NOTES

Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs

INTRODUCTION

The relationship between celebrities[1] and the media[2] is generally symbiotic in nature. Media accounts of the day-to-day activities of public personalities make "great copy" and, thereby, produce large profits.[3] Coverage by the media, in turn, affords celebrities a kind of free advertising that can engender public interest and further the individual's career.[4] The balance of this mutually beneficial relationship, however, can be upset when the press, in publishing certain material about a celebrity without his authorization, either

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1. In this Note the term "celebrity" is used interchangeably with the term "public personality" and denotes any "[c]elebrated or widely known person," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 359 (1971), except one who is a public official. One of the primary functions of the first amendment is to foster the process of democratic self-government. *See infra* notes 114, 120-24 & 147 and accompanying text. This fundamental first amendment principle suggests that different standards than those advocated here should apply to cases involving the unauthorized publication of photographs of public officials. A discussion of standards applicable to public officials is beyond the scope of this Note.

2. In this Note the term "media" is used interchangeably with the term "press" and refers to any

> medium of communication (as the newspapers, radio, motion pictures, television) that is designed to reach the mass of the people and that tends to set the standards, ideals, and aims of the masses.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1389 (1971) (definition of "mass medium").

3. The National Enquirer, for example, publishers of a magazine devoted largely to stories about celebrities, was the sixty-third largest media company as of 1982 with gross revenues of 140 million dollars. *100 Leading Media Companies*, ADVERTISING AGE, June 27, 1983, at M-63.

4. Ashdown states:

> Anytime a member of the news media chooses to make a presentation of a particular event or performance, the publication or broadcast will customarily take the form of free advertising and publicity. Such gratuitous exposure will not only increase the immediate economic value of the act, but will also help to build long term reputation, thus producing future economic benefits for the player or performer.

Ashdown, *Media Reporting and Privacy Claims—Decline in Constitutional Protection for the Press*, 66 KY. L.J. 759, 792 (1977-1978). *See* Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1589 (1979) ("publicity, far from being unwelcome to [professional performers], is their very livelihood").

invades the celebrity's privacy[5] or appropriates something of value for which he feels he should be compensated.[6] These concerns are frequently present when a newspaper or magazine publishes a photograph of a celebrity without obtaining the celebrity's consent.[7]

When attempting to recover damages from the press for the unauthorized publication of their photographs, celebrities frequently encounter the first amendment[8] as an obstacle. The first amendment insulates the press from liability when it publishes matters that are "newsworthy" or "of public interest."[9] Broad judicial declarations that their activities are newsworthy and of public interest[10] force celebrities, in effect, to contribute aspects of their private and commercial lives to the public domain. This Note offers a legal framework which, without compromising key first amendment values, accommodates more fully the interests public personalities have in privacy and in capitalizing economically on their fame.

This discussion first briefly outlines the history of the common law tort of invasion of privacy[11] and then describes the applicability of the rights of privacy and publicity[12] to suits brought by celebrities. The Note then demonstrates why the principles underlying these two rights should be extended

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5. *See, e.g.*, Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401 (S.D.N.Y. 1980) (discussed *infra* text accompanying notes 32-45).

6. *See, e.g.*, Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973) (suit by Cary Grant seeking damages for unauthorized use of photograph in connection with magazine article dealing with clothing styles).

7. Although this Note deals primarily with the publication of photographs, much of what is said is also applicable to other methods of reproducing images, such as film or live broadcasting.

8. The first amendment provides in part: "Congress shall make no law. . .abridging the freedom. . .of the press. . . ." U.S. CONST. amend. I.

9. Although the Supreme Court has not explicitly addressed the issue, it is well settled that the newsworthiness defense is required by the first amendment. The Court of Appeals for the Fifth Circuit recently stated that:

> [t]he first amendment mandates a constitutional privilege applicable to those torts of invasion of privacy that involve publicity. . . . This broad constitutional privilege recognizes two closely related yet analytieally distinct privileges. First is the privilege to publish or broadcast facts, events, and information relating to public figures. Second is the privilege to publish or broadcast news or other matters of public interest.

Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980). *See* Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 328, 221 N.E.2d 543, 545, 274 N.Y.S.2d 877, 879 (1966) ("The factual reporting of newsworthy persons and events is in the public interest and is protected."); RESTATEMENT (SECOND) OF TORTS § 652D comment d (1977) (no actionable invasion of privacy occurs when the subject-matter of the disclosure is of legitimate public concern); Woito & McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 186 (1979).

10. *See Ann-Margret*, 498 F. Supp. at 405 ("the fact that the plaintiff . . . chose to perform unclad in one of her films is a matter of great interest to many people"); *see also infra* notes 26-31 and accompanying text.

11. *See infra* notes 17-19 and accompanying text.

12. *See infra* notes 53-57 and accompanying text.

to provide celebrities with broader protection against the unauthorized publication of their photographs. The Note concludes by outlining three prevalent theories of the first amendment and by demonstrating that two of these theories would support the broader protection for celebrities advocated here.

I. THE RIGHT OF PRIVACY

The concept of a legal right of privacy first gained prominence in 1890 in Samuel Warren's and Louis Brandeis's famous *Harvard Law Review* article entitled *The Right to Privacy*.[13] Responding to what they viewed as the press's increasing affront to "the sacred precincts of private and domestic life,"[14] Warren and Brandeis argued for judicial recognition of a tort cause of action for unwarranted publication of private matters. Although noting that the right of privacy could not strictly be premised on traditional notions of private property or copyright,[15] the authors relied heavily upon these concepts in attempting to establish that the right was, in effect, already recognized by the common law.[16]

Since its conception by Warren and Brandeis, the notion of a legal right of privacy has gradually gained acceptance in the common law and is now recognized in most jurisdictions.[17] Dean Prosser analyzed the privacy-related cases and discerned four categories of privacy torts: (1) publicity which places a person in a false light in the public eye; (2) intrusion upon a person's seclusion or solitude, or into his private affairs; (3) public disclosure of embarrassing private facts about a person; and (4) appropriation, for commercial purposes, of a person's name, likeness, or personality.[18] The *Restatement (Second) of Torts* adopted Prosser's formulation.[19] Among these four categories of privacy torts, all but the false light tort have possible application in the context of the unauthorized publication of a non-misleading photograph of a celebrity.[20]

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

14. *Id.* at 195.

15. *Id.* at 200-05.

16. The authors posited that the common law right to intellectual and artistic property are "but instances and applications of a general right to privacy." *Id.* at 198.

