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# The Right of Publicity: Preventing the Exploitation of a Celebrity's Identity or Promoting the Exploitation of the First Amendment?

Joshua Waller

The purpose of this comment is to address the inherent tension between the right of publicity and the First Amendment. After an introduction to the right of publicity and its justifications, this article discusses the First Amendment, its principles, and the categories of speech that it protects. Next, Part II observes that a lack of United States Supreme Court guidance has generated confusion among the circuits, leading to decisions that erroneously prioritize the protection of celebrities' identities over the First Amendment interest in protecting speech. Section III explains that many right of publicity cases involve commercial speech, a form of speech typically given the least amount of protection under the First Amendment. However, Section III describes the Supreme Court's *Central Hudson* decision, which holds that commercial speech nevertheless receives a significant degree of protection. This comment concludes that until the Supreme Court grants certiorari in a case involving the right of publicity and the First Amendment, courts may not regulate commercial speech to protect a celebrity's identity without carefully applying the *Central Hudson* test.

## I. BACKGROUND

### A. The Right of Publicity

The right of publicity stems from the tort law concept of the right of privacy, first introduced more than 100 years ago.<sup>1</sup> In an 1890 law

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<sup>1</sup> J. Thomas McCarthy, *Melville B. Nimmer Symposium: Article: Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1704 (1987) (citing Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)) [hereinafter McCarthy, *Melville B. Nimmer Symposium*].

review article, Louis Brandeis and Charles Warren argued for a common law right of privacy to prohibit truthful but intrusive and embarrassing disclosures by the media.<sup>2</sup> Although courts in some states quickly accepted the right, some states dealt with this issue by enacting a statute authorizing a right to sue in certain invasion of privacy cases.<sup>3</sup>

Most of the early cases treated the right of privacy as the "right to be left alone."<sup>4</sup> However, whenever well-known people (later known as "celebrities") sued under this right, courts reasoned that they could not be "left alone" because their identities were already widely recognized in the news media.<sup>5</sup> Courts were thus unable to find remedies under the right of privacy for plaintiffs whose real claim was "uncompensated, rather than unwelcomed, publicity."<sup>6</sup> In sum, "privacy law seemed unable to accommodate the view that human identity constituted an intellectual property right with commercial value measured by supply and demand in the advertising and promotion marketplace."<sup>7</sup>

However, a breakthrough came in 1953 in *Haelan Laboratories, Inc. v. Topps Chewing Gum*<sup>8</sup> when Judge Jerome Frank created the right of publicity, giving celebrities a property right in their identities that could be assigned and licensed.<sup>9</sup> One year after the *Haelan* case, Melville B. Nimmer wrote an article analyzing and defining the boundaries of the right of publicity.<sup>10</sup> According to Nimmer, the right of publicity should pick up where the right of privacy left off.<sup>11</sup> Thus, the right of privacy protected the "solitude and privacy" of those who were not

<sup>2</sup> "The central thesis of the root article by Warren and Brandeis . . . was that the press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for the alleged abuses." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 (1975)(citing Warren & Brandeis, *supra* note 1, at 196).

<sup>3</sup> See McCarthy, *Melville B. Nimmer Symposium*, *supra* note 1, at 1705 (stating that the Warren and Brandeis article was followed by a time of conflict over the right of privacy); see also J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 6.2[A] (1987).

<sup>4</sup> See McCarthy, *Melville B. Nimmer Symposium*, *supra* note 1, at 1705 (stating that the right and remedy focused on the "indignity and personal affront of having one's name or face spread around in advertising without permission").

<sup>5</sup> *Id.* (stating that these plaintiffs were "celebrities").

<sup>6</sup> Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603, 622 (1984).

<sup>7</sup> McCarthy, *Melville B. Nimmer Symposium*, *supra* note 1, at 1706.

<sup>8</sup> 202 F.2d 866 (2d Cir. 1953).

<sup>9</sup> McCarthy, *Melville B. Nimmer Symposium*, *supra* note 1, at 1706 (adding that Judge Frank was the first to coin the term "right of publicity").

<sup>10</sup> Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954) (finding that privacy law could not assist in protecting the commercial interests in a person's identities).

<sup>11</sup> McCarthy, *Melville B. Nimmer Symposium*, *supra* note 1, at 1706-07 (arguing that "privacy law could not do the job because it hinged on the embarrassing and humiliating impact of the unpermitted advertising use").

in the public eye, while the right of publicity protected the unauthorized commercial use of celebrities' names, photographs, and likenesses.<sup>12</sup> In a 1960 commentary, Professor William Prosser further cemented the principle underlying the right of publicity,<sup>13</sup> defining it as the "appropriation, for the defendant's advantage, of the plaintiff's name or likeness."<sup>14</sup> Today twenty-seven states recognize the right of publicity through common law and/or state statute,<sup>15</sup> however, courts continue to refer to Prosser's definition.<sup>16</sup>

## B. Justifications for the Right of Publicity

There are three main rationales for the right of publicity.<sup>17</sup> The first is "economic:" people will put forth the time and effort to develop the skills necessary to become a celebrity only if they are assured that they will be able to "reap what they sow."<sup>18</sup> The second is a "moral"

<sup>12</sup> *Id.* at 1707 (arguing that celebrities' concern — the right of publicity — is the other side of the privacy coin).

<sup>13</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 398-407 (1960).

<sup>14</sup> *Id.* at 389. According to Prosser, violation of publicity rights is one of four different torts that constitute the invasion of privacy. The other three include: intrusion upon the plaintiff's seclusion or solitude or into his private affairs, public disclosure of embarrassing private facts about the plaintiff, and publicity which places the plaintiff in a false light in the public eye. *Id.*

<sup>15</sup> The following states recognize the common law right of publicity: Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin. The following states have statutes recognizing the right of publicity, some of which are labeled "privacy:" California, CAL. CIV. CODE §§ 3344-3344.1 (Deering 2000); Florida, FLA. STAT. ch. 540.08 (2000); Illinois, 765 ILL. COMP. STAT. 1075 §§ 1-60 (1999); Indiana, IND. CODE §§ 32-13-1-1 to 32-13-1-20 (2000); Kentucky, KY. REV. STAT. ANN. § 391.170 (Michie 2000); Massachusetts, MASS. GEN. LAWS ANN. ch. 214 § 3A (West 2000); Nebraska, NEB. REV. STAT. ANN. §§ 20-201 to 20-211, 25-840.01 (Michie 2000); Nevada, NEV. REV. STAT. ANN. 597.770-597.810 (Michie 2001); New York, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2001); Ohio, OHIO REV. CODE ANN. §§ 2741.01-2741.09 (West 2000); Oklahoma, OKLA. STAT. ANN. tit. 21 §§ 839.1-839.3, 1448-1449 (West 2001); Rhode Island, R.I. GEN. LAWS §§ 9-1-28 to 9-1-28.1 (1999); Tennessee, TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (2001); Texas, TEX. PROP. CODE ANN. §§ 26.001-26.015 (Vernon 2000); Utah, UTAH CODE ANN. §§ 45-3-1 to 45-3-6 (2000); Virginia, VA. CODE ANN. §§ 8.01-40, 18.2-216.1 (Michie 2000); Washington, WASH. REV. CODE ANN. §§ 63.60.010-63.60.080 (West 2000); and Wisconsin, WIS. STAT. ANN. § 895.50 (West 2000). See J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 6.3, at 6-9 to 6-11, § 6:7, at 6-127, at 6-242, (2d 2000).

<sup>16</sup> See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992); *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 346 (Cal. Ct. App. 1983); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 133 (Wis. 1979).

<sup>17</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 178 (1993).

<sup>18</sup> *Id.* See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 30-31 (3d ed. 1986) (stating that a secondary economic justification is that the right of publicity ensures that those who use the celebrity's "work product," (for example, the celebrity's image to promote a product) pay the appropriate cost).

rationale. By this theory, it would be unjust to allow those who did not contribute to a celebrity's success to benefit from the celebrity's work or "reap where they have not sown."<sup>19</sup> This point is further elucidated by an often-cited federal district court opinion stating that "a celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labors and is a type of property."<sup>20</sup> Finally, there exists a "consumer protection" rationale, which states that an enforceable right of publicity will "protect consumers from deceptive trade practices."<sup>21</sup> For example, an enforceable right will prevent people from buying sneakers that they mistakenly thought a celebrity like Michael Jordan willingly endorsed.<sup>22</sup> The question is whether these justifications for the right of publicity should still be applied in cases where they conflict with constitutionally protected principles, such as the First Amendment.

### C. The First Amendment and its Underlying Principles

The First Amendment to the Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>23</sup> Many constitutional scholars agree that Justice Brandeis authored the authoritative statement of the main goals of the First Amendment in *Whitney v. Califor-*

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<sup>19</sup> Madow, *supra* note 17, at 178. *But see id.* at 178-96 (arguing that the "moral" rationale is weak because: (1) audiences, not the celebrity's hard work, make the celebrity famous; (2) chance, not the celebrity's hard work, makes the celebrity famous; (3) the media, not the celebrity's hard work, make the celebrity famous; and (4) the audience and the media, not the celebrity, create the celebrity's image).

