

Caught on Tape: Exposing the Unsettled and Unpredictable State of the Right of Publicity

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I. INTRODUCTION

The right of publicity is the right to control the commercial exploitation of one's identity.¹ Casting out its net, the right of publicity provides a tool to prevent or stop people from benefiting from the unauthorized use of another's image, likeness, or identity.² If unsuccessful in defending the use, the unauthorized user must cease its activity or provide compensation for the right to continue the use.³

The right of publicity does not automatically condemn all use of another's image.⁴ Further, various defenses may prevail over a right

1. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (holding "in addition to and independent of that right of privacy, . . . a man has a right in the publicity value of his photograph."); MCCARTHY THOMAS, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2002) (stating the right of publicity is "the inherent right of every human being to control the commercial use of his or her identity." It is a "state-law created intellectual property right whose infringement is a commercial tort of unfair competition.").

2. See MCCARTHY, *supra* note 1 § 3:2 (stating a prima facie claim of right of publicity infringement consists of the following elements: "1. Validity: Plaintiff owns an enforceable right in the identity or persona of a human being. 2. Infringement: A. Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use. B. Defendant's use is likely to cause damage to the commercial value of that persona.").

3. See generally MCCARTHY, *supra* note 1 §§ 11:21-11:37 (discussing remedies for right of publicity infringement including injunctions and damages).

4. See generally *ETW Corp. v. Jireh Publ'g, Inc.*, 99 F. Supp. 2d 829, 834 (N.D. Ohio 2000) (stating "the First Amendment limits the reach of the right of publicity, for example it does not allow a celebrity to prevent use in a First Amendment protected work" (citing MCCARTHY THOMAS, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 28:40-28:41 (4th ed. 1999)) and (citing JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 2.16[2] (1999) stating "the individual's right of publicity is balanced with, and limited by, the right of the public to know and that of the news media under the First Amendment

of publicity infringement claim allowing continued and unscathed use.⁵ The parameters of these permissible or defensible uses are at times unclear.⁶ As a result, the extent of protection afforded by the right of publicity continues to be debated in case law.⁷ The lack of defined parameters potentially allows a party to benefit from the unauthorized use of another's identity while the subject in use remains exploited and uncompensated.⁸

A claim of right of publicity infringement may be refuted by asserting several arguments including non-celebrity status or fungibility of the plaintiff's image, consent provided for the use, or First Amendment protection.⁹ These arguments may succeed in dismissal of a suit in its early stages.¹⁰ While at other times, despite asserting a defense, sufficient issues of material fact remain requiring further scrutiny.¹¹ The lack of bright line rules renders the right of

freedoms of speech and of the press to disseminate information. . .").

5. See generally MCCARTHY, *supra* note 1 §§ 11:38-11:58 (stating defenses to a right of publicity infringement claim include the statute of limitations, federal preemption, and copyright ownership).

6. Compare *Lane v. MRA Holdings, LLC*, No. 6:01-cv-1493-Orl-22KRS, 2002 U.S. Dist. LEXIS 24111 (M.D. Fla. Nov. 26, 2002) (granting defendant MRA's motion for summary judgment), with *Gritzke v. MRA Holdings, LLC*, No. 4:01cv495-RH, 2003 U.S. Dist. LEXIS 9307 (N.D. Fla. Mar. 22, 2002) (denying defendant MRA's motion to dismiss).

7. See *Lane*, 2002 U.S. Dist. LEXIS 24111, at *45 (granting defendant MRA's motion for summary judgment on plaintiff's claim of unauthorized publication of her image for commercial purposes in violation of section 540.08 of Florida law).

8. *Id.*

9. See *Ainsworth v. Century Supply, Co.*, 693 N.E.2d 510 (Ill. App. Ct. 1998) (defendant argued that (1) it received no commercial benefit from use of plaintiff's fungible image in its television commercial; (2) by consenting to appear in an instructional video, plaintiff also consented to appearing in television commercials; (3) as a media defendant, its incidental use of plaintiff's image was protected by the First Amendment).

10. See generally *Lane*, 2002 U.S. Dist. LEXIS 24111, at *45 (granting defendant's motion for summary judgment because no reasonable jury could conclude that plaintiff's consent to being videotaped was limited and because defendant's video was an expressive work protected by the First Amendment with its incidental use of plaintiff's image in advertising sharing First Amendment protection); *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 on freedom of speech and expression finding defendant's paintings and drawings of famous golfer protected by the First Amendment); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 341 (E.D. Penn. 1996) (granting defendant's motion for summary judgment for use of plaintiff's name and likeness in film, picture, book, and video in describing Black Panthers because it was for purpose of expression and protected by the First Amendment).

11. *Gritzke v. MRA Holdings LLC*, No. 4:01cv495-RH, 2003 U.S. Dist. LEXIS 9307 (N.D. Fla. 2002) (denying defendant's motion to dismiss because plaintiff stated a valid claim for commercial misappropriation of likeness for defendant's use of her image in advertisements for video as commercial exploitation); *Seale*,

publicity, in certain situations, an unpredictable and perhaps ineffective tool for protecting against exploitation of one's identity.¹²

The rising popularity of live or reality television exposes not only those caught on tape, but also the undefined boundaries of the right of publicity when claims of commercial exploitation are dismissed in the early stages of litigation.¹³ Examining those gaps, this note applies a right of publicity claim to two Florida District Court cases with similar factual situations.¹⁴ The note explores arguments surrounding the use of videotaped images of women taken in public places, compiled with similar footage of other women and sold in a videocassette and DVD series.¹⁵ As the images of otherwise unknown people prove commercially popular when strategically marketed and targeted to certain groups, the right of publicity may increasingly face situations in which it may prove ill-equipped to protect peoples' rights.¹⁶

II. *GIRLS GONE WILD* AND THE RIGHT OF PUBLICITY

Joseph Francis is the founder of MRA Holdings, LLC (MRA), a video production business.¹⁷ MRA obtains, edits and assembles video footage taken in various public places to create videotapes and DVDs

949 F. Supp. at 341 (denying defendant's motion for summary judgment because issues of material fact remained as to use of plaintiff's likeness on a CD cover); *Cheatham v. Paisano Publ'ns, Inc.*, 891 F. Supp. 381, 388 (W.D. Ky. 1995) (denying defendant's motion to dismiss plaintiff's claim of appropriation of image for commercial gain for use of her image on a photo design and T-shirt raised issues of material fact as to identifiability of plaintiff's image).

12. *Compare* *Lane v. MRA Holdings, LLC*, No. 6:01-cv-1493-Orl-22KRS, 2002 U.S. Dist. LEXIS 24111 (M.D. Fla. Nov. 26, 2002) (granting defendant MRA's motion for summary judgment), *with* *Gritzke v. MRA Holdings, LLC*, No. 4:01cv495-RH, 2003 U.S. Dist. LEXIS 9307 (N.D. Fla. Mar. 22, 2002) (denying defendant MRA's motion to dismiss).

13. *See Lane*, 2002 U.S. Dist. LEXIS 24111, at *45 (granting defendant MRA's motion for summary judgment on plaintiff's claim of unauthorized publication of her image for commercial purposes in violation of section 540.08 of Florida law).

14. *Lane v. MRA Holdings, LLC*, No. 6:01-cv-1493-Orl-22KRS, 2002 U.S. Dist. LEXIS 24111 (M.D. Fla. Nov. 26, 2002); *Gritzke v. MRA Holdings, LLC*, No. 4:01cv495-RH, 2003 U.S. Dist. LEXIS 9307 (N.D. Fla. Mar. 22, 2002).

15. MRA Holdings, LLC obtains, edits, and compiles footage and sells the compilations in theme video series such as *Girls Gone Wild* and *Sexy Sorority Sisters*. *See* <http://www.girlsgonewild.com>.

16. *See generally* Kathleen Lavey, *Is Lansing Ready for 'Girls Gone Wild'?*, LANSING STATE JOURNAL (Jan. 31, 2003), available at http://www.lsaj.com/things/events/030131_gone_wild_1d.html (last visited Apr. 2, 2003 (on file with author) (noting that several women have unsuccessfully sued MRA)).

