LEXSEE

Copyright (c) 2007 University of Texas at Austin School of Law
Texas Review of Entertainment & Sports Law

Fall, 2007

9 Tex. Rev. Ent. & Sports L. 175

**LENGTH:** 20118 words

NOTE: Paparazzi, Tabloids, and the New Hollywood Press: Can Celebrities Claim a Defensible Publicity Right in Order to Prevent the Media from Following their Every Move?

**NAME:** Keith D. Willis*

**BIO:** * J.D. Candidate, 2008, J. Reuben Clark Law School, Brigham Young University.

**HIGHLIGHT:**

Abstract

Today, the Hollywood news media is more aggressive and combative than ever. Because they can earn substantial income by capturing the right celebrity photograph, members of the paparazzi are constantly following celebrities around town, seeking the perfect scandalous photograph. Recognizing that privacy rights have not provided refuge for celebrities that are photographed whenever they are in public, this article suggests that celebrities may be able to claim a defensible publicity right which would prevent publication of certain candid photographs and also give celebrities breathing space to lead more tranquil lives. In doing so, this article outlines case law supporting this proposition, shows why legislation implementing this policy does not offend the First Amendment, and concludes that states should consider implementing such legislation.

**TEXT:**

[*176]

I. Introduction

In the wake of high speed pursuits and violent encounters between celebrities and the paparazzi, the California legislature recently enacted an "anti-paparazzi statute" designed to curb the paparazzi's reckless behavior and protect celebrities from danger. n1 Passed in 1997 and amended in 2006, this statute allows celebrities to recover punitive and treble damages against trespassers, requires offenders to disgorge all funds earned from such illegal endeavors and imposes greater liability for assaults committed with the intent to obtain a photograph. n2

Despite this positive step, however, celebrities continue to find themselves at the mercies of a merciless paparazzi. While the California statute may prevent photographers from climbing fences and chasing limousines, nothing in any state law currently [*177] discourages the paparazzi from endlessly trailing celebrities and snapping pictures of them and their families on the streets, at parks, or in any other public place. Because such "real life" pictures are often in highest demand, celebrities are constantly pursued by the paparazzi as they go about their daily lives. n3 In fact, the paparazzi (often referred to as the stalkarazzi) have been so persistent in recent years that the E! Entertainment channel recently aired a documentary detailing their tactics and behaviors as they endlessly followed celebrities around town. n4

The paparazzi are, of course, motivated by money. The financial rewards for capturing the right celebrity photograph can be quite substantial. Peter Howe, author of The Paparazzi, states that "the price tag on an exclusive shot of an A-list personality seems almost without limit." n5 A single photo can sell from anywhere between $ 6,000 and $ 100,000, and it has been estimated that an aggressive paparazzo can earn up to one million dollars a year. n6 Importantly, candid and revealing photos capturing celebrities in their most "unguarded moments" bring in the most money. n7 Consequently, the paparazzi have a substantial financial incentive to shadow celebrities as they go about their daily lives. And while this recent trend is very unsettling, it does not appear that the status quo is about to change. Stephanie Dubois, an entertainment news reporter, was correct when she stated that "as long as there are readers willing to pay to see ... their favorite celebrities in all their lesser glory, there will be editors willing to pay paparazzi whatever it takes to get the story." n8

Surely the public must shoulder some of the blame for enabling the paparazzi to hound celebrities everywhere they go. Nonetheless, many have argued that in this case, the supply has created the demand. n9 The fact remains that before these candid photographs make their way to the public, someone must pay the paparazzi for them. n10 The latest increase in paparazzi activity stems in part from the emergence of a new Hollywood press that is feeding the paparazzi's greed at an all time high. n11 As a result of the recent blogging craze, thousands of celebrity websites have been created which publish, almost immediately, the latest candid celebrity photographs. n12 Many of these websites are operated by individuals who pay for paparazzi pictures and post them on their blogs or websites in [*178] the hope that the photos will attract readers and revenue from advertisers. n13 As a result of this phenomenon, the public no longer must wait for celebrity photos to become available; the Internet has created a way for pictures to become public in a matter of minutes. In addition to the Internet, mainstream entertainment magazines continue to publish photographs of celebrities as they engage in the daily routines of life. Both People and US Weekly, for example, dedicate numerous pages in each issue to the latest candid celebrity photographs. n14

The rapid delivery of celebrity photographs combined with a paparazzo's substantial financial incentive, has resulted in celebrities being followed, hounded and even harassed when they leave their homes. Not surprisingly, several Hollywood stars have expressed outrage at this kind of treatment, seeking greater respect for celebrity privacy. n15 While many have sympathy for their plight, unfortunately no legal remedies have been proposed which would prevent the paparazzi from taking pictures of celebrities in public places. Perhaps substantial reforms in this area have not been seriously considered because any limitation on candid photography must be reconciled with the First Amendment. Because the freedom of the press is a hallmark of our cherished constitutional system, many are apprehensive about preventing magazines and websites from publishing paparazzi photography. n16 Despite its importance, however, the First Amendment has been frequently limited when

its exercise intrudes upon other important rights. n17 By identifying such a right, celebrities might be able augment the functioning of this controversial industry.

This paper suggests that celebrities may be able to find relief through a right which has not previously been discussed in the context of this controversy: the right of publicity. Simply put, the right of publicity is the right of an individual to prevent others from using his or her name, likeness, photograph or image for commercial purposes without first obtaining consent. n18 Because the right of publicity inherently imposes a limitation on speech, appropriate assertions of publicity rights may entail only legitimate abridgements of First Amendment principles. n19 For this reason, the right of publicity is not violated when celebrity images are used in the dissemination of bona fide news reports. n20 This paper seeks to establish that Internet websites and entertainment magazines violate publicity rights when they publish - for commercial profit - celebrity pictures which do not qualify as legitimate news.

[*179] Parts II and III of this paper lay the foundation for this argument. Part II will briefly show why the well-spring of publicity rights, the right to privacy, has not provided refuge for celebrities who are photographed and harassed by the paparazzi. Part III will summarize the right of publicity and analyze important judicial decisions which have shaped this right. Parts IV and V assert that many magazines and websites should not be protected under the First Amendment because they are not reporting legitimate news information and because they are commercially exploiting celebrity images. Specifically, Part IV will argue that photographs of celebrities walking to their cars or going to the gym, for example, are not newsworthy, and as a result, they should not be constitutionally protected. Part V will argue that even when Internet websites and entertainment news magazines communicate newsworthy information, they often violate publicity rights by using celebrity images in order to increase readership, and consequently, revenue. Recognizing such use of celebrity images is primarily exploitative rather than informative, these Internet websites and entertainment magazines do not merit First Amendment protection. Part V concludes by suggesting that narrowly tailored legislation be enacted which would allow celebrities to use publicity rights to enjoin publication of photographs documenting the minutia of their daily lives. Finally, Part VI will anticipate potential arguments against extending celebrity publicity rights in this manner and will show why they should ultimately fail.

II. Celebrity Privacy Rights

Frustrated at their lack of privacy, many celebrities have vocalized their disdain for the paparazzi. n21 Recently, both Hillary Duff and Britney Spears expressed displeasure at being constantly followed and pleaded for greater privacy and respect. n22 Celebrity appeals for greater privacy rights have not gone unnoticed; increased media scrutiny into the private lives of celebrities has caused many to zealously advocate for celebrity privacy. n23 Nonetheless, with the exception of news gathering torts such as trespass, theft or intrusion by electronic means, courts have been largely unsympathetic to celebrity privacy claims. n24 The judiciary has been hesitant to recognize celebrity privacy rights for two reasons. First, celebrities are considered public figures who, by nature of their profession, have essentially waived their right to privacy. n25 Second, photographs taken in public places are not subject to privacy claims. n26 The following sections will briefly consider each point in turn.

A. Public Figures and Waiver of Privacy Rights

Although millions of Americans would love to obtain celebrity status, many fail to realize that Hollywood stars are forced to sacrifice personal privacy in exchange for fame and fortune. Since the Supreme Court's landmark decision in Gertz v. Robert Welch, Inc., courts have held that celebrities are considered "public figures" because their talents attract [*180] public debate and commentary. n27 Although the public figure characterization was originally applied in defamation actions, courts have also utilized this analysis to justify greater media scrutiny into the lives of celebrities. n28 For example, in Carlisle v. Fawcett Publications, a well-known actress brought a claim against an entertainment magazine for invasion of privacy after the magazine published a cover story examining her previous sexual encounters and multiple marriages. n29 The court held that the actress did not have a viable claim because "public figures have to some extent lost the right of privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons." n30

Although that line of reasoning is unfortunate for celebrities claiming privacy violations, various other courts have also come to the same conclusion. A California court noted that "[a] person may by his own activities ... become a public personage and thereby relinquish a part of his right of privacy to the extent that the public has a legitimate interest in his doings, affairs, or character." n31 Although this holding may be troublesome, courts have nonetheless been hesitant to allow celebrities to assert privacy rights because "their fame seems inconsistent with the injury to solitude or personal feelings implicitly required" for such claims. n32 Consequently, while many celebrities are incensed that the paparazzi hound them every time they go out in public, the fact remains that they are "substantially without a right of privacy." n33

