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# CHILLED BIRD: FREEDOM OF EXPRESSION IN THE EIGHTIES

by  
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*Amy D. Hogue\*\**

“Only the birds sing free” is a saying frequently heard in law offices when speaking about the necessity of billing for legal services. In recent cases, the cost of defending media interests in right of publicity, defamation, right to privacy, and copyright infringement litigation has soared into the six figure range.<sup>1</sup> Practically speaking, many media clients want to know whether the form and substance of their publications can result in legal claims that cannot be terminated by a relatively inexpensive motion prior to a protracted trial. In the real world, freedom of expression requires consideration of not only the marketplace of ideas and access to the marketplace, but also awareness of the legal costs arising from exercise of first amendment rights—the cost of going to market.

From the point of view of litigators who defend the media’s exercise of first amendment rights, several troublesome trends have emerged during the past decade. The purpose of this article is to consider recent developments in the areas of right of publicity, privacy, defamation, and copyright law that have chilled expression and have resulted in fewer cases being terminated short of full trial.

## I. THE RIGHT OF PUBLICITY

Although the right of publicity has in the past been confused with the right to privacy,<sup>2</sup> recent decisions have distinguished the two. Commercial rights, analogous to those protected by tortious misappropriation, have been protected by the so-called right of publicity and

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1. *See* *Herbert v. Lando*, 441 U.S. 153 (1979) (litigation costs reached and threatened to surpass six figures even before trial on the merits).

2. *See generally* W. PROSSER, *LAW OF TORTS* 802-18 (4th ed. 1971).

sometimes held to be a form of property which survives the death of the celebrity originator. Until recently, however, the clash with first amendment values implicit in this emerging doctrine of the right of publicity has been largely ignored.<sup>3</sup>

The right of publicity exercised by a celebrity during his lifetime poses a threat to free expression only when the public's right to follow newsworthy events threatens to appropriate some or all of the commercial value of the celebrity's act. People have the right to know about the public figures of contemporary history and performers are entitled to earn a living. Much of the reward reaped by famous persons in appearances before the public is attributable to news and feature coverage by the media. Sports figures, for example, could not command high fees for speaking appearances were it not for extensive coverage of their personal and professional lives by the press and other communications media. If every celebrity could monopolize his publicity until eternity, democracy would be divorced from entertainment, and expression would likely be chilled.

The flow of information essential to a free society must be supported by a privilege of newsworthiness so that information sought by the public is freely available.<sup>4</sup> If the right of publicity rests upon notions of commercial advantage, then expression only in direct competition with a celebrity's *income* should be subject to liability. News about a celebrity must not be confused with theft of his act for financial gain. Reporters and biographers are entitled to disseminate ideas and expression even if they are original only in the research and extraction of facts worthy of comment. Just as the law of copyright carves out a statutory privilege for fair use,<sup>5</sup> the right of publicity must make some allowance for the first amendment. As long as reportage does not directly dimin-

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3. Although one Justice of the Supreme Court addressed the issue in a dissenting opinion, the most thorough discussion to date was advanced in a concurring opinion by Chief Justice Bird of the California Supreme Court. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 579 (1977) (Powell, J., dissenting); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 862, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 353 (1979) (Bird, C.J., concurring).

4. The law of copyright accounts for this privilege in its fair use exception to the copyright holder's monopoly. *See, e.g., Italian Book Corp. v. ABC, Inc.*, 458 F. Supp. 65 (S.D.N.Y. 1978) (finding no infringement of plaintiff's copyrighted song in a news story about a parade which included film of musicians on a float playing plaintiff's song); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (holding that sketches reproducing plaintiff's copyrighted film of the assassination of President Kennedy that were published in *Six Seconds in Dallas*, a study of the assassination, were a fair use of the film). *See* notes 85-91 *supra* and accompanying text.

5. 17 U.S.C. § 107 (1976). *See* note 85 *infra*.

ish a celebrity's financial return, it should be permitted in the name of liberty.

Few of these considerations have been recognized in the right of publicity cases. For example, in *Price v. Hal Roach Studios, Inc.*,<sup>6</sup> Larry Harmon Pictures Corporation sued Hal Roach Studios, Inc. claiming to own the exclusive right to the names, likenesses, characters, and characterization of the famous comedians, Stan Laurel and Oliver Hardy. Defendant Hal Roach Studios, who owned the copyright to Laurel and Hardy motion pictures, claimed to be the successor in interest to employment contracts with the two comedians, and as such, had conveyed exclusive merchandising rights in Laurel and Hardy to defendant Feiner.