17. Vincent Rowe, *MGM Lands Girls Gone Wild* (Oct. 4, 2002), available at <http://ca.movies.yahoo.com/fs/20021004/103376335400.html>.

based on different themes.¹⁸ *Girls Gone Wild* is one such series which depicts young women in various stages of undress in public places.¹⁹ The videos and DVDs are marketed through paid television commercials, infomercials and on a company website.²⁰ The venture has achieved significant commercial success.²¹

At the outset, a person willing to expose their body in public with the likelihood of a video camera present in the vicinity seemingly has no expectation of privacy.²² The right of publicity, however, is a branch of the right of privacy that protects not embarrassment and hurt feelings, but the right to control the commercial exploitation of one's image.²³ When the footage of a woman ends up in one of MRA's videos and also used in its advertisements, the questions become *Who can claim commercial exploitation? What constitutes consent to commercial exploitation?* and most important and debatable, *What is commercial exploitation?*²⁴

18. See *Lane v. MRA Holdings, LLC*, No. 6:01-cv-1493-Orl-22KRS, 2002 U.S. Dist. LEXIS 2411, at *3 (M.D. Fla. Nov. 26, 2002)

19. *Id.*

20. <http://www.hoovers.com/co/capsule/8/0,2163,106568,00.html> (last visited Apr. 2, 2003) (on file with author) (noting MRA's infomercials for the *Girls Gone Wild* series "runs on cable outlets such as E! Entertainment Television, BET, and Comedy Central, as well as local broadcast stations around the country"); <http://www.girlsgonewild.com>.

21. See generally Kathleen Lavey, *Is Lansing Ready for 'Girls Gone Wild'?*, LANSING STATE JOURNAL (Jan. 31, 2003), available at http://www.lsj.com/things/events/030131_gone_wild_1d.html (last visited Apr. 2, 2003) (on file with author) (noting there have been more than 80 variations of the *Girls Gone Wild* video and DVD series since the first one in 1998. The products retail for about \$20); <http://www.hoovers.com/co/capsule/8/0,2163,106568,00.html> (noting that in 2002 4.5 million MRA videos and DVDs were sold).

22. See Press Release, Mantra Entertainment, 'Girls Gone Wild' Producer Wins Lawsuit (June 4, 2002) (on file with author) (quoting Judge C. Hunter King of New Orleans as saying "[w]hen you do it [expose your body] on Bourbon Street or in a club and you know there is an individual with a video, certainly you must expect that this is going to be shown all over the place.").

23. See generally *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (stating that "far from having their feelings bruised through public exposure of their likenesses, [plaintiffs] would feel sorely deprived if they no longer received money for authorizing advertisements"); *Cabaniss v. Hipsley*, 151 S.E.2d 496, 504 (Ga. Ct. App. 1966) (noting that the main distinction between the right of privacy and the right of publicity is that privacy involves "injury to feelings, sensibilities, or reputation" while claims involving an appropriation of likeness are "in the nature of property rights for commercial exploitation.").

24. See *supra* notes 13-16..

III. EVOLUTION OF THE RIGHT OF PUBLICITY

A. *Origins of the Right to Privacy*

In an 1890 article, Samuel D. Warren and Louis D. Brandeis stated the invasion of the right to privacy was a separate tort, essentially recognizing the right “to be let alone.”²⁵ Courts initially declined to recognize this new tort.²⁶ In 1902, in *Roberson v. Rochester Folding Box Co.*, the New York Court of Appeals dismissed a suit for invasion of privacy by a woman whose picture was placed on 25,000 posters advertising defendant’s flour without her consent.²⁷ The court declared that no right of privacy existed.²⁸

B. *Early Statutory Protection and Common Law Protection of the Right to Privacy*

In response to the public outcry after *Roberson*, The New York legislature enacted section 51 of the Civil Rights Law providing a cause of action for anyone whose name, portrait or picture is used for advertising purposes or for the purposes of trade without written consent.²⁹ Three years after *Roberson* in 1905, in *Pavesich v. New England Life Insurance Co.*, the Supreme Court of Georgia recognized a common law right to privacy where the defendant published plaintiff’s name and picture to advertise its insurance services without the plaintiff’s consent.³⁰ Over the years following *Pavesich*, many courts recognized a common law right of privacy for misappropriation of name or likeness for commercial purposes and some for noncommercial purposes.³¹

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

26. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

27. *Id.*

28. *Id.*

29. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2003) (“Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without [his] written consent . . . may maintain an equitable action in the supreme court of this state against the person, firm, or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person’s name, portrait, picture or voice in such manner . . . the jury, in its discretion, may award exemplary damages.”).

30. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 81 (Ga. 1905) (holding “the publication of one’s picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right [of privacy].”).

31. See generally *Mendonsa v. Time Inc.*, 678 F. Supp. 967, 969 (D.R.I. 1988) (citing *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86 (1924) (use of name as

C. Recognition of the "Right of Publicity": *Haelan Laboratories and Beyond*

In 1953, an individual's right to protect the publicity value of his photograph was recognized and designated the "right of publicity" by the Second Circuit in *Haelan Laboratories v. Topps Chewing Gum, Inc.*³² In this case, the court held that "in addition to and independent of that right of privacy a man has a right in the publicity value of his photograph."³³

While the debate continued over the definition and scope of the right to privacy, in 1960 Professor Prosser categorized four distinct kinds of invasion: (1) intrusion upon one's physical solitude or seclusion; (2) public disclosure of private facts; (3) publicity that places someone in a false light in the public's eye; and (4) appropriation of one's name or likeness for another's benefit.³⁴ The American Law Institute adopted Prosser's formulation in the Restatement (Second) of Torts, § 652A (1977).³⁵ Many courts have adopted the Restatement formulation as the common law rule in their jurisdictions.³⁶

D. Modern Development

"Unlike intrusion, disclosure, or false light, the appropriation branch of Prosser's categories does not require the invasion of something secret or private to the plaintiff nor does it involve falsity."³⁷ "It consists of the appropriation, for the defendant's benefit, use or advantage, of the plaintiff's name or likeness."³⁸ This distinction, that the appropriation violates the right to the use of one's name and likeness, marked the decisions of the 1970s as the right of

candidate by political party); *Hinish v. Meier & Frank Co.*, 166 Or. 482 (1941) (name signed to telegram urging governor to veto a bill); *Schwartz v Edrington*, 133 La. 235 (1913) (name signed to petition)).

32. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

33. *Id.* at 868.

34. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

35. RESTATEMENT (SECOND) OF TORTS § 652A (1977) (under the Restatement definition, four causes of action exist, each classified as invasion of privacy: "(2) The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another. . . or (b) appropriation of the other's name or likeness . . . or (c) unreasonable publicity given to the other's private life; . . . or (d) publicity that unreasonably places the other in a false light before the public.").

36. See *Mendonsa*, 678 F. Supp. at 969 (citing *Lawrence v. A.S. Abell Co.*, 475 A.2d 448 (Md. 1982); *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904 (D.N.J. 1986)).

37. See *Cabaniss v. Hipsley*, 151 S.E.2d 496, 503 (Ga. Ct. App. 1966).

38. *Id.*

publicity came into its own as distinct from the right of privacy.³⁹

Today, the Restatement of the Law of Unfair Competition includes sections defining and addressing the right of publicity.⁴⁰ The Restatement declares it to be illegal to use a person's identity without consent for "purposes of trade."⁴¹ It treats the right of publicity as distinct from the right or privacy because its focus is on the redress for appropriation of the commercial value of identity.⁴² It states that the right of publicity exists in us all, both celebrities and non-celebrities.⁴³ Today, the right of privacy has been recognized in some form in every state, while the right of publicity exists in nearly half of the states in either common law or statutory form.⁴⁴

IV. *LANE AND GRITZKE VERSUS MRA: EXPOSING THE UNSETTLED AND UNPREDICTABLE STATE OF THE LAW*

A. *Lane v. MRA Holdings, LLC*

In *Lane v. MRA Holdings, LLC*, the plaintiff was a young woman who, while on a public street, was encouraged by a videographer to remove her clothes and expose areas of her body.⁴⁵ Some time later, Lane discovered that two minutes of footage taken of her appeared in the video titled *Girls Gone Wild- College Girls Exposed*.⁴⁶ In addition, two to three seconds censored clips of Lane were being used in television commercials to advertise the videos.⁴⁷

Lane brought suit under Florida's statutory version of the right of publicity, section 540.08.⁴⁸ Section 540.08 prohibits the unauthorized

39. See *Hirsch v. SC Johnson and Son, Inc.*, 280 N.W.2d 129 (Wis. 1979) (rejecting existence of a right of privacy while recognizing a right of publicity in its common law).

