10-1976

Zacchini v. Scripps-Howard Broadcasting Co.

Lewis F. Powell Jr.

(Changed to Grant)

Petr, a "human cannon ball", was performing his act at a county fair. A reporter for Resp., over Petr's objection, videotaped the entire act, & Resp. broadcast the reproduction of the act.

This is neither a defamation (no falsehood) nor a "false-light" case (Petr's act was faithfully portrayed). Petr claims his "privacy" was invaded. This makes no sense to me, altho Petr's act was appropriated, used commercially. Difficult area. Let it develope.

Party not responsible nor in Hill or N.Y.T.

PRELIMINARY MEMORANDUM

January 7, 1976 Conference
List 1, Sheet 2

No. 76-577 Cert to Ohio SC
(Stern, for the court; Celebrezze, dissenting)

ZACCHINI

v.

SCRIPPS-HOWARD BROADCASTING CO. State/Civil Timely

Deny

1. SUMMARY: Following the line of cases extending from New York Times v. Sullivan, 376 U.S. 254, to Time, Inc. v. Firestone, 424 U.S 448, this case presents a conflict between the tort of "appropriation" or "right of publicity" privacy and the First Amendment rights of broadcasters.

2. FACTS: Petr is a "human cannonball." His act, which was originated by his father and performed only by his family for 50 years, consists of being blasted from a cannon into a net 200 feet away. The entire performance lasts 15 seconds.

An interesting question, but not a burning one. Drinkwater thinks the record is insufficient to explore all key variables. TRB

In August 1972 petr was performing at a county fair in Burton, Ohio. His act was staged in a grandstand area for the pleasure of anyone attending the fair. There was no separate admission for petr's performance, and it is unclear whether petr received a percentage of the general gate receipts.

One night a reporter for WEWS, resp's television station, attended the fair.[1/] Petr noticed the reporter's camera and asked him not to film the performance. The reporter complied, but returned the following day on orders from his producer and videotaped the entire performance. WEWS broadcast the act on its eleven o'clock news program that night, accompanied by commentary describing the act as a "true spectator sport . . . a thriller" and "you really need to see it in person . . . to appreciate it . . . ." Pet. A57.

Petr sued for invasion of privacy, contending that resp had appropriated his professional talents. The trial court granted resp's motion for summary judgment without opinion, but the state CA reversed.

The Ohio Supreme Court held that petr's complaint made out a valid claim for invasion of privacy. The Supreme Court characterized this as a "right of publicity," "a right of exclusive control over the publicity given to his performances . . . ." The court went on to assume that petr's public performance did not constitute an abandonment of his right of publicity beyond the limits of the fair.

The court then turned to "[t]he decisive issue in the case . . . whether the defendant TV station had a privilege to film and televise the plaintiff's performance, on its nightly news program . . . ."

1/ An affidavit by the photographer-reporter accompanying the motion for summary judgment alleged that "news reporters and cameramen are admitted to the fair by its promoters without charge in order to permit news coverage and generate publicity for the fair." Pet. A54-56.

Reviewing this Court's decisions in Time, Inc. v. Hill, 385 U.S. 374, and New York Times v. Sullivan, the court concluded that

> "[j]ust as the press was held to be privileged to report matters which would otherwise be private, . . . [t]he same privilege exists in cases where appropriation of a right of publicity is claimed, and the privilege may properly be said to be lost where the actual intent of the publication is not to give publicity to matters of legitimate public concern . . . . The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer."

No

Impossible standard

The privilege remained intact in this case. The court thought petr's performance was a matter of legitimate public interest, which resp treated as such, as evidenced by its use of the film only once, and then in conjunction with one of its nightly news broadcasts.

Justice Celebrezze complained in dissent that the majority overlooked Gertz v. Robert Welch, Inc., 418 U.S. 323, and that summary judgment was improper because of unresolved issues of material fact, among them whether petr was a public figure and whether resp's broadcast of petr's act was prompted by commercial motives.

3. CONTENTIONS: Petr amplifies the dissent, arguing that there are no considerations of free public debate which motivated the New York Times test. Indeed that standard is inapplicable where the claim is for appropriation, not defamatory falsehood. Petr argues that since he is clearly not a public figure Gertz mandates far less First Amendment protection for resp.

Resp maintains that both the substantive cause of action and the privilege in this case are solely state common-law creations, which in any event have an independent basis in Ohio constitutional law. Resp also argues that petr is a public figure and that the state supreme court's

test is consistent with New York Times and its progency. Finally, resp notes that the facts of this case are unique, that performers ordinarily have adequate means to control media coverage and so safeguard their right of publicity, and that resp's use of the film was de minimis.

4. DISCUSSION: Though the state supreme court does not give us the location of the "privilege" as clearly as it might, the court cites and discusses only First Amendment cases by this Court. The opinion is an attempt to accommodate the Ohio law of defamation with First Amendment guarantees. Since the result is predicated solely on resp's First Amendment defense, we have jurisdiction under §1257(3).

On the merits, petr cannot bring his case squarely within any of the relevant precedents because the privacy interest he is asserting has not yet been addressed by this Court in the First Amendment context.

In Time, Inc. v. Hill, a "false light" privacy case, the Court held that factually erroneous statements about matters of "public interest" deserved New York Times protection, even though the plaintiffs in Hill were apparently private individuals. In Gertz, a defamation case, the New York Times standard was held too stringent a protection for defamatory falsehoods about private individuals. The Court rejected the "general or public interest" distinction as a means for determining the constitutional protection to be given defamatory publications. This appeared to inter Time, Inc. v. Hill, but Cantrell v. Forest City Publishing Co., 419 U.S. 245, 250-51, another "false light" privacy case, revivified it by reserving the question whether "a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in Time, Inc. v. Hill applies to all false-light cases."

While also reserving final judgment on Time, Inc. v. Hill, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 & n.19, indicated that different constitutional standards may apply depending upon whether the tort action is one for defamation, where New York Times defends against lawsuits by public officials or public figures, or invasion of privacy, where the inquiry is whether "the materials published, although assertedly private, are 'matters of public interest.' " See id. at 500 (Powell, J., concurring). In Cox Broadcasting, a "public disclosure" privacy case, the Court found it unnecessary to reach

> "the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press. . . ." 420 U.S. at 491.

True

The applicable constitutional test in petr's case has not yet been formulated. New York Times is inapposite because this case has nothing to do with defamatory falsehood, but with whether petr can forbid a televised publication which is only too faithful to reality. Though the question is quite close to that reserved in Cox Broadcasting, this is not a report or comment on petr's performance; it is an "appropriation," for whatever purpose, of the entire act itself. Indeed Cox Broadcasting, supra at 489, recognizes that "right of publicity" actions may call into play a wholly different analysis: "we should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph . . . ."

Even though the state court found this to be a matter of public interest, it would be a mistake to treat this as a "false light" privacy case determined by the vitality of Time, Inc. v. Hill. By the same token, it makes little sense to make the case turn on petr's status as a public figure (of which there was no finding below).

The essence of the right which petr asserts is prevention of the exploitation of someone who is presumably already in the public eye and whose actions are matters of public interest. Some of the key variables would appear to be whether petr has contracted away his right with respect to this performance, and whether resp's conduct constitutes an appropriation harmful to petr's commercial interests. The record here is probably inadequate on both counts. It is also unclear to me that this case presents a recurring problem, or that petr has any damages.

There is a response.

12/7/76 Drinkwater SC op in petn
SN

The reply adds little. In thinking more about this case, I think it would be a lot of fun. It does involve a number of issues unresolved in other decisions. If the vote is close, I would cast a "fun-to-work-on" vote to grant.

EAB

yes

Court Ohio Sup. Ct. | Voted on ....., 19... | No. 76-577

Argued ....., 19... | Assigned ....., 19...

Submitted ....., 19... | Announced ....., 19...

HUGO ZACCHINI, Petitioner

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY

10/23/76 - Cert.

I think this will be interesting case.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.			✓										
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J.			✓										
White, J.			✓										
Stewart, J.		✓											
Brennan, J.			✓										
Burger, Ch. J.			✓										

ec/// 4/25/77

TO: MR. JUSTICE POWELL

FROM: Gene Comey

RE: No. 76-577, Zacchini v. Scripps-Howard Broadcasting Co.

BOBTAIL BENCH MEMO

The petition for cert poses the following question: "where a performer has a protected right of publicity--the right of exclusive control over his professional affairs--and that right is held as a matter of state law to have been infringed by a television station's filming of his entire act over his specific objection, and the broadcasting thereof on a nightly news show, is the television station's tortious conduct immunized as a matter of law by the First Amendment. . . ."

JURISDICTION: Respondent suggests that this Court does not have jurisdiction over the case in that there is an adequate and independent state ground. The thrust of this point is that the Ohio Supreme Court based its decision on a state law privilege, and that a state is of course free to give the press more protection than that required by the First Amendment. Thus, even if the First Amendment does not require the result below, the state law privilege does so require.

Given the opinion of the Ohio Supreme Court, this contention would ordinarily be easily resolved just by looking at it. But the complication is, of course, the fact that only the syllabus necessarily

carries the approval of the Ohio Supreme Court. And respondent presses strongly the point that the syllabus does not mention the first amendment.

I think it is clear that this Court has jurisdiction. To begin with, this case seems to be on all fours with Perkins v. Benguet Mining Co., 342 U.S. 437, cited by respondent in its brief. In that case, a foreign corporation temporarily carried on a continuous but limited part of its general business in Ohio. While enaged in doing such business in Ohio, its president was served with a summons in an action in personam against the corporation filed in an Ohio state court by a nonresident of Ohio. The cause of action did not arise in Ohio and did not relate to the corporation's activities in that state. The trial court sustained a motion to quash the service of summons. The Ohio Supreme Court affirmed. Its syllabus makes no mention of the Fourteenth Amendment. It simply states that the doing of business by this foreign corporation would not make the corporation subject to service of process. This Court expressly recognized that "[i]f the [syllabus] stood alone, it might mean that the decision rested solely upon the law of Ohio." Indeed, I would note that there is nothing to prevent Ohio from establishing procedural protections as to service of process above and beyond those mandated by the Fourteenth Amendment. But this Court stated that the syllabus had to be read "in the light of the facts and issues of the case," and found that the opinions in the case expressed the view that the Fourteenth Amendment prohibited Ohio from asserting jurisdiction over the respondent corporation. This Court then concluded that "for

us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the Court below had felt free, under our decisions, to do so." The Court proceeded in that case to determine that the Fourteenth Amendment would not prohibit Ohio from asserting jurisdiction over the foreign corporation.

This case seems to me to be in an identical posture, and in light of Perkins I see no bar to reaching the merits.

THE MERITS: This is an interesting and important case, but also one that is quite difficult. Indeed, I find it hard to get a fairly good grasp on the precise questions at issue. In any event, I am quite surprised to find the Court in the posture of deciding what could be a very important First Amendment case without the aid of interested amici such as broadcasters and newspapers. For some reason, the news media apparently does not realize that this case has the potential of being a major First Amendment decision.

So do I

True

Before discussing the legal issues, I want to make one comment about the nature of the state-created right that is at issue here. There has been some discussion in this case as to whether we are dealing with a "right of privacy" or a "right of publicity." In my view they are in most contexts (such as this) two sides of the same coin. To use Justice White's language in Cox Broadcasting, what we are really confronted with is a state defined and protected "area of privacy free from unwanted publicity." I emphasize the word "unwanted." Some people consider a part of their lives "private" and seek to avoid publicity as to that part of their lives because

a preference for privacy. In that context, it seems appropriate to talk about a right to privacy.

There are other situations in which an individual plans to make a part of his life "open" to the public, but, perhaps for reasons of commercial profit, the individual wants to control access to what he intends to expose. In that context, it seems appropriate to talk of a "right of publicity." In both cases the individual seeks to limit exposure of his actions to the public. The extent and nature of the exclusion differs in the two contexts, but it nonethless is essentially a right to exclude publication of a part of one's life.

Where does the First Amendment fit into this scheme of individual interests in limiting publication about one's life? To begin with, it is worth emphasizing that the First Amendment does not require that States recognize and protect areas of privacy free from unwanted publicity. Putting to one side other possible federal constitutional constraints such as substantive due process, the First Amendment leaves the States free to decide whether to define and create an area of privacy free from unwanted publicity.

On the other hand, once a State does decide to create such an area, the First Amendment must be considered in determining whether there are federal constitutional limits on the scope of the area of privacy created and enforced by the State. In the instant case, it is clear from paragraph 2 of the syllabus that the Ohio Suprme Court has recognized in the performer a "right to the publicity value of his performance." The question for us is whether, and to what extent, the First Amendment requires a privilege for legitimate news use of aspects of the performance.

no defamation
or false light

None of our prior cases ~~are~~ is directly applicable in resolving that question. I have reread the cases from New York Times v. Sullivan through last Term's decision in Firestone, and I find them generally inapplicable. We are dealing in this case with an entirely accurate and comprehensive report of an obviously newsworthy event. We are not confronted with questions of defamation, false light privacy, public figure doctrine, or the scope of matters of public interest. Moreover, we are not confronted here with appropriation for the purpose of commercial advertising or the use of aspects of the performance to promote the sale of goods. For reasons that will appear shortly, I think the most relevant precedent is Cox Broadcasting.

This Court specifically noted in Cox Broadcasting that it was not addressing the question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press. 420 U.S. at 491. In this case we must address that question at least in part. The reason I say "in part" is quite important--we have before us a narrow state-created area of privacy. First of all, the State has not protected this area of privacy--the performance--from all truthful publication. The press is still free to write about, describe, and criticize Zacchini's performance. Zacchini argues that the First Amendment does not require that the State extend to news broadcaseters the privilege of filming his entire performance and showing it on the nightly news. He apparently would not be concerned if they

aired a still photograph of his coming out of the cannon or his landing on the net. The second narrow aspect to this case is that the area which the State has defined to be private is limited to performers. We are talking in this case, according to syllabus #2, about the right to the publicity value of a performance. We are not confronted here with broader questions of the right to film public figures performing private though newsworthy activities. For example, we are not dealing here with whether the press could tomorrow film the Secretary of State taking a stroll alongside the B&O Canal while thinking about the problems of the nation.

