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NEWS GATHERING, INTANGIBLE PROPERTY RIGHTS AND 900-LINE TELEPHONE SERVICES: ONE COURT MAKES A BAD CONNECTION

I. INTRODUCTION

Pay-per-call services, commonly known as 900-number telephone lines, or "900-lines," are rapidly becoming a multi-billion dollar industry by providing callers with services that range from diet tips to horoscope predictions to sexually explicit conversations.¹ In the recent case *New Kids on the Block v. News America Publishing, Inc.*² ("New Kids"), U.S. District Judge William J. Rea ruled that the news media have a constitutional right to use 900-numbers to make money while gathering news.³ The case is believed to be the first to rule that such news gathering may be immunized by the first amendment from claims of trademark infringement and misappropriation of right to publicity.⁴

The common law right to publicity doctrine protects an individual's pecuniary interest in his or her name or likeness.⁵ The doctrine grants a public figure a monopoly in the commercial exploitation of his or her own persona.⁶ Similarly, the Lanham Act⁷ protects the holder of a valid trademark from any commercial use of the mark in relation to goods or services by another which is likely to cause confusion or mistake, or to deceive as to the origin of such goods or services.⁸

Both the right to publicity doctrine and the Lanham Act protect intangible property rights.⁹ The scope of protection afforded to intangi-

1. Declaration of Rick Parkhill in Support of Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Gannett Satellite Information Network, Inc.'s Motion for Summary Judgment at 2, *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90-1378 WJR (JRx)). Rick Parkhill is the publisher of InfoText Publishing, Inc., a trade journal for the audio text industry. *Id.* at 1.

2. 745 F. Supp. 1540 (C.D. Cal. 1990). This case is actually the result of the combination of two companion cases, each brought by New Kids against separate defendants, *News America Publishing, Inc. and Gannett Satellite Information Network, Inc.*

3. *Los Angeles Daily Journal*, Sept. 11, 1990, at 1, col. 4, citing *New Kids*, 745 F. Supp. at 1547.

4. *Los Angeles Daily Journal*, Sept. 11, 1990, at 1, col. 4.

5. J. MCCARTHY, RIGHTS OF PUBLICITY & PRIVACY § 4.9 at 4-48-49 (1989). *See also* *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

6. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978).

7. 15 U.S.C. § 1125 (1980).

8. *Id.*

9. *See Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 405 (8th Cir. 1987) (trademark

ble property rights is limited, however, by the operation of the first amendment.¹⁰ Prior to *New Kids*, courts applied a balancing test set out in *Lloyd Corp. v. Tanner*,¹¹ ("*Lloyd*"), to determine when property rights must yield to first amendment concerns in the area of news gathering and news dissemination.¹²

In *New Kids*, the District Court for the Central District of California distinguished the *Lloyd* test¹³ and extended the scope of news gathering protected by the first amendment to include 900-number telephone opinion polls conducted about the plaintiffs, the popular musical group, New Kids on the Block by two newspaper periodicals, *Star Magazine* and *USA Today*.¹⁴ In doing so, the court determined that such use of the plaintiffs' trademark¹⁵ and persona by the defendant newspapers was immune from trademark infringement and misappropriation under the first amendment.¹⁶ Unfortunately, the court incorrectly interpreted precedent and applied contorted reasoning to reach its conclusion. Furthermore, the court erred by employing a single line of reasoning for the resolution

is a form of intangible property that conveys or symbolizes ideas); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1978) (analogizing the right of publicity to patent and copyright law); *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288, 290 (S.D.N.Y. 1977), *aff'd*, 579 F.2d 215 (2d Cir. 1978), *cert. denied* 440 U.S. 908 (1979) (Elvis Presley's assigned right of publicity descends at death like any other intangible property).

10. U.S. CONST. amend. I. See *infra* text accompanying notes 11-16.

11. 407 U.S. 551 (1972).

12. The Supreme Court found that property rights need not "yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist." *Lloyd*, 407 U.S. 551, 566-67. See, e.g., *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402 (8th Cir. 1987), *cert. denied*, 488 U.S. 933 (1988) (first amendment does not bar an action for trademark infringement where other media of expression are available to the defendant); *Reddy Communications, Inc. v. Environmental Action Foundation, Inc.*, 199 U.S.P.Q. (BNA) 630, 634 (D.D.C. 1977) (first amendment does not require plaintiff's trademark rights to yield where defendant could express views through other avenues); *Sid and Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (copyright claim not barred by the first amendment because copyright law protects particular expression of ideas leaving other expressions of the idea available). *But see, e.g., Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74, 85 (1980) (California Supreme Court declined to use the "alternative avenues of communication test" developed in *Lloyd*, to rule that property rights of shopping center owner to exclude students soliciting support for political cause must yield to state constitution-based free speech rights of students). See *infra* notes 192-220 and accompanying text.

13. *New Kids*, 745 F. Supp. at 1544-45.

14. *Id.* at 1547.

15. The plaintiffs' trademark, service mark and trade name is "New Kids on the Block." Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Gannett Satellite Information Network, Inc.'s Motion For Summary Judgment at 1, *New Kids on the Block v. News America Publishing Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90-1378 WJR (JRx)).

16. *New Kids*, 745 F. Supp. at 1541-42.

of the two separate actions brought by *New Kids* against the two defendants. This is because the claims against *Star Magazine* were factually distinguishable from the claims against *USA Today* in a constitutionally significant way.¹⁷

This Note analyzes the *New Kids* decision in light of contrary precedent. It also examines the court's decision to incorporate the two separate cases comprising *New Kids* into a single decision. Next, this Note explores the potential conflict between first amendment rights and intangible property rights which would result if the reasoning employed in *New Kids* is adopted by other courts. Finally, this Note suggests an alternative analysis equally protective of first amendment freedoms as that adopted by the court in *New Kids* but without unduly constricting intangible property rights.

II. STATEMENT OF THE CASE: NEW KIDS ON THE BLOCK V. NEWS AMERICA PUBLISHING, INC.

On February 7, 1990, Gannett Satellite Information Network, Incorporated, doing business as the daily newspaper, *USA Today* ("USA Today"), advertised a 900-number *New Kids*' hotline.¹⁸ The advertisement included a photograph of the *New Kids* and carried the bold type query "WHO'S THE BEST ON THE BLOCK?"¹⁹ The survey further inquired "Which of the five is your fave? Or are they a turn off?"²⁰ The advertisement invited readers to call and vote for their favorite *New Kid* at a cost of fifty cents per call.²¹

On March 6, 1990, News America Publications Incorporated, doing

17. See *infra* notes 166-168 and accompanying text.

18. *New Kids*, 745 F. Supp. at 1542. According to the plaintiffs, sponsors of 900-line hotlines, such as *Star Magazine* and the *New Kids*, arrange with service providers such as telephone companies to offer 900-line services. Consumers purchase the service provided by calling the numbers. The services can range from diet tips to sexually-explicit conversations. The cost of the calls generally range from \$.50 to \$5.00 billed per minute or per call. The charges incurred appear on the caller's phone bill. Profits from the operation of 900-line services are shared between the sponsor and the service provider. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant News America Publishing, Inc.'s Motion for Summary Judgment at 4, *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90-1378 WJR (JRx)).

19. *New Kids*, 745 F. Supp. at 1542.

20. *Id.*

21. *USA Today*, Feb. 7, 1990 at 1 col. 1. It is important to note that in its opinion the *New Kids* court erroneously cites a "per minute" rather than "per call" basis for determining the 900-line charge. 745 F. Supp. at 1542. The court's failure to note this distinction is critical because any time a "voter" spends on a 900-line beyond the time the caller takes to vote is arguably not related to news gathering and hence beyond the reasoning of the court. See *infra* notes 140-165 and accompanying text.

business as *Star Magazine* ("Star Magazine"), also advertised a 900-number New Kids hotline.²² Like USA Today's advertisement, Star Magazine's advertisement also included a photograph of the New Kids and contained a solicitation inviting readers to call and "vote" for the sexiest New Kid.²³ The advertised cost of the call was ninety-five cents per minute.²⁴ In contrast to USA Today's 900-line, Star Magazine's 900-line invited callers to participate in "Star's entertainment trivia game" while the caller was on the New Kids line.²⁵

The pop group has used the New Kids trademark to identify its goods and services since 1986.²⁶ Two 900-number telephone hotlines were among the New Kids' services using the New Kids mark at the time the defendants' articles were published.²⁷ New Kids claimed that the use of their mark in connection with the defendants' 900-lines was a commercial, profit-oriented venture that infringed on their trademark.²⁸ The plaintiffs contended that defendants' New Kids surveys were merely disguised advertisements for the sale of collateral commercial products in the form of 900-line services.²⁹ New Kids further argued that Star Magazine and USA Today could have used a toll free "800" prefix line or regular toll phone lines to conduct their surveys.³⁰ Instead, New Kids claimed that the defendants chose 900-lines to commercially misappropriate the goodwill created by the New Kids and to capitalize on the public's familiarity with the goods and services identified by the New Kids mark.³¹

New Kids brought eleven causes of action against both defendants claiming federal and state statutory and common law infringement; dilution of trademark, service mark and trade name; and commercial misappropriation.³² The group based their infringement claims on the theory

22. *New Kids*, 745 F. Supp. at 1542.