<sup>20</sup> *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

<sup>21</sup> Madow, *supra* note 17, at 228 (stating that another version of this rationale emphasizes that an enforceable right of publicity protects consumers from advertisers who exploit celebrity images in selling dangerous and shoddy goods). *But see id.* at 228-36 (arguing that the "consumer protection" rationale is weak because: (1) most consumers' buying habits are not based on contracts between celebrities and advertisers; (2) the right of publicity can actually prevent advertisements that are not misleading; (3) in circumstances in which an endorsement is misleading, celebrities can seek relief under other laws, e.g., trademark statutes; (4) the right of publicity can thwart useful, in addition to deceptive, information about a product; and (5) it is not clear that consumers automatically link endorsement with celebrity merchandise).

<sup>22</sup> See James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973).

<sup>23</sup> U.S. CONST. amend. I.

nia<sup>24</sup> more than 70 years ago.<sup>25</sup> According to Justice Brandeis, the three goals of the First Amendment are: (1) “enlightenment;” (2) “self-fulfillment;” and (3) “the safety valve.”<sup>26</sup> The theory underlying the first goal is that people should have access to all facts so that they can form their own opinions and make informed choices.<sup>27</sup> This means that government may not censor information so that people only have access to the truth as perceived by the government.<sup>28</sup> Moreover, false information should not be suppressed because an open opportunity for rebuttal can remedy it.<sup>29</sup> The purpose behind Brandeis’ second principle may have been best stated by Justice Thurgood Marshall:

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.<sup>30</sup>

Finally, the idea behind Brandeis’ third goal is that people will be less likely to cause violence to accomplish a political goal if they can subli-

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<sup>24</sup> 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>25</sup> J. THOMAS MCCARTHY, 2 *THE RIGHTS OF PUBLICITY AND PRIVACY* 8:2, 8-5 to 8-6 (2000). [hereinafter MCCARTHY, 2 *THE RIGHTS OF PUBLICITY AND PRIVACY*].

<sup>26</sup> *Whitney*, 274 U.S. at 375.

<sup>27</sup> MCCARTHY, 2 *THE RIGHTS OF PUBLICITY AND PRIVACY*, *supra* note 25, 8:3, at 8-6.

<sup>28</sup> *Id.* 8:4, at 8-6 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 88 (1983) (Stevens, J., concurring) (“Governmental suppression of a specific point of view strikes at the core of First Amendment values.”). Moreover, Justice Holmes stated:

If you have no doubt of your premises or your power and want a result with all your heart you naturally express your wishes in law and sweep away all opposition . . . But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>29</sup> According to Justice Brandeis, “[I]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.” See also MCCARTHY, 2 *THE RIGHTS OF PUBLICITY AND PRIVACY*, *supra* note 25, 8:5, at 8-6 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927)).

<sup>30</sup> *Procurier v. Martinez*, 416 U.S. 396, 427 (1974); see also Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 *YALE L.J.* 877, 879 (1963) (“[S]uppression of belief, opinion and expression is an affront to the dignity of man, a negation of man’s essential nature.”). Note, however, that there is doubt as to whether this principle can by itself justify First Amendment protection. MCCARTHY, 2 *THE RIGHTS OF PUBLICITY AND PRIVACY*, *supra* note 25, 8:7, at 8-11.

mate their ambitions through speech advocating their goals.<sup>31</sup> Forms of speech that effectively carry out these goals are most likely to receive the highest amount of protection under the First Amendment.<sup>32</sup>

Speech involving “news” typically receives the fullest constitutional protection because information about the world is needed for clear thought and public debate.<sup>33</sup> Speech involving “entertainment” is primarily designed to entertain and is helpful in understanding and dealing with the world.<sup>34</sup> However, it does not always inform us, so it receives less protection.<sup>35</sup> Finally, “commercial” speech designed to sell products or services receives the least protection because it does not always inform or entertain us.<sup>36</sup> However, pursuant to the Supreme Court’s decision in *Central Hudson Gas & Elec. Corp. v. Public*

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<sup>31</sup> See *Whitney*, 274 U.S. at 375 (Brandeis, J.) (“[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”); MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY, *supra* note 25, 8:8, at 8-11 to 8-12. Note that this principle normally only receives a supporting role in justifying First Amendment protection. *Id.*

<sup>32</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2944 (1985) (plurality opinion) (“We have long recognized that not all speech is of equal First Amendment importance. . . . [C]ertain kinds of speech are less central to the interests of the First Amendment than others.”). *But see* *New York Magazine v. Metro. Transit Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (asserting that speech should not be rigidly divided into separate categories).

<sup>33</sup> MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY, *supra* note 25, 8:13, at 8-18 to 8-20 (noting that there are certain forms of “news” that are entitled to greater First Amendment protection than other forms; e.g., “political news” receives greater protection than “entertainment news”).

<sup>34</sup> *Id.* at 8:15, 8-20.

<sup>35</sup> *Id.* (noting that entertainment can be provided by any medium, e.g., from books to paintings to photographs). *Harper & Row Publishers, Inc. v. Nation Enters.*, 105 S. Ct. 2218, 2232 (1985) (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”). However, the line between “informing” and “entertaining” is elusive; thus, some courts have argued that “news” and “entertainment” should receive the same First Amendment protection. See *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 867 (1979).

<sup>36</sup> MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY, *supra* note 25, 8:16, at 8-21 to 8-22 (noting that commercial speech’s primary message, “buy me,” is often slipped between informing and entertaining the potential consumer). *But see* Diane Leenheer Zimmerman, Amicus Curiae Brief of 73 Law Professors in Support of Defendant/Appellee Jireh Publishing, Inc. at 5, *ETW Corp. v. Jireh Publ’g, Inc.*, available at [http://jurist.law.pitt.edu/amicus/etw\\_v\\_jireh.pdf](http://jurist.law.pitt.edu/amicus/etw_v_jireh.pdf) (2000) (No. 00-3584) (stating that Supreme Court precedent is against lumping purely expressive materials into the “commercial” speech category “simply because [it] generate[s] profits and [is] not traditional reportage”) [hereinafter Zimmerman, Brief of 73 Law Professors]; Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 292-302 (1983) (arguing that enthusiasm for the distinction between “news” and “commercial speech” died down after courts began to recognize that a celebrity’s exclusive right to control information about himself would overwhelm the constitutional protection of free speech). Note that a number of early courts lumped “entertainment” into the “commercial speech” category. See *Binns v. Vitagraph Co. of America*, 103 N.E. 1108 (N.Y. 1913); *Leverton v. Curtis Publ’g Co.*, 192

*Serv. Comm'n of N.Y.*,<sup>37</sup> commercial speech cannot be restricted unless a four-part test is met: (1) The commercial speech must concern lawful activity that is neither false nor misleading; (2) The asserted governmental interest in restricting the speech must be substantial; (3) The restriction must directly advance the asserted governmental interest; and (4) The restriction must not be more extensive than necessary to serve that interest.<sup>38</sup> Unlike the case that immediately follows, most right of publicity cases involve potential restrictions on "commercial" speech, so courts in those cases must employ the *Central Hudson* test.

## II. CASES IN WHICH THE GOALS OF THE RIGHT OF PUBLICITY CONFLICT WITH THOSE OF THE FIRST AMENDMENT

### A. The Seminal Cases

#### 1. *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>39</sup>

In 1977, the United States Supreme Court decided the only U.S. Supreme Court case involving the right of publicity and the First Amendment.<sup>40</sup> In *Zacchini*, a local television news broadcaster videotaped and aired an entire 15-second "human cannonball" performance by the plaintiff at a county fair.<sup>41</sup> The Supreme Court of Ohio held that the broadcast was privileged under the First Amendment as a news report of a matter of public interest.<sup>42</sup> Justices Powell, Brennan, and Marshall agreed with the Ohio Supreme Court, stating that there is a presumption of First Amendment protection for an act used "for a routine portion of a regular news program."<sup>43</sup> A majority of the Court, however, reversed the Ohio Supreme Court and held that the First

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F.2d 974 (3d Cir. 1951); *Hazlitt v. Fawcett Publ'ns, Inc.*, 116 F. Supp. 538 (D. Conn. 1953); and *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939).

<sup>37</sup> 447 U.S. 557 (1980).

<sup>38</sup> *Id.* at 566.

<sup>39</sup> 433 U.S. 562 (1977).

<sup>40</sup> *Id.*

<sup>41</sup> Plaintiff Hugo Zacchini performed regularly at the Geauga County Fair in Burton, Ohio in August and September 1972. He performed in an enclosed area, but people attending the fair were not charged a separate admission fee to observe his act. On August 30, a freelance reporter attended the fair. Zacchini noticed the reporter and asked that he not record the performance. However, the following day the reporter videotaped the entire act pursuant to instructions from a producer at his station. The entire act was shown on the news that night. *Id.* at 563-64.

<sup>42</sup> The trial court granted summary judgment in favor of the defendant, and the Ohio Court of Appeals reversed. The Supreme Court of Ohio, however, reversed again, holding that the First Amendment protected the news report. *Id.* at 564-66.

<sup>43</sup> *Id.* at 581.