I stress these points because I think they have relevance to the First Amendment balance. On the one side, the fact that this case involves a limitation on the nature and extent of media coverage rather than a complete ban on discussion is something to be considered. Of course, one might argue that this cuts the other way if there is any meaning to the argument that a picture is worth a thousand words. On the other side of the balance there is, when one considers only "performances", a legitimate state interest that may not be present in other contexts. The state interest is analagous to the interest which underlies our federal copyright and patent protections. We want people to invent and perform entertaining acts. Many will do it only if they are assured that their financial rewards will not be drained off by others. So we want to give to the performer the right to decide whether and how much publicity he needs by giving him the right to control publicity. Although these are relevant considerations, the tough question is one of result.

Determining the final result in this case is complicated somewhat by the factual situation, so I will start down the road with a few hypotheticals.

Suppose a performer gets copyright protection on a play, rents a small theater, and performs the play. He allows admission only for a fee, he bars the use of tape recorders and note pads and pencils, and allows pursuant to contract one T.V. network to film the performance for the purpose of live T.V. transmission to local stations. So far there are no real First Amendment problems. The First Amendment does not require that the press be admitted free of charge. It does not require that the press be entitled to bring in tape recorders or even note pads. It does not require that the performer contract with a T.V. network for live transmission; and if he does so, it does not require that he provide the same opportunity to all networks.

The press can report the play. They can describe it. They can criticize it. They cannot reproduce it word for word since it is a copyrighted production. But there is in copyright the doctrine of fair use, which allows a relative short or small portion of a copyrighted work to be used without authorization from the copyright owner if the user has a valid reason to do so and the use does not adversely affect the owner's interests. [A common example of fair use is a quotation in a book review.] The roots of the fair use doctrine in the copyright area are obscure, but they have not--to my knowledge--been developed under the First Amendment and its interrelationship with the copyrights clause.

Can't be copyrighted.

Now suppose the performance is something that cannot be copyrighted.* It could be a professional fight or a human cannonball. Again the performer can exclude all those except those willing to pay admission, and he can sell live TV rights. Suppose he decides not to have his performance, or a tape thereof, aired on any T.V. show. Nonethless a TV station, aware of his prohibition on videotaping, sneaks in and tapes the performance. It then airs a small portion of the performance on the evening news as part of the entertainment news of the day. Can the State use its power to enforce a tort judgment against the TV station on behalf of the producer, or does that infringe the First Amendment?

There are three possible answers. First, it does infringe the First Amendment. The press should be free to attempt to get access for the purpose of taping things like this, and they should be free to show it for news purposes. A picture is not worth a thousand words.

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*/ It is important to stress cannot be copyrighted. For if the performance can be copyrighted and has not been copyrighted, there is a preemption issue--at least a potential issue--if the State through its tort law gives a "property right" to something that could have been but was not copyrighted.

not be subject to civil liability for the act of publication. This performance is in the public domain, just as the records in Cox Broadcasting were public records. Once a performer decides to place his performance in the public domain, the press can film it and display it without being subected to civil liability by the State. Moreover, since the State cannot establish civil liability for the act of publicity, it cannot establish an independent liability for the act of having violated the producer's restrictions on filming. [There might be exceptions to this position, not relevant here, where the act of filming or taking pictures with flash bulbs actually intereferes with the performance.]

2. The second approach is to conclude that it is not inconsistent with the First Amendment for the State to establish civil liability in this context. This position would emphasize that we left open in Cox the extent to which a state could define and protect an area of privacy free from unwanted truthful publicity. This case does not require us to resolve that broad question. All we need say is that with respect to performances, the State interest in protecting private citizens and their valuable publicity rights in entertainment justifies this particular restriction on the media.

3. Finally, the third approach would be to take a case by case balancing approach, using the factors that have been developed in the application of the fair use doctrine in copyright law. These factors include: (1) The extent to which the use is in competition with the copyright owner and affects his market; (2) The size and relative importance of the part used; (3) the nature of the performance; and (4) The user's reasons for appropriating the work and for not seeking permission.

My present incliniation is to go with the second alternative. As you have noted in a different context--Gertz--there is not much to be said in favor of the case-by-case approach. And as between the first and second alternatives, in this limited area the state interest which is analagous to the interest that underlises our copyright laws seems to me sufficient to justify this infringement of First Amendment freedoms. Application of that approach to this case is complicated. First, if we are willing to allow the State to give Zacchini a property right the publicity value of his performance that is not subject to a news privilege as to videotaped reproductions, we have to determine whether he retained that right or passsed it on to the producers who ran the county fair. This is an important inquiry, since it appears that the producers gave news people free admission to the fair, while Zacchini told the film crew not to film his act. In circumsatnces such as this, we don't want the press to have to guess as to who really holds the property right and what the owner of the right wants to do with it. Here however the press could have checked on this during the intervening day between the first attempt to film and the actual filming. Moreover, to this point everyone seems to have assumed that Zacchini had the property right. Subject to further rethinking, it might be best to just treat the case as one in which Zacchini had the right.

76-577 ZACCHINI v. SCRIPPS-HOWARD Argued 4/25/77

"Human cannon-ball" case.

Ohio found a "right to the publicity value of his performance"

~~Resp~~ Resp. say there is an "independent state ground" (the prop. right under Ohio law). Petr. answers that the "privilege" relied upon by Ohio Ct was derived from First Amend. & our decisions.

Lancione (Petr)

Ohio called right a proprietary ~~right in~~ interest in "right to publicity"

Not a "false light" case.

Media had right to report the act & to show a "still shot" – but no right to reproduce an entire act.

Ohio's privilege limited to "news" of public interest

No contract rights involved.

Bryan (Resp)

Distinguishes bet. 15 second show & a 30 min. symphony.

Ctt. arrangements usually protect acts, etc.

If there is a "legitimate news interest", and no copyright or contract int., the media is privileged.

(P.S. asked about new "hit" record & TV plays part of it on news ~~broad~~ broadcast)

File 76-577

Zacchini (My pre-Conference Notes)
76-577

State has created a property right — "area of privacy free from unwanted publicity": (Syllabus)

First Amend. doesn't prevent a State from creating "privacy rts".

But it may impose constitutional limits on scope of the privacy. (e.g. in a new program following a public performance)

None of prev cases really on point. Cox closest: it left open whether could create area of privacy from from unwanted publicity.

Three possible answers:

1. First Amend protects news broadcast of a public ~~p~~, uncopyrighted performance — when broadcast as news rather than as a commercial program.

2. State may protect free from First Amend.

State interest may be sufficient in protecting this prop. ~~rts~~ right.

3. "Fair use test" of copyright law — a balancing of factors & interests.

LFP 4/26

Reverse 6-3

76-577 ZACCHINI v. SCRIPPS-HOWARD Conf. 4/27/77

The Chief Justice Reverse + Remand for Trial

Almost entire "show" would be revealed by a still picture.

Record + opinion below inadequate for a decision by this Court.

Mr. Justice Brennan Affirm

The Ct. of Common Pleas was "dismissal" of case. Ohio S/Ct. affirmed.

(No discussion)

Mr. Justice Stewart Reverse + Remand

Doubts a fed. Q is presented. There is now a prop. right of some sort of privacy under Ohio law + also the "privilege" seems to be Ohio law. But opinion of Ct. relies on our Cases - N.Y. Times, Hill, etc - thus a 1st Amend issue. See Perkins v. Ben Gay Minning 342 U.S. 347 On basis of Perkins, we probably have juris.

On merits, 1st amend has little to do with this. A prop. int. was appropriated. It can't be taken.

Mr. Justice White Reverse

There was no consent by π.
Privilege to publish does not go
this far.
Agree with Potter.

Mr. Justice Marshall Affirm

First amend.

Mr. Justice Blackmun Reverse

Case of first impression
Agree with Stewart + White
Prop. right.

Mr. Justice Powell Affirm

This was a public event
Reported only as news - in news program.
Could hardly have reported it any more modestly.

Mr. Justice Rehnquist Reverse

Agree with Paller + Byron

Mr. Justice Stevens Dismiss Cert

Ohio Ct doesn't decide case on 1st Amend.
See note 5, A 14
No fed Q

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 5-31-77

Recirculated: _____

FIRST DRAFT

No. 76-577 — Zacchini v. Scripps-Howard Broadcasting Co.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September, 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a free lance reporter for Scripps-Howard Broadcasting Company, the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and

videotaped the entire act. This film clip, approximately 15 seconds in length, was shown on the 11:00 o'clock news program that night, together with favorable commentary. 1/

Petitioner then brought this action for damages, alleging that he is "engaged in the entertainment business," that the act he performs is one "invented by his father and . . . performed only by his family for the last 50 years," that respondent "showed and commercialized the film of his act without his consent," and that such conduct was an "unlawful appropriation of plaintiff's professional property." App. 4-5. Respondent answered and moved for summary judgment, which was summarily granted by the trial court.

The Court of Appeals of Ohio reversed. The majority held that petitioner's complaint stated a cause of action for conversion and for infringement of a common law copyright, and one judge concurred in the judgment on the ground that the complaint stated a cause of action for appropriation of petitioner's "right of publicity" in the film of his act. All three judges agreed that the First Amendment did not privilege the press to show the entire performance on a news program without compensating petitioner for any financial injury he could prove at trial.

Like the concurring judge in the Court of Appeals, the Supreme Court of Ohio rested petitioner's cause of action under state law on his "right to the publicity value of his performance." 47 Ohio St. 2d 224, ___ N.E. 2d ___ (1976). The opinion Syllabus,

to which we are to look for the rule of law used to decide the case,[2/] declared first that one may not use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial one, and second that respondent would be liable for the appropriation, over petitioner's objection and without license or privilege, of petitioner's right to the publicity value of his performance. Ibid. The court nevertheless gave judgment for respondent because, in the words of the Syllabus:

> "A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual." Ibid.

We granted certiorari, ___ U.S. ___ (1977), to consider an issue unresolved by this Court: whether the First and Fourteenth Amendments immunized respondent from damages for its alleged infringement of petitioner's state law "right of publicity." Petition for Certiorari 2. Insofar as the Ohio Supreme Court held that the First and Fourteenth Amendments of the United States Constitution required judgment for respondent, we reverse the judgment of that court.

II

If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, Wilson v. Lowes, 355 U.S. 597 (1958), for "our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal laws. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). We are confident, however, that the judgment below did not rest on an adequate and independent state ground and that we have jurisdiction to decide the federal issue presented in this case.

There is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right under Ohio law. It is also clear that respondent's claim of constitutional privilege was sustained. The source of this privilege was not identified in the Syllabus. It is clear enough from the opinion of the Ohio Supreme Court, which we are permitted to consult for understanding of the Syllabus, Perkins v. Benguet Mining Co., 342 U.S. 437, 442-443 (1952), [3/] that in adjudicating the crucial question of whether respondent had

a privilege to film and televise respondent's performance, the court turned immediately to Time, Inc. v. Hill, 385 U.S. 374 (1967). It construed the principle of that case, along with that of New York Times v. Sullivan, 376 U.S. 354 (1964), to be that "the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private," and concluded, therefore, that the press is also "privileged when an individual seeks to publicly exploit his talents while keeping the benefits private." 47 Ohio St. 2d, at 234, ___ N.E. 2d, at ___. The privilege thus exists in cases "where the appropriation of the right of publicity is claimed." The court's opinion also referred to Draft 21 of the relevant portion of Restatement of Torts Second, which was understood to make room for reasonable press appropriations by limiting the reach of the right of privacy rather than by creating a privileged invasion. The opinion said, however, that "the gravamen of the issue in this case is not whether the degree of intrusion is reasonable but whether First Amendment principles require that the right of privacy give way to the public right to be informed of matters of public interest and concern. The concept of privilege seems the more useful and appropriate one." Id., at 234 n. 5, ___ N.E. 2d, at ___. (Emphasis added.)

The controlling consideration was thus one of privilege rather than of the substantive reach of the right of publicity. In deciding the question, had the Ohio court rested on both state

and federal grounds, either of which would have been dispositive, we would have no jurisdiction. Fox Films v. Mueller, 296 U.S. 207 (1935); Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157, 164 (1917). But the opinion, like the Syllabus, did not mention the Ohio constitution, citing instead this Court's First Amendment cases as controlling. It appears to us that decision rested solely on federal grounds. That the Ohio court might have, but did not, invoke state law does not foreclose jurisdiction here. Steel v. L&N R. Co., 323 U.S. 192, 197 n. 1 (1944); Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 98 (1938).

If the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law. Perkins v. Benquet Mining Co., supra. "If the Supreme Court [of Ohio] held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide these suits according to its own local law." Missouri v. Mayfield, 340 U.S. 1, 5 (1950).

III

The Ohio Supreme Court held that respondent is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose. If under this standard respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case. But petitioner is not contending that his appearance at the fair and his performance could not be reported by the press as newsworthy items. His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy. This, he claimed, was an appropriation of his professional property. The Ohio Supreme Court agreed that petitioner had "a right of publicity" that gave him "personal control over the commercial display and exploitation of his personality and the exercise of his talents." [4/] This right of "exclusive control over the publicity given to his performance" was said to be such a "valuable part of the benefit which may be attained by his talents and efforts" that it was entitled to legal protection. It was also observed, or at least expressly assumed, that petitioner had not abandoned his rights by performing under the circumstances present at the Geauga County Fair Grounds.