B. Public Places

Although the paparazzi are occasionally held liable for trespassing on private property or committing physical assaults, most of their work is done by snapping photos of celebrities in public. Even if Hollywood stars could successfully claim that they have not waived their privacy rights, they would still be without a remedy because courts have held that photos taken in public places do not violate individual privacy. n34 One of the first cases to address this issue was Gill v. Hearst Publishing Company. n35 Here, a married couple sued a magazine for publishing a photograph of them sitting together at their ice cream store, which was located in an open market in Los Angeles. n36 The plaintiffs alleged that by printing this photograph the defendant intruded upon their "right to be let alone". n37 The court disagreed, however, and held that the photograph did not amount to a privacy violation because, by sitting in the open market, the plaintiffs had "voluntarily exposed [*181] themselves to public gaze." n38 Noting that "there can be no privacy in that which is already public," the court dismissed the claim because anyone walking through the market could have seen them. n39

Unfortunately for them, celebrities face a double hurdle in winning privacy claims against aggressive photographers: not only are they considered to have waived their privacy rights, but also even private citizens cannot make viable privacy claims when they are taped or photographed in public places. n40 Their inability to fight back through the judicial system may explain why celebrities sometimes attack photographers who endlessly follow them around town. n41 Although physically attacking a paparazzo is inexcusable, personal privacy is something everyone cherishes. Consequently, celebrity aggression against the paparazzi is both understandable and contemptible. Motivated partially by sympathy for celebrities who cannot lead normal lives and partially out of revulsion for the paparazzi, tabloids and websites that constantly exploit them, the remainder of this pa-

per analyzes whether the right of publicity can succeed in protecting celebrities where the right of privacy has failed. Although using the right of publicity to prevent publication of candid celebrity photographs poses its own unique problems, this right may be more effective because individuals do not waive their publicity rights by becoming famous or by appearing in public places. n42 In fact, publicity claims are strengthened rather than weakened by increased fame and notoriety. n43

## III. The Right of Publicity

The right of publicity is the right of an individual to prevent others from using his or her name, likeness, photograph or image for commercial purposes without first obtaining consent. n44 This right is inherently proprietary in nature; courts have held that celebrities and private citizens alike retain a property interest in being able "to profit from the full commercial value of their identities." n45 Consequently, states that recognize publicity rights allow recovery against persons who exploit celebrity images for profit. n46 This property right is grounded in the idea that fame is the result of hard work and effort, and a celebrity, therefore, has a "legitimate protectible interest" in obtaining any value resulting from that fame. n47

[*182]

### A. History and Origin of the Right to Publicity

The right of publicity was first recognized in 1953 in Haelan Laboratories v. Topps Chewing Gum. n48 Holding that a trading card company could not use pictures of baseball players without obtaining permission, the Second Circuit stated that "a man has a right in the publicity value of his photograph, [which is] the right to grant the exclusive privilege of publishing his picture." n49 Although the right of publicity was essentially created by this decision, it was a later ruling by the United States Supreme Court that enabled the right to gain significant judicial acceptance. In Zacchini v. Scripps-Howard Broadcasting, the Court held that a man who had made a living by performing a cannonball stunt had a protectible publicity right in the value of this performance. n50 The Court held that when a news station replayed his entire act on the news, it violated his right to "exclusive control over the publicity given to his performance." n51 In so holding, the Court also outlined the policy rationale behind this new right, noting that the right of publicity is intended to "prevent[] 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." n52

Today, publicity claims frequently involve product endorsement. n53 Companies can reap large financial rewards by creating the inference that a certain celebrity approves of their product. When companies do so without permission, however, they have violated publicity rights by appropriating another's image or likeness without permission. n54 Some of the most famous cases involving product endorsement include celebrities such as Kareem Abdul-Jabbar and Bette Midler. n55 But, the right of publicity is not limited to advertising and endorsement claims; in fact, the doctrine does not require that the celebrity's photograph or likeness be used to sell a separate product. n56 Publicity rights are often infringed when the celebrity's image itself is the product being sold. n57 For example, the Supreme Court of California imposed liability when a person printed a celebrity's image onto a T-shirt and sold it for profit. n58

Ironically, the right of publicity is actually an outgrowth from the common law right of privacy. According to Dean Prosser, a right of privacy exists which allows claims for the appropriation of

one's name or likeness for the commercial benefit of another. n59 In this way, the two torts actually parallel one another. n60 And while courts used the two terms interchangeably for a number of years, publicity and privacy were not able to swim in tandem forever. Courts eventually came to recognize that these rights were fundamentally [*183] different. n61 This distinction developed in recognition of the difference between the right to be left alone and the right to obtain commercial benefits from the use of one's identity. n62 The Supreme Court held as much in Zacchini, noting that while privacy laws exist to protect people from being invaded by the outside world, the right of publicity has been created to protect an individual's proprietary interest in his or her image. n63

As the need to separate privacy and publicity became inevitable and as state legislatures recognized their legitimate interest in granting proprietary rights in publicity, the right of publicity gained considerable strength and acceptance. Today, the right exists as a creature of both common and statutory law. n64 Despite various efforts, a federal right of publicity does not exist; nonetheless, today the right is "widely recognized" n65 in at least thirty six states. n66 No longer a newcomer in the law, the right to publicity has "matured into a distinctive legal category occupying an important place in the law." n67

B. From Privacy to Publicity

Because courts initially recognized publicity and privacy rights interchangeably, plaintiffs often made no effort to distinguish between the two. As the difference between the torts became more clear, however, courts and scholars began to recognize that publicity was often more suitable to celebrity claims than was the right of privacy. In his influential article published in the Northwestern Law Review, Professor Harold Gordon stated "much ... confusion ... arose because litigants chose to sue in almost every case for invasion of privacy (premised on injury to feelings), rather than for the appropriation for commercial exploitation of property rights in name, likeness, etc., in situations where injury to feelings had only secondary application." n68

This point was recognized by the court in O'Brien v. Pabst Sales when it refused to grant relief in a privacy action filed by a well-known football player against a beer company that used his name in an advertisement without permission. n69 Finding for the beer company, the court noted that rather than asserting a claim for invasion of privacy, the football player should have brought suit based on the value of his name used in the advertisement. n70

Recognizing that publicity often "constitutes a firmer basis for granting relief" n71 than privacy, this paper will analyze whether asserting publicity rights can prevent the publication of photographs of celebrities as they go about their daily lives. In addition to the [*184] fact that privacy provides no remedy for celebrities in public, this analysis is worth pursuing because of the increased circulation of candid celebrity photographs. n72 In order to determine if commercialization of celebrity photos over the Internet and in news magazines violates celebrity publicity rights, a more detailed analysis of the contours of the right of publicity, especially where it involves First Amendment freedoms, is required.

IV. The Newsworthy Exception and the First Amendment

"There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment." n73 As media scrutiny of celebrities increases, this tension has become "particularly acute." n74 Consequently, the debate regarding where the right of publicity ends and where the First Amendment begins has escalated. The general consensus is that when balancing

the two interests, courts must weigh "the right to be protected from unauthorized publicity ... against the public interest in the dissemination of news and information consistent with ... the constitutional guarantees of freedom of speech and of the press." n75 Given this balancing test, First Amendment concerns will sometimes outweigh the right of publicity, and other times, the freedom of the press must yield to celebrities' legitimate proprietary interests. n76 The uncertainty which necessarily accompanies balancing tests is further exacerbated because of the varied interpretations resulting from state, rather than federal, recognition of the right of publicity. States often differ regarding when the right of publicity trumps First Amendment rights and visa versa. n77

The inherent confusion regarding balancing tests, however, does not impair this analysis. This paper does not claim that all states must limit First Amendment protection of media coverage regarding celebrities' daily lives. Rather, it will argue that case law supports the idea that narrowly tailored legislation which limits some First Amendment freedoms is justified under the right to publicity and can pass constitutional scrutiny. In order to prove this assertion, this paper will offer a concise but comprehensive summation of policy arguments outlining the domain in which First Amendment rights must be protected. This paper will then address the two areas where publicity rights bump up against the First Amendment: the newsworthy exception and exploitive commercial use. After doing so, this paper will analyze the First Amendment with regard to each factor and show why allowing celebrities to make publicity claims in this context does not offend constitutional principles.

A. The Case for a Broad Newsworthy Exception

Celebrities cannot assert publicity rights when their name or likeness is used in conjunction with bona fide news reports. n78 Because they are constantly making news, most [*185] celebrity images and photographs will rightfully be protected under the First Amendment. Thus, in order for a celebrity to win a publicity claim, she must show that the commercial use of her photograph was not related to a news event. n79 In order to analyze publicity claims against magazines and websites which constantly display celebrity photos, we must first determine what qualifies as newsworthy material. Not surprisingly, courts have taken a very inclusive stance when deciding what information should be considered newsworthy. n80 Because rebutting this presumption is an uphill battle, this paper will first identify cases and theories which support broad First Amendment freedoms.

