

TOO FAMOUS FOR THE RIGHT OF PUBLICITY:  
*ETW Corp.* AND THE TREND TOWARDS  
 DIMINISHED PROTECTION FOR  
 TOP CELEBRITIES

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## INTRODUCTION

Infamous is when you're more than famous. This man . . . is evidently so famous that he's in-famous.

—*THREE AMIGOS!* (Orion Pictures 1986)

Imagine two golfers competing in the PGA Tour. One is at the top of his game and enjoys the number one ranking. He is still young, but already is considered one of the best in the sport's long history. He drives balls farther than was previously imagined and strikes terror in the hearts of his opponents. His incomparable ability and youthful image combine to create a potent marketing force. Several major brands sponsor the young golfer and pay him handsomely for his services. On a historic level, he is widely credited with revitalizing a sport previously seen as the domain of the elite. Let's call this golfer "Tiger Woods."<sup>1</sup>

The second golfer duffs better than you or me, but he is no Tiger Woods. He is ranked number 100 in the world – not bad, considering a wicked slice plagues his short game. He has never won a major PGA competition, and he has attained little recognition outside of his hometown, where he is a hero. He has no major sponsors and makes appearances in golf magazines only when he hits a hole-in-one, a feat he performs every few tournaments. He spends most of his practice time teeing off on par three holes, where he has a better chance of sinking the initial drive than he does of scoring on a chip shot. This golfer's name is, for the sake of simplicity and to emphasize his fictionality, Holden One.<sup>2</sup>

Enter a third and final personality: Rick Rush, who heralds himself as "America's Sports Artist."<sup>3</sup> Rush has always been fascinated by sports, but prefers the horsehair brush to bats, clubs, and

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<sup>1</sup> See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (from which facts for Tiger Woods are derived); see also David J. Michnal, *Tiger's Paper Tiger: The Endangered Right of Publicity*, 58 WASH. & LEE L. REV. 1155, 1156 (2001) (setting the scene of the 1997 Masters Golf Tournament); Marcia Chambers, *Lawsuit Pits Artists' Rights vs. Athletes'*, N.Y. TIMES, Feb. 16, 1999, at D1 (providing background for *ETW Corp.* lawsuit).

<sup>2</sup> This fictional golfer is used for purposes of comparison to Tiger Woods.

<sup>3</sup> See *ETW Corp.*, 332 F.3d at 918 (from which facts for Rick Rush are derived); see also *supra* note 1; Jireh Publishing International, Inc. Homepage, at <http://www.jirehpub.com> (last visited Jan. 31, 2005) (referring to "America's Sports Artist, Rick Rush").

the like. He travels the country painting athletes who excel in their games. To Rush, their Ruthian accomplishments symbolize the triumph of the human spirit. Additionally, Rush licenses his original works to a publishing company that markets thousands of lithograph versions to sports fans.

Woods, One, and Rush are all present at the PGA Masters Tournament, one of the tour's most prestigious events. The club in Augusta, Georgia has a storied past and winning means taking home the famed green jacket and, possibly, golf immortality.

During the tournament, Woods makes easy work of his competitors. His strong swing and intense focus while putting are unmatched. He wins by the largest margin in Masters history and is also the youngest golfer to don the green jacket.<sup>4</sup>

Holden One finishes predictably in the number 100 spot, but his practice on par three holes has paid off and he scores the only hole-in-one of the tournament. When he sees the ball drop into the cup, he throws his hat into the air and high-fives everyone in sight.

Rush is thrilled with the Masters this year. He has seen Woods perform at the pinnacle of golf and One accomplish a rare achievement. He decides to render two paintings of the Masters: one of Woods, the other of One.

The two paintings are similar in composition. Both depict the golfers in three different stances. The Woods painting emphasizes his swing in one view and his putting acumen in the other two.<sup>5</sup> Holden One is shown once mid-swing and then throwing up his hat and high-fiving fans in the other views. In the immediate backgrounds of each painting are Augusta's clubhouse and signature magnolias. Six great golfers can be seen even further in the background, along with the leader board.<sup>6</sup>

Rush, satisfied with his paintings, submits them to his pub-

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<sup>4</sup> See *supra* note 1.

<sup>5</sup> See *ETW Corp.*, 332 F.3d at 918. The court described Rush's painting, *The Masters of Augusta*, in detail:

In the foreground of Rush's painting are three views of Woods in different poses. In the center, he is completing the swing of a golf club, and on each side he is crouching, lining up and/or observing the progress of a putt. To the left of Woods is his caddy, Mike "Fluff" Cowan, and to his right is his final round partner's caddy. Behind these figures is the Augusta National Clubhouse. In a blue background behind the clubhouse are likenesses of famous golfers of the past looking down on Woods. These include Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus. Behind them is the Masters leader board.

*Id.* (footnotes omitted).

<sup>6</sup> *Id.*

lisher, who prints low-end lithographs<sup>7</sup> and more expensive serigraphs.<sup>8</sup> The publisher advertises the prints on the company website and soon takes orders from golf fans.<sup>9</sup>

Tiger Woods and Holden One are distraught when they learn about the prints. They are appalled that Rush and his publishing company are selling their images without permission, and worse, without sharing the profits. Woods and One each consult with their attorneys, who believe (other claims notwithstanding) that each golfer's right of publicity has been infringed.<sup>10</sup> The attorneys inform their clients that they have a right to profit from the commercial use of their identities.<sup>11</sup> The two sportsmen file suit separately against Rush's distributor, Jireh Publishing, Inc., who responds that the posters, as artistic speech, are protected by the First Amendment.<sup>12</sup>

In July 2003, the Sixth Circuit considered the Woods case and affirmed the Northern District Court of Ohio's grant of summary judgment for Jireh Publishing. The court held that Woods' right of publicity was outweighed by the artist's right to free expression. In reaching this decision, the court deviated from the traditional examination of First Amendment and publicity rights. One factor in the court's decision was its finding, without citing evidence, that "Woods, like most sports and entertainment celebrities with commercially valuable identities, engages in an activity, professional golf, that in itself generates a significant amount of income which is unrelated to his right of publicity."<sup>13</sup> Consequently, "[e]ven in the absence of his right of publicity, [Woods] would still be able to reap substantial financial rewards from authorized appearances and endorsements."<sup>14</sup>

The court's emphasis on the degree of Woods' celebrity represents a recent trend in right of publicity cases.<sup>15</sup> When balancing

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<sup>7</sup> Lithographs are prints produced by pressing metal or stone plates on which an image is depicted. Jireh published and marketed five thousand 9" x 11" lithographs of Rush's *The Masters of Augusta* at an issuing price of \$100. *See id.* at 919.

<sup>8</sup> Serigraphs are handmade prints produced by pressing paint through a series of silk screens. Jireh published and marketed two hundred and fifty 22½" x 30" serigraphs of Rush's *The Masters of Augusta* at an issuing price of \$700. *See id.*

<sup>9</sup> *See supra* note 1.

<sup>10</sup> *See infra* note 20 (defining the right of publicity).

<sup>11</sup> *Id.*

<sup>12</sup> *See infra* Part I.C (describing the First Amendment defense to the right of publicity).

<sup>13</sup> *ETW Corp.*, 332 F.3d at 938.

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g.,* *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 974 (10th Cir. 1996) (holding that a publisher's First Amendment right to free expression in printing parody baseball cards that mocked famous players outweighed the proprietary right of the players). The court noted:

[E]ven without the right of publicity the rate of return to stardom in the en-

the defendant's First Amendment rights against the plaintiff's right of publicity, courts such as the Sixth Circuit have incorporated the notion of degree of celebrity into the mix of more established factors.<sup>16</sup> The result is that fame may have the effect of infamy when a well-known plaintiff attempts to assert his right of publicity.<sup>17</sup>

Given the new focal point on degree of celebrity, it is not evident that a court would make the same determination in the case of Holden One that it would for Tiger Woods, since the distance between them on the spectrum of fame is wide. This Comment will examine two serious consequences for the still-developing right of publicity, should judicial attention to the extent of a plaintiff's celebrity become the norm. First, the current economic justifications for the right of publicity will be undermined, in that celebrities will neither be rewarded for the fruits of their labor, nor incentivized to bear costs in time, effort, privacy, and personal freedom. Second, such a move by the courts will show that the minority Cultural Studies approach<sup>18</sup> has gained significant acceptance in the past fifteen years. The Cultural Studies approach, discussed throughout this Comment, argues that celebrity personas are part of a cultural commons and, therefore, should be more freely available for use in communication.<sup>19</sup>

Part I of this Comment will provide a detailed history of the right of publicity, including discussions of its justifications and First Amendment issues. Part II will examine the Sixth Circuit's reasoning in *ETW Corp.*, with special focus on its evaluation of Rush's First Amendment rights, Woods' economic interests, and diminished protection for top celebrities. Part III will consider the Sixth Circuit's incorporation of the Cultural Studies perspective into its decision and its impact on the right of publicity doctrine. The conclusion will summarize the argument that when courts curtail the publicity rights of those with a high degree of public exposure,

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tainment and sports fields is probably high enough to bring forth a more than 'adequate' supply of creative effort and achievement . . . In addition, even in the absence of publicity rights, celebrities would still be able to reap financial reward from authorized appearances and endorsements. The extra income generated by licensing one's identity does not provide a necessary inducement to enter and achieve in the realm of sports and entertainment. Thus, while publicity rights may provide some incentive for creativity and achievement, the magnitude and importance of that incentive has been exaggerated.

