 231-32, 351 N.E.2d 454, 459 (1976).

³¹ Zacchini did not indicate in his complaint whether the requested damages reflected the unjust enrichment received by defendant or the harm he suffered by defendant's act. Furthermore, the Supreme Court of Ohio did not elucidate what the proper measure of damages should be in a right of publicity suit. In regard to this issue, the Supreme Court of the United States was equivocal as to the proper measure of damages. As noted by the dissent:

At some points the Court seems to acknowledge that the reason for recognizing a cause of action asserting a "right of publicity" is to prevent unjust enrichment. ... But the remainder of the opinion inconsistently accepts a measure of damages based not on the defendant's enhanced profits but on harm to the plaintiff regardless of any gain to the defendant.

97 S. Ct. at 2859 n.2 (Powell, J., dissenting) (citations omitted).

³² *Id.* at 2851. No opinion was reported for the court of appeals, but the opinion can be found in the Petitioner's Brief for Certiorari at App. p. 27, *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849 (1977).

³³ 97 S. Ct. at 2851.

³⁴ *Id.* at 2852. The majority held that Zacchini had set forth a valid cause of action against defendant Scripps-Howard "based either on conversion or the invasion of the per-

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The Supreme Court of Ohio reversed the judgment of the court of appeals and reinstated the trial court judgment for defendant Scripps-Howard.³⁵ Although recognizing that Zacchini had stated a valid cause of action for invasion of his right of publicity,³⁶ the court nevertheless reasoned that the news media must be given broad latitude in their determination as to how much of a particular story to present.³⁷ Relying principally on the United States Supreme Court's decisions in *New York Times Co. v. Sullivan*³⁸ and *Time, Inc. v. Hill*,³⁹ the court held that the defendant was privileged to show Zacchini's act on its newscast.⁴⁰

former's common law copyright." A concurring judge stated that plaintiff's cause of action was for invasion of his property interest in controlling the publicity given to his act, an interest which the concurring judge labelled the "right of publicity." Although differing as to the appropriate denomination of plaintiff's claim, both Ohio Court of Appeals opinions agreed that the first amendment did not privilege the defendant to show Zacchini's act without his consent. *Zacchini*, 97 S. Ct. at 2852.

³⁵ *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 235-36, 351 N.E.2d 454, 462 (1976).

³⁶ *Id.* at 231-32, 351 N.E.2d at 459. The Ohio Supreme Court first recognized a cause of action for invasion of privacy in *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956), where it held that:

An actionable invasion of the right of privacy is the unwarranted *appropriation or exploitation of one's personality*, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to *outrage or cause mental suffering, shame or humiliation* to a person of ordinary sensibilities.

Id. at 35, 133 N.E.2d at 341 (emphasis added). As the language in *Housh* indicates, the right recognized in that case was directed primarily at redressing injury to feelings. In *Zacchini*, the Ohio Supreme Court recognized for the first time the right of publicity. The court was not concerned with redressing injury to feelings, but with protecting the property interest which a performer has in controlling the publicity given to his act. However, the court did not deal with the right of publicity as a tort separate from the right of privacy, but as being encompassed by the branch of privacy known as "appropriation of name or likeness." 47 Ohio St. 2d at 224, 351 N.E.2d at 455. The court reconciled the apparent inconsistency of allowing a performer to recover for damage to his right of publicity under the general rubric of the right of privacy by noting that

the "privacy" which the performer seeks is personal control over commercial display and exploitation of his personality and the exercise of his talents. In other words, performers and other public figures wish to keep the benefits of their performances private, or at least retain control over them, in much the same way that any individual would wish to keep control over his name and face.

Id. at 231, 351 N.E.2d at 459.

³⁷ 47 Ohio St. 2d at 235, 351 N.E.2d at 461.

³⁸ 376 U.S. 254 (1964).

³⁹ 385 U.S. 374 (1967). The Supreme Court of Ohio concluded that the net effect of *Sullivan* and *Hill* was that "the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private." 47 Ohio St. 2d at 234, 351 N.E.2d at 461.

⁴⁰ 47 Ohio St. 2d at 235-36, 351 N.E.2d at 462. In reaching its decision, the Supreme Court of Ohio reasoned that the application of a fixed standard which prevented the press from reporting an entire performance would unduly inhibit the freedom of the press. *Id.* at 235, 351 N.E.2d at 461. The court concluded that the

proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer.

Id. Applying this standard to the instant case, the court determined that the defendant had not abused its privilege. *Id.* at 235-36, 351 N.E.2d at 462.