In 1967, the Supreme Court issued a landmark opinion which reiterated First Amendment freedoms for newspapers and outlined the policy rationale for doing so. In Time v. Hill, the Supreme Court held that a magazine company did not violate the plaintiff's individual privacy rights when it merely reported that a theatrical production had been based upon the experiences of her family, which had been taken hostage by three escaped prisoners. n81 Noting that the public had a legitimate interest in receiving this information, the Court stated that the freedom of the press "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." n82 Although it recognized that political discussion might be the most important kind of speech, the Court held that the First Amendment must embrace a wide expanse of information without granting greater protection to speech based upon the "importance of the ideas seeking expression." n83

The Court also recognized that granting broad First Amendment protection to news organizations would sometimes harm individuals:

Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value of freedom of speech and of press ... . "Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.' n84

Thus, in addition to holding that the freedom of the press encompasses all forms of information, the Court asserted that the First Amendment requires sacrifice by those who feel they have been injured by an unfettered press. n85 Unfortunately for some, Time v. Hill established that the benefits of living in a country which values a free press outweigh the public shame and humiliation that accompany certain news reports. n86

While the Supreme Court has addressed general First Amendment principles, various lower courts have protected the freedom of the press in contexts which are very similar to the debate regarding celebrities and candid photography. Specifically, these courts have [*186] addressed the extent to which the private lives of celebrities are newsworthy. n87 A number of courts have, in harmony with important Supreme Court decisions such as Time v. Hill, held that information regarding the personal lives of celebrities should not be protected under the First Amendment. n88

One of the earliest such cases was Sidis v. F-R Publishing, in which the Second Circuit refused to impose liability on a magazine company for publishing unflattering biographical information regarding a child prodigy whose documented ability in mathematics had attracted public attention. n89 The court stated that "the misfortunes and frailties of ... "public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in ... newspapers, books, and magazines." n90 Other courts have likewise recognized that celebrity activity constitutes legitimate news information. California courts, for example, have held that the romantic involvement of celebrities with each other is a matter of legitimate public concern. n91 Similarly, it has been held that divorce and child custody proceedings are subjects of public interest and should be protected by the First Amendment. n92

It seems at first glance that both general First Amendment law and specific cases addressing media scrutiny of celebrity behavior support the idea that the press cannot be prevented from photographing celebrities on the street. First, the Supreme Court has clearly established a broad rule for protecting speech, one that does not prevent the dissemination of information simply because it is not "important" or harms personal feelings, reputation or even privacy. n93 Second, courts have held that publication of information regarding the daily lives of celebrities is newsworthy. n94 While any person, celebrity or not, may be offended by publicity regarding their private lives, courts have nonetheless held that publications concerning divorce proceedings, marriages and child custody disputes are protected by the First Amendment. n95 In addition, the misfortunes and frailties of celebrities are newsworthy; the press does not need permission to publish stories about addictions, arrests or other misbehavior. n96 Thus, a significant and influential body of case law indicates that magazines and tabloids that publish the latest celebrity exploits, while frequently offensive, are likely protected under the First Amendment.

B. The Other Side of the Coin

Simply because courts favor an expansive freedom of the press, does not mean, however, that limitations cannot be placed on news reporters or photojournalists. The Supreme Court has held that while the "dissemination of information and opinion on [*187] questions of public concern is ordinarily a legitimate, protected and indeed cherished activity, [this] does not mean ... that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others." n97 Despite the strong presumption against regulating the press, courts have upheld various limitations on the media by determining that certain information should not be considered newsworthy. n98 This section will analyze these decisions - none of which have been overturned - and argue that they can be applied to the debate regarding paparazzi photography and harmonized with the aforementioned case law (which is protective of First Amendment rights). Importantly, the following sections will show that there is judicial support for certain regulations which would protect celebrity publicity rights and be found constitutional at the same time.

Granted, courts have taken a liberal view regarding what qualifies as newsworthy, but liberal does not mean universal; courts sometimes do in fact find that certain information does not qualify as newsworthy. n99 Although there is not a universal standard for making this determination, two main theories have been put forth. Some courts have held that newsworthiness should be determined by using the "reasonable member of the public" standard. n100 Others have held that newsworthy material does not include information which serves only to satisfy "mere curiosity." n101

1. Reasonable member of society

Some courts subscribe to the definition espoused by the Ninth Circuit in Virgil v. Time, Inc. when it adopted the Restatement's standard for newsworthiness:

The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. n102

Although the court noted that this distinction was not as clear as it would have liked, it determined that it did not offend the First Amendment. n103 But while the court bravely drew this line separating appropriate and inappropriate news, this test is actually quite vague because it is frequently subject to a jury's determination regarding community standards. n104 A jury may be called upon to define acceptable community standards and then decide if the challenged news report is newsworthy under that standard. n105 Although such a test may be [*188] unpredictable, other First Amendment issues are also resolved based on jury determinations regarding community values. n106

Recognizing that juries may need to make some important decisions regarding newsworthiness, the Virgil court helped clarify the meaning of acceptable community standards. n107 First, as noted above, the court held that an issue is not newsworthy when a "reasonable member of the public, with decent standards" would recognize that he has no concern with the information being presented. n108 In other words, the right to report information is "subject to reasonable limitations." n109 Likewise, the court clarified what morbid and sensational prying meant when it stated: "the fact that [people] engage in an activity in which the public can be said to have a general interest

does not render every aspect of their lives subject to public disclosure." n110 Thus, while determining newsworthiness may require a jury to clearly indicate the standards of the day, when a certain action clearly exceeds that standard, the court may declare a report to not be newsworthy. n111

Whether the standard set forth by the court in Virgil is determined by a judge or jury, a compelling argument can be made that the paparazzi, by following celebrities everywhere they go, are offending community standards and morbidly and sensationally prying into the lives of others. A reasonable person with decent standards may very well be offended to know that photojournalists follow celebrities to their children's soccer games and then sell photos taken of them to tabloids and Internet companies. Likewise, community standards of decency are likely offended when the paparazzi stalk celebrities and purposefully provoke them with the aim of increasing the value of photos or video to be later sold. n112

This argument is not limited to speculation regarding how a reasonable person would react to paparazzi antics; there is evidence that this kind of media behavior currently offends community standards of decency. Many people have started Internet websites questioning the paparazzi's legitimacy and calling for other members of the public to refuse to purchase magazines that buy the paparazzi's photographs. n113 In the academic realm, scholars have issued a call for greater celebrity protection from photographers. n114 Even members of Congress have advocated for celebrities by proposing legislation and forming exploratory committees to see what can be done in the face of this unsettling trend. n115 Because a significant number of individuals recognize that the paparazzi have crossed the line separating legitimate from inappropriate reporting, the Virgil test may be used to assert that many candid celebrity photographs are not newsworthy.

[*189]

2. Mere Curiosity

Despite arguments that the paparazzi have offended common standards of decency, a more effective newsworthy test has been developed. Many courts have held that while society has a legitimate claim to certain information regarding other people, the public interest does extend to knowledge which only satisfies "mere curiosity." n116 This term of art was most notably embraced in Galella v. Onassis, where a federal court refused to grant First Amendment protection to a photojournalist (who claimed to be the first American paparazzo). n117 This paparazzo made his name and money by constantly following Jacqueline Onassis and her children and by publishing photographs of their daily activities. n118 After Onassis filed suit, he asserted that his actions were protected under the First Amendment. n119 The court disagreed, however, and held that his photographs were not sufficiently newsworthy to warrant constitutional protection:

In this case, photographs of defendant walking in Central Park, riding in automobiles, eating in restaurants, [and] picnicking with her children ... are of miniscule importance to the public. The torment inflicted upon her in the course of ... obtaining these photographs ... clearly outweighs any interest in [the public's] obtaining such information. n120

The court held that the mundane details of a celebrity's personal life are not sufficiently newsworthy to be protected by the First Amendment. n121 But the court did not simply declare the paparazzo's actions to be unprotected; it also explained how its ruling was harmonious with Supreme

Court decisions that support First Amendment freedoms. n122 The court noted the famous lines, quoted by the Supreme Court in Time v. Hill, that the First Amendment applies to all information which is "needed or appropriate to enable members of society to cope with the exigencies" n123 of life, and it explained that the paparazzo's "reporting" did not fall within this category:

Doubtless, Mrs. Onassis is a public figure, whose life has included events of great public concern. But it cannot be said that information about her comings and goings, her tastes in ballet, [and] the food that she eats ... bear significantly [*190] upon public questions or otherwise "enable members of society to cope with the exigencies of their period.' It merely satisfies curiosity. n124

Since this decision, other courts have likewise held that information which satisfies mere curiosity is not newsworthy. n125 Most recently, a federal district court affirmed this general rule in 2004 when it held that while newsworthiness includes matters of the general public interest that interest does not extend to information which serves to satiate mere curiosity. n126 In 2003, a California court applied the mere curiosity test and held that a dispute between private individuals was not of legitimate public concern. n127 Widely recognized as a judicially accepted doctrine, this test has been noted in American Jurisprudence as the method for determining newsworthiness. n128

Despite the court's holding in Onassis, celebrities today are constantly followed, stalked and even harassed by paparazzi photographers who sell pictures in order to satisfy the public's mere curiosity. In fact, the paparazzi frequently obtain and sell pictures that reveal the same information which the Onassis court held not to be newsworthy: candid photos of celebrities eating, n129 shopping, n130 or enjoying a day at the beach n131 bring the paparazzi some of their largest paychecks. Recently, images surfaced on the Internet showing Harrison Ford buying a burrito and Ben Affleck frequenting a McDonald's drive-thru. n132 Because these are the exact types of photographs that the Onassis court determined to be of "minuscule importance" and therefore unprotected under the First Amendment, n133 the mere curiosity test could be applied to prevent these pictures from being published.

It is worth noting that other countries have limited the ability of the press to publish photographs which satisfy only a mere curiosity. The European Court of Human rights, for example, held that Princess Caroline, princess of Monaco, had the right to prevent the publication of German paparazzi photographs taken of her while she was engaging in the activities of her "daily life." n134 Stating that because photographs of her at restaurants, walking around town and enjoying a vacation, served only to "satisfy the curiosity of a particular readership," the court held that the photographs were not sufficiently newsworthy to be protected under the freedom of expression. n135

[*191]

3. Conclusion

Although the European Court clearly supports a restriction on certain candid photographs, American case law also indicates that some material should not be considered newsworthy. n136 This limitation can be justified either because such publicity violates community standards of decency or because it satisfies mere curiosity. But while both lines of legal reasoning are applicable, the mere curiosity test provides greater protection because it does not rely on illusive "community standards of decency" which are often subject to unpredictable jury determinations. The mere curiosity analy-

sis, on the other hand, is applied without regard for whether a majority of the public is interested in the intimate details of a celebrity's life. n137 As a result, the mere curiosity test, as outlined by the Galella court, prevents publication of candid photographs despite society's increasingly morbid fixation with the meaningless details of celebrities' lives. n138 Utilizing Galella, legislators can effectively and constitutionally block photographs which serve only to satiate the public's mere curiosity.