*Id.* (citation and footnotes omitted).

<sup>16</sup> See *ETW Corp.*, 332 F.3d at 915. See also *supra* note 15 (representing the 10th Circuit's perspective).

<sup>17</sup> See *supra* note 16.

<sup>18</sup> See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993) (championing the Cultural Studies view).

<sup>19</sup> See *id.*

they must first examine other doctrinal remedies and contemplate the impact on all who seek right of publicity protection.

## I. BACKGROUND

### A. *The Right of Publicity's Private Roots*

The right of publicity is “the inherent right of every human being to control the commercial use of his or her identity.”<sup>20</sup> Under the right of publicity, “it is illegal . . . to use without a license the identity of a real person to attract attention to an advertisement or product.”<sup>21</sup>

In the past decade, there has been a dramatic rise in the prominence of the right of publicity. A string of star-studded cases<sup>22</sup> has thrust the doctrine into the limelight, and it has attained near-celebrity status in its own right. Under the heightened attention of legal scholars and litigators alike, the right of publicity has rapidly developed in scope and sophistication. However, the recent prominence of the right of publicity belies its slow development over more than a century. Similarly, its image as a safeguard for celebrities<sup>23</sup> betrays its humble roots in the right of the com-

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<sup>20</sup> 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2003); see RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). The right of publicity is a “state-law created intellectual property right whose infringement is a commercial tort of unfair competition.” MCCARTHY, *supra*, § 1:3, at 1-2.

<sup>21</sup> J. Thomas McCarthy, *The Human Person as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995). McCarthy stresses the importance of understanding what the “right of publicity can do and what it cannot do,” especially with regard to news, advertising, and parody.

For example, an athlete like Superbowl star quarterback Steve Young, cannot use the right of publicity to prevent the use of his name and picture in a story in *Sports Illustrated* magazine and he cannot use it to prevent a sports writer in the *San Francisco Chronicle* from criticizing him. Steve Young can use the right of publicity to either prevent or to license for a fee the use of his name to help sell sports equipment. Steve Young cannot use the right of publicity to stop a writer from doing a biography of his life in print or on film, whether he likes it or hates it. And he cannot use the right of publicity to stop the *National Enquirer* from writing an “in depth” expose of his life.

*Id.* at 131.

<sup>22</sup> See, e.g., *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188 (5th Cir. 1998); *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001); *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284 (9th Cir. 1999); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

<sup>23</sup> See MCCARTHY, *supra* note 20, § 4:2 (“It should come as no surprise that the overwhelming majority of reported right of publicity cases involve a plaintiff whose name or face many people would recognize and therefore label the plaintiff a ‘celebrity.’”); Cristina Fernandez, *The Right of Publicity on the Internet*, 8 MARQ. SPORTS L.J. 289, 320 (1998) (“[T]he right of publicity, while universal in form, is in reality, a special celebrity’s right . . .”); Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity “Wheel” Spun Out of Control*, 45 U. KAN. L. REV. 329, 339 (1997) (“Cases brought by celebrity plaintiffs dominate right of publicity jurisprudence . . .”); Edgar Sargent, *Right of Publicity Tarnishment and the First Amendment*, 73 WASH. L. REV. 223, 232 (1998) (stating non-celebrities’ claims would be “rare”).

mon person to be left alone.<sup>24</sup>

### 1. The Right of Privacy is Recognized

At the close of the nineteenth century, Louis Brandeis and Samuel Warren championed what they deemed “the right of privacy.”<sup>25</sup> In their seminal article, they theorized that “the common law creates a ‘quiet zone’ in each person’s life that is immune from the prying of neighbors, the press and public.”<sup>26</sup> After an initially lukewarm reception in the courts,<sup>27</sup> most judges favored a common law right of privacy by the 1940s.<sup>28</sup>

There were four causes of action that could be supported by a legal right of privacy.<sup>29</sup> The fourth, “the misappropriation of an individual’s name or likeness,” provided the basis for a nascent right of publicity.<sup>30</sup> Yet courts were still reluctant to let celebrities invoke a right to privacy to prevent unauthorized commercial use of their names or likenesses.<sup>31</sup>

### 2. Publicity Rights for a Burgeoning Mass Media

The right sought by celebrities was a nameless concept until the Second Circuit coined the term “right of publicity” in *Haelan*

<sup>24</sup> Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

<sup>25</sup> *Id.* This Comment’s discussion of privacy concerns the unauthorized use of identity by private parties. Not discussed are constitutional privacy protections (derived from the Fourth Amendment) and state privacy laws, which focus on government interference. See MCCARTHY, *supra* note 20, at § 5:94 - 5:102.

<sup>26</sup> Martin P. Hoffman, *Trademarks, Copyrights, and Unfair Competition for the General Practitioner and the Corporate Counsel: The Rights of Publicity and Privacy*, SC68 A.L.I.-A.B.A. 217, 219 (1998).

<sup>27</sup> See MCCARTHY, *supra* note 20, at § 1:15; see also *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (rejecting the notion of a common law right of privacy and holding against a young woman whose image was used without permission in a flourmill’s advertisements); see also Alicia M. Hunt, Comment, *Everyone Wants to Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 Nw. U. L. REV. 1605, 1613 (2001) (describing public disapproval of the 1902 *Roberson* decision). However, in *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905), the Georgia Supreme Court became the first to find in favor of a right of privacy. The court noted:

So thoroughly satisfied are we that the law recognizes . . . the right of privacy, and that the publication of one’s picture without his consent by another as an advertisement . . . is an invasion of this right, that we venture to predict that the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . . .

*Id.* at 81; see also Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455 (1978) (noting the common sense appeal of *Pavesich*).

<sup>28</sup> See MCCARTHY, *supra* note 20, § 1:15.

<sup>29</sup> See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

<sup>30</sup> *Id.* at 389.

<sup>31</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). See, e.g., *O’Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941); *Pallas v. Crowley-Milner & Co.*, 54 N.W.2d 595 (Mich. 1952).

*Laboratories, Inc. v. Topps Chewing Gum*.<sup>32</sup> Responding to the mass-marketing of celebrities for profit<sup>33</sup> – on television, in movies, and in *Haelan*, in baseball cards – the court found that separate from the right of privacy, “a man has a right in the publicity value of his photograph . . . .”<sup>34</sup> Indeed, this new right diverged from the tradition of privacy law.<sup>35</sup> The court found that the right of publicity protected a pecuniary interest, not the dignitary interest envisioned by Brandeis and Warren.<sup>36</sup> This allowed the plaintiff, a chewing gum company that bought the exclusive right to the image of a particular baseball player, to prevail in its claim against a rival company that sold cards with that player’s picture.<sup>37</sup>

For celebrities, the new right of publicity presented a more effective means of seeking damages for the unauthorized publication of their images. Before *Haelan*, they were limited to the tort of invasion of privacy.<sup>38</sup> This remedy was inadequate because many courts believed celebrities had waived their right of privacy by permitting extensive publication of their identities “in connection with their profession.”<sup>39</sup> Additionally, the tort analysis conducted during an invasion of a privacy claim required a showing of emotional harm and damage to character or reputation.<sup>40</sup> Such show-

<sup>32</sup> 202 F.2d 866 (2d Cir. 1953).

<sup>33</sup> See Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, 7 (2001) (discussing the rise of mass media vis-à-vis the right of publicity).

<sup>34</sup> *Haelan*, 202 F.2d at 868.

<sup>35</sup> Nimmer further sharpened the distinction between the rights of publicity and privacy in his influential article of the following year. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

<sup>36</sup> See *Haelan*, 202 F.2d at 868 (noting that unlike private individuals, many celebrities are not embarrassed by public exposure, but rather seek to benefit financially from it); see also Laurel Kallen, *Invading the “Homes” of the Homeless: Is Existing Right-of-Privacy/Publicity Legislation Adequate?*, 19 CARDOZO ARTS & ENT. L.J. 405, 412 (2001) (“Right of publicity claims are generally stronger than right of privacy claims because the former involve a question not of the right to disseminate information, but of proprietorship, i.e. who engages in the dissemination, an interest that parallels the interests involved in patent and copyright law.”); Bridgette Marie de Gyrfas, *Right of Publicity v. Fiction-Based Art: Which Deserves More Protection?*, 15 LOY. L.A. ENT. L. REV. 381, 389 (1995):

Though the Constitution does explicitly provide protection of inventions under the patent laws, it does not explicitly provide protection for an individual’s right of publicity. This constitutional silence regarding the right of publicity may be due to the fact that, at the time the Constitution was written, there was not nearly the value associated with being prominent that there is today.