Amendment does “not immunize the media when they broadcast a performer’s entire act without his consent.”<sup>44</sup>

Nevertheless, the majority opinion in *Zacchini* cannot be relied upon by plaintiffs in right of publicity cases because it is narrowly drawn to the facts of that case and involves the unauthorized appropriation of an “entire act.”<sup>45</sup> Unlike most right of publicity plaintiffs, *Zacchini* did not demonstrate that he had a right to control any “identifying aspects of his persona.”<sup>46</sup> Rather, he claimed that he had an economic right in his act.<sup>47</sup> Thus, as J. Thomas McCarthy’s right of publicity treatise states, “no clear message emerges” from *Zacchini*, and “no general rule is discernible by which to predict the result of conflicts between the right of publicity and the First Amendment.”<sup>48</sup> However, sixteen years later, the Supreme Court had another opportunity to fashion a predictable standard for other courts to use in cases where the right of publicity and the First Amendment conflict.

## 2. *White v. Samsung Electronics America, Inc.*<sup>49</sup>

In the early 1990s, Samsung Electronics America, Inc. ran advertisements depicting its electronic products and current items from popular culture.<sup>50</sup> The purpose of the advertisements was to convey the message that the Samsung product would still be used in the twenty-first century.<sup>51</sup> In a Samsung video-cassette recorder ad that was captioned “Longest-running game show. 2012 A.D.,” a robot appeared in a wig, gown, and jewelry next to a game board purposefully resembling the set from “Wheel of Fortune.”<sup>52</sup> Vanna White,<sup>53</sup> the “Wheel of For-

<sup>44</sup> *Id.* at 574-75.

<sup>45</sup> *See id.* at 575.

<sup>46</sup> *Id.* at 575-76.

<sup>47</sup> *Id.*

<sup>48</sup> MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY, *supra* note 25, 8:27, at 8-38. In fact, McCarthy states that *Zacchini* is not actually a right of publicity case. According to McCarthy, *Zacchini*’s claim should have come under common law copyright. However, the Ohio Supreme Court misunderstood the law of copyright and held that *Zacchini*’s act was not eligible for copyright protection. *Id.* at 8:103, at 8-173, 8-173 n.6.

<sup>49</sup> 971 F.2d 1395 (9th Cir. 1992), *rehearing denied by White v. Samsung Electronics America, Inc.*, 989 F.2d 1512 (9th Cir. 1993), *and cert. denied by Samsung Electronics America, Inc. v. White*, 508 U.S. 951 (1993).

<sup>50</sup> *Id.* at 1396 (stating that the advertisements ran in several publications with widespread circulation).

<sup>51</sup> The advertisements predicted outrageous future outcomes for the items. For example, news show host Morton Downey Jr. appeared in front of a United States flag in one advertisement captioned “Presidential candidate. 2008 A.D.” *Id.*

<sup>52</sup> *Id.* The show has a daily audience of approximately forty million people. *Id.*

<sup>53</sup> Vanna White has capitalized on her fame from the show by marketing her identity to several advertisers. *Id.*

tune” hostess, argued that the robot resembled her.<sup>54</sup> Although the “Wheel of Fortune” copyright owner did not object to the ad, and White had no rights in the program or in the role she played, White sued Samsung and Deutsch, its advertising agency.<sup>55</sup> She brought suit under California’s statutory and common law right of publicity, alleging that she neither consented to nor was compensated for the ad.<sup>56</sup>

The district court entered summary judgment for the defendants because White did not allege sufficient facts to show that the robot was her “likeness.”<sup>57</sup> On appeal, the decision with respect to the statutory right of publicity claim was affirmed.<sup>58</sup> According to the circuit court, the robot was not White’s “likeness” within the meaning of the statute.<sup>59</sup> However, the circuit court reversed the lower court’s decision with respect to the common law right of publicity claim, holding that the right of publicity under the common law is broader than the statutory right.<sup>60</sup> The circuit court stated that the common law right of publicity “is not limited to the appropriation of name or likeness,” and thereby expanded White’s control over any speech potentially relating to the role that she played in “Wheel of Fortune.”<sup>61</sup> According to the court:

It is not important how the defendant has appropriated the plaintiff’s identity, but whether the defendant has done so. . . a rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.<sup>62</sup>

In rejecting the district court’s decision with regard to White’s common law claim, the

circuit court held that White had demonstrated enough facts necessary to show that

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<sup>54</sup> *Id.*

<sup>55</sup> Richard Kurnit, *Clearing Advertising and Promotion: Cutting Edge Creative*, LAW & BUSINESS ANALYSIS & PLANNING REPORT, Aug./Sept. 1999, at 8.

<sup>56</sup> *White*, 971 F.2d at 1396. White also sued under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). The district court granted summary judgment against this claim. However, the court of appeals reversed. *Id.* at 1396-97, 1399-1401.

<sup>57</sup> *Id.* at 1396-97.

<sup>58</sup> *Id.* at 1397-99.

<sup>59</sup> The court held that the defendants “used a robot with mechanical features,” as opposed to “a manikin [sic] molded to White’s precise features.” *Id.*

<sup>60</sup> *Id.* at 1397-99.

<sup>61</sup> *Id.* at 1397-98 (citing Prosser, *supra* note 13, at 401 n.155 (1960); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974). *See also* *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983)).

<sup>62</sup> *Id.* at 1398.

Samsung and Deutsch exploited her celebrity value.<sup>63</sup>

Moreover, the majority downplayed the value of the speech, concluding that its decision was not a "First Amendment chill to expressive conduct" because the spoof of the game show and its hostess was "subservient" to the defendants' main message: "buy our video-cassette recorders."<sup>64</sup> However, the majority never applied the *Central Hudson* test to determine if this "commercial" speech deserved First Amendment protection. Instead, it only cited *Central Hudson* in passing, stating that "[i]n the case of commercial advertising . . . the [F]irst [A]mendment hurdle is not so high."<sup>65</sup> The majority also cited *Zacchini* to strengthen their position that the First Amendment does not bar all right of publicity cases.<sup>66</sup>

Judge Alarcon, concurring in part and dissenting in part in *White*, argued that the circuit court should have affirmed the district court's decision regarding White's common law right of publicity claim.<sup>67</sup> The judge demonstrated concern with regard to the extended control over speech that the majority gave White. He stated that the common law right of publicity should not be expanded to protect a person's "identity."<sup>68</sup> The legislature considered protection of interests other than "name" and "likeness" when it added "voice" and "signature" to the list of protected interests, thereby limiting a cause of action to those attributes.<sup>69</sup> Moreover, even if the right did cover "identity," the robot was not White's identity because no one would ever confuse White with the robot.<sup>70</sup> Judge Alarcon also argued that there was nothing unique about White or her attributes.<sup>71</sup> "Her work does not require her to

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<sup>63</sup> *Id.* at 1399 (noting that White's celebrity value is protected regardless of whether it was achieved through a "rare ability" or "dumb luck"). *But see* Madow, *supra* note 17, at 178-96.

<sup>64</sup> The court stated that commercial advertising using a celebrity's fame is different than expressive activity because advertising requires the celebrity's identity to be evoked. 971 F.2d at 1401 n.3.

<sup>65</sup> *Id.* The majority believed that "Samsung attempt[ed] to elevate its ad above the status of garden-variety commercial speech by pointing to the ad's parody of Vanna White." *Id.* (citing *Bd. of Trs. v. Fox*, 492 U.S. 469, 474-75 (1989) and *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983)).

<sup>66</sup> *Id.*; *but see supra* note 48 and accompanying text.

<sup>67</sup> *Id.* at 1402 (stating that Judge Alarcon also dissented from the court's holding on the Lanham Act claim).

<sup>68</sup> *Id.* at 1402-04 (citing *Lugosi v. Universal Pictures*, 25 Cal. 3d 813 (1979); *Guglielmi*, 25 Cal. 3d 860 (1979); *Eastwood*, 149 Cal. App. 3d 409; *In re Weingand*, 231 Cal. App. 2d 289 (1964); *Fairfield v. Am. Photocopy Equip. Co.*, 138 Cal. App. 2d 82 (1955), *later app.* 158 Cal. App. 2d 53 (1958); *Gill v. Curtis Publ'g Co.*, 38 Cal. 2d 273 (1952); and *Prosser, supra* note 13 at 401 n.155 (1960)).

<sup>69</sup> *Id.* at 1403.

<sup>70</sup> *Id.* at 1404 (distinguishing this case from *Motschenbacher*, 498 F.2d 821; *Midler*, 849 F.2d 460; and *Carson*, 698 F.2d 831).

<sup>71</sup> *Id.*

display whatever artistic talent she may possess,” and the blond hair, gown and jewelry that the robot wore were attributes shared by many other women.<sup>72</sup> The judge stated that the imitation of the “Wheel of Fortune” set was the only thing that could lead a viewer to think of White, but the set was an attribute of the show, not White.<sup>73</sup> Moreover, the ad depicted a robot playing White’s role, not White, and the fact that a celebrity has become famous for playing a role has never been enough to give the celebrity a proprietary interest in the role.<sup>74</sup> The dissenting portion of Judge Alarcon’s opinion concluded that the effect of the majority’s ruling on expression is “difficult to estimate” because it indicates that any celebrity can file a lawsuit based on “any commercial advertisement that depicts a character or role performed by the [celebrity].”<sup>75</sup>

A panel of circuit judges rejected Samsung and Deutsch’s petition for rehearing *en banc*.<sup>76</sup> However, Judges Kozinski, O’Scannlain, and Kleinfeld echoed Judge Alarcon’s sentiments in their dissent to the decision rejecting the *en banc* petition. These judges were also concerned with the lower court’s decision granting extended control over speech to White. White was given the “right to control our thoughts.”<sup>77</sup> The district court’s holding in *White* went beyond trademark and copyright law by prohibiting “any means of reminding people” of a celebrity.<sup>78</sup> Copyright law would not be constitutional if it preempted every means of expressing an idea about a protected work.<sup>79</sup>

The First Amendment is . . . about protecting the free development of our national culture. Parody, humor, irreverence are all vital components of the marketplace of ideas. The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them, or from “evok[ing]” their images in the mind of the public.<sup>80</sup>

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<sup>72</sup> *Id.* at 1405 (stating that these attributes are common among models, actresses, singers, and other game show hostesses).