V. Commercial Use And The First Amendment

The newsworthiness test has primarily been applied to cases in which plaintiffs claim that dissemination of information violates their privacy rights. n139 Importantly, when a publication is found to not be newsworthy, it necessarily follows that the claimant's privacy rights have been violated. As previously discussed, in Time v. Hill, the Supreme Court was called upon to determine whether a family crisis was newsworthy. n140 Had the Court decided that this information did not serve the public interest, the family's privacy interests would have automatically been violated because the information was transmitted publicly through a theatrical production. n141 Unlike privacy suits, however, which require only that the information be communicated, it is not enough for plaintiffs asserting publicity violations to show that their photograph was made public; they must also show that it was published for profit. n142 In other words, even if a publication does not depict a newsworthy activity, publicity rights prevail only if that picture appropriated the celebrity's image for commercial gain. n143

Speech which exists primarily to generate revenue is known as commercial speech, a category of speech entitled to less constitutional protection. n144 Normally, speech is not considered commercial when it communicates news or information. n145 Nonetheless, courts have held that even when legitimate news information is presented, if a publication [*192] primarily serves to exploit a celebrity's image for profit, the speech will be considered commercial and publicity rights will trump First Amendment considerations. n146 This has become known as the predominant purpose test, and it has been applied to constrain various publications under the right of publicity. n147 This Part will review cases in which courts have applied the predominant purpose test and found that defendants violated publicity rights by exploiting celebrity images for commercial gain. After analyzing these decisions, this Part will apply the predominant purpose test to photographs published on Internet websites and in entertainment magazines, and it will conclude that these news sources are currently violating celebrity publicity rights.

A. Predominant Purpose Test

1. Important cases

The predominant purpose test was first embraced in 1981 by the court in Estate of Presley v. Russen. n148 In this case, the estate of Elvis Presley alleged publicity violations when a production company created, for profit, a stage show patterned after one of Elvis' concerts. n149 Denying summary judgment for the production company, the court held that while the stage show contained some informational elements regarding a well-known celebrity, the First Amendment did not trump the estate's right to obtain the commercial benefits of Elvis' image. n150 The court noted that although publications which communicate information regarding political, social and entertainment issues are normally protected under the First Amendment, such protection does not apply when the "name or likeness of [a] public figure is being used predominantly for commercial exploitation." n151 Thus, while the Elvis show contained informational and entertainment elements, the court held

that the First Amendment should yield to publicity rights because the play was predominantly a ploy to make money off Elvis' name and persona. n152

Even images which portray information that clearly would be deemed newsworthy in other circumstances cannot be used primarily to commercially exploit a celebrity's image. In 2004, a federal district court held, in Bosley v. WildWett.Com, that an online movie company could not use footage of a local news anchor dancing nude at a bar to advertise for its website, Sex.Brat.com. n153 Following the dancing incident, the company posted images of the local celebrity online and advertised that its Internet videos contained a "naked anchor woman." n154 Although the court determined that a local celebrity dancing nude on the table was newsworthy, it held that the news anchor's publicity rights trumped the film company's First Amendment rights because the video was used primarily to commercially exploit her image, rather than to communicate newsworthy information. n155

[*193] Other courts have likewise held that a photograph is primarily exploitive if it uses celebrity images in order to draw attention to a separate product. n156 In Grant v. Esquire, Inc., a federal court held that a magazine would violate Cary Grant's publicity rights if on remand the trial court determined it used his photo "merely to attract attention" to an article which contained information regarding fashion trends. n157 In 2003, in Doe v. TCI Cablevision Inc., the Missouri Supreme Court also favored publicity rights over First Amendment considerations when a comic book company used a professional hockey player's name for one of its villains. n158 Weighing publicity and First Amendment rights, the court found that the comic book company wrongfully appropriated the hockey player's image in order to catch the eye of the consumer. n159 Rejecting the notion that any expressive content brought the comic book within First Amendment protection, the court held that if a product is sold that "predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity." n160

2. Internet websites and entertainment magazines

Presley, Bosley, Grant, and Doe stand for the proposition that commercial exploitation of celebrity images is not protected by the First Amendment, even if what is being communicated has entertainment, informational or even news value. This reasoning has not been applied to websites or magazines that reap substantial commercial profits by publishing candid celebrity images captured by the paparazzi. This is probably because at first glance it appears that these websites and magazines are simply reporting news. But as this paper has already asserted, pictures of a celebrity walking to the gym or relaxing at the beach are arguably not newsworthy. n161 As such, entertainment magazines and websites arguably violate publicity rights by publishing and profiting - through subscription and advertising fees - from such photos.

a. Some informational or news value

Even when they communicate legitimate news or information, many websites and magazines use celebrity photographs primarily to exploit them for commercial gain. For example, TMZ.com, a website which tracks entertainment news, contains a link entitled "paparazzi photos" that airs daily updates of candid celebrity photos. n162 Some of the latest pictures include Matthew Broderick cleaning snow off his front steps and Jennifer Garner walking in the park with her daughter Violet. n163 Unlike some websites which contain only pictures, these photographs are accompanied by one or two sentence "articles" about the [*194] celebrity. Included under the Matthew Broderick picture are two short sentences: "The "Producers,' which has grossed $ 1 billion worldwide, will be

closing in New York on April 22 after nearly 2,500 performances. Broderick's salary was rumored to be in the $ 100,000 a week range." n164 Similarly, the caption under the photograph of Jennifer Garner and Violet reads: "Jen and Vi are in Vancouver filming the movie "Juno,' which is about a pregnant woman who makes an unusual choice." n165

TMZ.com is certainly not an anomaly; many other websites post the latest candid shots of celebrities and include captions with various information. n166 Another Internet site, Just Jared, includes daily updates of celebrity photographs, many of which are candid street pictures. n167 Recently, the website included a photograph of Alyssa Milano preparing to board a plane at the Los Angeles Airport. n168 Included under the photograph was a short paragraph informing readers that the actress will be starring in an upcoming drama on ABC. n169 Similarly, entertainment magazines sometimes exploit celebrity images under this news reporting guise. A recent issue of US Weekly showed a picture of Cate Blanchett shopping at a grocery store in New Orleans. n170 The caption below the picture noted that she is starring in an upcoming movie with Brad Pitt. n171

Similar to the play in Presley and the video in Bosley, which both contained newsworthy and informational elements, these websites and articles relay information regarding celebrities' upcoming projects. n172 However, like the defendants in Presley and Bosley - who exploited a celebrity's image for commercial gain - these websites and magazines exist primarily to create advertising revenue by publishing pictures of celebrities that others want to view. Indeed, the information contained under these celebrity photographs is wholly unrelated to the photo of the celebrity: the fact that Alyssa Milano is at an airport, that Matthew Broderick is shoveling snow or that Cate Blanchett is grocery shopping, have no correlation with their upcoming movies or television shows. Although the latest celebrity projects are in fact newsworthy, the informative content provided is predominated by the candid photographs - which exist to increase circulation or hits, not to inform readers. Even though a person can obtain celebrity information from these websites or magazines (just as people could learn more about Elvis by attending an imitation concert) these celebrity images are primarily being exploited for commercial profit. The fact that the TMZ.com link says "paparazzi photos," rather than "celebrity news," n173 further suggests that these publications utilize the celebrity images for their commercial - rather than informative - value. For this reason, the First Amendment should not protect them against publicity actions.

[*195]

b. Attracting attention to a separate product

Perhaps the worst offenders are those website owners who post celebrity pictures and then use those images as a means of attracting attention to their own products. For example, a current website run by Electronic Books Here is used to lure Viggo Mortensen fans searching for photographs of the famous actor. n174 Easily found by a Google or Yahoo search with the terms "Viggo Mortensen" and "photo," a website entitled "Viggo Mortensen Pictures" contains "paparazzi shots" of the actor walking down the street in Los Angeles. n175 But this website does not merely display photographs of the star - it is actually an advertisement for a new Viggo Mortensen biography written by Marina Rundell. n176 Directly above the candid photograph is a link reading: "Viggo Mortensen Hard Copy Book is now again in stock!" n177 The link directs the reader to a webpage, run by the same company, which describes the book and contains an online purchasing form. n178 This website was clearly created so that people searching online for photographs of Viggo

Mortensen would see not only the advertisement, but also the link where the book could be purchased. n179

Like the defendants in Grant and Doe, who violated publicity rights by using a celebrity's image in order to attract attention to a separate product, n180 this website uses Viggo Mortensen's photograph in order to catch the eye of potential customers. Knowing that Viggo Mortensen fans are far more likely to purchase a biography about him, the website owner uses a candid paparazzi photograph of Mortensen to lure Internet users searching for pictures of the movie star. Thus, the website appropriates Mortensen's image for the primary purpose of attracting attention to a biography, the purchase of which would produce financial gain. Because a celebrity picture is used almost exclusively for this purpose, the speech is predominately exploitative and does not warrant First Amendment protection.

