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Teri N. Hollander

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COMMENTS

ENJOINING UNAUTHORIZED BIOGRAPHIES AND DOCUDRAMAS

In August 1994, Elizabeth Taylor filed a lawsuit in Los Angeles County Superior Court against the National Broadcasting Company ("NBC"), claiming trademark infringement and invasion of privacy by a proposed docudrama based on an unauthorized biography of her life.¹ Her lawsuit brings to the fore the question whether a claim of appropriation of name or likeness affords expanded protection to a celebrity's name when others use that name in the legitimate, noncompetitive context of a docudrama.²

In the last few years, we have witnessed the American public's insatiable demand for docudramas.³ This never-ending appetite for stories based on truth has resulted in the broadcast of three movies of the week ("MOW"s) involving Amy Fisher.⁴ The networks are willing to take risks on this type of MOW because: docudramas are cheaper to produce than stories involving original screenplays;⁵ the public is familiar with and interested in the story, thus helping to ensure relatively high ratings;⁶ and

1. Stephen Galloway, *Taylor Sues to Stop NBC Mini*, HOLLYWOOD REP., Aug. 8, 1994, at 1, 14.

2. Elizabeth Taylor's Complaint stated in pertinent part:

Defendants will substantially profit from the sale of its product by exploiting plaintiff, deliberately fictionalizing her life and misappropriating her registered trademark, service mark and tarnishing the image of her trademark, service mark and trade name, which has achieved strong secondary meaning.

Plaintiff's Complaint at 9, *Taylor v. National Broadcasting Co.*, (L.A. Super. Ct. Aug. 17, 1994) (No. BC 110922).

3. "The genre involves a merging of 'documentary,' an objective, factual interpretation of real persons or events, and 'drama,' which can be defined as a 'creative, subjective interpretation of a human situation.'" Tim A. Pilgrim, *Docudramas and False-Light Invasion of Privacy*, 10 COMM. & THE L. 3, 4 (1988) (quoting Joseph P. McKerns, *Television Docudramas: The Image as History*, 7 JOURNALISM HIST. 24 (1980)).

4. Tom Shales, *TV Previews 'Lolita' and The Network Sleazestakes*, WASH. POST, Jan. 2, 1993, at D1.

5. Michelle E. Lentzner, Note, *My Life, My Story, Right? Fashioning Life Story Rights in the Motion Picture Industry*, 12 HASTINGS COMM. & ENT. L.J. 627, 628 (1990).

6. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 128-29 (1993).

news broadcasts can cross-promote⁷ the story because the real person's story is considered "news."

Due to the high demand for such stories, networks are willing to go to extreme lengths to secure the rights to already public stories.⁸ Instead of plucking the story from the headlines, more and more, producers approach the subject seeking an often expensive "exclusive" right to the subject's life story.⁹ By creating this market for exclusive stories, the networks unwittingly may have created a right for public figures to own their life stories completely, as a written biography or docudrama.¹⁰

One commentator stated that "[b]iographical efforts that are complimentary in tone appear to be beyond the reach of liability for disclosure."¹¹ Other commentators noted that the public commonly believes that the life of a public figure¹² belonged to the citizens.¹³

[The law] has recognized a legitimate public curiosity about the personalities of celebrities, and about a great deal of otherwise private and personal information concerning them. Their biographies can be written, and their life histories and their characters set forth before the world in unflattering detail. Discreditable facts about them can be exposed.¹⁴

7. Cross-promotion means that news broadcasters interview the subject of the docudrama and show clippings from broadcasts taken at the time the story first appeared in order to promote the MOW. The MOW, in turn, produces interest in the news broadcast by titillating viewers with the opportunity to see the "real" person. The "celebrity enhances the marketability of a wide array of collateral products and services." *Id.* at 129.

8. Howard Kurtz, *Fees for Sleaze: When You Buy News, Do You Get Taken?*, WASH. POST, Jan. 27, 1994, at C1.

9. *Id.*

10. George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 448 (1991). "The legal doctrine of ownership as exclusive rights is both a consequence of and a stimulus to market exchange." *Id.*

11. Stephen I. Katz, Comment, *Unauthorized Biographies and Other "Books of Revelations": A Celebrity's Legal Recourse to a Truthful Public Disclosure*, UCLA L. REV. 815, 818 (1989).

12. "A public figure has been defined as a person who, by his accomplishments, fame, or mode of living . . . has become a 'public personage.' He is . . . a celebrity — one who by his own voluntary efforts has succeeded in placing himself in the public eye." William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 410 (1960) (citing *Cason v. Baskin*, 30 So. 2d 635, 638 (1947)).

13. Katz, *supra* note 11, at 820 (quoting Connelly, *Kitty Kelley's Battle with Sinatra*, N.Y. DAILY NEWS, Sept. 25, 1984, at C14). See Jeannine Stein, *Ben Stein; He's Been a Lawyer, Actor, Speechwriter and Journalist; Now He's Playing Opposite Joan Rivers in a Libel Suit*, L.A. TIMES, Jan. 21, 1988, at 4.

14. Prosser, *supra* note 12, at 416-17 (citing *Jeffries v. New York Evening J. Co.*, 124 N.Y.S. 780 (1910)); *Koussevitzky v. Allen, Towne & Heath, Inc.*, 68 N.Y.S.2d 779 (1947), *aff'd*, 69 N.Y.S.2d 432 (1947). See also *Corliss v. E.W. Walker Co.*, 64 F. 280 (D. Mass. 1894); *Smith v. Suratt*, 7 Alaska 416 (D. Alaska 1926).

In fact, "storytellers are entitled to dramatic license and . . . this privilege is unquestioned all the way back to Shakespeare's 'Richard III.'"¹⁵

In "the age of the multi-media publicity blitzkrieg,"¹⁶ the recent trend to produce unauthorized docudramas about the lives of living public figures has brought about an increasing number of legal objections to their broadcast.¹⁷ While courts traditionally refused to grant injunctions under a defamation theory,¹⁸ creative plaintiffs have attempted to bypass this obstacle by alleging a violation of the right of privacy, right of publicity, or copyright infringement.

While the right to an injunction under the right of privacy or publicity has never been successfully challenged on First Amendment principles, courts have been unwilling to extend injunctions to an obvious reformulation of the attempt to protect one's reputation. This Comment assesses the possibility of obtaining an injunction in the context of the unauthorized biography or docudrama. Part I defines and discusses the elements and constitutionality of prior restraints. Part II focuses on the viability of prior restraints under defamation, the right of privacy, and commercial speech. Part III considers whether the availability of prior restraints can be extended to the unauthorized biography. The analysis postulates that courts will more likely find an appropriation of a life story violating the right of publicity where the plaintiff seeks damages, rather than an injunction.¹⁹ This explains the apparent discrepancies in the results of the various cases. Part IV assesses the availability of injunctions against the unauthorized biography under copyright law. This Comment concludes that public figures have difficulty protecting their reputations since courts rarely grant injunctions. In order to succeed in an appropriation claim, generally celebrities must allege a violation of their right of publicity, rather than privacy, and must request damages, rather than an injunction. In fact, courts may only grant an injunction for unauthorized biographies where the defendant violated a provision of copyright law.