The Ohio Supreme Court nevertheless held that the challenged invasion was privileged, saying that the press "must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires." 47 Ohio St., at 235, ___ N.E. 2d, at ___. Under this view, respondent was thus constitutionally free to film and display petitioner's entire act. 5/

The Ohio Supreme Court relied heavily on Time, Inc. v. Hill, supra, but that case does not mandate a media privilege to televise a performer's entire act without his consent. Involved in Time, Inc. v. Hill was a claim under the New York "Right of Privacy" statute that Life Magazine, in the course of reviewing a new play, had connected the play with a long-past incident involving petitioner and his family and had falsely described their experience and conduct at that time. The complaint sought damages for humiliation and suffering flowing from these nondefamatory falsehoods that allegedly invaded Hill's privacy. The Court held, however, that the opening of a new play linked to an actual incident was a matter of public interest and that Hill could not recover without showing that the Life report was knowingly false or was

published with reckless disregard for the truth -- the same rigorous standard that had been applied in New York Times v. Sullivan, supra.

Time, Inc. v. Hill, which was hotly contested and decided by a divided Court, involved an entirely different tort than the "right of publicity" recognized by the Ohio Supreme Court. As the opinion reveals in Time, Inc. v. Hill, the Court was steeped in the literature of privacy law and was aware of the developing distinctions and nuances in this branch of the law. The Court, for example, cited Prosser, Handbook of the Law of Torts (3d Ed. 1964), and the same author's well-known article, Privacy, 48 Cal. L. Rev. 383 (1960), both of which divided privacy into four distinct branches. 7/ The Court was aware that it was adjudicating a "false light" privacy case involving a matter of public interest, not a case involving "intrusion," 385 U.S., at 384-385 n. 9, "appropriation" of a name or likeness for the purposes of trade, id., at 381, or "private details" about a non-newsworthy person or event, id., at 383 n. 7. It is also abundantly clear that Time, Inc. v. Hill did not involve a performer, a person with a name having commercial value, or any claim to a "right of publicity." This discrete kind of "appropriation" case was plainly identified in the literature cited by the Court 8/ and had been adjudicated in the reported cases. 9/

The differences between these two torts are important. First, the State's interests in providing a cause of action in each instance are different. "The interest protected" in permitting recovery for placing the plaintiff in a false light "is clearly that of reputation, with the same overtones of mental distress as in defamation." Prosser, supra, 48 Cal. L. Rev., at 400. By contrast, the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. 10/ As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation. Second, the two torts differ in the degree to which they intrude on dissemination of information to the public. In "false light" cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in "right of publicity" cases the only question is who gets to do the publishing. An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication. Indeed, in the present case petitioner did not seek to enjoin the broadcast of his act; he simply sought compensation for the broadcast in the form of damages.

Nor does it appear that our later cases, such as Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); and Time, Inc. v. Firestone, 424 U.S. 448 (1976), require or furnish substantial support for the Ohio court's privilege ruling. These cases, like New York Times, emphasize the protection extended to the press by the First Amendment in defamation cases, particularly when suit is brought by a public official or a public figure. None of them involve an alleged appropriation by the press of a right of publicity existing under state law.

Moreover, Time, Inc. v. Hill, New York Times, Metromedia, Gertz, and Firestone all involved the reporting of events; in none of them was there an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid. It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act.[11/] Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, 17 U.S.C.,

cf. Kalem Co. v. Harper Bros., 222 U.S. 55 (1911); Manners v. Morosco, 252 U.S. 317 (1920), or to film and broadcast a prize fight, Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (CA 3 1956), or a baseball game, Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938), where the promoters or the participants had other plans for publicizing the event. There are ample reasons for reaching this conclusion.

The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of the act. As the Ohio court recognized, this act is the product of petitioner's own talents and energy, the end result of much time, effort and expense. Much of its economic value lies in the "right of exclusive control over the publicity given to his performance"; if the public can see the act for free on television they will be less willing to pay to see it at the fair. [12/] The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. "The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay." Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemporary Problems 326, 331 (1966). Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for the purposes of trade

where's enrichment to TV stn.?

or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus in this case, Ohio has recognized what 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.

Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court. As the Court stated in Mazer v. Stein, 347 U.S. 201, 219 (1964),

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

These laws perhaps regard the "reward to the owner a secondary consideration," United States v. Paramount Pictures, 334 U.S. 131, 158 (1948), but they were "intended definitely to grant valuable,

enforceable rights" in order to afford greater encouragement to the production of works of benefit to the public. Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, 36 (1939). The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work for public benefit. Cf. Goldstein v. California, 412 U.S. 546 (1973); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 476 (1974).[13/]

There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. Time, Inc. v. Hill, supra. But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state-law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of Gertz, supra. Respondent knew exactly that petitioner objected to televising his act, but nevertheless displayed the entire film.

We conclude, as have others,[14/] that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.

Reversed.

Zacchini footnotes

1/ The script of the commentary accompanying the film clip read as follows:

> "This . . . now . . . is the story of a true spectator sport . . . the sport of human cannonballing . . . in fact, the great Zacchini is about the only human cannonball around, these days . . . just happens that, where he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a long act, it's a thriller . . . and you really need to see it in person . . . to appreciate it. . . ." (Emphasis in original.) App. 12.

2/ Beck v. Ohio, 379 U.S. 89, 93 n. 2 (1964); Perkins v. Benguet Mining Co., 342 U.S. 437, 441-443 (1952); Minnesota v. National Tea Co., 309 U.S. 551, 554 (1940). See Cassidy v. Glossip, 12 Ohio St. 2d 17 (1967); The Williamson Heater Co. v. Radich, 128 Ohio St. 124 (1934); Thackery v. Helfrich, 123 Ohio St. 334, 336 (1931); State v. Hauser, 101 Ohio St. 404, 408 (1920); 14 Ohio Jur. 2d § 247.

3/ In Perkins the issue was whether the Ohio courts could exercise personal jurisdiction over a foreign corporation. The Syllabus of the Ohio Supreme Court declared that it did not have personal jurisdiction, but it gave no indication of whether the Ohio court's decision rested on state grounds or on the Fourteenth Amendment. The only opinion

filed with the Syllabus reasoned, however, that the Due Process Clause of the Fourteenth Amendment prohibited the Ohio courts from exercising personal jurisdiction in that case. While recognizing the existence of the Ohio Syllabus rule, this Court felt obliged in these circumstances to reach the merits of the constitutional issue, holding that the Due Process Clause did not preclude the exercise of jurisdiction. "[F]or us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so." 342 U.S., at 443.

4/ The court relied on Housh v. Peth, 165 Ohio St. 35, 133 N.E. 2d 340 (1956), the Syllabus of which held:

> "An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person or ordinary sensibilities."

The court also indicated that the applicable principles of Ohio law were those set out in Restatement of Torts Second, Tentative Draft No. 13, 1967, § 252c, and the comments

thereto, portions of which were stated in the footnotes of the opinion. Also, referring to the right as the "right of publicity," the court quoted approvingly from Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F. 2d 866, 868 (C.A. 2 (1952).

5/ The court's explication was as follows:

> "The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here." 47 Ohio St., at 235, ___ N.E.2d, at ___.

6/ Section 51 of the New York Civil Rights Law provides an action for injunction and damages for invasion of the "right of privacy" granted by § 50:

> "A person, firm or corporation that uses for advertising purposes, or for the purposes of

trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

7/ "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." Prosser, Privacy, 48 Cal. L. Rev. 383, 389 (1960). Thus, according to Prosser, some courts had recognized a cause of action for "intrusion" upon the plaintiff's seclusion or solitude; public disclosure of "private facts" about the plaintiff's personal life; publicity that places the plaintiff in a "false light" in the public eye; and "appropriation" of the plaintiff's name or likeness for commercial purposes. One may be liable for "appropriation" if he "pirate[s] the plaintiff's identity for some advantage of his own." 48 Cal. L. Rev., at 403.

8/ See, for example, Prosser, Torts, 3rd Ed. 842 (1964); Bloustein, Privacy as an Aspect of Human Dignity; An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962, 986-991 (1964); Kalven, Privacy in Tort Law--Were Warren and Brandeis Wrong?, 31 Law and Contemporary Problems 326, 331 (1966).

9/ E.g., Ettore v. Philco Television Broadcasting Corp., 229 F. 2d 481 (C.A. 3 1956); Sharkey v. National Broadcasting Co., Inc., 93 F. Supp. 986 (S.D. N.Y. 1950); Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (1938); Twentieth Century Sporting Club, Inc. v. Transradio Press Service, Inc., 165 Misc. 71, 30 N.Y.S. 159 (1937); Hogan v. A. S. Barnes & Co., 114 U.S.P.L.Q. 314 (Pa. Ct. C.P. 1957); Myers v. U. S. Camera Publishing Corp., 167 N.Y.S. 2d 771, City Ct. of City of N. Y. (1957). The cases prior to 1961 are helpfully reviewed in Gordon, Right of Property in Name, Likeness, Personality and History, 55 N.W.U.L. Rev. 553 (1960).

Ettore v. Philco Television Broadcasting Corp., supra, involved a challenge to television exhibition of a film made of a prize fight that had occurred some time ago. Judge Biggs, writing for the Court of Appeals, said at 229 F. 2d 486, 490:

> "There are, speaking very generally, two polar types of cases. One arises when some accidental occurrence rends the veil of obscurity surrounding an average person and makes him, arguable, newsworthy. The other type involves the appropriation of the performance or production of a professional performer or entrepreneur. Between the two extremes are many gradations,

most involving strictly commercial exploitation of some aspect of an individual's personality, such as his name or picture.

. . . . . .

"The fact is that, if a performer performs for hire, a curtailment, without consideration, of his right to control his performance is a wrong to him. Such a wrong vitally affects his livelihood, precisely as a trade libel, for example, affects the earnings of a corporation. If the artistry of the performance be used as a criterion, every judge perforce must turn himself into a literary, theatrical or sports critic."

10/ The Ohio Supreme Court expressed the view "that plaintiff's claim is one for invasion of the right of privacy by appropriation, and should be considered as such." 47 Ohio St., at 226, ___N.E. 2d, at ___. It should be noted, however, that the case before us is more limited than the broad category of lawsuits that may arise under the heading of "appropriation." Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.

11/ Prosser, Torts, 4th Ed. (1971), 806-807, generalizes on the cases:

> "The New York courts were faced very early with the obvious fact that newspapers and magazines, to say noahing of radio, television and motion pictures, are by no means philanthropic institutions, but are operated for profit. As against the contention that everything published by these agencies must necessarily be 'for purposes of trade,' they were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper itself is sold; and that the presence of advertising matter in adjacent columns, or even the duplication of a news item for the purpose of advertising the publication itself, does not make any difference. Any other conclusion would in all probability have been an unconstitutional interference with the freedom of the press. Accordingly, it has been held that the mere incidental mention of the plaintiff's name in a book or a motion picture is not an invasion of his privacy; nor is the publication of a photograph or a newsreel in which he incidentally appears." (Footnotes omitted.)

Compare American Law Institute, Restatement of the Law Second, Tentative Draft No. 22, § 652c, Comment D.

12/ It is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to prove damages and thus would not recover. But petitioner has alleged that the broadcast injured him to the extent of $25,000, App. 5, and we think the State should be allowed to compensate this injury if proven.

13/ Goldstein involved a California statute outlawing "record piracy"--the unauthorized duplication of recordings of performances by major musical artists. Petitioners there launched a multifaceted constitutional attack on the statute, but they did not argue that the statute violated the First Amendment. In rejecting this broad-based constitutional attack, this Court concluded:

> "The California statutory scheme evidences a legislative policy to prohibit 'tape piracy' and 'record piracy', conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes of property. No restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals in precisely the same manner and with

the same personnel as appeared on the original recording.

. . . . . .

"Until and unless Congress takes further action with respect to recordings . . . , the California statute may be enforced against acts of piracy such as those which occurred in the present case." 412 U.S., at 571. (Emphasis added.)

We note that federal district courts have rejected First Amendment challenges to the federal copyright law on the ground that "no restraint has been placed on the use of an idea or concept." United States v. Bodin, 375 F. Supp. 1265, 1267 (S.D. Okla. 1974). See also Walt Disney Productions v. Air Pirates, 345 F. Supp. 108, 115 (N.D. Cal. 1972) (citing Nimmer, Does Copyright Abridge First Amendment Guarantees of Free Speech and Press, 17 U.S.L.A.L. Rev. 1180 (1970), arguing that copyright law does not abridge the First Amendment because it does not restrain the communication of ideas or concepts); Robert Stigwood Group Ltd v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972) (also relying on Nimmer). Of course this case does not make a claim that respondents would be prevented by petitioner's "right of publicity" from staging or filming its own "human cannonball" act.

In Kewanee this Court upheld the constitutionality of Ohio's trade secret law, although again no First Amendment claim was presented. Citing Goldstein, the Court stated:

> "Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress . . . ." 416 U.S., at 479.

Although recognizing that the trade secret law resulted in preventing the public gaining certain information, the Court emphasized that the law had "a decidedly beneficial effect on society," id., at 485, and that without it, "organized scientific and technological research could become fragmented, and society, as a whole, would suffer." Id., at 487.

14/ "There can be no offense to the Constitution if the [media] is compelled to pay the fair value of what it has taken . . . ." Hill, Defamation and Privacy Under the First

Amendment, 76 Col. L. Rev. 1205, 1276 (1976). "More and more courts seem willing to acknowledge that plaintiffs who sue for appropriation deserve damages not because they suffered some kind of severe mental distress but because the defendant used something which belonged to the plaintiff--his name or likeness--without compensation." Pember and Teeter, Privacy in the Press Since Time v. Hill, 50 Wash. L. Rev. 57, 87 (1974).

June 1, 1977

No. 76-577 Zacchini v. Scripps-Howard Broadcasting Co.

Dear Byron:

In due time I will circulate a dissent.