B. Commercial Speech and Transformative Use

An important defense to the predominant purpose test must be mentioned. A person can show that his use of a celebrity's image is not primarily exploitative if, through his own creative endeavors, he transforms the celebrity's image into something that "belongs" to him. n181 Applying what has become known as the transformative use test, courts have held that if an artist applies his own skill and creativity to a work which uses a celebrity's image, the work will be considered expressive, rather than commercial, speech, and the First [*196] Amendment will trump the celebrity's publicity rights. n182 If, however, an artist simply copies a celebrity image and uses it for commercial gain, he is engaging in commercial speech, and his First Amendment interest will yield to the celebrity's proprietary interest in the use of his image. n183

1. Comedy III Productions and transformative use

The transformative use analysis was first outlined in 2001 in the landmark decision Comedy III Productions v. Gary Saderup, n184 and has been widely accepted as one of the definitive tests for determining if the use of a celebrity's image is protected under the First Amendment. n185 In Comedy III, the registered owner of the Three Stooges' publicity rights brought suit against an artist after he printed a famous picture of the actors onto T-shirts and sold them for profit. n186 The plaintiff claimed that this action violated the Three Stooges' publicity rights while the artist asserted that his speech was protected under the First Amendment. n187 The court disagreed with the artist and held that he violated the plaintiff's publicity rights by using a "literal depiction or imitation of a celebrity for commercial gain." n188 Although finding in favor of publicity rights, the court stated that First Amendment concerns trump publicity interests when the expression contains "significant transformative elements" such that the artist creates something "recognizably his own." n189

Since this decision, a few highly controversial cases have been decided. n190 This is in large part because the line between commercial and transformative use can be difficult to determine. The Ninth Circuit, for example, was recently called upon to decide if a magazine violated Dustin Hoffman's publicity rights when it published a digitally altered photograph of him wearing women's designer clothing. n191 While the court held for the magazine company, it noted that its decision was extremely difficult because the commercial aspects of the article were "inextricably entwined" with its expressive elements. n192 A similar high-profile case was decided by the Ninth Circuit in ETW Corp. v. Jireh Publishing, where the court extended First Amendment protection to an artistic collage that captured Tiger Woods' historic victory at the Masters' Golf Tournament. n193 The collage

displayed images of Woods from various angles and included the faces of former golf legends in the background. n194 Viewing the artist's work as a whole, the court held that because he "added a significant creative component to Woods' identity," the artist did not "capitalize solely on a literal depiction" of the celebrity. n195

[*197]

2. Entertainment news websites and magazines

Despite its importance, the transformative use test has little relevance to this discussion as merely posting photographs of celebrities does not involve any creative effort. In fact, publishing a candid photograph of a celebrity, with the aim of exploiting its commercial value, is closely akin to printing the image of a celebrity onto a T-shirt and selling it. In both instances, a celebrity's image is utilized for commercial gain and no creative or transformative components are added. Thus, magazine and website owners, as well as the paparazzi themselves, are profiting at the expense of celebrities, and are quite literally "hitching [their] wagons to a star." n196 Because this is the exact kind of activity that courts have consistently held to be within reach of publicity rights, a law or ruling prohibiting these publications would not violate the First Amendment.

It is worth noting that at least one major celebrity website does slightly more than publish candid photographs of celebrities as they engage in non-newsworthy activity. PerezHilton.com, run by self-proclaimed the "Queen of the Media," mogul Perez Hilton, contains thousands of celebrity photographs, most of which have been captured by the paparazzi. n197 Unlike many other websites, however, Perez Hilton usually inserts a small (and often degrading) drawing or comment about the celebrity on top of the photograph. n198 For example, Hilton recently posted a picture of Heather Mills (former glamour model and ex-wife of Paul McCartney) as she left a parking garage in exercise clothes. On top of Mills' head, Hilton drew two devilish horns, and at the bottom of the picture he criticized Mills' recent efforts to fight against the British news media. n199 Another recent picture featured Evangeline Lilly in a bikini carrying a surfboard along the beach near her home in Hawaii. n200 Commenting on Evangeline's now famous body, Hilton wrote "nice view" at the bottom of the picture. n201 These are two examples among thousands of celebrity photographs which appear on this website and contain various quips and jokes about Hollywood stars.

These comments and one-liners are sometimes creative, occasionally humorous, and often derogatory. Nonetheless, Perez Hilton is not transforming celebrity images by adding a significant creative component to the photographs. Creating a few arrows pointing to a celebrity's buttocks or drawing horns on a celebrity's head does not square with the kind of artistic creation needed in order to trump celebrity publicity rights. n202 Although Perez Hilton has become more well-known than other celebrity bloggers, he still exploits celebrity images for commercial profit without disseminating news or making transformative use. His drawings and comments are "merely trivial variations," n203 and even if they are skillfully carried out, they do not create something which is recognizably his own.

[*198]

C. Conclusion

The predominant purpose test demonstrates that certain publications, even if they contain informational or newsworthy components, can violate publicity rights and lose First Amendment protection.

n204 A review of various Internet websites and entertainment magazines indicates that celebrity photographs are currently being exploited for commercial profit. n205 Many celebrity pictures that are published for financial gain exist simply to satiate the public's mere curiosity, and this alone establishes their illegitimacy. But even if some photographs contain legitimate news or information, publicity rights trump First Amendment considerations when these pictures are used primarily to exploit celebrity images. n206 While news is created when a celebrity signs a deal to star in an upcoming movie, reporting that fact alone in a caption should not bring the photo within the ambit of news and the protection afforded it under the First Amendment when the photo has been published primarily for commercial gain. Even worse are those who create websites designed to attract Internet users to celebrity images in order to advertise and sell products. Since it is the photograph of the star alone which enables these websites and magazines to make profits, they, with the help of the paparazzi, are clearly exploiting celebrity images.

In order to prevent this exploitation and at the same time create a buffer whereby celebrities can live free from unreasonable scrutiny, this paper suggests that a ban be placed on unauthorized publication of photographs of celebrities as they engage in the mundane, daily activities of life. Although this moratorium is justified by judicial precedent - establishing that neither information which satisfies mere curiosity nor photographs which predominantly exploit celebrity images are protected by the First Amendment - such a limitation should come from a legislative body, rather than the courts. Recognizing this fact, the court in Goetlet v. Confidential held that limitations on First Amendment freedoms should be "the result of a clear expression of legislative policy." n207 Because legislatures can craft specific, narrowly tailored legislation which takes into account multiple factors and important details, they are better equipped to create an effective constitutional limitations on the news media.

VI. Problems with Limiting Celebrity Photography

Although this proposed legislation is grounded in case law and bolstered by the fact that celebrity exploitation is currently occurring in various places, any limitation on First Amendment rights will undoubtedly be subjected to intense judicial scrutiny. This Part will address the most plausible criticisms of this proposed legislation and explain why none of them should prevent the legislation from surviving a constitutional challenge.

A. Overbreadth

Overbreadth is a crucial principal of First Amendment jurisprudence that should give any legislature pause before limiting First Amendment freedoms in favor of publicity rights. Courts have made it clear that when it comes to First Amendment rights, they prefer to err [*199] on the side of freedom, rather than to allow legitimate speech to go unprotected. n208 For example, the Supreme Court in Time v. Hill, noted that because the line between entertainment and news is too difficult to draw, both means of communication must be allowed so as to avoid the risk of chilling legitimate speech. n209 This theory has become known as the overbreadth doctrine - a concept further developed by the Supreme Court in Grayned v. City of Rockford, when it held that First Amendment restrictions are unconstitutional if they "inhibit the exercise of First Amendment freedoms" by causing people to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." n210 Consequently, in order to pass constitutional scrutiny, limitations on the press cannot be vague or confusing; rather, they must be clear enough to "give the person of ordi-

nary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." n211

Thus, limiting publication of celebrity photos because they exploit celebrity images cannot discourage others from conducting activity which is actually protected. Blocking news organizations from publishing certain celebrity photographs, however, should not actually chill free speech; such a rule does not prevent a reasonable person from knowing where the line between protected and unprotected speech has been drawn. In fact, by using the rules put forth in cases which protect First Amendment rights, n212 a state can craft legislation which protects celebrities from the public's mere curiosity and, at the same time, allows the media to continue reporting newsworthy entertainment stories.

Consequently, this paper does not propose abandoning judicial precedent in any way; instead it suggests that prior case law should serve as the marker separating newsworthy and non-newsworthy information. As noted in Part IV, the court in Sidis v. F-R Publishing held that the misfortunes and frailties of celebrities are newsworthy subjects. n213 The media has a First Amendment right to publish pictures of celebrities checking into mental hospitals, drug rehab centers and even to publicize celebrity eating disorders. In addition, as noted earlier in this paper, n214 the press is free to publicize celebrity relationships, marriages, divorces and child custody disputes. n215 None of these holdings should cause confusion because they actually help draw the line separating newsworthiness from non-newsworthiness. And if this boundary is not absolutely clear in every instance, it is at least intuitive: many in the news media already recognize this distinction. For example, Jill Ishkanian, co-owner of Sunset Photo and News and former editor of US Weekly, stated recently on E! Entertainment's documentary that unlike a photograph of Denise Richards walking down the street by herself, a picture of her with her ex-husband Charlie Sheen after [*200] their bitter divorce is highly desirable because it "has news value." n216 Following this basic rationale, legislation can be crafted which remains in harmony with judicial precedent and which would enable a reasonable person to determine what kinds of celebrity photographs are newsworthy.