The United States Supreme Court granted certiorari,⁴¹ and, in a five to four decision,⁴² reversed the judgment of the Supreme Court of Ohio.⁴³ In an opinion written by Justice White, the Court held that the first amendment does not privilege the media to broadcast a performer's entire act without his consent,⁴⁴ at least when they have actual knowledge that the performer expressly objects to such a broadcast.⁴⁵

In reaching its decision, the Court first distinguished the case at hand from its decision in *Time, Inc. v. Hill*⁴⁶ recognizing a first amendment privilege in the area of false light privacy. The *Zacchini* Court drew two distinctions between false light privacy and the right of publicity. First, the Court perceived a different state interest in providing a cause of action for false light privacy than for the right of publicity. While the state interest in redressing false light invasion of privacy is to protect against injury to reputation and feelings, the state interest underlying the right of publicity is to safeguard a performer's proprietary interest in his act, in part to encourage such performances for the public benefit.⁴⁷ Second, the Court reasoned that false light privacy and the right of publicity differ in the degree to which their protection inhibits dissemination of information to the public.⁴⁸ In false light privacy, the Court observed, the individual can be protected only by minimizing the spread of false information.⁴⁹ In contrast, where the right of publicity is protected, the dissemination of information is not curtailed; the only issue is which party has the right to do the disseminating.⁵⁰ The Court noted that entertainers usually have no objection to the broadcast of their act as long as they thereby derive the commercial benefit.⁵¹ Indeed, *Zacchini* had not sought to enjoin the broadcast of his

The syllabus preceding the Ohio Supreme Court opinion did not indicate whether the court had based its decision on federal or state grounds. Although the syllabus and not the accompanying opinion is the law in Ohio, OHIO REV. CODE ANN. § 2503.20 (Baldwin 1964), the opinion may be referred to in order to elucidate the reasoning behind the syllabus. See, e.g., *Hart v. Andrews*, 103 Ohio St. 218, 221, 132 N.E. 846, 847 (1921). In *Zacchini*, the Ohio Supreme Court opinion appeared to be based solely on federal grounds, since the court relied solely on United States Supreme Court decisions construing the first amendment. Moreover, the Ohio Supreme Court did not cite any state decisions, nor did it mention the Ohio constitution.

⁴¹ —U.S.—, 97 S. Ct. 730 (1977).

⁴² Justice White was joined in his majority opinion by Chief Justice Burger, and Justices Rehnquist, Blackmun and Stewart. Justice Powell filed a dissenting opinion in which Justices Brennan and Marshall joined. Justice Stevens dissented separately on the ground that the Court should not have reached the merits because it was doubtful that there was even a federal question.

⁴³ 97 S. Ct. at 2859. Before reaching the first amendment issue, the Court first determined that it had jurisdiction to hear the case since the Supreme Court of Ohio opinion did not rest on an independent and adequate state ground. The majority reasoned that the opinion either rested solely on the first amendment, or that, at the very least, the Supreme Court of Ohio "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Id.* at 2853. On either basis, the majority concluded, there was no independent and adequate state ground. *Id.* at 2853-54.

⁴⁴ *Id.* at 2857.

⁴⁵ *Id.* at 2859.

⁴⁶ 385 U.S. 374 (1967).

⁴⁷ 97 S. Ct. at 2856.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

act, but only to receive compensation in the form of damages.⁵² Since the Court determined that the right of publicity is distinct from the tort of false light privacy, it concluded that its decision in *Hill* did not mandate a first amendment privilege to infringe a performer's right of publicity.⁵³

After distinguishing *Hill* from the case at hand, the Court also indicated that *New York Times Co. v. Sullivan*⁵⁴ and its progeny,⁵⁵ which had established a first amendment privilege in defamation law, did not support a similar privilege in the right of publicity context.⁵⁶ None of these cases had involved an appropriation by the media of a performer's right of publicity.⁵⁷ Moreover, the Court pointed out, both the *Sullivan* line of defamation cases and *Hill* had involved only the reporting of the details of an event, not the broadcast of a performer's entire act.⁵⁸ The Court concluded that defendant Scripps-Howard clearly would have been privileged under the first amendment had it limited the report to only the newsworthy details of Zacchini's performance.⁵⁹

Convinced that its previous decisions in defamation and false light privacy did not mandate a media privilege to televise an entertainer's entire act, the Court proceeded to examine the two state interests which underlie the right of publicity.⁶⁰ First, the Court noted that a state has an interest in protecting the economic value of a performer's act.⁶¹ In this connection, the Court observed that *Zacchini* presented "what may be the strongest case for a 'right of publicity'—involving not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place."⁶² Second, a state has an interest in encouraging entertainers to produce acts of interest to the public.⁶³ Analogizing these two state interests to the policies underlying the patent and copyright laws,⁶⁴ the Court likened the broadcast of *Zacchini*'s act to the unlicensed broadcast of a copyrighted dramatic work,⁶⁵ a prize fight,⁶⁶ or a baseball game.⁶⁷ The Court concluded that "[w]herever the line . . . is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."⁶⁸ In reaching this decision, the Court was careful to note that its

⁵² *Id.*

⁵³ *Id.* at 2855.