17. Felcher & Rubin, *supra* note 4, at 1581.

18. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

19. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977).

20. This Note focuses on cases involving the unauthorized publication of "truthful" or "non-misleading" photographs and thus only briefly discusses the false light tort. One false light case, Braun v. Flint, 726 F.2d 245 (5th Cir. 1984), is discussed below, *see infra* notes 88-95 and accompanying text, to demonstrate a principle applicable to the unauthorized publication of photographs generally.

The false light tort could be applicable to an unauthorized publication of a celebrity's photograph if the publication gives "unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false," and thus places him before

The *Restatement's* tort of intrusion upon seclusion,[21] in certain circumstances, could support a suit by a celebrity against a media defendant for the unauthorized use of photographs. This form of the privacy tort compensates the plaintiff primarily for the mental harm[22] that occurs when someone intentionally intrudes into a "private seclusion that the plaintiff has thrown about his person or affairs."[23] The tort may be committed by physical intrusion into a private place, in which case the tort is indistinguishable from trespass, or by intrusion through use of the senses, with or without mechanical aids.[24] Courts and commentators typically take the position that the first amendment does not license the press "to trespass . . . or to intrude by electronic means into the precincts of another's home or office."[25] This general principle logically applies to celebrities' homes as well as to the homes of private individuals. A celebrity, therefore, should be able to recover damages for the unauthorized publication of his photograph obtained through an intrusion upon a private place or seclusion.

Courts have refused to apply the *Restatement's* tort of public disclosure of embarrassing private facts[26] in the context of celebrity plaintiffs. The

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the public in a false position. *See* RESTATEMENT (SECOND) OF TORTS § 652E comment b (1977). However, since the false light tort closely resembles defamation—the essence of both being the falsity of the portrayal—many of the principles of defamation are carried over to false light cases. *See, e.g.*, Braun v. Flynt, 726 F.2d at 250 (5th Cir. 1984). It seems fairly clear, for example, that the "actual malice" standard applicable in defamation cases involving "public figures," Curtis Publishing Co. v. Butts, 388 U.S. 130 (1966), applies to false light suits brought by celebrities, thus requiring the celebrity to prove the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967). The Supreme Court's restricted application of the "public figure" category in defamation cases, *see infra* notes 130-41 and accompanying text, however, may suggest that most celebrities would not have to prove "actual malice" in a false light case.

21. The RESTATEMENT (SECOND) OF TORTS provides:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

RESTATEMENT (SECOND) OF TORTS § 652B (1977).

22. Prosser states that the interest protected by the intrusion tort is primarily a mental one. Prosser, *supra* note 18, at 392.

23. RESTATEMENT (SECOND) OF TORTS § 652B comment c (1977).

24. *Id.* § 652B comment b.

25. Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971). *See* Emerson, *The Right of Privacy and Freedom of the Press,* 14 HARV. C.R.—C.L. L. REV. 329, 332 (1979); Miller, *The William O. Douglas Lecture: Press v. Privacy,* 16 GONZ. L. REV. 843, 850 (1981); Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.,* 30 STAN. L. REV. 1185, 1191 n.20 (1978). But see Abrams, *The Press, Privacy, and the Constitution,* N.Y. Times, Aug. 21, 1977, § 6 (Magazine), at 67, who argues that the press should not be liable when it trespasses or uses false pretenses to enter someone's home to gather news if the intrusion "benefitted the public."

26. The *Restatement (Second) of Torts* provides that:

> [o]ne who gives publicity to a matter concerning the private life of another is sub-

public disclosure tort has been called the "pure" or "true" privacy tort[27] since, unlike the other three privacy torts, it is based wholly on the idea that certain truthful facts about a person are not appropriate for publication.[28] Since its inception, however, the public disclosure tort has been limited by the "public interest" or "newsworthiness" defense whereby a media defendant can defeat a privacy claim by showing that the published material is of public interest.[29] Although the term "public interest" could refer to two very different things—the public's "curiosity" or the public's "well-being"—courts rarely make this distinction. Judges, in determining whether certain published material is newsworthy and thus protected by the first amendment, typically emphasize the public's curiosity in the material rather than the public's need for it.[30] Unable to define "news" and fearing that the imposition of liability in even the most egregious instances of press invasiveness might inhibit legitimate press activities, courts generally defer to the press's determination of what is newsworthy.[31] This deference has precluded celebrities from recovering under the public disclosure tort.

The case of *Ann-Margret v. High Society Magazine, Inc.*,[32] illustrates the extent to which celebrities have been precluded from recovering in cases involving public disclosures.[33] In that case the defendants, publishers of a magazine "which specializes in printing photographs of well-known women caught in the most revealing situations and positions that the defendants are able to obtain,"[34] published a photograph of actress Ann-Margret partly naked.[35] The photograph was taken from a scene in the motion picture *Magic*.[36] The plaintiff agreed to do the scene nude only on the condition that few persons would be present during the filming and that no still

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ject to liability to the other for invasion of his privacy, if the matter is of a kind that
(a) would be highly offensive to a reasonable person, and
(b) is not of legimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1977).

27. Glasser, *Resolving the Press-Privacy Conflict: Approaches to the Newsworthiness Defense,* COM. & LAW, Spring 1982, at 23, 24.

28. The false light, intrusion, and appropriation torts are largely derivative of defamation, trespass, and passing off or trademark infringement, respectively. Ellis, *Damages and the Privacy Tort: Sketching a "Legal Profile,"* 64 IOWA L. REV. 1111 (1979).

29. *See supra* note 9 and accompanying text.

30. *See, e.g.,* Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied,* 311 U.S. 711 (1940); Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (discussed *infra* text accompanying notes 32-45); *see also* Woito & McNulty, *supra* note 9, at 196.

31. Glasser, *supra* note 27, at 24-25.

32. 498 F. Supp. 401 (S.D.N.Y. 1980).

33. Although the plaintiff's claim in *Ann-Margret* was based, in part, on New York's privacy statute, *see infra* note 38, it is clear from the facts of the case that this part of her claim was virtually identical to the common law public disclosure tort.

34. 498 F. Supp. at 403.