<sup>73</sup> “To say that Vanna White may bring an action when another blond female performer or robot appears on such a set as a hostess will, I am sure, be a surprise to the owners of the show.” *Id.* (Alarcon, J., dissenting in part).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1407 (adding that, according to the majority’s view, Gene Autry could have brought a lawsuit against other singing cowboys and Sylvester Stallone could sue actors playing working-class boxers).

<sup>76</sup> The panel also denied a petition for rehearing. 989 F.2d at 1512.

<sup>77</sup> *Id.* at 1519. The judges also argued in their dissent that intellectual property law, including the Copyright Act and Copyright Clause, preempted White’s claims. *Id.* at 1512-19.

<sup>78</sup> According to the dissenting judges, *White* prevents more than the use of a celebrity’s identity or the implication that the celebrity endorses a product—it prevents anything that evokes the celebrity’s image in the public’s mind. *Id.* at 1514, 1519.

<sup>79</sup> *Id.* at 1519 (citing *Harper & Row*, 471 U.S. at 560).

<sup>80</sup> *Id.* (citing 971 F.2d at 1399).

Moreover, the dissenters noted that there is no longer a line between commercial and noncommercial speech because “salesmanship” entertains and “entertainment must sell.”<sup>81</sup> They argued that, pursuant to *Central Hudson*, the Samsung ad deserved First Amendment protection even though it was commercial speech because commercial speech profoundly affects our culture by influencing the public’s social and political attitudes.<sup>82</sup>

The Supreme Court did [not] set out the *Central Hudson* test for its health. It devised the test because it saw lower courts were giving the First Amendment short shrift when confronted with commercial speech . . . we should [not] thumb our nose at the Supreme Court by just refusing to apply its test.<sup>83</sup>

Thus, the majority was wrong in concluding that *Zacchini* allows right of publicity plaintiffs to overcome First Amendment defenses. To the contrary, *Zacchini* only prevents the broadcast of a plaintiff’s “entire performance,” not “the unauthorized use of another’s name for trade purposes.”<sup>84</sup> By refusing to scrutinize carefully the disputed commercial speech pursuant to *Central Hudson*, the majority in *White* placed the “vibrancy of our culture” at stake.<sup>85</sup>

The U.S. Supreme Court denied Samsung’s petition for certiorari.<sup>86</sup> However, a few years later, the Court again had the opportunity to fashion a predictable standard for other courts to use in cases where the right of publicity and the First Amendment conflict.

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<sup>81</sup> The dissent, referring to *White*, argued that the Samsung parody is no different than a Saturday Night Live parody because both use a celebrity’s identity for profit, potentially adding something to our culture. *Id.* at 1520.

<sup>82</sup> *Id.* at 1519-20 (citations omitted). *But see supra* notes 64-65 and accompanying text.

<sup>83</sup> 989 F.2d at 1520-21 (citing *Central Hudson*, 447 U.S. at 561-62 and 567-68).

The *Central Hudson* test was an attempt to constrain lower courts’ discretion, to focus judges’ thinking on the important issues—how strong the state interest is, how broad the regulation is, whether a narrower regulation would work just as well. If the Court wanted to leave these matters to judges’ gut feelings, to nifty lines about “the difference between fun and profit,” it could have done so with much less effort. Maybe applying the test would have convinced the majority to change its mind; maybe going through the factors would have shown that its rule was too broad, or the reasons for protecting *White*’s “identity” too tenuous. Maybe not.

*Id.* at 1520-21 (citing *White*, 971 F.2d at 1401); *but see supra* notes 65-66 and accompanying text.

<sup>84</sup> 989 F.2d at 1519 n.28 (citing *Zacchini*, 433 U.S. at 576); *see supra* notes 46-47 and accompanying text.

<sup>85</sup> *Id.* at 1520-21 (citing *Central Hudson*, 447 U.S. at 566; *Bd. of Trs. v. Fox*, 492 U.S. 469, 476-81 (1989); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985); and *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 347 (1986)); *see supra* note 38 and accompanying text.

<sup>86</sup> 508 U.S. 951 (1993).

## B. The Current Cases

### 1. *Wendt v. Host International, Inc.*<sup>87</sup>

A few years after *White*, two actors from the television show *Cheers*<sup>88</sup> brought a lawsuit against Host International, Inc., and Paramount Pictures Corporation<sup>89</sup> for placing animated figures of their characters in airport bars modeled after the set from the show.<sup>90</sup> The robots were designed to converse with each other and with patrons sitting near them.<sup>91</sup> Although Host obtained a license from the show's copyright holder, the actors, George Wendt and John Ratzenberger,<sup>92</sup> argued that the robots violated their statutory and common law rights of publicity because they did not consent to figures that were based upon their "likenesses."<sup>93</sup>

The district court entered summary judgment in favor of Host and Paramount, but the court of appeals reversed and remanded.<sup>94</sup> According to the appellate court, the actual three-dimensional animated figures were not "so dissimilar" from the actors as to warrant a grant of summary judgment for the defendants.<sup>95</sup> The court noted that issues of material fact remained with regard to the actors' common law right of publicity claims.<sup>96</sup> Specifically, the court determined a need to review and compare the physical characteristics of the actors and the robots in order to resolve Wendt and Ratzenberger's claims.<sup>97</sup> Nevertheless, after inspecting the robots in court, the district court on remand again

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<sup>87</sup> Nos. 93-56318, 93-56510, 1995 U.S. App. LEXIS 18971 (9th Cir. 1995), *appeal after remand* *Wendt v. Host Intn'l, Inc.*, 125 F.3d 806 (9th Cir. 1997), *rehearing and suggestion for rehearing en banc denied* by *Wendt v. Host Intn'l, Inc.*, 197 F.3d 1284 (9th Cir. 1999), *cert. denied* by *Paramount Pictures Corp. v. Wendt*, 531 U.S. 811 (2000).

<sup>88</sup> *Cheers* centered around a bar in a friendly Boston neighborhood. The owner and bartender, "Sam," entertained customers with stories about his days as a Red Sox pitcher. Another bartender, "Coach," chimed in with obtuse advice. Regular customers "Diane" and "Frasier" spoke self-importantly. "Carla," a waitress, terrorized patrons. The characters at issue were "Norm," a lovable, heavy-set, often-unemployed accountant who always sat at the same corner barstool, and "Cliff," a windbag mailman. The show was on the air for eleven years. 197 F.3d at 1285.

<sup>89</sup> Paramount Pictures Corporation was an applicant in intervention. *Id.*

<sup>90</sup> 125 F.3d at 809.

<sup>91</sup> Brief for Petitioner Paramount Pictures Corp., at 34-35, *Paramount Pictures Corp. v. Wendt*, 531 U.S. 811 (1999), (No. 99-1567).

<sup>92</sup> George Wendt played "Norm," and John Ratzenberger played "Cliff." 125 F.3d at 811.

<sup>93</sup> 197 F.3d at 1285; 125 F.3d at 809 (noting that the actors also claimed that Host violated the Lanham Act, 15 U.S.C. § 1125(a)).

<sup>94</sup> 125 F. 3d at 809.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (citing 1995 WL 115571 at \*\*2).

<sup>97</sup> *Id.* (citing 1995 WL 115571 at \*\*2). *Id.* (citing 1995 WL 115571 at \*\*3). The court also found that there were disputed issues of material fact as to the actors' unfair competition claim under Section 43(a) of the Lanham Act. *Id.*

granted summary judgment for Host and Paramount.<sup>98</sup> The court denied Wendt and Ratzenberger's claims, holding that it could not "find, by viewing both the robotics and the live persons of Mr. Wendt and Mr. Ratzenberger, that there is any similarity at all . . . except that one of the robots, like one of the plaintiffs, is heavier than the other . . . The facial features are totally different."<sup>99</sup>

The actors appealed, arguing that their right of publicity should be extended to prevent speech involving the robots, even though the robots were not identical to them.<sup>100</sup> The court of appeals agreed with the actors and again reversed and remanded to the district court.<sup>101</sup> After its own inspection, the appellate court concluded that a reasonable jury could find the robots sufficiently "like" the actors to violate the actors' statutory right of publicity.<sup>102</sup> Moreover, reasonable jurors could find that the actors' common law right of publicity, which protects against appropriations of a plaintiff's identity by means not limited to use of the plaintiff's "name" or "likeness," was violated.<sup>103</sup> As in *White*, the court downplayed the significance of the speech at issue by referring to it as a commercial exploitation.<sup>104</sup> However, the appeals court never purported to apply the *Central Hudson* test to determine if the speech deserved First Amendment protection.<sup>105</sup>

A panel of circuit judges denied a petition for rehearing en banc.<sup>106</sup> However, Judge Kozinski, the author of the dissenting opinion in *White*, dissented again.<sup>107</sup> He argued that the robotic portrayal of "Norm" and "Cliff" and the social commentary that they engage in is a "literary work . . . worthy of the highest First Amendment protection from intrusive state laws like California's right of publicity statute."<sup>108</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* See *supra* note 61 and accompanying text; but see also *supra* notes 68-70 and accompanying text.