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

41. *Id.* §§ 46-47.

42. *Id.* § 48-49; see also Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) ("The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.'").

43. *Id.* § 46.

44. See MCCARTHY, *supra* note 1 § 6:2.

45. *Lane*, 2002 U.S. Dist. LEXIS 24111, at *4-6.

46. *Id.* at *6-7.

47. *Id.* at *7.

48. *Id.* at *13-14; FLA. STAT. § 540.08 (West 2002) (providing "No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph or other likeness of any natural person without the express written or oral consent to such use given by . . . such person.").

publication “for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph or other likeness of any natural person without [the] express written or oral consent to such use given by such person.”⁴⁹ The court interpreted the terms “trade” “commercial” or “advertising purpose” in section 540.08 to mean use of the likeness to “directly promote” a product or service.⁵⁰ In deciding as a matter of law that Lane’s image was not used to “directly promote” a product or service, the court relied on section 47 of the Restatement (Third) of Unfair Competition.⁵¹ Section 47 states that “the name, likeness, and other indicia of a person’s identity are used ‘for purposes of trade. . . if they are used in advertising the user’s goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user.’”⁵² “However, use ‘for the purpose of trade’ does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising incidental to such uses.”⁵³ Therefore, the “use of another’s identity in a novel, play or motion picture is . . . not ordinarily an infringement . . . [unless] the name or likeness is used solely to attract attention to a work that is not related to the identified person.”⁵⁴

MRA argued its videos are expressive works, like motion pictures, aiming to entertain.⁵⁵ The documentaries show real women in actual public places and are entitled to First Amendment protection.⁵⁶ The court agreed and found the *Girls Gone Wild* video to be “irrefutably” an expressive work created solely to entertain.⁵⁷ Although Lane’s image was used to sell copies of the video, she was not used to promote it but rather depicted in the video and advertisement “as part

49. § 540.08

50. *Lane*, 2002 U.S. Dist. LEXIS 24111, at *18 (citing *Tyne v. Time Warner Entm’t Co.*, 204 F. Supp. 2d 1338, 1342 (M.D. Fla. 2002) (holding that “the use of names and likenesses of individuals in a motion picture and promotion and advertisement of such picture did not violate §540.08 because there was no showing that their names and likenesses were used to directly promote a service or product” and noting that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments)).

51. *Lane*, 2002 U.S. Dist. LEXIS 24111, at *16-18.

52. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

53. *Lane*, 2002 U.S. Dist. LEXIS 24111, at *17.

54. *Id.* (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995)).

55. See Stephen Van Drake, ‘*Girls Gone Wild*’ cases test Constitution, SOUTH FLORIDA BUSINESS JOURNAL (Aug. 9, 2002), available at <http://washington.bizjournals.com/southflorida/stories/2002/08/12/story4.html> (on file with author).

56. *Id.*

57. *Lane*, 2002 U.S. Dist. LEXIS 24111, at *17.

of an expressive work in which she voluntarily participated.”⁵⁸ Because MRA’s work was deemed expressive its use of Lane’s image in the advertisements was found to be “incidental,” entitling it to share the First Amendment protection of the underlying work.⁵⁹ Based on these conclusions, the court held MRA’s use of Lane’s image in the video and in its advertisements does not violate section 540.08.⁶⁰

Regarding the extent of Lane’s consent, Lane argued that even if she did consent to the initial taping, her consent does not extend to the widespread distribution of her image in MRA’s video or use in its advertisements.⁶¹ Considering various factors, the court stated that no reasonable jury could conclude that her consent limited viewing of the footage to only those present at the taping.⁶² The court granted MRA’s motion for summary judgment.⁶³

B. Gritzke v. MRA Holdings, LLC

In *Gritzke v. MRA Holdings, LLC*, plaintiff Gritzke was also a young woman caught by a videographer exposing her body at a Mardi Gras celebration.⁶⁴ Footage taken of Gritzke ultimately ended up in MRA’s video titled *Girls Gone Wild- Sexy Sorority Sisters*, on the videotape’s package, and in television advertisements.⁶⁵ Applying the same provisions of Florida law section 540.08, the judge denied MRA’s motion to dismiss.⁶⁶ The judge stated that by alleging that MRA published her photograph for commercial and advertising purposes - specifically on the videotape’s package and in advertisements without her permission, that Gritzke properly alleged a claim under section 540.08.⁶⁷

58. *Id.*

59. *Id.*

60. *Id.* at *17-18.

61. *Id.* at *24.

62. *Lane*, 2002 U.S. Dist. LEXIS 24111, at *36-37 (basing its holding on a variety of facts including that the conduct occurred in public, before a stranger and statements made by plaintiff regarding her understanding of possible use of the tape).

63. *Lane*, at *45; FED. R. CIV. P. 56(c) (Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”).

64. *Gritzke v. MRA Holdings, LLC*, No. 4:01cv495-RH, 2003 U.S. Dist. LEXIS 9307, at *1 (N.D. Fla. Mar. 22, 2002)

65. *Id.*

66. *Id.* at *3 (a motion to dismiss for failure to state a claim may be granted “only if it appears to a certainty that the plaintiff would be unable to recover under any set of facts that could be proved in support of the complaint.”).

67. *Id.*

As in *Lane*, MRA asserted First Amendment protection of its work by arguing that it merely used videotape of a newsworthy event: a crowd at Mardi Gras.⁶⁸ The judge, however, operating under the standard governing motions to dismiss, accepted as true that MRA made Gritzke's image a focus of its advertisements.⁶⁹ In denying MRA's motion to dismiss, the court stated "the First Amendment provides no right to make an unconsenting individual the poster-person for a commercial product."⁷⁰

Regarding the scope of Gritzke's consent, MRA argued that because Gritzke was filmed in a public place it was not required to obtain any consent from Gritzke.⁷¹ In response, the court reiterated that a commercial vendor cannot use an unconsenting person as its poster-person, prominently displayed in advertisements just because the individual was initially photographed in public.⁷² Gritzke ultimately settled with MRA before trial.⁷³

Distinguishing *Gritzke*, the *Lane* court noted that the judge was operating under a more liberal standard governing motions to dismiss.⁷⁴ Distinguishing the facts, the plaintiff in *Gritzke* appeared on the videotape's cover in addition to television advertisements.⁷⁵ Although neither *Lane* nor *Gritzke* proceeded to trial, the different outcomes in these cases reveal that what constitutes use for "commercial" or "for trade purposes" is not always entirely clear.⁷⁶ More specifically, the status of the images used in the *Girls Gone Wild* videos and advertisements is not clear as being protected expressive speech or actionable commercial exploitation.⁷⁷

68. *Id.* at *2.

69. *Gritzke v. MRA Holdings, LLC*, No. 4:01cv495-RH, 2003 U.S. Dist. LEXIS 9307, at *2 (N.D. Fla. Mar. 22, 2002)

70. *Id.* at *13.

71. *Id.* at *9.

72. *Id.* (citing *Shariff v. American Broad. Co.*, 613 So. 2d 768 (La. App. 4th Cir. 1993)).

73. Associated Press, *Student Settles With 'Girls Gone Wild' Producers* (Oct. 4, 2002), available at <http://www.cnn.com/2002/us/south/10/04/offbeat.ggwild.settlement.ap/index.html> (stating that the terms of the financial settlement are confidential, however, MRA must stop distribution of videos and all advertising using plaintiff's image).

74. *Lane*, 2002 U.S. Dist. LEXIS 24111, at *21-22.

75. *Id.*

76. Compare *Lane*, 2002 U.S. Dist. LEXIS 24111 (holding MRA's use of plaintiff's image did not constitute use for a commercial purpose), with *Gritzke*, 2003 U.S. Dist. LEXIS 9307 (holding that allegations of similar use of an image by MRA stated a claim for commercial misappropriation).

