

1-900-NEW KIDS: THE CLASH BETWEEN NEWSGATHERING AND THE RIGHT OF PUBLICITY

Cynthia Anne Baker¹

Introduction

The explosion of 900-number telephone technology has given birth to a new conflict between the media's first amendment rights of free speech and press and the countervailing individual right of publicity.² While individuals in the entertainment business have witnessed skyrocketing publicity values of their names, faces, and voices, the media has been able to profit from that same publicity value using 900-number technology. In a recent duel, two newspapers were brought to court for infringing on the plaintiff's right of publicity when they profited by polling their readers about a popular teenage singing group using 900-number technology.³ A federal district court judge in California resolved the conflict by granting summary judgment in favor of the newspapers because the profits came from newsgathering, an activity protected by the first amendment.⁴

New Kids on the Block v. USA Today, Inc. and Star Magazine, Inc. presents the interesting conflict between the media's first amendment rights and the right of an individual to "enjoy the fruits of his own industry free from unjustified interference."⁵ This article assesses the adequacy of current right of publicity analysis in light of the news media's recently acquired ability to profit from 900-number technology. First, the growth industry of 900-number technology is explained and explored. Then, the article presents an overview of the *New Kids* litigation and introduces the conflict which arises when 900-number technology reaps profits to the news media without the consent of the subject of a 900-number poll. Next, the discussion turns to the origin and development of right of publicity law and attempts by courts to protect the right of publicity in light of the first amendment freedoms accorded to the media. Finally, the article suggests the reintroduction of the alternative channels of communication test as a means to protect private publicity rights when the news media profits from using the publicity value of others to gather the news.

900-Number Technology

When first introduced, 900-number telephone services were associated with sexually explicit conversations and horoscope predictions.⁶ Today, a wide variety of sponsors use 900-number services to promote products and events as well as to provide interactive entertainment.⁷ For a charge, consumers can dial 900-numbers to find jobs, talk to the Easter Bunny, and reach weather, sports, and money hotlines.⁸ Recently, the media has implemented 900-number technology to gather "news" by encouraging the public to call in their opinions or votes.

To provide a 900-number service, a business sets up a program with a telephone company, allowing the telephone company to establish a distinct 900-number for that business for a base fee, much like an 800-number service.⁹ However, unlike the 800-number service, which provides free phone calls to consumers, the 900-number caller normally is charged a price, ranging from \$.50 to \$10.00 per call, which is charged to the caller's monthly telephone bill. Profits from the service, over and above the actual cost of approximately \$.30 per call,¹⁰ go directly to the sponsor.¹¹

The 900-number business has grown from \$27 million in 1985 to a projected \$2.5 billion in 1992.¹² In 1988 there were 233 900-number lines in the United States and by 1991, the number of 900-lines exceeded 14,500.¹³ By encouraging consumers to dial 900 numbers, businesses can increase profits and exposure. For example, in a joint venture between AT&T and American Express, consumers paid for \$2.4 million of a promotion.¹⁴ Further, 900-number technology has been touted as a unique marketing tool that will build new subscribers and revenues, increase reader involvement, and build an additional revenue center.¹⁵ For example, when *Sports Illustrated* implemented a 900-number service providing up-to-the-minute sports scores, the magazine increased its exposure and reader involvement while establishing a lucrative addition to the magazine's editorial products.¹⁶ In

short, 900-number technology has changed the use of the phone. The telephone, no longer merely a means of communication, has become a means to achieve everything from "one-way intimacy" to a profitable means of collecting data; however trivial some of the data may be.¹⁷

New Kids on the Block v. USA Today, Inc. and Star Magazine, Inc.

The *New Kids* litigation arose when *USA Today* and *Star Magazine* advertised 900-number services encouraging readers to call and select their favorite member of the popular teenage singing group.¹⁸ *Star Magazine* charged \$.95 per call and *USA Today* charged \$.50 per call.¹⁹ The results of the surveys were to be published in later editions of the publications.²⁰ The New Kids on the Block, one of the most popular musical groups to young teenagers at the time, sued *USA Today* and *Star Magazine* for violating their right of publicity.²¹

The impetus for this suit is easily understood when the popularity of the band is considered. The New Kids on the Block, five former teenagers from the Dorchester section of Boston, have sold more than 16.9 million copies of their four record albums.²² However, record sales are only a small part of the New Kids' business. The New Kids trademark, used by the group since 1986, has equal strength in selling towels, T-shirts, and even a cartoon series.²³ The New Kids have been called a "fountain of licensed merchandise profits."²⁴ For example, the average fan at New Kids concerts, which sell out football stadiums months in advance, comes home with \$15 to \$20 worth of posters, T-shirts, and buttons.²⁵ New Kids' latest venture, doll replicas of the singers, caused a near riot when they were introduced at a Hard Rock Cafe on West 57th Street in New York City.²⁶

Among the services offered by the New Kids under their trademark are two 900-number hotlines.²⁷ One of them, (900) 909-5KIDS, averages 100,000 calls a week, at \$2 for the first minute and 45 cents for each additional minute.²⁸ Each day the caller hears a different personal message from the New Kids.²⁹ Plaintiffs allege that they have received over 4.7 million calls from New Kids fans.³⁰ Plaintiffs further allege that the defendants' use of the 900-number service was to capitalize on the public's familiarity with the goods and services identified by the New Kids name and persona.³¹

Plaintiffs claim their right to preserve the commercial value of their proprietary rights in the New Kids name and persona entitles them to damages under their right of publicity.³² Plaintiffs argue the surveys appearing in *USA Today* and *Star Magazine* were disguised advertisements for a commer-

cial collateral product; the 900-number service.³³ According to declarations filed in connection with motions for summary judgment, *Star Magazine* made a profit of approximately \$1,600 and *USA Today* a profit of \$300.³⁴ At first blush, this seems to be a paltry sum. However, several areas of law provide incentive for New Kids to prevent unauthorized exploitation of their valuable right of publicity interest at early stages of its use.