<sup>101</sup> *Id.* at 810-15.

<sup>102</sup> But see *supra* note 58 and accompanying text. The court also rejected the defendants' assertion that the actors' statutory right of publicity claim is preempted by federal copyright law. *Id.* at 810.

<sup>103</sup> *Id.* at 811 (citing *White*, 971 F.2d at 1398; *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996); *Midler*, 849 F.2d at 463-64; and *Motschenbacher*, 498 F.2d at 827). The court also reversed the dismissal of the unfair competition claim and remanded. *Id.* at 814.

<sup>104</sup> *Id.* at 811.

<sup>105</sup> Compare *supra* notes 64-65 and accompanying text with *supra* notes 82-83 and accompanying text.

<sup>106</sup> A petition for rehearing was also denied. 197 F.3d at 1284.

<sup>107</sup> *Id.* at 1288-89.

<sup>108</sup> *Id.* at 1288 (citing *Cartoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970-72 (10th Cir. 1996)). *Id.* at 1288-89 (stating that this case is different than *White*,

Judge Kozinski concluded that Host's sole message, which "creatively put [sic] its familiar mise-en-scene to work," was not exclusively commercial.<sup>109</sup>

The United States Supreme Court denied Host and Paramount's petition for certiorari.<sup>110</sup> Thus, the Court again missed the opportunity to fashion a predictable standard for other courts to use in cases where the right of publicity and the First Amendment conflict.

## 2. *Hoffman v. Capital Cities/ABC, Inc.*<sup>111</sup>

A few years after *Wendt*, another case pertaining to the conflict between the right of publicity and the First Amendment arose. Through computer imaging software, Los Angeles Magazine published a humorous photograph of Dustin Hoffman<sup>112</sup> on page 118 of its March 1997 issue in which he looked like the character he played in the 1982 movie "Tootsie."<sup>113</sup> The software made it appear as though he was wearing a Richard Tyler-designed contemporary silk gown and Ralph Lauren-designed high-heel shoes.<sup>114</sup> The page contained the text: "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."<sup>115</sup> Hoffman's name and photograph also appeared in an article on pages 104 through 119 entitled "Grand Illusions."<sup>116</sup> The article used computer technology to merge famous photographs of celebrities from classic movies with photographs of

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where the advertisement there subjected the defendants to less First Amendment protection as recognized in *Central Hudson*, 447 U.S. at 561-63 (1980)); see *supra* note 31, at 566. The dissenting judges also argued that Host's copyright license of the show preempted the actors' claims. *Id.* at 1285-88. Compare *supra* notes 64-65 and 104-05 and accompanying text with *supra* notes 82-83 and accompanying text.

<sup>109</sup> 197 F.3d at 1288-89; compare *supra* notes 64-65 and 104-05 and accompanying text with *supra* notes 82-83 and accompanying text.

<sup>110</sup> *Paramount Pictures Corp. v. Wendt*, 531 U.S. 811 (2000).

<sup>111</sup> 33 F. Supp. 2d 867 (C.D. Cal. 1999) reversed by 255 F.3d 1180 (9th Cir. 2001).

<sup>112</sup> Dustin Hoffman has appeared in scores of motion pictures over the past 30 years and has received numerous honors, including six Academy Award nominations, two Academy Awards, a Golden Globe Award nomination, a Golden Globe Award, and an Emmy Award. *Id.* at 869.

<sup>113</sup> The photograph at issue was a still from the movie *Tootsie*, in which Hoffman starred. The original photograph portrayed him in character, wearing a long red dress and standing in front of a United States flag with the text "What do you get when you cross a hopelessly straight starring actor with a dynamite red sequined dress?" and "You get America's hottest new actress." The new computer-generated photograph incorporated Hoffman's face and head and the United States flag from the original photograph, and a new photograph of a male body clothed in the silk gown and high-heel shoes. *Id.* at 870. See also Appellant's Reply Brief at 13, *Hoffman v. Los Angeles Magazine, Inc.*, 255 F. 3d 1180 (9th Cir. 2001) (No. 99-55563). [Hereinafter Appellant's Reply Brief].

<sup>114</sup> 33 F. Supp. 2d at 870.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*



models wearing spring 1997 fashions.<sup>117</sup> Hoffman sued the magazine and its owner, Capital Cities/ABC, Inc.,<sup>118</sup> under California's statutory and common law right of publicity, claiming that he did not give them permission to portray him in the silk gown and high-heels.<sup>119</sup>

The district court rejected the defendants' argument that Hoffman did not have a right to protect his role in "Tootsie."<sup>120</sup> Moreover, the court downplayed the value of the humor in the speech, holding that the magazine violated Hoffman's common law right of publicity by using his name and likeness solely for commercial purposes.<sup>121</sup> The magazine also violated Hoffman's statutory right of publicity by using his name and likeness in the magazine without his consent solely for commercial purposes.<sup>122</sup> Unlike the majority opinions in *White* and *Wendt*, however, the court purported to apply the first step in the *Central Hudson* test to determine if the "commercial" speech deserved First Amendment protection.<sup>123</sup> Although it never cited *Central Hudson*, the court accepted Hoffman's argument that readers would get the

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<sup>117</sup> *Id.* (noting that many of the clothing articles in "Grand Illusions" were designed by designers who advertised heavily in Los Angeles magazine). Page 7 of the article stated: "104 GRAND ILLUSIONS. By using state-of-the-art digital magic, we clothed some of cinema's most enduring icons in fashions by the hottest designers." At page 10, the Editor-in-Chief wrote:

The movie stills in our refashioned spectacular, "Grand Illusions" (Page 104), have appeared before — in fact, they're some of the most famous images in Hollywood history. But you've never seen them quite like this. . . We know purists will be upset, but who could resist the opportunity to produce a 1997 fashion show with mannequins who have such classic looks?

*Id.* at 870-871.

<sup>118</sup> Capital Cities/ABC, Inc., now known as ABC, Inc., is owned by the Walt Disney Company. Capital Cities/ABC, Inc. owned 100% of Los Angeles Magazine, Inc., the publisher of Los Angeles Magazine. *Id.* at 870.

<sup>119</sup> *Id.* at 871, 874 (noting that Hoffman also brought suit under Section 43 of the Lanham Act, 15 U.S.C. § 1125(a) and Section 17200 of the California Business and Professions Code). The court also found that the magazine ignored its contractual obligations with the companies that supplied the celebrity pictures by altering them. *Id.* at 872.

<sup>120</sup> The defendants argued that Columbia Pictures, the *Tootsie* copyright holders, could assert a copyright claim that would preempt Hoffman's right of publicity claim. *Id.* at 871.

<sup>121</sup> The court also held that Hoffman suffered injury and damage "in that he was unable to reap the commercial value or control the use to which his name and likeness were put" when the magazine used his name and likeness without his permission. *Id.* at 873 (citing *Eastwood*, 149 Cal.App.3d at 417 and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992)); compare *supra* notes 64-65 and 104-05 and accompanying text with *supra* notes 82-83 and 108-09 and accompanying text.

<sup>122</sup> The court also held that Hoffman suffered injury and damage when the magazine knowingly used his name and likeness in the magazine without his consent. *Hoffman*, 33 F. Supp. 2d at 873-74 (citing Section 3344 of the California Civil Code and *Waits*, 978 F.2d at 1103); compare *supra* notes 64-65 and 104-05 and accompanying text with *supra* notes 82-83 and 108-09 and accompanying text.

<sup>123</sup> See *supra* note 31 and accompanying text; compare *supra* notes 64-65 and 104-05 and accompanying text with *supra* notes 82-83 and 108-09 and accompanying text.

false impression that the body in the photograph was actually Hoffman's body.<sup>124</sup> The court thus rejected a First Amendment defense because the article was "misleading."<sup>125</sup> Moreover, the court held that the *Zacchini* holding prohibited the magazine's "news" or "public affairs" defense.<sup>126</sup> "[T]he right of publicity permits the use of a person's likeness only to the limited extent reasonably required to convey the news to the public," and this article did not convey news.<sup>127</sup> In addition to punitive damages and attorney's fees, the district court awarded Hoffman \$1.5 million.<sup>128</sup>

The Court of Appeals for the Ninth Circuit, however, reversed the district court.<sup>129</sup> Without citing *Central Hudson*, Judge Boochever noted that "[c]ommercial speech' has special meaning in the First Amendment context. . . Such speech is entitled to a measure of First Amendment protection."<sup>130</sup> Nevertheless, Judge Boochever held that the magazine's publication was not commercial speech.<sup>131</sup> "Viewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are 'inextricably entwined' with expressive elements, and so they cannot be separated out 'from the fully protected whole.'"<sup>132</sup> Thus, the only way Hoffman could have recovered damages for this "noncommercial" speech was if he could

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<sup>124</sup> *Hoffman*, 33 F. Supp. 2d at 874-75 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). The court also indicated that the First Amendment would have protected the magazine if the article contained commentary, e.g., on styles or colors of clothes that were popular, and if Hoffman's name and likeness were necessary to deliver the article's message. *Id.* at 874; compare *supra* notes 64-65 and 104-05 and accompanying text with *supra* notes 82-83 and 108-09 and accompanying text.