23. *Id.*

24. *Id.* Note that the charges on Star's 900-line are "per minute" in contrast to USA's per call system. This is significant for the reasons raised *supra* note 21.

25. *New Kids*, 745 F. Supp. at 1542.

26. *Id.* at 1543.

27. *Id.*

28. *Id.*

29. *Id.*

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

31. *Id.*

32. *Id.* at 1542. See *infra* notes 33-34 for the first through tenth claims. The eleventh claim, was for the remedy of a constructive trust which the court deemed to be dependent upon the disposition of the other causes of action. *New Kids*, 745 F. Supp. at 1543 n.3. A claim for dilution of the New Kids trademark was disputed by the court because the plaintiffs failed to specifically "cite the California Business and Professions Code § 14330, but stated in paragraph 6 of the complaint that defendants "threaten to dilute" plaintiffs' mark." *Id.* at 1542 n.1.

that the defendants disseminated false or misleading information which was likely to confuse the public regarding the relationship between the New Kids' and the defendants' 900-number services.³³ The misappropriation claims were based on the theory that the defendants' reference to the New Kids in their 900-number advertisements constituted a misappropriation of their publicity rights.³⁴

New Kids moved for summary judgment, alleging that the defendants had infringed their intangible property rights and were not shielded by the first amendment.³⁵ Star Magazine and USA Today also moved for summary judgment on the grounds that the New Kids' claims were barred, as a matter of law.³⁶ The defendants argued that their 900-lines were used for news gathering and dissemination and, as such, were constitutionally protected under the first amendment.³⁷

III. REASONING OF THE COURT

The *New Kids* court determined that the resolution of the single issue of whether the first amendment barred all of New Kids' claims was dispositive of the case.³⁸ Starting with New Kids' trademark infringement claim, the court dismissed the New Kids' argument that the proper test to evaluate intangible property rights in relation to the first amendment is the test outlined in *Lloyd*.³⁹

In *Lloyd*, the United States Supreme Court held that the first amendment rights of protesters were not violated when the owner of a shopping center prohibited distribution of anti-war pamphlets on his premises.⁴⁰ The *Lloyd* Court used a two-step test to arrive at this conclusion.⁴¹ First, the Court considered whether the content of the com-

33. *Id.* at 1542. The following claims fit under this theory: common law trademark infringement (first claim); Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), ("Lanham Act") false advertising (second claim); Lanham Act false designation of origin (third claim); Lanham Act unfair competition (fourth claim); trade name infringement (seventh claim), false advertising under CAL. BUS. & PROF. CODE § 17200 (eighth claim); and unfair competition under CAL. BUS. & PROF. CODE § 17200 and § 17500 (ninth claim). *Id.* at n.2.

34. *Id.* at 1542-43. The following claims fit under this theory: commercial misappropriation under CAL. CIV. CODE § 3344 (fifth claim); common law misappropriation (sixth claim); and interference with prospective economic advantage (tenth claim). *Id.* at 1543 n.3.

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

36. *Id.*

37. *Id.*

38. *Id.* The court did not address "whether the New Kids have established, as a matter of law, defendants' liability for infringement or misappropriation." *Id.*

39. *New Kids*, 745 F. Supp. at 1541, 1543.

40. *Lloyd*, 407 U.S. at 571.

41. See *infra* text accompanying footnotes 42-45.

munication at issue was being censored.⁴² In *Lloyd*, the Court found that the pamphlet distribution restriction did not discriminate on the basis of the content of the pamphlet.⁴³ Next, the *Lloyd* Court balanced the protesters' first amendment rights against the property owner's right to exclude others from his property.⁴⁴ The Court concluded that property rights need not "yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist."⁴⁵

The court in *New Kids*, however, determined that the appropriate analysis was not that of the United States Supreme Court in *Lloyd* but instead that of the second circuit in *Rogers v. Grimaldi*⁴⁶ ("*Rogers*").⁴⁷ In *Rogers*, the plaintiff, dancer Ginger Rogers, brought an action against the producers and distributors of a motion picture for the use of the title "Ginger and Fred."⁴⁸ The defendant producers' film was a story about two fictional Italian cabaret performers who imitated Ginger Rogers and Fred Astaire and became known as "Ginger and Fred."⁴⁹ Rogers sought permanent injunctive relief and money damages alleging that the use of "Ginger and Fred" for the film's title constituted a violation of the Lanham Act and infringement of her common law right of publicity.⁵⁰ In *Rogers*, the court held that "the First Amendment did not provide absolute immunity to works of artistic expression because of the legitimate government concern regarding consumer deception."⁵¹ Nevertheless, the *Rogers* court reasoned that first amendment concerns must inform judicial consideration of the scope of the Lanham Act when applied to claims involving film titles.⁵² The court stated that the Lanham Act:

should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression . . . In the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads

42. *Lloyd*, 407 U.S. at 564.

43. *Id.*

44. *Id.* at 566-67.

45. *Id.* at 567.

46. 875 F.2d 994 (2d Cir. 1989).

47. *New Kids*, 745 F. Supp. at 1541, 1543.

48. *Rogers*, 875 F.2d at 996.

49. *Id.* at 996-97.

50. *Id.* at 997.

51. *New Kids*, 745 F. Supp. at 1544 (citing *Rogers*, 875 F.2d at 997).

52. *Rogers*, 875 F.2d at 998.

as to the source or the content of the work.⁵³

The court in *New Kids* noted the *Rogers* decision as a narrowing of the scope of the Lanham Act when first amendment concerns are implicated.⁵⁴ In addition, the *New Kids* court further noted that the *Rogers* court specifically rejected Ginger Rogers' request to apply the "no alternative avenues of communication" standard developed in *Lloyd*, because the *Lloyd* standard did not sufficiently accommodate the public's interest in free expression.⁵⁵

The court in *New Kids* acknowledged that the *Rogers* case only addressed the role of first amendment values in the specific context of artistic expression.⁵⁶ Nevertheless, the *New Kids* court deemed that "the First Amendment plays the *same* central role regarding news gathering and dissemination."⁵⁷ To bolster this contention the court cited cases affirming that news gathering is protected speech,⁵⁸ that exit polling is protected news gathering,⁵⁹ and that news gathering is not commercial speech.⁶⁰

After deciding that an application of the *Rogers* test was appropriate for cases addressing news gathering, the court used the reasoning in *Rogers* to conclude that "the Lanham Act will not prohibit the use of the New Kids trademark unless the defendants explicitly and falsely denoted authorship, sponsorship, or endorsement by the New Kids or explicitly mislead [sic] as to content."⁶¹ The court found that the evidence presented by both USA Today and Star Magazine supported their claims that the use of the New Kids trademark was related to news gathering and dissemination.⁶² The court reached this conclusion even though it acknowledged that Star Magazine's case was distinguishable from USA Today's because Star Magazine took the opportunity to solicit the caller's participation in its entertainment trivia game, a separate 900-

53. *Id.* at 999 (footnote omitted).

54. *New Kids*, 745 F. Supp. at 1544 (quoting *Rogers*, 875 F.2d at 998).

55. *New Kids*, 745 F. Supp. at 1544 (quoting *Rogers*, 875 F.2d at 999).

56. *New Kids*, 745 F. Supp. at 1544.

57. *Id.* (emphasis added).

58. *Id.*, (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) and *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988)).

59. *Id.* at 1544 n.4. ("See *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 223 Cal. Rptr. 58 (1986) ("First Amendment therefore bars interference with this traditional function of a free press in seeking out information by asking questions."); *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1984) (holding that a state statute interfering with the news gathering activity of taking voter exit polls was unconstitutional).

60. *Id.*, (citing *Daily Herald v. Munro*, 838 F.2d 380, 384 n.4 (9th Cir. 1988)).

61. *New Kids*, 745 F. Supp. at 1545.