For example, in *Rossner v. CBS*,³⁵ the novelist of *Looking for Mr. Goodbar*, a best selling³⁶ novel based on an actual Manhattan murder that received extensive media coverage, sued CBS for using the term "Mr. Goodbar" in a made for television movie.³⁷ After the plaintiff's novel was initially published, the term "Mr. Goodbar" was used by many newspapers, magazines, and even in a subsequent novel.³⁸ Plaintiff Rossner did not take any legal action to protect her trademark until her action against CBS. In that suit she learned her failure to police at early stages was fatal to her present claim.³⁹ In its decision to dismiss the author's claim under the Lanham Act,⁴⁰ the court specifically stated the strength of the term "Mr. Goodbar" had been diminished by unprotected widespread use and that the author's failure to police the mark had inevitably caused the mark to lose its value.⁴¹

To preclude the outcome of *Rossner*,⁴² the New Kids are taking a path much like the owners of the "Star Wars" trademark in *Lucasfilm Ltd. v. High Frontier*.⁴³ The term "Star Wars" was being used by political groups to refer to President Reagan's Strategic Defense Initiative (SDI), a politically controversial plan of defense spending.⁴⁴ Plaintiff Lucasfilm claimed that associating "Star Wars" with real world political controversy would injure the "valuable goodwill [the "Star Wars" trilogy] has achieved by developing a mark associated with imaginary battles among fantastic creatures in different worlds."⁴⁵

The *Lucasfilm* plaintiffs lost because the challenged use of "Star Wars" was political discourse and public debate protected by the first amendment. However, the court recognized the "plaintiff's natural concern that if he does not seek legal remedies to protect his mark he will lose it."⁴⁶ Thus, justification for the New Kids' vigorous protection of even the de minimis profits gained by *Star Magazine* and *USA Today* is justified based on the *Rossner* and *Lucasfilm* decisions.

According to the plaintiffs, the defendants defend their use of the 900-number mode of "news-gathering" because the 900-number service avoids the distortion of multiple voting.⁴⁷ The plaintiffs also challenge the defendants' claim that 900-num-

ber surveys can be tabulated more quickly and that more telephone lines can be used with 900-numbers, enabling more callers to participate in the service.⁴⁸ The plaintiffs respond that any 800-number service is as accommodating as its 900-number counterpart and, in fact, that an 800-number service may be less expensive to set up.⁴⁹ The plaintiffs also refute the idea that free 800-number calls would distort the polls more than a 900-number polling technique.⁵⁰ Further, New Kids argue that 800-number services, regular telephone services, letters, post cards, and telegrams provide alternative survey methods that would not infringe on the New Kids' right of publicity.⁵¹ The plaintiffs assert the only drawback to using an 800-number service is that the 800-number service does not have the potential to generate profit.⁵²

The defendants allege the first amendment provides immunity from any right of publicity cause of action because the 900-number technology was used for news gathering purposes.⁵³ The defendants' argument is based on authority establishing the right of publicity must bow to the dissemination of thoughts, ideas, newsworthy events, and matters of public interest.⁵⁴ Courts are reluctant to recognize private pecuniary interests over matters of public interest resting on the public's right to know and the freedom of the press to tell it.

Because the defendants' use of the New Kids' persona was not "wholly unrelated" to news gathering and dissemination, the district judge granted summary judgment for the defendants.⁵⁵ In the *New Kids* opinion, Judge Rea summarily stated that newsworthiness was broadly defined.⁵⁶ Whether application of the first amendment defense to the 900-number arena was proper is for the Ninth Circuit to decide. What is certain is more 900-number technology disputes will increase in the future "because there is so much money to be made."⁵⁷

Balancing the Right of Publicity Against the First Amendment: A Current Analysis

The Right of Publicity

The common law right of publicity arose long before celebrities could expect to earn millions of dollars through the use of their persona in connection with the sale of a product.⁵⁸ Although protecting slightly different interests,⁵⁹ the right of publicity stems from ancient recognition of the right of privacy.⁶⁰ The right of privacy is a personal right while the right of publicity is more akin to a property right.⁶¹

When Judge Frank coined the term "right of publicity" in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁶² in 1953, he probably could not envision an endorsement industry in which singer Michael Jackson could earn \$15 million for two 45 second endorsements for Pepsi-Cola.⁶³ Nevertheless, the *Haelan* court held Topps Chewing Gum liable based on the common law right of publicity.⁶⁴ Topps' unauthorized use of professional baseball players' pictures on Topps baseball cards laid the foundation for judicial⁶⁵ and legislative⁶⁶ protection of an individual's proprietary publicity value.

Amidst the scholarly debate and judicial decisions regarding the scope and purpose of the right of publicity, an amorphous set of rationales has emerged. The right of publicity guards against abuse and misrepresentation.⁶⁷ The right also serves to prevent the unauthorized dilution⁶⁸ of an individual's publicity value and prevents unjust enrichment.⁶⁹ Similarly, recognition of a right of publicity ensures that those who develop a commercially valuable trait will be able to reap the fruits of their labor.⁷⁰ Melville Nimmer, in his seminal article on the right of publicity, asserted simply that each and every person should be able to control and profit from the publicity values which he has created or purchased.⁷¹

A prima facie case for liability under the right of publicity requires a plaintiff to prove the two elements of validity and infringement.⁷² Validity, a right of identity of a human being, is not often a critical issue in right of publicity cases.⁷³ However, to prove that the defendant's use constitutes an infringement of the plaintiff's publicity right, the plaintiff bears the burden of showing that the defendant is, in effect, trespassing on the plaintiff's right of publicity.⁷⁴ Defenses to a prima facie right of publicity case range from the statute of limitations defense to the first amendment defense.⁷⁵ One commentator has written, "Probably the most difficult defense to deal with will be the assertion of the first amendment."⁷⁶

The First Amendment Defense

The freedom of the press⁷⁷ is essential to society's ability to become and remain enlightened, to attain self fulfillment, and to provide a safety valve for expression.⁷⁸ The purpose of enlightenment, which has had "the most impact by far on the history of constitutional law," has given rise to protection of a broad spectrum of speech.⁷⁹ Justice Holmes' analogy of first amendment freedoms as ensuring a free marketplace of ideas⁸⁰ embodies the ideal of American citizens having access to uncensored information from which to form their own opinions and make their own choices.⁸¹ To carry out these ideals, the first amendment defense powerfully protects

the media and what the media prints, broadcasts, and sells.