Sincerely,

Mr. Justice White

Copies to the Conference

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1977

76-577, Zacchini v. Scripps-Howard

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1977

Re: No. 76-577 - Zacchini v. Scripps-Howard

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1977

Re: No. 76-577 - Zacchini v. Scripps-Howard Broadcasting Co.

Dear Byron:

I am with you.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

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1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-577

Hugo Zacchini, Petitioner, v. Scripps-Howard Broadcasting Company. } On Writ of Certiorari to the Supreme Court of Ohio.

[June —, 1977]

File 9th dissenting

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September, 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a freelance reporter for Scripps-Howard Broadcasting Company, the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and videotaped the entire act. This film clip, approximately 15 seconds in length, was shown on the 11 o'clock news program that night, together with favorable commentary.[1]

[1] The script of the commentary accompanying the film clip read as follows:

"This . . . now . . . is the story of a *true spectator* sport . . . the sport

Petitioner then brought this action for damages, alleging that he is "engaged in the entertainment business," that the act he performs is one "invented by his father and . . . performed only by his family for the last 50 years," that respondent "showed and commercialized the film of his act without his consent," and that such conduct was an "unlawful appropriation of plaintiff's professional property." App. 4–5. Respondent answered and moved for summary judgment, which was summarily granted by the trial court.

The Court of Appeals of Ohio reversed. The majority held that petitioner's complaint stated a cause of action for conversion and for infringement of a common law copyright, and one judge concurred in the judgment on the ground that the complaint stated a cause of action for appropriation of petitioner's "right of publicity" in the film of his act. All three judges agreed that the First Amendment did not privilege the press to show the entire performance on a news program without compensating petitioner for any financial injury he could prove at trial.

Like the concurring judge in the Court of Appeals, the Supreme Court of Ohio rested petitioner's cause of action under state law on his "right to the publicity value of his performance." 47 Ohio St. 2d 224, — N. E. 2d — (1976). The opinion Syllabus, to which we are to look for the rule of law used to decide the case,[2] declared first that one may not

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of human cannonballing . . . in fact, the great *Zacchini* is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it. . . ." (Emphasis in original.) App. 12.

[2] *Beck* v. *Ohio*, 379 U. S. 89, 93 n. 2 (1964); *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437 441–443 (1952); *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 554 (1940). See *Cassidy* v. *Glossip*, 12 Ohio St. 2d 17 (1967); *The Williamson Heater Co.* v. *Radich*, 128 Ohio St. 124 (1934); *Thackery* v. *Helfrich*, 123 Ohio St. 334, 336 (1931); *State* v. *Hauser*, 101 Ohio St. 404, 408 (1920); 14 Ohio Jur. 2d § 247.

use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial one, and second that respondent would be liable for the appropriation, over petitioner's objection and without license or privilege, of petitioner's right to the publicity value of his performance. *Ibid.* The court nevertheless gave judgment for respondent because, in the words of the Syllabus,

> "[a] TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some nonprivileged private use, or unless the actual intent was to injure the individual." *Ibid.*

We granted certiorari, — U. S. — (1977), to consider an issue unresolved by this Court: whether the First and Fourteenth Amendments immunized respondent from damages for its alleged infringement of petitioner's state law "right of publicity." Petition for Certiorari 2. Insofar as the Ohio Supreme Court held that the First and Fourteenth Amendments of the United States Constitution required judgment for respondent, we reverse the judgment of that court.

II

If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Lowes*, 355 U. S. 597 (1958), for "our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal laws. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945). We are

confident, however, that the judgment below did not rest on an adequate and independent state ground and that we have jurisdiction to decide the federal issue presented in this case.

There is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right under Ohio law. It is also clear that respondent's claim of constitutional privilege was sustained. The source of this privilege was not identified in the Syllabus. It is clear enough from the opinion of the Ohio Supreme Court, which we are permitted to consult for understanding of the Syllabus, *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437, 442–443 (1952),[8] that in adjudicating the crucial question of whether respondent had a privilege to film and televise respondent's performance, the court turned immediately to *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967). It con-

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[8] In *Perkins* the issue was whether the Ohio courts could exercise personal jurisdiction over a foreign corporation. The Syllabus of the Ohio Supreme Court declared that it did not have personal jurisdiction, but it gave no indication of whether the Ohio court's decision rested on state grounds or on the Fourteenth Amendment. The only opinion filed with the Syllabus reasoned, however, that the Due Process Clause of the Fourteenth Amendment prohibited the Ohio courts from exercising personal jurisdiction in that case. While recognizing the existence of the Ohio Syllabus rule, this Court felt obliged in these circumstances to reach the merits of the constitutional issue, holding that the Due Process Clause did not preclude the exercise of jurisdiction. "[F]or us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so." 342 U. S., at 443.

The Ohio courts do not suggest that the opinion is not relevant to a determination of the Ohio Supreme Court's holding.

"The syllabus is the language of the court. The opinion is more particularly the language of the judge preparing the same, and yet *so much of the opinion as is reasonably necessary to sustain the judgment must of necessity be concurred in by the court.*"

Hart v. *Andrews*, 103 Ohio St. 218, 221 (1921) (emphasis added). See also *Williamson Heater, supra; State* v. *Hauser, supra.*

strued the principle of that case, along with that of *New York Times* v. *Sullivan*, 376 U. S. 374 (1964), to be that "the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private," and concluded, therefore, that the press is also "privileged when an individual seeks to publicly exploit his talents while keeping the benefits private." 47 Ohio St. 2d, at 234, — N. E. 2d, at —. The privilege thus exists in cases "where the appropriation of the right of publicity is claimed." The court's opinion also referred to Draft 21 of the relevant portion of Restatement of Torts Second, which was understood to make room for reasonable press appropriations by limiting the reach of the right of privacy rather than by creating a privileged invasion. The opinion said, however, that "the gravamen of the issue in this case is not whether the degree of intrusion is reasonable but whether *First Amendment principles* require that the right of privacy gives way to the public right to be informed of matters of public interest and concern. The concept of privilege seems the more useful and appropriate one." *Id.*, at 234 n. 5., — N. E. 2d, at —. (Emphasis added.)

The controlling consideration was thus one of privilege rather than of the substantive reach of the right of publicity. In deciding the question, had the Ohio court rested on both state and federal grounds, either of which would have been dispositive, we would have had no jurisdiction. *Fox Films* v. *Mueller*, 296 U. S. 207 (1935); *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157 164 (1917). But the opinion, like the Syllabus, did not mention the Ohio Constitution, citing instead this Court's First Amendment cases as controlling. It appears to us that decision was rested solely on federal grounds. That the Ohio court might have, but did not, invoke state law does not foreclose jurisdiction here. *Steel* v. *L&N R. Co.*, 323 U. S. 192, 197 n. 1 (1944); *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98 (1938).

If the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law. *Perkins* v. *Benguet Mining Co., supra.* "If the Supreme Court [of Ohio] held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide these suits according to its own local law." *Missouri* v. *Mayfield,* 340 U.S. 1, 5 (1950).

III

The Ohio Supreme Court held that respondent is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose. If under this standard respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case. But petitioner is not contending that his appearance at the fair and his performance could not be reported by the press as newsworthy items. His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy. This, he claimed, was an appropriation of his professional property. The Ohio Supreme Court agreed that petitioner had "a right of publicity" that gave him "personal control over the commercial display and exploitation of his personality and the exercise of

his talents."[4] This right of "exclusive control over the publicity given to his performance" was said to be such a "valuable part of the benefit which may be attained by his talents and efforts" that it was entitled to legal protection. It was also observed, or at least expressly assumed, that petitioner had not abandoned his rights by performing under the circumstances present at the Geauga County Fair Grounds.

The Ohio Supreme Court nevertheless held that the challenged invasion was privileged, saying that the press "must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance to be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires." 47 Ohio St., at 235, — N. E. 2d, at —. Under this view, respondent was thus constitutionally free to film and display petitioner's entire act.[5]

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[4] The court relied on *Housh* v. *Peth*, 165 Ohio St. 35, 133 N. E. 2d 340 (1956), the Syllabus of which held:

"An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

The court also indicated that the applicable principles of Ohio law were those set out in Restatement of Torts Second, Tentative Draft No. 13, 1967, § 252c, and the comments thereto, portions of which were stated in the footnotes of the opinion. Also, referring to the right as the "right of publicity," the court quoted approvingly from *Haelan Laboratories, Inc.* v. *Topps Chewing Gum, Inc.*, 202 F. 2d 866, 868 (CA2) (1952).

[5] The court's explication was as follows:

"The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to

The Ohio Supreme Court relied heavily on *Time, Inc.* v. *Hill, supra,* but that case does not mandate a media privilege to televise a performer's entire act without his consent. Involved in *Time, Inc.* v. *Hill* was a claim under the New York "Right of Privacy" statute[6] that Life Magazine, in the course of reviewing a new play, had connected the play with a long-past incident involving petitioner and his family and had falsely described their experience and conduct at that time. The complaint sought damages for humiliation and suffering flowing from these nondefamatory falsehoods that allegedly invaded Hill's privacy. The Court held, however, that the opening of a new play linked to an actual incident was a matter of public interest and that Hill could not recover without showing that the Life report was knowingly false or was published with reckless disregard for the truth—the same rigorous standard that had been applied in *New York Times* v. *Sullivan, supra.*

Time, Inc. v. *Hill,* which was hotly contested and decided by a divided court, involved an entirely different tort than the "right of publicity" recognized by the Ohio Supreme Court. As the opinion reveals in *Time, Inc.* v. *Hill,* the Court was steeped in the literature of privacy law and was aware of the developing distinctions and nuances in this branch of the law. The Court, for example, cited Prosser, Handbook of the

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report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here." 47 Ohio St., at 235, — N. E. 2d, at —.

[6] Section 51 of the New York Civil Rights Law provides an action for injunction and damages for invasion of the "right of privacy" granted by § 50:

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Law of Torts (3d ed. 1964), and the same author's well-known article, Privacy, 48 Calif. L. Rev. 383 (1960), both of which divided privacy into four distinct branches.[7] The Court was aware that it was adjudicating a "false light" privacy case involving a matter of public interest, not a case involving "intrusion," 385 U. S., at 384–385, n. 9, "appropriation" of a name or likeness for the purposes of trade, *id.*, at 381, or "private details" about non-newsworthy person or event, *id.*, at 383 n. 7. It is also abundantly clear that *Time, Inc.* v. *Hill* did not involve a performer, a person with a name having commercial value, or any claim to a "right of publicity." This discrete kind of "appropriation" case was plainly identified in the literature cited by the Court[8] and had been adjudicated in the reported cases.[9]

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[7] "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." Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960). Thus, according to Prosser, some courts had recognized a cause of action for "intrusion" upon the plaintiff's seclusion or solitude; public disclosure of "private facts" about the plaintiff's personal life; publicity that places the plaintiff in a "false light" in the public eye; and "appropriation" of the plaintiff's name or likeness for commercial purposes. One may be liable for "appropriation" if he "pirate[s] the plaintiff's identity for some advantage of his own." 48 Calif. L. Rev., at 403.

[8] See, for example, Prosser, Torts, 3rd Ed. 842 (1964); Bloustein, Privacy as an Aspect of Human Dignity; An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962, 988–991 (1964); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemporary Problems 326, 331 (1966).

[9] *E. g., Ettore* v. *Philco Television Broadcasting Corp.*, 229 F. 2d 481 (CA3 1956); *Sharkey* v. *National Broadcasting Co., Inc.*, 93 F. Supp. 986 (SDNY 1950); *Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (1938); *Twentieth Century Sporting Club, Inc.* v. *Transradio Press Service, Inc.*, 165 Misc. 71, 30 N. Y. S. 159 (1937); *Hogan* v. *A. S. Barnes & Co.*, 114 U. S. P. L. Q. 314 (Pa. Ct. C. P. 1957); *Myers* v. *U. S. Camera Publishing Corp.*, 167 N. Y. S. 2d 771, City Ct. of City of

The differences between these two torts are important. First, the State's interests in providing a cause of action in each instance are different. "The interest protected" in permitting recovery for placing the plaintiff in a false light "is clearly that of reputation, with the same overtones of mental distress as in defamation." Prosser, *supra*, 48 Calif. L. Rev., at 400. By contrast, the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.[10] As we later note, the State's interest is closely

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N. Y. (1957). The cases prior to 1961 are helpfully reviewed in Gordon, Right of Property in Name, Likeness, Personality and History, 55 N. W. U. L. Rev. 553 (1960).

Ettore v. *Philco Television Broadcasting Corp.*, *supra*, involved a challenge to television exhibition of a film made of a prize fight that had occurred some time ago. Judge Biggs, writing for the Court of Appeals, said at 229 F. 2d 486, 490:

"There are, speaking very generally, two polar types of cases. One arises when some accidental occurrence rends the veil of obscurity surrounding an average person and makes him, arguable, newsworthy. The other type involves the appropriation of the performance or production of a professional performer or entrepreneur. Between the two extremes are many gradations, most involving strictly commercial exploitation of some aspect of an individual's personality, such as his name or picture.

* * * * *

"The fact is that, if a performer performs for hire, a curtailment, without consideration, of his right to control his performance is a wrong to him. Such a wrong vitally affects his livelihood, precisely as a trade libel, for example, affects the earnings of a corporation. If the artistry of the performance be used as a criterion, every judge perforce must turn himself into a literary, theatrical or sports critic."

[10] The Ohio Supreme Court expressed the view "that plaintiff's claim is one for invasion of the right of privacy by appropriation, and should be considered as such." 47 Ohio St., at 226, — N. E. 2d, at —. It should be noted, however, that the case before us is more limited than the broad category of lawsuits that may arise under the heading of "appropriation." Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the

analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation. Second, the two torts differ in the degree to which they intrude on dissemination of information to the public. In "false light" cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in "right of publicity" cases the only question is who gets to do the publishing. An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication. Indeed, in the present case petitioner did not seek to enjoin the broadcast of his act; he simply sought compensation for the broadcast in the form of damages.