15. Amy E. Schwartz, *Cut the 'Crawl,'* WASH. POST, Oct. 8, 1994, at A19.

16. *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 304 (9th Cir. 1992).

17. While Elizabeth Taylor went so far as to file suit to enjoin the broadcast of a docudrama about her life, other stars such as Mia Farrow, Roseanne Barr, and Madonna spoke to their attorneys about similar actions. John Dugdale, *Feuds Corner*, THE TIMES (London), Sept. 18, 1994, at Features 1.

18. See discussion *infra* part II.A.

19. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). See also *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (1983).

I. BACKGROUND

A. *Constitutionality of Prior Restraints*

There is a heavy presumption against prior restraints²⁰ in the context of First Amendment violations.²¹ In fact, this presumption acts as an almost complete bar against such restraints.²² The Supreme Court recognized that “[e]ven where questions of allegedly urgent national security or competing constitutional interests are concerned, [the Court has] imposed this ‘most extraordinary remed[y]’ only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.”²³ While “prior restraints are not unconstitutional [*per se*,”²⁴ courts view prior restraints as more serious encroachments on the First Amendment right to free speech than ensuing punishment, such as damages.²⁵ “[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.”²⁶

Courts are reluctant to grant an injunction where a broadcast may cause speculative economic harm.²⁷ However, plaintiffs suing for damages for appropriation of a life story, which interferes with their right of publicity, are more likely to succeed in attaching liability during the liability phase of a trial, because damages do not interfere with a defendant’s First Amendment rights, “A prior restraint prevents the speech from reaching the marketplace, while post-publication penalties allow the speech to be disseminated, and merely force the speaker to bear the consequences.”²⁸ By granting damages, a court acknowledges the plaintiff’s rights

20. “[P]rior restraint’ is a term of art referring to judicial orders or administrative rules which operate to forbid expression before it takes place.” RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 8.01[2], at 8-5 (1994).

21. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558 (1976) (citing *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

22. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975).

23. *CBS Inc. v. Davis*, 114 S. Ct. 912, 914 (1994) (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (citations omitted); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Ass’n*, 427 U.S. at 562).

24. *Southeastern Promotions, Ltd.*, 420 U.S. at 558.

25. *Nebraska Press Ass’n*, 427 U.S. at 559; *Southeastern Promotions, Ltd.*, 420 U.S. at 559.

26. *Southeastern Promotions, Ltd.*, 420 U.S. at 559.

27. *CBS Inc.*, 114 S. Ct. at 914 (citing *Nebraska Press Ass’n*, 427 U.S. at 563).

28. SMOLLA, *supra* note 20, § 8.02[2], at 8-15.

by paying the owner of the right for any unjust enrichment enjoyed by the defendant. Prior restraints are disfavored because, while “a threat of criminal or civil sanctions after publication ‘chills’ speech, [a] prior restraint ‘freezes’ it at least for the time.”²⁹

Although the courts have promulgated a balancing test to weigh the First Amendment interests against the property interest in one’s persona, the Supreme Court has applied a strict scrutiny test to determine whether to impose an injunction.³⁰ Prior restraints are “a form of infringement upon freedom of expression to be especially condemned.”³¹ The government must prove a compelling government interest and that the remedy sought is the least restrictive means to achieve the plaintiff’s goal,³² in other words, there are no other alternatives that could better protect the defendant’s right of free speech and equally protect the plaintiff’s rights.

A court order issuing an injunction as a prior restraint has serious consequences on First Amendment freedoms. Under the “collateral bar rule,” a plaintiff who publishes, despite a court order, will face contempt of court.³³ This is a grave violation of First Amendment rights with the effect of silencing the speaker. Chilling speech completely is more egregious than a mere premium on the right to speak.

Even though the collateral bar rule restrains speech by prohibiting those who disobey the prior restraint from challenging its constitutionality, the court in *Matter of Providence Journal Company*³⁴ created an exception. That court held that “[a] party subject to an order that constitutes a transparently invalid prior restraint on pure speech may challenge the order by violating it.”³⁵ Yet, violating a court order is a risky undertaking. If the court fails to find that the order was “transparently invalid,” then the collateral bar rule still applies.³⁶

29. *CBS Inc.*, 114 S. Ct. at 914 (quoting *Nebraska Press Ass’n*, 427 U.S. at 559).

30. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

31. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)).

32. *CBS Inc.*, 114 S. Ct. at 914 (citing *Nebraska Press Ass’n*, 427 U.S. at 559).

33. SMOLLA, *supra* note 20, § 8.02[2], at 8-16. “The ‘collateral bar rule’ generally forbids a defendant from raising objections in a contempt of court proceeding to the substantive legal validity of the court order the defendant disobeyed.” *Id.* at 8-16 n.19.

34. 820 F.2d 1342 (1st Cir. 1986), *modified, on reh’g, en banc*, 820 F.2d 1354 (1st Cir. 1987), and *cert. granted, sub nom.*, *United States v. Providence Journal Co.*, 484 U.S. 814 (1987), and *cert. dismissed*, 485 U.S. 693 (1988).

35. *Id.* at 1344.

36. *Id.* at 1353.

B. Procedural Requirements

In *Southeastern Promotions Ltd. v. Conrad*,³⁷ the Supreme Court held that prior restraints must be "accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech."³⁸ The procedural safeguards are necessary because "[t]he heavy presumption of unconstitutionality against a prior restraint 'is not reduced by the temporary nature of [the] restraint.'"³⁹

Courts have adopted a five-step test to decide whether to grant a preliminary injunction:

- (1) Can plaintiff show a probability of success at the ultimate trial on the merits?
- (2) Can plaintiff show that she will suffer "irreparable injury" pending a full trial on the merits?
- (3) Will a preliminary injunction preserve the "status quo" which preceded the dispute?
- (4) Do the hardships balance in favor of plaintiff?
- (5) Is a preliminary injunction helpful to protect third parties?⁴⁰

The Ninth and Second Circuit Courts of Appeals have developed a more complex test. The moving party must show: "(1) Irreparable harm pending trial; and (2) either (a) a probability or likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly in the moving party's favor."⁴¹ Although courts have granted preliminary injunctions when the harm is irreparable, courts have refrained from so doing when the burden on the defendant is inordinate.⁴²

37. 420 U.S. 546 (1975).

38. *Id.* at 559 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963)).

39. *Matter of Providence Journal Co.*, 820 F.2d at 1352 (quoting *Nebraska Press Ass'n*, 427 U.S. at 559).

40. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 11.6[B], at 11-26 (1994). See *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Coffee Dan's, Inc. v. Coffee Don's Charcoal Broiler*, 305 F. Supp. 1210 (N.D. Cal. 1969).

41. MCCARTHY, *supra* note 40, § 11.6[B], at 11-26.1 (alteration in original). See *Sardi's Restaurant Corp. v. Sardi*, 755 F.2d 719 (9th Cir. 1985); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206-07 (2d Cir. 1979).

42. MCCARTHY, *supra* note 40, § 11.6[B], at 11-26.1. See *Smith v. Goro*, 323 N.Y.S.2d 47 (1970); *Marcinkus v. NAL Publishing Inc.*, 522 N.Y.S.2d 1009 (N.Y. Sup. Ct. 1987).