<sup>125</sup> *Id.* at 874-75; compare *supra* notes 64-65 and 104-05 and accompanying text with *supra* notes 82-83 and 108-09 and accompanying text.

<sup>126</sup> 33 F. Supp. 2d at 875; compare *supra* notes 46-47 and accompanying text with *supra* note 84 and accompanying text.

<sup>127</sup> The court indicated that the "news" or "public affairs" defense would have protected the magazine if the clothing in the article were unified by a point of view about fashion and if Hoffman's likeness was required to help convey this view. *Id.*

<sup>128</sup> In reaching this figure, the court considered: (1) Hoffman's stature in the film industry over the previous 30 years; (2) the first-time use of his name and likeness in a non-movie promotional context; (3) his perception of the impact defendants' use would have on film executives; (4) his unique role in *Tootsie*; and (5) the fact that the defendant magazine was located in the home town of the film industry. *Id.* at 872-873.

<sup>129</sup> *Hoffman*, 255 F.3d 1180 (9th Cir. 2001).

<sup>130</sup> *Id.* at 1184 (citing *Greater New Orleans Broad. Assoc., Inc. v. United States*, 527 U.S. 173, 183 (1999)).

<sup>131</sup> *Hoffman*, 255 F.3d at 1185-86; compare *supra* notes 64-65, 104-05, and 121-25 and accompanying text with *supra* notes 82-83 and 108-09 and accompanying text.

<sup>132</sup> *Id.* at 1185 (citing *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1991) and *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988)):

have proved by clear and convincing evidence that the magazine published the article with “reckless disregard for the truth” or a “high degree of awareness of probable falsity.”<sup>133</sup> This decision is currently being appealed.

### 3. *Parks v. LaFace Records*<sup>134</sup>

Within a year after the district court decision in *Hoffman*, another case pertaining to the conflict between the right of publicity and the First Amendment arose. During late September 1998, LaFace Records<sup>135</sup> released an album by the musical group Outkast<sup>136</sup> entitled “Aquemini.”<sup>137</sup> The album contained 15 songs, including its first single release, “Rosa Parks.”<sup>138</sup> Although song lyrics did not mention Rosa Parks, a well-known African-American public figure who came to prominence in 1955 when she refused to give up her seat on a bus to a white passenger,<sup>139</sup> the chorus repeated the words “[a]h, ha, hush that fuss. . . [e]verybody move to the back of the bus,” ten times throughout the song.<sup>140</sup> More than two million copies of the album have been sold,<sup>141</sup> and “Rosa Parks” achieved success on the Billboard Charts.<sup>142</sup> The song also helped Outkast receive its first Grammy nomination.<sup>143</sup> The group advertised the album, the song, and its nomination in print advertisements, a music video, and with stickers on cassette and com-

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LAM [Los Angeles Magazine] did not use Hoffman’s image in a traditional advertisement printed merely for the purpose of selling a particular product. Insofar as the record shows, LAM did not receive any consideration from the designers for featuring their clothing in the fashion article containing the altered movie stills. Nor did the article simply advance a commercial message. “Grand Illusions” appears as a feature article on the cover of the magazine and in the table of contents. It is a complement to and a part of the issue’s focus on Hollywood past and present.

*Id.*; compare *supra* notes 64-65, 104-05, and 121-25 and accompanying text with *supra* notes 82-83 and 108-09 and accompanying text.

<sup>133</sup> *Id.* at 1186-89; compare *supra* notes 64-65, 104-05, and 121-25 and accompanying text with *supra* notes 82-83 and 108-09 and accompanying text.

<sup>134</sup> 76 F. Supp. 2d 775 (E.D. Mich. 1999).

<sup>135</sup> LaFace is a record company that creates, manufactures, and distributes musical sound recordings. Its recordings are manufactured and distributed by various entities under the Arista Records and BMG Entertainment auspices. *Id.* at 778.

<sup>136</sup> Outkast consists of recording artists Kenny Edmonds and Antonio Reid. By contract, Outkast’s services are rendered to LaFace Records. *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Parks’ refusal to give up her bus seat in Montgomery, Alabama launched a bus boycott that helped end segregation on public transportation. Parks’ act later sparked the 1960s Civil Rights Movement. *Id.* at 777.

<sup>140</sup> *Id.* at 778.

<sup>141</sup> *Id.* (noting that this is double platinum status).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

pact disc jewel cases.<sup>144</sup> However, Rosa Parks sued Outkast under the Michigan common law right of publicity for failure to obtain permission to use her name.<sup>145</sup>

The District Court for the Eastern District of Michigan held that a right of publicity claim does not exist when a celebrity's name or likeness is used in ads for a work that is protected by the First Amendment.<sup>146</sup> The court did not apply the *Central Hudson* test because it found that music is not commercial speech, but is instead "a form of expression and communication . . . [fully] protected under the First Amendment."<sup>147</sup> Moreover, titles are oftentimes the products of "word-play, ambiguity, irony, and illusion," deserving full First Amendment protection.<sup>148</sup> The court added that the use of Parks' name in conjunction with the phrase "move to the back of the bus" is "metaphorical and symbolic."<sup>149</sup> This decision is currently being appealed.

#### 4. *ETW Corp. v. Jireh Publishing, Inc.*<sup>150</sup>

Within a year after *Parks*, yet another case pertaining to the conflict between the right of publicity and the First Amendment arose. Rick Rush, a "sports artist," created an art print captioned "The Masters of Augusta."<sup>151</sup> An insert accompanying the artwork described it as featuring Eldrick "Tiger" Woods<sup>152</sup> "displaying that awesome swing"

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 779 (noting that Parks is particularly offended by the use of her name as the title of a song that allegedly contains "profanity, racial slurs, and derogatory language directed at women").

<sup>146</sup> *Id.* at 780 (citing *Rom Guglielmi v. Spelling-Goldberg Prod's.*, 25 Cal. 3d 860 at 873); compare *supra* notes 64-65, 104-05 and 121-25 and accompanying text with *supra* notes 82-83, 108-09, and 131-33 and accompanying text.

<sup>147</sup> 76 F. Supp. 2d at 779-80 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995)). The court noted that entertainment and the possible offensive use of a person's name receive the same protection under the First Amendment as the exposition of ideas. *Id.* at 781-82; compare *supra* notes 64-65, 104-05, and 121-25 and accompanying text with *supra* notes 82-83, 108-09, and 131-33 and accompanying text.

<sup>148</sup> *Id.* at 780; compare *supra* notes 64-65, 104-05, and 121-25 and accompanying text with *supra* notes 82-83, 108-09, and 131-33 and accompanying text.

<sup>149</sup> *Id.* at 780-82 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989)). The court rejected Parks' claim that her name was used as the title solely to attract attention and that the song is unrelated to her and Civil Rights. *Id.* at 780. The court ordered that Parks' motion for summary judgment and injunctive relief be denied and that the defendants' motion for summary judgment be granted. *Id.* at 789.

<sup>150</sup> 99 F. Supp. 2d 829 (N.D. Ohio 2000).

<sup>151</sup> *Id.* at 830.

<sup>152</sup> Tiger Woods was one of the world's best-known professional golfers in 2000. He was the youngest person ever to win the U.S. Junior Amateur Championship and the only person to win it three times. He was also the youngest U.S. Championship winner and the first to win this title three straight years. In 1996, Woods became a full-time professional golfer and

and “flanked by his caddie . . . and final round player partner’s caddie.”<sup>153</sup> After learning about the print, Tiger Woods’ exclusive licensing agent, ETW Corp.,<sup>154</sup> sued the publisher of Rush’s artwork, Jireh Publishing, Inc.,<sup>155</sup> under the Ohio common law right of publicity.<sup>156</sup>

In a decision similar to *Parks*, the District Court for the Northern District of Ohio held that the artwork was not commercial speech requiring *Central Hudson* analysis because it deserved full First Amendment protection.<sup>157</sup> The work was “an artistic creation seeking to express a message.”<sup>158</sup> Moreover, the court held that *Zacchini* did not prevent a First Amendment defense because this case, unlike *Zacchini*, did not involve the appropriation of an “entire act.”<sup>159</sup> This decision is currently being appealed.

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won two Professional Golf Association (PGA) tour events. The following year, Woods won six PGA tour events and became the youngest player to win the Masters Tournament. *Id.*

<sup>153</sup> The bottom of the print contains the words “The Masters of Augusta,” “Rick Rush,” and “Painting America through Sports.” Rush’s signature is on the bottom right hand corner of the print. The print is certified as a “limited edition” in another insert. In large letters, the language, “Rick Rush — Painting America Through Sports” and a large copy of Rush’s signature appears on the outside of the white envelope containing the print. In smaller print, the words, “Masters of Augusta, Tiger Woods” appear under the back flap of the envelope. *Id.*

<sup>154</sup> ETW has filed several trademark applications with the United States Patent and Trademark Office for the “Tiger Woods” mark. In 1998, ETW received registration for art prints, calendars, mounted photographs, unmounted photographs, notebooks, pencils, pens, posters, and trading cards under the “TIGER WOODS” trademark. *Id.* at 829.