77. Compare *Lane*, 2002 U.S. Dist. LEXIS 24111, at *17 (stating it is "irrefutable" that MRA's works are expressive), with *Gritzke*, 2003 U.S. Dist. LEXIS 9307 (stating MRA's use of plaintiff's image in its film supported a claim of commercial exploitation and arguing its work to be expressive failed to succeed).

V. WHO CAN CLAIM COMMERCIAL EXPLOITATION?

A. *Is Celebrity Status a Requirement for Asserting a Right of Publicity Claim?*

The defendant in a right of publicity case may argue that no rights have been violated because the plaintiff is a non-celebrity and his or her image is fungible.⁷⁸ Asserting fungibility, the defendant argues that because it could have used any one of several similar images the use of the plaintiff's image was of no value to the defendant and the plaintiff has suffered no damages on which to base a claim.⁷⁹ Over time, however, the view that the right of publicity belongs only to celebrities or public figures has expanded to include non-celebrities.⁸⁰

B. *Establishing Violation of the Right of Publicity by a Non-celebrity*

1. *The Elements of a Right of Publicity Claim*

The basic elements of a right of publicity claim are:

“1. Validity: Plaintiff owns an enforceable right in the identity or persona of a human being [meaning the plaintiff's own identity is at issue].

2. Infringement:

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

B. Defendant's use is likely to cause damage to the commercial value of that persona.”⁸¹

b. *Identifiability*

A plaintiff claiming right of publicity infringement must establish that the defendant's use is of an identifiable or recognizable image of

in dismissal of the case).

78. See *Gritzke*, No. 4:01cv495-RH, Preliminary Order on Damages, at 5 (stating plaintiff's image had “little if any unique value” to MRA because it could have hired a willing participant without substantially decreasing sales and that “plaintiff's was only one of many images appearing on the videotape and in defendant's marketing materials, all of which presumably contributed to [MRA's] sales and profits”); *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 514-15 (Ill. App. Ct. 1998) (defendant argued it received no commercial benefit from using plaintiff's image because his image was fungible).

79. See *Ainsworth*, 693 N.E.2d at 514-15.

80. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (stating “the identity of an unknown person may possess commercial value.”).

81. See MCCARTHY, *supra* note 1 § 3:23.

the plaintiff.⁸² Establishing identifiable use is not a significant hurdle for a plaintiff due to the liberally applied tests developed in case law.⁸³ For example, courts have held identifiability established if someone familiar with the plaintiff could identify the plaintiff by looking at the defendant's work.⁸⁴ In addition, one scholar has proposed an "aided identification test" for non-celebrity plaintiffs.⁸⁵ A non-celebrity plaintiff satisfies the "aided identification test" by having people who know him or her look at the image used by the defendant and state whether the image is recognizable as that of the plaintiff.⁸⁶

c. Establishing Damages to Commercial Value of One's Image

The plaintiff's level of celebrity status will likely have its most significant role in determining damages.⁸⁷ A defendant may argue that the image used was valueless and there was thus no commercial value to damage. The use of even an unknown image, however, may have commercial value.⁸⁸ While it may be that other images could be used interchangeably, defendant's use of the image in question gives evidence of some value to the defendant.⁸⁹ Further, the appropriation itself of an unknown person's likeness may result in creating

82. *Id.* § 3:17.

83. See generally *Cohen v. Herbal Concepts*, 63 N.Y.2d 379, 385 (1984) (holding that "whether an advertisement that included an unauthorized photograph of the sides and back of a mother and daughter walking nude through a stream was a recognizable [image] was a question of fact for the jury" and that a "jury could find that someone familiar with the persons in the photograph could identify them by looking at the advertisement"); *Cheatham*, 891 F. Supp. at 387 (holding plaintiff's assertions that friends and customers could recognize her clothing designs in an image used by defendant of a woman's bottom on a T-shirt overcame defendant's motion to dismiss); *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930, 934 (1995) (holding that "someone familiar with the persons in the photograph could identify them by looking at [defendant's] jersey" which had the photograph on it).

84. See generally *Cohen*, 63 N.Y.2d at 385.

85. MCCARTHY, *supra* note 1 § 3:23.

86. *Id.*

87. See *Cheatham*, 891 F. Supp. at 387 (noting the amount of damages awarded would reflect the extent of plaintiff's celebrity status).

88. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (stating the identity of even an unknown person may have commercial value); see also § 46 cmt. d ("Private persons may also recover damages measured by the value of the use by establishing the market price that the defendant would have been required to pay to secure similar services from other private persons or from professional models.").

89. See *Gritzke*, No. 4:01cv495-RH, Order, at 3 (plaintiff argues MRA has been able to make its profits by "selling an image [of plaintiff] which purports to be 'the girl next door,' an image which is 'candid, spontaneous, and untainted by the act of posing for money'"); *Ainsworth*, 693 N.E.2d at 514-15 (holding defendant's use reveals value to defendant even if it were "ease of procurement.").

economic value in what was previously economically valueless.⁹⁰ The fact is defendant's use was of the plaintiff's image and no other.⁹¹ Thus establishing damages as part of the right of publicity claim can be satisfied with mere evidence of unauthorized use by the defendant.⁹²

The women appearing in the *Girls Gone Wild* videos are non-celebrities.⁹³ A woman appearing in an *Girls Gone Wild* production could establish identifiable use rather easily under such liberal tests as applied in case law or under the "aided identification" test by having someone familiar with them view the video and identify them.⁹⁴ Regarding damages, because the *Girls Gone Wild* own "cutting room floor" reveals a choice to use certain images while discarding others, its use establishes value to MRA, such as candor, spontaneity, youthful appearance and an appearance "untainted by the act of posing for money."⁹⁵ Further, the appropriation itself by MRA has turned what was previously economically valueless, the uncommercialized images of these women, into a highly profitable venture for MRA.⁹⁶

VI. WHAT CONSTITUTES CONSENT TO COMMERCIAL EXPLOITATION?

While it is difficult to argue lack of consent to being "caught on tape" when one willingly exposes parts of his or her body in public to strangers operating video cameras, it is arguable if consent to that one transaction implies consent for the videographer to do whatever he likes with the footage.⁹⁷ Stated another way, it is debatable whether

90. See *Motschenbacher v. R.J. Reynolds Tobacco, Co.*, 498 F.2d 821, 824 (9th Cir. 1974) (noting that appropriation of the identity of an unknown person may itself create economic value in what was previously economically valueless).

91. See *Ainsworth*, 693 N.E.2d at 514-15; see also MRA's website at <http://www.girlsgonewild.com> in which there is a page called "Cutting Room Floor" containing pictures of girls who for whatever reason did not get used in the final video, suggesting there is a selection process and some images are worth more than others to MRA.

92. See *Wendt v. Host Int'l, Inc.*, No. 96-55243, 1997 U.S. App. LEXIS 25584, at *9 (9th Cir. Sept. 22, 1997) (stating the right of publicity means "in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed and planned, endows the name and likeness of the person involved with commercially exploitable opportunities"); see also MCCARTHY, *supra* note 1 §4:17 (discussing the concept of presuming economic value from defendant's use of plaintiff's identity).

93. See *supra* note 18 and accompanying text.

94. See *supra* note 83 and accompanying text.

95. See *supra* notes 89 and 91 and accompanying text.

96. See *supra* note 21 and 90 and accompanying text.

97. See Press Release, Mantra Entertainment, 'Girls Gone Wild' Producer Wins Lawsuit (June 4, 2002) (on file with author) (quoting Judge C. Hunter King of New

the initial performance before the video camera, however unwise, confers consent to participate in a commercial enterprise involving widespread distribution of the footage and at times in the advertisements for the product, all without compensation.