62. *Id.*

number service.⁶³ The court found that both Star Magazine and USA Today represented that they conducted the 900-number survey merely to find out which member of the New Kids was the public's favorite, and concluded that the results were newsworthy.⁶⁴

The court then determined that for the Lanham Act to apply, the *New Kids* plaintiffs had the burden of providing evidence that the defendants' uses of their trademark were misleading as to content or that Star Magazine or USA Today falsely and explicitly denoted authorship, sponsorship or endorsement by the plaintiffs.⁶⁵ The court ruled that this burden was not met because New Kids relied on the theory of implicit endorsement.⁶⁶ The court held that "[t]he risk that some people might think that the New Kids implicitly endorsed or sponsored the Star Magazine's and USA Today's 900-number services is outweighed by the danger of restricting news gathering and dissemination."⁶⁷

The court distinguished *Cher v. Forum Int'l, Ltd.*⁶⁸ ("*Cher*") to support its conclusion that a showing of implicit endorsement is insufficient.⁶⁹ In *Cher*, the performer sued *Forum* magazine for use of headlines, cover promotions and advertising in connection with published interviews she had given.⁷⁰ Cher contended that the magazine falsely created and exploited the impression that Cher had given an exclusive interview directly to *Forum* when she had not, and that the magazine had exploited Cher's celebrity value to sell magazines without her consent by implying that she endorsed *Forum*.⁷¹ The *Cher* court upheld the trier of fact's finding that Cher had demonstrated implied endorsement and had stated a claim for appropriation of publicity.⁷² The court in *New Kids* distinguished *Cher*, however, by contending that *Cher* was an appropriation of publicity case while *New Kids* was a Lanham Act case.⁷³ The *New Kids* court also noted that even if allegations of implied endorsement were sufficient under the Lanham Act, no genuine issue of fact was raised by the plaintiffs.⁷⁴ The court stated that the *Cher* defendants published false statements, whereas in *New Kids*, the defendants'

63. *Id.* at 1545 n.5.

64. *Id.* at 1545.

65. *Id.*

66. *New Kids*, 745 F. Supp. at 1545.

67. *Id.* See also *Rogers*, 875 F.2d at 1000.

68. 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983).

69. *New Kids*, 745 F. Supp. at 1545 n.6.

70. *Cher*, 692 F.2d at 637.

71. *Id.* at 638.

72. *Id.* at 639-40.

73. *New Kids*, 745 F. Supp. at 1545 n.6.

74. *Id.*

claim of implied endorsement was premised on the fact that the polling solicitation was in the defendants' publications.⁷⁵

Citing *Universal City Studios, Inc. v. Ideal Publishing Corp.*⁷⁶ ("Universal"), the court rejected the New Kids contention that mere publication of the solicitation in their publications was sufficient to state a cause of action for implied endorsement.⁷⁷ In *Universal*, a merchandiser holding a license to exploit the trademark "Hardy Boys" sued the publisher of *Teen Beat* magazine for trademark infringement for publishing a souvenir issue which was composed of articles about and photos of the stars of the television series "Hardy Boys."⁷⁸ The *Universal* court found that the plaintiffs failed to demonstrate that the public would tend to associate *Teen Beat* magazine with the Hardy Boys television series merely because articles and photos in the magazine were labeled as pertaining to the "Hardy Boys."⁷⁹

Next, the *New Kids* court addressed the plaintiffs' misappropriation claims.⁸⁰ The court noted that "[t]he California Supreme Court has subjected the 'right of publicity' under California law to a narrowing interpretation which accords with First Amendment values."⁸¹ The court adopted the defendants' argument that use of the New Kids' name and likeness is protected by the first amendment unless such use is wholly unrelated to news gathering and dissemination.⁸² The court relied upon *Midler v. Ford Motor Co.*⁸³ ("*Midler*") to reach its conclusion.⁸⁴ In *Midler*, the court addressed the issue of whether the first amendment shielded the use of an imitator of Bette Midler's voice to sing the song "Do You Want To Dance?" to advertise automobiles.⁸⁵ Midler contended that such use constituted a misappropriation of her right to publicity, while Ford claimed *inter alia*, that its use of an imitation of her voice was pro-

75. *Id.*

76. 195 U.S.P.Q. 761 (S.D.N.Y. 1977).

77. *New Kids*, 745 F. Supp. at 1545 n.6.

78. *Universal*, 195 U.S.P.Q. at 761.

79. *Id.* at 762.

80. *New Kids*, 745 F. Supp. at 1545.

81. *Id.*, (quoting *Cher v. Forum Int'l Ltd.*, 692 F.2d at 638 (9th Cir. 1982) (citing *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 873, 603 P.2d 454, 461-62, 160 Cal. Rptr. 352, 359-60 (1979) (Bird, J. concurring))) (footnote omitted).

82. *New Kids*, 745 F. Supp. at 1545-6.

83. 849 F.2d 460 (9th Cir. 1988).

84. 745 F. Supp. at 1545-46. The *New Kids* court also noted as relevant *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980). *New Kids*, 745 F. Supp. at 1545 n.7. However, the court did not apply the ruling in *Pruneyard* because the *New Kids* court focused exclusively upon a federal first amendment analysis which it deemed was dispositive of all issues. *Id.* at 1543.

85. *Midler*, 849 F.2d at 461-462.

ted by the first amendment.⁸⁶ In concluding that Ford's use of Midler's voice was not protected, the court held

[t]he purpose of the media's use of a person's identity is central. If the purpose is "informative or cultural" the use is immune; "if it serves no such function but merely exploits the individual portrayed, immunity will not be granted."⁸⁷

While the *New Kids* court noted that total commercial exploitation is precluded,⁸⁸ the court explained that commercial exploitation of a public figure's name and likeness is allowed in the context of a publication's advertising under California law.⁸⁹ The court then applied the standard in *Midler* to the facts of *New Kids* and found the defendants' use to be descriptive, related to news gathering and not merely commercial exploitation.⁹⁰ The court concluded that such usage is constitutionally protected.⁹¹

The court did, however, explicitly explain that its ruling should not be interpreted to mean that the first amendment provides absolute immunity for tortious conduct in connection with news gathering and dissemination.⁹² In fact, the court acknowledged that "[h]ad the plaintiffs shown that USA Today or Star Magazine began running a 900-number in a manner that was wholly unrelated to news gathering and reporting, the First Amendment would provide no protection."⁹³ The court then listed some examples of what it deemed would constitute such usage.⁹⁴

The court acknowledged that the defendants' 900-number services could be construed as commercial enterprises distinguishable from their news publication businesses.⁹⁵ Yet the court ultimately rejected *New Kids*' contention that the defendants' method of gathering information constituted a collateral commercial enterprise outside the protection of

86. *Id.*

87. *Id.* at 462 (quoting, Felcher and Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596 (1979)).

88. *New Kids*, 745 F. Supp. at 1546 (citing *Midler*, 849 F.2d 460).

89. *New Kids*, 745 F. Supp. at 1546 (citing *Guglielmi*, 25 Cal. 3d at 873, 603 P.2d at 462, 160 Cal. Rptr. at 360).

90. *New Kids*, 745 F. Supp. at 1546.

91. *Id.*

92. *Id.* at 1547.

93. *Id.*

94. *Id.* The court stated "[f]or example, if the defendants provided 900-number services that had no relation to any proposed article or continued running the 900-number service past the time of the publication of the article, plaintiffs could sustain their burden of showing that a defendants' [sic] use of the *New Kids* name was not related to a protected First Amendment activity and constituted commercial exploitation." *Id.*

95. *New Kids*, 745 F. Supp. at 1546.

the first amendment.⁹⁶ The court reiterated that neither federal⁹⁷ nor California⁹⁸ courts have decided first amendment protection cases based on whether the expressing actor's activity is profitable or unprofitable.⁹⁹

Finally, the court dismissed the New Kids' claim that it should apply the ruling in *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁰⁰ ("Zacchini").¹⁰¹ In *Zacchini*, the defendant television station broadcasted the entire fifteen second act of plaintiff Zacchini being shot out of a cannon.¹⁰² Zacchini contended that the broadcast constituted a violation of his right to publicity.¹⁰³ The Court agreed and held that the first amendment did not immunize the television station's use during its newscast.¹⁰⁴ The *New Kids* court noted that in *Zacchini*, the Supreme Court weighed the first amendment rights of the television station against the Zacchini's right to earn a livelihood, and found that the broadcast of the daredevil's entire act posed a substantial threat to the economic value of that performance.¹⁰⁵ The court in *New Kids* declined to apply *Zacchini*, however, because the court found no analogous threat to the economic value of the New Kids name.¹⁰⁶

IV. ANALYSIS

The *New Kids* court consolidated its discussion of the plaintiffs' eleven causes of action brought against each defendant into a single opinion addressing two broad lines of inquiry.¹⁰⁷ The first question was whether the defendants infringed New Kids' federal and state statutory and common law trademark rights.¹⁰⁸ The second inquiry addressed whether the defendants' actions constituted a misappropriation of the New Kids' right to publicity.¹⁰⁹ This section examines the court's dis-

96. *Id.*

97. *Id.* See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

98. *New Kids*, 745 F. Supp. at 1546 (citing *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 160 Cal. Rptr. 352, 603 P.2d 454 (1979)).

99. *New Kids*, 745 F. Supp. at 1546.

100. 433 U.S. 562 (1977).

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

102. *Zacchini*, 433 U.S. at 563-64.

103. *Id.* at 564.

104. *Id.* at 578-79.

105. *New Kids*, 745 F. Supp. at 1547 (quoting *Zacchini*, 433 U.S. at 575).