Although the broad protection afforded under the first amendment defense is not boundless,⁸² the amendment protects speech concerning political issues,⁸³ historical events,⁸⁴ educational information,⁸⁵ satires,⁸⁶ and to a certain extent, advertising.⁸⁷ One view is that the broad application of the first amendment defense acts as a government subsidy for the media.⁸⁸ Never has this analogy been so accurate since the *New Kids* decision which allows direct media profits from the unauthorized use of valuable publicity rights.

The Right of Publicity v. The First Amendment Defense

In *Zacchini v. Scripts-Howard Broadcasting Co.*,⁸⁹ the United States Supreme Court balanced, for the first and only time, the right of publicity against the first amendment media defense. When a local television station broadcasted a county fair event of a human cannonball act on its evening news programs, Hugo Zacchini, the human cannonball artist, sued to protect his right of publicity. The Court emphasized that Zacchini did "not seek to enjoin the broadcast of his performance, he simply wants to be paid for it."⁹⁰ The Court took into account that airing Zacchini's entire fifteen second act posed a substantial threat to the economic value of the performance, an act which was the end result of much time, effort, and expense on Zacchini's part.⁹¹ As a result, the Court allowed recovery based on his right of publicity.

The *Zacchini* case does not answer many of the difficult questions that arise in a typical right of publicity case because it is so narrowly drawn and based on facts quite unlike the usual right of publicity case.⁹² One important consideration is that the *Zacchini* court awarded damages based on the right of publicity in what was clearly a "news" setting; an area explicitly protected by the first amendment. Current law pays great attention to whether a right of publicity plaintiff's persona is being used for newsworthy as opposed to commercial purposes.⁹³ In light of the pivotal distinctions made between commercial or cultural use of one's likeness, today's right of publicity plaintiffs have a much stronger case when their persona is used in a commercial setting.⁹⁴

In *Estate of Presley v. Russen*,⁹⁵ the court gracefully conveyed the essence of this analysis. In *Russen*, the estate of Elvis Presley brought suit alleging, *inter alia*, an infringement of the right of publicity.⁹⁶ The defendant operated a live stage production, called "The Big El Show," which began two years before the death of Elvis.⁹⁷ The show imitated and simulated a live performance by Elvis

Presley. The *Russen* court relied on the "commercial or cultural" dichotomy in their analysis⁹⁸ and granted the first amendment defense to those publications that contribute information, which is not false or defamatory, to public debate or free expression of creative talents.⁹⁹ The court also precluded the first amendment defense from applying to portrayals which function primarily as a means of commercial exploitation.¹⁰⁰

The *Russen* court held that the "The Big El Show" did not fall clearly on either side of the "commercial or cultural" dichotomy.¹⁰¹ The court decided although the show contained informational and entertainment elements, the show primarily exploited the likeness of Elvis Presley "without contributing anything of substantial value to society" and enjoined all future performances.¹⁰²

Another example of the purpose of portrayal being dispositive is *Titan Sports v. Comics World Corp.*¹⁰³ In *Titan*, the defendant magazine publishers included poster sized pictures of professional wrestlers as a part of the magazine without consent of the wrestlers or their agents.¹⁰⁴ The plaintiffs claimed the posters were unauthorized commercial exploitation. The defendants countered this argument by arguing that the pictures were matters of public interest and therefore protected by the first amendment. Although the appellate court agreed with the district court that "the constitutional protection of freedom of the press does not stop at 8" x 11", the appellate court reversed and remanded for a determination of the "purpose of the portrayal."¹⁰⁵

Titan may represent judicial hesitation to slam the door of the first amendment defense upon every knock of a right of publicity plaintiff. However, that same court revealed their willingness to do just that in *Rogers v. Grimaldi*.¹⁰⁶ In *Rogers*, the court allowed the first amendment to protect the defendants who used plaintiff's name in the motion picture entitled "*Fred and Ginger*."¹⁰⁷ Because the movie title was clearly related to the content of the movie and not a disguised commercial advertisement, Ginger Rogers' right of publicity claim failed.¹⁰⁸

The purpose of portrayal test has seen widespread use in an interesting group of cases involving unauthorized use of pictures or likenesses of celebrities to promote a publication or gain a commercial advantage over competitors.¹⁰⁹ In *Cher v. Forum International, Ltd.*, Cher alleged a violation of her right of publicity for *Forum's* false indication of her endorsement of the magazine.¹¹⁰ *Forum* had purchased the interview and pictures of Cher from a free-lance writer.¹¹¹ The issue containing the interview and picture proclaimed on its cover that "Cher tells *Forum*" things that she "would never tell

Us [a competing magazine]."¹¹² However, using the court's words, "Forum was not content with the honest exploitation of the fact that it possessed some pictures of Cher and an interview that she had given a writer."¹¹³ The court held the cover indicating Cher preferred *Forum* to other competing magazines was not protected by the first amendment.¹¹⁴

In *Ali v. Playgirl, Inc.*,¹¹⁵ the court addressed the propriety of a preliminary injunction against defendant for publishing, without Muhammad Ali's consent, a nude drawing of Ali.¹¹⁶ The court held that the nude drawing contained no informational or newsworthy speech and found that Ali's commercially valuable proprietary interest in his likeness warranted an injunction to remove the magazines from sale.¹¹⁷ A third example case upon which courts rely in determining the scope and extent of an individual's right of publicity is *Grant v. Esquire, Inc.*¹¹⁸ *Esquire Magazine* used a thirty year old photograph of Cary Grant, a model's torso, and some photographic trickery to portray the "ageless enchantment" of some clothing styles.¹¹⁹ The court framed the issue as "whether *Esquire* has the right to compel Mr. Grant to contribute his face for free."¹²⁰ Relying on an unjust enrichment rationale, Mr. Grant's right of publicity interest defeated defendant's motion for summary judgment.¹²¹

In these cases, *Forum*, *Playgirl*, and *Esquire's* gain from the unauthorized use of Cher's, Muhammad Ali's, and Cary Grant's photographs was the result of an increase in sales or publicity.¹²² To clarify, the celebrity photographs promoted sales of particular issues, allowed defendants to gain a "commercial advantage" over other competitors, and attracted consumer attention.¹²³ In all of the cases, the right of publicity plaintiffs prevailed. However, right of publicity plaintiffs should not be lulled into relying on the current analysis nor should courts deem the "cultural or commercial" dichotomy analysis appropriate in all right of publicity cases. With the development of technology and newgathering techniques, including 900-number technology, the cultural commercial dichotomy becomes less and less helpful. For example, the catch phrases of "predominantly commercial,"¹²⁴ "wholly unrelated to newgathering,"¹²⁵ or "merely incidental to the public interest"¹²⁶ have served as either a nemesis or a godsend to right of publicity plaintiffs. Newgathering is the broad range of activities that are necessary to collect, package, and transmit information that becomes public news. As such, newgathering is a distinct media activity, having cultural and commercial traits and, at the same time, remains separate from either a cultural purpose or a commercial purpose.¹²⁷ Therefore,

when a plaintiff is exploited by media newsgathering under the cover of the first amendment, a plaintiff has no choice but to attempt to protect his or her publicity interest with case law not addressing the unique characteristics of newsgathering in today's society.