II. AVAILABILITY OF PRIOR RESTRAINTS UNDER VARIOUS THEORIES OF RECOVERY

Plaintiffs have a choice of many different theories of recovery against publishers of an unauthorized biography. However, the "single publication rule"⁴³ prohibits plaintiffs from filing multiple lawsuits that could arise out of the mass publication.⁴⁴ Courts apply this rule to both defamation and invasion of privacy claims.⁴⁵ Thus, plaintiffs must assert all causes of action at one time, and cannot recover large amounts in multiple jurisdictions under different theories of recovery. An injunction in one court is national in scope.

A. Defamation

Courts traditionally refuse to grant injunctions to enjoin defamation against public and limited public figures.⁴⁶ "[W]here truth or falsity is the issue, judges are fallible in the context of a hearing on a preliminary injunction and could be mistaken about what is true and what is false."⁴⁷ Thus, the fear of chilling what might be true speech has led to the practical prohibition against issuing injunctions where the cause of action is grounded in defamation or false speech. Generally, damages are thought

43. Section 1 of the Uniform Single Publication Act, 9C U.L.A. 173 (1971), provides:

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

Khaury v. Playboy Publications, Inc., 430 F. Supp. 1342, 1345-46 n.3 (S.D.N.Y. 1977) (quoting 9C U.L.A. 173 (1971)).

44. *Khaury*, 430 F. Supp. at 1345; *Morgan v. Hustler Magazine, Inc.*, 653 F. Supp. 711, 717 (N.D. Ohio 1987).

45. *Khaury*, 430 F. Supp. at 1345. At least eight jurisdictions have applied "the single publication rule to invasion of privacy claims founded upon mass communications." *Id.* at 1345-46. These include Arizona, California, Idaho, Illinois, New Mexico, North Dakota, and Pennsylvania. *Id.* at 1346 n.4.

46. See *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206 (6th Cir. 1990) (quoting *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987)); *Alberti v. Cruise*, 383 F.2d 268 (4th Cir. 1967); *Robert E. Hicks Corp. v. National Salesmen's Training Ass'n*, 19 F.2d 963 (7th Cir. 1927).

47. *MCCARTHY*, *supra* note 40, § 11.6[C], at 11-28.

to be an adequate remedy.⁴⁸ Yet damages do not prevent harm to one's reputation.

In *Goldblum v. National Broadcasting Corp.*,⁴⁹ the Ninth Circuit refused to grant an injunction suspending the broadcast of a docudrama and held as void an order by the district court to produce said docudrama in court to determine the legitimacy of the allegations, even where the plaintiff's constitutional rights would be infringed. In this case, the underlying cause of action apparently was defamation, but the plaintiff alleged that the broadcast would interfere with his right to a fair trial.⁵⁰ The court found the connection to his right to a fair trial too attenuated to justify a prior restraint.⁵¹ In addition, the court noted that "the press may not be required to justify or defend what it prints or says until after the expression has taken place."⁵² It would be just as much of an infringement on free speech to interfere by editing speech as it would be to freeze it entirely.⁵³ Consequently, even an infringement of the plaintiff's constitutional rights fails to overcome the heavy presumption against prior restraints under a defamation claim.⁵⁴ A party seeking to obtain an injunction against the publication of a biography under a theory of defamation faces an almost impossible task.⁵⁵

B. Right of Privacy Generally

Courts have sometimes granted injunctions against certain speech when it invades an individual's right of privacy. Under the privacy right, a plaintiff objects to the injurious, albeit truthful nature of the speech.⁵⁶

48. *Alberti*, 383 F.2d at 272.

49. 584 F.2d 904 (9th Cir. 1978).

50. *Id.* at 906.

51. *Id.* at 906-07.

52. *Id.* at 907 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975); *Near v. Minnesota*, 283 U.S. 697 (1931)).

53. *Goldblum*, 584 F.2d at 907.

54. See Elaine Dutka, *Political Drama Tests the Limits of Diplomacy*, L.A. TIMES, Sept. 14, 1995, at F10 ("[A] public figure . . . has the burden of proving malice—reckless disregard for the truth. The possibility of preventing [a] show from airing at all, . . . is slim to none.")

55. It should be noted, however, that USC law professor Matthew Spitzer has suggested that the subject of an MOW may be better able to argue that the media disregarded the truth if the media were made aware of, yet ignored, factual inconsistencies before broadcast. Such may be the case for Henry Kissinger: For the Turner Network-produced MOW, "Kissinger & Nixon," meetings took place between the actor, Ron Silver, and the subject, Kissinger, in which Kissinger voiced his objections to the factual portrayal of events. Turner Network ignored Kissinger's objections. *Id.*

56. See *Rosemont Enters. v. Random House, Inc.*, 294 N.Y.S.2d 122, 127 (1968), *aff'd mem.*, 301 N.Y.S.2d 948 (1969).

"Whereas injuries to reputation can, at least in theory, be 'cured' and 'made whole' by money damages, there are forms of privacy invasion that cannot be remedied unless the invasive activity is stopped, or the revelation of private information prevented."⁵⁷ However, courts have recognized that legitimate public interest in the subject may allow some intrusion into the private life of the individual; thus, injunctions must be narrowly drawn so as not to deprive the public of its right to the story.⁵⁸

In *Commonwealth v. Wiseman*,⁵⁹ the court granted an injunction against the display of a film which invaded the privacy rights of inmates at a mental institution by depicting them in the nude and ranting obscenely.⁶⁰ Due to the failure to obtain consent from many of the inmates, and the humiliating and degrading portrayal of those inmates, the court found that the legitimate state interest did not warrant invading the rights of privacy in such a crass manner.⁶¹ Although the issues were of public interest, the inmates were private figures. Accordingly, the court held that the "massive, unrestrained invasion of the intimate lives of these State patients [could] be prevented by properly framed injunctive relief."⁶² The court ruled that the film could only be shown to those with professional or specialized interests such as "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity."⁶³

C. Commercial Rights

Dean Prosser redefined the tort of invasion of privacy to include the misappropriation of a name or likeness.⁶⁴ What he failed to include in

57. SMOLLA, *supra* note 20, § 8.05[1][b], at 8-75.

58. *Galella v. Onassis*, 487 F.2d 986, 995, 998 (2d Cir. 1973).

59. 249 N.E.2d 610 (1969).

60. *Id.* at 613 & n.2.

61. *Id.* at 613-14.

62. *Id.* at 615.

63. *Id.* at 618.