Nor does it appear that our later cases, such as *Rosenbloom* v. *Metromedia*, 403 U. S. 29 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974); and *Time, Inc.* v. *Firestone*, 424 U. S. 448 (1976), require or furnish substantial support for the Ohio court's privilege ruling. These cases, like *New York Times*, emphasize the protection extended to the press by the First Amendment in defamation cases, particularly when suit is brought by a public official or a public figure. None of them involve an alleged appropriation by the press of a right of publicity existing under state law.

Moreover, *Time, Inc.* v. *Hill*, *New York Times*, *Metromedia*, *Gertz*, and *Firestone* all involved the reporting of events; in none of them was there an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid. It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about

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much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.

petitioner's act.[11] Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, 17 U. S. C. § 101 *et. seq.*, cf. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911); *Manners* v. *Morosco*, 252 U. S. 317 (1920), or to film and broadcast a prize fight, *Ettore* v. *Philco Television Broadcasting Corp.*, 229 F. 2d 481 (CA3 1956), or a baseball game, *Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (WD Pa. 1938), where the promoters or the participants had other plans for publicizing the event. There are ample reasons for reaching this conclusion.

The broadcast of a film of petitioner's entire act poses a

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[11] Prosser, Torts, 4th Ed. (1971), 806–807, generalizes on the cases:

"The New York courts were faced very early with the obvious fact that newspapers and magazines, to say nothing of radio, television and motion pictures, are by no means philanthropic institutions, but are operated for profit. As against the contention that everything published by these agencies must necessarily be 'for purposes of trade,' they were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper itself is sold; and that the presence of advertising matter in adjacent columns, or even the duplication of a news item for the purpose of advertising the publication itself, does not make any difference. Any other conclusion would in all probability have been an unconstitutional interference with the freedom of the press. Accordingly, it has been held that the mere incidental mention of the plaintiff's name in a book or a motion picture is not an invasion of his privacy; nor is the publication of a photograph or a newsreel in which he incidentally appears." (Footnotes omitted.)

Compare American Law Institute, Restatement of the Law Second, Tentative Draft No. 22, § 652c, Comment D.

substantial threat to the economic value of that performance. As the Ohio court recognized, this act is the product of petitioner's own talents and energy, the end result of much time, effort and expense. Much of its economic value lies in the "right of exclusive control over the publicity given to his performance"; if the public can see the act for free on television they will be less willing to pay to see it at the fair.[12] The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. "The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay." Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemporary Problems 326, 331 (1966). Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for the purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus in this case, Ohio has recognized what 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.

Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the

[12] It is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to prove damages and thus would not recover. But petitioner has alleged that the broadcast injured him to the extent of $25,000, App. 5, and we think the State should be allowed to compensate this injury if proven.

protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court. As the Court stated in *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954),

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

These laws perhaps regard the "reward to the owner as secondary consideration," *United States* v. *Paramount Pictures*, 334 U. S. 131, 158 (1948), but they were "intended definitely to grant valuable, enforceable rights" in order to afford greater encouragement to the production of works of benefit to the public. *Washingtonian Publishing Co.* v. *Pearson*, 306 U. S. 30, 36 (1939). The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work for public benefit. Cf. *Goldstein* v. *California*, 412 U. S. 546 (1973); *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 476 (1974).[13]

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[13] *Goldstein* involved a California statute outlawing "record piracy"—the unauthorized duplication of recordings of performances by major musical artists. Petitioners there launched a multifaceted constitutional attack on the statute, but they did not argue that the statute violated the First Amendment. In rejecting this broad-based constitutional attack, this Court concluded:

"The California statutory scheme evidences a legislative policy to prohibit 'tape piracy' and 'record piracy,' conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes

There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. *Time, Inc.* v. *Hill, supra.* But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state-law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz, supra.* Respondent knew exactly that petitioner objected to televising his act, but nevertheless displayed the entire film.

We conclude, as have others,[14] that although the State of

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of property. *No restraint has been placed on the use of an idea or concept;* rather, petitioners and other individuals in precisely the same compensation." Pember and Teeter, Privacy in the Press Since *Time* v. *Hill*, 50 Wash. L. Rev. 57, 87 (1974).

In *Kewanee* this Court upheld the constitutionality of Ohio's trade secret law, although again no First Amendment claim was presented. Citing *Goldstein*, the Court stated:

"Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress . . . ." 416 U. S., at 479.

Although recognizing that the trade secret law resulted in preventing the public gaining certain information, the Court emphasized that the law had "a decidedly beneficial effect on society," *id.*, at 485, and that without it, "organized scientific and technological research could become fragmented, and society, as a whole, would suffer." *Id.*, at 487.

[14] "There can be no offense to the Constitution if the [media] is compelled to pay the fair value of what it has taken . . . ." Hill, Defamation and Privacy Under the First Amendment, 76 Col. L. Rev. 1205, 1276 (1976). "More and more courts seem willing to acknowledge that plaintiffs who sue for appropriation deserve damages not because they suffered

Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.

Reversed.

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some kind of severe mental distress but because the defendant used something which belonged to the plaintiff—his name or likeness—without manner and with the same personnel as appeared on the original recording.

* * * * *

"Until and unless Congress takes further action with respect to recordings . . . , the California statute may be enforced against acts of piracy such as those which occurred in the present case." 412 U. S., at 571. (Emphasis added.)

We note that federal district courts have rejected First Amendment challenges to the federal copyright law on the ground that "no restraint has been placed on the use of an idea or concept." *United States* v. *Bodin*, 375 F. Supp. 1265, 1267 (SD Okla. 1974). See also *Walt Disney Productions* v. *Air Pirates*, 345 F. Supp. 108, 115 (ND Cal. 1972) (citing Nimmer, Does Copyright Abridge First Amendment Guarantees of Free Speech and Press, 17 U. S. L. A. L. Rev. 1180 (1970), arguing that copyright law does not abridge the First Amendment because it does not restrain the communication of ideas or concepts); *Robert Stigwood Group, Ltd.* v. *O'Reilly*, 346 F. Supp. 376 (Conn. 1972) (also relying on Nimmer). Of course this case does not make a claim that respondents would be prevented by petitioner's "right of publicity" from staging or filming its own "human cannonball" act.

pp 8, 9, 13

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

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1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-577

Hugo Zacchini, Petitioner, v. Scripps-Howard Broadcasting Company. | On Writ of Certiorari to the Supreme Court of Ohio.

[June —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September, 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a freelance reporter for Scripps-Howard Broadcasting Company, the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and videotaped the entire act. This film clip, approximately 15 seconds in length, was shown on the 11 o'clock news program that night, together with favorable commentary.[1]

[1] The script of the commentary accompanying the film clip read as follows:

"This . . . now . . . is the story of a *true spectator* sport . . . the sport

Petitioner then brought this action for damages, alleging that he is "engaged in the entertainment business," that the act he performs is one "invented by his father and . . . performed only by his family for the last 50 years," that respondent "showed and commercialized the film of his act without his consent," and that such conduct was an "unlawful appropriation of plaintiff's professional property." App. 4–5. Respondent answered and moved for summary judgment, which was summarily granted by the trial court.

The Court of Appeals of Ohio reversed. The majority held that petitioner's complaint stated a cause of action for conversion and for infringement of a common law copyright, and one judge concurred in the judgment on the ground that the complaint stated a cause of action for appropriation of petitioner's "right of publicity" in the film of his act. All three judges agreed that the First Amendment did not privilege the press to show the entire performance on a news program without compensating petitioner for any financial injury he could prove at trial.

Like the concurring judge in the Court of Appeals, the Supreme Court of Ohio rested petitioner's cause of action under state law on his "right to the publicity value of his performance." 47 Ohio St. 2d 224, — N. E. 2d — (1976). The opinion Syllabus, to which we are to look for the rule of law used to decide the case,[2] declared first that one may not

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of human cannonballing . . . in fact, the great *Zacchini* is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it. . . ." (Emphasis in original.) App. 12.

[2] *Beck* v. *Ohio*, 379 U. S. 89, 93 n. 2 (1964); *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437 441–443 (1952); *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 554 (1940). See *Cassidy* v. *Glossip*, 12 Ohio St. 2d 17 (1967); *The Williamson Heater Co.* v. *Radich*, 128 Ohio St. 124 (1934); *Thackery* v. *Helfrich*, 123 Ohio St. 334, 336 (1931); *State* v. *Hauser*, 101 Ohio St. 404, 408 (1920); 14 Ohio Jur. 2d § 247.

use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial one, and second that respondent would be liable for the appropriation, over petitioner's objection and without license or privilege, of petitioner's right to the publicity value of his performance. *Ibid.* The court nevertheless gave judgment for respondent because, in the words of the Syllabus,

> "[a] TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some nonprivileged private use, or unless the actual intent was to injure the individual." *Ibid.*

We granted certiorari, — U. S. — (1977), to consider an issue unresolved by this Court: whether the First and Fourteenth Amendments immunized respondent from damages for its alleged infringement of petitioner's state law "right of publicity." Petition for Certiorari 2. Insofar as the Ohio Supreme Court held that the First and Fourteenth Amendments of the United States Constitution required judgment for respondent, we reverse the judgment of that court.

II

If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted. *Wilson* v. *Lowes*, 355 U. S. 597 (1958), for "our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal laws. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945). We are

confident, however, that the judgment below did not rest on an adequate and independent state ground and that we have jurisdiction to decide the federal issue presented in this case.

There is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right under Ohio law. It is also clear that respondent's claim of constitutional privilege was sustained. The source of this privilege was not identified in the Syllabus. It is clear enough from the opinion of the Ohio Supreme Court, which we are permitted to consult for understanding of the Syllabus, *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437, 442–443 (1952),[8] that in adjudicating the crucial question of whether respondent had a privilege to film and televise respondent's performance, the court turned immediately to *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967). It con-

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[8] In *Perkins* the issue was whether the Ohio courts could exercise personal jurisdiction over a foreign corporation. The Syllabus of the Ohio Supreme Court declared that it did not have personal jurisdiction, but it gave no indication of whether the Ohio court's decision rested on state grounds or on the Fourteenth Amendment. The only opinion filed with the Syllabus reasoned, however, that the Due Process Clause of the Fourteenth Amendment prohibited the Ohio courts from exercising personal jurisdiction in that case. While recognizing the existence of the Ohio Syllabus rule, this Court felt obliged in these circumstances to reach the merits of the constitutional issue, holding that the Due Process Clause did not preclude the exercise of jurisdiction. "[F]or us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so." 342 U. S., at 443.

The Ohio courts do not suggest that the opinion is not relevant to a determination of the Ohio Supreme Court's holding.

"The syllabus is the language of the court. The opinion is more particularly the language of the judge preparing the same, and yet *so much of the opinion as is reasonably necessary to sustain the judgment must of necessity be concurred in by the court.*"

Hart v. *Andrews*, 103 Ohio St. 218, 221 (1921) (emphasis added). See also *Williamson Heater, supra; State* v. *Hauser, supra.*

strued the principle of that case, along with that of *New York Times* v. *Sullivan*, 376 U. S. 374 (1964), to be that "the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private," and concluded, therefore, that the press is also "privileged when an individual seeks to publicly exploit his talents while keeping the benefits private." 47 Ohio St. 2d, at 234, — N. E. 2d, at —. The privilege thus exists in cases "where the appropriation of the right of publicity is claimed." The court's opinion also referred to Draft 21 of the relevant portion of Restatement of Torts Second, which was understood to make room for reasonable press appropriations by limiting the reach of the right of privacy rather than by creating a privileged invasion. The opinion said, however, that "the gravamen of the issue in this case is not whether the degree of intrusion is reasonable but whether *First Amendment principles* require that the right of privacy gives way to the public right to be informed of matters of public interest and concern. The concept of privilege seems the more useful and appropriate one." *Id.*, at 234 n. 5., — N. E. 2d, at —. (Emphasis added.)

The controlling consideration was thus one of privilege rather than of the substantive reach of the right of publicity. In deciding the question, had the Ohio court rested on both state and federal grounds, either of which would have been dispositive, we would have had no jurisdiction. *Fox Films* v. *Mueller*, 296 U. S. 207 (1935); *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157 164 (1917). But the opinion, like the Syllabus, did not mention the Ohio Constitution, citing instead this Court's First Amendment cases as controlling. It appears to us that decision was rested solely on federal grounds. That the Ohio court might have, but did not, invoke state law does not foreclose jurisdiction here. *Steel* v. *L&N R. Co.*, 323 U. S. 192, 197 n. 1 (1944); *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98 (1938).

If the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law. *Perkins* v. *Benguet Mining Co., supra.* "If the Supreme Court [of Ohio] held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide these suits according to its own local law." *Missouri* v. *Mayfield,* 340 U. S. 1, 5 (1950).

III

The Ohio Supreme Court held that respondent is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose. If under this standard respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case. But petitioner is not contending that his appearance at the fair and his performance could not be reported by the press as newsworthy items. His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy. This, he claimed, was an appropriation of his professional property. The Ohio Supreme Court agreed that petitioner had "a right of publicity" that gave him "personal control over the commercial display and exploitation of his personality and the exercise of

his talents."[4] This right of "exclusive control over the publicity given to his performance" was said to be such a "valuable part of the benefit which may be attained by his talents and efforts" that it was entitled to legal protection. It was also observed, or at least expressly assumed, that petitioner had not abandoned his rights by performing under the circumstances present at the Geauga County Fair Grounds.