106. *Id.* at 1547.

107. *Id.* at 1542-3.

108. *Id.* at 1543-45.

109. *Id.* at 1545-47. Actions claiming a violation of right to publicity may in fact encompass several common law actions such as unfair competition, *J. MCCARTHY, RIGHTS OF PUBLICITY & PRIVACY* § 4.14[C], at 4-87 (1989) and misappropriation, *Id.* at note 1, § 5.6 [A] at 5-48.1 through 5-49. In *New Kids*, the court determined that the plaintiffs' common law mis-

cussion of both theories and finds its reasoning flawed. This section also discusses the court's decision to address the plaintiffs' claims against both Star Magazine and USA Today in one opinion and concludes that such a consolidation was inappropriate. Finally, this section addresses a potential conflict between first amendment rights and intangible property rights created by the *New Kids* court's reasoning.

A. Trademark Infringement Analysis

1. The Court's Misplaced Reliance Upon *Rogers v. Grimaldi*

Although the *New Kids* court relied heavily upon *Rogers* to resolve the trademark infringement claims,¹¹⁰ this reliance is ill founded. The court's expansive application of the test in *Rogers* misreads the *Rogers* court's opinion and, in effect, creates a sweeping new test apparently applicable whenever conflicts arise between intangible property rights and the first amendment.¹¹¹ The creation of a new standard seems particularly unwarranted, however, because the *Rogers* opinion does not indicate an intention to abandon the rule in *Lloyd* or to establish a new test ubiquitously applicable to all forms of speech.¹¹² In fact, the language in *Rogers* clearly indicates a narrow holding addressing the rare instances where the title of an artistic work relates to the persona of a celebrity.¹¹³ This intent is evidenced by the *Rogers* court's careful choice of limiting language stating that "in the context of titles, [the] 'no alternative' standard provides insufficient leeway for literary expression."¹¹⁴ Consequently, *Rogers* did not entirely reject the balancing test used in *Lloyd*. Instead, the *Rogers* court merely determined that the *Lloyd* test was inappropriate in the context of titles because the *Lloyd* test would unduly constrict literary expression.¹¹⁵

The *Rogers* court also distinguished *Lloyd* by utilizing the distinction between property rights claims which impose restrictions upon the location of speech and those which impose restrictions upon the artistic

appropriation claim, its commercial misappropriation claim under CAL. CIV. CODE § 3344 and its claim of interference with prospective economic advantage fit under a theory of misappropriation of publicity rights. 745 F. Supp. 1540, 1543 n.3.

110. *New Kids*, 745 F. Supp. at 1541.

111. See *infra* notes 111-138 and accompanying text.

112. *Rogers*, 875 F.2d at 999.

113. *Id.* Cf. *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490 (1989) (*Rogers*' balancing approach held to be applicable to Lanham Act claims against works of artistic expression, including parody). *Id.* at 494-95.

114. *Rogers*, 875 F.2d at 999 (emphasis added).

115. *Id.*

content of speech.¹¹⁶ Using this distinction, the *Rogers* court implied that the *Lloyd* test is applicable to property claims which restrict the location of speech, but not for property claims which restrict the artistic content of speech in the context of titles.¹¹⁷ In the context of titles, the *Rogers* court held that a balancing test is appropriate for conflicting property claims which restrict the artistic content of speech.¹¹⁸ Thus, the *Rogers* court determined that the Lanham Act "should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."¹¹⁹ Applying this balancing test, however, the *Rogers* court expressly limited the scope of its holding, stating that

[i]n the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.¹²⁰

Thus, the court in *Rogers* clearly did not intend that its balancing test supplant the application of the *Lloyd* test in any context other than where artistic expression is at issue.¹²¹

The *New Kids* court's reliance upon *Rogers* is also inappropriate because the reasoning underlying the *Rogers* decision is pertinent to artistic expression and not news gathering.¹²² The *New Kids* court said that "[a]lthough *Rogers* concerned First Amendment values in the context of artistic expression, the First Amendment plays the same central role regarding news gathering and dissemination."¹²³ While the first amendment plays a central role regarding news gathering,¹²⁴ the role is not

116. *Id.*

117. *Id.*

118. *Id.*

119. *Rogers*, 875 F.2d at 999.

120. *Id.* (emphasis added). In addition, a further indication of the *Rogers* court's intention to limit the range of its holding can be derived from the court's statement that its limiting construction of the Lanham Act would not apply to cases where misleading titles are confusingly similar because the public interest in preventing consumer confusion would outweigh the public's interest in permitting authors to use titles in such a manner. Thus, the court in *Rogers* clearly did not intend that its balancing test supplant the application of the *Lloyd* test in any context other than where artistic expression is at issue. *Id.* at n.5.

121. *Rogers*, 875 F.2d. at 999.

122. *Id.* at 997.

123. *New Kids*, 745 F. Supp. at 1544 (emphasis added).

124. *Daily Herald v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (The first amendment protects the media's right to gather news). See *In re Express News Corp.*, 695 F.2d 807 (5th Cir.

automatically the same when applied to the narrow context of artistic expression at issue in *Rogers*, and vice versa.

In *Rogers*, the court determined that liability under the Lanham Act would only be found if the defendant's usage of either had no artistic relevance to the underlying work or the use was explicitly misleading.¹²⁵ In *New Kids*, the court apparently analogized news gathering to artistic expression and applied a hybridized version of the *Rogers* test.¹²⁶ As a result, the court in *New Kids* held that in the context of news gathering, liability under the Lanham Act would only be found if the "defendants explicitly and falsely denoted authorship, sponsorship, or endorsement by the New Kids[,] . . . explicitly mislead as to content,"¹²⁷ or use the mark in a manner that has no relevance to news gathering.¹²⁸

The Supreme Court's ruling in *Zacchini* demonstrates, however, that the standard adopted by the *New Kids* court is not well-founded.¹²⁹ In *Zacchini*, the Court held that the plaintiff's recovery for violation of his right to publicity was not precluded by the press' first amendment right to gather news.¹³⁰ If the *Rogers* test is applied to the facts of *Zacchini*, however, an opposite result seems inevitable. The plaintiff in *Zacchini*, did not contend that his daredevil cannon act was not newsworthy.¹³¹ Furthermore, *Zacchini* did not assert that the broadcast was explicitly misleading. Since the use of *Zacchini*'s act was related to news gathering and dissemination and did not explicitly mislead, using the *New Kids* court's hybridized version of the *Rogers* test,¹³² the television station's usage of the plaintiff's persona in *Zacchini* should have been protected by the first amendment. The United States Supreme Court held to the contrary, however, and ruled in favor of *Zacchini*'s intellectual property rights, despite the acknowledgment of news gathering relevance and an absence of explicit misleading.¹³³ The Supreme Court's holding in *Zacchini* requires the corollary conclusion that the first amendment is not as broad a shield against liability for infringement of intangible property rights when news gathering is involved as the opinion in *New Kids* indicates.

1982) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

125. *Rogers*, 875 F.2d at 999.

126. *New Kids*, 745 F. Supp. at 1545-46.

127. *Id.* at 1545.

128. *Id.* at 1547.

129. 433 U.S. at 575 (1977).

130. *Id.*

131. *Id.* at 569.

132. See *supra* notes 125-128 and accompanying text.

133. *Zacchini*, 433 U.S. at 562-63.

Although *Zacchini* addressed the issue of the scope of first amendment protection for news gathering in the context of misappropriation of right to publicity,¹³⁴ the Court's ruling is instructive on the issue of the appropriate scope of application of the *Rogers* test to Lanham Act claims under circumstances such as those in *New Kids*.¹³⁵ The right to publicity is generally considered to be a potentially more expansive protection of intangible property rights than the Lanham Act.¹³⁶ This is primarily because the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement.¹³⁷ As the court in *Rogers* stated "[p]erhaps for that reason, courts delineating the right of publicity, more frequently than in applying the Lanham Act, have recognized the need to limit the right to accommodate First Amendment concerns."¹³⁸ Thus, because the ruling in *Zacchini* demonstrates that the *Rogers* test is inappropriate for right to publicity cases involving news gathering, it would be inconsistent to apply the *Rogers* test to Lanham Act cases involving news gathering. The court, therefore, erred in importing the *Rogers* test and applying it to the trademark infringement claims in *New Kids*, where the usage of the plaintiffs' trademark was claimed to involve protected news gathering and dissemination and not artistic expression.¹³⁹

2. The Court's Finding That All Of The Defendants' Actions Were Protected News Gathering Was Incorrect.

In *New Kids*, the court determined that the actions of both defendants were related to news gathering.¹⁴⁰ As a result, the court held that the first amendment immunized *Star Magazine* and *USA Today* from the plaintiffs' claims of trademark infringement.¹⁴¹

134. *Id.* at 565.