B. Unfair Restriction on the Entertainment Press

In addition to not causing confusion regarding the line between protected and unprotected speech, this proposal would not overly restrict the freedom to report entertainment news. Because it is aimed solely at the publication of commercially exploitive photographs, this legislation would only mildly impact mainstream media outlets that report on valid entertainment news. Proof of this can be seen by examining a recent issue of US Weekly, which contains very few photographs that would be affected by the proposed legislation. The January 8th, 2007 issue contains numerous photographs of stars posing for pictures on the red carpet, interviews with and photographs of television celebrities, a story regarding Miss USA's substance abuse problems, the latest update on the feud between Donald Trump and Rosie O'Donnell, and pictures of the latest celebrity romances, breakups, and friendships. n217 Only a few photographs in this issue - assuming they were obtained without permission - would violate publicity rights: a picture of Denise Richards at the park with her daughter, Heidi Klum at a ski resort in Colorado and Orlando Bloom at the airport. n218 Consequently, this legislation would not cause celebrities and their activities to suddenly become immune from media scrutiny. Although it would prevent the paparazzi from stalking celebrities in order to gain the latest candid shot, it would still allow an incredible amount of entertainment news to be reported. Thus, if this proposed legislation were passed, the news media could still continue to regularly report entertainment news.

Further, many celebrities are willing to consent to additional publicity because the entertainment news industry can assist them in their rise to fame. For this reason, the court noted in Grant v. Esquire, Inc., that limitations on the use of celebrity images for commercial profit would not negatively impact the entertainment news industry:

With respect to any possible chilling effect of the particular requirement recognized by this decision, the Court can take judicial notice that there is no shortage of celebrities who ... are only too happy to lend their faces, names, and reputations for [commercial] exploitations. There is no conceivable ... purpose served by Mr. Grant's picture that would not equally well have been served by any one of numerous other celebrities. n219

Because so many celebrities are willing to consent to publicity, requiring the press to use celebrity images in a non-exploitive way will not unduly prevent celebrity activity from being publicized. Interestingly, some claim that because celebrities need the media to assist their rise to fame, photojournalists should be able to constantly follow them around town. n220 The opposite is actually true. Because the media facilitates stardom, there is no reason that the paparazzi should have to shadow celebrities every time they leave their homes. There is [*201] more than enough news to be reported, and there are more than enough celebrities desiring publicity.

C. Right of Publicity: From a Shield to a Sword

It can be argued that allowing publicity rights to prevent candid paparazzi photography might give more power to the right of publicity than was previously envisioned by the courts. First, such a law might give celebrities who do not want certain candid photos published the ability to suppress publicity which casts them in a negative light. This is a legitimate concern because courts have held that publicity rights should not allow celebrities to ward off parody, criticism or satire. n221 But a rule preventing the news media from exploiting celebrity images would not allow Hollywood stars to quell legitimate speech. Criticism and commentary are a far cry from exploitation of a person's image. It is one thing for someone to criticize a celebrity or create a clever parody; it is another thing altogether to post a picture of a celebrity running errands in order to obtain commercial profit. Humorists and columnists can still use celebrity images in their commentary as long as their predominant purpose is not to appropriate the commercial value of the celebrity in those images. The proposed legislation would suppress exploitation, not criticism.

A second possible reason for being skeptical of this rule is that it uses the right of publicity more to protect celebrities' privacy concerns than to protect their proprietary interests. After all, the Supreme Court in Zacchini stated that while the right of privacy protects celebrities from unwanted intrusions, the primary purpose of the right of publicity is to allow celebrities to reap financial rewards. n222 Consequently, a rule that limits First Amendment rights so that celebrities do not have to be harassed while in public adds a privacy component to a right that was originally intended to protect proprietary and financial interests in one's name or image.

While the proposed legislation would expand the right of publicity in this manner, this fact should not affect its constitutionality. Although the primary purpose of the right of publicity is to protect the value of one's image, courts have also held that the right of publicity serves other purposes. n223 The Ninth Circuit, for example, held that remedies for violations of publicity rights are

not limited solely to economic damages; rather, because appropriation of one's image can cause "humiliation, embarrassment, and mental distress," deserving plaintiffs may recover for injury to peace, happiness and feelings under the right of publicity. n224 This same line of reasoning was used by the court in Abdul-Jabbar v. General Motors, when it held that a professional basketball star could recover not only for economic but also for emotional damages as a result of an advertisement which used his name without express permission. n225 Thus, although the primary purpose of publicity rights is to protect one's image, a valid secondary purpose of the law is to protect celebrities from [*202] the humiliation which accompanies unwanted publicity and undesirable associations. n226 For this reason, using the right of publicity to allow celebrities to live more peaceful lives is actually in harmony with previous judicial application of this right.

Secondly, even if the primary purpose for bringing publicity claims is to achieve the byproduct of the litigation, this does not alter the legal analysis regarding commercial exploitation of another's image. The relevant issue is whether celebrity images are being used for commercial exploitation, rather than for the dissemination of legitimate news. n227 If an analysis of relevant case law and current media practices supports a constitutional limitation upon First Amendment rights, this legislation is warranted, even if the practical effect of the rule is more desirable than its legal justification.

VII. Conclusion

Jude Law, who is known for his strong dislike of the paparazzi, recently stated "the constant attention and hounding by photographers, that's an actual sort of physical violation." n228 Law may very well be correct, but privacy law provides no remedy for his situation. Even if celebrities are not being physically violated, however, their images are often being wrongfully appropriated by those who publish paparazzi photography. Legislation which limits the publication of such photography would simultaneously prevent unjust enrichment and create a much needed buffer in which celebrities can more privately enjoy their lives. To survive a constitutional challenge, such legislation should track the language of those courts which hold that information serving only to satisfy mere curiosity is not newsworthy and that photographs that predominately exploit celebrity images receive no First Amendment protection. In addition, a narrowly tailored rule can be drawn which would prevent publication of non-newsworthy celebrity photographs while still allowing the media to report the latest celebrity romances, break-ups, and exploits. Such legislation should be seriously considered by states, namely California and New York, if they want to prevent the paparazzi from destroying the tranquilities of life and the ownership of one's image, both of which rightfully belong to celebrities.

**Legal Topics:**

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsGeneral OverviewTortsIntentional TortsInvasion of PrivacyAppropriationDefensesTortsIntentional TortsInvasion of PrivacyAppropriationRemedies

**FOOTNOTES:**

n1. CAL. CIV. CODE § 1708.8 (West Supp. 2007); see also Lisa Vance, Comment, Amending its Anti-Paparazzi Statute: California's Latest Baby Step in its Attempt to Curb the Aggressive Paparazzi, 29 Hastings Comm. & Ent. L.J. 99, 109 (2006).

n2. See CAL. CIV. CODE at § 1708.8.

n3. David M. Halbfinger & Alison Hope Weiner, As Paparazzi Push Harder, Stars Try to Push Back, N.Y. Times, June 9, 2005, at A1 (referring to a statement by Janice Min, editor of US Weekly, that there is a market for photos of stars in unguarded moments).

n4. THS Investigates: Paparazzi (E! television broadcast Feb. 10, 2007) This documentary included video clips of the paparazzi following celebrities as they tried to carry on with the normal routines of life. The celebrities followed included, among others, Bruce Willis, Katie Holmes, Woody Harrelson, and Jude Law.

n5. Vance, supra note 2, at 103 (quoting Peter Howe, Paparazzi 32 (2005)).

n6. Id.

n7. See Halbfinger & Weiner, supra note 3, at A1.

n8. Stephanie Dubois, Stars' Run-Ins with Paparazzi Show Lessons Unlearned, http://webcenters.netscape.compuserve.com/celebrity/becksmith.jsp?p=ce bsf 151 (last visited Mar. 7, 2007).

n9. See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 487 n.16 (1975); Carlisle v. Fawcett Publ'ns., Inc., 201 Cal. App. 2d 733, 745 (Ct. App. 5th D. 1962); Y.G and L.G. v. Jewish Hospital, 795 S.W.2d 488, 495 (Mo. Ct. App. 1990); Henry v. Cherry & Webb, 73 A. 97, 100 (R.I. 1909).

n10. See Jennifer R. Scharf, Shooting for the Stars: A Call for Federal Legislation to Protect Celebrities' Privacy Rights, 3 Buff. Intell. Prop. L.J. 164, 187 (2006).

n11. See id. at 186 (noting that many paparazzi photographs and stories appear on the Internet).

n12. See Alan Kato Ku, Comment, Talk is Cheap, but a Picture is Worth a Thousand Words: Privacy Rights in the Era of Camera Phone Technology, 45 Santa Clara L. Rev. 679, 697 (2005) (noting that the Internet has created a way for candid photographs to become instantaneously available).

n13. See THS Investigates, supra note 5. This documentary noted that many Internet bloggers have started posting paparazzi photographs to their websites, and it focused on the work of the most famous of these bloggers, Perez Hilton. For examples of this and other websites which publish candid celebrity photographs see infra notes 127, 130, 161-67, 198-202 and accompanying text.

n14. See Hot Pics, Us Weekly, Jan. 8, 2007, at 24-38; Star Tracks, People, Dec. 4, 2006, at 12-17.

n15. See Halbfinger & Weiner, supra note 3, at A1 (quoting Halle Berry as stating that the paparazzi did not used to be so "invasive" and noting that Cameron Diaz, Justin Timberlake, and Lindsey Lohan have joined forces to "turn the tables on the paparazzi"); Dubois, supra note 8 (quoting Jude Law complaining that the paparazzi are physically invading celebrities by constantly taking their pictures).

n16. See W. Mack Webner & Leigh Ann Lindquist, Transformation: The Bright Line Between Commercial Publicity Rights and The First Amendment, 37 Akron L. Rev. 171, 180 (2004) (noting that when it comes to freedom of the press and celebrity images, "First Amendment rights advocates are more focused, more vocal, and more zealously organized.").

