

Spring 2002

## Stop the Presses! First Amendment Limitations of Professional Athletes' Publicity Rights

Erika T. Olander

Follow this and additional works at: <https://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

---

### Repository Citation

Erika T. Olander, *Stop the Presses! First Amendment Limitations of Professional Athletes' Publicity Rights*, 12 Marq. Sports L. Rev. 885 (2002)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol12/iss2/10>

This Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

# STOP THE PRESSES! FIRST AMENDMENT LIMITATIONS OF PROFESSIONAL ATHLETES' PUBLICITY RIGHTS

## INTRODUCTION

Every article, whether for a legal journal or a popular magazine, needs an attention getting illustration. However, when the article's subject deals with professional athletes, the author must choose the illustration carefully. One wrong word could infringe upon the athletes' rights.

This article explores the professional athlete's right of publicity as limited by the media's First Amendment rights of freedom of speech, press, and information. "The right of publicity is a relatively new legal concept"<sup>1</sup> and arguably a rapidly growing area of legal theory as celebrities, including professional athletes, strive to protect what may be their most valuable asset: themselves.<sup>2</sup>

This article will begin with a general discussion of the right of publicity. This section will define the right of publicity and detail its origins and development as a legal theory in general. The next section of this article will focus on the application of these publicity rights to professional athletes (exclusive of applications to amateur athletes), to amateur and professional athletic teams or franchises, and to leagues, conferences and governing bodies. In the next section the specific limitations imposed by the First Amendment on publicity rights will be addressed.

Finally, this article will examine the current state of professional athletes' publicity rights as limited by the First Amendment. I will argue that current case law fails to delineate a clear standard for First Amendment protection of the communication of events and performances related to professional athletes—in other words, the use of a professional athlete's likeness. This in turn fails to clearly establish when professional athletes may claim a right to

---

1. ALEXANDER LINDEY, LINDEY ON ENTERTAINMENT PUBLISHING AND THE ARTS: AGREEMENTS AND THE LAW § 12.01(1) (2d ed. Supp. 2000).

2. Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 24 (1999) (citing Marcia Chambers, *Lawsuit Pits Artists' Rights vs. Athletes*, N.Y. TIMES, Feb. 16, 1999, at 1D).

profit from their likenesses and abilities or achievements. I will also argue that the current case law distinctions of protected speech based upon classification of the "style" of the use of the likeness is inadequate. The distinction of protected speech should be based upon the classification of the medium in which the likeness appears.

## I. THE RIGHT OF PUBLICITY—GENERALLY

Simply stated, the right of publicity "is the inherent right of every human being to control the commercial use of his or her identity."<sup>3</sup> As such, "[t]he right of publicity is not merely a legal right of the 'celebrity,' but is a right inherent to *everyone* to control the commercial use of [his] identity and persona and recover in court damages and the commercial value of an unpermitted taking."<sup>4</sup>

The right of publicity initially emerged and developed within the law of privacy.<sup>5</sup> The origins of the right of privacy stem from an 1890 law review article by Louis Brandeis and Charles Warren.<sup>6</sup> Warren and Brandeis envisioned a common law right of privacy as "preventing truthful but intrusive and embarrassing disclosures by the press"—essentially, the right to be left alone.<sup>7</sup>

Later, and in this context, commentator William Prosser conceived his theory of the "four torts of privacy," which stated that "'privacy' was not a unified concept, but consisted of a cluster of four quite distinct torts."<sup>8</sup> Essentially, the right of privacy developed into a personal right including the right to be let alone and the right "to live quietly, to be free from unwarranted intrusion, [and] to protect [one's] name and personality from commercialization."<sup>9</sup>

Specifically, Prosser's four torts of privacy consisted of: 1) "invasion of privacy by intrusion[-] . . . 'privacy' is invaded by physical intrusion upon the plaintiff's seclusion or solitude, or into his private affairs[;]"<sup>10</sup> 2) "public

---

3. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed., rev. vol. 2001).

4. *Id.* (emphasis added).

5. *Id.* § 1:7.

6. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 28:3 (4th ed., rev. 2000) (citing Charles Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

7. *Id.*

8. MCCARTHY, *supra* note 3, § 1:19.

9. LINDEY, *supra* note 1, § 12.01(1).

10. MCCARTHY, *supra* note 3, § 1:20.

disclosure of private facts[-] . . . the public disclosure of embarrassing private facts about the plaintiff[;]"<sup>11</sup> 3) "false light privacy[-] . . . to present plaintiff to the public in a 'false light[;]'"<sup>12</sup> and finally, 4) "invasion of privacy by appropriation[-] [the] unpermitted use, usually for commercial purposes, of . . . identity, with damage to . . . dignitary interests and peace of mind."<sup>13</sup> The fourth prong represents the foundation for the right of publicity.<sup>14</sup>

In this context the original right of publicity cases were brought as cases of invasion of the right of privacy based upon "the indignity and personal affront of having one's name or face widely used to sell a product without permission."<sup>15</sup> This was different from the traditional right of privacy cases in which an individual claims a right to be let alone. Based on this distinction, courts often found it difficult to reconcile a celebrity's claim for redress for unauthorized use of his picture in advertising when he himself had "sought [out] such attention and profited from it."<sup>16</sup>

For instance, an early right of publicity case was presented as an invasion of an athlete's right of privacy by appropriation.<sup>17</sup> A claim was made by football player David O'Brien that Pabst Brewery's use of his picture in a calendar associated with Pabst beer caused him mental distress by means of embarrassment and humiliation.<sup>18</sup> O'Brien was a celebrated college and professional football player and a member of the Allied Youth of America, whose major goal was to rid young people of alcohol.<sup>19</sup> As such, O'Brien claimed he was embarrassed and humiliated by the allegedly false impression conveyed by the calendar that he used and endorsed the use of beer.<sup>20</sup> Not only did the court find no such false impression in the calendar images, but also it had difficulty finding O'Brien had even suffered an invasion of privacy, since "the publicity he got was only that which he had been constantly seeking and receiving."<sup>21</sup>

Since the law of privacy was proving to be an inadequate basis upon which to regulate the appropriation of one's identity, courts began to analyze

---

11. *Id.* § 1:21.