There is no intrusion on one's rights by photographing or videotaping a person in public.⁹⁸ While consent is not required to take photographs of newsworthy events, the people in those photographs can not be turned into unpaid professional actors.⁹⁹ The fact that a person can be seen by one does not mean they can "legally be forced" to be seen by everyone.¹⁰⁰

Right of publicity cases often arise when a plaintiff consents to the use of an image in the first instance but objects to a later use for a further and different purpose arguing that there was no waiver or consent for such later use.¹⁰¹ Consent to one invasion of privacy does not automatically mean consent to other forms of invasion of privacy related to that act.¹⁰²

Orleans as saying "[w]hen you do it [expose your body] on Bourbon Street or in a club and you know there is an individual with a video, certainly you must expect that this is going to be shown all over the place."); *Gritzke*, No. 4:01cv-495-RH, Order, at 2 (stating "plaintiff may have voluntarily allowed herself to be photographed" but not to be the "poster-person" for a commercial product); *Lane*, 2002 U.S. Dist. LEXIS 24111, at *24 (plaintiff argues a "genuine issue of material fact exists as to whether or not her consent [to the initial videotaping extended to MRA's] widespread publication of her image.").

98. See MCCARTHY, *supra* note 1 § 5:88 (citing *Gill v. Hearst Publ'g Co.*, 253 P.2d 441 (Cal. 1953) (holding that it is not an invasion of privacy to publish a photo "(1) taken in a pose voluntarily assumed in a public place and (2) portraying nothing to shock the ordinary sense of decency or propriety.")).

99. See *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 884 (S.D.N.Y. 1973) (stating it cannot be contended that once a celebrity permits his picture to be used in a publication the publisher can by *simply referring to the original appearance as an "event"* "convert the original permission into a perpetual license to use the celebrity as an unpaid professional model . . . movie companies and publishers . . . are entitled to photograph newsworthy events, but they are not entitled to convert unsuspecting citizens into unpaid professional actors."). (Emphasis added).

100. See MCCARTHY, *supra* note 1 § 5:88.5

101. See *Faber v. Condecor, Inc.*, 477 A.2d 1289, 1294 (N.J. Super. Ct. App. Div. 1984) (affirming award of damages to plaintiff in action against defendant corporation for invasion of privacy because defendant's use of plaintiff's family photograph for commercial purposes established a cause of action, and plaintiff's consent for one company to use the photograph did not waive their right to object to its use by defendant. The court stated that "a plaintiff may waive his right of privacy by consent to a publication of his photograph," but "[i]f the actual invasion goes beyond the contract, fairly construed, as for example, by alteration of the plaintiff's picture, or publicity differing materially in kind or in extent from that contemplated, or exceeding, the authorized duration, there is liability.").

102. See *id.*; see also RESTATEMENT (SECOND) OF TORTS § 892A cmt. e (1979) ("consent to an invasion by particular conduct is not consent to the same invasion by entirely different conduct.").

When consent is implied or informal it should be construed narrowly against the user.¹⁰³ Conduct alone can imply consent such as hamming it up for the camera or not moving when the cameraman makes his presence and intent to photograph known.¹⁰⁴ Use of an image captured in public, however, may only be used in an incidental manner and not as a means to pick someone out of the crowd and thrust him or her into public view.¹⁰⁵

Even if consent to one “risk” exists, if the risk that materializes is significantly different the plaintiff may still have a claim.¹⁰⁶ For example, consent to have pictures appear in *Playboy* magazine does not imply consent for those pictures to appear in the more provocative magazine, *Hustler*.¹⁰⁷ An instructional video on floor installation does not confer consent to have that footage used in a television commercial.¹⁰⁸ Asserting that consent does extend that far one court noted, amounts to saying that “by consenting to eat apples with dinner, one has also consented to eat oranges.”¹⁰⁹ The fact that “both are fruit does not make them indistinguishable.”¹¹⁰ While one may waive protection from intrusion into privacy, the immunity from liability to a right of publicity claim extends only so far as the waiver.¹¹¹

103. See MCCARTHY, *supra* note 1 §10:24 (citing RESTATEMENT (SECOND) OF TORTS § 892A cmt. e (1979)).

104. See *Neff v. Time, Inc.*, 406 F. Supp. 858, 861 (W.D. Penn. 1976) (holding that because plaintiff was photographed in a public place for a newsworthy article, defendant’s work was entitled to First Amendment protection. Further, although plaintiff did not give express consent to be photographed, the photograph was taken with plaintiff’s “active encouragement and participation, and with knowledge that the photographer was connected with a publication”); *Schifano v. Greene County Greyhound Park, Inc.*, 624 So. 2d 178, 181 (Ala. 1993) (affirming summary judgment on issue of express consent where plaintiffs had not said they consented but had remained before camera while photograph was being taken).

105. See *Mendonsa v. Time, Inc.*, 678 F. Supp. 967, 972 (D.R.I. 1988) (denying defendant’s motion to dismiss plaintiff’s claim that defendant used his likeness without his consent for commercial purposes, stating “One traveling upon the public highway may expect to be televised, but only as an incidental part of the general scene . . . if a mere spectator, he may be taken as part of the general audience, but may not be picked out of the crowd alone, thrust upon the screen and unduly featured for public view.”).

106. See *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (stating that while plaintiff “took a risk that her nude photographs would end up in an offensive setting” which might lead one to infer she did not “have high regard for her privacy, . . . the risk she took (with *Playboy*) and the risk that materialized (*Hustler*) were not the same”).

107. *Id.*

108. *Ainsworth v. Century Supply, Co.*, 693 N.E.2d 510 (Ill. App. Ct. 1998).

109. *Id.* at 514.

110. *Id.*

111. See *Mathews v. ABC Television, Inc.*, No. 88 CIV. 6031, 1989 U.S. Dist.

Applied to the images used in *Girls Gone Wild*, even if consent is not required for the initial videotaping because the plaintiff was taped in a public place, it arguably is required for its later and significantly different use in the *Girls Gone Wild* production.¹¹² As the *Gritzke* court noted, a person cannot be made the subject of an advertisement just because a person was initially photographed in public.¹¹³ The fact that the girls consented to being videotaped by one person does not mean they consented to participate in MRA's commercial venture of widely producing and distributing videos.¹¹⁴ The fact that both are videos does not make them indistinguishable.¹¹⁵ While it would be unreasonable for a plaintiff to assume no one would see the video, for by its nature a video is meant to be viewed, consent to be seen by one does not entail consent to be seen by everyone.¹¹⁶

The lawyers in *Lane* argued that MRA went about creating its purported "news" as the videotape rolled.¹¹⁷ While the girls were not involuntary performers for the initial taping, MRA's subsequent use makes them involuntary and uncompensated "stars" or unpaid models in MRA's commercial venture.¹¹⁸ There is a debatable distinction as

LEXIS 10694, at *16 (S.D.N.Y. Sept. 11, 1989) (stating "defendant's immunity from the invasion of privacy claim is no broader than the plaintiff's consent").

112. See generally *id.*; see also RESTATEMENT (SECOND) OF TORTS § 892A (1979) ("to be effective consent must be (a) by one who has the capacity to consent or by a person empowered to consent for him, and (b) to the particular conduct, or to substantially the same conduct"); *Russell v. Marboro Books*, 183 N.Y.S.2d 8, 29 (1959) ("as a general rule, advance consent to commit a tort upon oneself is strictly confined to those acts which are substantially the same as the acts consented to."); MCCARTHY, *supra* note 1 § 10:21 (noting "consent to one act is not necessarily consent to any and all forms of invasion of privacy related to that act").

113. *Gritzke*, 2003 U.S. Dist. LEXIS, at *9; see also *Lermin v. Flynt Distrib. Co.*, 745 F.2d 123, 131 (2d Cir. 1984) (citing *Gautier v. Pro-Football, Inc.* 107 N.E.2d 485 (N.Y. 1952) stating that while one who is a "public figure or is presently newsworthy may be the proper subject of the news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information.")).

114. See *Gritzke*, 2003 U.S. Dist. LEXIS, at *13; *Lane*, 2002 U.S. Dist. LEXIS 24111, at *24 (both plaintiffs conceded consent to the initial videotaping but argued that consent did not extend to the later use by MRA).

115. See *supra* note 111 and accompanying text.

116. See MCCARTHY, *supra* note 1 §5:88.

117. *Lane*, Memorandum in Opposition to Motion for Summary Judgment, at 5 (arguing there was "no 'event' until MRA's cameras started rolling" and the "'events' in *Girls Gone Wild* were created for the sole purpose of commercially exploiting them").