35. *Id.*

36. *Id.*

photographs would be made of the performance.[37] The plaintiff's claim against the magazine alleged that the unauthorized publication of the photograph violated both section 51 of the New York Civil Rights Law[38] and the common law "right of publicity."[39]

The trial court, in granting the defendant's motion for summary judgment,[40] held that the unauthorized publication did not violate the privacy statute.[41] Although noting that a celebrity "does not, simply by virtue of his or her notoriety, lose all rights to privacy,"[42] the court stated that "such rights can be severely circumscribed as a result of an individual's newsworthiness."[43] More particularly, the court surmised that the

> use of a person's name or picture in the context of an event within the "orbit of public interest and scrutiny" . . . a category into which most of the events involving a public figure . . . fall, can rarely form the basis for an actionable claim under section 51.[44]

According to the court,

> the fact that the plaintiff, a woman who has occupied the fantasies of many moviegoers over the years, chose to perform unclad in one of her films is a matter of great interest to many people. And while such an event may not appear overly important, the scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters of "entertainment and amusement, concerning interesting phases of human activity in general." . . . [I]t is not for the courts to decide what matters are of interest to the general public.[45]

The court's broad characterization of the newsworthiness defense typifies the public disclosure tort cases.

II. THE RIGHT OF PUBLICITY

A. *The Appropriation Tort and the Right of Publicity*

The final category of privacy torts possibly applicable to an unauthorized publication of a non-misleading photograph of a celebrity is the appropri-

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37. *Id.* at 403 n.2.

38. *Id.* at 404. Section 51 of the New York Civil Rights Law provides, in pertinent part:

> Any person whose name, portrait or picture is used . . . for advertising purposes or for purposes of trade without . . . written consent . . . may . . . sue and recover damages for any injuries sustained by reason of such use . . . .

N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976).

39. 498 F. Supp. at 404. *See infra* notes 53-57 and accompanying text.

40. 498 F. Supp. at 407.

41. *Id.* at 406.

42. *Id.* at 404.

43. *Id.* at 405.

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

45. *Id.* (footnote omitted) (quoting Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 448, 299 N.Y.S.2d 501, 506 (N.Y. Sup. Ct. 1968)).

ation of name or likeness tort.[46] In some cases the appropriation tort cause of action compensates the plaintiff for the annoyance and humiliation he may suffer as a result of the unauthorized publication of his name or likeness.[47] In *Ann-Margret v. High Society Magazine, Inc.*,[48] for example, the plaintiff, "a woman of taste,"[49] plainly felt embarrassed[50] by the appearance of a nude photograph of herself in an "unsavory"[51] magazine. In appropriation cases involving celebrities, however, the plaintiff's complaint is more likely to be that he was not compensated for the publication rather than that he was emotionally injured by it.[52] Courts and commentators, accordingly, have used the term "right of publicity" to describe a popular figure's proprietary interest in his name or likeness.[53] This term more accurately reflects the real nature of the celebrity's claim in these cases than does the term "right of privacy." Typically, the appropriation of a celebrity's name or likeness involves no invasion of privacy because the person is already "public" and is thus considered to have "waived"[54] his right to privacy.[55]

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46. Section 652C of the *Restatement (Second) of Torts* provides:

> One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

RESTATEMENT (SECOND) OF TORTS § 652C (1977).

47. T. Haas, Storehouse of Starlight: The First Amendment Privilege To Use Names and Likenesses in Commercial Advertising 3 (unpublished manuscript) (on file with *Indiana Law Journal;* forthcoming in 19 U.C.D. L. REV. (1986)). Haas states that

> [a] person's name and likeness are generally considered intimately associated with the person himself. He may experience annoyance and humiliation from having his name or likeness widely publicized even when there is nothing embarrassing in the presentation.

Id.

48. 498 F. Supp. 401 (S.D.N.Y. 1980).

49. *Id.* at 403.

50. *Id.* at 405.

51. *Id.* at 405 n.9.

52. *See* Ellis, *supra* note 28, at 1128-33; *see also* Ashdown, *supra* note 4, at 785-86; Prosser, *supra* note 18, at 401.

53. *See, e.g.*, Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied,* 346 U.S. 816 (1953); Uhlaender v. Hendricksen, 316 F. Supp. 1277 (D. Minn. 1970); Nimmer, *The Right of Privacy,* 19 LAW & CONTEMP. PROBS. 203 (1954); Comment, *The Right of Publicity—Protection for Public Figures and Celebrities,* 42 BROOKLYN L. REV. 527 (1976).

54. The view that a celebrity has "waived" his right to privacy by entering the public limelight is, of course, a fictional legal conclusion. A legal waiver is generally defined as the intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, BLACK'S LAW DICTIONARY 1417 (5th ed. 1979),

> and it seems rather fanciful to suggest that someone has voluntarily agreed to publicity about his private life when he accepts a part in a motion picture, [etc.] . . . The concept of waiver involved in these cases is that of a constructive waiver—in other words, it is merely a way of restating the conclusion that public figures have no right of privacy due to the countervailing and more powerful commands of the First Amendment.

Felcher & Rubin, *supra* note 4, at 1587.

55. Ashdown, *supra* note 4, at 786 n.130.

A celebrity, because he is accustomed to life in the public eye, may also suffer embarrassment or humiliation from unwanted publicity less readily than a private person.[56] The unauthorized publication of a celebrity's name or likeness does, however, "involve the misappropriation of a pecuniary interest—the right of a public personality to commercially utilize his fame."[57] The United States Supreme Court protected this type of pecuniary interest in the face of a first amendment claim in *Zacchini v. Scripps-Howard Broadcasting Co.*[58]

B. The Zacchini Case

In *Zacchini,* the Court considered a right of publicity[59] claim brought by the performer of a "human cannonball" act at a county fair. Objecting to the unauthorized broadcast of a fifteen-second film-clip of his act on a television newscast, Zacchini brought an action alleging that the broadcaster had unlawfully appropriated his professional property.[60] The Court of Appeals of Ohio reversed the trial court's grant of summary judgment for the broadcaster and held that the complaint stated a cause of action for conversion and for infringement of commonlaw copyright.[61] The court also held that the first amendment did not privilege the press to broadcast Zacchini's performance on a news program without compensating him for any resulting financial injury.[62]

The Ohio Supreme Court rejected the appellate court's holding that Zacchini's claim was cognizable under common law copyright[63] and instead characterized the action as one involving the right of publicity.[64] Although it concluded that a performer's right of publicity is ordinarily entitled to legal protection,[65] the court held that the first amendment privileged the television station to report "matters of legitimate public interest" unless the "actual intent" of the broadcaster was to appropriate the benefit of the act for "some non-privileged use" or to "injure" Zacchini.[66] Finding that no such intent was shown and that the performance was a matter of legitimate public interest, the court reversed the judgment of the court of appeals.[67]

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56. *See id.*
57. *Id.*
58. 433 U.S. 562 (1977).
59. *Id.* at 565.
60. *Id.* at 564.
61. *Id.*
62. *Id.*
63. 47 Ohio St. 2d 224, 228, 351 N.E.2d 454, 457 (1976).
64. *Id.* at 232, 351 N.E.2d at 460.
65. *Id.* The court stated that a public performer's "right of exclusive control over the publicity given to his performances . . . is a valuable part of the benefit which may be attained by his talents and efforts . . . [and] is entitled to legal protection." *Id.*
66. *Id.* at 244, 351 N.E.2d at 455.
67. *Id.* at 235-36, 351 N.E.2d at 461-62.