64. Prosser, *supra* note 12, at 389.

The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff which . . . may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Id. *Accord* *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (1979).

that definition is the misappropriation of a life story. Prosser states that the appropriation of one's name concerns "a symbol of his identity . . . , and not his name as a mere name."⁶⁵ Courts have generally agreed that product endorsements use names as symbols.⁶⁶ A name is "a right of value upon which the plaintiff can capitalize by selling licenses."⁶⁷ In cases where the defendant seeks to tell a celebrity's life-story in a negative light, the celebrity primarily wishes to protect the first three types of privacy rights, and only secondarily the fourth, which is now known as the "right of publicity."⁶⁸ "[T]he right of publicity protects the celebrity's pecuniary interest in the commercial exploitation of h[er] identity."⁶⁹

There are policy reasons behind the failure to recognize a life story as a "name or likeness." "Tortious liability for appropriation of a name or likeness is intended to protect the value of an individual's notoriety or skill."⁷⁰ Yet, the appropriation of a life story might also diminish the value of said "celebrity," especially where some of that fame derives from the scarcity of appearances. "Associating one's goodwill with a product transmits valuable information to consumers. Without the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero."⁷¹ Accordingly, "the facts of an individual's life possess no intrinsic value that will deteriorate with repeated use."⁷² The fictionalization of a real person into a character could not reasonably be understood to refer to that real person.⁷³

Whether damages would adequately compensate for the appropriation of a name or likeness under the right of publicity appears doubtful. As it is extremely difficult to assess the amount of damages to a celebrity,⁷⁴ any amount of damages would be purely speculative and possibly not enough

65. Prosser, *supra* note 12, at 403. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 n.9 (9th Cir. 1974).

66. *Motschenbacher*, 498 F.2d at 824, n.9 and accompanying text.

67. Prosser, *supra* note 12, at 406.

68. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983) (citing *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 220 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979)). See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

69. *Carson*, 698 F.2d at 834 (citing *Zacchini*, 433 U.S. at 573). See generally Howard I. Berkman, Comment, *The Right of Publicity — Protection for Public Figures and Celebrities*, 42 BROOK. L. REV. 527 (1976).

70. *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994).

71. *Id.* at 437-38; see generally Frank H. Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 Q.J. ECON. 582 (1924).

72. *Matthews*, 15 F.3d at 438.

73. *Levey v. Warner Bros. Pictures, Inc.*, 57 F. Supp. 40 (S.D.N.Y. 1944).

74. *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970).

to compensate the harm. The dilution of the celebrity's persona may hurt the celebrity's ability to promote and endorse products in the future; furthermore no reasonable method exists to discover what offers might have otherwise received.⁷⁵ For this reason, in a purely commercial context, courts generally find injunctions proper to prevent the misappropriation of a name or likeness.⁷⁶ Because commercial speech is afforded only limited First Amendment protection, "[p]rior restraints designed to protect commercial or economic interests are more likely to be found to meet First Amendment standards than most other forms of prior restraints."⁷⁷

Although prior restraints should be used sparingly on commercial matters,⁷⁸ they should be available when the plaintiff's right of publicity has been invaded.⁷⁹ "If an injunction were denied, the court would be telling plaintiff to sit by and watch defendant continue to infringe upon plaintiff's rights until such time as plaintiff decided to sue again for money damages as compensation."⁸⁰ Forcing the plaintiff to wait until after broadcast requires the plaintiff to face continual harm until such time as damages can be obtained. This result hardly seems just.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁸¹ the Supreme Court enunciated a four part test to determine the legality of government restrictions on commercial speech. Under that rubric, a court must analyze whether (1) the speech in question enjoys First Amendment protection, meaning that it is lawful and not misleading; (2) the governmental interest asserted is substantial; (3) the regulation is directed to advance the state or federal interest; and (4) "[the regulation] is not more extensive than . . . necessary to serve that interest."⁸²

In *Puerto Rico Tele-Com, Inc. v. Rodriguez*,⁸³ an administrative board applied the *Central Hudson* test, and issued a cease and desist order

75. *Id.*

76. *See id.* *See also* Carson, 698 F.2d 831 (1983).

77. SMOLLA, *supra* note 20, § 8.05[2], at 8-76. *See* United States v. Richey, 924 F.2d 857 (9th Cir. 1991); American Motors Corp. v. Huffstutler, 575 N.E.2d 116 (Ohio 1991).

78. Boemler Chevrolet Co. v. Combs, 808 S.W.2d 875, 881 (Mo. App. 1991); SMOLLA, *supra* note 20, § 8.05[2], at 8-78. *See* American Future Sys., Inc. v. Pennsylvania State Univ., 688 F.2d 907 (3d Cir.), *cert. dismissed*, 459 U.S. 1093, *on remand*, 553 F. Supp. 1268 (M.D. Pa. 1982).

79. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 48 cmt. b (Tentative Draft No. 4, 1983) ("A continuing or threatened infringement of the plaintiff's right of publicity ordinarily justifies an award of injunctive relief.")

80. MCCARTHY, *supra* note 40, § 11.6[A], at 11-24.

81. 447 U.S. 557 (1980).

82. *Id.* at 566.

83. 747 F. Supp. 836 (D.P.R. 1990).

against a telephone company for false and deceptive advertising of its services. Although commercial speech is protected under the First Amendment, that protection is limited.⁸⁴ The justification behind granting less protection to commercial speech under the First Amendment is that "the greater objectivity and hardness of commercial speech . . . may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker."⁸⁵ Due to the lesser protection afforded to commercial speech, fewer procedural safeguards exist.⁸⁶ Consequently, the court held that prior restraints which meet the *Central Hudson* test are acceptable.⁸⁷ However, the advertisements in question in *Puerto Rico Tele-Com* failed to meet that test due to their misleading nature.⁸⁸

In *Carson v. Here's Johnny Portable Toilets, Inc.*,⁸⁹ Johnny Carson sued to enjoin a toilet manufacturer from infringing upon his right of publicity by misappropriating a phrase closely associated with his persona to market a portable toilet. "The famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality."⁹⁰ The Sixth Circuit reasoned that it should prevent the defendant's unjust enrichment for intentionally appropriating Carson's identity for commercial exploitation.⁹¹ The court found that Carson sufficiently stated a cause of action for misappropriation of his right of publicity and remanded for further proceedings.⁹² Thus, in the context of commercial speech, a court may issue an injunction against speech which contravenes a plaintiff's right of publicity by capitalizing on a celebrity's persona.

The policy behind recognizing only a limited protection for commercial speech becomes important in the context of the unauthorized biography:

The truth of commercial speech . . . may be more easily verifiable . . . than . . . news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information

84. *Id.* at 840 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

85. *Id.* (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (1976)).

86. *Puerto Rico Tele-Com, Inc.*, 747 F. Supp. at 842.

87. *Id.* at 844.

88. *Id.* at 845.

89. 698 F.2d 831 (6th Cir. 1983).

90. *Id.* at 835 (quoting *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 957 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980)).

91. *Id.* at 837.

92. *Id.*

about a specific product or service that he himself provides Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.⁹³

This policy has no meaning when the plaintiff seeks to prohibit the dissemination of an unauthorized biography under a theory of misappropriation of the right of publicity, i.e., as commercial speech. Even when no dispute exists as to the purely financial purpose behind producing the docudrama or publishing the biography, courts have refused to find such speech commercial.⁹⁴ When the product is an unauthorized biography, there still exists a “fear of silencing the speaker.”⁹⁵ Thus, the defendant’s unauthorized biography or docudrama deserves full protection under the First Amendment, even when the plaintiff attempts to disguise the purpose behind publication of the story as purely commercial.