118. See *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434, 438 (3d Cir. 1973) (holding a triable issue of fact existed as to whether plaintiff, whose two-minute interview became a significant part of defendant's documentary, was "drawn out and made an involuntary performer" in defendant's film or "was a mere participant in a newsworthy event.") (cited in MCCARTHY, *supra* note 1 § 8:60 noting people who are part of the news need not be paid, while performers in an entertaining

to whether the women in *Lane* and *Gritzke* were drawn out and made involuntary performers (if not for the initial taping, then for the later video production) or if they were “mere participants in a newsworthy event” captured on film.¹¹⁹ Both plaintiffs in *Lane* and *Gritzke* conceded initial consent to the videotaping.¹²⁰ The more debatable issue is how far the consent extends.¹²¹

VII. WHAT IS COMMERCIAL EXPLOITATION?

A. First Amendment Protection and the Right of Publicity

The First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits states from abridging the freedom of speech.¹²² The right of publicity has the potential of frustrating the purposes of the First Amendment by limiting the use of images in public discourse.¹²³ Entertainment and expressive ideas are entitled to the same constitutional protection as news or the exposition of ideas.¹²⁴ Works that are sold for profit are

presentation must be).

119. *Id.*

120. *See supra* note 114 and accompanying text.

121. *See Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y. 1978) (stating that while plaintiff “may have voluntarily on occasion surrendered [his] privacy, for a price or gratuitously, does not forever forfeit for anyone’s commercial profit so much of [his] privacy as [he] has not relinquished”); *Faber v. Condecor, Inc.*, 477 A.2d 1289, 1294 (N.J. Super. Ct. App. Div. 1984) (stating many right of privacy cases exist where “plaintiff had consented to his or her photograph being taken in the first instance, but because defendant then used the photograph for a further and different purpose, for its own commercial benefit, it is held that there is no waiver or consent for such later use.”).

122. U.S. CONST. amends. I, XIV.

123. *See Comedy III Prods., Inc. v. Saderup, Inc.*, 21 P.3d 797, 803 (Cal. 2001) (stating that “the tension between the right of publicity and the First Amendment is highlighted by recalling the two distinct, commonly acknowledged purposes of the latter. First, to preserve an uninhibited marketplace of ideas and to repel efforts to limit the uninhibited, robust and wide-open debate on public issues. Second, to foster a fundamental respect for individual development and self-realization. The right of publicity has a potential for frustrating the fulfillment of both these purposes.”).

124. *See id.* at 804 (noting that courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas); *see also Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) (“There is no doubt that entertainment, as well as news, enjoys First Amendment protection”); *Mendonsa v. Time Inc.*, 678 F. Supp. 967, 971 (D.R.I. 1988) (“The privilege of enlightening the public is by no means limited to the dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general” (citing *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 506 (1968))).

not deprived of First Amendment protection.¹²⁵ Nor is protection removed if the work has no discernable message, is of questionable taste, and exists in a nontraditional medium.¹²⁶ Further, the First Amendment protection of certain expressive works such as motion pictures, books and magazines extends to “incidental uses” such as advertising.¹²⁷

The statutes and common law formulations of the right of publicity generally require that to establish a claim of illegal use, the use of the image must be for a “commercial,” “trade” or “advertising” purpose.¹²⁸ Commercial speech is “that which does no more than propose a commercial transaction or that which merely advertises a product or service for a business purpose.”¹²⁹ Unauthorized use of one’s image in commercial sales or advertising may trigger a right of publicity claim without offending the First Amendment protection of speech because commercial speech receives limited First Amendment protection.¹³⁰ To avoid liability for infringing the right of publicity, a

125. See *ETW Corp. v. Jireh Publ’g, Inc.*, 99 F. Supp. 2d 829, 836 (N.D. Ohio 2000) (stating the fact that defendant’s work, containing the image of Tiger Woods, was sold for profit is “*irrelevant* to the determination of whether it receives First Amendment protection.”). (Emphasis added).

126. See *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1141 (7th Cir. 1985) (“Art, even of the questionable sort represented by erotic photographs in ‘provocative’ magazines—even of the artless sort represented by ‘topless dancing’ - today enjoys extensive protection in the name of the First Amendment”); *Lermin v. Flynt Distrib. Co.*, 745 F.2d 123, 138 (2d Cir. 1984) (stating that even “vulgar” publications are entitled to First Amendment guarantees); *Comedy III Prods., Inc.*, 21 P.3d at 804 (stating “a work of art is protected by the First Amendment even if it conveys no discernable message” or exists in nontraditional medium).

127. See *Page v. Something Weird Video*, 960 F. Supp. 1438, 1444 (C.D. Cal. 1996) (holding “defendants’ advertising [using plaintiff’s image] is protected because the videos themselves are protected by the First Amendment, and the advertising is incidental to the protected publication of the videos”); *Namath v. Sports Illustrated*, 371 N.Y.S.2d 897 (1975) (“Use of plaintiff’s photograph was merely incidental advertising of defendant’s magazine in which plaintiff had earlier been properly and fairly depicted”); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 336 (E.D. Pa. 1996) (stating “the use of a person’s name and likeness to advertise a novel, play, or motion picture concerning that individual is not actionable as an infringement of the right of publicity”).

128. See generally FLA. STAT. § 540.08 (West 2002) (prohibiting the unauthorized publication of name or likeness for *purposes of trade* or for any *commercial* or *advertising* purpose) (emphasis added); *Lane*, 2002 U.S. Dist. LEXIS 24111, at *38 (stating the elements under Florida’s common law for a claim of misappropriation of likeness); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2003) (providing a right to “any person whose name, portrait, picture or voice is used within this state for *advertising purposes* or for the *purposes of trade* without his written consent.”). (Emphasis added).

129. See *ETW Corp. v. Jireh Publ’g, Inc.*, 99 F. Supp. 2d 829, 835 (N.D. Ohio 2000).

130. See *Hoffman v. Capital Cities/ABC, Inc.* 255 F.3d 1180, 1184 (9th Cir.

user may argue the work is entitled to First Amendment protection as either a “newsworthy” or “expressive” work.¹³¹

The different outcomes in *Lane* and *Gritzke* reveal that the status of the *Girls Gone Wild* videos is unsettled.¹³² If the videos are expressive works, as held in *Lane*, then use of the images in its advertisement are merely incidental and protected by the First Amendment.¹³³ In contrast, the judge in *Gritzke* found MRA’s use to constitute a claim under section 540.08, suggesting the underlying video does not receive First Amendment protection, which would extend to its use of the image to advertise the video.¹³⁴

B. Tiger Woods, Joe Montana and the “Majesty of a Newsworthy Moment”

In *ETW Corp. v. Jireh Publishing, Inc.*, the plaintiff asserted a right of publicity violation in defendant’s making and selling prints of a painting depicting golfer Tiger Woods.¹³⁵ Arguing that his work was art expressing “the majesty of a newsworthy moment,” the defendant sought First Amendment protection to shield him from the right of publicity claim.¹³⁶ In response, the plaintiff argued the prints to be “merely sports merchandise . . . or at best commercial speech,” that were not protected by the First Amendment.¹³⁷

2001) (stating “commercial messages . . . do not receive the same level of constitutional protection as other types of protected expression”) (cited in MCCARTHY, *supra* note 1 §8:18)).

131. See *Zacchini v. Scripps-Broad. Co.*, 433 U.S. 562 (1977) (defendant news station that videotaped and broadcast plaintiff’s cannonball acts asserted First Amendment protection); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001) (defendant used a picture of surfing plaintiff in its clothing catalog and asserted First Amendment protection. The court noted, “This First Amendment defense extends ‘to almost all reporting of recent events’, as well as to publications about ‘people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.’ However, the defense is not absolute; [courts must find] a proper accommodation between [the] competing concerns of freedom of speech and the right of publicity”) (quotations omitted); *Lane*, 2002 U.S. Dist. LEXIS 24111, at *17 (MRA argues its works are expressive and protected by the First Amendment); *Gritzke*, 2003 U.S. Dist. LEXIS 9307, at *2 (MRA argues its work depicts a newsworthy event “much as CBS might cover a presidential speech or Fox might cover the Super Bowl.”).