12. *Id.* § 1:22.

13. *Id.* § 1:23.

14. *Id.*

15. MCCARTHY, *supra* note 6, § 28:3.

16. Stapleton & McMurphy, *supra* note 2, at 27 (citing PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 422 (2d ed. 1998)).

17. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942).

18. *Id.* at 168-69.

19. *Id.*

20. *Id.* at 169-70.

21. *Id.* at 170.

publicity rights in the context of property rights.<sup>22</sup> For instance, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>23</sup> addressed the consequences of the different analyses of one's right of privacy in one's publicity value and of one's "property" right in that publicity value.<sup>24</sup> Also, *Haelan* presented the first judicial recognition of an independent right of publicity.<sup>25</sup> Here, *Haelan* claimed to have exclusive contracts with leading baseball players for the use of their photographs in production of *Haelan's* baseball trading cards and that *Topps* tortiously interfered with those contracts.<sup>26</sup>

The court found New York's statutory right of privacy was a personal right and thus limited the ballplayers' contracts to mere releases of liability and did not vest property or other legal interests in the plaintiff.<sup>27</sup> The court went on to find:

[I]n addition to and independent of that [personal and non-assignable] right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture. . . .

This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant that barred any other advertiser from using their pictures.<sup>28</sup>

With this decision commentator Melville Nimmer observed that:

what the celebrity want[s] [is] not protection against unreasonable intrusion into privacy, but a right to control the commercial value of identity: . . . [His] concern is rather with publicity, . . . [he does not] wish to have his name, photograph, and likeness reproduced and publicized without his consent or without remuneration to him."<sup>29</sup>

---

22. Stapleton & McMurphy, *supra* note 2, at 26.

23. 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

24. *Id.* at 868.

25. *Id.*

26. *Id.* at 867.

27. *Id.*

28. *Haelan Labs.*, 202 F.2d at 868.

29. MCCARTHY, *supra* note 6, § 28:4 (citing Melville B. Nimmer, *The Right of Publicity*, 19

Nimmer acutely articulated the difficulty in co-mingling privacy and publicity rights: They differ significantly since privacy rights assure the right to be let alone whereas publicity rights assure the right to profit from one's self. Therefore, with Judge Frank's *Haelan* decision<sup>30</sup> as a basis, "Nimmer designed and built the foundation of a new intellectual property right—the right of publicity."<sup>31</sup> Therefore, by 1953 when *Haelan* was decided,<sup>32</sup> the common law recognized that celebrities had a right to profit from the use of their likeness, distinct from their right to be let alone.<sup>33</sup>

Since its "official" judicial recognition in 1953, "the right of publicity [now] exists in some form [in a majority of states.]"<sup>34</sup> While in many states publicity rights remain a creature of the common law, some states have enacted specific right of publicity statutes.<sup>35</sup> Despite these explicit state recognitions of the right of publicity, no parallel federal legislation exists.

However, the right of publicity has secured distinct treatment in the *Restatement (Third) of Unfair Competition*.<sup>36</sup> The *Restatement* uniformly applies the right of publicity in the context of "appropriation of the commercial value of a person's identity. . . . One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate."<sup>37</sup> Essentially, the *Restatement* allows a person to be compensated when another person or entity profits from that use.<sup>38</sup>

With this general definition of the right of publicity from the *Restatement*, a *prima facie* case for infringement of the right of publicity can be made by pleading and proving the basic elements of validity and infringement of the right:

1. *Validity*. Plaintiff owns an enforceable right in the identity or persona of a human being.

---

LAW & CONTEMP. PROBS. 203, 203-04 (1954)).

30. *Haelan Labs.*, 202 F.2d at 866.

31. MCCARTHY, *supra* note 6, § 28:4 (citing J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1712 (1987)).

32. *Haelan Labs.*, 202 F.2d at 866.

33. Stapleton & McMurphy, *supra* note 2, at 26.

34. *Id.* at 32.

35. *Id.* (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY & PRIVACY, § 6.1[B] at 6-6 to 6-8, § 6.3[A] at 6-13 to 6-15 (Rev. 1999)).

36. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995).

37. *Id.* § 46.

38. *Id.* § 49.

## 2. *Infringement.*

A. Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use.

B. Defendant's use is likely to cause damage to the commercial value of that persona.<sup>39</sup>

Commentator J. Thomas McCarthy theorizes that the issue of validity will rarely be *the* critical issue, so long as the right of a human being is asserted and not the right of a "corporation, partnership, institution or animal."<sup>40</sup> Since "person" is unqualified, every human being maintains a right to profit from his own person; thus, when one claims a violation of his right of publicity it will rarely be contested that he does not in fact have a right to be compensated for a use of his likeness. By default, then, the second element, infringement, will usually be the critical issue in determining an infringement of the right of publicity.