⁵⁴ 376 U.S. 254 (1964).

⁵⁵ See note 14 *supra*.

⁵⁶ 97 S. Ct. at 2856.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2857.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911); *Manners v. Morosco*, 252 U.S. 317 (1920).

⁶⁶ *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

⁶⁷ *Pittsburg Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938).

⁶⁸ 97 S. Ct. at 2856-57.

holding did not amount to imposing strict liability on the defendant because Scripps-Howard had known that Zacchini expressly objected to the broadcast of his act.⁶⁹ Moreover, the Court observed that while the first amendment does not require a privilege in this context, a state is free to create such a privilege under its own law.⁷⁰

Joined in dissent by Justices Brennan and Marshall, Justice Powell criticized the majority opinion as insensitive to the first amendment interests at stake.⁷¹ The dissent found the fact that Zacchini's act was shown on a news program rather than on a commercial broadcast determinative of the first amendment issue,⁷² reasoning that Zacchini could not complain if his performance was the subject of routine news coverage once he had decided to make his act interesting to the public.⁷³ The dissent also warned that the Court's holding might result in media self-censorship:

Hereafter, whenever a television news editor is unsure whether certain film footage received from a camera crew might be held to portray an "entire act," he may decline coverage—even of clearly newsworthy events—or confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture This is hardly the kind of news reportage that the First Amendment is meant to foster.⁷⁴

Accordingly, the dissent concluded that Scripps-Howard was privileged to use the film of plaintiff's act as part of a routine news program, "absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation."⁷⁵

The Court in *Zacchini* narrowly limited its decision to the facts of the case before it. As a result, the only concrete constitutional principle to emerge from the Court's opinion is that the first amendment does not preclude liability when the news media both appropriate a performer's entire act and know of the performer's objection to that appropriation. By tailoring its decision narrowly, the Supreme Court left unresolved two issues concerning the limits which the first amendment places upon state protec-

⁶⁹ *Id.* at 2859.

⁷⁰ *Id.*

⁷¹ *Id.* (Powell, J., dissenting).

⁷² *Id.*

⁷³ *Id.* at 2860.

⁷⁴ *Id.* at 2859-60.

⁷⁵ *Id.* at 2860. Justice Powell doubted that the majority's holding provided a standard clear enough to decide even the case at hand. He noted that:

Although the record is not explicit, it is unlikely that the "act" commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later. One may assume that the actual firing was preceded by some fanfare, possibly stretching over several minutes, to heighten the audience's anticipation: introduction of the performer, description of the uniqueness and danger, last-minute checking of the apparatus, and entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the "entire act" in its 15-second newsclip—and the Court's opinion then would afford no guidance for resolution of the case. Moreover, in future cases involving different performances, similar difficulties in determining just what constitutes the "entire act" are inevitable.

Id. at 2859 n.1.

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tion of the right of publicity. The first issue concerns the appropriate standard of liability when the news media broadcast a performer's act and are not aware that he objects to such a broadcast. The second issue concerns the circumstances under which the news media may be held liable for appropriation of something less than an entire performance. The resolution of these issues is of practical importance to the news media in order that they may gauge their potential liability for broadcasting a performer's act.⁷⁶

II. POTENTIAL MEDIA LIABILITY FOR INFRINGING A PERFORMER'S RIGHT OF PUBLICITY

The narrow, ad hoc resolution of the issues in *Zacchini* contrasts with the approach which the Court previously has employed to resolve first amendment issues in defamation⁷⁷ and false light privacy⁷⁸ cases. In these fields, the Court has formulated broad constitutional rules by balancing the first amendment interest in preserving a free press against the state interest in protecting reputation.⁷⁹ Once formulated, such rules can be employed to decide later cases without the necessity of reweighing the competing interests in each new case. In discussing the merits of this constitutional rulemaking approach, the Court has stated:

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. . . . But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.⁸⁰

One commentator has labelled this constitutional rulemaking "definitional balancing."⁸¹ After examining how the Court has used definitional balancing to resolve first amendment issues in defamation and false light privacy cases, this note will explore the possible application of definitional balancing to right of publicity cases.

A. Definitional Balancing in Defamation and False Light Privacy

The Supreme Court first employed definitional balancing in *New York Times Co. v. Sullivan*.⁸² The plaintiff in *Sullivan* was a public official who

⁷⁶ The remainder of this note will be concerned with media liability for *news* use of a performer's act. Commercial use of a performer's act by the media would present different considerations.

⁷⁷ See note 14 *supra*.

⁷⁸ See text at notes 12-15 *supra*.