132. Compare *Lane v. MRA Holdings, LLC*, No. 6:01-cv-1493-Orl-22KRS, 2002 U.S. Dist. LEXIS 24111 (M.D. Fla. Nov. 26, 2002) (granting defendant MRA’s motion for summary judgment), with *Gritzke v. MRA Holdings, LLC*, No. 4:01cv495-RH, 2003 U.S. Dist. LEXIS 9307 (N.D. Fla. Mar. 22, 2002) (denying defendant MRA’s motion to dismiss).

133. See *supra* notes 57 and 127 and accompanying text.

134. See *supra* note 66 and accompanying text.

135. *ETW Corp. v. Jireh Publ’g, Inc.*, 99 F. Supp. 2d 829, 834 (N.D. Ohio 2000).

136. *Id.*

137. *Id.*

The court agreed with the defendant holding that the prints sought to convey a message on a topic “central to American life” rather than merely reproducing an existing photograph.¹³⁸ Stating that the fact the prints were sold was irrelevant to the application of the First Amendment, the court said that “paintings, photographs, prints and sculptures .. *always* communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.”¹³⁹

In *Montana v. San Jose Mercury News, Inc.*, a newspaper published a picture of pro-football player Joe Montana after a victorious Super Bowl.¹⁴⁰ Later, the newspaper created and sold posters featuring the picture that had originally appeared in the newspaper.¹⁴¹ Montana brought suit alleging the poster constituted a misappropriation of his likeness.¹⁴² The court held that the initial picture was protected by the First Amendment as a “matter of public interest,” which Montana conceded.¹⁴³ He argued, however, that the reproduction of the picture in poster form was not similarly protected.¹⁴⁴ The court disagreed holding that the posters used his image for the same reason it was used in the newspaper: because he was a “major player” in “newsworthy sports events.”¹⁴⁵ The court denied Montana’s claim that the newspaper used his image solely to extract its commercial value.¹⁴⁶ The court also based its holding on the newspaper’s constitutional right to promote itself by reproducing its original protected works.¹⁴⁷ The court further noted the poster was an exact reproduction of the picture, contained no additional information, and did not imply that Montana endorsed the newspaper.¹⁴⁸

Both *ETW Corp.* and *Montana* bear factual similarities to the *Girls Gone Wild* cases.¹⁴⁹ In all these cases an initial picture was taken and

138. *Id.* at 835 (distinguishing *Dallas Cowboys Cheerleaders v. Scoreboard Posters*, 600 F.2d 1184 (5th Cir. 1979) in which the court, under the Copyright Act, enjoined defendant from distributing a poster mimicking a previous poster created by the plaintiff).

139. *Id.* at 836 (quoting *Bery v. New York*, 97 F.3d 689, 695 (2d Cir. 1996)).

140. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 792 (1995).

141. *Id.*

142. *Id.* at 793.

143. *Id.* at 794.

144. *Id.*

145. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 794 (1995).

146. *Id.*

147. *Id.* at 796.

148. *Id.* at 797.

149. *See supra* note 14.

subsequently reproduced in another form or fashion.¹⁵⁰ The later use by MRA of the images it caught on camera is, however, distinguishable from the later uses at issue in *ETW Corp. and Montana*. For example, MRA is arguably not capturing the “majesty of a newsworthy moment” a woman is chided to expose her bare skin.¹⁵¹ Nor are the women in MRA’s films “major players” in newsworthy events.¹⁵² Instead, MRA is extracting the economic value of the woman’s images and securing protection to do so by capturing its footage in the context of a newsworthy event or matter of public interest, such as Mardi Gras.¹⁵³ Finally, while MRA may reproduce the same image it initially caught on tape, its use does add additional footage (or information) to create the montage of images its films portray.¹⁵⁴

Even if a work receives the designation of “newsworthy” or “expressive” thus gaining First Amendment protection, a right of publicity claim is not necessarily defeated at the outset.¹⁵⁵ Rather doctrines are emerging that may allow a right of publicity claim to prevail despite protection of the First Amendment.¹⁵⁶

C. *Saderup and the Transformative Test*

In *Comedy III Productions, Inc. v. Saderup, Inc.*, the plaintiff asserted a right of publicity infringement claim against defendant’s use of a lithograph, created by defendant, of The Three Stooges on a T-shirt.¹⁵⁷ The court held defendant’s T-shirt was an expressive work protected by the First Amendment.¹⁵⁸ The court, however, did not

150. *Id.*

151. *See supra* note 136 and accompanying text.

152. *See supra* note 145 and accompanying text.

153. *See supra* note 64 and accompanying text.

154. *See* James L. Rosica, *Girls Gone Wild case up for trial*, TALLAHASSEE DEMOCRAT (Sept. 14, 2002), available at <http://www.philly.com/mld/democrat/2002/09/14/news/local/4071315.htm> (on file with author) (discussing footage of Gritzke as winding up in “the Girls Gone Wild ‘Sexy Sorority Sweethearts’ video, which includes unrelated scenes of other women performing sex acts, according to court documents.).

155. *See supra* Discussion VII(2).

156. *Id.*

157. *Comedy III Prods., Inc. v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (plaintiff brought suit under CAL CIV. CODE § 990(a) (West 2003) prohibiting any person without consent from using a deceased personality’s name, voice, photograph etc., in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases or, products, merchandise, goods, or services) *Id.* at 799.

158. *Id.* at 802 (agreeing with the trial court’s finding that defendant’s portraits of the Three Stooges are expressive works and not an advertisement for or endorsement of a product and stating that although his work was done for financial

end its analysis there as it went on to establish a balancing test between the First Amendment and the right of publicity based on whether the work added significant creative elements so as to be transformed into something more than a “mere imitation” of the celebrity likeness.¹⁵⁹ In one formulation of the test, the court asks whether the celebrity likeness is one of the “raw materials from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.”¹⁶⁰ The court held that the right of publicity prevailed over the First Amendment protection because the artist did not sufficiently transform the image he used.¹⁶¹

In *Saderup* the defendant created and sold a product: the T-shirt with the image of the Three Stooges screened on to it to make it more attractive or marketable.¹⁶² In contrast, MRA arguably sells images that are both the raw materials and the end product transferred via a video cassette or DVD.¹⁶³ The videotape is not the work product but merely the means of transferring the images that are the “very sum and substance” of the work.¹⁶⁴

The “artistic” or transformative contribution comes from selecting, piecing, and editing the footage together.¹⁶⁵ MRA could argue that

gain “the First Amendment is not limited to those who publish without charge . . . an expressive activity does not lose its constitutional protection because it is undertaken for profit” (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979))).

159. *Id.* at 806 (stating “an action for infringement of the right of publicity can be maintained only if the proprietary interests at issue clearly outweigh the value of free expression in this context” (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979))).

160. *Id.* at 809 (stating “when artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.”). *Id.* at 808.

161. *Id.* at 811 (discerning “no significant transformative or creative contribution” in defendant’s work and stating “his undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of the Three Stooges so as to exploit their fame.”).

162. *Id.* at 800-01.

163. Kathleen Lavey, *Is Lansing Ready for ‘Girls Gone Wild’?*, LANSING STATE JOURNAL (Jan. 31, 2003), available at http://www.lsj.com/things/events/030131_gone_wild_1d.html (last visited Apr. 2, 2003 (on file with author) (describing MRA’s videos as “direct to public,” also noting that the images are popular as internet downloads suggesting the video or DVD is the mere means of transferring the product)).