To the extent that the parties' dispute centered on merchandising rights to things which looked like Laurel and Hardy rather than expression pertaining to the comedy duo, first amendment rights were not meaningfully involved. On the other hand, plaintiff's alleged exclusive right to exploit characters or characterizations of Laurel and Hardy even after the comedians' deaths, poses serious constitutional questions: Would a biographer have to purchase certain rights of publicity before writing life stories of the two comedians? Would a cartoonist have to pay for the right to create a Saturday morning series based on characters similar to Laurel and Hardy? Would a producer be required to compensate the comedians when he makes a Hollywood documentary based on uncopyrighted footage or on a made-for-television fictionalization of the comedians' off-camera exploits? Although the law of copyright rarely prohibits biography based on copied facts or characters<sup>7</sup> and in fiction generally does not protect characters from infringement,<sup>8</sup> their protection under a theory of right of publicity is an open question.

The danger exists, however, that the first amendment values implicit in the fair use exception to copyright law will be eroded by liabil-

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6. 400 F. Supp. 836 (S.D.N.Y. 1975).

7. See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967); *Norman v. CBS, Inc.*, 333 F. Supp. 788 (S.D.N.Y. 1971); *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957). But see *Miller v. Universal City Studios, Inc.*, 460 F. Supp. 984 (S.D. Fla. 1978) (finding infringement of the research of plaintiff's biographical work in defendant's docudrama based on the same facts); *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970) (finding infringement of plaintiff's biography of Lenny Bruce in defendant's film biography, *Dirtymouth*).

8. See *Warner Bros. Pictures, Inc. v. CBS, Inc.*, 216 F.2d 945 (9th Cir. 1954), cert. denied, 348 U.S. 971 (1955); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931).

ity imposed under the guise of a purported right of publicity. In essence, a new copyright monopoly threatens to be created with no basis in the copyright clause<sup>9</sup> or its supporting legislation.<sup>10</sup> This danger is exacerbated by decisions such as *Price*, involving Laurel and Hardy, in which the right of publicity was held to survive the death of the personality portrayed. In *Price*, the court reasoned that because the right of publicity is commercial in nature and unrelated to personal injury to feelings, "[t]here appears to be no logical reason to terminate this right upon death of the person protected."<sup>11</sup> In so concluding, however, the court ignored constitutional considerations and, perhaps because the dispute centered upon merchandising rights, failed to consider the impact an extension of this monopoly would have on creative expression.

*Factors Etc., Inc. v. Pro Arts, Inc.*<sup>12</sup> also held that the right of publicity as exploited in merchandising rights survives a celebrity's death. *Factors Etc.*, however, arguably required some acknowledgment of first amendment considerations because the disputed item was a poster announcing the death of Elvis Presley. Plaintiff had created and exploited the Presley persona from 1956 until the singer's death in 1977, and claimed exclusive ownership to all commercial rights in the singer's name or likeness. Although defendant purchased the copyrighted photograph for its poster from an Atlanta newspaper, the court held that conversion of the photo from a newspaper to a poster offered for sale stripped the photo of any privilege of newsworthiness.<sup>13</sup> This distinction, based on the difference between a photograph printed on newsprint and a photograph printed on fine poster paper, not only belies the Chinese adage that a picture tells a thousand words, but also suggests that non-traditional or artistic conveyors of information enjoy less first amendment protection than their more traditional competitors.

The court's acknowledgment that a privilege of newsworthiness might come into play suggests that first amendment considerations are

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9. U.S. CONST. art. I, § 8, cl. 8.

10. 17 U.S.C. §§ 101-810 (1976).

11. 400 F. Supp. at 844.

12. 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). *See also* *Factors Etc., Inc. v. Pro Arts, Inc.*, [1980] COPYRIGHT L. REP. (CCH) ¶ 25,176 (S.D.N.Y. July 30, 1980) (granting summary judgment to *Factors Etc.* in line with the principles announced by the Second Circuit).

13. 579 F.2d at 221. The court distinguished *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968), which held that a presidential election poster of comedian Pat Paulsen was privileged under the first amendment and refused to award him damages for his claimed right of publicity. The *Factors* court held that the Elvis Presley poster was "not privileged as a newsworthy event." 579 F.2d at 222.

pertinent in right of publicity cases although the appropriate analysis is yet to be fully revealed. The Pat Paulsen case,<sup>14</sup> in which a court upheld defendant's right to distribute a photograph of the comedian on a "Paulsen for President" poster during the comedian's apparently facetious candidacy for president, has often been cited with *Factors Etc.* to illustrate the confusion among right of publicity cases. Examination of the two precedents in light of Supreme Court discussion of the first amendment in *Young v. American Mini Theaters, Inc.*<sup>15</sup> provides a plausible although unsound basis for distinction: non-political expression may enjoy less first amendment protection than political expression.<sup>16</sup>