*Id.*

<sup>37</sup> *Haelan*, 202 F.2d at 866. The defendant failed to persuade the court that the plaintiff’s contract merely waived the athlete’s privacy rights. The court found an independent “right of publicity” in the ballplayer’s identity, and held that that the ballplayer had granted the exclusive use of his image to the plaintiff. *Id.* at 868.

<sup>38</sup> See *id.* at 868 (separating publicity and privacy rights).

<sup>39</sup> Nimmer, *supra* note 35, at 208-9; see also Carpenter, *supra* note 33, at 7.

<sup>40</sup> But see Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 230 (1999) (showing

ings “seemed unable to accommodate the claims of those whose identity was already public.”<sup>41</sup> Judge Frank opined in *Haelan* that, “far from having their feelings bruised through public exposure of their likenesses, [celebrities] would feel sorely deprived if they no longer received money for . . . popularizing their countenances . . . .”<sup>42</sup> What they really sought was to promote their identities in a manner that was within their control and that permitted them to profit.

### 3. *Zacchini* and the Expanding Scope of Protection

In the period after *Haelan*, there was widespread regard for publicity rights as theorized by Nimmer<sup>43</sup> and the *Restatement (Third) of Unfair Competition*.<sup>44</sup> Amidst growing attention, the United States Supreme Court heard its first (and only) right of publicity case, *Zacchini v. Scripps-Howard Broadcasting Co.*, in 1977.<sup>45</sup> The suit concerned Hugo Zacchini’s human cannonball act, which was performed at an Ohio county fair and broadcast in its entirety on a local news program.<sup>46</sup> The Court upheld the performer’s common law right of publicity claim against the television station, finding that much of the economic value of Zacchini’s 200-foot flight “lies in the ‘right of exclusive control over the publicity to his performance;’ if the public can see the act for free on television, it will be less willing to pay to see it at the fair.”<sup>47</sup> Thus, the rationale for the right of publicity was located in an effort to prevent “unjust enrichment by the theft of good will.”<sup>48</sup>

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the growing influence during the first half of the twentieth century of property interests in invasion of privacy suits). “[D]amages were increasingly measured in terms of lost compensation and unjust enrichment.” *Id.*, as quoted in Carpenter, *supra* note 33, at 7 n.19.

<sup>41</sup> MCCARTHY, *supra* note 20, § 1:7.

<sup>42</sup> *Haelan*, 202 F.2d at 868.

<sup>43</sup> See Nimmer, *supra* note 35.

<sup>44</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

<sup>45</sup> 433 U.S. 562 (1977).

<sup>46</sup> *Id.* See McCarthy, *supra* note 21, at 133 (describing the rarity of *Zacchini*’s facts): *Zacchini* is what I call a performance value kind of right of publicity case . . . [T]hat kind of right of publicity case is very rare – perhaps less than two percent of all day-to-day publicity problems fall in the performance value category. But because *Zacchini* is the only Supreme Court case in the field, many new comers to the area are misled into thinking that is all that the right of publicity is about. What the right of publicity is about ninety-eight percent of the time is the use of some aspect of a person to help sell a product – like drawing attention to an advertisement.

*Id.* See also Douglas G. Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1186-87 (1978) (arguing that rights of performance cases should be distinguished from other right of publicity cases).

<sup>47</sup> *Zacchini*, 433 U.S. at 575 (footnote omitted); see also Hunt, *supra* note 27, at 1615 (discussing defendant’s First Amendment defense in *Zacchini*).

<sup>48</sup> *Zacchini*, 433 U.S. at 576.

Since *Zacchini*, the scope of the doctrine has expanded and gained increased legitimacy. More than half of the states have recognized a right of publicity through either common law or legislation.<sup>49</sup> The doctrine is included in the latest edition of the *Restatement of Unfair Competition*.<sup>50</sup> Courts have protected an increasing array of facets of celebrities' identities,<sup>51</sup> finding against advertisers who have used voice-a-likes<sup>52</sup> and even robot impersonators.<sup>53</sup>

### B. *Rationales for the Right of Publicity*

Four chief policy rationales support the modern right of publicity: "providing incentives for creativity, allowing those who achieve notoriety to enjoy the fruits of their own labor, guarding against consumer deception, and preventing unjust enrichment."<sup>54</sup>

A primary reason for the right of publicity is to provide an economic incentive for creating entertainment. The *Zacchini* court supported the notion that a celebrity should reap the financial rewards of "produc[ing] a performance of interest to the public."<sup>55</sup>

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<sup>49</sup> See McCARTHY, *supra* note 20, §§ 6:1(B) at 6-6 to 6-8, 6:3(A) at 6-13 to 6-15. McCarthy lists seventeen states that have adopted a common law version of the right of publicity as of March 1999. See *id.* § 6:1[B] at 6-6.

<sup>50</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995). "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." The unauthorized user "is liable for the pecuniary loss to the other caused by the appropriation or the actor's own pecuniary gain resulting from the appropriation, whichever is greater." *Id.* Concerning "[t]he appropriate method of measuring . . . relief," the RESTATEMENT recommends the following:

a comparative appraisal of all the factors of the case, including the following primary factors: (a) the degree of certainty with which the plaintiff has established the fact and extent of the pecuniary loss or the actor's pecuniary gain resulting from the appropriation, (b) the nature and extent of the appropriation, (c) the relative adequacy to the plaintiff of other remedies, (d) the intent of the actor and whether the actor knew or should have known that the conduct was unlawful, (e) any unreasonable delay by the plaintiff in bringing suit or otherwise asserting his or her rights, and (f) any related misconduct on the part of the plaintiff.

*Id.*

<sup>51</sup> See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992):  
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.

*Id.*

<sup>52</sup> See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

<sup>53</sup> See *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993).

<sup>54</sup> Carpenter, *supra* note 33, at 11-14 (describing the four justifications for the right of publicity) (citing Roberta Rosenthal Kwall, *The Right of Publicity v. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 54-55 (1994)).

<sup>55</sup> *Zacchini*, 433 U.S. at 576.

Such reasoning reflects the notion that in achieving notoriety and entering the public domain, one must bear costs in terms of time, money, effort, privacy, and personal freedom.<sup>56</sup> Individuals will be encouraged to make these sacrifices if given additional financial incentive.

The second rationale is that the effort invested by celebrities should be rewarded by allowing them to enjoy the fruits of their labor.<sup>57</sup> Some have criticized the notion that celebrities' investment of hard work is a suitable basis for the right of publicity. Michael Madow contends that celebrities need no further reward in the form of additional rights.<sup>58</sup> He notes that celebrities already receive exceptionally high salaries and enjoy public recognition and influence over popular tastes.<sup>59</sup> Furthermore, their renown may have little to do with their own actual work.<sup>60</sup> Still, to most courts and scholars, this justification for the right of publicity remains persuasive.

A third rationale, similar to an underpinning of trademark law,<sup>61</sup> is prevention of consumer confusion. Under the right of publicity, advertisers who use the identity of a celebrity without authorization will be held accountable.<sup>62</sup> Critics of this rationale note that existing trademark law permits celebrities to register their names and images as protected trademarks with the Patent and Trademark Office. Nonetheless, the right of publicity enables celebrities and others who have completed registration to prevent the use of their likenesses by advertisers.

The fourth policy rationale for the right of publicity concerns the goodwill of a celebrity. It reflects the notion that publishers should not be unjustly enriched by profiting from a celebrity's rep-

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<sup>56</sup> See Madow, *supra* note 18, at 191-93:

Especially in the entertainment world, the production of fame and image has become more organized, centralized, methodical, even "scientific." The work of "fashioning the star out of the raw material of the person" is done not only by the star herself, but by an army of specialists consultants, mentors, coaches, advisors, agents, photographers, and publicists.

*Id.* at 191.

<sup>57</sup> See *id.* at 175-76, 182-85.

<sup>58</sup> See *id.* at 182-96.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See Carpenter, *supra* note 33, at 13:

Just as trademark law protects consumers against deceptive use of a symbol or phrase normally associated with a well-known brand or product, the right of publicity holds advertisers accountable for their misleading use of a celebrity image where the celebrity is not actually associated with the publisher of the image.

*Id.* (citing Madow, *supra* note 18, at 228-38).