⁷⁹ See Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942 (1968) [hereinafter cited as *Nimmer*].

⁸⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

⁸¹ *Nimmer*, *supra* note 79, at 942.

⁸² 376 U.S. 254 (1964). Although the opinion in *Sullivan* does not acknowledge expressly that the standard defined there was the result of balancing, this fact has been made clear by subsequent opinions. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

brought suit against the defendant newspaper for publishing an advertisement which defamed him.⁸³ In considering the first amendment interests at issue in *Sullivan*, the Supreme Court rejected any rule which would require a newspaper to guarantee the truth of its assertions regarding a public official.⁸⁴ Such a rule would constitute strict liability and would deter newspapers from voicing their criticism of public officials.⁸⁵ In order to protect the first amendment interest in preserving a vigorous and uninhibited press, the Court reasoned that some falsehood must be tolerated.⁸⁶ At the same time, however, the Court recognized a legitimate state interest in protecting an individual's reputation.⁸⁷ The Court reconciled this state interest with the first amendment interest in maintaining a free press by developing a constitutional rule which requires a public official to prove that a defamatory statement relating to his official conduct was made with "knowledge that it was false or with reckless disregard of whether it was false or not."⁸⁸

The Supreme Court later extended the *Sullivan* rule to apply to public figures as well as public officials.⁸⁹ However, in *Gertz v. Robert Welch, Inc.*,⁹⁰ the Court was faced with a media defamation of a private individual rather than a public figure or public official,⁹¹ and used definitional balancing to arrive at a standard different from that in *Sullivan*.⁹² As in *Sullivan*, the competing interests at stake were the need for a robust press and the state interest in protecting reputation.⁹³ In *Gertz*, however, the Court found the state interest in protecting the reputation of private individuals to be stronger than the state interest in protecting the reputation of public persons.⁹⁴ As a result, the Court concluded that the first amendment does not require a knowledge or reckless disregard standard of liability for media defamation of a private individual, at least where "the substance of the defamatory statement makes substantial danger to reputation apparent."⁹⁵ Instead, the Court held that as long as the states do not impose strict liability, they may decide for themselves the appropriate standard of liability

⁸³ 376 U.S. at 256-57.

⁸⁴ *Id.* at 279.

⁸⁵ *Id.*

⁸⁶ *Id.* at 271-72.

⁸⁷ *Id.* at 256.

⁸⁸ *Id.* at 279-80.

⁸⁹ *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

⁹⁰ 418 U.S. 332 (1974).

⁹¹ *Id.* at 326.

⁹² *Id.* at 347-48.

⁹³ *Id.* at 343.

⁹⁴ *Id.* at 344-45. The Court distinguished in two ways the state interest in a private individual's reputation from the analogous interest in a public person's reputation. First, the Court noted that public persons "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the State interest in protecting them is correspondingly greater." *Id.* Second, the Court found persuasive the fact that the media are entitled to act on the assumption that public persons have voluntarily exposed themselves to the risk of injury from defamation, but that no such assumption is justified with regard to private individuals. *Id.* Thus, the Court concluded, "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." *Id.* at 345.

⁹⁵ *Id.* at 347-48.

when the media defames a private individual.⁹⁶ After *Gertz*, then, a state can choose to employ a negligence standard when the media defames a private individual rather than the more rigorous reckless disregard standard required when the media defames a public person.

In *Time, Inc. v. Hill*,⁹⁷ the Supreme Court introduced definitional balancing to the conflict between the freedom of the press and the right of privacy. The plaintiff in *Hill* brought suit against the defendant magazine for publishing an article which depicted him in a false light.⁹⁸ The Supreme Court held that the *Sullivan* standard of knowledge or reckless disregard for falsity is appropriate in false light privacy.⁹⁹ The Court indicated that it did not find this standard appropriate through a blind application of *Sullivan*, but rather through a consideration of the competing interests involved in false light privacy.¹⁰⁰ As in *Sullivan* and *Gertz*, the Court was concerned primarily with avoiding media self-censorship. In this light, the Court concluded that a negligence standard would be inappropriate because it would require the media to guess as to how a jury might assess the reasonableness of the steps taken to assure truthful publications.¹⁰¹ Moreover, the Court found a negligence standard particularly inappropriate when dealing with nondefamatory falsehoods since "the content of the speech itself affords no warning of prospective harm to another through falsity."¹⁰²

In *Zacchini*, the Court did not need to develop a broad definitional standard of liability for media infringement of a performer's right of publicity. Scripps-Howard knew that *Zacchini* did not consent to the broadcast of his act.¹⁰³ Such a condition of actual knowledge clearly satisfies either the *Sullivan* reckless disregard standard or the *Gertz* negligence standard. Consequently, the Court was not required to define, as in *Sullivan*, *Hill*, and *Gertz*, a standard less than actual knowledge by which liability could be imposed on the news media. Nevertheless, if in the future the Court is presented with a right of publicity case in which the news media were unaware that a performer objected to the broadcast of his act, it is likely that the Court will adopt a definitional standard. Such an approach would be consistent with the Court's seeming preference for a definitional rule in cases involving similar interests.¹⁰⁴ Moreover, a definitional standard is more

⁹⁶ *Id.*

⁹⁷ 385 U.S. 374 (1967).