n17. See Eugene Volokh, The First Amendment and Related Statutes: Problems, Cases, and Policy Arguments, 43 (2nd ed. 2005).

n18. See White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992).

n19. See Stephen R. Barnett, First Amendment Limits on the Right of Publicity, 30 Tort & Ins. L.J. 635, 643-45 (1995).

n20. See, e.g., Bosley v. WildWett.Com, 310 F. Supp. 2d 914, 922 (D.Ohio 2004).

n21. Dubois, supra note 8.

n22. Yahoo!Music, Duff Hates Paparazzi But Loves Celebrity Magazines, http://au.launch.yahoo.com/060420/10/o1sw.html (last visited Mar. 7, 2007); Celebrity Baby Blog, Britney Spears: The paparazzi has crossed the line, http://www.celebrity-babies.com/2006/06/in progress bri.html (last visited Mar. 7, 2007).

n23. See Scharf, supra note 10, at 165.

n24. See Dietemann v. Time, Inc., 449 F.2d 245, 248-29 (9th Cir. 1971).

n25. Id.

n26. See infra note 34.

n27. Dietemann, 418 U.S. 323, 345 (1974).

n28. See Time, Inc. v. Hill, 385 U.S. 374, 386 (1967); Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 409-10 (Ct. App. 1st D. 2001); Carlisle v. Fawcett Publ'g Co., 201 Cal. App. 2d 733, 747 (Ct. App. 5th D. 1962); Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 117 (Ct. App. 2d D. 1961); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 83 (W.Va. 1984); Beaumont v. Brown, 257 N.W.2d 522, 533 (Mich. 1977) (Coleman, J., dissenting).

n29. Carlisle, 201 Cal. App. 2d at 735-41.

n30. Id. at 747.

n31. Werner, 193 Cal. App. 2d at 117.

n32. Gionfriddo, 94 Cal. App. 4th at 409.

n33. Time, Inc., 385 U.S. at 386.

n34. See e.g., Gill v. Hearst Publ'g Co., 253 P.2d 441, 444 (Cal. Sup. Ct. 1953).

n35. Id.

n36. Id. at 442.

n37. Id. at 443.

n38. Id. at 444.

n39. Id.

n40. See Id.

n41. See Dubois, supra note 8 (noting that Mel Gibson, Alec Baldwin, Tommy Lee, and Will Smith have physically attacked the paparazzi); THS Investigates, supra note 4 (showing

Woody Harrelson and Jude Law lashing out against paparazzi photographers who would not stop photographing them).

n42. See Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996).

n43. See Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

n44. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992).

n45. Cardtoons, L.C., 95 F.3d at 968.

n46. See Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 414 (9th Cir. 1996).

n47. See Uhlaender, 316 F. Supp at 1282.

n48. 202 F.2d 866 (2d Cir. 1953).

n49. Id. at 868.

n50. 433 U.S. 562 (1977).

n51. Id. at 575.

n52. Id. at 576.

n53. See, e.g., Abdul-Jabbar, 85 F.3d 407 (9th Cir. 1996); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

n54. Abdul-Jabbar, 85 F.3d at 414.

n55. Id.; Midler, 849 F.2d at 460.

n56. Bosley v. Wildwett.com, 310 F.Supp.2d 914, 920 (N.D. Ohio 2004).

n57. Id.

n58. Comedy III Prod., Inc., v. Gary Sarderup, Inc., 21 P.3d 797, 811 (Cal. 2001).

n59. Presley v. Russen, 513 F. Supp. 1339, 1353 (D.N.J. 1981) (quoting W. Prosser, Law of Torts, 804 (4th ed. 1971)).

n60. Stephano v. News Group Publ'ns., Inc., 474 N.E.2d 580, 584 (N.Y. 1984).

n61. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996).

n62. Id.

n63. Zacchini v. Scripps-Howard, 433 U.S. at 573 (1977).

n64. Mark S. Lee, Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface, 23 Loy. L.A. Ent. L. Rev. 471, 479 (2003).

n65. Almeida v. Amazon.Com, Inc., 456 F.3d 1316, 1322 (11th Cir. 2006).

n66. Lee, supra note 64, at 479.

n67. Almeida, 456 F.3d at 1322 (quoting J. Thomas McCarthy, Melville B. Nimmer & the Rights of Publicity: A Tribute, 34 U.C.L.A. L. Rev. 1703, 1712 (1987)).

n68. Gordon, Right of Property in Name, Likeness, Personality and History, 55 Nw. U. L. Rev. 553, 554 (1960).

n69. 124 F.2d 167, 168-70 (5th Cir. 1942).

n70. Id. at 170.

n71. Gordon, supra note 68, at 555.

n72. Halbfinger & Weiner, supra note 4, at A1 (referring to a statement by Janice Min, editor of US Weekly, that there is a market for photos of stars in unguarded moments).

n73. ETW Corp. v. Jireh Publ'g., Inc., 332 F.3d 915, 931 (6th Cir. 2003).

n74. Id.

n75. Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 409-10 (Ct. App. 1st D. 2001) (quoting Gill v. Hearst Publ'g Co., 253 P.2d 441, 443 (Cal. 1953)).

n76. See id.

n77. Webner & Lindquist, supra note 16, at 181.

n78. See, e.g., Bosley v. Wildwett.com, 310 F.Supp.2d 914, 920 (N.D. Ohio 2004).

n79. See id.

n80. See generally Time, Inc. v. Hill, 385 U.S. 374 (1967); Sidis v. F-R Publ'g, 113 F.2d 806 (2nd Cir. 1940); Eastwood v. Super. Ct., 149 Cal. App. 3d 409 (Ct. App. 2nd Dist. 1984), superseded by statute, Cal. Civ. Code § 3344 (1997); Carlisle v. Fawcett Publ'ns, Inc., 201 Cal. App. 2d 733 (Ct. App. 5th Dist. 1962).

n81. Time, 385 U.S. 374, 378-79 (1967).

n82. Id. at 388 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

n83. Id. (quoting Bridges v. California, 314 U.S. 252, 269 (1941)).

n84. Id. at 388-89 (quoting 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.)) (statement of James Madison).

n85. Id.

n86. Id.

n87. See generally Sidis, 113 F.2d at 809; Eastwood, 149 Cal. App. 3d at 423; Carlisle, 201 Cal. App. 2d at 746-47; Berg v. Minneapolis Star & Tribune Co., 79 F.Supp. 957, 961 (D.Minn. 1948).

n88. Id.

n89. Sidis, 113 F.2d 806.

n90. Id. at 809.

n91. Eastwood, 149 Cal. App. 3d at 423; Carlisle, 201 Cal. App. 2d at 746-47.

n92. Berg, 79 F. Supp. at 961.

n93. Time, Inc. v. Hill, 385 U.S. at 388-89 (1967).

n94. Id. at 388-89; Sidis, 113 F.2d at 809; Eastwood, 149 Cal. App. 3d at 423; Carlisle, 201 Cal. App.2d at 746-47; Berg, 79 F.Supp. at 961.

n95. Eastwood, 149 Cal. App. 3d at 423; Carlisle, 201 Cal. App. 2d at 746-47; Berg, 79 F.Supp. at 961.

n96. Sidis, 113 F.2d at 809.

n97. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150 (1967).

n98. Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 216 (2nd Cir. 1978), rev'd on other grounds, 652 F.2d 278 (2nd Cir. 1981) (holding that a picture of Elvis Presley with the words "In Memoriam" underneath was not newsworthy); Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (holding that information which offends community standards of decency is not newsworthy).

n99. See generally Virgil, 527 F.2d at 1129.

n100. Id. at 1129.

n101. Galella v. Onassis, 353 F.Supp. 196, 216 (S.D.N.Y. 1972).

n102. Virgil, F.2d at 1129.

n103. Id.

n104. Id. at 1129 n.12.

n105. Id.

n106. See Miller v. California, 413 U.S. 15, 24 (1973) (holding that community standards of decency should be the standard in determining if a publication is obscene).

n107. Virgil, 527 F.2d at 1129.

n108. Id.

n109. Id. at 1128.

n110. Id. at 1131.

n111. Id.

n112. See THS Investigates, supra note 4 (noting that the paparazzi often set traps by having a photographer film another photographer while he purposefully provokes a celebrity to anger).

n113. See, e.g., Posting to progressiveu.org blog, Should the Paparazzi Be Regulated?, http://www.progressiveu.org/blog/mamacom25 (last visited Mar. 7, 2007); Stop Paparazzi and Tabloids!, http://ourworld.compuserve.co.uk/oconnorcarmel/myhomepage/fan.html (last visited Mar. 7, 2007).

n114. Scharf, supra note 10, at 165.

n115. See Personal Privacy Protection Act of 1998, H.R. 4425, 105th Cong. (2nd Sess. 1998); Mark Jurkowitz, Journalists Take Aim at Anti-Paparazzi Bill, Boston Globe, May 21, 1998. at D1 (noting that Senators Orrin Hatch and Diane Feinstein were teaming up to support anti-paparazzi legislation).

n116. Galella v. Onassis, 353 F.Supp. 196, 216 (S.D.N.Y. 1972); Bosley v. Wildwett.com, 310 F.Supp.2d 914, 920 (N.D. Ohio 2004); Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1132 (Ct. App. 3rd D. 2003).