<sup>62</sup> Carpenter, *supra* note 33, at 13.

utation without sharing proceeds with the person who created the public value.<sup>63</sup> The notion of curtailing free-riders runs deep in American jurisprudence and courts frequently refer to it when protecting publicity rights.<sup>64</sup>

### C. *The First Amendment Limit to the Right of Publicity*

Perhaps the greatest limit to the application of the right of publicity is the First Amendment guarantee of freedom of speech and freedom of the press.<sup>65</sup> A New York court noted, “[w]here the right to publicity is recognized, it does not invest a prominent person with the right to exploit financially every public use of name or picture.”<sup>66</sup> That matters of public interest are “constitutionally protected and must supersede any private pecuniary considerations is conceded even by those who urge more widespread recognition of a distinct right of publicity.”<sup>67</sup>

#### 1. The Rationales for First Amendment Protection

Since the First Amendment is such a formidable restriction on the right of publicity, it is important to understand both the rationale and the scope of its protections. In Judge Brandeis’ authoritative statement of the First Amendment’s purposes,<sup>68</sup> he noted the Framers’ tripartite goals of sponsoring enlightenment, self-fulfillment, and providing a “safety valve.”<sup>69</sup>

The enlightenment function protects public access to information so that people may make informed choices in politics and

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<sup>63</sup> See Vincent M. Grandpre, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 77 (2001) (“[C]ase law is replete with references to unjust enrichment.”). See, e.g., *Carson v. Here’s Johnny Portable Toilets, Inc.* 698 F.2d 831, 838 (6th Cir. 1983) (Kennedy, J., dissenting); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978); see also Roberta Rosenthal Kwall, *supra* note 54, at 59-62 (discussing the prominence of the unjust enrichment rationale in publicity theory).

<sup>64</sup> See *Zacchini*, 433 U.S. at 576; *Midler*, 849 F.2d at 462.

<sup>65</sup> U.S. CONST. amend. I; see Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete’s Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 44 (1999) (“Legal scholars claim the most difficult defense to deal with in a right of publicity case is the assertion of the First Amendment.”) (citing MCCARTHY, *supra* note 20, § 3:1[F], at 3-5); Michnal, *supra* note 1 at 1164 (“Courts are quite resistant to attempts to limit First Amendment activity.”) (citing Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 681 (1992)) (asserting that Supreme Court jurisprudence does not permit government or private parties to interfere with dissemination of ideas except under extraordinary circumstances).

<sup>66</sup> *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 508 (N.Y. Special Term 1968).

<sup>67</sup> *Id.*

<sup>68</sup> See MCCARTHY, *supra* note 20, § 8:2, (noting that “[m]ost constitutional scholars” consider Brandeis’ concurring opinion in *Whitney* to be “the authoritative and classic statement of the underlying goals and rationales of the First Amendment”).

<sup>69</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

other socially important areas without undue state influence. Judge Holmes contemplated the natural desire of governments to “sweep away all opposition.”<sup>70</sup> In contrast, he expressed his faith in the ideal of an unfettered marketplace of ideas in which “the ultimate good desired is . . . reached by free trade in ideas,” with the best ideas gaining the most social currency.<sup>71</sup> Political speech represents the core value of the enlightenment rationale, as it is considered most relevant to public issues and most likely to be quelled.<sup>72</sup> Yet speech intended to entertain also receives some protection, to a lesser degree. Courts have had difficulty in drawing “[t]he line between the informing and the entertaining.”<sup>73</sup> Additionally, “[w]hat is one man’s amusement, teaches another’s doctrine.”<sup>74</sup>

The First Amendment goal of self-fulfillment shifts the focus from the polity, as protected by the enlightenment function, to the individual. Brandeis’ conception of self-fulfillment has been understood to mean that free self-expression is a basic human need and a good in its own right.<sup>75</sup> The Supreme Court has recognized that the “human spirit . . . demands self-expression.”<sup>76</sup> However, it is not clear that, standing alone, the self-fulfillment rationale will justify First Amendment protection.<sup>77</sup>

The “safety valve” function stems from Brandeis’ statement that, “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”<sup>78</sup> The opening of the valve thus permits the release of tension in the form of speech, rather than violence. In First Amendment cases, this function tends to assume lesser importance than the aforementioned goals of enlightenment and self-fulfillment.<sup>79</sup>

## 2. The Scope of the First Amendment and its Levels of Protection

The courts have held that the First Amendment covers a broad

<sup>70</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

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

<sup>72</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 n.5 (1985) (Powell, J., plurality opinion) (“[C]ertain kinds of speech are less central to the interests of the First Amendment than others . . . [R]egulation of political speech is subject to the most rigorous scrutiny.”).

<sup>73</sup> *Winters v. New York*, 333 U.S. 507, 510 (1948).

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

<sup>75</sup> See McCARTHY, *supra* note 20, § 8:7.

<sup>76</sup> *Procunier v. Martinez*, 416 U.S. 396, 427 (1974).

<sup>77</sup> See McCARTHY, *supra* note 20, § 8:7.

<sup>78</sup> *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

<sup>79</sup> See McCARTHY, *supra* note 20, § 8:8.

array of speech. However, different levels of protection are afforded to speech depending on the type of speech and its content.<sup>80</sup> Political speech and news have garnered the highest degree of protection, largely due to their close connection to the enlightenment function of the First Amendment.<sup>81</sup> A secondary level of First Amendment merit is afforded to entertainment, which may be embodied in any medium, “from painting and photography to music and the printed page.”<sup>82</sup> Difficulties may arise when drawing the line between information and entertainment, as noted by the Supreme Court in *Winters*.<sup>83</sup> Yet both forms of speech are highly protected for their “communicative” value.<sup>84</sup>

Commercial speech occupies a lower rung in the hierarchy of the First Amendment.<sup>85</sup> Advertising, a form of commercial speech, was the last form of speech to receive First Amendment protection from the Supreme Court, finally attaining such status in 1976 in *Virginia Board of Pharmacy*.<sup>86</sup> The Court noted that since information is needed for “private economic decisions,” advertising has some constitutional value, “however tasteless and excessive it sometimes may seem.”<sup>87</sup>

### 3. Distinguishing “Commercial” from “Communicative” Speech, and the Effect on Right of Publicity

Courts must perform a fact-specific analysis to determine where protected “communicative” speech ends and the prohibited “commercial” speech begins.<sup>88</sup> For example, the dissent in *Zacchini* emphasized that the broadcast was a newscast, not commercial advertising, and therefore deserving of constitutional protection. However, the majority found the station had not merely reported on the event, but appropriated “the very activity by which the entertainer acquired his reputation in the first place.”<sup>89</sup>

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<sup>80</sup> See McCARTHY, *supra* note 20, § 8:13 (“There is no ‘equal protection’ for all ‘speech’ within the First Amendment. All ‘speech’ is not equal.”).

<sup>81</sup> See *supra* note 72 and accompanying text (describing the enlightenment function).

<sup>82</sup> McCARTHY, *supra* note 20, § 8:15; see also *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected: motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within First Amendment guarantee.”).

<sup>83</sup> See *supra* note 73.

<sup>84</sup> See *supra* note 82 (describing communicative value).

<sup>85</sup> See McCARTHY, *supra* note 20, at § 8:17.

<sup>86</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>87</sup> *Id.* at 765.

<sup>88</sup> See *Stapleton & McMurphy*, *supra* note 65, at 44; see also McCARTHY, *supra* note 20, at § 28:41.

<sup>89</sup> *Zacchini*, 433 U.S. at 576.

Unlike *Zacchini*, the media usually enjoy a broad immunity from the right of publicity. In *Hoffman v. Capital Cities/ABC, Inc.*,<sup>90</sup> a photograph of the actor Dustin Hoffman from the film *Tootsie* was digitally altered in *Los Angeles Magazine*. The end result was that Mr. Hoffman was wearing what appeared to be a silk gown “designed by Richard Tyler and high-heel shoes designed by Ralph Lauren.”<sup>91</sup> The district court rejected the magazine’s “newsworthiness” defense, contending that the unauthorized image “[bore] no reasonable (or other) relationship” to a story.<sup>92</sup> Rather, the image “only serve[d] to attract attention” to the publication.<sup>93</sup> The Ninth Circuit reversed, holding that the First Amendment’s protection may extend to an article “meant to draw attention to a for-profit magazine.”<sup>94</sup>

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,<sup>95</sup> the Supreme Court of California adopted a “transformative use” test to determine whether First Amendment protection should be afforded to a particular work.<sup>96</sup> The court examined “whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.”<sup>97</sup> Artist Gary Saderup created a charcoal drawing of The Three Stooges comedy team which was used to produce lithographic prints and silk screen images on t-shirts. Comedy III, the owner of The Three Stooges’ rights, prevailed in its suit under a California right of publicity statute. Despite Saderup’s “undeniable skill,” it was evident to the court that the artist’s effort

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<sup>90</sup> See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) [hereinafter “Hoffman II”].