⁹⁸ *Id.* at 378-79.

⁹⁹ *Id.* at 387-88.

¹⁰⁰ *Id.* at 388-89.

¹⁰¹ *Id.* at 389.

¹⁰² *Id.*

¹⁰³ 97 S. Ct. at 2851.

¹⁰⁴ See text at notes 82-102 *supra*. The Court's decision in *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) makes it unclear whether the Court favors a definitional balancing approach in all right of privacy categories. *Cox* raised first amendment issues in the disclosure category of the right of privacy, and the Court declined to adopt a broad holding as to first amendment privilege in this category. Instead the Court limited its decision narrowly to the facts before it. *Id.* at 491. See text at notes 16-20 *supra*.

Although the narrow resolution of first amendment issues in *Zacchini* might be interpreted as an indication that the Supreme Court does not favor a definitional balancing test in the appropriation branch of the right of privacy, the *Zacchini* decision just as easily can be viewed as an application of the Court's historic reluctance to decide more constitutional law than necessary. See, e.g., *Boynton v. Virginia*, 364 U.S. 454 (1960). Indeed this same observa-

protective of the first amendment concern for press freedom. Such a standard both warns the news media of their potential liability, and minimizes the chilling effect of media liability based upon an ad hoc balancing.¹⁰⁵ Under a definitional rule, the trier of fact must judge media conduct according to a predetermined standard, and, as a result, is less likely to decide upon personal bias as to the role of the press in our society or the value of the publication at issue.¹⁰⁶ Thus, it is not only likely that the Court will use definitional balancing to resolve first amendment issues in right of publicity cases, but such an approach is also preferable.

B. *Definitional Balancing as Applied to the Right of Publicity*

In developing the appropriate definitional standard of liability where the news media broadcast a performer's entire act and are actually unaware of his objection, the Court will have to balance the first amendment interest in guarding the freedoms of press and speech against the competing state interest in protecting an entertainer's proprietary rights. In *Zacchini*, the Supreme Court identified two state interests in protecting the right of publicity.¹⁰⁷ First, a state has an interest in protecting the economic value of a performer's act. Second, a state has an interest in encouraging entertainers to produce acts of interest to the public. In comparing these interests with those underlying the tort of false light privacy, the Court stressed that the right of publicity protects property rights and not reputation or feelings as in false light privacy.¹⁰⁸ Although the Court did not explain why this distinction is significant, implicitly it considers property rights to be more important than reputational rights.¹⁰⁹ Consequently, it would appear that the Supreme Court finds the state interests underlying the right of publicity to be weightier than the corresponding state interests in false light privacy.

Although the *Zacchini* Court devoted most of its opinion to a discussion of the state interests in providing a cause of action for the right of publicity, the Court did evince concern for protecting two first amendment interests: preserving the free flow of information to the public and maintaining a robust and uninhibited press. The Court implied that protection of the right of publicity does not infringe the first amendment interest in preserving the free flow of information to the public.¹¹⁰ The Court noted that in a right of publicity suit the only issue is which party has the right to do the broadcasting.¹¹¹ Accordingly, in the Court's view, there is no danger

tion can be made as to the Court's decision in *Cox*. Therefore, just because the Court has decided two of the most recent privacy cases on narrow grounds does not mean that the Court has eschewed a definitional balancing approach in the privacy context. Moreover, in another recent privacy case, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), the Court indicated that it still considers definitional balancing to be the appropriate test in false light privacy. *Id.* at 250.

¹⁰⁵ See *Nimmer*, *supra* note 79, at 939-42.

¹⁰⁶ *Id.* See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 346 (1974).

¹⁰⁷ 97 S. Ct. at 2857.

¹⁰⁸ *Id.* at 2856.

¹⁰⁹ The Supreme Court has also implied that property interests are more compelling than reputational interests in the procedural due process context. *Paul v. Davis*, 424 U.S. 693, 711-12 (1976) (injury to reputation does not result in deprivation of either "liberty" or "property" within the meaning of the due process clause of the fourteenth amendment).

¹¹⁰ 97 S. Ct. at 2856.

¹¹¹ *Id.*

that the public will be deprived of an opportunity to see the performance or to learn of it by a press report which does not appropriate the performer's act. By contrast, the Court indicated, the tort of false light privacy necessarily infringes the first amendment interest because an individual's reputation can be protected only by minimizing the flow of damaging information.¹¹² Thus, it would appear that the Supreme Court considers the first amendment interest in preserving the flow of information to be less implicated by the right of publicity than false light privacy.