The United States Supreme Court reversed the judgment of the Ohio Supreme Court[68] and held that "the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."[69] The Court, focusing on Zacchini's proprietary interest and its similarity to the interests protected by patent and copyright laws, reasoned that

> "[t]he broadcast of a film of petitioner's entire act pose[d] a substantial threat to the economic value of that performance," and that the "same consideration under[lying] the patent and copyright laws" required protection of petitioner's right to publicity as "an economic incentive for him to make the investment required to produce a performance of interest to the public."[70]

The Court posited that fewer people might wish to pay to see the act in person if they were able to see it on television and, therefore, that the effect of the broadcast was similar to preventing Zacchini from charging an admission fee.[71] The Court also suggested that Zacchini's publicity claim could be premised on a theory of unjust enrichment.[72]

The Court's holding in *Zacchini* affords celebrities little protection against the unauthorized publication of their photographs because it applies only when the publication constitutes an appropriation of an "entire act."[73] Federal copyright law likewise provides celebrities with limited protection because it applies only to works " 'fixed' in a tangible medium of expression."[74] A public performer can, of course, secure a copyright for a performance by fixing it in a tangible medium of expression.[75] Frequently, however, a celebrity is not engaged in a copyrightable performance when he is photographed by the press. Although neither the right of publicity as limited by *Zacchini* nor the federal copyright laws provides celebrities with a legal mechanism for controlling the dissemination of photographs depicting them in their day-to-day lives, they do suggest, in part, a rationale for such a mechanism.

C. *Rationale for Extending the Right of Publicity*

Extending the right of publicity to cases other than those involving either purely commercial appropriations or appropriations of "entire acts" would

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68. 433 U.S. at 579.
69. *Id.* at 575. The Court's opinion emphasizes that the broadcaster had appropriated Zacchini's "entire act." *See id.* at 564, 570, 575.
70. Ashdown, *supra* note 4, at 789-90 (quoting *Zacchini,* 433 U.S. at 575-76).
71. 433 U.S. at 576.
72. *Id.; see infra* note 84 and accompanying text.
73. *See supra* note 69 and accompanying text.
74. 17 U.S.C. app. 101 (1976) (definition of "fixed").
75. Note, *supra* note 25, at 1193 n.26.

furnish talented performers with additional economic incentives to develop their abilities, prevent unjust enrichment, promote economic efficiency, and deter the press from creating unwanted associations for celebrities. As the Supreme Court explicitly recognized in *Zacchini,*[76] a performer's interest in controlling the dissemination of his act is a proprietary interest similar to the interest protected by a copyright. As the Court noted, the primary purpose of the copyright laws is to benefit the general public by providing authors and artists with an economic incentive to create;[77] the concomitant benefit to the copyright owner is a "secondary consideration."[78] A copyright, in effect, provides the copyright owner with a limited monopoly over the dissemination of the copyrighted material.[79] While a copyright by definition limits the flow of creative works and ideas to the public, this limitation is considered necessary in order to encourage the production of new creative expression.[80] Similarly, protecting the right of performers to control the dissemination of photographs of their performances encourages the production of new performances.

The Court's "entire act" standard does not adequately protect a public performer's economic incentive to produce performances that the public finds appealing. A performer's economic incentive to perform could be undermined by an unauthorized broadcast of less than his entire act. In *Zacchini,* for example, the broadcast of a newsclip beginning with Zacchini already in flight might have reduced attendance at Zacchini's act just as much as the broadcast of the clip of the entire act. Furthermore, as Justice Powell noted in dissent,[81] the appropriation in *Zacchini* may not actually have been of the entire act. Although the Court purported to limit its holding to cases involving entire acts, the Court may have in fact protected the right of publicity in a case involving the appropriation of less than an entire act. The Court's "entire act" standard, therefore, bears little relationship to the economic realities of public performances.

The policy underlying the right of publicity—the protection of a public performer's economic incentive to perform—suggests that the right should extend to a performer's daily activities as well as to his "acts." For example, the compensation a famous baseball player can command for endorsing a product in a television commercial is part of the "reward" he reaps for his efforts and talents on the baseball field; the compensation corresponds little

76. 433 U.S. 562 (1977).

77. *Id.* at 576 (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

78. *Id.* at 577 (quoting United States v. Paramount Pictures, 334 U.S. 131, 158 (1948)).

79. *See* Note, *supra* note 25, at 1192 ("a grant of copyright necessarily limits the flow of ideas by limiting the means by which these ideas can be expressed. Copyright law represents a compromise between encouraging the production of new artistic expression and giving the public access to this expression.").

80. *Id.*

81. 433 U.S. at 579 n.1 (Powell, J., dissenting).

to the ballplayer's acting ability or to the labor he expends in making the commercial. Indeed, in some cases the public performer's income from endorsements, public appearances, and other "side" activities may greatly exceed the compensation he receives from his principal occupation.[82] In such a case, protecting the public performer's right to be compensated for these "side" activities encourages him to continue to perform in a way society finds pleasing so as to maintain his public appeal. More importantly, the knowledge that the law protects the right of actors and athletes to exploit their fame commercially beyond the context of movies or sports events will further encourage others to aspire to become actors and athletes. Extending the right of publicity to cases involving the unauthorized publication of a celebrity's photograph would similarly make the "job" of being a public performer more attractive. By protecting the right of celebrities to commercially exploit their fame generally rather than solely in the context of performances or commercial endorsements, the law would help maximize incentive to develop and maintain skills and talents that society finds appealing.

Equitable considerations and principles of economic efficiency also support extending the right of publicity. Permitting the media to publish celebrities' photographs without compensating them enables the media to benefit from the celebrities' fame at no cost beyond the expense involved in taking and producing the photograph.[83] As the Court noted in *Zacchini,*

> [t]he rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.[84]

A right to control the dissemination of their photographs would make it possible for celebrities to secure compensation for the benefits they bestow on the media and the public,[85] and would thus foster basic notions of fairness.