<sup>155</sup> Jireh is an Alabama publishing company. *Id.*

<sup>156</sup> ETW also sued under the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a) and (c), the Ohio unfair competition and deceptive trade practices statute, and the Ohio unfair competition and trademark infringement common law. *Id.* at 830-31.

<sup>157</sup> *Id.* at 836 (citing *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996)); compare *supra* notes 64-65, 104-05, and 121-25 and accompanying text with *supra* notes 82-83, 108-09, 131-33 and 146-48 and accompanying text.

<sup>158</sup> *Id.* at 835-36 (citing *Hurley*, 515 U.S. at 569; *Kaplan v. California*, 413 U.S. 115, 119-20 (1973); and *Bery*, 97 F.3d at 695. The court rejected the plaintiff’s arguments that: (1) the poster was merely merchandise not entitled to First Amendment protection; (2) the poster was commercial speech; and (3) the defendant pretended to deliver newsworthy information. *Id.* at 834-36; compare *supra* notes 64-65, 104-05, and 121-25 and accompanying text with *supra* notes 82-83, 108-09, 131-33, and 146-48 and accompanying text.

<sup>159</sup> *Id.* at 834 (citing *Zacchini*, 47 Ohio St. 2d at 351, and *Carson*, 698 F.2d at 834). “The right of publicity is limited in certain circumstances by the First Amendment.” *Id.* (citing *Parks*, 76 F. Supp. 2d at 779; J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 28:40-28:41 (4th ed. 1999); and JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 2.16[2] (1999)); compare *supra* notes 46-47 and accompanying text with *supra* notes 84 and 126 and accompanying text.

### III. ANALYZING CASES THAT INVOLVE A CONFLICT BETWEEN THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

#### A. The Supreme Court's Central Hudson Test Would Afford Significant Protection to Speech in Most Right of Publicity Cases

The fact that defendants in many right of publicity cases want to profit from their speech does not mean that they should lose First Amendment protection.<sup>160</sup> In fact, most disseminated information is intended to make a profit. For example, television and radio news stations, newspapers, and magazines would never be able to participate in speech if they were unable to recover their costs and profits.<sup>161</sup> In the past, however, many scholars did not think that non-newsworthy speech raised constitutional concerns.<sup>162</sup> Moreover, several courts merely regarded commercial speech as "durable expression" not requiring legal protection, for it was thought that no regulation could ultimately prevent advertisers from advertising.<sup>163</sup>

In spite of this view, commercial speech moved a step closer to First Amendment protection in the 1950s and 1960s.<sup>164</sup> After World War II, the Supreme Court held that various forms of speech, including fiction, film, and art, received the same amount of First Amendment protection as "news."<sup>165</sup> Then, in the 1970s, the Supreme Court afforded commercial speech a measurable degree of constitutional pro-

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<sup>160</sup> Several cases hold that constitutional protection is not any weaker if the speech is profitable. See *New Kids on the Block v. News America Pub., Inc.*, 745 F.Supp. 1540, 1546 (C.D. Cal. 1990); *Time, Inc. v. Hill*, 385 U.S. 374, 396-97 (1967) (works produced for "trade purposes" maintain First Amendment protection); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (stating that the fact the speaker was paid is irrelevant with respect to First Amendment protection); and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (stating that speech "conducted for private profit" does not lose constitutional protection).

<sup>161</sup> Zimmerman, Brief of 73 Law Professors, *supra* note 36, at 16.

<sup>162</sup> *Id.* at 7.

<sup>163</sup> The Supreme Court in *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942), explicitly stated that commercial speech was unprotected. The Court later held that speech concerning "economic self-interest" deserves less protection because it is a "hardy breed of expression." *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 n. 6 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24 (1976). Moreover, commercial speech is "less likely to be 'chilled' [sic] and not in need of surrogate litigators." *Bd. of Trs. v. Fox*, 492 U.S. 469, 481 (1989).

<sup>164</sup> Zimmerman, Brief of 73 Law Professors, *supra* note 36, at 8.

<sup>165</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Spence v. Washington*, 418 U.S. 405 (1974); *Burstyn*, 343 U.S. 495; *Winters v. New York*, 333 U.S. 507 (1948).

tection.<sup>166</sup> Other courts soon began to follow the Supreme Court's lead in protecting commercial speech.<sup>167</sup>

Some twenty years later, the Court held that speech that "does no more than propose a commercial transaction" should receive stronger constitutional protection than it had been receiving.<sup>168</sup> In *City of Cincinnati v. Discovery Network, Inc.*,<sup>169</sup> the Court struck down a city ordinance based on safety and aesthetics banning sidewalk newsracks dispensing "commercial handbills" but not ones dispensing newspapers.<sup>170</sup> The city argued that commercial speech had only a low constitutional value.<sup>171</sup> The Court rejected that argument, however, stating that such a view seriously underestimated the value of commercial speech.<sup>172</sup> "[T]he consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."<sup>173</sup> According to the Court, commercial speech informs the public of "the availability, nature, and prices of products and services" and thereby "performs an indispensable role in the allocation of resources in a free enterprise system."<sup>174</sup>

In 1996, the Court in *44 Liquormart, Inc. v. Rhode Island*<sup>175</sup> again struck down a ban on commercial speech.<sup>176</sup> According to Justices Stevens, Thomas, Kennedy, and Ginsburg, the following basic First Amendment principles apply to commercial speech:

[A]ttempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role

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<sup>166</sup> The Court reversed itself in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, when it held that advertising deserved partial protection. 425 U.S. 748, 773 (1976).

<sup>167</sup> In *Lugosi v. Universal Pictures*, 25 Cal. 3d 813 (1979), for example, Judge Mosk stated that a "salutary tendency . . . is to encourage the free dissemination of ideas — political, literary, artistic — even by commercial sources." *Id.* at 828.

<sup>168</sup> *City of Cincinnati v. Discovery Network, Inc.*, 407 U.S. 410, 420 (1993)(citing *Virginia State Board of Pharmacy*, 425 U.S. at 762).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* One of the respondents advertised adult educational, recreational, and social programs. The other respondent published and distributed a free magazine that advertised real estate. *Id.* at 1508.

<sup>171</sup> *Id.* at 1511. The city thus contended that restricting the use of newsracks to disseminate commercial messages "burden[ed] no more speech than [was] necessary to further its interest in limiting the number of newsracks." *Id.* See *supra* note 36 and accompanying text.

<sup>172</sup> *Id.* at 1511. But see *supra* note 36 and accompanying text.

<sup>173</sup> *Id.* at 1512 n. 17 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)). But see *supra* note 36 and accompanying text.

<sup>174</sup> *Id.* (citing *Bates*, 433 U.S. 350 and *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring)). But see *supra* note 36 and accompanying text.

<sup>175</sup> 517 U.S. 484 (1996).

<sup>176</sup> *Id.* The ban involved prohibitions enacted by the Rhode Island Legislature against the advertisement of retail liquor prices except at the place of sale. *Id.* at 489-90.

that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.<sup>177</sup>

Justices Stevens, Kennedy, and Ginsburg added that “[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that we should apply to decisions to suppress them.”<sup>178</sup> Moreover, in 1999 and in 2001, the Court in *Greater New Orleans Broadcasting Assoc., Inc. v. United States*<sup>179</sup> and in *Lorillard Tobacco Co. v. Reilly*,<sup>180</sup> respectively, also rejected bans on commercial speech, holding that the *Central Hudson* test must be applied strictly before a restriction on commercial speech will be upheld.<sup>181</sup>

This trend of increasing protection for commercial speech may be related to the recent view that commercial speech is not “durable.”<sup>182</sup> The *White* case and other decisions, for example, have forced advertisers to “rethink the time-honored use of satire and parody in commercials.”<sup>183</sup> As evidence, one lawyer who represents advertisers describes how he advises his clients in the wake of *White*:

What we tell our clients these days is that the safest course . . . if a contemplated ad is questionable, is really just obtain permission from the celebrity, or scrap it. . . As we’ve learned from Vanna White, you just don’t know which way a jury’s going to come out. . . It benefits us and our clients, certainly, if we’re on the side of caution. . . [the Vanna White case] certainly put the fear of God into our clients.<sup>184</sup>

<sup>177</sup> *Id.* at 512.

<sup>178</sup> *Id.* at 501 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491-92 (1995) (Stevens, J., concurring in judgment)).

<sup>179</sup> 527 U.S. 173 (1999).

<sup>180</sup> 121 S. Ct. 2404 (2001).

<sup>181</sup> *Greater New Orleans Broadcasting Ass’n. v. United States*, 527 U.S. 173, 182 (1999). See also *id.* at 196-97 (Rehnquist, J., concurring) (stating that the *Central Hudson* test imposes a demanding standard of review on commercial speech regulation). The ban in *Greater New Orleans Broadcasting Assoc.* involved restrictions against broadcast promotional advertisements for gaming available at private, for-profit casinos. *Id.* at 180. The ban in *Lorillard Tobacco Co.* involved the regulation of outdoor and point-of-sale advertising of smokeless tobacco and cigars. *Lorillard Tobacco Co.*, 121 S. Ct. at 2410-12. The Court rejected petitioners’ argument that Court should not apply the *Central Hudson* analysis in cases involving restrictions on commercial speech. *Id.* at 2421.