Alternative Avenues of Communication Test

When the media directly profits from the use of a newsgathering technique, including 900-number technology polling, courts should ask if the defendant had reasonable access to a non-exploitative, non-profit making alternative. Applying the alternative communications test in this discrete arena would more adequately address the individual right of publicity in light of the first amendment interests of the press.

In *Lloyd v. Tanner* the Supreme court used the alternative avenues of communication test as a benchmark in determining whether a private property right had to defer to the first amendment rights of free speech.¹²⁸ In *Lloyd*, a shopping center owner asserted his private property rights to stop protesters in his shopping center.¹²⁹ The court held that, since alternative avenues of communication existed, the shopping center owner did not need to accommodate the protesters.¹³⁰ The owner's accommodation of the protesters would "diminish property rights without significantly enhancing the asserted right of free speech."¹³¹ Similarly, the news media's exploitation of celebrities by profiting from 900-number polling causes an individual's property rights to diminish when the speech interest could be preserved through alternative avenues of communication.

A similar use of the less exploitative alternative means test was applied in *Dallas Cowboys Cheerleaders v. Pussycat Cinema, Ltd.*¹³² The defendant's X-Rated film, "*Debbie Does Dallas*," featured an actress clad in the distinctive uniform of the Dallas Cowboy Cheerleaders.¹³³ The court held that the defendant's use of a "combination of the white boots, white shorts, blue blouse, and white star-studded vest and belt" violated the cheerleaders' trademark.¹³⁴ Because alternative, less exploitative means existed to allow free movement while performing cheerleading routines and would not inhibit the defendant's free speech interests in the movie, the court granted a preliminary injunction and preliminary relief to the Dallas Cowboy Cheerleaders.¹³⁵ The court held the cheerleaders, like people who may be exploited by today's newsgathering techniques, had a valuable persona and had a significant interest in protecting that persona from unauthorized exploitation.¹³⁶

The alternative means test, however, has not served as a reliable means of relief for right of publicity plaintiffs seeking relief since the *Lloyd* and *Dallas Cheerleader* cases. The United States Supreme Court backed away from the stance taken in *Lloyd* when it held that a California rule permitting persons to engage in speech activities in a privately owned shopping center did not constitute an unconstitutional taking or deprivation of property.¹³⁷ Likewise, the Second Circuit has questioned its reliance on *Lloyd* as well as significantly narrowed the *Dallas Cowboys* holding in *Rogers v. Grimaldi*.¹³⁸

In *Grimaldi*, Ginger Rogers brought suit against a filmmaker for using the title "*Fred and Ginger*" for a movie about an oldtime Italian vaudeville dance team. Because Ms. Rogers' name had some artistic relevance to the film, the court held that no infringement of her right of publicity had occurred.¹³⁹ The *Grimaldi* court stated that the alternative avenues test did not sufficiently accommodate the public interest of free expression.¹⁴⁰ The court replaced the alternative avenues test with a new balancing test which weighs the public interest in avoiding consumer confusion against the public interest in free expression.¹⁴¹

As case law illustrates, courts have moved away from the alternative avenues test because it is not a complete answer to the difficult issues presented when free speech conflicts with individual property rights. However, the recent judicial vacillation is not cause to abandon the concept of the alternative avenues test. Rather, the reasons for rejecting the alternative avenues test support its proposed use in 900-number newsgathering cases.

Both the Supreme Court's retreat from the alternative avenues test in *Lloyd* and the Second Circuit's limiting of *Dallas Cowboys* with the *Grimaldi* balancing test were based on cases involving political speech and artistic expression, respectively. In contrast, newsgathering by solicitation of public opinion and profiting from 900-number technology is not the type of artistic and political expression at issue in *Pruneyard*¹⁴² and *Grimaldi*.¹⁴³ The potential for direct profit from utilizing 900-number technology for newsgathering provides a unique and appropriate setting for the reintroduction and use of the alternative avenues doctrine. First, 900-number technology can play a role "wholly unrelated" to newsgathering and dissemination despite the fact that it gathers information for a media defendant.¹⁴⁴ One commentator discussing the *New Kids* decision stated, "Newspaper publishers know that advertising and circulation departments bring in money . . . [n]ow, a federal district judge in Los Angeles has approved one way that newsrooms can

be profit centers."¹⁴⁵ The immense profit potential of 900-number technology when it is associated with individuals who possess high publicity value makes an evaluation of whether alternative, less exploitative means should be used in the newsgathering process an important determination.

Further, if media entities are allowed to profit from polling readers about celebrities, they are in effect selling the readers a chance to voice their opinion. Although public opinion provides an indispensable topic for the media, public opinion elicited by a celebrity's commercially valuable personae and then collected for profit encroaches on the celebrity's publicity rights.¹⁴⁶ Such an encroachment should only be allowed if there are no reasonable, alternative means to gather such information. If the media, under cover of a first amendment defense, continues to profit by polling the public about commercially exploitable individuals, the entire body of law establishing the right of publicity is undermined.