<sup>91</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 870 (C.D. Cal. 1999) [hereinafter “Hoffman I”].

<sup>92</sup> *Id.* at 875.

<sup>93</sup> *Id.*; see also *Pagan v. N.Y. Herald Tribune*, 301 N.Y.S.2d 120, 124 (N.Y. App. Div. 1969) (Nunez, J., dissenting) (arguing that the swimsuit fashion spread is really an advertisement because it states the price for Lord & Taylor).

<sup>94</sup> *Hoffman II*, 255 F.3d at 1186.

<sup>95</sup> 21 P.3d 797 (Cal. 2001).

<sup>96</sup> The “transformative use” test also grows out of the Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). In *Acuff-Rose*, the Court evaluated the first criteria for a fair use inquiry under copyright law, “the purpose and character of the use.” The Court noted that, “[although] such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.” *Id.* at 579. The *Comedy III* court acknowledged that the right of publicity and copyright law share the goal of “protecting the creative fruits of intellectual and artistic labor.” *Comedy III Productions*, 21 P.3d at 808.

<sup>97</sup> *Comedy III Productions*, 21 P.3d at 809. The court was wary of granting First Amendment protection to a work that drew its value “primarily from the fame of the celebrity depicted.” *Id.* at 810. However, an artist could gain a presumption of First Amendment protection if the value of the work comes “from the creativity, skill, and reputation of the artist.” *Id.*

was “manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame.”<sup>98</sup>

*Comedy III Productions* stands for the proposition that an artist who fails to demonstrate that he has made transformative uses of a celebrity image will be dealt with as one who has preyed upon the economic rights of the celebrity.<sup>99</sup> The artist’s speech will be viewed as commercial and his First Amendment rights may be easily trumped by his subject’s right of publicity. Although publicity rights were favored in *Comedy III Productions*, the balance was shifted back to the artist and societal interests in free expression in *ETW Corp.*, as the court supported the erosion of major celebrities’ publicity rights.

## II. *ETW CORP.* AND NEW FACTORS IN BALANCING FIRST AMENDMENT AND PUBLICITY RIGHTS

In weighing Tiger Woods’ right of publicity against Rick Rush’s First Amendment rights, the Sixth Circuit chose to look beyond the simple framework of transformative use. The court announced its belief that “the transformative elements test adopted by the Supreme Court of California in *Comedy III Productions*, will assist us in determining where the proper balance lies between the First Amendment and Woods’s intellectual property rights.”<sup>100</sup> However, even before the court reached its conclusions on the transformative use issue,<sup>101</sup> it appeared to have already decided in favor of the defendant based on economic evaluations of Woods and Rush.<sup>102</sup> The heightened attention to the economic roots of the right of publicity represents a major shift in the focus of the inquiry involving the right of publicity and the First Amendment.

### A. *Transformative Use and Additional First Amendment Analysis in ETW Corp.*

The two-to-one majority held that Rush’s work, *The Masters of*

<sup>98</sup> *Id.* at 811. The court noted that protecting Saderup’s work would sap the right of publicity of nearly all its strength. The right would only remain viable “in cases of falsified celebrity endorsements.” *Id.*

<sup>99</sup> *See id.* at 807. The *Comedy III* court recognized the right of publicity as “essentially an economic right. What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame through the merchandising of the ‘name, voice, signature, photograph, or likeness’ of the celebrity.” *Id.*

<sup>100</sup> *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003).

<sup>101</sup> *Id.* at 938.

<sup>102</sup> *Id.* The court’s discussion of economic factors seems to have been based more in judicial suppositions than in evidence.

*Augusta*, “consists of much more than a mere literal likeness of Woods. It is a panorama of Woods’s victory . . . with all the trappings of that tournament in full view.”<sup>103</sup> Much like in *Comedy III Productions*, the court analyzed the separate elements of the work. The court seemed to be especially persuaded by depictions of individuals other than Woods, such as “the two caddies” and “carefully crafted likenesses of six past winners of the Masters Tournament.”<sup>104</sup> Furthermore, unlike Saderup’s literal depiction of The Three Stooges, which was found to have no message beyond the exploitation of famous faces,<sup>105</sup> Rush’s work was found to convey a message, “that Woods himself will someday join that revered group [of past winners].”<sup>106</sup>

The court found additional meaning in the work’s use of Tiger Woods’ persona in that it was content to view the scene as an important “historic event in the world of sports.”<sup>107</sup> The majority reasoned that Rush’s work “communicates and celebrates the value our culture attaches to such events.”<sup>108</sup> Through this analysis, the court raised the level of protection afforded to Rush’s speech. Instead of perceiving a commercial use of Woods’ identity, the court spoke of valuable communicative speech that commented on societal norms. In such a view of the work, a close depiction of Woods was essential and therefore permissible.<sup>109</sup>

The strength of the court’s thorough transformative use and general First Amendment analyses, however, was diluted by its emphasis on economic factors not pertaining to the First Amendment. Rather than being content with an analysis in the manner of *Comedy III Productions*, the court broadened the scope of its opinion by chipping away at well-established economic justifications for the

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<sup>103</sup> *Id.* at 936. In his dissenting opinion, Judge Clay contended that Rush failed to satisfy the transformative use test, as laid out in *Comedy III Productions*. He noted, “it is difficult to discern any appreciable transformative or creative contribution in Defendant’s prints so as to entitle them to First Amendment protection.” *Id.* at 959. He viewed Rush’s rendition of Woods, in “his red shirt and holding his famous swing,” as “nearly identical to that depicted in [a] Nike poster.” *Id.* Judge Clay also asserted that Rush’s work should not be protected by the First Amendment because “the prints gain their commercial value by exploiting the fame and celebrity status that Woods has worked to achieve.” *Id.* at 960.

<sup>104</sup> *Id.* at 936. See *supra* note 5 (describing Rush’s work).

<sup>105</sup> See *Comedy III Productions*, 21 P.3d at 811. The *Comedy III Productions* court noted that Andy Warhol’s silkscreen portraits, with images of such celebrities as Marilyn Monroe and Elvis Presley, conveyed a message about “the dehumanization of celebrity itself.” *Id.* Consequently, artworks such as Warhol’s might be entitled to First Amendment protection. See *id.*

<sup>106</sup> *ETW Corp.*, 332 F.3d at 936.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (“It would be ironic indeed if the presence of the image of the victorious athlete would deny the work First Amendment protection.”).

right of publicity.<sup>110</sup>

B. *Economic Analysis of Publicity Rights in ETW Corp.*

Before delivering its final decision concerning the transformative use test, the court engaged in three paragraphs of speculation about the economic status of sports celebrities in general and Tiger Woods in particular.<sup>111</sup> Such discussion results in the importation of new economic considerations into the weighing of First Amendment and publicity rights. By focusing on the economic roots of the right of publicity, top celebrities will have weakened protection, even when the First Amendment merits of a work are negligible.

To those reading the Sixth Circuit's opinion, it may not have seemed like a dramatic conclusion when the court noted: "In balancing these interests against Woods's right of publicity, we note that Woods, like most sports and entertainment celebrities with commercially valuable identities, engages in an activity, professional golf, that in itself generates a significant amount of income which is unrelated to his right of publicity."<sup>112</sup>

However, the court was taking a radical step in deciding not to simply balance publicity and First Amendment rights, but rather looking outside the parameters of the traditional inquiry. The Sixth Circuit did so in order to reconsider the economic incentives that support a celebrity's right of publicity. Yet, rather than proceed with an in-depth, incisive inquiry, the court came to the seemingly common sense conclusion that "[e]ven in the absence of his right of publicity, [Woods] would still be able to reap substantial financial rewards from authorized appearances and endorsements."<sup>113</sup> According to the court's reasoning, those with a high degree of celebrity who have commercially valuable personas can be deemed to have a limited need to control the commercial use of their identities.<sup>114</sup> Such a conclusion muddles the economic basis of the right of publicity and confuses the logic on which the right of publicity is founded.

1. Economic Incentives to Create Entertainment

Two primary economic justifications for the modern right of publicity are providing incentives for creating entertainment and

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<sup>110</sup> See *id.* at 938.

<sup>111</sup> *ETW Corp.*, 332 F.3d at 938.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See *id.*

permitting those who achieve fame to enjoy the fruits of their labor.<sup>115</sup> To properly ground a discussion of the economic underpinnings of the right of publicity, a court must address these incentives.

The Sixth Circuit viewed Woods' status as a celebrity in a manner contrary to traditional views of economic incentives for the right of celebrity.<sup>116</sup> The majority described Woods as a professional who was capable of generating a substantial stream of income through his mastery of golf. Woods' ability to earn a living through tournaments and endorsements was portrayed as effortless. However, Woods' ability to make the sport of golf look easy should not be the basis of an assumption that maintaining celebrity status, or skill at a craft, can simply be willed.<sup>117</sup> The court should also consider the effort, time, money, and other costly expenditures made by Woods on his path to celebrity.<sup>118</sup>

The *ETW Corp.* court considered Woods as a professional who had hit the big-time, but failed to consider what encourages young athletes such as Woods to become great at their sports and how they should be rewarded for their toils.