III. REMEDIES FOR THE MISAPPROPRIATION OF A LIFE STORY

Prosser defined “appropriation” very narrowly as an instance where someone impersonates the celebrity to gain information or some financial or personal advantage.⁹⁶ Today, courts apply the claim of appropriation to instances when the name or picture of a celebrity is used to endorse a product without the celebrity’s consent.⁹⁷ On the other hand, courts have been reluctant to extend the scope of liability under appropriation to include a celebrity’s life story.⁹⁸ One possible explanation for the courts’ hesitation is that “there is no fear that any valuable information provided by the facts of one’s life will be reduced by repeated use”⁹⁹ The law does not forbid appropriating this type of information.¹⁰⁰

Courts hesitate to enjoin matters protected by the First Amendment: “A preliminary injunction is a drastic remedy, and the Court’s reluctance to so intervene and condemn in this manner and at this stage of the action is heightened by the realization that [the court is] dealing with a book and

93. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976).

94. See *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994); *DeClemente v. Columbia Pictures Indus.*, 860 F. Supp. 30 (E.D.N.Y. 1994).

95. *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

96. Prosser, *supra* note 12, at 403.

97. James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 651 (1973).

98. See generally *Matthews*, 15 F.3d 432; *DeClemente*, 860 F. Supp. 30.

99. *Matthews*, 15 F.3d at 439.

100. *Id.*

not with an ordinary subject of commerce."¹⁰¹ One court stated that before granting an injunction, the court would require the plaintiff "to establish a clear and compelling legal right thereto based upon undisputed facts."¹⁰² Although courts frequently grant injunctions for invasion of the rights of publicity or privacy, they hesitate to do so "if the rights of publicity or privacy are asserted in an attempt to muzzle publication of matters of public concern because of plaintiff's desire to control the content of information published about him or her."¹⁰³ As a result, public figures have been unable to suppress the publication "of a truthful and factual biography, or a fictionalized biography."¹⁰⁴

A. *Pure Speech Disguised as Commercial Speech*

Although courts may grant prior restraints more easily in the context of commercial speech, the presumption against prior restraints remains if it involves the "non-commercial aspects of speech in a general commercial setting."¹⁰⁵ For example, in *Matter of National Service Corporation*,¹⁰⁶ an advertising agency appealed an injunction prohibiting its billboard advertisement proclaiming the bankrupt status of one of the agency's customers.¹⁰⁷ The order had restrained the agency from publicly stating that the company was in debt to the agency or from communicating a message which would adversely affect the debtor company, thus interfering with the debtor's bankruptcy proceedings.¹⁰⁸

In *National Service Corporation*, the Fifth Circuit noted that the Supreme Court had defined commercial speech as speech "related solely to the economic interest of the speaker and its audience" or that "which does no more than propose a commercial transaction."¹⁰⁹ The court found that the advertiser's message did not constitute commercial speech because it was "not a solicitation for the sale or purchase of a product or service" nor

101. *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) (quoting *Pocket Books, Inc. v. Dell Publishing*, 267 N.Y.S.2d 269, 273 (1966)).

102. *Estate of Hemingway v. Random House, Inc.*, 268 N.Y.S.2d 531, 534 (1966).

103. MCCARTHY, *supra* note 40, § 11.6[C], at 11-29.

104. *Id.* § 11.6[C], at 11-29 & n.35-36. See *Rosemont Enters. v. McGraw-Hill Book Co.*, 380 N.Y.S.2d 839, 843 (1975); *Rosemont Enters. v. Random House, Inc.*, 294 N.Y.S.2d 122, 127, *aff'd without op.*, 301 N.Y.S.2d 948 (1969).

105. SMOLLA, *supra* note 20, § 8.05[2], at 8-78.

106. 742 F.2d 859 (5th Cir. 1984).

107. *Id.* at 861.

108. *Id.*

109. *Id.* See generally *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

“published by one whose profit interests are served by the view espoused.”¹¹⁰ Once the court found that the advertisement constituted pure speech, it had little difficulty holding that the prior restraint was an unconstitutional restraint on First Amendment rights.

B. *Pecuniary Rights in One's Persona*

One theory proposes that the interest in one's persona is not a personal right, but a pecuniary right:

Generally, one's interest that his name or picture not be published or broadcast is an interest of personality. But if the owner has treated it as of pecuniary value, or if by virtue of his profession or business it has become such, privacy ceases to be the dominant element, for there is now the distinct interest of substance that no one interfere with that name or picture to detract from its value.¹¹¹

For example, celebrity endorsements generate an incremental increase in a product's economic value above its actual worth.¹¹² Therefore, it would be unjust for a celebrity to go unrewarded while the distributor of the product reaps the benefits from the increased product value.

The law must protect the celebrity's name if that celebrity is to derive some economic value from the use of her name:

If the appropriation of an individual's goodwill were left untrammelled, it soon would be overused Each use of the celebrity's name or face will reduce the value that other users can derive from it. . . . We grant celebrities a property right to ration the use of their names in order to maximize their value over time.¹¹³

Otherwise, a celebrity's name would soon have no value. For example, Cher's clout in the entertainment industry dropped following the oversaturation of her infomercial on the American public.¹¹⁴ When a distributor falsely creates the appearance of a celebrity endorsement without the celebrity's consent, “[t]he tort of misappropriation of name or likeness,

110. *Nat'l Serv. Corp.*, 742 F.2d at 862.

111. *Armstrong*, *supra* note 10, at 462 (quoting Note, *Possible Interest in One's Name or Picture*, 28 HARV. L. REV. 689, 690 (1914)).

112. *Madow*, *supra* note 6, at 128.

113. *Matthews v. Wozencraft*, 15 F.3d 432, 438 n.2 (5th Cir. 1994). See generally *Knight*, *supra* note 71.

114. Ryan Murphy, *The Real Cher Life of a Businesswoman Rings with Disappointment*, DENV. POST, May 30, 1994, at F8.

. . . creates property rights . . . where the failure to do so would result in . . . excessive exploitation"¹¹⁵ It is inequitable to allow others to exploit the value of the celebrity's name without compensating the person who created the persona, while denying celebrities the right to choose which products to endorse and how often they should appear publicly.

C. *Are Damages an Adequate Remedy?*

Damages may not provide an adequate remedy for appropriation of a life story.¹¹⁶ On the one hand, if the plaintiff wishes to prevent the defendant from broadcasting an unauthorized docudrama, he or she most likely has taken offense at the material or at its public release, thus implicating the right of privacy. On the other hand, the defendant would be required to pay for the right to interfere with the plaintiff's property right, thus damages would be an adequate remedy for the appropriation of a life story under the right of publicity.¹¹⁷

In the landmark case, *Zacchini v. Scripps-Howard Broadcasting Co.*,¹¹⁸ the Supreme Court addressed the issue of appropriation of the publicity right, and stated:

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 . . . usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication.¹¹⁹

Thus, the Court distinguished the right of privacy from the right of publicity by the remedy sought. Generally, celebrities would not wish to enjoin the broadcast of their act, but would want compensation because "[t]he broadcast of a film of [the celebrity's] entire act poses a substantial threat to the economic value of that performance."¹²⁰ Similarly, celebrities would attempt to enjoin the broadcast if they wished "to be let alone."¹²¹

115. *Matthews*, 15 F.3d at 438.

116. *See* *Lugosi v. Universal Pictures*, 603 P.2d 425, 438 (1979) (Bird, C.J., dissenting).

117. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977) (The First Amendment does not give the press the privilege to show a complete performance on a news broadcast without compensating the plaintiff for financial injuries.).

118. 433 U.S. 562 (1977).

119. *Id.* at 573.

120. *Id.* at 575.