In the 900-number technology conflict addressed by this article, a reasonable, less exploitative alternative means is 800-number technology. Future technological advances in newsgathering will continue to provide alternative avenues of communication to provide relief for plaintiffs. To consider the equitable and economic advantages of the alternative avenues test now will preclude greater inequities in the future. Before applying an alternative avenues analysis in a right of publicity case, three elements should be present. First, the case must present a valuable publicity right being asserted against a media entity that is using a personae in an unauthorized manner. Second, the unauthorized use must result in an externality; that is, an economic benefit is being received without incurring any costs for the use of that benefit.¹⁴⁷ Third, the economic benefit must extend beyond the sale of news by creating a distinct and identifiable economic gain to the media defendant. When these three elements are present, courts should abandon the "cultural or commercial" dichotomy analysis and apply the alternative avenues test.

In choosing whether an alternative avenue should be required of the media, courts should consider: 1) the difference in administrative and financial costs to the media between the challenged use and the alternative avenue; 2) the diminution of the publicity value from the challenged means of newsgathering compared to the alternative avenue's potential economic impact; and 3) if the alternative means would significantly alter or diminish the media's newsgathering ability. If the costs to the media are minimal, the adverse economic impact on the plaintiff is reduced, and the alternative

avenue would not impair newsgathering, the alternative avenue should be required.

Conclusion

Due to advances in media technology, newsgathering techniques, and sheer volume of information available to entertain and inform the public, an individual's right of publicity and the value of that right is worth more than ever before. Further, a person with any publicity value must protect that value at its inception. One can lose judicial protection of their publicity value forever if that publicity value is diluted by public use. To exist at all, the right of publicity must be substantially protected by the courts.

Those most likely and most able to exploit a person's publicity value are today's media organizations. Because of the media's important role in informing, educating, and enlightening the public, the media has been afforded the use of the powerful first amendment defense. When the media uses an individual's persona in a cultural or news setting, the right of publicity must bow to the first amendment. Traditionally, however, that defense has been taken away if the media has exploited an individual's publicity right for purely commercial reasons.

900-number newsgathering brings news as well as profit to the media. Unlike conventional newsgathering techniques, 900-number technology polling gives rise to an identifiable economic gain wholly apart from profits due to increased sales which are traditionally protected by the first amendment. Because it serves a newsgathering function, 900-number technology polling presents right of publicity plaintiffs with hurdles virtually impossible to clear under current right of publicity analysis. Blindly allowing the first amendment to protect 900-number technology newsgathering now could open the door to blatant commercial exploitation of individuals and celebrities.

This article presents a means to meet the demands on today's courts to better protect the economic and property interests that the common law right of publicity seeks to protect. At times, the media gains a distinct economic benefit, separate from increased sales or circulation, from the use of an individual's publicity value. 900-number polling is such an instance. When such a profit arises, courts should apply the alternative avenues test proposed in this article. In doing so, courts will more effectively balance the individual proprietary concerns of the right of publicity against the public concerns of free speech and press. Ω

1. Cynthia Anne Baker received her J.D. *magna cum laude* from Valparaiso University School of Law. She holds a B.A. in English and Political Science with distinction from Valparaiso University and a Degree in Humanities from the Honors College of Valparaiso University. Cynthia is currently employed as a judicial law clerk for the Honorable Robert D. Rucker, Indiana Court of Appeals, in Indianapolis, Indiana.

2. "[a]t one and the same time, totally apart from your privacy interests, you have a potentially exploitable right of publicity which enables you . . . to prevent others from commercially exploiting your name and likeness . . ." Pilpel, *The Right of Publicity*, 27 BULL. OF THE COPYRIGHT SOC'Y 249, 262 (1979-80).

3. *New Kids on the Block v. Star Magazine and USA Today, Inc.*, 745 F. Supp. 1540, 1547 (C.D. Cal. 1990).

4. *Id.*

5. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

6. Brown, *Pay to Play: 900 Numbers Direct Marketing*, 25 MARKETING & MEDIA DECISIONS 16 (Sept. 1990).

7. *Id.*

8. Debate, *USA Today*, March 15, 1991, Section A, at 6. The editorial page addresses the current abuses of 900-number technology. Due to fraudulent advertisement, people have been victimized by dialing and paying for 900-number telephone calls and receiving nothing in return. Currently, this problem is being addressed by state government officials, the Federal Communication Commission, and the United States Congress. *Id.* However, the abuses of 900-number technology are beyond the scope of this article.

9. Brown, *supra* note 6.

10. Parkhill, *How to Profit From 900 Numbers*, 19 THE MAG. FOR MAG. MANAGEMENT 122 (Aug. 1990).

11. Brown, *supra* note 6.

12. *Id.*; Fahey, *Fledgling "Telemedia" Fights for Respect*, ADVERTISING AGE, Nov. 19, 1990, at 50.

13. Source: Strategic Telemedia, as reprinted in, Debate, *USA Today*, March 15, 1991, Section A, at 6.

14. *Id.*

15. Parkhill, *supra* note 10.

16. *Id.*

17. Many entertainment acts use 900 numbers as indicators of their popularity. "The most popular [numbers], including those of D.J. Jazzy Jeff and the Fresh Prince and Bobby Brown, are aimed at young audiences. In the multi-media '90s, these 900 numbers, more than chart positions, may be the best indicators of an act's true juice." J. Leland, *When Kids 'R' Culture*, NEWSDAY, July 15, 1990, part II, at 4.

18. *New Kids on the Block v. Star Magazine and USA Today, Inc.*, 745 F. Supp. 1540, 1542 (C.D. Cal. 1990).

19. *Id.*

20. *USA Today* published the survey results, but *Star Magazine* withheld them because of the lawsuit. *Id.*

21. The Plaintiffs also stated causes of actions based on Trademark, Unfair Competition, and Commercial Misappropriation "Law". *Id.*

22. Leland, *supra* note 17.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant Gannett Satellite Information Network, Inc.'s Motion for Summary Judgment, filed July 16, 1990, at 1. filed in the matter of *New Kids on the Block v. Star Magazine and USA Today, Inc.*, 745 F.Supp. 1540, 1547 (C.D. Cal. 1990)[hereinafter Plaintiff's Memorandum].

28. Leland, *supra* note 17, at 4.

29. *Id.*

30. Plaintiff's Memorandum, *supra* note 27, at 5.

31. *Id.*

32. *New Kids on the Block v. Star Magazine and USA Today, Inc.*, 745 F. Supp. 1540, 1543 (C.D. Cal. 1990).