The test for infringement is "identifiability [of the persona] . . . and not confusion as to endorsement."<sup>41</sup> Therefore, the only thing necessary for infringement to occur is that the likeness is identifiable as the person; infringement does not require that the use imply that the person whose likeness is used endorses a product or service. The broad term "persona" encompasses not only the traditional name or physical likeness, but has expanded to include other attributes.<sup>42</sup> For example, courts have recognized claims for infringement of celebrities' publicity rights based upon the identifiability of persona by: look-alike,<sup>43</sup> distinctive voice or sound-alike,<sup>44</sup> "[p]hrase [a]ssociated with [c]elebrity,"<sup>45</sup> and "[c]haracter [p]ortrayed by [c]elebrity,"<sup>46</sup> amongst others which will be discussed in detail in the following

---

39. MCCARTHY, *supra* note 3, §§ 3:2-3:3 (citations omitted).

40. *Id.* § 3:3 (citations omitted) (emphasis added).

41. Stapleton & McMurphy, *supra* note 2, at 35-36.

42. MCCARTHY, *supra* note 3, § 4:45.

43. Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 KAN. L. REV. 329, 362-66 (1997) (citing as examples Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254 (1984), *aff'd*, 110 A.D.2d 1095 (N.Y. App. Div. 1985); Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985)).

44. *Id.* at 366-84 (citing Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962); Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993)).

45. *Id.* at 388-90 (citing Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983)).

46. *Id.* at 391-99 (citing McFarland v. Miller, 14 F.3d 912 (3d Cir. 1994)).

sections.

Thus, with its origins in common law privacy rights, the right of publicity has developed into a common law property right in the persona of a human being. A variety of characteristics can identify a persona and implicate an infringement of publicity rights.

## II. PUBLICITY RIGHTS OF PROFESSIONAL ATHLETES

This section will explore the specific scope of professional athletes' rights of publicity. This effectively excludes from consideration the publicity rights of amateur athletes as well as those of amateur and professional athletic teams or franchises, leagues, conferences and governing bodies. Overall, the development of professional athletes' publicity rights mirror those of the right of publicity in general; the focus of case law is on questions of which characteristics are protected as "persona" because they identify the athlete.<sup>47</sup>

In the analysis of identifiability, courts have found the protection of one's name to include protection of one's nickname.<sup>48</sup> *Hirsch v. S.C. Johnson & Son, Inc.*<sup>49</sup> is the leading case recognizing a publicity right protection of a professional athlete's nickname. While playing football for the University of Wisconsin-Madison, Elroy Hirsch earned the nickname "Crazylegs" for his unique running style.<sup>50</sup> The nickname stuck and Hirsch was known as "Crazylegs" throughout his career as a professional athlete and as a coach.<sup>51</sup> During his career, not only was Hirsch known as "Crazylegs," but he also made "a number of advertisements, in all of which he was identified as 'Crazylegs.'"<sup>52</sup> The court first recognized a cause of action for appropriation of a person's name within the Wisconsin law of privacy, noting:

The celebrity creates audience appeal not only through the substantive achievements that bring him fame, but at the expense of the privacy that he must surrender in becoming a public personality. It would be ironic for a court to refuse to protect a celebrity's economic interest on the grounds that he had surrendered any interest in privacy.<sup>53</sup>

The court went on to recognize that "athletes have a property right in their

---

47. See generally Stapleton & McMurphy, *supra* note 2.

48. *Id.* at 38.

49. 90 Wis. 2d 379 (1979).

50. *Id.* at 384.

51. *Id.* at 384-86.

52. *Id.* at 385.

53. *Id.* at 391 (quoting James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 646-47 (1973)).



identities.”<sup>54</sup> Ultimately, the court concluded:

The fact that the name, “Crazylegs,” used by Johnson, was a nickname rather than Hirsch’s actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person. . . . [And,] it is not disputed . . . that the nickname identified the plaintiff Hirsch.<sup>55</sup>

Thus, courts adopting the *Hirsch* decision have protected nicknames under the right of publicity as encompassed within the concept of persona.

Next, courts recognized professional athletes’ publicity rights as assignable property rights in *Topps Chewing Gum, Inc. v. Major League Baseball Players Ass’n*.<sup>56</sup> Here, the court addressed the assignability of publicity rights when Topps filed an antitrust suit against the Major League Baseball Players Association (MLBPA), claiming the MLBPA illegally restrained the market for the publicity rights of Major League baseball players by acquiring and collectively managing the group publicity rights of the players.<sup>57</sup> Though in this particular decision the court did not specifically address the assignability of the players’ publicity rights, the court apparently acquiesced to such assignability by means of the MLBPA’s execution of its Commercial Authorization Agreements, because the court did not discuss the agreements or their validity and moved directly to the antitrust analysis.<sup>58</sup> Therefore, professional athletes can assign their publicity rights to licensees for a specified use.

Finally, in *Newcombe v. Adolf Coors Co.*,<sup>59</sup> a court recently considered a claim for infringement of publicity rights by appropriation of a former professional baseball player’s likeness in a beer advertisement. Donald Newcombe, a former Major League Baseball All-Star, began playing in the Negro leagues and moved to the majors, where he played from 1949 to 1960.<sup>60</sup> In the majors he was a celebrated athlete who achieved many honors.<sup>61</sup> Unfortunately, Newcombe struggled with alcohol problems and considered himself a recovering alcoholic at the time of litigation.<sup>62</sup>

---

54. *Hirsch*, 90 Wis. 2d at 397 (citing Judith Endejan, Comment, *The Tort of Misappropriation of Name or Likeness Under Wisconsin’s New Privacy Law*, 1978 WIS. L. REV. 1029, 1046).