121. Prosser, *supra* note 12, at 389 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)).

The *Zacchini* court found an appropriation of the plaintiff's right of publicity where the plaintiff sought damages. In *Zacchini*, the Supreme Court addressed the issue whether showing a complete "human cannonball" act with accompanying favorable commentary on a news broadcast¹²² constituted the appropriation of the right of publicity.¹²³ The Court found that the individual has the right "to reap the reward of his endeavors . . . having little to do with protecting feelings or reputation."¹²⁴ The plaintiff simply sought compensation in the form of damages, rather than by injunction.¹²⁵ By granting the requested relief, the Court did not interfere with the defendant's right of free speech, yet the Court compensated the plaintiff for his property right by allowing him to benefit from the fruits of his labor.¹²⁶

Similarly, in *Eastwood v. Superior Court*,¹²⁷ the California Court of Appeal reversed the lower court's order sustaining a demurrer without leave to amend because the Court of Appeal determined that the plaintiff could state a cause of action for commercial appropriation under the common law where the plaintiff sought damages.¹²⁸ The court based its reasoning on the remedy sought; the plaintiff requested damages rather than an injunction. The request of damages implicated the right of publicity rather than privacy, even though the plaintiff also alleged injury to his feelings.¹²⁹ The court applied the analysis of both the *Spahn* and *Zacchini* courts to conclude that damages would not infringe upon the defendant's First Amendment rights,¹³⁰ and would give the plaintiff the commercial benefit resulting from the publication.¹³¹

The *Matthews v. Wozencraft*¹³² court left unanswered the question whether liability would exist for appropriation of a celebrity's name for use in a life story. The court reasoned that because Matthews was not a public

122. *Zacchini*, 433 U.S. at 564 n.1. ("[B]elieve me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it.").

123. *Id.* at 563-64.

124. *Id.* at 573.

125. *Id.* at 573-74. The dissent noted that the Court would have difficulty measuring damages because the defendant did not increase its profits based on the broadcast, and the plaintiff would have difficulty proving that his income had decreased. *Id.* at 581 n.2.

126. *Id.* at 578.

127. 198 Cal. Rptr. 342 (1983).

128. *Id.* at 352.

129. *Id.* at 345-46.

130. *Id.* at 350.

131. *Id.* See *Zacchini*, 433 U.S. at 573.

132. 15 F.3d 432 (5th Cir. 1994).

figure, the use of Matthews' name in the biography would not be actionable because he had no value in his name as a right of publicity:

There is nothing unique about Matthew's [sic] name or likeness that creates value for Wozencraft to appropriate. She is not "cashing-in" on goodwill associated with his name but is simply converting factual events that happen to include Matthews into fiction. The use of his name does not provide value to the book, nor is she using his name to "endorse" the book to the public, because his name has no independent value.¹³³

While this reasoning may be appropriate in cases in which the subject is a private figure or a limited public figure, it should not be applied to cases in which the subjects are celebrities who have independent value in their names which others could arguably appropriate for commercial benefit.

On the other hand, in *Melvin v. Reid*,¹³⁴ the California Court of Appeal held that the plaintiff stated a cause of action for invasion of the right of privacy where the defendant used the plaintiff's real name and distributed a film about her involvement in a murder trial and her former life as a prostitute.¹³⁵ The plaintiff asked solely for damages.¹³⁶ The use of actual facts that were in the public record were not actionable under the right of privacy.¹³⁷ However, the right of privacy encompasses the "right to happiness which includes a freedom from unnecessary attacks on [one's] character, social standing or reputation."¹³⁸ It is possible that the court might have granted a request for an injunction since the film implicated the right of privacy and furthered no First Amendment goals by using the plaintiff's real name rather than substituting a false one. From the foregoing discussion, it appears that in the context of an MOW or biography, a court will more readily grant damages to a plaintiff claiming violation of the right of publicity rather than an injunction.

D. Injunctions

If the privacy right is a personal right, then damages would not compensate for the infringement of that right; the only remedy that would

133. *Matthews*, 15 F.3d at 437.

134. 297 P. 91 (Cal. 1931). See also *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971) (right of privacy violated where publication revealed rehabilitated plaintiff's identity eleven years after crime committed).

135. *Melvin*, 297 P. at 91.

136. *Id.*

137. *Id.* at 93.

138. *Id.*

adequately protect the plaintiff would be an injunction. Where the privacy right has been infringed, humiliation or degradation still occurs even if the plaintiff receives money for his or her story after publication. Damages do not achieve the plaintiff's desire to stop the broadcast of the MOW. Damages merely compensate the plaintiff's humiliation.

Even though damages fail to remunerate the infringement of the plaintiff's right of privacy, courts typically refuse to grant an injunction to restrain the publication of news or entertainment:

[T]he Court has implied that . . . a [prior] restraint might be appropriate in a very narrow range of cases, when either national security or an individual's right to a fair trial is at stake. An individual's right to protect his privacy from damage by private parties, although meriting great protection, is simply not of the same magnitude.¹³⁹

Thus, impingement on the privacy right in the context of the unauthorized biography or MOW lacks the significance to overcome the constitutional presumption against prior restraints. Yet from a policy standpoint, "where truth or falsity is not in issue, such as with threatened or continuing invasion of privacy by intrusion, disclosure of private facts or commercial appropriation, the heavy presumption against prior restraints does not seem applicable."¹⁴⁰ However, a plaintiff pursuing an injunction under the right of privacy in the context of an unauthorized MOW or biography still faces a high probability of failure.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*,¹⁴¹ the Second Circuit addressed whether the district court should have enjoined publication of an allegedly infringing biography based on already copyrighted magazine articles about the same subject.¹⁴² The plaintiff, Howard Hughes, alleged a violation of his right of privacy.¹⁴³ The court held that the defendant's First Amendment rights outweighed any right of privacy held by the plaintiff,¹⁴⁴ and it concluded that "whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair

139. *Matter of Providence Journal Co.*, 820 F.2d 1342, 1350 (1st Cir. 1986).

140. MCCARTHY, *supra* note 40, § 11.6[C], at 11-28.

141. 366 F.2d 303 (2d Cir. 1966).

142. *Id.* at 304.

143. *Id.* at 305.

144. *Id.* at 309.

use."¹⁴⁵ Consequently, the court found that the public interest in obtaining information outweighed the individual's right of privacy.¹⁴⁶

The *Rosemont* court confronted the policy reasons against granting injunctive relief. The court considered it important that the articles and purportedly infringing book were not in competition with one another.¹⁴⁷ In addition, the plaintiffs did not demonstrate "that the biography . . . lessened the value of the articles copyrighted. . . ."¹⁴⁸ Thus, because the biography portrayed the plaintiff in a positive light,¹⁴⁹ the court was unwilling to grant an injunction based on the right of privacy.