The Ohio Supreme Court nevertheless held that the challenged invasion was privileged, saying that the press "must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance to be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires." 47 Ohio St., at 235, — N. E. 2d, at —. Under this view, respondent was thus constitutionally free to film and display petitioner's entire act.[5]

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[4] The court relied on *Housh* v. *Peth*, 165 Ohio St. 35, 133 N. E. 2d 340 (1956), the Syllabus of which held:

"An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

The court also indicated that the applicable principles of Ohio law were those set out in Restatement of Torts Second, Tentative Draft No. 13, 1967, § 252c, and the comments thereto, portions of which were stated in the footnotes of the opinion. Also, referring to the right as the "right of publicity," the court quoted approvingly from *Haelan Laboratories, Inc.* v. *Topps Chewing Gum, Inc.*, 202 F. 2d 866, 868 (CA2) (1952).

[5] The court's explication was as follows:

"The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to

The Ohio Supreme Court relied heavily on *Time, Inc.* v. *Hill, supra,* but that case does not mandate a media privilege to televise a performer's entire act without his consent. Involved in *Time, Inc.* v. *Hill* was a claim under the New York "Right of Privacy" statute[6] that Life Magazine, in the course of reviewing a new play, had connected the play with a long-past incident involving petitioner and his family and had falsely described their experience and conduct at that time. The complaint sought damages for humiliation and suffering flowing from these nondefamatory falsehoods that allegedly invaded Hill's privacy. The Court held, however, that the opening of a new play linked to an actual incident was a matter of public interest and that Hill could not recover without showing that the Life report was knowingly false or was published with reckless disregard for the truth—the same rigorous standard that had been applied in *New York Times* v. *Sullivan, supra.*

Time, Inc. v. *Hill,* which was hotly contested and decided by a divided court, involved an entirely different tort than the "right of publicity" recognized by the Ohio Supreme Court. As the opinion reveals in *Time, Inc.* v. *Hill,* the Court was steeped in the literature of privacy law and was aware of the developing distinctions and nuances in this branch of the law. The Court, for example, cited Prosser, Handbook of the

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report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here." 47 Ohio St., at 235, — N. E. 2d, at —.

[6] Section 51 of the New York Civil Rights Law provides an action for injunction and damages for invasion of the "right of privacy" granted by § 50:

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

Law of Torts (3d ed. 1964), and the same author's well-known article, Privacy, 48 Calif. L. Rev. 383 (1960), both of which divided privacy into four distinct branches.[7] The Court was aware that it was adjudicating a "false light" privacy case involving a matter of public interest, not a case involving "intrusion," 385 U. S., at 384-385, n. 9, "appropriation" of a name or likeness for the purposes of trade, *id.*, at 381, or "private details" about non-newsworthy person or event, *id.*, at 383 n. 7. It is also abundantly clear that *Time, Inc.* v. *Hill* did not involve a performer, a person with a name having commercial value, or any claim to a "right of publicity." This discrete kind of "appropriation" case was plainly identified in the literature cited by the Court[8] and had been adjudicated in the reported cases.[9]

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[7] "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." Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960). Thus, according to Prosser, some courts had recognized a cause of action for "intrusion" upon the plaintiff's seclusion or solitude; public disclosure of "private facts" about the plaintiff's personal life; publicity that places the plaintiff in a "false light" in the public eye; and "appropriation" of the plaintiff's name or likeness for commercial purposes. One may be liable for "appropriation" if he "pirate[s] the plaintiff's identity for some advantage of his own." 48 Calif. L. Rev., at 403.

[8] See, for example, Prosser, Torts, 3rd Ed. 842 (1964); Bloustein, Privacy as an Aspect of Human Dignity; An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962, 986-991 (1964); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemporary Problems 326, 331 (1966).

[9] *E. g., Ettore* v. *Philco Television Broadcasting Corp.*, 229 F. 2d 481 (CA3 1956); *Sharkey* v. *National Broadcasting Co., Inc.*, 93 F. Supp. 986 (SDNY 1950); *Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (1938); *Twentieth Century Sporting Club, Inc.* v. *Transradio Press Service, Inc.*, 165 Misc. 71, 30 N. Y. S. 159 (1937); *Hogan* v. *A. S. Barnes & Co.*, 114 U. S. P. L. Q. 314 (Pa. Ct. C. P. 1957); *Myers* v. *U. S. Camera Publishing Corp.*, 167 N. Y. S. 2d 771, City Ct. of City of

The differences between these two torts are important. First, the State's interests in providing a cause of action in each instance are different. "The interest protected" in permitting recovery for placing the plaintiff in a false light "is clearly that of reputation, with the same overtones of mental distress as in defamation." Prosser, *supra*, 48 Calif. L. Rev., at 400. By contrast, the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.[10] As we later note, the State's interest is closely

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N. Y. (1957). The cases prior to 1961 are helpfully reviewed in Gordon, Right of Property in Name, Likeness, Personality and History, 55 N. W. U. L. Rev. 553 (1960).

Ettore v. *Philco Television Broadcasting Corp.*, *supra*, involved a challenge to television exhibition of a film made of a prize fight that had occurred some time ago. Judge Biggs, writing for the Court of Appeals, said at 229 F. 2d 486, 490:

"There are, speaking very generally, two polar types of cases. One arises when some accidental occurrence rends the veil of obscurity surrounding an average person and makes him, arguable, newsworthy. The other type involves the appropriation of the performance or production of a professional performer or entrepreneur. Between the two extremes are many gradations, most involving strictly commercial exploitation of some aspect of an individual's personality, such as his name or picture.

* * * * *

"The fact is that, if a performer performs for hire, a curtailment, without consideration, of his right to control his performance is a wrong to him. Such a wrong vitally affects his livelihood, precisely as a trade libel, for example, affects the earnings of a corporation. If the artistry of the performance be used as a criterion, every judge perforce must turn himself into a literary, theatrical or sports critic."

[10] The Ohio Supreme Court expressed the view "that plaintiff's claim is one for invasion of the right of privacy by appropriation, and should be considered as such." 47 Ohio St., at 226, — N. E. 2d, at —. It should be noted, however, that the case before us is more limited than the broad category of lawsuits that may arise under the heading of "appropriation." Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the

analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation. Second, the two torts differ in the degree to which they intrude on dissemination of information to the public. In "false light" cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in "right of publicity" cases the only question is who gets to do the publishing. An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication. Indeed, in the present case petitioner did not seek to enjoin the broadcast of his act; he simply sought compensation for the broadcast in the form of damages.

Nor does it appear that our later cases, such as *Rosenbloom* v. *Metromedia*, 403 U. S. 29 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974); and *Time, Inc.* v. *Firestone*, 424 U. S. 448 (1976), require or furnish substantial support for the Ohio court's privilege ruling. These cases, like *New York Times*, emphasize the protection extended to the press by the First Amendment in defamation cases, particularly when suit is brought by a public official or a public figure. None of them involve an alleged appropriation by the press of a right of publicity existing under state law.

Moreover, *Time, Inc.* v. *Hill*, *New York Times*, *Metromedia*, *Gertz*, and *Firestone* all involved the reporting of events; in none of them was there an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid. It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about

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much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.

petitioner's act.[11] Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, 17 U. S. C. § 101 *et. seq.*, cf. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911); *Manners* v. *Morosco*, 252 U. S. 317 (1920), or to film and broadcast a prize fight, *Ettore* v. *Philco Television Broadcasting Corp.*, 229 F. 2d 481 (CA3 1956), or a baseball game, *Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (WD Pa. 1938), where the promoters or the participants had other plans for publicizing the event. There are ample reasons for reaching this conclusion.

The broadcast of a film of petitioner's entire act poses a

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[11] Prosser, Torts, 4th Ed. (1971), 806–807, generalizes on the cases: "The New York courts were faced very early with the obvious fact that newspapers and magazines, to say nothing of radio, television and motion pictures, are by no means philanthropic institutions, but are operated for profit. As against the contention that everything published by these agencies must necessarily be 'for purposes of trade,' they were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper itself is sold; and that the presence of advertising matter in adjacent columns, or even the duplication of a news item for the purpose of advertising the publication itself, does not make any difference. Any other conclusion would in all probability have been an unconstitutional interference with the freedom of the press. Accordingly, it has been held that the mere incidental mention of the plaintiff's name in a book or a motion picture is not an invasion of his privacy; nor is the publication of a photograph or a newsreel in which he incidentally appears." (Footnotes omitted.)

Compare American Law Institute, Restatement of the Law Second, Tentative Draft No. 22, § 652c, Comment D.

substantial threat to the economic value of that performance. As the Ohio court recognized, this act is the product of petitioner's own talents and energy, the end result of much time, effort and expense. Much of its economic value lies in the "right of exclusive control over the publicity given to his performance"; if the public can see the act for free on television they will be less willing to pay to see it at the fair.[12] The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. "The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay." Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law and Contemporary Problems 326, 331 (1966). Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for the purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus in this case, Ohio has recognized what 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.

Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the

[12] It is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to prove damages and thus would not recover. But petitioner has alleged that the broadcast injured him to the extent of $25,000, App. 5, and we think the State should be allowed to compensate this injury if proven.

protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court. As the Court stated in *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954),

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

These laws perhaps regard the "reward to the owner as secondary consideration," *United States* v. *Paramount Pictures*, 334 U. S. 131, 158 (1948), but they were "intended definitely to grant valuable, enforceable rights" in order to afford greater encouragement to the production of works of benefit to the public. *Washingtonian Publishing Co.* v. *Pearson*, 306 U. S. 30, 36 (1939). The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work for public benefit. Cf. *Goldstein* v. *California*, 412 U. S. 546 (1973); *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 476 (1974).[13]

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[13] *Goldstein* involved a California statute outlawing "record piracy"—the unauthorized duplication of recordings of performances by major musical artists. Petitioners there launched a multifaceted constitutional attack on the statute, but they did not argue that the statute violated the First Amendment. In rejecting this broad-based constitutional attack, this Court concluded:

"The California statutory scheme evidences a legislative policy to prohibit 'tape piracy' and 'record piracy,' conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes

There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. *Time, Inc.* v. *Hill, supra.* But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state-law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz, supra.* Respondent knew exactly that petitioner objected to televising his act, but nevertheless displayed the entire film.

We conclude, as have others,[14] that although the State of

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of property. *No restraint has been placed on the use of an idea or concept;* rather, petitioners and other individuals in precisely the same compensation." Pember and Teeter, Privacy in the Press Since *Time* v. *Hill,* 50 Wash. L. Rev. 57, 87 (1974).

In *Kewanee* this Court upheld the constitutionality of Ohio's trade secret law, although again no First Amendment claim was presented. Citing *Goldstein,* the Court stated:

"Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress . . . ." 416 U. S., at 479.

Although recognizing that the trade secret law resulted in preventing the public gaining certain information, the Court emphasized that the law had "a decidedly beneficial effect on society," *id.,* at 485, and that without it, "organized scientific and technological research could become fragmented, and society, as a whole, would suffer." *Id.,* at 487.

[14] "There can be no offense to the Constitution if the [media] is compelled to pay the fair value of what it has taken . . . ." Hill, Defamation and Privacy Under the First Amendment, 76 Col. L. Rev. 1205, 1276 (1976). "More and more courts seem willing to acknowledge that plaintiffs who sue for appropriation deserve damages not because they suffered

Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.

Reversed.

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some kind of severe mental distress but because the defendant used something which belonged to the plaintiff—his name or likeness—without manner and with the same personnel as appeared on the original recording.

. . . . .

"Until and unless Congress takes further action with respect to recordings . . . , the California statute may be enforced against acts of piracy such as those which occurred in the present case." 412 U. S., at 571. (Emphasis added.)

We note that federal district courts have rejected First Amendment challenges to the federal copyright law on the ground that "no restraint has been placed on the use of an idea or concept." *United States* v. *Bodin*, 375 F. Supp. 1265, 1267 (SD Okla. 1974). See also *Walt Disney Productions* v. *Air Pirates*, 345 F. Supp. 108, 115 (ND Cal. 1972) (citing Nimmer, Does Copyright Abridge First Amendment Guarantees of Free Speech and Press, 17 U. S. L. A. L. Rev. 1180 (1970), arguing that copyright law does not abridge the First Amendment because it does not restrain the communication of ideas or concepts); *Robert Stigwood Group, Ltd.* v. *O'Reilly*, 346 F. Supp. 376 (Conn. 1972) (also relying on Nimmer). Of course this case does not make a claim that respondents would be prevented by petitioner's "right of publicity" from staging or filming its own "human cannonball" act.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 9 '77

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76-577 - Zacchini v. Scripps-Howard Broadcasting Co.

MR. JUSTICE STEVENS, dissenting.

The Ohio Supreme Court held that respondent's telecast of the "human cannonball" was a privileged invasion of petitioner's common law "right of publicity" because respondent's actual intent was neither (a) to appropriate the benefit of the publicity for a private use, nor (b) to injure petitioner.*/

As I read the State court's explanation of the limtis on the concept of privilege, they define the substantive reach of a common law tort rather than anything I recognize as a limit on a federal constitutional right. The decision was unquestionably influenced by the Ohio court's proper sensitivity to First Amendment principles, and to this Court's cases construing the First Amendment; indeed, I must confess that the opinion can be read as resting entirely on federal constitutional grounds. Nevertheless, the basis of the State court's action is sufficiently doubtful that I would remand the case to that court for clarification of its holding before deciding the federal constitutional issue.

*/ Paragraph 3 of the court's syllabus reads as follows:

> "A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual."

In its opinion, the court described the "proper standard" in language which I read as defining the boundaries of a common law tort:

> "The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here."

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

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Circulated: _____

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-577

Hugo Zacchini, Petitioner,
v.
Scripps-Howard Broadcasting Company.

On Writ of Certiorari to the Supreme Court of Ohio.

[June —, 1977]

MR. JUSTICE STEVENS, dissenting.