## 2. Reaping the Fruits of One's Labor

The court's attempt to address the "fruits of labor" justification in the next paragraph was similarly misguided. Rather than evaluate Woods' investment of labor and the benefits he deserves, the court considered Rush's input:

While the right of publicity allows celebrities like Woods to enjoy the fruits of their labors, here Rush has added a significant creative component of his own to Woods's identity. Permitting Woods's right of publicity to trump Rush's right of freedom of expression would extinguish Rush's right to profit from his creative enterprise.<sup>119</sup>

In pairing Rush's effort with Woods', the court shifted the dynamics of the "fruits of labor" concept.<sup>120</sup> Instead of considering Woods' enterprise on its own, as the evaluation traditionally proceeds,<sup>121</sup> the court created a model in which two parties put in effort and only one can bear the fruits of their collective labor.

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<sup>115</sup> See *supra* Part I.B.

<sup>116</sup> See *id.*

<sup>117</sup> See *supra* note 56 (describing the work of "fashioning the star").

<sup>118</sup> See *supra* Part I.B.

<sup>119</sup> *ETW Corp.*, 332 F.3d at 938.

<sup>120</sup> See *supra* Part I.B.

<sup>121</sup> See *id.*

The court's unorthodox method creates an inequitable relationship between the celebrity and the artist who employs the celebrity's persona in a work. In that relationship, the effort of the celebrity is not rewarded; it is simply accepted that the public figure will engage in an activity that merits attention. Contrary to well-established economic justifications for the right of publicity, the spoils go to the person who harnesses the momentum of the celebrity persona. The artist who "add[s] a significant creative component of his own to [the celebrity's] identity"<sup>122</sup> receives the fruit of the collective effort in that he can sell his work on a large scale, as Rush and Jireh Publishing did with *The Masters of Augusta* lithographs. This non-traditional result is reached when the "fruits of labor" justification is applied to the artist, rather than to the celebrity.

### 3. The Celebrity and Society

In its final deliberation about the economic interests at play in the right of publicity, the court did not pit Woods' interest in publicity rights against the artist accused of infringing them, but against society as a whole.<sup>123</sup> As the court stated: "After balancing the societal and personal interests embodied in the First Amendment against Woods's property rights, we conclude that the effect of limiting Woods's right of publicity in this case is negligible and significantly outweighed by society's interest in freedom of artistic expression."<sup>124</sup>

Upon reading the court's language, one might wonder whose right of publicity might *ever* outweigh society's interest in freedom of artistic expression. In reaching its conclusion, the court took an extreme step in diminishing the ability of a commercially successful celebrity to assert his right of publicity. Instead of comparing Woods' right of publicity with Rush's First Amendment right,<sup>125</sup> the court pitted Woods's interests against society as a whole, the needs of which must surely supersede those of any individual.

### 4. The Structure of *ETW Corp.*'s Economic Analysis

The court's process of chipping away at a major celebrity's

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<sup>122</sup> *ETW Corp.*, 332 F.3d at 938.

<sup>123</sup> *See id.* at 937.

<sup>124</sup> *Id.*; *see also id.* at 931 (citing Judge Kennedy's dissent in *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 841 (6th Cir. 1983)) ("[P]ublic policy requires that the public's interest in free enterprise and free expression take precedence over any interest Johnny Carson may have in a phrase associated with his person.").

<sup>125</sup> *See id.*; *cf. Comedy III Productions*, 21 P.3d 797 (also balancing right of publicity with First Amendment concerns).

right of publicity is best understood when viewed in sequence. First, it considered Woods and emphasized his commercial success;<sup>126</sup> surely he could put food on the table without a right of publicity. Second, although Woods was the one who accomplished a significant achievement, Rush should be rewarded for creating and selling a likeness of Woods, thus earning the fruit of their collective effort.<sup>127</sup> Third, Woods' right of publicity pales in comparison to the widespread social benefit of free expression.<sup>128</sup> Through these three evaluations, the *ETW Corp.* court engaged in a revisionist analysis of the economic bases of the right of publicity without explaining the reasons for its unconventional approach and without considering the potential consequences of its conclusions. In doing so, the court did not cite evidence to support its propositions, but rather proceeded on stereotypes of commercially successful celebrities. It is not evident how its treatment of economic factors may affect lesser celebrities, such as the fictional Holden One.

### 5. Undefined Rights of Lesser Celebrities

The Sixth Circuit noted that:

[I]nherent tension between the right of publicity and the right of freedom of expression . . . becomes particularly acute when the person seeking to enforce the right is a famous actor, athlete, politician, or otherwise famous person whose exploits, activities, accomplishments, and personal life are subject to constant scrutiny and comment in the public media.<sup>129</sup>

However, the court did not discuss how to evaluate the case of a celebrity who does not fall into that category of fame, such as Holden One. It appears that in contrast to the court's trivialization of Tiger Woods's right of publicity, Holden would have a stronger case because his right of publicity would be more valuable to him. This is still unclear because it is not evident whether the court's analysis of the right of publicity's economic roots would extend beyond top celebrities to lesser and non-celebrities.

## III. UNDERSTANDING THE SIXTH CIRCUIT'S SHIFT IN FOCUS

In weighing publicity and First Amendment rights, the *ETW*

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<sup>126</sup> See *ETW Corp.*, 332 F.3d at 938.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> *Id.* at 931.

*Corp.* court went beyond traditionally considered factors<sup>130</sup> and chose to incorporate analyses of Woods' economic status,<sup>131</sup> Rush's effort in producing the work,<sup>132</sup> and society's interest in the use of a celebrity image.<sup>133</sup> These new avenues of judicial consideration represent a fundamental shift in the Sixth Circuit's view of the right of publicity as a whole, not simply the doctrine's First Amendment aspects.<sup>134</sup> In its discussion, the court drew largely from a conceptual basis developed during the early 1990s in the field of cultural studies. That outlook, which will be referred to as the "Cultural Studies" view,<sup>135</sup> emphasizes the importance of free use of famous personas in societal discourse,<sup>136</sup> in contrast to celebrities' control over their images.<sup>137</sup> The court's adoption of this view represents an attempt to diminish top celebrities' ability to successfully litigate the right of publicity.<sup>138</sup> This section will discuss the reasons for the Sixth Circuit's selection of the Cultural Studies view and potential difficulties with the court's application of that doctrine.

#### A. *The Appeal of the Cultural Studies Approach to Celebrity*

In his extremely influential article on popular culture and the right of publicity,<sup>139</sup> Michael Madow concluded that the way in which courts conceive of celebrity has a vital impact on the deci-

<sup>130</sup> See *supra* Part I.B.

<sup>131</sup> See *ETW Corp.*, 332 F.3d at 938.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.* at 931-33, 935, 938.

<sup>134</sup> Compare *ETW Corp.* 332 F.3d 915, with *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

<sup>135</sup> See Madow, *supra* note 18, at 126 (introducing Madow as "[w]riting from a 'Cultural Studies' perspective.>").

<sup>136</sup> See *id.* at 141 (noting "popular culture remains what it long has been: a struggle for, and over, meaning.>").

<sup>137</sup> See *id.* at 138 (contending "publicity rights facilitate private censorship of popular culture.>").

<sup>138</sup> See *id.* at 141-42 (calling on "the law" to challenge the right of publicity):

The law can strengthen the already potent grip of the culture industries over the production and circulation of meaning, or it can facilitate popular participation, including participation by subordinate and marginalized groups, in the processes by which meaning is made and communicated. The law can accelerate the already powerful trend toward centralized, top-down management of popular culture, or it can fight a rearguard (and perhaps futile) action on the side of a more decentralized, open, democratic cultural practice.