135. See *infra* text accompanying notes 136-139.

136. *Rogers*, 875 F.2d at 1004. (See Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 160-66 (1982)).

137. *Rogers*, 875 F.2d at 1004 (citing Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 160-66 (1982)).

138. *Id.*

139. Even if the right to publicity enjoyed a greater scope of protection outside the ambit of the first amendment than does trademark protection, this analysis should allow plaintiffs to prevail on their claims of misappropriation of right to publicity. See *infra* text accompanying notes 179-186.

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

141. *Id.* at 1541, 1547.

- a. The court should have found that the defendants' articles were advertisements.

In *New Kids*, the plaintiffs argued that the actions of Star Magazine and USA Today did not constitute news gathering protected by the first amendment.¹⁴² Claiming that "[t]his is not a case about communication; it is a case about remuneration,"¹⁴³ the plaintiffs contended that the "articles" published by the magazine were merely advertisements for their 900-numbers and, as such, were not entitled to expansive first amendment protection.¹⁴⁴

Courts have held that the purpose of the media's use of a trademark or a person's likeness is crucial to the determination of whether misuse of tradename or likeness has occurred.¹⁴⁵ First amendment protection is not afforded the press if trademark or likeness use is merely a subterfuge for commercial exploitation.¹⁴⁶ Thus, the court was called upon to determine whether the defendants' articles were either bona fide attempts to gather news, disguised advertisements, or a hybrid of both.¹⁴⁷

Courts have broadly construed what constitutes protected "news gathering."¹⁴⁸ However, in *Daily Herald Co. v. Munro*¹⁴⁹ ("*Munro*"), the court did define one limitation by stating that "[n]ewsgathering is not commercial speech; commercial speech 'does no more than propose a commercial transaction.'"¹⁵⁰ Thus, if the actions of the defendants constituted only commercial speech, that is, merely proposing a transaction, such actions should not be regarded as news gathering.¹⁵¹ Courts

142. *Id.* at 1543.

143. *Id.*

144. *Id.*

145. *Midler*, 849 F.2d at 462.

146. *Arrington v. The New York Times Co.*, 55 N.Y.2d 433, 434 N.E.2d 1319, 1322, 449 N.Y.S.2d 941 (N.Y. 1982), *cert. denied*, 459 U.S. 1146 (1983) (publisher of a photograph illustrating a newspaper article is not liable for misuse of tradename or person's likeness unless the usage has no relationship to the article or unless the article is an advertisement in disguise). *See also Rand v. Hearst Corp.*, 31 A.D.2d 406, 298 N.Y.S.2d 405, 410 (1969) (use of a public figure's name on the cover of a book is protected by the first amendment unless the usage is merely a commercial exploitation of the figure's personality).

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

148. *See Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (N.Y. Sup. Ct. 1968) (scope of subject matter considered newsworthy has been defined in the most far reaching terms); *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 434 N.E.2d 1319, 1322 (1982), *cert. denied*, 459 U.S. 1146 (1983) (the term "public interest" is to be freely defined).

149. 838 F.2d 380 (9th Cir. 1988).

150. *Munro*, 838 F.2d at 384 n.4 (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 762 (1976))).

151. *Munro*, 838 F.2d at 384 n.4.

have long held that advertisements constitute commercial speech.¹⁵² An obvious corollary is that "article[s] . . . may be nothing more than someone's advertisement in disguise."¹⁵³ Thus, to the extent that the "articles" published by USA Today and Star Magazine constituted mere advertisements, they fell outside the ambit of what can be deemed to be news gathering.

In reaching its decision, the *New Kids* court failed to recognize the predominant advertising character of the defendants' articles and over-emphasized their minimal news gathering character. *New Kids* correctly argued that the defendants' "articles" contained many characteristics of advertisements.¹⁵⁴ The most significant of these characteristics, however, was the virtual absence of any text in the "articles" other than the solicitations to call.¹⁵⁵ Additionally, the plaintiffs argued that the use of 900-numbers instead of standard telephone or toll free 800-line services further indicated that the articles were merely advertisements specifically designed to promote the 900-line service itself.¹⁵⁶ *New Kids* argued that the use of 900-numbers belied the true nature of the enterprise which, the plaintiffs claimed, was to "commercially misappropriate the goodwill created by the *New Kids*, and to capitalize on the public's familiarity with the goods and services identified by [their] mark."¹⁵⁷

The court erred in failing to characterize the "articles" as advertise-

152. *Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376 (1973) (the U.S. Supreme Court characterized employment advertisements as "classic examples of commercial speech"). *Id.* at 385. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

153. *Griffin v. Medical Soc. of State of New York*, 7 Misc. 2d 549, 550, 11 N.Y.S.2d 109, 110 (1939).

154. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant News America Publishing Inc.'s Motion For Summary Judgment at 29-30, *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90-1376 WJR (JRx)).

155. *Id.* The USA Today advertisement contained a photograph of the band, the solicitation to call, the cost of the call, the times the lines would be open, and a caveat to callers to inform their parents of the call. USA Today Feb. 7, 1990 at 1, col 2. Star Magazine's advertisement featured a photograph of the band, the headline query of "Now which kid is the sexiest?," the question "So which of the *New Kids* on the Block would you most like to move next door?" followed by "Star wants to know which cool *New Kid* is the hottest with our readers," followed by the names, ages and instruments played by each band member and instructions of how to "vote." Star Magazine, Mar. 6, 1990.

156. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant News America Publishing Inc.'s Motion For Summary Judgment at 29-30, *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90-1376 WJR (JRx)); *New Kids*, 745 F. Supp. at 1543.

157. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Gannett Satellite Information Network, Inc.'s Motion For Summary Judgment at 5, *New Kids on*

ments for two reasons. First, when used for polling purposes, the only beneficial difference between a 900-line and either an 800-line or a standard telephone line is that a 900-line can generate income, whereas the others can not.¹⁵⁸ Consequently, a reasonable inference can be drawn that the defendants' choice to use a 900-line was, at least to a significant extent, precisely because the lines had the potential to generate income.¹⁵⁹ Thus, the defendants' publication of their 900-lines could be characterized, at least in large part, as commercial offers made to prospective callers to purchase the services represented in the articles with the purpose of generating income for the defendants. Published offers to sell services with the aim of generating income are a form of advertising in the purist sense.¹⁶⁰

The second reason why the court should have found that the defendants' "articles" were merely advertisements and not sincere attempts to gather news derives once again from scrutiny of the defendants' choice to use 900-numbers as vehicles with which to conduct their "polls." Most 900-line surveys contain inherent problems of inaccuracy which toll-free or standard lines do not.¹⁶¹ For example, common sense would indicate

the *Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90 1378 WJR (JRx))

158. "Technologically, anything that can be done using a 900-number service can also be done using an 800-number or standard telephone service." Declaration of Rick Parkhill in Support of Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Gannett Satellite Information Network, Inc.'s Motion for Summary Judgment at 2, *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90-1378 WJR (JRx)). "The primary reason for employing 900-number services is to generate revenue." *Id.*

159. "The main reason for using a 900-number service is to generate revenue. If a service subscriber did not want to make a profit, the subscriber should choose a less expensive way to set up the service, for example, 800-number service." Declaration of Rick Parkhill in Support of Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Gannett Satellite Information Network, Inc.'s Motion for Summary Judgment at 3, *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90-1378 WJR (JRx)).

160. To "advertise" is defined as

[t]o . . . announce, . . . give notice of, inform, make known, publish. On call to the public attention by any means whatsoever. Any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business and includes, without limitation because of enumeration, statements and representations made in a newspaper or other publication or . . . contained in any notice . . .

BLACK'S LAW DICTIONARY at 50 (5th ed. 1979). "Advertisement" is defined as "[n]otice given in a manner designed to attract public attention. *Edwards v. Lubbock County*, Tex.Civ.App., 33 S.W.2d 482, 484. Information communicated to the public, or to an individual concerned, as by handbills, newspaper, television, billboards, radio. *First Nat. Corporation v. Perrine*, 99 Mont. 454, 43 P.2d 1073, 1077." *Id.*

161. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Gannett Satellite Information Network, Inc.'s Motion For Summary Judgment at 23, *New Kids on*

that a charge of only fifty cents per minute in addition to the standard cost of a call would serve as a disincentive to lower income callers, thus skewing results.¹⁶² The defendants attempted to counter this criticism, however, by claiming that 900-lines are actually more accurate than their standard or toll-free counterparts because the additional charge acts to discourage repeat callers who would skew the results.¹⁶³ But this argument ignores the fact that the defendants could have eliminated the multiple voting problem without resorting to 900-lines. For example, the defendants could have utilized caller identification technology on their telephone survey lines to screen out previous calls from the same telephone number and exclude them from the tabulated results.¹⁶⁴ Consequently, the court erred in failing to recognize that the so called "articles" published by the defendants functioned predominantly as advertisements for commercial phone services which had only incidental and inaccurate polling utility.¹⁶⁵

the Block v. News America Publishing, Inc., 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90 1378 WJR (JR_x)).