The Court discussed the first amendment interest in maintaining an uninhibited media only briefly in *Zacchini*. Because Scripps-Howard knew that the plaintiff objected to the broadcast of his act, the Court indicated that a damage recovery by *Zacchini* would not be based upon strict liability contrary to the spirit of *Gertz*.¹¹³ It is unlikely, however, that the Supreme Court would dismiss as summarily the first amendment interest in maintaining an uninhibited media if it were defining a standard of media liability triggered by less than actual knowledge of a performer's objection. To remain consistent with *Sullivan* and its progeny, the Court would need to be more concerned with assuring the press the necessary breathing space to carry out their constitutionally protected right of reporting the news. In *Sullivan* and *Gertz*, the Court determined that some falsehood must be tolerated in order that the press are not deterred unduly in reporting the truth.¹¹⁴ Correspondingly, in the right of publicity context, it would seem that some unconsented uses of a performer's act must be allowed so that the media continue to inform the public of entertainment events.

The *Zacchini* Court did not decide whether the requisite breathing space is accorded the media in the right of publicity context by a negligence standard as in *Gertz* or by a stricter reckless disregard standard as in *Sullivan*. In determining how the Court will resolve this issue, it is significant that in *Hill* the Court deemed a negligence standard particularly inappropriate when dealing with nondefamatory falsehoods because "the content of the [nondefamatory falsehood] itself affords no warning of prospective harm to another through falsity."¹¹⁵ Similarly, in *Gertz*, although the Court found that a negligence standard of liability for defamation of private individuals is constitutionally permissible, the Court conditioned the application of this standard to situations where "the substance of the defamatory statement makes substantial danger to reputation apparent."¹¹⁶ The message of *Hill* and *Gertz* is that a negligence standard might not chill the media unduly if the content of the communication can warn the media of potential liability. Applying this principle to the right of publicity, the content of the communication, a paid performer's act, would appear to provide sufficient warning of a question whether the performer would consent to an appropriation of his act. For example, in *Zacchini*, both the fact that the act was performed in a closed environment¹¹⁷ and the fact that the public was charged an admission fee¹¹⁸ reasonably should have indicated to

¹¹² *Id.*

¹¹³ *Id.* at 2859.

¹¹⁴ *Sullivan*, 376 U.S. at 279; *Gertz*, 418 U.S. at 343.

¹¹⁵ 385 U.S. at 389.

¹¹⁶ 418 U.S. at 347-48.

¹¹⁷ 97 S. Ct. at 2851.

¹¹⁸ *Id.*

the defendant that substantial property rights were involved. Because the form of communication in the appropriation of a performance provides a warning of potential liability, the Court might find that a negligence standard does not infringe the first amendment interest in preserving an uninhibited media as it does in false light privacy.¹¹⁹

Since it appears that the Supreme Court, on one hand, considers the state interest in providing a cause of action to be stronger for the right of publicity than for false light privacy, and, on the other hand, perceives the first amendment interest in the free flow of information to be implicated less by protecting the right of publicity than false light privacy, it would seem that the constitutional balance favors the state interests in the right of publicity more than in false light privacy. This balance toward state interests in the right of publicity context is reinforced by the possibility that the Court might find the first amendment interest in preserving an uninhibited media to be infringed less by the right of publicity than false light privacy. As a result, if the Court is faced with the issue of what standard less than actual knowledge of objection is constitutionally sufficient to attach liability on the media in a right of publicity suit, it is likely to find that a negligence standard is appropriate rather than the reckless disregard standard applied to false light privacy. Under a negligence standard, the news media would be liable for appropriating a performer's act if they either knew of his objection or were unreasonable in ascertaining whether he consented to such a broadcast.¹²⁰

C. *Potential Media Liability for News Use of Less Than an Entire Act*

Although it is likely that the Supreme Court would find a negligence standard as to consent constitutionally appropriate, there remains the second issue left open by the Court in *Zacchini*: does the first amendment privilege the media against liability for news use of less than an entire act, regardless of consent. Although the *Zacchini* Court did not resolve this is-

¹¹⁹ Some might consider the *Sullivan* reckless disregard standard applicable to *Zacchini* because he was without doubt a public figure, and that therefore the considerations which led the Court in *Gertz* to find a negligence standard applicable to private individuals are not present in *Zacchini*. This position, although superficially convincing, is untenable upon close examination of the *Gertz* decision. In *Gertz*, the Supreme Court found a negligence standard constitutionally permissible for media defamations of private individuals because they are less able than public figures to use means of communication to correct the harm from defamation. See note 94 *supra*. These considerations have no relevance to the right of publicity. For one thing, there is no such being as a "private" performer. For another, although harm through defamation can be corrected by additional speech to establish the truth, the same is not true of harm through appropriation. Once a performer's property rights have been infringed, no amount of additional speech can correct the harm done. Because different considerations are present in the right of publicity, the application of a negligence standard as to consent would not be inconsistent with the Court's decision in *Gertz*.