*Id.*

<sup>139</sup> See Madow, *supra* note 18; see also Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 411 (1999) (referring to Madow's "important treatment of the right of publicity."); Grandpre, *supra* note 63, at 75 n.12 (identifying Madow's article as "stand[ing] out in [its] postmodern critique of the right of publicity."). The influence of Madow's article is evinced by a Shepard's search performed on LEXIS on February 29, 2004, which revealed ninety-five total citations to *Private Ownership of Public Image*, eighty-eight of those from law journals and periodicals.

sion whether or not to recognize a publicity right.<sup>140</sup> Celebrity, he contends, can be viewed in one of two ways. The “older, more communitarian conception”<sup>141</sup> envisions “famous persons as a kind of communal property, freely available for commercial as well as cultural exploitation.”<sup>142</sup> Madow asserts that this view was prevalent from the framing of the Constitution through the early twentieth century.<sup>143</sup> The more modern approach, developed during the expansion of intellectual property law, stresses individual rights and consequently showers more rewards upon celebrities.<sup>144</sup> This conceptualization gained preeminence with the widespread dissemination of celebrity images and provided support for publicity rights as viewed by McCarthy and Nimmer.<sup>145</sup> The acceptance of this property-based model, as opposed to its communitarian counterpart, appeared to culminate in the 1990s, as top celebrities earned greater shares of income and increasingly strove to protect their publicity rights in court.<sup>146</sup> Perceiving a threat to social discourse from celebrity-imposed censorship,<sup>147</sup> Madow rejected the right of publicity’s attempt to meet “the needs of Broadway and Hollywood,” as theorized by Nimmer.<sup>148</sup> On a fundamental level, he disagreed with McCarthy’s notion that the right of publicity is a common sense legal right and sought a return to an age in which

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<sup>140</sup> See Madow, *supra* note 18, at 238-39 (noting the “choice between a market-oriented, instrumental, individualistic conception on the one hand, and an older, more communitarian conception on the other.”).

<sup>141</sup> *Id.* at 239.

<sup>142</sup> *Id.* at 148.

<sup>143</sup> See *id.* (noting that the “traditional common property conception was ultimately displaced by one more suited to what Melville Nimmer, in his seminal 1954 article on the right of publicity, unashamedly called ‘the needs of Broadway and Hollywood.’”); see also *id.* at 148-78 (outlining the history of celebrity images in America).

<sup>144</sup> See Madow, *supra* note 18.

<sup>145</sup> See *id.* at 160 (discussing the “Graphic Revolution,” in which motion pictures and radio expanded the public’s familiarity with celebrity personas).

<sup>146</sup> See *supra* note 22 (listing recent high-profile right of publicity cases). During this period, courts and legal scholars became increasingly fixated on the amount of money earned by celebrities. See, e.g., Madow, *supra* note 18, at 137 (citing the \$10 million collected by Arnold Schwarzenegger for his role in the movie *Total Recall*, and the \$7.4 million salary of Chicago Cubs second baseman Ryne Sandberg, and asking, “Is that not enough, or even too much?”); see also *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 974 (10th Cir. 1996) (citing the \$20 million received by Jim Carrey for his role in the movie *Cable Guy* and noting “major league baseball players’ salaries currently average over one million dollars per year.”). *Id.*

<sup>147</sup> See Madow, *supra* note 18, at 195 n.334 (asserting “the potential . . . for private censorship of popular meaning-making . . . should make us hesitant about embracing the right of publicity.”); see also *id.* at 146 (addressing the potential for self-censorship).

<sup>148</sup> See *id.* at 174 (criticizing Nimmer for only making “passing references to ‘community needs.’”). In his seminal article, Nimmer contended that “although the concept of privacy which Brandeis and Warren evolved fulfilled the demands of Beacon Street in 1890, it may seriously be doubted that the application of this concept satisfactorily meets the needs of Broadway and Hollywood in 1954.” Nimmer, *supra* note 35, at 203.

celebrity images could be freely appropriated.<sup>149</sup>

Central to Madow's communitarian vision is an understanding of the importance of celebrity personas in societal discourse. Madow stresses that as "leading players in our Public Drama," sports and entertainment celebrities serve as symbols representing moral values.<sup>150</sup> The public, having imbued the symbols with meaning, uses them as "expressive and communicative resources."<sup>151</sup> Additionally, artists must be free to "recode" these symbols, changing and rearranging them to construct new meanings for mass consumption.<sup>152</sup> This shift in focus from the celebrity to the public at large results in diminished rights for celebrities, who are asked to make sacrifices for the greater good.

Madow's populist vision has recently been espoused by courts that seek reasons to reject right of publicity claims brought by top celebrities.<sup>153</sup> The notion of shifting focus from the celebrity to the public at large certainly has strong rhetorical appeal. In 1996, the Tenth Circuit held in *Cardtoons* that major league baseball players did not have their rights of publicity infringed by a company printing baseball cards that parodied them. The court emphasized that, "[c]elebrities . . . are an important element of the shared communicative resources of our cultural domain."<sup>154</sup> Consequently, courts believe they are standing on firm moral ground when they cast themselves as protectors of popular discourse, rather than property rights of the elite.

Courts have also turned to Madow's view when they believe that no additional economic benefit, such as the right of publicity, is necessary to encourage artistic and athletic achievements.<sup>155</sup> This argument is premised primarily on the notion of the overpaid athlete. In *Cardtoons*, the court noted that the average player in major league baseball earns a salary of more than one million dollars per year.<sup>156</sup> Such information is used to bolster the notion that

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<sup>149</sup> See Madow, *supra* note 18, at 136.

<sup>150</sup> *Id.* at 128.

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

<sup>152</sup> See *id.* at 145.

<sup>153</sup> See, e.g., *Cardtoons*, 95 F.3d at 972-75 (using Madow's theories to support arguments for diminished right of publicity protection for celebrities).

<sup>154</sup> *Id.* at 972 (later cited by the Sixth Circuit in *ETW Corp.*, 332 F.3d at 938).

<sup>155</sup> See Madow, *supra* note 18, at 203; see also *supra* note 135 and accompanying text. Madow's core view regarding economic incentives is that "[e]ven in a world without publicity rights, celebrities would still be able to derive substantial income from their publicity values, to say nothing of the income they would continue to derive from the activities to which they owe their fame." See Madow, *supra* note 18, at 203.

<sup>156</sup> See *Cardtoons*, 95 F.3d at 974 (later cited in *ETW Corp.*, 332 F.3d at 933). Here, the Tenth Circuit took judicial notice that:

The extra income generated by licensing one's identity does not provide a nec-

top-tier athletes already get their fair share of income and that any additional rights are superfluous because they are at the expense of public values in open communication. As will be discussed, this view ignores the athlete who is not in a top income tier for his sport and has greater financial dependence upon the right of publicity.

### B. *ETW Corp.'s Use of the Cultural Studies Approach*

The Sixth Circuit was drawn to Madow's Cultural Studies approach as an alternative to supporting the increasing number of high-profile right of publicity suits. Rather than encouraging suits from stars, such as Woods, who appeared to be over-compensated and unappreciative of good fortune, the court chose to stress the importance of celebrity symbols in public dialogue. In its discussion, the court relied not only on Madow's academic work and *Cardtoons*, but also on dissenting opinions that resonated with the communitarian view of celebrity.

In addition to *Cardtoons*, the Sixth Circuit drew support for a community-based vision of publicity rights from dissenting opinions written during the 1980s and 1990s, an era in which high-profile celebrities, such as Johnny Carson and Vanna White, litigated their right of publicity cases.<sup>157</sup> In *Carson*, a majority of the Sixth Circuit held that Carson's right of publicity was invaded when the defendant used the phrase "Here's Johnny," to advertise its portable toilets.<sup>158</sup> In *ETW Corp.*, the court focused on Judge Kennedy's dissenting view in *Carson* that "public policy requires that the public's interest in free enterprise and free expression take precedence over any interest Johnny Carson may have in a phrase associated with his person."<sup>159</sup> The *ETW Corp.* court went on to support the dissenting view in the Ninth Circuit's Vanna White case, agreeing with Judge Kozinski's observation that "[s]omething very dangerous is going on here. . . . Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain."<sup>160</sup> The Sixth Circuit looked to the dissents of

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essary inducement to enter and achieve in the realm of sports and entertainment. Thus, while publicity rights may provide some incentive for creativity and achievement, the magnitude and importance of the incentive has been exaggerated.

*Id.* at 974.

<sup>157</sup> See *supra* note 22.

<sup>158</sup> See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983).

<sup>159</sup> *Id.* at 841 (Kennedy, J., dissenting).

<sup>160</sup> *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

Judges Kennedy and Kozinski to support its firm stance against the growth of publicity rights.

*ETW Corp.* likely exacerbated the court's fears of a growing right of publicity through its conduct in business and in the manner in which it brought charges against Jireh Publishing. The corporation, of which Tiger Woods was chairman of the board, played into the court's apprehensions of growing celebrity control over symbols and the stifling of public dialogue. Woods had assigned to ETW "the exclusive right to exploit his name, image, likeness, and signature, and all other publicity rights."<sup>161</sup> Furthermore, ETW had registered the trademark "TIGER WOODS" for use in connection with art prints, photographs, and posters, among other items.<sup>162</sup> After Jireh published prints of Rush's work, Woods sued on six counts, including trademark infringement and dilution under the Lanham Act.<sup>163</sup> In considering the trademark infringement claim, the Sixth Circuit noted that "ETW asks us, in effect, to constitute Woods himself as a walking, talking trademark."<sup>164</sup> The Sixth Circuit viewed Woods as asking for an unreasonable scope of intellectual property protection. He sought strict control over his image and the court presumed that his goal was censorship of public dialogue. In the court's Madow-inspired view, Woods and ETW seemed to exemplify the greatest dangers posed to society by the right of publicity.