162. *Id.*

163. Defendant Gannett Satellite Information Network, Inc.'s Notice of Motion and Motion For Summary Judgment; Memorandum Of Points and Authorities at 4 n.2, New Kids on the Block v. News America Publishing, Inc., 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90 1378 WJR (G_x)).

164. Caller identification technology allows the receiver of a phone call to ascertain the caller's telephone number. The defendants could have employed "caller i.d." circuitry to identify the telephone numbers of the "voters" responding to their surveys. Relatively simple software modifications of the defendants' telephonic information devices would allow the storage and utilization of this data to prevent the recounting of subsequent calls from a previously identified line. Thus, the defendants could have effectively solved the problem of repeat callers skewing survey results while using only standard or 800-type lines. In fact, this system may be more effective in solving the repeat caller problem than a market driven solution because some repeat callers may not find the price of the services a sufficient disincentive to refrain from repeat voting. Interview with Warren Jason, telephone information service equipment broker, December 14, 1990. "The usual range of tolls charged for participating in a 900-number poll does not necessarily discourage multiple voting. For many people, the cost is nominal and the phone company will not disconnect anyone's phone service for failure to pay 900-number charges." Declaration of Rick Parkhill in Support of Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Gannett Satellite Information Network, Inc.'s Motion for Summary Judgment at 4, New Kids on the Block v. News America Publishing, Inc., 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90-1378 WJR (JR_x)).

165. Another unfortunate result of the court's decision is the fact that the opinion can also be interpreted as condoning unethical journalistic practices. This is because accuracy of disseminated information has been recognized as an important part of journalistic ethics. Brown v. Kelly Broadcasting 48 Cal. 3d 711, 748-49, 771 P.2d. 406, 430, 257 Cal. Rptr. 708, 732 (1989). Thus, continued use of 900-numbers by USA Today and Star Magazine as a means of gathering news and representing the data gathered as news would violate one of their profession's canons of ethics because of the inherent inaccuracy of data compiled by 900-line polling methods. See *supra* text accompanying note 162.

- b. The court erred in applying the same reasoning to both Star Magazine and USA Today.

Even if the court in *New Kids* was correct in its assessment that the advertisement and telephonic survey conducted by USA Today was related to news gathering, the court certainly erred in its determination that all of Star Magazine's usage of the New Kids' trademark and personality were related to bona fide news gathering.¹⁶⁶ Unlike USA Today, Star Magazine used its 900-line to promote its entertainment trivia game, another of Star Magazine's commercial 900-lines.¹⁶⁷ This distinction is significant because Star Magazine's trivia game's promotion was thus effected by the usage of the New Kids' name and popularity. Specifically, Star Magazine's "article" was used to stimulate caller participation to "vote" for a New Kid, then such participation was exploited to market Star Magazine's separate commercial service.¹⁶⁸

The *New Kids* court failed to recognize that from the moment a solicited caller's "vote" is cast, presumably at the instant telephone computer equipment registers the "vote," any on-line marketing of other commercial ventures should be deemed purely commercial speech and not protected news gathering. Thus the court in *New Kids* should not have granted Star Magazine's motion for summary judgment.

3. The Court's Application of *Rogers* to the Facts of *New Kids* Leads to Legal Absurdities.

The court granted the defendants' motion for summary judgment after concluding that New Kids had failed to meet any of the requisites for trademark infringement.¹⁶⁹ The court determined the infringement criteria upon a hybrid of the test set forth in *Rogers*.¹⁷⁰ Consequently, the court stated that the plaintiffs failed to raise a genuine issue of material fact showing that the defendants' use of 900-lines was "unrelated to news gathering and dissemination."¹⁷¹ But the court erred by applying the *Rogers* test to a case where news gathering, not artistic expression, was at issue.¹⁷² Additionally, even if the *Rogers* test could be interpreted

166. See *infra* notes 167-168 and accompanying text.

167. *New Kids*, 745 F. Supp. at 1542, 1545 n.5.

168. *Id.*; Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant News America Publishing Inc.'s Motion for Summary Judgment at 3, *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (No. CV 90 1376 WJR (JRx)).

169. *New Kids*, 745 F. Supp. at 1545.

170. *Id.*

171. *Id.*

172. See *supra* notes 111-139 and accompanying text.

to apply to news gathering cases, the court should have found that the defendants' use of the New Kids' trademark was not realistically related to serious news gathering.¹⁷³

Most distressing, however, is the fact that the court's compound errors of misadapting the *Rogers* test and neglecting the overwhelming commercial nature of the defendants use of the New Kids mark, when taken together, inevitably lead to legal absurdity.¹⁷⁴ For example, the Lanham Act would prohibit a newspaper business not licensed to use the trademarks of Levis, Lee, Jordache, and Guess to place these trademarks on four different types of jeans and offer the jeans for sale.¹⁷⁵ If the reasoning of the *New Kids* court is employed however, trademark laws could be easily circumvented by the attachment of a disclaimer that the newspaper had labeled the jeans and was selling them to determine which clothing manufacturer was the most popular on the basis of the "votes" cast in the form of sales for each type of jean. This absurdity results from the *New Kids* court applying the *Rogers* standard for infringement in artistic expression cases to news gathering cases. Specifically, since *Rogers*, requires that there be *no* relationship of the trademark usage to underlying artistic expression for infringement to occur,¹⁷⁶ the *New Kids* court's substitution of "news gathering" for "artistic expression," results in a standard which requires that there be no relationship of the usage to news gathering for infringement to be found.¹⁷⁷ Since every transaction could be deemed to have *some* news gathering relevance simply because the transaction occurred, and since a disclaimer could deflect a claim of explicit misleading, the application of the *Rogers* test in trademark actions involving news gathering could create a first amendment exception with the practical effect of obliterating trademark protection. The absurdity of this result is amplified when one considers that while an offer to sell jeans would be *related* to news gathering, it almost certainly could

173. See *supra* notes 142-165 and accompanying text.

174. See *infra* notes 175-177 and accompanying text.

175. The Lanham Act prohibits the use in connection with any goods or services "any word, term, name, symbol or device . . . which is likely to cause confusion, or . . . mistake . . . as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship or approval of his or her goods, services or commercial activities . . ." 15 U.S.C. § 1125. To determine whether a likelihood of confusion exists the court will weigh several factors: "(1) the strength or weakness of the marks; (2) the similarity in appearance, sound, and meaning; (3) the class of goods in question; (4) the marketing channels; (5) evidence of actual confusion; and (6) evidence of the intention of the defendant in selecting and using the alleged infringing name." *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1179 (9th Cir. 1988). Since all these marks are strong, and the putative user's are identical to them and the class goods is the same, owners infringement would almost certainly be found.

176. *Rogers*, 875 F.2d at 999.

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

not be deemed *to be* the type of news gathering that the courts have heretofore held deserving of full first amendment protection because such offers have been deemed to constitute commercial speech.¹⁷⁸

B. *Misappropriation Analysis*

The court in *New Kids* predicated its misappropriation analysis upon the finding that the usage of the plaintiffs' persona was protected news gathering and dissemination and not mere exploitation of the individuals portrayed.¹⁷⁹ The court held that because of the news gathering character of the defendants' usage of the plaintiffs' persona, such use was "protected by the First Amendment unless such use is wholly unrelated to constitutionally protected news gathering and dissemination."¹⁸⁰ The court's finding that all of the defendants' usage of the *New Kids* persona was related to news gathering is suspect.¹⁸¹ But even if the defendants' usage was related to bona fide news gathering, the court in *New Kids* still erred in its analysis.

The *New Kids* court stated that "California courts have specifically allowed incidental commercial exploitation of a public figure's name and likeness in the context of a publication's advertising activities."¹⁸² Although not explicitly stated, the court concluded that the defendants' usage was merely an incidental commercial exploitation of the *New Kids* persona relevant to news gathering.¹⁸³ The court failed, however, to acknowledge that the commercial exploitation of the *New Kids*' persona was not simply confined to the context of the defendants' advertising activities, but was, in large part, a usage identical to that of the plaintiffs': to advertise a commercial *New Kids* 900-line. Thus, *Star Magazine* and *USA Today* were *in competition* with the *New Kids* in the same market offering virtually the same product. Such usage is not a mere "incidental commercial exploitation of . . . name and likeness in the context of a publication's advertising activities."¹⁸⁴ More importantly, however, this distinction mirrors the competing interests of *Zacchini* and the news show producers that broadcast his live human cannonball act. Thus,

178. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 762 (1976)).

179. *New Kids*, 745 F. Supp. at 1545-46.

180. *Id.*

181. *See supra* notes 112-178 and accompanying text.

182. *New Kids*, 745 F. Supp. at 1546 (citing *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 873, 603 P.2d 454, 462, 160 Cal. Rptr. 352, 360 (1979)). *See* CAL. CIV. CODE § 3344(d) (1988).