55. *Id.*

56. 641 F. Supp. 1179 (S.D.N.Y. 1986).

57. *Id.* at 1181-90.

58. *Id.* at 1181-92.

59. 157 F.3d 686 (9th Cir. 1998).

60. *Id.* at 689.

61. *Id.*

62. *Id.*

Newcombe complained that an advertisement for Killian's Irish Red Beer, a brand owned by Adolf Coors Co., featured a drawing of an "old-time baseball game,"<sup>63</sup> including a pitcher who was recognizable as Newcombe.<sup>64</sup> While Coors denied that the advertisement used a likeness of Newcombe, it did admit "that the drawing . . . was based on a newspaper photograph of Newcombe pitching in the 1949 World Series."<sup>65</sup> Newcombe claimed "the defendants violated his [common law] right of privacy and . . . his statutory rights under Cal. Civ. Code § 3344" by using "his likeness and identity to their commercial advantage."<sup>66</sup>

In their analysis, the court reaffirmed the common law cause of action test articulated in *Eastwood v. Superior Court of Los Angeles County*:<sup>67</sup>

To sustain a common law cause of action for commercial misappropriation, a plaintiff must prove: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."<sup>68</sup>

In addition, the court found:

Cal. Civ. Code § 3344 provides in relevant part, "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising . . . without such person's prior consent . . . shall be liable for any damages sustained by the person."<sup>69</sup>

Thus, the court found the identifiability of the likeness was the main issue to be decided.<sup>70</sup> In analyzing "readily identifiable," the court relied on the definition in section 3344(b), which specifies that one is "readily identifiable from a photograph 'when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the

---

63. *Id.*

64. *Newcombe*, 157 F.3d at 689.

65. *Id.* at 690.

66. *Id.* at 691.

67. 198 Cal. Rptr. 342 (1983). In *Eastwood*, actor Clint Eastwood sought to overturn a verdict of a lower court which sustained the demurrer of a tabloid newspaper on the basis that Eastwood failed to state a cause of action for invasion of privacy through section 3344 of the California Civil Code and California common law. This reviewing court found Eastwood had satisfied the elements necessary to state a claim, as well as that the section 3344 exemption for incidental advertising of media outlets themselves did not apply when the media outlet knowingly presented reckless falsehoods in the advertising. See generally *id.*

68. *Newcombe*, 157 F.3d at 692 (citing *Eastwood*, 198 Cal. Rptr. at 346.).

69. *Id.* (citing CAL. CIV. CODE § 3344(a)).

70. *Id.*

same person who is complaining of its unauthorized use.”<sup>71</sup>

The court went on to find this definition appropriate for likenesses, as well as for photographs.<sup>72</sup> The court also found that it would not be unreasonable for a jury to find the drawing constituted a readily identifiable likeness of Newcombe<sup>73</sup> and that “a direct connection [existed] between [him,] as the central feature of the advertisement, and the commercial sponsorship of Killian’s Red.”<sup>74</sup> Thus, courts adopting the *Newcombe* decision have protected non-photographic physical likenesses of professional athletes, in addition to protecting their right to profit from uses of their photographs.

In this manner the development of the professional athlete’s right of publicity has mirrored the general development of publicity rights and has focused on identifiability of persona.

### III. MEDIA’S FIRST AMENDMENT LIMITATIONS ON PUBLICITY RIGHTS

In the context of the development of publicity rights, the First Amendment has emerged as a limitation to the claim of a right of publicity in every usage of persona.<sup>75</sup> It is important to first have a general understanding of the theory of the First Amendment. Then, more specific applications can be explored.

#### A. First Amendment Theory

In the 1927 case *Whitney v. California*,<sup>76</sup> Justice Brandeis listed three purposes of the First Amendment: “(1) ‘Enlightenment’—which encompasses both political, social and scientific ‘news’ as well as ‘entertainment’; (2) ‘Self-fulfillment’—the need for human self-expression in all forms; and (3) ‘The Safety Valve’—the societal need for free expression as an alternative for or sublimation of social or political violence.”<sup>77</sup> One commentator has explained the “enlightenment function” advocates access to information in order to make informed opinions and choices;<sup>78</sup> the “self-fulfillment function” conceives of self-expression as a “goal of the First Amendment;”<sup>79</sup> and, finally, the “safety-

---

71. *Id.* (citing CAL. CIV. CODE § 3344(b)(1)).

72. *Id.*

73. *Newcombe*, 157 F.3d at 693-94.

74. *Id.* at 694.

75. Stapleton & McMurphy, *supra* note 2, at 44.

76. 274 U.S. 357 (1927).

77. MCCARTHY, *supra* note 3, § 8.2.

78. *Id.* § 8.3.

79. *Id.* § 8.7.

valve function" advocates free speech to air alleged grievances and disputes.<sup>80</sup>

In addition to the different rationales of the First Amendment, McCarthy observes, "[t]here is no 'equal protection' for all 'speech' within the First Amendment. All 'speech' is not equal. [And] [a]s Nimmer observed, the degree of protection given to 'speech' will turn upon the type of speech and its content."<sup>81</sup> In this context, observers Felcher and Rubin conceive of the classification of media uses of human identity along a three segment spectrum: "(1) 'news'—information about the real world; (2) 'stories'—fictionalized information primarily designed to entertain; and (3) 'advertising'—uses which clearly have the message 'buy me.'"<sup>82</sup> Accordingly, First Amendment protection decreases along the spectrum.<sup>83</sup> By these observations, commentators have traditionally allowed varying degrees of First Amendment protection to speech based upon the classification of the style of speech.