¹²⁰ In this regard, it is noteworthy that the concurring judge for the Ohio Court of Appeals advocated the application of a negligence standard as to consent. In so doing, he observed:

If Mr. Zacchini had performed under circumstances sufficient to justify the photographer in believing that Zacchini did not object to the filming, then that reasonable reliance on the part of the photographer would be sufficient to estop Zacchini from asserting his claim for appropriation of his right of publicity.

Petitioner's Brief for Certiorari at App. p. 45, *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849 (1977).

sue, the Court did define broad parameters as to how much of a performer's act the news media can appropriate. On one hand, the Court suggested that the first amendment privileges the media when they report merely the newsworthy details of a performance.¹²¹ On the other hand, the Court found that the news media are not privileged when they appropriate an entire act.¹²² However, the Court did not develop criteria for drawing the line between those reports which are privileged as constituting merely a report of the newsworthy details of a performance, and those which are unprivileged as appropriating an entire act.¹²³

Several possible standards are open to the Court in drawing the line between media reports which are privileged and those which are not. At one extreme, the Court could adopt its decision in *Zacchini* as the limit on media liability, and find that the news media are privileged by the first amendment to appropriate anything but an entire act. At the other extreme, the Court could decide that the news media are not privileged to use any part of a performer's act without consent. Such a standard would limit the media to broadcasting a verbal report of a performance's newsworthy details. Alternatively, the Court might adopt a standard between these extremes. One such intermediate standard would privilege the press to broadcast as much of a performer's act as is newsworthy. Another intermediate standard would privilege media appropriations of an entertainer's performance so long as the media do not broadcast a "material or substantial" part of the performance. The relative merits of these four standards, and their potential for adoption by the Court will now be examined.

Despite the *Zacchini* Court's frequent emphasis on the fact that Scripps-Howard had broadcast the plaintiff's entire act, it is doubtful that the Court would adopt a standard privileging the media to appropriate anything but an entire act. Such a standard is impractical because, as Justice Powell observed in his dissenting opinion,¹²⁴ it is often impossible for the media to determine what constitutes an entire act. At the same time, such a limit on media liability does not reflect the *Zacchini* Court's concern for the state interest in protecting a performer's property rights. The economic value of a performer's act may be impaired as readily by media appropriation of only a portion of the act as by appropriation of the entire act. In addition, by specifically declining to draw the line between media reports which are privileged and those which are not, the Court implied that some intermediate standard is constitutionally appropriate. Thus, it is unlikely that the Court would adopt a standard of liability triggered only by unconsented use of an entire act.

At the other extreme, the Supreme Court could adopt a standard which would prohibit the unconsented use of any part of a performer's act. The *Zacchini* Court's conclusion that Scripps-Howard would have been privileged if it had limited its report to just the newsworthy details of *Zacchini's* performance can be viewed as support for this standard.¹²⁵ A standard which limits the media to reporting the newsworthy facts of a per-

¹²¹ 97 S. Ct. at 2856.

¹²² *Id.* at 2857.

¹²³ *Id.* at 2856-57.

¹²⁴ *Id.* at 2859 n.1 (Powell, J., dissenting).

¹²⁵ *Id.* at 2854, 2858.

formance is also consistent with the nature of the right of publicity; a performer's right of publicity is infringed when any part of his act is taken without consent, not just when the entire act is appropriated. Despite these considerations, it is unlikely that the Supreme Court would find such a standard appropriate. Again, the Court's reluctance in *Zacchini* to draw the line between media reports which are privileged and those which are not implies that some intermediate standard is appropriate. Moreover, it is likely that the Court would find that a standard which prohibits the unconsented use of any part of a performer's act impinges too deeply on the first amendment concern for an open and robust media.