Such a right would also promote economic efficiency. Under the law in its current status, the press is able to produce entertainment by appropriating the fame of public personalities and then to invoke the protections of the first amendment in order to avoid paying for the appropriation.[86]

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82. A famous Olympic swimmer, for example, may never be compensated for swimming but might earn millions of dollars from endorsements upon retiring from amateur sports.

83. Note, *supra* note 25, at 1190.

84. 433 U.S. at 576 (quoting Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?,* 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

85. Note, *supra* note 25, at 1190.

86. *See* Ellis, *Damages and the Privacy Tort: Sketching a "Legal Profile,"* 64 IOWA L. REV. 1111, 1140 (1979). Although Ellis's discussion concerns the public disclosure tort and private individuals rather than the right of publicity and celebrities, his observations are equally applicable here.

> In economic terms, the press does not internalize the full costs of production; instead it imposes external costs on involuntary participants [celebrities] . . . . This results in a waste of resources and the production of excessive entertainment by the press. It is therefore inefficient.[87]

The economic inefficiency and the unfairness that result from the current state of the law are strong reasons for extending the right of publicity.

Another rationale for extending the right of publicity is rooted in the belief that it is an "affront to human dignity" to permit others to publish a person's likeness and thereby establish associations for him.[88] The emotional harm that can result from having one's photograph appear in a particular context is evident in *Braun v. Flynt.*[89] In *Braun,* a female entertainer who performed a novelty act[90] in an amusement park brought suit against *Chic Magazine,* a "hard-core men's magazine,"[91] objecting to the defendant's unauthorized publication of a photograph of her act.[92] The court, in affirming a jury verdict based on the false-light invasion of privacy tort,[93] suggested that "[c]ommon sense dictates that the context and manner in which a . . . picture appears determines to a large extent the effect which it will have on the person . . . seeing it."[94] According to the court, the jury was reasonable in implicitly finding "that the ordinary reader automatically will form an unfavorable opinion about the character of a woman whose picture appears in" the defendant's magazine.[95]

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87. *Id.*

88. T. Haas, *supra* note 47, at 4.

89. 726 F.2d 245 (5th Cir. 1984).

90.

> Part of Mrs. Braun's job included working in a novelty act with "Ralph the Diving Pig." In the act, Mrs. Braun, treading water in a pool, would hold out a bottle of milk with a nipple on it. Ralph would dive into the pool and feed from the bottle.

Id. at 247.

91. *Id.*

92. Mrs. Braun had signed a release authorizing the amusement park to use photographs of her act provided that they be in good taste and not embarrass her or her family. *Id.* The defendant had obtained the park's consent to publish the photograph but had done so by fraudulently misrepresenting the nature of its magazine. *See id.* at 255. According to the court, the amusement park "gave fraudulently induced consent, which is the legal equivalent of no consent." *Id.*

93. *Id.* at 252-53. The false-light tort is briefly discussed *supra* note 20.

94. 726 F.2d at 254.

95. *Id.* In responding to the defendant's argument "that no ordinary reader would assume Mrs. Braun to be unchaste or promiscuous on the basis of its publication of her picture," the court posited:

> Even if this were true, the jury might have found that the publication implied Mrs. Braun's approval of the opinions expressed in *Chic* or that it implied Mrs. Braun had consented to having her picture in *Chic.* Either of these findings would support the jury verdict that the publication placed Mrs. Braun in a false light highly offensive to a reasonable person.

Id. at n.11.

III. Defining the Broader Protection

The rights of privacy and publicity, as well as the copyright laws, provide celebrities with a measure of protection against the unauthorized publication of their photographs. Unless one of these well-established legal principles is directly applicable, however, celebrities are unable to recover from the media for the unauthorized publication of their photographs. Protected by the newsworthiness defense, the media is frequently able to exploit freely the fame of public personalities; celebrities, in effect, are forced to contribute various aspects of their private and commercial lives to the public domain because of the public's interest[96] in them. The press has increasingly been criticized for its intrusive and exploitative tendencies.[97] Courts should expand the protection currently available to celebrities against this invasiveness by extending the well-established intrusion and publicity torts.

As noted earlier,[98] movie stars, professional athletes, and other public performers, because of the "public" nature of their occupations, are typically considered to have "waived" their right to privacy; they are also probably more psychologically tolerant of having their daily lives depicted in the press.[99] While the private lives of popular figures are therefore rightfully accorded little protection, it does not follow that the press should have the unfettered ability to capitalize on a celebrity's fame. Fame, whether it be acquired by luck, talent, or effort, is capable of being exploited for economic gain. The unauthorized publication of a celebrity's likeness may "involve the misappropriation of a pecuniary interest—the right of a public personality to commercially utilize his fame."[100] Courts, therefore, should focus on whether the press has appropriated something with potential proprietary value when assessing the celebrity's interest in a case involving the unauthorized publication of his photograph.

The conclusion that in certain circumstances a celebrity has a proprietary interest in his likeness is a legal conclusion.[101] A celebrity will have ownership rights in his likeness only to the extent that he can legally enforce such rights. "[A] person's appearance is in the usual course of social interaction a beneficial externality"[102] that anyone may freely enjoy. The law could, of

96. *See supra* notes 29-31 and accompanying text.

97. *See, e.g.*, Smith, *Let's Spare Charles And Diana The Cheap Shots,* TV Guide, Nov. 9-15, 1985, at 34; Miller, *supra* note 25.

98. *See supra* notes 54-55 and accompanying text.

99. *See supra* note 56 and accompanying text.

100. Ashdown, *supra* note 4, at 786 n.130.

101. In Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953), for example, the court noted that it is "immaterial" whether the right to grant the exclusive privilege of publishing one's picture is labelled a property right: "the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth." *Id.* at 868.

102. Haas, *supra* note 47, at 3.

course, say that no one may publish a celebrity's photograph without his consent in any circumstances; such a position, however, would violate the first amendment[103] and would be highly difficult to enforce. A celebrity's ability to capitalize economically on his appearance depends on his ability to restrict the public's access to it. In determining whether a celebrity should be permitted to recover damages for the unauthorized publication of his photograph, a court should consider not only the public policies outlined earlier but also whether it would be practical to restrict the public's access to the celebrity's likeness under the facts of the particular case.