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a limit on a federal constitutional right. The decision was unquestionably influenced by the Ohio court's proper sensitivity to First Amendment principles, and to this Court's cases construing the First Amendment; indeed, I must confess that the opinion can be read as resting entirely on federal constitutional grounds. Nevertheless, the basis of the state court's action is sufficiently doubtful that I would remand the case to that court for clarification of its holding before deciding the federal constitutional issue.

dm/ss 6/14/77

1st draft

No. 76-577 ZACCHINI v. SCRIPPS-HOWARD

MR. JUSTICE POWELL, dissenting.

Disclaiming any attempt to do much more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: "a performer's entire act." Its holding is summed up in one sentence:

> "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." Ante, at 120

I have doubts ~~do not share the Court's apparent confidence~~ that this formula provides a standard clear enough even for resolution of this case.[1] But in any event I believe the Court is insufficiently sensitive to the First Amendment values at stake, and I therefore dissent.

Respondent used the film of petitioner's performance strictly as a routine part of its regular news program. Today's decision permitting recovery therefore casts a cloud over the daily editorial choices of every

television news editor. Each time he receives film footage of an event at ~~from~~ a local fair, a circus, or even ~~from~~ of a dramatic production made up of short skit ~~one-act plays~~ - to offer only a few examples - he will have to take extra precautions to determine whether any of the segments might be held to portray a performer's entire act. Otherwise ~~Lest~~ he leave the television station open to liability for substantial damages.[2] This is so even if he intends to use the footage only for a brief portion of a regular news program. ~~Given the pressure of deadlines,~~ Editors frequently will be unable to do adequate checking before show time, and consequently they often will choose not to run clearly newsworthy but chancy items. Or perhaps the station will report on ~~mention~~ the event, but it will confine itself to verbal presentation, accompanied perhaps by a still picture. The public is then the loser. This is hardly the ~~robust~~ news reportage that the First Amendment is meant to foster. See generally Miami Herald Publishing Co. v. Tornillo, 418 U.S., 241, 257-258 (1974); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 270-272, 279 (1964); Cf. Smith v. California, 361 U.S. 147, 150-154 (1959).

These probable consequences reveal another problem with the Court's approach. It does not take

adequate account of the unique requirements of this particular medium, television news programs.[3] Such programs exist largely to bring movie footage to the viewers - to present the news of the day with an immediacy and impact impossible through other media.

no 9

Petitioner concedes that respondent properly considered his act a newsworthy event. ~~The station thus had broad latitude to decide what manner of coverage it would provide as part of its regular news broadcast, but~~ It was hardly a surprise that respondent, a television station, chose to report on such an event by means of film coverage. Given this choice, meaningful presentation practically required a film clip of the length employed here, and the station simply is not responsible for the fact that petitioner's performance happens to last only 15 seconds. The Court's decision essentially makes film coverage in these circumstances impossible. It promotes liability rules that inevitably tend to deprive this medium of its characteristic reporting method whenever the subject of the news reporting is a short performance.

The First Amendment stands guard against this kind of confinement of a news medium, and I am convinced that it commands a different analytical starting point from the one selected by the Court. Rather than begin

with a quantitative analysis of the performer's behavior - is this or is this not his entire act? - we should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a "right of publicity" or "appropriation" suit,[4] absent a truly extraordinary showing by the plaintiff that the news broadcast was a subterfuge permitting private or commercial exploitation.[5] Since the film clip here was undeniably treated as news and since there is no claim that the news use was subterfuge, respondent's action were constitutionally protected. ~~I respectfully dissent~~.

1. I have never witnessed a human cannonball performance, and the record does not supply a sufficiently detailed description to know for sure, but I would be surprised if the "act" commences only with the explosion that launches petitioner on his way, ending with the landing in the net a few seconds later. I would guess there is some fanfare, probably stretched over as many minutes as possible, to heighten the audience's anticipation: introduction of the performer, last-minute checking of the apparatus, suiting up, and lastly entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the "entire act" in its 15-second newsclip - and the Court's opinion then would afford no guidance whatever for resolution of the case. Moreover, in future cases involving other kinds of performances, I would expect similar difficulties in determining just what constitutes the "entire act".

2. At some points the Court seems to acknowledge that the cause of action to defend ~~for~~ a right of publicity is designed ~~rests on~~ to prevent ~~the theory that~~ unjust enrichment ~~is thereby prevented.~~

See, e.g., ante, at 13. But the remainder of the opinion inconsistently accepts a measure of damages based not on the defendant's enhanced profits but on harm to the plaintiff regardless of any gain to the defendant. See, e.g., ante, at 13, n. 12. Indeed, in this case there is no suggestion whatever that respondent television station gained a single penny based on the showing of petitioner's flight (although it no doubt received its normal advertising revenue for the news program - revenue it would have received no matter which ~~regardless of what~~ news items appeared). Nevertheless, in the unlikely event that petitioner can prove that his income was somehow reduced as a result of the broadcast, respondent will apparently have to compensate him for the difference.

3. In another important First Amendment case arising in a somewhat different context, the Court was careful to note:

> "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (emphasis added). See Red Lion Broadcasting Co. v. FCC 395 U.S. 367, 386-387 (1969).

4. ~~I limit~~ This statement is necessarily limited to the ~~to this~~ type of suit involved here. It may not be appropriate in other "right of privacy" cases, ~~for the~~ for the competing interests are considerably different

when a suit is based instead on "intrusion" or publication of "private details." See ante, at 9; Prosser, Privacy, 48 Calif. L. Rev. 383 (1960). Cf. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (clarifying the different standards required in defamation suits, depending on whether or not the plaintiff is a public figure. In an "appropriation" or "right of publicity" suit like the one before us, the plaintiff ~~apparently~~ does not complain about the fact of publication, but rather about its timing or manner. He seeks to retain control over these aspects in order to keep the monetary benefits that flow from such publication. But having made the matter public, in my view he cannot consistently with the First Amendment, complain of routine news reportage. In the other causes of action, however, the plaintiff generally seeks to avoid any sort of public exposure. ~~When~~ Thus when the suit is for "intrusion" or publication of "private details", the existence of constitutional privilege is much less likely to turn on whether the media used the information in a news broadcast or in some other fashion. ~~since the plaintiff's interest lies in preventing all publication. But I simply note the potential differences and express no opinion on the proper outcome in such a case.~~

5. Perhaps this is not far different from the standard employed by the Supreme Court of Ohio in its

holding quoted ante, at 3. But this case does not require any detailed specification of when liability may be imposed despite ostensible news use, since there is no claim here that the news use was anything but bona fide. I would emphasize, however, that selling time during a news broadcast to advertisers in the customary fashion obviously does not make for "commercial exploitation" in the sense intended here. See Prosser, Torts 806-807 (4th ed. 1971). Cf. New York Times v. Sullivan, supra, at 266.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1977

Re: 76-577 - Zacchini v. Scripps-Howard Broadcasting Co.

Dear Byron:

I join. If the longhand note on the attached copy of page 7 interests you, I grant you the right to copy my entire "performance" sans royalties.

Regards,

WBO

Mr. Justice White

Copies to the Conference

dm/ss 6/18/77

2d draft

No. 76-577 ZACCHINI v. SCRIPPS-HOWARD

MR. JUSTICE POWELL, dissenting.

Disclaiming any attempt to do much more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: "a performer's entire act." Its holding is summed up in one sentence:

> "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." Ante, at 12.

I ~~have~~ doubt ~~do not share the Court's apparent confidence~~ that this formula provides a standard clear enough even for resolution of this case.[1] But in any event I believe the Court is insufficiently sensitive to the First Amendment values at stake, and I therefore dissent.

~~"Respondent used the film or petitioner's performance strictly as a routine part of its regular news program. Today's decision permitting recovery therefore casts a cloud over the daily editorial choices of every~~

Although the Court lumps the cases together, ante, at 12, respondent's action here is by no means comparable to an unconsented commercial broadcast of a prize fight or a baseball game, wherein the broadcaster keeps the profits and refuses to share them with the performers. There is no suggestion here that respondent made any such special use of the film. Instead, it simply reported on what petitioner concedes to be a newsworthy event, in a way hardly surprising for a television station -- by means of film coverage. The report was an ordinary part of an ordinary daily news program, consuming a total of 15 seconds.

It is the purest example of the press fulfilling the informing function contemplated for it in our First Amendment system of free expression.

The Court holding that the station's ordinary news report may give rise to substantial liability[2] has disturbing implications, for the decision will inevitably lead to a degree of media self-censorship. Cf. Smith v. California, 361 U.S. 147, 150-154 (1959). Whenever a television news editor is unsure whether certain film footage he has received from a camera crew might be held to portray an "entire act,"[3] he is now encouraged to decline coverage--even of clearly newsworthy events--or else to confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of robust news reportage that the First Amendment is meant to foster. See generally Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257-258 (1974); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 270-272, 279 (1964).

In my view the First Amendment commands a different analytical starting point from the one selected by the Court. Rather than begin →

with a quantitative analysis of the performer's behavior - is this or is this not his entire act? - we should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a "right of publicity" or "appropriation" suit, absent a truly extraordinary showing by the plaintiff that the news broadcast was a subterfuge permitting private or commercial exploitation.[4]

Since the film clip here was undeniably treated as news and since there is no claim that the news use was subterfuge, respondent's actions were constitutionally protected. I respectfully dissent.

I emphasize that this is an "appropriation" suit, rather than one of the other varietées of "right of privacy" tort suits delineated by Dean Prosser in his classic article. Prosser, Privacy, 48 Calif. L. Rev. 383 (1960). In those other causes of action the competing interests are considerably different. The plaintiff generally seeks to avoid any sort of public exposure, and the existence of constitutional privilege is therefore less likely to turn on whether the publication occurred in a news broadcast or in some other fashion. In a suit like the one before us, however, the plaintiff does not complain about the fact of exposure to the public, but rather about its timing or manner. He seeks to retain control over those aspects in order to keep the monetary benefits that flow from such publication. But having made the matter public -- having chosen, in essence, to make it newsworthy -- he cannot, consistently with the First Amendment, complain of routine news reportage. Cf. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (clarifying the different liability standards appropriate in defamation suits, depending on whether or not the plaintiff is a public figure).

Since the film clip here was undeniably treated as news and since there is no claim that the news use was subterfuge, respondent's actions were constitutionally privileged. I would affirm.

1. I have never witnessed a human cannonball performance, and the record does not supply a sufficiently detailed description to know for sure, but I would be surprised if the "act" commences only with the explosion that launches petitioner on his way, ending with the landing in the net a few seconds later. I would guess there is some fanfare, probably stretched over as many minutes as possible, to heighten the audience's anticipation: introduction of the performer, last-minute checking of the apparatus, suiting up, and lastly entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the "entire act" in its 15-second newsclip - and the Court's opinion then would afford no guidance whatever for resolution of the case. Moreover, in future cases involving other kinds of performances, I would expect similar difficulties in determining just what constitutes the "entire act".

~~We have no indication from the majority whether~~ Is the majority saying that a First Amendment privilege springs into being whenever the news cameras fail to capture

2. At some points the Court seems to acknowledge that the cause of action does a right of publicity exist to prevent the unjust enrichmen

See, e.g., ante, at 13. But the remainder of the opinion inconsistently accepts a measure of damages based not on the defendant's enhanced profits but on harm to the plaintiff regardless of any gain to the defendant. See, e.g., ante, at 13, n. 12. Indeed, in this case there is no suggestion whatever that respondent television station gained a single penny based on the showing of petitioner's flight (although it no doubt received its normal advertising revenue for the news program - revenue it would have received no matter which ~~regardless of what~~ news items appeared). Nevertheless, in the unlikely event that petitioner can prove that his income was somehow reduced as a result of the broadcast, respondent will apparently have to compensate him for the difference.

3. In another important First Amendment case arising in a somewhat different context, the Court was careful to note:

> "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (emphasis added). See Red Lion Broadcasting Co. v. FCC 395 U.S. 367, 386-387 (1969).

4. ~~I limit~~ This statement is necessarily limited to the ~~to this~~ type of suit involved here. It may not be appropriate in other "right of privacy" cases ~~for the~~ for the competing interests are considerably different

3. Such doubts might arise when the editor receives film footage of an event at a local fair, a circus, or a dramatic production made up of short skits, to offer only a few examples.

4. This case does not require any detailed specification of the standards for identifying a ~~when liability may be imposed despite subterfuge, ostensible news use~~, since there is no claim here that respondent's news use was anything but bona fide. I would point out, however, that selling time during a news broadcast to advertisers in the customary fashion obviously does not make for "commercial exploitation" in the sense intended here. See Prosser, Torts 806-807 (4th ed. 1971). Cf. New York Times Co. v. Sullivan, supra, at 266.

Cf. 47 Ohio St. 2d 224, —, — N.E.2d —, — (the standards suggested by the Supreme Court of Ohio, quoted ante, at 3).

lfp/ss 6/20/77

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 20 1977

Recirculated: _____

No. 76-577 ZACCHINI v. SCRIPPS-HOWARD

MR. JUSTICE POWELL, dissenting.

Disclaiming any attempt to do more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: "a performer's entire act." The holding today is summed up in one sentence:

> "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." Ante, at 12.

I doubt that this formula provides a standard clear enough even for resolution of this case.[1] In any event, I am not persuaded that the Court's opinion is appropriately sensitive to the First Amendment values at stake, and I therefore dissent.

Although the Court would draw no distinction, ante, at 12, I do not view respondent's action as comparable to unauthorized commercial broadcasts of sporting events, theatrical performances, and the like where the broadcaster keeps the profits. There is no suggestion here that respondent made any such use of the film. Instead, it simply reported on what petitioner concedes to be a newsworthy event, in a way hardly surprising for a television station - by means of film coverage. The report was part of an ordinary daily news program, consuming a total of 15 seconds. It is a routine example of the press fulfilling the informing function so vital to our system.