183. *New Kids*, 745 F. Supp. at 1546.

184. *Id.*

New Kids would fall directly under the rule of *Zacchini* despite the express assertion of the court in *New Kids* to the contrary.¹⁸⁵

In *Zacchini*, the news broadcast of the daredevil's entire human cannonball act was found to pose "a substantial threat to the economic value of that performance."¹⁸⁶ Similarly, the appropriation of the *New Kids* persona to advertise a commercial 900-line service poses a substantial threat to the economic value of the *New Kids*' hotline, both directly, by use of the *New Kids* personality to promote a competing service, and indirectly by appropriating the *New Kids* persona itself. Consequently, the *New Kids* court incorrectly distinguished *Zacchini* and inappropriately constricted the plaintiffs' right to publicity.

V. AN ALTERNATIVE APPROACH

To resolve the plaintiffs' trademark claims, the court should have employed the rule in *Lloyd* and decided the case utilizing the "alternative channels" standard.¹⁸⁷ Using this test, the court could have arrived at the same conclusion by determining that if the defendants are not allowed to recover reasonable costs associated with news gathering via the use of a 900-line service, a "chilling effect" upon the exercise of first amendment rights could result.¹⁸⁸ Specifically, the court might have found that to restrict the defendants' ability to conduct surveys with a 900-line telephone service could leave some news gatherers without adequate alternative channels of news collection.¹⁸⁹ Additionally, this reasoning would not be inconsistent with a determination that the utilization of some alternate channels such as 800-lines, standard service telephone lines or mail may be prohibitively expensive, thereby chilling the free exercise of first amendment news gathering in some instances.¹⁹⁰

185. *Id.* at 1547.

186. *Zacchini*, 433 U.S. at 575.

187. *Lloyd*, 407 U.S. at 567.

188. *See* *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29, 50 (1970).

189. It is unlikely that large newspapers such as *Star Magazine* and *USA Today* could not afford to expend resources for alternatives to 900-number polling. However, if the defendants could show that the sample they were interested in could only be effectively polled by telephone (because, for example, the target population does not respond adequately to mail questionnaires or live polling), then the defendants' 900-number polling may well be without reasonable alternatives to 900-number polling.

190. For example, with respect to telephonic surveys, it is reasonable to infer that the cost of a 900-line call probably acts as a disincentive to call versus a free line, thus skewing survey results toward those who could afford the call. But an 800-number that is toll-free to the consumer would result in charges to the 800-line subscriber. Interview with Mary Calloway, ATT Readyline Services, Dec. 27, 1990. A subscriber news gatherer would be responsible for the expense of the poll respondents' calls made to such an 800-line. But a price incentive (free calls to the consumer) could, in some cases, result in a volume of calls which would be prohibi-

Thus, utilization of the rule in *Lloyd* would have allowed the court to more appropriately balance the trademark rights of the plaintiffs with the public interest in the maximum production and protection of news gathering and dissemination.

Since the plaintiffs' misappropriation of publicity and, statutory and common law trademark claims arose under state law,¹⁹¹ the *New Kids* court should have applied the precedent set out in *Robins v. Pruneyard Shopping Center*¹⁹² ("Pruneyard").¹⁹³ In that case, the United States Supreme Court affirmed the California Supreme Court's narrowing of property rights by interpreting California's Constitution as providing a greater protection of speech than the federal Constitution.¹⁹⁴ In *Pruneyard*,¹⁹⁵ students who sought to solicit support for their opposition to a United Nations resolution against "Zionism," set up a card table in a shopping center's central courtyard, distributed pamphlets and asked pedestrians to sign petitions.¹⁹⁶ A shopping center security guard told the students that their activity violated the shopping center's regulations and asked them to leave.¹⁹⁷ The guard's superior suggested that the students move to the public sidewalk at the shopping center's periphery.¹⁹⁸ The students, who immediately left the premises, subsequently filed a lawsuit to enjoin the shopping center from denying them access to the

tively costly to a news gatherer, where the lower volume 900-line would not. *Id.* It is conceivable that in some circumstances the revenue earning potential of a 900-line to recoup the cost of news gathering may provide the only practical method for a news gatherer to conduct a particular news gathering. One jurist observed that, with respect to free expression, picketing may be the poor man's equivalent of a printing press. *United States v. Miller*, 367 F.2d 72, 79 (2d Cir. 1966). Similarly, in some circumstances it may be reasonable to view 900-number surveys as the poor man's Gallup Poll.

191. *New Kids*, 745 F. Supp. at 1542-3. The court also acknowledged, but did not resolve a dispute as to whether the plaintiffs stated a cause of action for dilution. *Id.* at 1542 n.1. The court stated, however, that its first amendment analysis would apply to such a claim if it existed. *Id.* The court's statement is not well reasoned. See *infra* text to notes 192-219.

192. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

193. See *supra* note 84.

194. *Pruneyard*, 447 U.S. at 85 (1980). The California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. ART. I, § 2. See also *Immuno A.G. v. Moor-Jankowski*, N.Y. Ct. App. No. 264, Jan. 15, 1991. (New York Constitution's free speech guarantee shields otherwise libelous statements that would lead a reasonable reader to consider the statements expressions of opinion and not fact).

195. The defendant, Pruneyard Shopping Center, is a privately owned shopping center open to the public which is comprised of walkways, plazas, sidewalks, and buildings that contain specialty shops, restaurants, and a movie theater. 447 U.S. at 77.

196. *Pruneyard*, 447 U.S. at 77.

197. *Id.*

198. *Id.*

have a real and substantial relation to the objective sought to be attained."²¹⁰

In *Pruneyard*, the Court held that the shopping center failed to "provide sufficient justification for concluding that this test is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution."²¹¹

The Court distinguished its ruling in *Lloyd*, stating:

[o]ur reasoning in *Lloyd* . . . does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution . . . [i]n *Lloyd* . . . there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court [in *Pruneyard*].²¹²

In *Pruneyard*, the Supreme Court also discounted the importance of the availability of alternative channels of expression in sharp contrast to its opinion in *Lloyd*, stating:

[a]lthough appellants contend there are adequate alternative avenues of communication available for appellees, it does not violate the United States Constitution for the State Supreme Court to conclude that access to appellants' property in the manner required here is necessary to the promotion of state-protected rights of free speech and petition.²¹³

Like *Pruneyard*, *Lloyd* addressed a property owner's right to exclude others from using the owner's real property for expressive purposes. Yet, *Lloyd* has been applied to cases where intangible property rights conflicted with federal free speech rights.²¹⁴ The *New Kids* court could have used analogous reasoning to support an application of the holding in *Pruneyard* to state intangible property rights claims, such as misappropriation, where such claims conflict with free speech rights granted by the California Constitution, as was the case in *New Kids*.²¹⁵

210. *Id.* at 85 (quoting *Nebbia v. New York*, 291 U.S. 502, 523, 525 (1934)). See also *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-125 (1978).

211. *Pruneyard*, 447 U.S. at 84.

212. *Id.* at 81. See *Cooper v. California*, 386 U.S. 58, 62 (1967); *Lloyd*, 407 U.S. at 569-570.

213. *Id.* at 85 n.8.

214. See *supra* note 12.

215. *New Kids*, 745 F. Supp. at 1545.

shopping center for the purpose of soliciting signatures for their petitions.¹⁹⁹

Ruling in favor of the students, the California Supreme Court distinguished *Lloyd*²⁰⁰ and held that the California Constitution protects speech and petitioning, reasonably exercised, in shopping centers even when the center is privately owned, and that such a result does not infringe the property owner's property rights protected by the federal Constitution.²⁰¹

The shopping center appealed,²⁰² claiming, inter alia, that the ruling amounted to a taking of its property without just compensation in violation of the taking clause of the federal Constitution.²⁰³ The United States Supreme Court affirmed the California decision.²⁰⁴ The Court stated that "a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."²⁰⁵ Noting that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense,"²⁰⁶ the Court stated that

the determination whether a state law unlawfully infringes a landowner's property in violation of the Taking Clause requires an examination of whether the restriction on private property "[forces] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."²⁰⁷

The Court stated that such a determination required an "inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."²⁰⁸ Noting that "[w]hen 'regulation goes too far it will be recognized as a taking,'"²⁰⁹ the Court stated that ". . . [t]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall

199. *Pruneyard*, 23 Cal. 3d at 903.

200. *Id.* at 905-906.

201. *Id.* at 910.

202. *Pruneyard*, 447 U.S. at 79.

203. *Id.* at 84.

204. *Id.* at 79.

205. *Id.* at 81.