164. *See id.*

165. Vincent Rowe, *MGM Lands Girls Gone Wild* (Oct. 4, 2002), available at <http://ca.movies.yahoo.com/fs/20021004/103376335400.html> (quoting creator Joseph Francis as he discusses the upcoming plans for a fictionalized movie of

the work is transformative as a collection of footage segments of several girls as opposed to the footage of one girl, such that the whole is greater than the sum of its parts resulting in a new work.¹⁶⁶ A similar argument was asserted in a case in which defendant used a photograph of the World Series winning Mets baseball team on T-shirts he was selling.¹⁶⁷ The court held that even though a picture of the whole team may be greater than the sum of its parts, the individual members of the team had the right to control the exploitation of their images.¹⁶⁸ Applying this reasoning to the *Girls Gone Wild* cases, even if the individual footage of one girl in the video would be of significantly less value to the defendant absent other footage with which to compile the video, this does not defeat the right of each girl to individually control the exploitation of her image.¹⁶⁹

D. New York's "Advertisement in Disguise" Doctrine

The use of an image in a work receives First Amendment protection only if there is a "reasonable relationship" between the use of the image and the subject of the story or work.¹⁷⁰ If the use is merely to increase sales, it is purely exploitative and infringes.¹⁷¹ The New York courts have developed the concept of an "advertisement in disguise," which is the unauthorized use of an image in a format that is facially a "news story" but may be actionable as an advertisement in disguise.¹⁷² The concept has arisen in situations involving a "story"

Girls Gone Wild, ". . . to the silver screen which we all know takes a hell of a lot more creativity.").

166. See *Gritzke*, No. 4:01cv495-RH, Preliminary Order on Damages, at 5 (noting Gritzke's image was only one of many, all of which contributed to the success of the video).

167. *Shamsky v. Garan, Inc.*, 632 N.Y.S.2d 930 (1995).

168. *Id.* at 933 (holding "the components of the picture are the faces of individual baseball players, each with their individual right to publicity. Under New York law, these players have the right to commercial exploitation of their individual identities, even if collectively these identities may be somewhat less valuable than the identity of a greater, more memorable, whole."). (Emphasis added).

169. See *id.*

170. See *Delan by Delan v. CBS, Inc.*, 91 A.D.2d 255 (N.Y. 1983) ("Of course, there must have existed a legitimate connection between the use of plaintiff's name and picture and the matter of public interest sought to be portrayed" (cited in *McCARTHY*, *supra* note 1 §8:57)).

171. See *McCARTHY*, *supra* note 1 §8:59.

172. See *Mathews v. ABC Television, Inc.*, No. 88 CIV. 6031, 1989 U.S. Dist. LEXIS 10694, at *22 (S.D.N.Y. Sept. 11, 1989) (citing *Stephano v. News Group Publ'ns*, 64 N.Y.2d 174, 485 N.Y.S.2d 220, 225 (1984) noting that "even a picture illustrating a newsworthy story was not protected by the newsworthy exception if the picture either has no real relationship to the article or if the article was an advertisement in disguise." In *Stephano* it was argued the use of plaintiff's picture to illustrate a fashion article was a newsworthy use of his likeness. Plaintiff argued

in a newspaper or magazine about fashion trends.¹⁷³ The issue in such cases is whether the unauthorized picture of the person wearing the clothes constitutes the news or information about a matter of public interest or if the use is actually an advertisement in disguise for the attire worn.¹⁷⁴ If the advertisement is proven to be merely incidental to a First Amendment privileged work there is no section 51 violation.¹⁷⁵

Critical of the doctrine, scholar Thomas McCarthy has proposed reassessing the question of what is the subject of the purported “news” viewing the situation as follows: that the clothing worn is the news, not the person wearing the clothes, who could be retouched so as to be unrecognizable.¹⁷⁶ As such, use of the person’s identity is not part of the news and therefore not within the First Amendment’s protection.¹⁷⁷ If a defendant argues that the identity or facial expression is a necessary component of the work and therefore the faces could not be airbrushed or disguised, the defendant’s own arguments concede that the image has commercial value to the defendant and consequently that compensation for the use is due.¹⁷⁸

In *Lane*, the plaintiff argued her image was commercially exploited because MRA not only disseminated the purported “news” in question, but also created it in the first instance and then commercially exploited what it created.¹⁷⁹ The plaintiff’s image was exploited not only in the *Girls Gone Wild* advertisements, but by its

that while the “bomber jacket” worn may be newsworthy, his picture was not a newsworthy event. The court decided the picture used “did relate to the article and was not an advertisement in disguise.”).

173. See MCCARTHY, *supra* note 1 §8:100.

174. See *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 338 (E.D. Penn. 1996) (holding issues of fact remained as to “whether the Defendant’s use of the Plaintiff’s name and likeness on the cover of the CD/cassette is a disguised advertisement for the sale” of the CD/cassette); *James v. Delilah Films, Inc.*, 544 N.Y.S.2d 447, 451 (1989) (stating that the “mere assertion of the First Amendment privilege will not forestall inquiry into the issue of whether defendants have merely identified the video as newsworthy as a pretext for usurping a creative effort”); see also *supra* note 171 and accompanying text.

175. See *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 131 (2d Cir. 1984) (noting, however, “that a plaintiff may attempt to demonstrate that [defendant’s use] has no real relationship to the discussion and is thus an advertisement in disguise”); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y. 1978) (“It is the established law of New York that the unauthorized use of an individual’s picture is not for a ‘trade purpose’, and thus not violative of § 51, if it is ‘in connection with an item of news or one that is newsworthy’” (quoting *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485 (N.Y. 1952))).

176. MCCARTHY, *supra* note 1 §8:101.

177. *Id.*

178. *Id.*

179. *Lane*, Memorandum in Opposition for Motion for Summary Judgment, at 5.

use in the video itself.¹⁸⁰ MRA merely asserts First Amendment protection of its works as expressive or newsworthy, when in fact its use constitutes mere commercialization of the plaintiff's image.¹⁸¹

McCarthy's conception of the advertisement in disguise doctrine is applicable to the *Girls Gone Wild* cases.¹⁸² The expressive component, or newsworthy aspect under McCarthy's formulation, of the videos is arguably the *not* wearing of clothes or the nudity rather than the fully identifiable girls themselves.¹⁸³ If MRA argues that the women's faces and identities are necessary for the full effect of the film, MRA defeats its own argument that the featuring of specific girls is of no value to them and implies that they should be compensated.¹⁸⁴ If the expressive aspect of the work consists merely of the nudity, then use of the women's faces is not protected by the First Amendment and MRA's use turns them into unpaid models.¹⁸⁵

VIII. CONCLUSION

The purpose of this note is not to condemn or condone the behavior of either MRA or the women featured in MRA's films. The goal is to explore the potential ramifications of freely granting First Amendment protection to works which make their focal point the indiscretions of other people. Armed with First Amendment protection, an entrepreneur may be able to exploit this constitutional guarantee in addition to exploiting the people caught on tape by defeating their rights of publicity at the outset.

In its only case to date dealing with the right of publicity, the Supreme Court stated that the case before it "may be the strongest case for a right of publicity- involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the *appropriation of the very activity* by which the entertainer acquired his reputation in the first place."¹⁸⁶ Similarly,

180. *Id.*

181. *Id.* at 5-6.

182. *See supra* note 176 and accompanying text.

183. *Id.*

184. *See Gritzke*, No. 4:01cv495-RH, Preliminary Order on Damages, at 5 (MRA arguing Gritzke's image was of little to no value to them); *see also* *Commonwealth v. Wiseman*, 249 N.E.2d 610, 617 (Mass. 1969) (stating that "recognizable pictures of individuals, although perhaps resulting in more effective photography, were not essential"); MCCARTHY, *supra* note 1 § 8:101 (noting that "if the personality of the [image or] person is important [to the work], then this alone tends to reveal that the identity or facial expression has value" and thus should be paid for).

185. *See* MCCARTHY, *supra* note 1 § 8:101 (citing *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973) stating that the First Amendment does not absolve movie companies of its "obligation of paying its help").

186. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977)

MRA appropriates not the reputations of the women in its films (although their reputations likely suffer harm), but the very activity of exposing their bodies that provides value to MRA.

Doctrines are emerging that attempt to focus on the use to which the image is put rather than emphasizing the irrelevance of profit motivation and level of artistry to First Amendment protection. These doctrines and their applications are at this time limited to specific factual situations. If and when these doctrines achieve wider application, what may be exposed is not only a naked person, but the naked taking of that person's rights, caught on tape.

(emphasis added) (holding that news station that secretly filmed and later broadcast plaintiff's 15 second human cannonball act violated plaintiff's right of publicity). *Id.* at 578.