<sup>182</sup> Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 TORT AND INS. L.J. 635, 658 (Spring 1995).

<sup>183</sup> Eben Shapiro, *Rising Caution on Using Celebrity Images*, N.Y. TIMES, Nov. 4, 1992, at D20. See also Aaron Epstein, *Risky Business: Ads’ Parodies of Stars*, ARIZ. REPUBLIC, Aug. 30, 1993, at C2; Robert F. Kemp, *Vanna White Parody Was Indeed a Knock-off, Says 9th Circuit. Robot Is a No-No*, CORP. LEGAL TIMES, Oct. 1993, at 11.

<sup>184</sup> Barnett, *supra* note 183, at 658 n. 166 (citing Howard Weingrad, Remarks at the Program “The Outer Limits of the Right of Publicity” at the Meeting of the American Bar



Another lawyer stated:

I can tell you that in the real world, where millions of dollars are depending on our decision . . . we're going to walk away from it. We're not going to subject our clients to the possibility of being drawn into that type of a lawsuit, notwithstanding the fact that we may at the end of the day win [due to] protection by the First Amendment.<sup>185</sup>

Thus, commercial speech is not "durable" because, although advertisers may not stop advertising, they will "change their approach to avoid liability risks" and thus avoid some of the satire, parody, social, and political content they otherwise might offer.<sup>186</sup>

Meanwhile, the *Central Hudson* test must be followed when assessing the constitutionality of laws restricting "commercial" speech.<sup>187</sup> According to the Supreme Court, the four parts of the test are all important and interrelated: "Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three."<sup>188</sup> Moreover, plaintiffs in cases involving commercial speech bear the burden of satisfying the third and fourth steps: identifying a substantial interest and justifying the challenged restriction.<sup>189</sup> The plaintiff's burden under the third part of the test "is not satisfied by mere speculation or conjecture;" rather, those proposing to restrict commercial speech must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree."<sup>190</sup> Consequently, "the regulation may not be sustained if it provides only ineffective or remote support" for the purpose of the restriction.<sup>191</sup> According to the Court,

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Association, Tort & Insurance Practice Section (Aug. 9, 1994) (tape available from the ABA).

<sup>185</sup> *Id.* (citing Stuart L. Friedel, Remarks at the Program "The Outer Limits of the Right of Publicity" at the Meeting of the American Bar Association, Tort & Insurance Practice Section (Aug. 9, 1994) (tape available from the ABA)).

<sup>186</sup> *Id.* at 661-62.

<sup>187</sup> See *supra* note 38 and accompanying text.

<sup>188</sup> *Greater New Orleans Broadcasting Ass'n., Inc.*, 527 U.S. at 183-84. Because of these intricacies, however, petitioners, judges, and scholars have advocated repudiation of the *Central Hudson* standard in favor of a more straightforward test for analyzing the validity of governmental restrictions on commercial speech. *Id.* at 184 n. 3 (citing Pet. for Cert. 23; Brief for Petitioners 10; Reply Brief for Petitioners 18-20; 44 *Liquormart, Inc.*, 517 U.S. at 526-28 (Thomas, J., concurring); Kozinski & Banners, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990); Brief for Association of National Advertisers, Inc., as *Amicus Curiae* 3-4; and Brief for American Advertising Federation as *Amicus Curiae* 2).

<sup>189</sup> See *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983).

<sup>190</sup> *Edenfield*, 507 U.S. at 770-71.

<sup>191</sup> *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).

“this requirement is critical.”<sup>192</sup> Otherwise, commercial speech could easily be restricted “in the service of other objectives that could not themselves justify a burden on commercial expression.”<sup>193</sup> The fourth part of the test (complementing the third) requires that the proponent of the commercial speech restriction demonstrate “narrow tailoring of the challenged regulation to the asserted interest—a fit that is not necessarily the single best disposition but one whose scope is in proportion to the interest served.”<sup>194</sup> The regulation must indicate that its proponent “carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition.”<sup>195</sup> Although the courts in *Hoffman*, *Parks*, and *ETW* did not find that the speech at issue was commercial, the courts in *White* and *Wendt* did. Thus, those two courts erred in not applying the *Central Hudson* test.

#### B. Applying the Supreme Court’s *Central Hudson* Test to Cases that Involve the Right of Publicity and Commercial Speech

In applying the first prong of *Central Hudson* to a case such as *White* or *Wendt*, where the speech at issue is considered “commercial,” a court must first determine whether the advertisement is lawful and not misleading.<sup>196</sup> In addition to offering evidence that the ad is a violation of a law (other than the right of publicity, which must first withstand the *Central Hudson* test), the celebrity might offer evidence that the ad centers around his endorsement of the product.<sup>197</sup> Thus, the ad is misleading. The advertiser, however, might introduce evidence that consumers do not make a link between a celebrity and purchasing the product.<sup>198</sup> Thus, the ad is not misleading.

If a court finds that the ad is neither unlawful nor misleading, it would have to determine whether the government’s interest in providing a right of publicity is substantial under the second prong of *Central Hudson*.<sup>199</sup> The celebrity might offer evidence that he put a great deal of time and effort into achieving his “celebrity” status, while the advertiser put no time or effort into creating that status.<sup>200</sup> Thus, the govern-

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<sup>192</sup> *Edenfield*, 507 U.S. at 771.

<sup>193</sup> *Id.*

<sup>194</sup> *Fox*, 492 U.S. at 480; 44 *Liquormart*, 517 U.S. at 529, 531 (O’Connor, J., concurring in judgment).

<sup>195</sup> *Fox*, 492 U.S. at 480.

<sup>196</sup> See *supra* note 38 and accompanying text.

<sup>197</sup> See *supra* notes 60-64 and accompanying text; *supra* notes 21-22 and accompanying text.

<sup>198</sup> See *supra* notes 68-75 and accompanying text; *supra* note 21 and accompanying text.

<sup>199</sup> See *supra* note 38 and accompanying text.

<sup>200</sup> See *supra* notes 19-20 and accompanying text.

mental interest in the celebrity's right of publicity is substantial. The advertiser, however, might demonstrate that the governmental interest in the celebrity's right of publicity is not substantial by arguing that the audience and the media, and not the celebrity alone, helped create his "celebrity" identity.<sup>201</sup>

Under *Central Hudson's* third prong, the celebrity would have the burden of establishing that a restriction on commercial speech directly and materially advances his interest in the right of publicity.<sup>202</sup> He could not satisfy this burden with "speculation or conjecture."<sup>203</sup> Thus, if the celebrity offers evidence, for example, that the right of publicity encourages people to put forth the time and effort to develop the skills necessary to become a celebrity because it assures them that they will be able to "reap what they sow," the burden might be satisfied.<sup>204</sup>

Under the fourth prong of *Central Hudson*, the celebrity must establish that the right is not more extensive than necessary to serve the governmental interests that support it.<sup>205</sup> If he can demonstrate that the legislature "carefully calculated" the costs and benefits to the First Amendment when it contemplated extending celebrities' control over speech relating to their "identities," then he will have satisfied his burden.<sup>206</sup>

Although the courts in *Hoffman*, *Parks*, and *ETW* did not find that the speech at issue was exclusively commercial, the courts in *White* and *Wendt* did.<sup>207</sup> A court applying *Central Hudson's* commercial speech test to *White* or *Wendt* could have reached the same result as the courts did in those cases. However, without specific Supreme Court guidance on resolving conflicts between the right of publicity and the First Amendment, *Central Hudson* requires that we analyze commercial speech carefully under each of its four steps.<sup>208</sup> Thus, until the Supreme Court grants certiorari in a case similar to *White* or *Wendt*, what matters under *Central Hudson* is not only whether commercial speech is restricted but whether a court properly analyzes that restriction.<sup>209</sup>

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<sup>201</sup> See *supra* note 19 and accompanying text.

<sup>202</sup> See *supra* note 38 and accompanying text; *supra* notes 190-93 and accompanying text.

<sup>203</sup> See *supra* notes 190-93 and accompanying text.

<sup>204</sup> See *supra* note 18 and accompanying text.

<sup>205</sup> See *supra* note 38 and accompanying text; *supra* notes 194-95 and accompanying text.

<sup>206</sup> See *supra* notes 194-95 and accompanying text; *supra* note 61 and accompanying text.

<sup>207</sup> Compare *supra* notes 64-65, 104-05, 121-25 and accompanying text with *supra* notes 82-83, 108-09, 131-33, 146-48, 158 and accompanying text.

<sup>208</sup> See *supra* note 38 and accompanying text.

<sup>209</sup> See *id.*

#### IV. CONCLUSION

In *Zacchini*, the United State Supreme Court decided the only case involving the inherent conflict between the right of publicity and the First Amendment. The Court's opinion in that case, however, cannot be relied upon by plaintiffs in right of publicity cases because it is narrowly drawn. This lack of Supreme Court guidance has caused confusion among the circuits, leading to decisions like those in *White* and *Wendt* that erroneously prioritize the protection of celebrities' identities via the right of publicity over the First Amendment's interest in protecting speech. The Supreme Court denied certiorari in *White* and *Wendt*. However, a petition for writ of certiorari in *Hoffman, Parks*, or *ETW* would provide the Court with at least one more opportunity to remedy this confusion.