### *B. Application of First Amendment Theory*

One commentator has explained, generally,

with a balancing between the property right of the right of publicity and the policy of free speech, a given unauthorized use of a person's identity will fall within one of two categories: the challenged use is either "communicative" or "commercial." A "communicative" use is one in which the policy of free speech predominates over the right of a person to his identity, and no infringement of the right of publicity takes place. A "commercial" use is one in which the right of publicity is infringed because while there are overtones of ideas being communicated, the use is primarily commercial.<sup>84</sup>

In addition to this general theory, pertinent statutory treatment of the right of publicity has attempted to draw similar distinctions in the type of speech in which one's persona is used.

First, due to California's extensive entertainment industry, that state has developed such right of publicity legislation and, therefore, California Civil Code Section 3344 provides a good example of such statutory language. California Civil Code Section 3344 provides liability for "[a]ny person who

---

80. *Id.* § 8.8.

81. *Id.* § 8.13 (citing 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2.07 (3d ed., rev. vol. 2001)).

82. MCCARTHY, *supra* note 3, § 8.13 (citing Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1597 (1979)).

83. *Id.*

84. MCCARTHY, *supra* note 6, § 28:41 (citations omitted).

knowingly uses another's name, voice, signature, photograph, or likeness, in any manner on or in products, merchandise, or goods, or *for purposes of advertising or selling, or soliciting* purchase of, products, merchandise, goods or services, without such person's prior consent."<sup>85</sup> The Code goes on to clarify that "a use of a name, voice, signature, photograph, or likeness *in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use* for which consent is required under . . . (a)."<sup>86</sup> The Code also provides that a prohibited use does not occur "solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether . . . [the] likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use [requiring] consent."<sup>87</sup> Basically, California Civil Code Section 3344 protects a person's right of publicity in any use of his identity which facilitates profit by another. Section 3344 exempts, however, advertisements by news media of themselves from publicity right infringement claims.

In a similar fashion, the *Restatement* declares: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity *for purposes of trade* is subject to liability for the relief appropriate."<sup>88</sup> The *Restatement* goes on to clarify "for purposes of trade" as a use

in advertising the user's goods or services, or [a use] on merchandise marketed by the user, or . . . in connection with services rendered by the user. *However, . . . "for purposes of trade" does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.*<sup>89</sup>

Essentially, in theory, "for purposes of trade" means the First Amendment will not preempt publicity rights in infringement cases of use of persona in advertising, but, the "First Amendment *will* preempt publicity rights when persona is used in the context of news reporting, commentary, entertainment or works of fiction and nonfiction."<sup>90</sup> Courts have attempted to distinguish cases along these theoretical approaches by balancing the property interest of

---

85. CAL. CIV. CODE § 3344(a) (West 1997) (emphasis added).

86. § 3344(d) (emphasis added).

87. § 3344(e).

88. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (emphasis added).

89. *Id.* § 47 (emphasis added).

90. MCCARTHY, *supra* note 6, § 28:6.

publicity rights against the interests of the First Amendment.<sup>91</sup>

A case that clearly illustrates a court's attempt to distinguish between "communicative" and "commercial" speech is *Abdul-Jabbar v. General Motors Corp.*,<sup>92</sup> the case brought by basketball star Kareem Abdul-Jabbar. General Motors Corporation (GMC) ran a "television commercial aired during the 1993 NCAA men's basketball tournament."<sup>93</sup> The ad featured a trivia question which asked, "'Who holds the record for being voted the most outstanding player of this tournament?' [and was answered by] the printed words 'Lew Alcindor, UCLA, '67, '68, '69.'"<sup>94</sup> Nothing in the advertisement was untrue.<sup>95</sup> Kareem Abdul-Jabbar's birth-name was Ferdinand Lewis ("Lew") Alcindor and during his college career he was known as Lew Alcindor; however, he later legally changed his name to Kareem Abdul-Jabbar and was known as such.<sup>96</sup> In assessing the unauthorized use of Abdul-Jabbar's name, the court rejected GMC's defense of a First Amendment privilege in Abdul-Jabbar's athletic statistics as "communicative" speech, or as "newsworthy," because, "[w]hile Lew Alcindor's basketball record may be said to be 'newsworthy,' its use is not automatically privileged. GMC used the information in the context of an automobile advertisement, not in a news or sports account."<sup>97</sup> The inference then to be drawn is that blatant or "traditional" advertising reclassifies otherwise "communicative" speech within the realm of "commercial" speech and thus loses its First Amendment protection.

Similarly, in *Pooley v. National Hole-In-One Ass'n*,<sup>98</sup> though a golfer's achievement of a hole-in-one shot worth one million dollars at a charity golf event was originally newsworthy, that achievement's "subsequent unauthorized reproduction was not automatically privileged simply because . . . [it] continued to be a 'newsworthy' event."<sup>99</sup> Here the court found a promotional video tape which included the golfer's name and video footage of his winning hole-in-one implied a false connection between the golfer and the business since "[t]he use of the Plaintiff's name and videotape footage was *crucial* to Defendant's commercial purpose of selling its

---

91. *Id.* § 28:41.

92. 85 F.3d 407 (9th Cir. 1996).

93. *Id.* at 409.

94. *Id.*

95. *Id.*

96. *Id.* at 409-10.