The tort of intrusion is intended to compensate a person for the emotional distress that occurs when some private place or seclusion is intentionally intruded upon by the defendant.[104] Although the intrusion tort may have the effect of protecting the individual's interest in keeping certain private or embarrassing facts or activities from public view, it does so indirectly by protecting the distinct interest in security.[105] In other words, the tort, by protecting a certain *place,* permits the individual to throw "about his person or affairs" a "private seclusion."[106] Celebrities should be able to recover damages from the press when it publishes photographs obtained by invading, either physically or by mechanical device, an area that should be legally protected from public view. Although the decision whether the press has invaded an area that should receive such protection will necessarily depend on the facts of the particular case, a few basic guidelines may inform the decision.

No intrusion into a private place occurs, of course, when a celebrity is photographed on a public street or in some other "public" place such as a park or courthouse. In public places such as these the press, like everyone else, may freely photograph celebrities and not be subject to liability. The press should also not be liable for the *publication* of photographs obtained in these circumstances unless one of the privacy torts or the publicity tort directly applies.

A celebrity should be accorded the greatest protection from intrusion by the press when in his house, apartment, or other living quarters. The press generally cannot physically trespass upon private property in order to photograph a celebrity,[107] and neither should it be permitted to "intrude" into a celebrity's home through the use of a telephoto lens or other mechanical device.[108] Celebrities should be expected to take reasonable steps to keep out

103. *See supra* notes 8-9 and accompanying text.
104. *See supra* notes 21-23 and accompanying text.
105. *See* Ellis, *supra* note 86, at 1146.
106. RESTATEMENT (SECOND) OF TORTS § 652B comment c (1977).
107. *See supra* note 25 and accompanying text.
108. *See* RESTATEMENT (SECOND) OF TORTS § 652B comment b (1977); Ellis, *supra* note 86, at 1148.

the unwanted eye of the press, such as closing curtains on windows or building privacy fences around swimming pools;[109] a celebrity's recourse to such forms of "self-help," however, may not always be sufficient to meet the press's ingenuity. The press, when it publishes photographs obtained by intruding into a celebrity's home or other private place, should be liable to the celebrity for unjust enrichment.

Cases falling in between the extreme cases of a public street or private home are more difficult to decide. Whether a celebrity should be able to recover damages for the unauthorized publication of photographs obtained at semi-secluded places such as a restaurant or exclusive resort area should be decided with reference to whether the celebrity had a reasonable expectation of privacy in the place. While deciding whether a person had a reasonable expectation of privacy in a given place may be difficult, courts are frequently called upon to make the same determination in cases involving fourth amendment challenges to police searches and seizures.[110] The inquiry should be a common-sense one and should take into account the fact that celebrities attract and expect greater attention from the press than do private individuals; a celebrity's expectation of privacy will be objectively and subjectively reasonable in fewer instances than for the private individual. A movie star, for example, should fully expect to be photographed at a public restaurant, but may reasonably expect not to be photographed while sunbathing on a beach at a privately owned island. Again, the inquiry must be guided by the facts of the particular case.

The reasonable-expectation-of-privacy principle would primarily apply to cases involving photographs of the day-to-day activities of the celebrity. When a celebrity is photographed while engaged in some performance, the determining factors for deciding whether the publisher should be liable to the celebrity should be the extent to which public access to the performance was limited and whether the celebrity was compensated for the performance. When a celebrity is paid for a performance and the public must pay to see it, the act is clearly being "marketed." It may be that in such a case the publication of photographs from the act might provide a type of free advertising and actually increase attendance and the celebrity's compensation. But the celebrity should be permitted to decide for himself whether photographs of the act should be published and, if so, by whom. He should, for example, be permitted to grant a broadcaster the exclusive right to broadcast his performance in exchange for certain compensation. Although the exposure might reduce attendance at the performance, the money received from the broadcaster might result in greater overall profits for the performer.[111] When a celebrity's act is in some manner being marketed, the

109. Ellis, *supra* note 86, at 1148.
110. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).
111. Note, *supra* note 25, at 1197.

media should not be able to appropriate that act without compensating the celebrity for it.

IV. THE BROADER PROTECTION AND THE FIRST AMENDMENT

While a wide variety of theories have been advanced concerning the values and functions of the free speech and press guarantees[112] of the first amendment,[113] three themes have perhaps been most prevalent. The most commonly accepted view is that freedom of expression is important primarily as a means toward democratic self-government.[114] A related though somewhat broader view emphasizes the role that free expression plays in the search for "knowledge" and "truth" in the "marketplace of ideas."[115] The third and most expansive theme is that free expression is important not as a means to an end but rather as an integral part of freedom itself; the purpose of the first amendment, according to this view, is to promote self-expression and self-realization,[116] essential aspects of individuality and autonomy. The broader protection for celebrities vis-à-vis the press advocated by this Note does not conflict with the first amendment under the first two views but cannot be justified under the third.

The view that the first amendment is intended primarily to promote individual self-expression and self-realization is boundless and cannot be harmonized with several Supreme Court cases. For example, the publication of obscene materials may be an expression of the publisher's world view or conception of beauty, but such publication can constitutionally be proscribed.[117] Similarly, when a person directs racial slurs at someone in an attempt to provoke a fight, the speaker may be expressing the combative

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112. This Note uses the terms "free speech" and "free press" synonymously. The terms are used interchangeably with the term "free expression."

113. *See* F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 5 (1981) (there is a "lack of consensus in our society concerning the basis [sic] purposes and values underlying the First Amendment").

114. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

115. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe their own conduct that 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 . . . .").

116. *See* F. HAIMAN, *supra* note 13, at 6 ("The self-expression and self-fulfillment of the individuals who compose a society are ends in themselves.").

117. Miller v. California, 413 U.S. 15 (1973).

nature of his personality; "fighting words," however, are not protected by the first amendment.[118] Thus, while the unauthorized publication of a celebrity's photograph may be an expression of the publisher's infatuation with fame or famous persons, this fact alone should not insulate the publisher from liability.

The notion that the right of free expression serves primarily to foster the process of democratic self-government was first persuasively advanced by Alexander Meiklejohn.[119] Meiklejohn drew a fundamental distinction between "public" speech—"speech which bears, directly or indirectly, upon issues with which voters have to deal"[120]—and "private" speech—speech "directed toward our private interests, private privileges, private possessions."[121] For Meiklejohn,

> [t]he principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.[122]

The first amendment under the Meiklejohn thesis protects only public speech, but the protection is absolute.[123] Private speech, on the other hand, is entitled only to the protection of "due process" and subject "to such abridgements as the general welfare may require."[124]

Although the Supreme Court has never explicitly adopted Meiklejohn's view that speech related to the process of self-government warrants greater protection than private expression, that view is clearly reflected in the Court's line of libel cases beginning with *New York Times Co. v. Sullivan.*[125] In *New York Times,* the Court created constitutional safeguards for the right to criticize the official conduct of public officials.[126] The Court's opinion emphasized the "profound national commitment. . .that debate on public

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118. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

119. *See also* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971).

120. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94 (1948).

121. *Id.*

122. *Id.* at 26-27.

123. *See, e.g., id.* at 65-66 ("Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but beeause we need to hear.").

124. *Id.* at 94-95.

125. 376 U.S. 254 (1964).

126. The Court held that:

> [t]he constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.

issues should be uninhibited,"[127] and suggested that "criticism of governmental conduct"[128] lies "at the very center of the constitutionally protected area of free expression."[129]

Three years after *New York Times,* the Court decided that the "actual malice" standard should apply to libel actions brought by "public figures" as well as by "public officials."[130] The Court's attempts to define and apply the "public figure" category in subsequent cases, however, evince a policy of limiting the constitutional protections of *New York Times* to speech with potential political significance.[131] For example, in *Gertz v. Robert Welch, Inc.,*[132] the Court found that the plaintiff was not a public figure even though he had "long been active in community and professional affairs" and was "well-known in some circles."[133] Justice Powell's majority opinion emphasized that the plaintiff "had achieved no general fame or notoriety in the community."[134] The Court concluded that "[a]bsent . . . general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."[135]

The narrowness of the "public figure" category was made even clearer in *Time, Inc. v. Firestone,*[136] decided in 1976. In *Firestone,* the defendant had published in *Time* magazine an article describing the divorce proceeding between an heir to the Firestone tire fortune and his wife.[137] The article falsely reported that a divorce had been granted on grounds of extreme cruelty and adultery.[138] The Court, in reviewing a $100,000 defamation judgment for Mrs. Firestone against the publisher, held that Mrs. Firestone was not a public figure for the purpose of determining the first amendment protection afforded the article.[139] In determining that the plaintiff was not a public figure, the Court emphasized that public figure status derives primarily from the individual's influence on public issues. In spite of the fact that Mrs. Firestone was " 'prominent among . . . Palm Beach society,' and an 'active [member] of the sporting set' . . . whose activities predictably attracted the attention of a sizeable portion of the public,"[140] she was not

127. *Id.* at 270.
128. *Id.* at 291.
129. *Id.* at 292.
130. Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967).
131. Ashdown, *supra* note 4, at 772.
132. 418 U.S. 323 (1974).
133. *Id.* at 351-52.
134. *Id.* at 352-53.
135. *Id.* at 352.
136. 424 U.S. 448 (1976).
137. *See id.* at 451-52.
138. *Id.* at 452.
139. *Id.* at 453-55.
140. *Id.* at 484-85 (Marshall, J., dissenting) (quoting Firestone v. Time, Inc., 271 So. 2d 745, 751 (Fla. 1972)).

a public figure as defined in *Gertz*. She had not "assume[d] any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she [had] not thrust herself into the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."[141] Mrs. Firestone, then, could recover damages without proving actual malice.

The Court, in limiting the protections of *New York Times* to cases involving public officials and public figures who have "thrust" themselves into public controversies,[142] has in effect drawn the distinction between public speech and private speech advocated by Meiklejohn.[143] Speech directed at prominent individuals who have injected themselves into public controversies is given greater protection against libel judgments than speech concerning private persons. Public officials, through their involvement in government, and public figures, through their influence on public opinion,[144] have a significant impact on the political process. The press, in order to fulfill its function of informing the public on matters that are affected by the political process, must be safeguarded from the inhibiting influence of libel actions brought by the individuals who have the greatest sway in that process.

Under the Meiklejohn view, the first amendment generally would not be implicated by the publication of a celebrity's photograph, since rarely will a celebrity be photographed in connection with a political event or issue. The picture in *Ann-Margret v. High Society Magazine, Inc.*,[145] for example, had no political significance and would not have been protected by the first amendment under this view. However, a celebrity's ability to recover damages from the press for the unauthorized publication of a photograph would be severely circumscribed by the first amendment if the photograph depicted the celebrity in connection with a political event or issue. For example, the press would have a broad privilege to publish a photograph of a popular singer's performance at a concert benefitting farmers since the plight of farmers is a highly politically charged issue.[146] But in the more typical case involving a photograph depicting a celebrity in his day-to-day activities or while engaged in a performance having no political significance, the first amendment would not privilege the publication.

Although the Supreme Court has on several occasions recognized the crucial role that free expression plays in our system of self-government,[147]

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141. 424 U.S. at 453.
142. *Id.*
143. *See supra* notes 120-21 and accompanying text.
144. The recent concerts benefitting the starving in Africa and American farmers are examples.
145. 498 F. Supp. 401 (S.D.N.Y. 1980). For a discussion of the *Ann-Margret* case, see *supra* notes 32-45 and accompanying text.
146. *See* N.Y. Times, Sept. 23, 1985, at A16, col. 1.
147. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("The First Amendment affords the

the Court has never suggested that the first amendment protects only political speech. Many of the Court's opinions make clear that the expression of all kinds of ideas—social, esthetic, moral, as well as political—falls within the purview of the first amendment.[148] The Court and commentators have frequently invoked the metaphor of the "marketplace of ideas" when advancing the view that the first amendment's chief function is to foster the search for "truth" and "knowledge" through discourse.[149] As with the Meiklejohn thesis, the primary benefits of the marketplace of ideas theory inure to the audience rather than to the speaker.[150] The major difference between the two theories is in their scope: the marketplace of ideas view, for example, protects many forms of entertainment—those that embody an idea—while the Meiklejohn thesis does not.[151]

The Supreme Court has made it clear that entertainment is protected by the first amendment.[152] The protection accorded entertainment may stem, in part, from a hesitation on the part of courts to make subtle distinctions between works that have some informative value, such as a news story, and works that merely entertain.[153] A stronger justification for protecting entertainment is that entertaining works frequently embody or evoke "ideas"

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broadest protection to such political expression. . . ."); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (" 'the essence of self-government' ") (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"); Herbert v. Lando, 441 U.S. 153, 184 (1979) (Powell, J., concurring) ("the First Amendment serves to foster the values of democratic self-government").