206. *Id.* at 82. (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

207. *Pruneyard*, 447 U.S. at 82-83 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

208. *Id.* at 83 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

209. *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Had the *New Kids* court applied the test set out in *Pruneyard*,²¹⁶ it could have concluded that the state's interest in promoting expansive free speech rights outweighed the New Kids' property interests in their name or likeness. While *New Kids* could argue that the use of their persona for news gathering by 900-lines "goes too far" and constitutes a taking in toto by virtue of the fact they too operated a 900-line,²¹⁷ it is unlikely such an argument would prevail. In *Pruneyard* the Court acknowledged that "one of the essential sticks in the bundle of property rights is the right to exclude others"²¹⁸ and that, with respect to the owners of the shopping center, "there has literally been a "taking" of that right."²¹⁹ Nevertheless, the Court held that California's interest in promoting free speech outweighed that essential property interest.²²⁰ If the *New Kids* court similarly balanced the New Kids' property interests against the state's interest in promoting free speech it seems likely that, given the result in *Pruneyard*, the state's interest would prevail. Thus, the *New Kids* court could have used the California Supreme Court's ruling in *Pruneyard* to resolve the plaintiffs' right to publicity claims, and reached the same result, but without the aforementioned contortions of reasoning and misinterpretation of precedent employed in the *New Kids* opinion. This reasoning would at least apply to the claims against USA Today, those against Star Magazine pose a somewhat different problem.

Even if the court had employed alternate analysis, suggested here, the court should still distinguish Star Magazine's use of its New Kids survey line to promote its trivia game.²²¹ Since such promotion amounts to little more than commercial speech,²²² the court should conclude that use of the plaintiffs' trademark for any collateral commercial benefit beyond news gathering should be actionable.²²³ Similarly, purely commercial use of the plaintiff's persona would probably fail under *Pruneyard* as such use would not substantially further the state's interest in strengthening state created free speech rights.²²⁴

The court may find that the defendants' usage of the plaintiffs'

216. See *supra* notes 207-211 and accompanying text.

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

218. *Pruneyard*, 447 U.S. at 82 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)).

219. *Pruneyard*, 447 U.S. at 82.

220. *Id.* at 83.

221. *New Kids*, 745 F. Supp. at 1542.

222. See *supra* notes 142-168 and accompanying text.

223. *Id.*

224. See *supra* notes 209-211 and accompanying text. This analysis would equally apply to New Kids state and common law trademark claims and any state dilution claim as well. See *supra* notes 205-210 and accompanying text.

trademark or persona or likeness is not limited to constitutionally protected news gathering and dissemination but that some protected usage has occurred. If this happens, an equitable solution would be to find liability for infringement and/or misappropriation but award damages in the amount of revenue generated beyond the costs conducting protected news gathering and dissemination.

VI. CONCLUSION

The alternative channels standard set out in *Lloyd* is fair, workable, and still good law. The court in *New Kids* should have used the rule in *Lloyd* instead of generating a new standard by misadapting the rule in *Rogers* to address *New Kids*' Lanham Act claims.²²⁵ Similarly, the court should have decided the *New Kids*' misappropriation claims in accordance with the rule in *Zachinni*, not *Midler*.²²⁶ Moreover, the court could have reached the same result regarding USA Today, without misapplication of precedent by utilizing the broad free speech provision of the California Constitution.²²⁷

More troubling, than the court's creative application of precedent, however, is the fact that the *New Kids* court failed to recognize that its reasoning results in severely constricted intangible property rights and opens a Pandora's box of first amendment concerns. For example, if a party's intangible property rights are subordinate to another's first amendment rights upon a mere showing that the second party's use of the intangible property is not completely unrelated to news gathering,²²⁸ are real property rights similarly subordinated? If so, could intrusions into the homes of private citizens by newspaper reporters be justified upon a showing that the reporters were simply digging up news for prospective articles?

Another concern arises from the court's expansion of the *Midler* test to include first amendment protection of the use of another's name or likeness if the use is not misleading and is simply related to the gathering of information for dissemination to the public.²²⁹ If followed by other courts, this reasoning could broaden the ambit of the first amendment far beyond its current scope. For example, courts could allow the commercial exploitation of a photograph of a person who is not a public figure, without compensation to that person merely because the photograph re-

225. See *supra* notes 110-139 and accompanying text.

226. See *supra* notes 179-186 and accompanying text.

227. See *supra* notes 191-224 and accompanying text.

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

229. *Id.* at 1546.

corded the physical location and physical characteristics of the person at a particular instant in time and that, in and of itself, could always be construed to have some informational value. This reasoning could effectively eviscerate state right to publicity laws.²³⁰

Yet, the *New Kids* court's finding of first amendment protection for Star Magazine's and USA Today's usage of the New Kids trademark and persona upon a determination that such use was newsworthy²³¹ could also constrict first amendment freedoms by allowing unwarranted judicial encroachment on the editorial prerogatives of the press to determine what is newsworthy. "A determination concerning . . . newsworthiness . . . cannot help but be based on the content of the . . . message it delivers."²³² An application of the *New Kids* court's ruling would allow one 900-line poll to use otherwise protected trademarks, names and likenesses while another will be "disallowed solely because the Government determines that the message being conveyed in the one is newsworthy . . . while the message imparted by the other is not."²³³ The permissibility of the use of the trademark, name or likeness of another would often depend "solely on the nature of the message being conveyed."²³⁴ This would result in a regulation of speech based upon its content. Thus, the "newsworthiness" requirement imposed by the *New Kids* court²³⁵ is constitutionally infirm because "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."²³⁶

But perhaps the best exemplars of the court's faulty reasoning comes from the court itself in the form of examples it gives to illustrate when the court would find the use of the New Kids persona or trademark to be wholly unrelated to news gathering.²³⁷ The first example the court cites as outside the ambit of first amendment protection is the utilization of the New Kids trademark or persona in relation to the operation of a 900-number that is unrelated to any proposed article.²³⁸ But since news can be gathered without any particular proposed article in mind and yet become a part of some subsequent article, or since data may be collected

230. See *supra* note 5 and accompanying text.

231. *Id.* at 1545.

232. *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

233. *Id.*

234. *Carey v. Brown*, 447 U.S. 455, 461 (1980).

235. *New Kids*, 745 F. Supp. at 1545.

236. *Regan v. Time, Inc.*, 468 U.S. at 648-9 (quoting *Carey v. Brown*, 447 U.S. at 463). See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

237. See *infra* notes 238-246 and accompanying text.

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

which is subsequently disseminated in a manner unforeseen at the time of the gathering,²³⁹ the court's first example contradicts its holding that use of trademark and persona is protected unless such use is *unrelated* to news gathering and dissemination.²⁴⁰ Similarly, the court's example seems to prohibit professional pollsters from taking polls where the purpose is simply for the sake of gathering data, or from gathering data and offering it to third parties who may or may not choose to publish the results. The court's example indicates that such pollsters would be prohibited merely because the pollsters' efforts would not be related to any specific proposed article.²⁴¹ Thus, while extending the scope of news gathering protected under the first amendment to 900-number polling technology,²⁴² the court's example would produce a chilling effect upon the gathering of news in general by requiring that it be related to an article *a priori*.²⁴³

The court's second example is equally flawed. The court states that use of the New Kids mark or persona in conjunction with a 900-number after publication of the news generated by the 900-number use of the mark or persona would also not be protected by the first amendment.²⁴⁴ This example suffers from the same infirmity as the court's other example because it fails to account for the fact that virtually all new data collection could rightly be construed as news simply by virtue of the fact that the data was heretofore not collected. For instance, extrapolating from the court's example, once a poll is taken using a 900-number and the results are published, the poll taker would be prohibited from retaking the poll.²⁴⁵ This would undoubtedly discourage poll takers from retaking polls as a check for accuracy or as a resampling of opinion at some future point in time. This, in turn, would conflict with one of the purposes of the first amendment, to encourage an informed public.²⁴⁶

239. Interview with Tom Wilkinson, managing editor, Washington Post, Mar. 8, 1991. "We expect people to gather information regardless of whether they have a particular story in mind. It happens all the time. We expect that reporters are really reporting throughout their waking hours and if they are in any situation where they can gather or process information that may appear in any number of later stories without having any of those particular stories in mind, they do so. That's just a given, and has been in this business for as long as I can remember. *Id.* Note, however, that some journalists feel that ethical journalistic practices require that data be collected with the intent to ultimately disseminate information. Interview with Terry Schwadron, assistant managing editor of the Los Angeles Times, Mar. 8, 1991.

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

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

242. *Id.* at 1542.

243. *Id.* at 1547.

244. *Id.*

245. *Id.*

246. *Kunz v. New York*, 340 U.S. 290, 302 (1951) ("[t]he purpose of constitutional protec-

Thus, the *New Kids* opinion, through misapplication of precedent and flawed reasoning, fails to appropriately protect intangible property rights and disregards the serious first amendment consequences which would flow from its decision if it is followed.

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tion of speech is to foster peaceful interchange of all manner of thoughts, information and ideas"). See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Consolidated Edison Co. v. Public Serv. Comm'n.*, 447 U.S. 530, 533 (1980).