n117. Galella, 353 F.Supp. at 216. Because this case is so important, a few things should be noted. First, the accused paparazzo did more than simply photograph Onassis and her children. He physically touched them at least once, and he also endangered them by following them too closely in his car. Id. at 207-09. The court found that his behavior was "extreme, intentional, and outrageous." Id. at 231. Nonetheless, a paparazzo does not need to go as far as the defendant in this case in order to lose First Amendment protection. The court's holding regarding mere curiosity applies to all photographers, even those who, unlike this man, do not have restraining orders placed upon them. See id. at 225. Finally, it should be noted that although this case has been overruled in part, none of its First Amendment analysis has been overturned. See Galella, 553 F.Supp 1076. In fact, Galella has recently been cited as the leading paparazzi case in American law. See Ann Loeb & Jonathon Stern, Paparazzi Exposed to Expanded Liability, 29 L.A. Law. 12, 14 (2006)).

n118. Galella, 353 F.Supp. at 224.

n119. Id. at 220.

n120. Id. at 224.

n121. Id. at 225.

n122. Id.

n123. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

n124. Galella, 353 F.Supp. at 225 (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 147 (1967)).

n125. Bosley v. Wildwett.com, 310 F.Supp.2d 914, 920 (N.D. Ohio 2004); Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1132 (Ct. App. 3d D. 2003).

n126. Bosley, 310 F.Supp.2d 914.

n127. Weinberg, 110 Cal. App. 4th at 1134.

n128. 62A Am. Jur. 2d Privacy § 186.

n129. Celebrities Eating Dot Com, http://www.celebrities-eating.com (last visited Mar. 7, 2007).

n130. Stars - They're Just Like US!, US Weekly, Feb. 7, 2007, http://www.usmagazine.com/february 5 2007 0 (showing a picture of Cate Blanchett shopping at a grocery store).

n131. Star Tracks, People, Jan. 15, 2007, at 10-11 (displaying photographs of celebrities at the beach).

n132. Harrison Ford's Meals on Wheels, In the Zone, Feb. 28, 2007, http://www.tmz.com/2007/02/28/harrison-fords-meal-on-wheels; Affleck in Cadillac Mac At-

tack, In the Zone, Feb. 28, 2007, http://www.tmz.com/2007/02/28/affleck-in-cadillac-mac-attack.

n133. Galella v. Onassis, 353 F.Supp. 196, 224 (S.D.N.Y. 1972).

n134. Barbara McDonald, Privacy, Princesses, and Paparazzi, 50 N.Y.L. Sch. L. Rev. 205, 220-22 (2006) (quoting Von Hannover, App. No. 59300/00, para. 61-67 (Eur. Ct. H.R. June 24, 2004)).

n135. Id.

n136. See generally Galella, 353 F.Supp. at 216; Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975).

n137. Galella, 353 F.Supp. at 225.

n138. Id.

n139. See, e.g., Galella, 353 F.Supp. at 216; Cason v. Baskin, 20 So.2d 243, 251 (Fla. 1944). In both of these cases the courts applied the mere curiosity test to determine if privacy violations had occurred.

n140. Time, Inc. v. Hill, 385 U.S. 374, 378-79 (1967).

n141. Id.

n142. See Comedy III Prod., Inc., v. Gary Sarderup, Inc., 21 P.3d 797, 805 (Cal. 2001) (holding that the right of publicity applies when someone appropriates a "celebrity's economic value" without permission).

n143. Id.

n144. Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762-63 (1976).

n145. See infra note 151.

n146. Estate of Presley v. Russen, 513 F.Supp. 1339, 1358 (D.N.J. 1981).

n147. See id.

n148. See id.

n149. Id. at 1348.

n150. Id. at 1361.

n151. Id. at 1358.

n152. Id. at 1359.

n153. Bosley v. Wildwett.com, 310 F.Supp.2d 914, 928 (N.D.Ohio 2004).

n154. Id. at 917.

n155. Id. at 928.

n156. Grant v. Esquire, Inc., 367 F.Supp. 876, 881 (D.N.Y. 1973).

n157. Id.

n158. Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).

n159. Id. at 371.

n160. Id. at 374.

n161. See supra Part IV.B.2.

n162. Posts from the Paparazzi Photo Category, http://www.tmz.com/category/paparazzi-photo (last visited Mar. 7, 2007).

n163. Matthew Broderick's Day Off, In the Zone, February 27, 2007, http://www.tmz.com/2007/02/27/matthew-brodericks-day-off (last visited Mar. 7, 2007); Affleck Walks Off Set, In the Zone, Feb. 27, 2007, http://www.tmz.com/2007/02/27/affleck-walks-off-set (last visited Mar. 7, 2007).

n164. Matthew Broderick's Day Off, http://www.tmz.com/2007/02/27/matthew-brodericks-day-off (last visited Mar. 7, 2007).

n165. Affleck Walks Off Set, http://www.tmz.com/2007/02/27/affleck-walks-off-set (last visited Mar. 7, 2007).

n166. See, e.g., Star Pulse, www.starpulse.com/Celebrity/photo galleries.html.

n167. See www.justjared.com.

n168. Alyssa Milano is the Perfect Pearl, http://justjared.buzznet.com/2007/03/01/alyssa-milano-airport (last visited Mar. 7, 2007).

n169. Id.

n170. Stars-They're Just Like US!, US Weekly, Feb. 7, 2007, at 30-31.

n171. Id.

n172. See, e.g., Alyssa Milano, supra note 168.

n173. Posts from the Paparazzi Photo Category, http://www.tmz.com/category/paparazzi-photo (last visited Mar. 7, 2007).

n174. Viggo Mortensen Pictures, http://electronicbookshere.com/entertainment column/2005 Columns/November 2005.html (last visited Mar. 7, 2007).

n175. Id.

n176. Id.

n177. Id.

n178. Viggo Mortensen, http://www.electronicbookshere.com/Viggo Mortensen/Viggo Mortensen.html (last visited Mar. 7, 2007).

n179. Id.

n180. Grant v. Esquire, Inc., 367 F.Supp. 876, 881 (D.N.Y. 1973); Doe v. TCI Cablevision, 110 S.W.3d 363, 366, 374 (Mo. 2003).

n181. Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 408 (2001).

n182. Id. at 409-10.

n183. Id. at 400.

n184. Id. at 404.

n185. See Webner & Lindquist, supra note 16, at 184-85, 199-200.

n186. Comedy III Prods., Inc., 25 Cal. 4th at 393.

n187. Id. at 394

n188. Id. at 405.

n189. Id. at 407, 409.

n190. See ETW Corp. v. Jireh Publ'g, 332 F.3d 915 (6th Cir 2003); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001).

n191. Hoffman, 255 F.3d at 1180.

n192. Id. at 1185.

n193. ETW, 332 F.3d at 915.

n194. Id. at 918.

n195. Id. at 938.

n196. Cardtoons v. Major League Baseball Players Ass'n, 95 F.3d 959, 976 (10th Cir. 1996).

n197. See http://perezhilton.com.

n198. See, e.g., infra notes 200-201.

n199. Perez Hilton, She's Losing It, http://perezhilton.com/?p=8066 (last visited Nov. 9, 2007).

n200. Perez Hilton, Quote of the Day, http://perezhilton.com/topics/evangeline lily/quote of the day 20070304.php (last visited Mar. 7, 2007).

n201. Id.

n202. See infra note 221.

n203. Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 407-08 (2001) (quoting L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976)).

n204. Estate of Presley v. Russen, 513 F.Supp. 1339, 1358 (D.N.J. 1981).

n205. See supra Part V.A.2.

n206. Estate of Presley v. Russen, 513 F.Supp. 1339, 1358 (D.N.J. 1981).

n207. Goetlet v. Confidential, Inc., 5 A.D.2d 226, 228 (N.Y. App. Div. 1958).

n208. Time, Inc., v. Hill 385 U.S. 374, 388 (1967) (quoting Winters v. People of State of New York, 333 U.S. 507, 510 (1948)).

n209. Id.

n210. 408 U.S. 104, 109 (1972) (quoting Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961) and Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958) (internal quotation marks omitted)).

n211. Id. at 108.

n212. See supra Part V.A.1.

n213. 113 F.2d 806, 809 (2nd Cir. 1940).

n214. See supra Part V.A.1.

n215. See Eastwood v. Super. Ct., 149 Cal. App. 3d 409, 423 (Ct. App. 2d D. 1984), superseded by statute, Cal. Civ. Code § 3344, as recognized in KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 367 (Ct. App. 2d D. 2000); Carlisle v. Fawcett Publ'ns, Inc. 201 Cal. App. 2d. 733, 746-47 (Ct. App. 5th D. 1962); Minneapolis Star & Tribune Co., 79 F. Supp. 957, 961 (D. Minn. 1948).

n216. THS Investigates, supra note 4.

n217. US Weekly, Jan. 8, 2007 at 2-4, 32-33, 56-63, 64-66, 66-67, 72-73.

n218. Id. at 22, 33, 34.

n219. Grant v. Esquire, Inc., 367 F.Supp. 876, 883 (S.D.N.Y. 1973).

n220. See THS Investigates, supra note 4.

n221. Comedy III Prods., Inc. v. Saderup, Inc., 25 Cal. 4th 387, 397 (2001); Cher v. Forum International, Ltd., 692 F.2d 634, 638 (9th Cir. 1982) (quoting Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 873 (1979) (Bird, J. concurring)).

n222. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977).

n223. See Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 416 (9th Cir. 1996); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1103 (9th Cir. 1992).

n224. Waits, 978 F.2d at 1103.

n225. Abdul-Jabbar, 85 F.3d at 416.

n226. See id.

n227. See Comedy III Prod., Inc., v. Gary Sarderup, Inc., 21 P.3d 797, 805 (Cal. 2001).

n228. Dubois, supra note 8.