97. *Abdul-Jabbar*, 85 F.3d at 416.

98. 89 F. Supp. 2d 1108 (D. Ariz. 2000).

99. *Id.* at 1114.

fundraiser.”<sup>100</sup> Again, the “newsworthiness” of unauthorized uses of a likeness is context-specific—when no longer presented in a context of reporting of newsworthy events, the use no longer enjoys a First Amendment privilege.

Similarly, in *Cardtoons, L.L.C. v. Major League Baseball Players Ass’n*, the court attempted to distinguish between “communicative” and “commercial” speech in the context of parody, a stylistic speech.<sup>101</sup> *Cardtoons* produced parody baseball cards featuring Major League baseball players along with commentary on the institution of baseball and baseball trading cards.<sup>102</sup> While the Major League Baseball Players Association (MLBPA) argued an infringement of the publicity rights licensed to it by its members and protected by the specific Oklahoma publicity rights statute,<sup>103</sup> *Cardtoons* defended the cards on grounds of First Amendment freedom of speech.<sup>104</sup>

In its examination of the state statute, the court found two First Amendment exceptions to the right of publicity: “The first, a ‘news’ exception, exempts use of . . . identity in connection with any news, public affairs, or sports broadcast or account, or any political campaign. . . . The second exception . . . exempts use in a commercial medium that is not directly connected with commercial sponsorship or paid advertising.”<sup>105</sup>

However, the court decided that the trading cards were “not commercial speech—they do not merely advertise another unrelated product.”<sup>106</sup> Instead, the cards are a “commentary on these public figures and the major commercial enterprise in which they work . . . [and] [t]he protections afforded by the First Amendment . . . have never been limited to newspapers and books.”<sup>107</sup> Thus, the cards were parody, which deserved First Amendment protection since they “convey[ed] information about their subject and therefore constitute an important means of expression.”<sup>108</sup> Presumably this parody expression, which conveys information, is to be protected by the First Amendment since it entertains while it conveys an opinion, arguably in order to assist the public at large to form its own opinions in light of this information. By this view of the parody cards, they should be protected by the First Amendment as speech that

---

100. *Id.* at 1113.

101. 95 F.3d 959 (10th Cir. 1996).

102. *Id.* at 959-63.

103. OKLA. STAT. tit. 12, § 1449 (1986).

104. *Cardtoons, L.L.C.*, 95 F.3d at 963-64.

105. *Id.* at 968 (citing OKLA. STAT. tit. 12, §§ 1449(D), (F)).

106. *Id.* at 970.

107. *Id.* at 969.

108. *Id.*

informs and is an original work that entertains.

However, just as equal protection of speech does not exist, nor does equal protection of the style of speech exist. *Ali v. Playgirl, Inc.*<sup>109</sup> involved celebrated heavyweight boxer Muhammad Ali's claim for infringement of his publicity rights by the publication of a parody caricature in defendant's publication. In this case, the New York court narrowly construed the phrase "purpose of trade" within Section 51 of the New York Civil Rights Law to mean that a use was "not violative of [Section] 51 . . . if it is 'in connection with an item of news or one that is newsworthy.'"<sup>110</sup> By this interpretation the court found "no such informational or newsworthy dimension to [the] unauthorized use."<sup>111</sup> The court ultimately found the establishment of a "likelihood that [Ali would] prevail on his claim that his right of publicity [had] been violated by the publication of the *offensive* portrait."<sup>112</sup> Thus, the same style of speech, parody, which enjoyed First Amendment protection in *Cardtoons* was considered of infringement by an athlete's publicity rights in *Ali*. Arguably, this inconsistency arose due to the court's emphasis in *Ali* on the "offensive" nature of the likeness.

Aside from consideration of publicity rights in the context of particular speech styles, namely parody, the United States Supreme Court has considered the pure conflict between a plaintiff's pecuniary interests and the media's First Amendment interests in reporting "newsworthy" events.<sup>113</sup> In *Zacchini v. Scripps-Howard Broad. Co.*,<sup>114</sup> a "human cannonball" was performing his fifteen-second routine at a state fair when a reporter videotaped the performance, which was subsequently aired in its entirety on the evening news.<sup>115</sup>

In its analysis of controlling law, the Court found the media would generally be privileged to report, unrestrained, "newsworthy facts about [the] petitioner's act."<sup>116</sup> Accordingly, to remove the report of newsworthy facts to become advertising, "there must be some closer and more direct connection, beyond the mere fact that the newspaper itself is sold; and that the presence of advertising . . . in adjacent columns, or . . . duplication of a news item for the

---

109. 447 F. Supp. 723 (S.D.N.Y. 1978).

110. *Id.* at 727 (quoting *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 359 (1952)).

111. *Id.*

112. *Id.* at 728 (emphasis added).

113. Patti T. Cotten, *Torts—The Right of Publicity—Protecting a Celebrity's Identity*, 52 TENN. L. REV. 123, 129-31 (1984) (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977)).

114. 433 U.S. 562.

115. *Id.* at 562-64.