148. *See, e.g., Red Lion Broadcasting Co.*, 395 U.S. at 390 (first amendment protects the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences"); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government"); United Mine Workers of America, Dist. 12 v. Illinois Bar Ass'n, 389 U.S. 217, 223 (1967) ("First Amendment does not protect speech and assembly only to the extent it can be characterized as political. . . . 'free speech and a free press are not confined to any field of human interest.' ") (quoting Thomas v. Collins, 323 U.S. 516, 531 (1945)).

149. *See, e.g., Red Lion Broadcasting Co.*, 395 U.S. at 390 ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."); M. NIMMER, NIMMER ON FREEDOM OF SPEECH 102[A]-[E] (1984). Nimmer defends the "marketplace of ideas" metaphor. *Id.* He suggests that the "enlightenment function" is the primary function of the first amendment and emphasizes the basic point that "[t]he search for all forms of 'truth,' which is to say the search for all aspects of knowledge and the formulation of enlightened opinion on all subjects is dependent upon open channels of communication." *Id.* at 102[A].

150. *See* M. NIMMER, *supra* note 149, at 1.02[F].

151. Under the Meiklejohn thesis, entertainment, like all "private speech," is entitled only to the protection of "due process." *See supra* note 124.

152. *See, e.g.,* Zacchini v. Scripps-Howard Broadeasting Co., 433 U.S. 562, 578 (1978) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection.").

153. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. at 388 (" 'The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press].' ") (quoting *New York Times*, 376 U.S. at 271-72).

that belong in the "marketplace." A work of fiction may stimulate intellectual thought as much as a great political treatise. Some forms of entertainment, however, such as a belly dance or sports event, are essentially non-intellectual in character; publications consisting of celebrities' photographs will typically be of this type. Such works warrant less first amendment protection because they do not contribute to the marketplace of ideas.

Publications involving celebrities' photographs may be placed on a rough continuum with respect to the degree that they contribute to the marketplace of ideas.[154] At one end of the continuum are unauthorized publications that are intended solely to create or sell a product and which have little or no informative value.[155] A poster of a movie star or famous athlete is a good example; the unauthorized use of a renowned inventor's likeness on medicine bottles is another.[156] Because these types of publications have little informative value and seek solely to exploit the public appeal of the individual for economic gain, they have generally been considered to fall outside the protection of the first amendment.[157] Celebrities, therefore, have frequently been permitted to recover the fair market value of their likenesses in these purely commercial settings.[158]

At the other end of the continuum lie publications which are primarily intended to convey information about some aspect or event in the celebrity's life.[159] These types of publications, in turn, can be grouped into those which present information with socio-political significance and those with no such significance.[160] Examples of the former would include photographs of celebrities protesting apartheid at the South African Embassy;[161] a photograph of a famous movie actor and actress walking arm-in-arm is an example of the latter. Publications which present information with socio-political significance warrant the fullest first amendment protection since they contribute to debate on issues of the day.[162] Unauthorized publications of photographs conveying no information of socio-political importance implicate less significant first amendment interests; such publications provide "little in the

154. *See* Felcher & Rubin, *supra* note 4, at 1601-08.

155. *Id.* at 1606.

156. Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 A. 392 (Ch. 1907).

157. *See* Felcher & Rubin, *supra* note 4, at 1606.

158. *See, e.g.*, Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135, 143, 296 S.E.2d. 697, 703 (1982) ("the measure of damages to a public figure for violation of his or her right of publicity is the value of the appropriation to the user"); Grant v. Esquire, Inc., 367 F. Supp. 876, 881 (S.D.N.Y. 1973) (famous actor entitled "to recover the fair market value of the use for the purposes of trade of his face, name and reputation").

159. *See* Felcher & Rubin, *supra* note 4, at 1602.

160. *Id.*

161. *See* N.Y. Times, July 10, 1985, at B6, col. 4.

162. *See* Felcher & Rubin, *supra* note 4, at 1602; *see also supra* notes 114 & 146 and accompanying text.

way of provocation of thought, . . . [have] scant relationship to the marketplace of ideas and minimal bearing on the conduct of the polity,"[163] and are essentially exploitative in nature. In this context, the first amendment should not bar celebrities from recovering compensation from the press for the unauthorized publication of their photographs.

Lying at the center of the continuum are publications whose primary purpose is to entertain.[164] As with information-oriented publications, entertainment-oriented publications can be roughly grouped into those which embody some socially useful characteristic and those which merely exploit the fame or other attributes of the public personality.[165] The primary characteristic that distinguishes the two groups is the presence or absence of some "creative effort."[166] For example, an unauthorized photograph published in a biography of a celebrity can be seen as part of the biographer's overall creative effort to "capture" the essence of his subject's life. On the other hand, a photograph published in a magazine and unaccompanied by exposition or presented with a small amount of primarily factual information will less likely be the product of significant creative effort.

> [A] work that merely capitalizes on the attributes of another, without contributing anything substantially unique or new, is likely to be subject to liability. In works of the latter type, nothing is added to our cultural experience; consequently, the First Amendment protection generally provided for creative works is not available.[167]

In accordance with the guidelines outlined in section III, the press should be subject to liability when it publishes, without authorization, photographs of celebrities in a manner that manifests no real creative effort.

CONCLUSION

Courts should extend the right of publicity and the tort of intrusion to provide celebrities with broader protections against the unauthorized publication of their photographs. Extending the right of publicity would furnish

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163. Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication,* 46 TEX. L. REV. 650, 659 (1968).

164. *See* Felcher & Rubin, *supra* note 4, at 1604.

165. *See id.*

166. *Id.*

167. *Id.* at 1604-05.

> The distinction between imitation and parody is based on the same principle. Imitation is primarily an attempt to duplicate the characteristics of another, either to delude the public or to compensate for an absence of creative effort. Parody, on the other hand, makes use of another's attributes as part of a larger presentation, in which a considerable amount of content is provided by the parodist. For this reason, imitation is generally actionable, while parody tends to be protected.

Id.

talented performers with additional economic incentives to develop their abilities, prevent unjust enrichment, promote economic efficiency, and deter the press from creating unwanted associations for celebrities. Extending the tort of intrusion to cases where the celebrity has a reasonable expectation of privacy would enable celebrities to enjoy more fully the amenities of their homes and other secluded places without fearing the intrusive eye of the press. Broadening these well-established remedies would not impinge on significant first amendment principles because the publication of photographs of celebrities rarely contributes to the marketplace of ideas.

D. SCOTT GURNEY