In *Spahn v. Julian Messner, Inc.*,¹⁵⁰ the plaintiff, a famous baseball player, in an apparent anomaly, *successfully* enjoined the defendant from publishing an unauthorized fictitious biography of the plaintiff's life.¹⁵¹ The plaintiff based his action on Section 51 of the Civil Rights Law of New York, which forbids the use of a person's name or picture when used for advertising or trade without that person's written consent.¹⁵² In order to recover under Sections 50¹⁵³ and 51¹⁵⁴ of the New York Civil Rights Law for the publication of an unauthorized biography, the presentation must be "infected with material and substantial falsification and the work [must be] published with knowledge of such falsification or with a reckless disregard for the truth."¹⁵⁵ The author knowingly manufactured dialogue, narrated out of context, and inserted inaccuracies.¹⁵⁶ Furthermore, his

145. *Id.* at 307. *Cf.* *Koussevitzky v. Allen, Towne & Heath, Inc.*, 68 N.Y.S.2d 779, 782-84, *aff'd*, 69 N.Y.S.2d 432 (1947) (construing N.Y. CIV. RIGHTS LAW §§ 6,51 (McKinney 1992)).

146. *Rosemont Enters. v. Random House, Inc.*, 366 F.2d at 309 (2d Cir. 1966) (citing *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809-10 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)).

147. *Id.* at 311.

148. *Id.* *See* *Life Music, Inc. v. Wonderland Music Co.*, 241 F. Supp. 653 (S.D.N.Y. 1965).

149. *Rosemont Enters.*, 366 F.2d at 309.

150. 221 N.E.2d 543, *vacated*, 387 U.S. 239 (1966), *aff'd on reh'g*, 233 N.E.2d 840 (1967).

151. *Id.* at 546.

152. *Id.* at 544 (citing N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992)).

153. Section 50 reads in pertinent part:

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, . . . is guilty of a misdemeanor.

N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992).

154. Section 51 reads in pertinent part:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action . . . against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof.

N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992).

155. *Sinatra v. Wilson*, 2 Media L. Rep. (BNA) 2008, 2010 (S.D.N.Y. Feb. 24, 1977) (quoting *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840, 842 (1967)).

156. *Spahn*, 233 N.E.2d at 842.

additional research consisted of gathering newspaper and magazine clippings.¹⁵⁷ The court of appeals reasoned that permitting publication of a “knowing fictionalization . . . would amount to granting a literary license which is not only unnecessary to the protection of free speech but destructive of an individual’s right — albeit a limited one in the case of a public figure — to be free of the commercial exploitation of his name and personality.”¹⁵⁸

In another New York case, the plaintiff sought a preliminary injunction against the defendant publisher to prevent the publication of a manuscript as either a purported authorized biography or autobiography of Howard Hughes.¹⁵⁹ The Supreme Court of New York set forth a test to determine the propriety of such relief. The court held that a plaintiff must show: (1) “the likelihood of its ultimate success on the merits of the underlying action;” (2) “that irreparable harm will occur absent the granting of the preliminary injunction;” and (3) “that balancing the equities mandates a grant of the injunctive relief sought.”¹⁶⁰ The court found that the plaintiff failed to show a clear right to relief under this standard, even though he purported to own the exclusive rights to Hughes’ life story. Public figures cannot grant monopolies in the content of their life stories, which eliminates the need to obtain consent to publish an unauthorized biography.¹⁶¹ The court also noted that “in instances where it will do greater harm to a defendant to grant an injunction than it will to a plaintiff to deny it, then an injunction will not issue.”¹⁶²

The First Amendment rights of defendants take precedence over economic interests in a noncommercial context.¹⁶³ Thus, a court may never issue a preliminary injunction prohibiting the publication of an unauthorized biography where the plaintiff merely alleges invasion of the right of publicity. If the publication implicates both free speech and pecuniary rights, courts should not impinge upon First Amendment rights by granting injunctive relief, because damages adequately compensate economic rights in one’s life story.¹⁶⁴

157. *Id.* at 843.

158. *Id.*

159. *Rosemont Enters. v. McGraw-Hill Book Co.*, 380 N.Y.S.2d 839, 841 (1975).

160. *Id.* at 842.

161. *Id.* at 844.

162. *Id.* (citing *Canadair, Ltd. v. Seaboard World Airlines, Inc.*, 250 N.Y.S.2d 723, 730 (1964)).

163. *Id.*

164. *See supra* part III.C.

IV. INJUNCTIONS UNDER COPYRIGHT LAW FOR PUBLICATION OF THE UNAUTHORIZED BIOGRAPHY

Disagreement exists as to whether a court should grant an injunction against the publication of one's life story under a theory other than copyright law. Although some courts have granted injunctions under other theories, they did so prior to the development of present-day freedom of speech analysis:¹⁶⁵ "it is doubtful that the overwhelming majority of news reports would violate the 'entire performance' test of the Supreme Court [enunciated in *Zacchini*]."¹⁶⁶

Threatened impingement on copyrights does not usually implicate the fears of violating First Amendment rights which are inherent in prior restraints in defamation cases.¹⁶⁷ Injunctions are a statutory remedy under the Copyright Act and are a common response by the courts.¹⁶⁸ The Copyright Act provision states in pertinent part: "Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."¹⁶⁹ Due to the statutory authority, courts that impose injunctions in copyright cases have a more valid basis to do so than in cases involving the infringement of the right of privacy or publicity.¹⁷⁰ However, courts remain hesitant to grant injunctions because damages still may constitute a sufficient remedy under copyright law.¹⁷¹ The legal remedy will be adequate when the defendant's injury of chilled speech and the high costs of stopping publication outweigh the plaintiff's injury of a trivial copyright infringement.¹⁷²

For a court to order a preliminary injunction in the Second Circuit, the plaintiff must prove "irreparable injury, combined with either a probability

165. See *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 (1966), *vacated*, 387 U.S. 239, *aff'd on reh'g*, 233 N.E.2d 840 (1967); *Binns v. Vitagraph Co. of America*, 103 N.E. 1108 (N.Y. 1913).

166. H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1, 38 (1993) (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 563 (1977)). The "entire performance" test refers to the injunction against the appropriation of the entire performance by a human cannonball.

167. *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979). "The first amendment [sic] is not a license to trammel on legally recognized rights in intellectual property." *Id.* at 1188. See *Zacchini*, 433 U.S. at 577 n.13.

168. *Dallas Cowboys Cheerleaders, Inc.*, 600 F.2d at 1187.

169. 17 U.S.C. § 502(a).

170. See *New York Times Co. v. United States*, 403 U.S. 713, 730-31, 741 (1971).

171. SMOLLA, *supra* note 20, § 8.05[3][a], at 8-82.

172. *Belushi v. Woodward*, 598 F. Supp. 36, 37 (D.D.C. 1984).

of success on the merits, or a fair ground for litigation and a balance of the hardships in his favor."¹⁷³ Once plaintiffs demonstrate a prima facie case of copyright infringement, irreparable injury is presumed.¹⁷⁴ To meet that burden, the plaintiff first must prove that he or she is the valid owner of the copyright.¹⁷⁵ Second, the plaintiff must prove that the defendant copied the copyrighted material without authorization.¹⁷⁶ Actionable copying, in turn, is "inferred from the defendant's access to the copyrighted work and substantial similarity between the copyrighted work and the alleged infringement."¹⁷⁷ Upon reaching this threshold, the plaintiff must also prove that "the copying amounts to an 'improper' or 'unlawful' appropriation by demonstrating that substantial similarities relate to protectible material."¹⁷⁸ This means that not only must the defendant copy protectible material, but the defendant also must have copied a *substantial amount* of protected material.