33. *Id.*

34. Letter from Judy Alexander who works with Philip Heller, counsel for the New Kids on the Block, to the author of this article (February 6, 1991)(Discussing *New Kids* litigation).

35. 612 F. Supp. 334 (S.D.N.Y. 1985).

36. The novel was published by Simon & Schuster in June of 1975 and generated wide critical acclaim and popular success. LOOKING FOR MR. GOODBAR sold approximately 133,000 copies in hardcover editions and 3,609,059 in paperback, and appeared on the best-seller lists for twenty-seven weeks. *Id.*

37. The title of the movie was TRACKDOWN: FINDING THE GOODBAR KILLER. *Id.*

38. *Id.* at 337.

39. The court stated, "... her failure to police the mark has inevitably caused the mark to lose its primary significance as a source-denoting mark. The frequent and disparate uses of the word Goodbar in association with Paramount, Fosburgh and the Quinn murder, prevent Rossner from demonstrating secondary meaning in her mark." *Id.*

40. The Lanham Act, 15 U.S.C. § 1125(a) (1946), protects valuable words, symbols, names, and likenesses which have acquired "secondary meaning" and when the unauthorized use creates a "likelihood of confusion" in misleading the public. *Id.* at 338.

41. *Id.* at 339, citing *Wallpaper Mfrs., Ltd. v. Crown Wall-covering Corp.*, 680 F. 2d 755, 766 (C.C.P.A. 1982).

42. *Rossner*, 612 F. Supp. at 339.

43. 622 F. Supp. 931 (D.C. 1985). The opinion begins, "Not so long ago, in a studio far, far away from the policymakers in Washington D.C., George Lucas conceived of an imaginary galaxy where fantastic creatures and courageous knights battled an evil empire with spaceships, 'blaster' guns and light sabers." *Id.* at 932.

44. *Id.* at 933.

45. *Id.*

46. *Id.* at 935.

47. Plaintiff's Memorandum, *supra* note 27, at 22.

48. *Id.*

49. *Id.*

50. *Id.*

51. *New Kids on the Block v. Star Magazine and USA Today*, 745 F. Supp. 1540, 1543 (C.D. Cal. 1990).

52. Plaintiff's Memorandum, *supra* note 27, at 23.

53. *New Kids*, 745 F. Supp. at 1543.

54. *Rosemont Enterprises v. Random House, Inc.*, 294 N.Y.S.2d 122 (1968); *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 508-09 (1968)(when a name or picture is used in connection with a matter of public interest, it is constitutionally protected and must supersede any private pecuniary considerations.).

55. *New Kids*, 745 F. Supp. at 1547.

56. *Id.* at 1545.

57. *Benedictus, New Kids Blocked*, 76 A.B.A. J. 20, 22 (Dec., 1990)(quoting *Star Magazine's* attorney, Rex S. Heinke).

58. See J. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.3[A] (1991) (author sets forth a helpful paradigm illustrating the historical sources of the right of publicity)[hereinafter *McCarthy*].

59. See Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954) (the right of publicity "may be regarded as the reverse side of the right to privacy").

60. Early Jewish and Roman law reveals that those societies supported a general concept of privacy. For example, the embodiment of ancient Jewish oral law, the Jewish Mishnah, prescribed a certain height for a wall opposite a neighbor's window so that a neighbor "should not peer and look into his house." MCCARTHY, *supra* note 58, at § 1.2., quoting HOFSTADTER & HOROWITZ, THE RIGHT OF PRIVACY 9 (1964). Similarly, Roman law recognized as a tort an act which willfully disregarded another's personality.

However, the concept of a common law right to privacy seems to be something uniquely American. *Id.*

61. *Id.* at 1.8, 8.5 ("The right of publicity is properly characterized as an intellectual property right.")

62. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). Commentators are unanimous in their assessment of the *Haelen* decision as the origin of the common law right of publicity. The *Haelen* decision was "groundbreaking." MCCARTHY, *supra* note 66, at § 1.7.

63. Garret, *Media: Slumped Over Their Balance Sheets*, THE INDEPENDENT, Jan. 16, 1991, at 17. With advertising underwriting, tax breaks for Jackson, and promotional tie-ins with an international concert tour, the value of the entire Pepsi Cola advertisement deal may have surpassed \$50 million. Taylor, *Michael Jackson Signs with Pepsi*, L.A. TIMES, May 7, 1986, Part 6, at 10.

64. *Haelen Laboratories*, 202 F.2d at 868.

65. The following state courts recognize a common law Right of Publicity: California, Connecticut, Florida, Georgia, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, and Wisconsin. See, MCCARTHY, *supra* note 58, at § 6.1[B].

66. See CAL CIV. CODE § § 990, 3344 (West Supp. 1987); KY. REV. STAT. ANN. § 391.170 (Michie/Bobbs-Merrill 1984); TENN. CODE ANN. § § 47-25-1101 to -1108 (1984). Other legislatures have created publicity rights under the guise of the right of privacy. See FLA. STAT. ANN. ch. 540.08 (West 1972); NEB. REV. STAT. § § 20-202, 20-208 (1983); N.Y. CIV. RIGHTS LAW § § 50-51 (McKinney 1976 & Supp. 1990); OKLA. STAT. ANN. TIT. 21, § § 839.2, 839.3 (West 1986); VA. CODE ANN. § § 8.01-40 (1984). Other statutes prohibit the misappropriation of another's name, photograph, or likeness, but these either deny descendibility or fail to address the issue. See MASS. ANN. LAWS. ch. 214, § 3A (Law. Co-op. 1986); R.I. GEN. LAWS § 9-1-28 (1985); UTAH CODE ANN. § § 45-3-1 to -6 (1981); WIS. STAT. ANN. § 895.50 (West 1983).

67. *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904 (N.J. 1986) (Unauthorized use of a Vietnam war veteran's picture to advertise a Time-Life publication resulted in extreme personal and emotional distress.).

68. The United States Supreme Court held that a defendant's broadcast of a human cannonball artist's entire act posed a substantial threat to the economic value of the plaintiff's performance in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Taking into account the fact that economic values were at issue, *Zacchini* suggests that the right of publicity is less limited by first amendment principles since it does not withhold the material in question from the public but only determines who will benefit from its dissemination. Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1590 (1979).