The Court's holding that the station's ordinary news report may give rise to substantial liability has disturbing implications,[2] for the decision could lead to a degree of media self-censorship. Cf. Smith v. California, 361 U.S. 147, 150-154 (1959). Hereafter, whenever a television news editor is unsure whether certain film footage he has received from a camera crew might be held to portray an "entire act,"[3] he may decline coverage - even of clearly newsworthy events - or confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of news reportage that the First Amendment is meant to foster. See generally

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257-258 (1974); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 270-272, 279 (1964).

In my view the First Amendment commands a different analytical starting point from the one selected by the Court. Rather than begin with a quantitative analysis of the performer's behavior - is this or is this not his entire act? - we should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a "right of publicity" or "appropriation" suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.[4]

I emphasize that this is an "appropriation" suit, rather than one of the other varieties of "right of privacy" tort suits delineated by Dean Prosser in his classic article. Prosser, Privacy, 48 Calif. L. Rev. 383 (1960). In those other causes of action the competing interests are considerably different. The plaintiff generally seeks to avoid any sort of public exposure, and the existence of constitutional privilege is therefore less likely to

turn on whether the publication occurred in a news broadcast or in some other fashion. In a suit like the one before us, however, the plaintiff does not complain about the fact of exposure to the public, but rather about its timing or manner. He welcomes some publicity, but seeks to retain control over means and manner as a way to maximize for himself the monetary benefits that flow from such publication. But having made the matter public - having chosen, in essence, to make it newsworthy - he cannot, consistently with the First Amendment, complain of routine news reportage. Cf. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (clarifying the different liability standards appropriate in defamation suits, depending on whether or not the plaintiff is a public figure).

Since the film clip here was undeniably treated as news and since there is no claim that the news use was subterfuge, respondent's actions were constitutionally privileged. I would affirm.

1. Although the record is not explicit, it is unlikely that the "act" commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later. One may assume that the actual "firing" was preceded by some fanfare, possibly stretching over several minutes, to heighten the audience's anticipation: introduction of the performer, description of the uniqueness and danger, last-minute checking of the apparatus, and entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the "entire act" in its 15-second newsclip - and the Court's opinion then would afford no guidance for resolution of the case. Moreover, in future cases involving different performances, similar difficulties in determining just what constitutes the "entire act" are inevitable.

2. At some points the Court seems to acknowledge that the reason for recognizing a cause of action asserting a "right of publicity" is to prevent unjust enrichment. See, e.g., ante, at 13. But the remainder of the opinion inconsistently accepts a measure of damages based not on the defendant's enhanced profits but on harm to the

plaintiff regardless of any gain to the defendant. See, e.g., ante, at 13, n.12. Indeed, in this case there is no suggestion that respondent television station gained financially by showing petitioner's flight (although it no doubt received its normal advertising revenue for the news program - revenue it would have received no matter which news items appeared). Nevertheless, in the unlikely event that petitioner can prove that his income was somehow reduced as a result of the broadcast, respondent will apparently have to compensate him for the difference.

3. Such doubts are especially likely to arise when the editor receives film footage of an event at a local fair, a circus, a sports competition of limited duration (e.g., the winning effort in a ski-jump competition), or a dramatic production made up of short skits, to offer only a few examples.

4. This case requires no detailed specification of the standards for identifying a subterfuge, since there is no claim here that respondent's news use was anything but bona fide. Cf. 47 Ohio St. 2d 224, ___ N.E.2d ___ (the standards suggested by the Supreme Court of Ohio, quoted ante, at 3). I would point out, however, that selling time during a news broadcast to advertisers in the customary fashion does not make for "commercial exploitation" in the sense intended here. See Prosser, Torts 806-807 (4th ed. 1971). Cf. New York Times Co. v. Sullivan, supra, at 266.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 21, 1977

RE: No. 76-577 Zacchini v. Scripps-Howard Broadcasting

Dear Lewis:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 22, 1977

Re: No. 76-577, Zacchini v. Scripps-Howard

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Cox Broadcasting v. Cohn 420 US 469

Rape - victim case

Lower ct C.L. tort of "public disclosure"
whether there was an invasion of the zone of privacy & to what extent, are jury issues. Pl must prove willful or negl disregard for the fact that reasonable man would find the invasion highly offensive.
1st & 14th do not req. judg for Δs as a matter of law.

(I) Powerful arg can be made that there is a zone of privacy, a zone in wh the State may protect the individ from intrusion by the press, in all its attendant publicity [however defined].

Not at issue action for (invasion of p involving) approp of ind's name or photo
a physical intrusion into a private area.
publ of private info that is otherwise false but not defamatory.

at issue rt to be free from unwanted publicity about private affairs that, tho true, would be offensive to the reasonable man.

New York Times v. Sullivan, 376 U.S. 254.

Issue: Adv. qualifies for con protection.
Q: Does it forfeit that protection by falsity of some of its statements & its alleged defamation of resp?

Held: Con limits power of State to award Ds for libel in actions brought by public officials agst critics of their official misconduct. Rule req actual malice is applicable.

libel: concern public exposure by false matter; Ds is to reputation.

privacy: primary Ds is exposure to public view. + concomitant mental distress
may be laudatory

Time, Inc. v. Hill

Issue: Rt of privacy stat ⇒ Protects agst advertising purpose or for trade purposes, name, portrait, or picture.

(cf) This protected agst approp for use in adv. or to promote sale of goods, "appl of that limited scope would present diff [con] qs." Stat has been construed more broadly.

(But) limits were grafted on by state cts.
Truth is a def in action by newsworthy people or events

No view on: (a) libel per good as to matters of public interest (b) libel where not a public off. (c) matter obtained by intrusion into protected area.

Held: NYT std applies to matters of public interest

Aff'd

Cantrell v. Forest City Pub. Co. 419 US 245

Q: Not have to decide whether opn 5th announced in Time applies to all false-light cases. Cf Gertz v. Welch.

common-law/actual malice distinc.

Gertz v. Welch 418 U.S. 325.

Issue Can a newscaster claim a con privilege for publication of defamatory falsehoods about an individ who is neither a public fig. or pub. off.

Public Person

NYT defines the std.
This is substantial abridgement of state law right to comp.
But represents an accomod. between concern for media immunity & "limited" state interest in libel actions brought by public persons.

Reject Ad Hoc Approach

Analysis

① PP has > self-help
② PP has thrust himself to fore front of public activities.

∴ Reject Rosenbloom
→ leaves to judge "what info is relevant to self-govt".
→ Serves inadeq both competing interests.

∴ Hold for defamatory falsehood injurious to a private person, states can define the std of liability, as long as does not estab liability w/o fault.

Actual Ds: must be proved
No punitive Ds:

Human Cannonball

《Petr》 Act There is a prop rt in the entertainment act. (JB) was it identified as prop rt? (A) No, as property rt. (PS) In sylleb? (A) see #1.

(WEB) Is The "syl. rule" binding on This ct in a First A. case. (A) No, go behind it.

(WJB) Ct of App speaks of a prop rt. Can we ignore This & look to Ohio Sup Ct headnotes only? Is it saying That O Sup. Ct. did not use some language (A) No. Rt to entertainment value = meaningful only of a rt of privacy.

(TM) Rt of privacy v. publicity. (A) Rt of privacy = Keep from public Those Things The public has no rt to hear. Can't give false light to known facts. Rt of pub: tell The public. He does advertise.

(HAB) Would you be here if There was only a still photo? (A) No. Taking of an entire performance. (HAB) Suppose it had been in a public square, any difference? (A) No, you can't capture The entire act.

(AAB) At Kennedy Ctr, can't take photos. Suppose you can? (A) News media can't come in & capture complete act.

(Brw) Would you be here if Ohio said There is no rt of pub in This mon. First A. does not give him a rt of pub. (A) yes. (Brw) Now Ohio gives him a rt, conditioned on press freedom. How differs? (A) —

(Bew) How do we know state law privilege op
First A privilege (A) We can look into the op. They
speak of First A cases.

(TM) Suppose sgl #2 & 3 said: under Ohio law. (A).
#2 is under Ohio law (TM) Suppose #3 was under
Ohio law. (A) There would be no fed q.. If no reliance
on fed First A, then no fed q.

(A) fn 5 would help to illuminate the sgl & indicate a fed q.

(WEB) Ali fight. Suppose someone got in & broadcast
it.

(JB) Wasn't this a public place. Suppose he never asked.
(A) Objection makes a stronger case

(WJB) (PB) Under K, he was paid. (A) Couldn't he Do; no
commercial value. (PB) No proprt. So K is critical? (A)
yes. If voluntary performed, that is diff q.

(WJB) p15. carryover TP bad sent. [K rt. ... not
presented here].

(WEB) You start to presume that to film entire act,
you need permission. (A) yes.

⇒ Objection. Intent to harm. (WJB) But they said go see it.
(A) Only way to show intent to harm is: object & they
did it.

《Resp》 Why are we here.

① Facts. goes into originality. (WEB) 5th symp-log -- how is it similar (A) you can't go on that log of = news. (PS) But such would not be a private use; some thing. (A). ——

(WHR) Why Impression that Sup Ct of Ohio felt constrained on First A grds. (A) Ask the Ohio Sup Ct. (WJB) what about fn 5. Did they fashion a state rule based on fed First A.? (A) Yes.

⇒ See Petr Brief pp 9-10. "There is no g of priv to report." He quarrels in line that Ohio Sup Ct drew in his case.

(WHR) (A) Ct did not look at it as a prop rt. (A) They rejected conversion argument.

(Bew) By usual stds of our cases, one gov suggestion and have no juris (A) ① O Sup Ct did not feel compelled ② This fed ct should not dictate to states min reqmts & that is it.

= Gertz involved libel per se.
Here, Broadcast a brief & flattering perf. report.

(PS) Ohio ct said a c.l. rt of publicity. Suppose a new hit record. Hands list. Here it is: (PS) would news shows be insulated from Ds. (A) They are not immunized by specific prop law (PS) This is specific prop law (A) No.

(Ps) Can a newsbroadcaster say pty the record w Ohio?
(A)

(#1) App at 65. Only off. dmt states that Z told the commentator not to do it. No diff if it were a scant transp. (WEB) TV — commercial for π distraction
(A) Did not do this for π.

(JPS) What about for S. The concept of privilege seems the more useful one. Cgn or state law? (A) It could be both. (JPS) If it is cgn, then in 3rd IP it is also cgn..

《Reply》 Same q. as n.5, -- A14 -- 2d IP. Under the stds articulated by the Court -- Time -- & then describe the privilege. Some prud. exists here.
∴ a Fed case.

Gertz
Firestone } who is a public person.

Firestone: Gertz applies to non public persons who participate in jud. proceeds. Cox protects accurate reports.

Defamation [protected interest is rep]

public person. { └ truth is a Δ. [Gannion] v. Lar.] are The LFP comm (in Cox) here
└ message of NYT is com min: Knowing or reckless disregard.

[protected interest is privacy]

The Life may gumen story

(t) └ rt claimed is to be free from publ of false or misleading info,

└ std is NYT where materials, Tho essentially private, are "matters of public interest."

Open is q whether NYT applies to all false-light cases, or in case of stmts injurious to a private individual under a false light Theory of invasion of privacy. Cantrell

LFP Gertz calls into the conceptual basis of Time.

private person

└ truth is a Δ. Gertz & LFP comm in Cox.

(rep) └ com minimum; can't impose liab. w/o fault.

while ppl others see it as open q.

Radiation & min are limited, say, to LFP in Firestone, to instance where substance of the charge making substantial danger to reputation apparent.

Time (Hill) raised open q whether Truthful publ of very private matters unrelated to public affairs could be cpr prosecuted.

Open whether State can define & protect an area of privacy free from unwanted publicity in The press. (Cox)

Gertz

418 US at 341
"protect some falsehood to protect speech that matters"
here protect some overlong appropriation in order to protect news that matters

Sullivan, 376 US 254, 266
- KO's notion that ∃ less protection b/c speech there was in the form of ad

also Pitt Press, 413 US 376, at 385-, 391?
- newspaper not wholly "commercial" b/c it sells ads & makes a profit

same
Jenkins v Dell Pub Co. 251 F2d 447, 451 (3/58) (en banc)

Sidis v F-R Pub Corp., 113 F2d 806 (2/40) cd 311 US 711

Gautier v Pro-Football, Inc, 278 App Div 181, 106 NYS2d 553 (51)

Milliken
338 F Supp
Prosser Torts
48 Cal L Rev 383
31 L & Contemp Prob 326
39 NY U L Rev 962

Rest 2d, Torts, §652c, Com. D · Text Dr No 22

Nimmer, Does Copyright Abridge 1st Am
17 UCLA L Rev 1180 (70)

906-482
5456

2 ✓ Hill, 385 US 374 — "breathing space"
✓ Gertz, 418 US 323
✓ Sullivan 376 US 354
— Goldstein v Calif 412 US 546
✓ Magan v Stein, 347 US 201 // Kewanee Oil Co v Bicron 416 US 476
Curtis Pub v Butts, 388 US 130
Rosenbloom v Metromedia Inc 403 US 29
✓ Gertz
Cantrell v Forest City Pub 419 US 245
✓ Cohen v Cox Broadcasting, 420 US
Time Inc v Firestone
✓ Tornillo
✓ Pittsburgh Press Co v Human Rel Comm, 413 US 376, 391
- dists news & commercial use
✓ Branzburg 408 US
specialchar of media
✓ Burstyn 343 US 495
✓ Red Lion 395 US 367
SE Prod Ltd v Conrad 420 US

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
			5/31/77					
Join BRW 6/7/77	Join LFP 6/21/77	Join BRW 6/1/77	1st draft 5/31/77	Join LFP 6/22/77	Join BRW 6/6/77	will dissent 6/1/77	Join BRW 6/3/77	dissent - lipped draft 6/7/77
			revised draft 6/7/77			1st lipped draft 6/19/77		1st draft 6/13/77

76-577 Zacchini v. Scripps-Howard