In *In re Capital Cities/ABC, Inc.*,¹⁷⁹ the Eleventh Circuit addressed whether preliminary injunctions in a copyright infringement case impinge on the right to free speech. In that case, the plaintiff alleged copyright infringement based on a biography of Robert Garwood, to which the plaintiff claimed exclusive rights.¹⁸⁰ The plaintiff attempted to preliminarily enjoin the broadcast of the performance. The court held that "the Copyright Act clearly contemplates injunctive relief to 'prevent' infringement."¹⁸¹ In issuing a preliminary injunction, the court found that it could effectively excise only those offending portions of the story from being broadcast. This would make the restraint "surgical," affecting the manner of expression rather than the content.¹⁸²

173. *Video Trip Corp. v. Lightning Video, Inc.*, 866 F.2d 50, 52 (2d Cir. 1989) (quoting *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)).

174. *Id.* at 51-52.

175. *Id.* at 52 (citing 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (1988)).

176. *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139 (2d Cir. 1992).

177. *Id.* See *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986).

178. *Laureyssens*, 964 F.2d at 139-40 (citing *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946)). *But see* *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992); *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990) (use of extrinsic and intrinsic test to determine substantial similarity).

179. 918 F.2d 140 (11th Cir. 1990).

180. *Id.* at 141-42.

181. *Id.* at 143.

182. *Id.* at 144.

The Second Circuit, in the notable case *Salinger v. Random House, Inc.*,¹⁸³ established judicial support for the issuance of preliminary injunctions in copyright infringement cases. J.D. Salinger objected to the use, by direct copying and paraphrasing, of several of his unpublished letters in an unauthorized biography.¹⁸⁴ The fact that these letters were unpublished did not negate his claim of copyright protection, because an author has the right of first publication of unpublished works, and such works are protected under federal copyright law.¹⁸⁵ "To the extent [the biographer] quotes (or closely paraphrases), he risks a finding of infringement and an injunction effectively destroying his biographical work."¹⁸⁶

Although "no author may copyright facts or ideas,"¹⁸⁷ the right of first publication prevents other authors from making a "fair use" of quotations and facts in the public domain until the author has the opportunity to enjoy a monopoly in the copyrighted material. If an author "cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy."¹⁸⁸ Justice O'Connor noted in *Harper & Row, Publishers v. Nation Enterprises*,¹⁸⁹ that the Senate Report is in accord.¹⁹⁰ "[t]he applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner."¹⁹¹ The Court applied this reasoning to every type of usage of copyrighted material.¹⁹² The Court found that the benefit to the author to develop his ideas "free from fear of expropriation outweighs any short-term 'news value' to be gained from premature publication of the author's expression."¹⁹³ Thus, the Court found it against public policy

183. 811 F.2d 90 (2d Cir. 1987).

184. *Id.* at 93.

185. *Id.* at 94. ("[T]he 1976 Copyright Act preempted the common law of copyright.")

186. *Id.* at 96 (quoting *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 424 (S.D.N.Y. 1986), *rev'd, remanded*, 811 F.2d 90 (2d Cir.), and *reh'g denied*, 818 F.2d 252 (2d Cir.), and *cert. denied*, 484 U.S. 890 (1987)) (alterations in original).

187. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (citing 17 U.S.C. § 102 (1994)).

188. *Id.* at 550 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (1841)).

189. 471 U.S. 539, 553 (1985).

190. See S. REP. NO. 473, 94th Cong., 1st Sess., at 65 (1975).

191. *Harper & Row, Publishers*, 471 U.S. at 553 (quoting S. REP. NO. 473, 94th Cong., 1st Sess., at 64 (1975)).

192. *Id.* at 554 (quoting S. REP. NO. 473, 94th Cong., 1st Sess., at 65 (1975)).

193. *Id.* at 555.

for a magazine to directly quote copyrighted material that the author had contractually sold to another publication.¹⁹⁴

The reasoning behind issuing a preliminary injunction against copying an unpublished work is that a reader would no longer be interested in reading the work once it were published if someone else had already copied and paraphrased the work.¹⁹⁵ Copyright law induces authors to be creative by granting a monopoly right in publication.¹⁹⁶ “[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”¹⁹⁷ A person would not want to pay for a book which he or she had already substantially read. Thus, if publishers lacked a copyright monopoly, they would be unable to recoup their investment.¹⁹⁸ On the other hand, if authors merely copy facts, they face no risk of an injunction because they have not infringed on a copyright.¹⁹⁹ Therefore, a court may enjoin the publication of a biography when it contains copied and paraphrased content.²⁰⁰ However, this is merely an injunction against publication of the work, not of the life story itself.

V. CONCLUSION

For a celebrity such as Elizabeth Taylor to succeed in a claim for appropriation of her life story, she must allege a violation of her right of publicity, rather than privacy. Next, the court must find that her rights outweigh the First Amendment rights of the defendant. Lastly, she must request damages rather than an injunction.²⁰¹

However, damages may not provide an adequate legal remedy for the appropriation of one's life story. Often, the story implicates both rights of

194. *Id.* at 561-62.

195. *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

196. *Harper & Row, Publishers, Inc.*, 471 U.S. at 546 (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

197. *Id.* at 562 (quoting *Sony Corp. of America*, 464 U.S. at 451).

198. Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 78 (1971).

199. *Salinger*, 811 F.2d at 96.

200. The opposite result will occur if the author has paraphrased the underlying content of copyrighted and published material, because the effect on the market for the already published work is minimal. *See New Era Publications Int'l v. Carol Publishing Group*, 904 F.2d 152, 161 (2d Cir. 1990).

201. It should be noted that from a tactical view, USC Law School professor, Michael Shapiro, has suggested that failure to file a suit for injunction “may be perceived as a tacit acknowledgment that the material is true.” Dutka, *supra* note 54, at F10.

privacy and publicity. A celebrity may wish to prevent production and broadcast of an unauthorized docudrama to keep certain truthful facts private. Yet, the most celebrities can expect to gain from a lawsuit for the appropriation of their life stories is "after-the-fact" compensation for violation of the right of publicity. Courts fail to grant injunctions because they cannot overlook the First Amendment concerns inherent in prior restraints. The granting of an injunction in the context of an unauthorized biography would completely thwart the First Amendment right to free speech.

No matter which theory celebrity plaintiffs use, they will assuredly fail to get an injunction. The First Amendment rights of the defendant cannot be ignored. First, plaintiffs will have difficulty proving malice as an element of defamation. Second, celebrities give up much of their right to privacy when they enter the public arena. Third, injury to the right of publicity can be compensated adequately through damages. Finally, copyright law does not contemplate that ideas should be protected. Everyone has the right to tell the same story as long they do not copy the content and form of the story with substantial similarity.

However, it may be possible for a plaintiff to use the right of first publication within copyright law to obtain an injunction against the broadcast of a docudrama or publication of a biography. If celebrities wish to protect their life stories, they could write the story and put it on file at a library, leaving it unpublished as in *Salinger*. In doing so, if they could prove that the biographer had read the manuscript, they could avoid any unauthorized biographies which paraphrased or copied directly the content of the unpublished work. Not only does this border on the ridiculous, but it also completely nullifies the purpose behind keeping one's life story from being published: preserving one's privacy.

*Teri N. Hollander**

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