69. In *Taggart v. Wadleigh-Maurice*, 489 F.2d 434, 438 (3rd. Cir. 1973), the court held that the first amendment does not absolve media defendants from the obligation of paying for the subjects of a movie or documentary. The plaintiff's job during the Woodstock concert was to clean out the port-a-johns for the thousands of Woodstock concert goers. The film crew engaged in several conversations with the plaintiff and used clips of these conversations to provide comic relief in their movie/documentary about Woodstock. The *Taggart* court held that the plaintiff was "drawn out as a performer" and subsequently used to the defendant's economic advantage without the plaintiff's consent. *Id.* at 438. The court reversed the trial court's summary judgment for the defendants because allowing the case to go to trial would only result in a "diminimus chill" on the press. *Id.*

70. For example, in *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th. Cir. 1988) the court expanded the Right of publicity to protect the money making voices of celebrities by allowing "celebrated chanteuse" Bette Midler to recover against Ford Motor Company for using a sound-alike singer to mimic Bette Midler's voice in an advertising campaign. *Id.* at 463. *Midler* is also significant because the holding dispensed with the copy-

right preemption defense in voice cases. *Id.* at 462. Recognizing that federal copyright law had been used to defend against publicity claims, the court held that since a voice was not "fixed in a tangible medium of expression" it is not copyrightable and therefore withstands a copyright defense. *Id.* The issues raised by copyright law are beyond the scope of this article. See generally Keller & Oestericher, *Recent Developments in the Right of publicity*, ALI-ABA COURSE OF STUDY: TRADEMARKS, COPYRIGHTS, AND UNFAIR COMPETITION 51, 70-76 (Nov. 30 - Dec. 1, 1990, Washington, D.C.); Comment, *The Right of publicity and Vocal larceny: Sounding Off on Sound Alikes*, 57 *FORDHAM L. REV.* 445, 457 (1988); See also R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 30 (3d ed. 1986) (protection of property rights encourages efficient resource use).

71. Nimmer, *The Right of publicity*, 19 *LAW AND CONTEMP. PROBS.* 203, 216 (1954).

72. MCCARTHY sets forth the elements as follows:

1. *Validity*. Plaintiff owns an enforceable right in the identity or persona if 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.

MCCARTHY, *supra* note 58, at § 3.1[B].

73. *Id.* at § 3.1[C].

74. *Id.* at § 3.1[D].

75. *Id.* at § 3.1[F].

76. *Id.*

77. U.S. CONST. amend. I states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

78. *Whitney v. California*, 274 U.S. 357, 275 (1927) (Brandeis, J., concurring).

79. See MCCARTHY, *supra* note 58, at § 8.1[A].

80. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (" . . . the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

81. "[In the eyes of the Founders,] [t]he press was to serve the governed, not the governors . . . The press was protected so that it could bare the secrets of government and inform the people." *New York Times v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

82. See MCCARTHY, *supra* note 58, at § 8.2 (addressing the hierarchy of first amendment protection).

83. "The primary concern of the first amendment is political speech." *Id.* at § 4.5[A]. "Whatever the [First] Amendment does, it protects *political* expression; the right of Americans to write and speak as they will about politics and public affairs." *Id.*, quoting A. Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to the Central Meaning of the First Amendment*, 83 *COL. L. REV.* 603, 605 (1983).

84. When a movie was made about the famous rape trial of the Scottsboro boys, Victoria Price Street, the prosecutrix and the main witness against the nine African American men charged with the rape, brought an action for libel and invasion of privacy. *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1237 (6th Cir. 1981), *cert. granted*, 454 U.S. 815, *cert. dismissed on stip.*, 454 U.S. 1095 (1981). The court held that as a portrayal of a "controversial historical events" the movie of the Scottsboro trial was political speech protected by first amendment safeguards. In imposing the constitutional malice standard against the plaintiff, the court stated that "[having plaintiff prove that the publication was made with the knowledge of its falsity or with reckless disregard for the truth,] protects us against the 'big political lie, the conscious or reckless falsehood. We do not have that in this case.'" *Id.*

85. *Henrink v. Harper & Row Publishers, Inc.* 607 F. Supp. 657, 659 (S.D. N.Y. 1985) (Court held that publisher of educational book on corporate management and structure was immune from liability under publicity or privacy rights asserted by the plaintiff whose name was used without authorization.)

86. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the court held that the first amendment precluded Jerry Falwell, television evangelist and the subject of a lude cartoon satire in *HUSTLER* magazine, from recovering under intentional infliction of emotional distress absent a showing of "actual malice." The court defined "actual malice" as showing that the defendants published with knowledge of the likelihood of an infliction of emotional distress or with reckless disregard for that likelihood. *Id.* For an excellent portrayal of the personalities and politics behind the *Falwell* litigation See R. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (1988).

87. *Guglielmi v. Spelling-Goldburg*, 603 P.2d 454 (Cal. 1979) (Court held that a newspaper or a motion picture production and its advertisements do not lose their constitutional protection because the publications are undertaken for profit and that profit seeking is not "constitutionally significant.").

88. MCCARTHY, *supra* note 58, at § 8.1[C].

89. 433 U.S. 562 (1977).

90. *Id.* at 578.

91. *Id.* at 575.

92. See MCCARTHY, *supra* note 58, at § 8.4[B][3].

93. Courts have focused on the purpose of the portrayal for guidance in reaching decisions in the area of unauthorized media portrayals. Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *YALE L.J.* 1577, 1601 (1979). For example, in *Titan Sports v. Comics World Corp.*, 870 F.2d 85 (2d Cir. 1989) the court held that a determination of the purpose of the portrayal was necessary to a determination of the rights of the parties. *Id.* at 89; *But see*, MCCARTHY, *supra* note 58, at § 8.5[A][1] (Commentator asserts that "[i]t should make no difference if [a right of publicity] defendant's message is "political" or "social" rather than commercial.").

94. Commenting on *Zacchini*, the court in *Tellado v. Time-Life Books*, 643 F. Supp. 904, 914 (D. N.J. 1986) stated, "*Zacchini* demonstrates therefore, that in certain situations, even when the publication at issue is clearly "news" and not for commercial purposes, that the publisher can be required to compensate the individual whose likeness was used. The right to compensation would seem even more compelling where the use is solely commercial."