One possible intermediate standard which the Court could adopt would privilege the news media to broadcast as much of a performer's act as is newsworthy. Such a standard recognizes that film broadcasts of entertainment events are important news to be protected by the first amendment. In *Gertz*, however, the Supreme Court discussed the first amendment implications of a standard similar to a newsworthiness standard.¹²⁶ In that case, the Court overruled its holding in *Rosenbloom v. Metromedia, Inc.*¹²⁷ that the *Sullivan* reckless disregard standard is applicable to media defamation of private individuals so long as the defamatory statement concerned "a matter of public or general interest."¹²⁸ The Court rejected the *Rosenbloom* public interest criterion primarily because it failed to give adequate deference to the legitimate state interest in protecting the reputation of private individuals.¹²⁹ However, the Court also found the public interest criterion inappropriate because it would force "judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not . . ."¹³⁰ The Court was unwilling to commit this determination to the discretion of judges, presumably because doing so would lead to media self-censorship. The same considerations which led the Court to reject a public interest criterion in defamation are relevant to a discussion of a newsworthiness standard in the right of publicity context. A newsworthiness standard has the potential of chilling the media because it is inherently subjective and unprincipled. Such a standard depends for its content on the individual bias of the trier of fact.¹³¹ Moreover, a newsworthiness standard is inappropriate because it is essentially incapable of judicial determination. For these reasons, it is unlikely that the Court would adopt a newsworthiness standard in the right of publicity context.¹³²

A second intermediate standard open to the Court would privilege the news media so long as they do not appropriate a "material or substantial" part of an entertainer's performance. For example, in *Zacchini* the defendant would have been privileged under a material or substantial standard to capture a few seconds of *Zacchini's* act. However, any film broadcast which constituted substantially all of *Zacchini's* act, or which appropri-

¹²⁶ 418 U.S. at 346.

¹²⁷ 403 U.S. 29 (1971).

¹²⁸ *Id.* at 43.

¹²⁹ 418 U.S. at 346.

¹³⁰ *Id.*

¹³¹ *Id.* at 339.

¹³² *Id.* Another factor weighing against the adoption of a newsworthy standard is that such a standard would overrule *Zacchini*. After all, *Zacchini's* entire act was arguably newsworthy.

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ated a material section of the act, such as the explosion from the cannon, would be prohibited. This standard balances the competing interests more adequately than a newsworthiness standard. On one hand, it recognizes that film reporting of entertainment is important news, and it allows the media to broadcast some portion of a performer's act to bring to life its verbal commentary. On the other hand, by recognizing a limit on the media privilege, a material or substantial standard affords some protection for the performer's property rights. Moreover, because a material or substantial standard focuses more on the degree of appropriation than on the character of what is appropriated, it is more capable of objective determination than is a newsworthiness standard. For these reasons, it is possible that the Court could find a material or substantial standard constitutionally appropriate.

While it appears likely that the Supreme Court would adopt an intermediate standard, the Court in *Zacchini* gave no real indication as to where it would draw the line between media reports which are privileged and those which are not. The Court could adopt any of the standards discussed above, or possibly even a standard not mentioned. From a media standpoint, however, it is not so important to know where the Court will draw the line, as to be aware of where it might possibly draw the line. The mere possibility that the Court would adopt a standard prohibiting all unconsented news use of a performer's act might be sufficient to deter the news media from making such unconsented appropriations.

CONCLUSION

In its first pronouncement on the conflict between the freedom of the press and the right of publicity, the Supreme Court held that the first amendment does not privilege the news media to broadcast a performer's entire act, at least when they have actual knowledge of his objection to such a broadcast. However, by tailoring its decision narrowly to the facts of *Zacchini*, the Supreme Court left unresolved two issues of practical importance to the news media. First, the Court did not define the appropriate standard of liability when the news media broadcast a performer's act and are unaware of his objection. In resolving this issue, it is likely that the Court will find that a negligence standard strikes the appropriate balance between the first amendment interest in maintaining a free press and the countervailing state interest in protecting a performer's right of publicity. Under such a negligence standard, the news media would be liable for appropriating a performer's act if they either acted with knowledge of his objection or were unreasonable in ascertaining whether he consented to such a broadcast. The second issue left unresolved by the Court in *Zacchini* is whether the first amendment privileges the news media to broadcast a certain portion of a performer's act despite his objection. Although the Court intimated no view as to how it would resolve this issue, there are several possible standards which the Court could use to define the necessary first amendment privilege. From a news media standpoint, the most drastic of these standards would prohibit any unconsented news use of a performer's act.

The potential impact of *Zacchini* on the news media stems more from an uncertainty as to how the Court will resolve the issues left open, than from the Court's holding itself. In dealing with the uncertainty created by *Zacchini*, the media should not be concerned about appropriating a performer's act when they broadcast it on a news program unless the act was performed for remuneration. When an entertainer performs his act for the general public, he forfeits any right to control the news coverage given to his act. For example, a tightrope artist who walks between tops of skyscrapers cannot complain when a television station broadcasts his feat as part of a newscast. Where the media desire to show on the news an act which is performed for remuneration, they should take the safest course and ask permission to show the act. If they choose not to ask permission, the media should be mindful of the issues left open by *Zacchini* and limit the report of the act to just the newsworthy details. For, in the final analysis, *Zacchini* would appear to stand for the proposition that the first amendment does not privilege the news media to report for free that for which the general public must pay.

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