116. *Id.* at 574.



purpose of advertising the publication itself.”<sup>117</sup> In addition, the Court found that when deciding between protected or unprotected media reports, the First Amendment does “not immunize the media when they broadcast a performer’s entire act without his consent.”<sup>118</sup> Most importantly, the Court determined:

The broadcast of a film of petitioner’s entire act poses a substantial threat to the economic value of that performance[,] . . . [which] lies in the ‘right of exclusive control over the publicity given to his performance[,]’ [since] if the public can see [it for] free on television, it will be less willing to pay to see it at the fair.<sup>119</sup>

The majority went on to declare that the broadcast of the entire performance “goes to the heart of petitioner’s ability to earn a living as an entertainer.”<sup>120</sup> Thus, since this case does not involve “the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place,”<sup>121</sup> it is, arguably, truly a claim for a “right of publicity.”<sup>122</sup> Therefore, the United States Supreme Court has made it clear that while the broadcast, and presumably the publication, of newsworthy facts of a performer’s act enjoys First Amendment protection, the performer’s publicity rights will trump First Amendment claims to the broadcast, and publication, of the performance in its entirety.

Related to the publication or broadcast of newsworthy events is the publication of those events in incidental advertising for the particular media outlet. In *Montana v. San Jose Mercury News, Inc.*,<sup>123</sup> a court specifically addressed a professional football player’s publicity rights in such incidental advertising. Joe Montana, an accomplished professional football quarterback for the San Francisco 49ers, led his team to an unprecedented four Super Bowl championships in one decade.<sup>124</sup> After each of the last three Super Bowl victories, the San Jose Mercury News (SJMN) featured front-page stories featuring the victories and photographs from the game of players, including Montana.<sup>125</sup> After the fourth Super Bowl win, SJMN printed, sold and distributed posters featuring an artist’s rendition of the newspaper cover

---

117. *Id.* at 575 n.11 (quoting WILLIAM PROSSER, LAW OF TORTS 806-07 (4th ed. 1971)).

118. *Id.* at 575.

119. *Zacchini*, 433 U.S. at 575.

120. *Id.* at 576.

121. *Id.*

122. *Id.*

123. 40 Cal. Rptr. 2d 639 (1995).

124. *Id.* at 640.

125. *Id.*

stories.<sup>126</sup> Montana claimed these posters infringed upon his right of publicity and SJMN defended on First Amendment grounds.<sup>127</sup> First, the court found that the exemption from claims of publicity right infringement for uses of likeness “in connection with an item of news”<sup>128</sup> extended to other communications media, including posters.<sup>129</sup> More importantly, the court determined the existence of a First Amendment protection for a truthful use of likeness in advertising to promote a protected medium (a news medium).<sup>130</sup>

Here, the court found the poster, including Montana’s likeness, was published because of its depiction of a newsworthy sports event, as well as the fact it was a depiction of a protected news medium for promotion of that medium.<sup>131</sup> Therefore, the court specifically addressed the First Amendment’s limitation on rights of publicity in the case of incidental advertising of a protected medium.

Finally, in *ETW Corp. v. Jireh Publishing, Inc.*,<sup>132</sup> a United States District Court addressed a claim for infringement of a right of publicity in the context of an artistic rendition. In this case, Tiger Woods, by his licensing agent, claimed a violation of his publicity rights and trademark rights by way of an artists production of a series of prints entitled “The Masters of Augusta,” which featured a likeness of Tiger Woods and included his name on the print and in an informational pamphlet included with the print.<sup>133</sup> The defendant claimed a First Amendment protection of the prints as artwork which does not constitute commercial speech and which expresses “the majesty of a newsworthy moment.”<sup>134</sup> Exclusive of the trademark infringement claims, the court opined that “the right of publicity . . . does not authorize a celebrity to prevent the use of her name in an expressive work protected by the First Amendment.”<sup>135</sup> The court also declared that since visual art “always communicate[s] some idea or concept to those who view it”<sup>136</sup> it enjoys First Amendment protection, which is not compromised when offered for sale.<sup>137</sup>

---

126. *Id.*

127. *Id.*

128. *Montana*, 40 Cal. Rptr. 2d at 641.

129. *Id.*

130. *Id.* at 642.

131. *Id.* at 641.

132. 99 F. Supp. 2d 829 (N.D. Ohio 2000).

133. *Id.* at 829-31.

134. *Id.* at 834.

135. *Id.* (citations omitted).

136. *Id.* at 836 (citations omitted).

137. *ETW Corp.*, 99 F. Supp. 2d at 835.

By this analysis the court found the defendant's prints enjoy First Amendment protections, which limited plaintiff's publicity rights.<sup>138</sup>

#### IV. IMPLICATIONS OF CURRENT CASE LAW FOR THE FUTURE OF PROFESSIONAL ATHLETE RIGHT OF PUBLICITY CLAIMS

Arguably, the preceding discussion does little to clarify the current state of First Amendment limitations of the publicity rights of professional athletes. The varied decisions make it difficult to discern any noticeable judicial trend striking a balance between these conflicting rights. While courts have attempted to draw distinctions in the type of speech implicated, or in the character of the use of the likeness implicated, and to relate those implications to each other, the courts have not successfully articulated a clear distinction, other than perhaps that the claim should be assessed on a fact-specific basis.

As a preliminary matter, *Zacchini*,—arguably as the only Supreme Court opinion directly on-point—is the only clear-cut decision regarding a pure case of conflict of publicity and First Amendment interests. The Supreme Court focused extensively on the use of the plaintiff's performance, *in its entirety*. Therefore, professional athletes may, fairly confidently, assert a right of publicity that would trump the media's First Amendment interests when the publication or broadcast depicts an entire athletic performance.

Next, *Abdul-Jabbar* and *Pooley* attempt to classify speech as "communicative" (i.e., "newsworthy") or as "commercial." In doing so they highlight the context-specific nature of these classifications, since what may initially be benign, communicative speech in the form of biographical information or career statistics or achievements becomes commercial speech when placed in an advertisement. By this analysis, professional athletes may sometimes enforce their publicity rights in their "stats," but it depends on the circumstances.