95. 513 F. Supp. 1339 (D. N.J. 1981).

96. *Id.*

97. *Id.* at 1349.

98. See generally, Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *YALE L.J.* 1577, 1596-99 (1979).

99. *Russen*, 513 F. Supp. at 1356.

100. *Id.*

101. *Id.* at 1358-59.

102. The court distinguished entertainment which was a "mere copy" skillfully carried out from "pure entertainment." *Id.* at 1359-60. The court apparently thought that the former failed to "contribute anything of substantial value to society." *Id.*

103. 870 F.2d 85 (2d Cir. 1989).

104. *Id.*

105. *Id.* at 89. New York's Civil Rights Law, the exclusive remedy for a right of publicity claim to the *Titan* plaintiffs, allows recovery only if the unauthorized publication is for purposes of trade. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976 & Supp. 1990). On remand, the trial court was instructed to consider whether the publication was for the purposes of trade, and thus, actionable under New York's Right of publicity statute. *Titan*, 870 F. 2d at 89. The court set forth a variety of factors for the fact-finder to determine whether a publication was for the purposes of trade:

1. nature of the item [poster publication];

2. the extent of its relationship to the traditional content of the magazine;
3. the ease with which it can be detached from the magazine;
4. whether it is suitable for use as a separate product once detached; and
5. how the publisher markets the item.

Id.

106. 875 F.2d 994 (2d Cir. 1989).

107. *Id.* at 1004-05.

108. *Id.* (applying Oregon Right of publicity law in the diversity action).

109. *Cher v. Forum International, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978); *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973).

110. *Cher*, 692 F.2d at 639.

111. *Id.* at 637.

112. *Id.*

113. *Id.* at 639.

114. The court awarded *Cher* \$100,000 in exemplary damages. *Id.* at 640.

115. 447 F. Supp. 723 (S.D.N.Y. 1978).

116. *Id.* at 726.

117. *Id.* at 729.

118. 367 F. Supp. 876, 878 (1973).

119. *Id.*

120. *Id.*

121. *Id.* at 885.

122. In fact, each court addressed the difficulty in assessing damages in right of publicity cases which have such an economically amorphous gain (e.g., more sales and publicity to defendant) and loss (e.g., dilution to plaintiff) at issue. *Cher*, 692 F.2d at 640; *Ali*, 447 F. Supp. at 729; and *Grant*, 367 F. Supp. at 881.

123. In *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983) the court pointed out that a direct connection existed between the use and the commercial purpose of the unauthorized photograph and sales. The following analysis used by the *Eastwood* court makes the difference between attracting consumer attention and directly profiting from the use of 900-number technology clear:

"The first step toward selling a product or service is to attract consumers' attention. Because of a celebrity's audience appeal, people respond almost automatically to a celebrity's name or picture . . . To the extent [the Enquirer's] use attracted the readers' attention, the Enquirer gained a commercial advantage . . . Moreover, the use of Eastwood's personality . . . provided the Enquirer with a ready made scoop—a commercial advantage over its competitors which it would otherwise not have [had]."

149 Cal.App.3d at 420, 198 Cal. Rptr. at 349.

124. *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904 (N.J. 1986) (A publication was "predominantly commercial" if it was used mainly for purposes of trade, without redeeming public interest, news, or historical value.).

125. *New Kids on the Block v. Star Magazine and U.S.A. Today, Inc.*, 745 F. Supp. 1540, 1547 (C.D. Cal. 1990) (Unless the defendants' use of the plaintiff's likeness was "wholly unrelated to news gathering," the first amendment defense provides immunity.).

126. *Titan Sports v. Comics World Corp.*, 870 F.2d 85, 88 (2d Cir. 1989) (If public interest of the publication is merely incidental to its commercial purpose, the first amendment defense does not apply.).

127. See, *Merges & Reynolds, News Media Satellites and the first amendment: A Case Study in the treatment of New Technologies*, 3 HIGH TECH. L.J. 1, 9 (1988).

128. 407 U.S. 551 (1972).

129. *Id.*

130. *Id.* at 567.

131. *Id.*

132. 604 F.2d 200 (2d Cir. 1979).

133. The court's description of the film was as follows:

"Debbie Does Dallas' [is] a gross and revolting sex film whose plot, to the extent that there is one, involves a cheerleader at a fictional high school, Debbie, who has been selected to become a Texas Cowgirl.[footnote omitted] In order to raise enough money to send Debbie, and eventually the entire squad to Dallas, the cheerleaders perform sexual services for a fee. . . . In the movie's final scene Debbie dons a uniform strikingly similar to that worn by the Dallas Cowboy Cheerleaders . . ."

Id.

134. The court notes that, although color alone is not capable of becoming a trademark, a combination of colors together with a distinctive arbitrary design may serve as a trade mark. *Id.* at 204 n.6 (2d Cir. 1979), quoting *Quaburg Rubber Co. v. Fabiano Shoe Co.*, 567 F.2d 154, 161 (1st Cir. 1977).

135. *Id.*

136. The Dallas Cowboy Cheerleaders licensed others to manufacture posters, calendars, T-shirts and receive large amounts of money for their commercial appearances. *Id.*

137. *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980).

138. 875 F.2d 994 (2d Cir. 1989).

139. *Id.*

140. *Id.*

141. *Id.*

142. 447 U.S. 74 (1980).

143. 875 F.2d 994 (2d Cir. 1989).

144. *Benedictus*, *supra* note 57, at 20.

145. *Id.*

146. One court has stated, "The first step toward selling a product or service is to attract consumers' attention. Because of a celebrity's audience appeal, people respond almost automatically to a celebrity's name or picture. . . ." *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983).

147. R. Haveman, *THE ECONOMICS OF THE PUBLIC SECTOR* 33 (2d. ed. 1976). For an extensive critique of the externality theory and the efficiency calculus method, see Kennedy, *Cost Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

The editorial staff of the DePaul-LCA Journal of Art and Entertainment Law is currently accepting submissions for lead articles. Interested individuals should contact Peter Borich, DePaul-LCA Journal of Art and Entertainment Law, DePaul University, College of Law, 25 East Jackson Boulevard, Chicago, IL 60604, (312) 362-5475. The deadline for consideration of publication in the Spring 1992 issue is February 28, 1992.