### C. *Hazards of the Cultural Studies View*

The appeal of the Cultural Studies view is that it prioritizes unfettered public discussion ahead of further accumulation of rights by top celebrities. In spite of the doctrine's rhetorical strength of favoring the public over the elite, the doctrine has several shortcomings.

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<sup>161</sup> *ETW Corp.*, 332 F.3d at 918.

<sup>162</sup> *See id.* (discussing Registration No. 2,194,381, in which the trademark "TIGER WOODS" was also registered for use in connection with notebooks, pens, pencils, and trading cards).

<sup>163</sup> *See id.* at 919. The counts included:

[T]rademark infringement in violation of the Lanham Act, 15 U.S.C. § 1114; dilution of the mark under the Lanham Act, 15 U.S.C. § 1125(c); unfair competition and false advertising under the Lanham Act, 15 U.S.C. § 1125(a); unfair competition and deceptive trade practices under Ohio Revised Code § 4165.01; unfair competition and trademark infringement under Ohio common law; and violation of Woods's right of publicity under Ohio common law.

*Id.*

<sup>164</sup> *Id.* at 922.

### 1. The Overlooked First Amendment Bar to the Right of Publicity

Proponents of the Cultural Studies view, including the Sixth Circuit, have failed to adequately consider the strength of the First Amendment as a bar to the expansion of publicity rights. The *ETW Corp.* court acknowledged that, “[t]here is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment.”<sup>165</sup> Yet, rather than focusing the majority of its attention on this tension and further developing the First Amendment bar, the court preferred to hastily cut away at the right of publicity.<sup>166</sup> The court failed to examine whether its goal of limiting the growth of publicity rights could be accomplished within the First Amendment, which has served as the constitutional foil to the right of publicity.<sup>167</sup> By neglecting this analysis, the *ETW Corp.* court shortchanged the power of the First Amendment and the well-conceived transformative use test advanced in *Comedy III Productions*.<sup>168</sup>

### 2. Undue Focus on Society’s Need for Discussion of Celebrities

The *ETW Corp.* court drew largely from the theory of *Cardtoons* in noting that “celebrities are an important part of our public vocabulary and have come to symbolize certain ideas and values.”<sup>169</sup> The *Cardtoons* court had considered the view of a Cultural Studies scholar who stated that celebrities are “common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory.”<sup>170</sup> Despite making such sweeping assertions, neither circuit court considered the possibility that it was overstating the importance of celebrities to the public discourse. Instead, both courts seemed to proceed on the assumption that top celebrities, namely athletes, have become entitled to too many rights. Rather than directly stating that view, the courts retreated behind the Cultural Studies doctrine, never supporting its assertions with evidence presented during trial. Having studied the two opinions, one might think

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<sup>165</sup> *Id.* at 931.

<sup>166</sup> *Id.* at 937-38.

<sup>167</sup> See, e.g., *Hoffman II*, 255 F.3d 1180.

<sup>168</sup> See *supra* note 96 (describing the transformative use test).

<sup>169</sup> *ETW Corp.*, 332 F.3d at 933.

<sup>170</sup> *Cardtoons*, 95 F.3d at 972 (citing JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION* 163 (1990)) (later cited by *ETW Corp.*, 332 F.3d at 933).

that meaningful public discourse could not exist without constant in-depth probing of celebrity identities.

### 3. Economic Incentives and Lesser Celebrities

In *ETW Corp.* and *Cardtoons*, the courts focused on top celebrities who were able to generate substantial income from work in their professional fields, such as acting or sports. The court in *Cardtoons* took judicial notice that “[t]he extra income generated by licensing one’s identity does not provide a necessary inducement to enter and achieve in the realm of sports and entertainment.”<sup>171</sup> The Sixth Circuit cited this view in *ETW Corp.*<sup>172</sup> To support this approach, both courts noted that “major league baseball players’ salaries currently average over one million dollars per year.”<sup>173</sup> With regard to this information, it is difficult for one to contend that any person needs to earn more than one million dollars per year to support himself. For this reason, the courts’ argument has strong rhetorical appeal.

However, the courts neglected to consider whether they should be making broad policy decisions on the basis of the highest paid athletes. The courts’ view seems to be summed up by the title of an article cited by *Cardtoons*: *Booooooooooooooooooooo! Let’s Hear It for Pampered, Preening, Overpaid Whiners: The Jocks.*<sup>174</sup> The courts’ argument that a right of publicity is superfluous may be true for top athletes, who earn salaries in the millions of dollars and for whom income earned through licensing may constitute only a fraction of total income, or mere icing on the cake. Yet, for the tens of thousands of small-time celebrities and even non-celebrities, who may seek protection under the right of publicity, such licensing income may constitute a substantial part of their earnings. Holden One, for example, would strive to carefully manage his image to attract licensing income that might outweigh his tour earnings. Holden’s predicament represents a significant flaw in the cultural studies approach, which only considers the top tier of stardom. It seems unjust to subject lesser celebrities, for whom publicity rights may be more meaningful, to views premised on the “Winner-Take-All” notion of superstars.<sup>175</sup>

<sup>171</sup> *Cardtoons*, 95 F.3d at 974 (“[W]hile publicity rights may provide some incentive for creativity and achievement, the magnitude and importance of the incentive has been exaggerated.”).

<sup>172</sup> See *ETW Corp.*, 332 F.3d at 933.

<sup>173</sup> *Id.* (citing *Cardtoons*, 95 F.3d at 974).

<sup>174</sup> *Cardtoons*, 95 F.3d at 974 (citing Bill Brashler, *Booooooooooooooooooooo! Let’s Hear It for Pampered, Preening, Overpaid Whiners: The Jocks*, CHI. TRIB., July 28, 1996, Magazine, at 12.

<sup>175</sup> See ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW*

## CONCLUSION

A thorough analysis of the Sixth Circuit's decision in *ETW Corp.* must consider that the court could have decided for Jireh Publishing simply on the basis of Rush's First Amendment rights. The court could have noted, as the district court did, that the "defendant's artistic prints seeking to convey a message may be distinguished from posters which merely reproduce an existing photograph."<sup>176</sup> Indeed, the Sixth Circuit presented First Amendment arguments in favor of the defendant and analyzed Rush's work according to the transformative use test. However, rather than engage in a pure balancing of publicity rights and the First Amendment, the court was determined to deliver a bold statement against the right of publicity and, consequently, incorporated a broader definition of celebrity into its decision. Although it need not have done so to affirm summary judgment against *ETW*, the court was determined to curtail the reach of publicity rights, especially for top celebrities.

In doing so, the Sixth Circuit failed to present a coherent vision and only served to muddy the doctrine of publicity rights. It follows from the court's arguments that top celebrities, for whom the right of publicity has evolved to protect, should now be subject to lesser protection on the basis of Cultural Studies theories. The court gutted economic justifications for publicity rights by taking judicial notice that celebrities probably earn enough in salary to preclude the need for additional incentives. Throughout its discussion, the court neglected to consider the fate of lesser celebrities, for whom income generated from the right of publicity may constitute a significant portion of total earnings. Additionally, it is not clear that the same strict standard applied to top celebrities, whose personas are apparently vital to public discourse, should be applied to those whose fame is cradled in less lofty heights.

Michael Madow, a chief proponent of the Cultural Studies view, has asserted that "the decision whether or not to recognize a property right in a celebrity's publicity value involves a choice between two fundamentally different conceptions of fame, and of the relation of famous persons to society."<sup>177</sup> The Sixth Circuit, seeking an alternative to the conception of fame that supports publicity

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AT THE TOP GET SO MUCH MORE THAN THE REST OF US (1996) (describing markets where top performers get high percentages of the proceeds).

<sup>176</sup> *ETW Corp. v. Jireh Publ'g, Inc.*, 99 F. Supp. 2d 829, 836 (N.D. Ohio 2000) (granting "defendant's Motion for Summary Judgment Based upon Freedom of Speech and Expression" with regard to the right of publicity claim).

<sup>177</sup> Madow, *supra* note 18, at 238-39.

rights, supposed that it could simply elect to switch to the more communitarian approach. By dramatically abandoning one doctrine and leaping to another, the *ETW Corp.* court left behind several opportunities to reform the right of publicity within its current framework.

A preferable approach would focus judicial attention solely on the balance of First Amendment and publicity rights. This dichotomy encourages a pure analysis of the speech itself and its commercial impact, rather than a broader examination of the speaker and the economic status of the celebrity. When the latter considerations are brought to the fore, as in *ETW Corp.*, the court compromises its ability to clarify the still-evolving doctrine of publicity rights.

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