Likewise, with *Cardtoons* and *Ali* courts split on the scope of an athlete's publicity rights when his likeness is used in a parody. Arguably, unlike *Cardtoons*, which involved parody in what is likely a commercial product, baseball trading cards, the speech at issue in *Ali* appeared in a more traditional medium, a magazine (though a pornographic magazine). However, just as in *Cardtoons*, the parody style of "communicative" speech is in contention; though lacking direct connection with "news" material, the parody caricature was neither advertising nor endorsing other products, though advertisements also appeared in the magazine. Arguably, the specific medium in which the parody appeared, and not the parody speech style itself, was determinative of

---

138. *Id.* at 834-35.

the lack of First Amendment protection. Therefore, professional athletes may not profit from the use of their likeness in a parody, though the parody may or may not possess some degree of commercial purpose. Again, the determination will be case-specific.

Finally, in the case of artistic impression of a newsworthy event, the professional athlete's right of publicity will be limited by the artist's First Amendment interests in freedom of expression, even though the artistic work may be sold for profit. This seems to be the most glaring example of conflict between the personal property right of publicity and the right of free expression. However, the force behind the right of publicity is one's inherent pecuniary interest in his persona. An artist producing, on a somewhat "mass" scale, a rendering of the athlete's athletic achievement allows the artist to profit from the athlete's efforts, while the athlete himself does not share in those same profits from his own effort. Again, the context is determinative.

Courts have yet to offer truly concrete definitions of First Amendment protected speech which limit a professional athlete's rights of publicity in his own persona and achievements. Decisions have mixed "commercial" and "communicative" classifications of the use of a likeness of a professional athlete. However, this means of distinction has created further confusion in the area of publicity rights. This confusion leaves athletes susceptible to diminished returns on their own efforts.

One more appropriate means of distinguishing uses of likeness, as either subject to right of publicity claims by professional athletes or as protected uses under the First Amendment, would be to distinguish the use based upon the medium in which it appears, subject to the *Zacchini* exception. Therefore, claims for infringement of publicity rights should be judged based upon the medium in which the athlete's likeness appears. This distinction by type of medium would reconcile *Cardtoons* and *Ali*, as well as clarify situations like that in *ETW*. This distinction by medium would also harmonize with the *Restatement*, which calls for the prohibition of unauthorized uses of one's likeness in commercial products.<sup>139</sup>

By this analysis, the *Cardtoons* and *Ali* decisions would be reversed. *Cardtoons'* trading cards are arguably commercial products, which happen to make a social commentary. Therefore, they should be subject to right of publicity claims. And, *Ali's* picture appears in a medium whose purpose is to convey ideas and opinions. Therefore, despite the perceived undesirable nature of the magazine's contents, the social commentary appears in a medium that is not a commercial product, but a medium whose purpose is to convey

---

139. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995).

speech, ideas, and opinions. Similarly, though likenesses such as those in *ETW* convey a newsworthy event, the likeness appears in what is arguably a commercial medium since it is not created as a single work of art for the sake of art, but as a product to be sold in a commercial market—the market for sports images.

Thus, by analysis based upon classification by medium, use of a professional athlete's likeness in advertising and on commercial products would be limited by the athlete's publicity rights. This, of course, would be limited by *Zacchini*. Accordingly, any use in a medium of communication—a non-advertising medium or a commercial product—would enjoy First Amendment protection, unless it conveyed the "entire athletic performance" (which may require a more concrete definition by the court). Thus, distinctions of uses based upon the "commercial" or "communicative" nature of the use should be abandoned.

Distinction of uses of likeness, which are either subject to publicity rights of athletes or are protected uses under the First Amendment, should be made based upon the type of medium in which the likeness appears. By this analysis, it is clear that likenesses appearing in advertisements or on commercial products would be subject to right of publicity claims by professional athletes, and that uses appearing in media of a purely communicative nature—those media designed to convey information, non-advertising media, or commercial products—would enjoy First Amendment protection subject only to the *Zacchini* exception.

## V. CONCLUSION

The right of publicity was born of common law privacy rights and flourished under property law analysis. Arguably, a professional athlete's most valuable asset is himself. Publicity rights allow the athlete to profit from the development of his persona. However, the First Amendment may, in certain situations, allow the media to infringe upon those rights by the uncompensated use of the professional athlete's persona.

Currently, case law does not clearly delineate uses that enjoy First Amendment protection as opposed to those uses subject to claims of publicity right infringement. The current law attempts to make such distinctions based upon classifications of the uses as either "commercial" or "communicative." This means of distinction is inadequate, as it has not produced a clear measure of when professional athletes enjoy a right of publicity in the use of their likeness.

A better distinction could be made based upon the classification of the medium in which the likeness appears, rather than based upon the

classification of the use of the likeness. Distinction based upon the classification of the medium in which the likeness appears would provide a clear indication of protected uses, reconcile the current case law opinions, and comport with the *Restatement*.<sup>140</sup>

Definitively, any appearances of likeness in advertisements or on commercial products would be subject to right of publicity claims. All uses of likenesses appearing in media of communication—media that convey information and opinions for sale in the marketplace, exclusive of advertisements and of products—would enjoy First Amendment protection, as long as the use did not convey the entire athletic performance. By this analysis the right of publicity more accurately protects the athlete's ability to profit from the use of his persona, just as the right is intended.

ERIKA T. OLANDER

---

140. *Id.*