A second right of publicity case involving the Presley heirs, *Memphis Development Foundation v. Factors Etc., Inc.*,<sup>17</sup> helps to clear the confusion by relying, at least partly, upon the first amendment in refusing to recognize an inheritable right of publicity. Even though the merchandising rights at issue in *Memphis Development* involved a bronze statue of Presley to be erected in the city of Memphis and the sale of miniature replicas of that statue, the court simply was not persuaded that "making the right of publicity inheritable would . . . significantly inspire the creative endeavors of individuals in our society."<sup>18</sup> Among the "practical problems of judicial line-drawing" weighed by the court

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14. *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968). See note 13 *supra*.

15. 427 U.S. 50 (1976).

16. *Young* implicitly rejects the reasoning of *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), and other cases which state that government regulation of the content of speech was impermissible under the first amendment. According to *Young*, "within the area of protected speech, a difference in content may require a different governmental response." 427 U.S. at 66. For example, "the content of a particular advertisement may determine the extent of its protection." *Id.* at 68. The Court indicated that artistic speech which is erotic in nature does not receive as much protection as political speech:

Moreover, even though we recognize that the first amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.

*Id.* at 70.

For New York decisions to the same effect, see *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968). In *Hicks*, the heirs and assignees of Agatha Christie sued to enjoin distribution of the movie and novel *Agatha*, which presented fictional accounts of an actual incident in Christie's life. The court balanced society's interest in the protection of speech with the commercial interests of those seeking to restrain speech and concluded that society's interest should prevail. Plaintiff's right of publicity was therefore denied. 464 F. Supp. at 433.

17. 616 F.2d 956 (6th Cir. 1980).

18. *Id.* at 959.

was the following question: “[a]t what point does the right [of publicity] collide with the right of free expression guaranteed by the first amendment?”<sup>19</sup> Although the *Memphis Development* court did not explicitly answer that question, it looked to the law of defamation for guidance and acknowledged the role of the media in both defamation and right of publicity actions.<sup>20</sup> With language reminiscent of *New York Times Co. v. Sullivan*<sup>21</sup> and its progeny, the court tipped the scales to favor free expression over personal advantage.

In California, the Supreme Court has consistently refused to recognize a right of publicity surviving death, although the extent to which the first amendment provides the rationale for these decisions is unclear. In *Lugosi v. Universal Pictures*,<sup>22</sup> the widow and surviving son of Bela Lugosi claimed that Universal had appropriated their inherited property. The issue was whether Lugosi’s employment contracts with Universal effected a grant of merchandising rights to his portrayal as Count Dracula. The California Supreme Court agreed with Professor Prosser that “there is no common law right of action for a publication concerning one who is already dead,”<sup>23</sup> suggesting that “[i]f rights to the exploitation of artistic or intellectual property never exercised during the lifetime of their creators were to survive their death, neither society’s interest in the free dissemination of ideas nor the artist’s rights to the fruits of his own labor would be served.”<sup>24</sup> Justice Mosk, in his concurring opinion, similarly noted the decision’s “salutory tendency . . . to encourage the free dissemination of ideas.” He observed that “[t]o approve such a bonanza [to Lugosi’s successors] on a newly created cause of action . . . ill serves the principles of free expression

19. *Id.*

20. *Id.* In concluding that the right of publicity was not inheritable, the Sixth Circuit relied on an analogy to the law of defamation:

*There is no right of action for defamation after death. . . . The two interests that support the inheritability of the right of publicity, namely, the “effort and creativity” and the “hopes and expectations” of the decedent, would also support an action for libel or slander for destruction of name and reputation after death. Neither of these reasons, however, is sufficient to overcome the common law policy terminating the action for defamation upon death.*

. . . The intangible and shifting nature of fame and celebrity status, the presence of widespread public and press participation in its creation, the unusual psychic rewards and income that often flow from it during life and the fact that it may be created by bad as well as good conduct combine to create serious reservations about making fame the permanent right of a few individuals to the exclusion of the general public.

*Id.* (emphasis added).

21. 376 U.S. 254 (1966). See note 50 *infra*.

22. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

23. *Id.* at 820, 603 P.2d at 429, 160 Cal. Rptr. at 327.

24. *Id.* at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329.

. . . .”<sup>25</sup> Chief Justice Bird, in dissent, argued for the creation of a right of publicity valid during the lifetime of the originator and fifty years thereafter.<sup>26</sup> Presumably because rights to merchandising rather than expression were involved in *Lugosi*, the Chief Justice did not address first amendment issues.

However, in a concurring opinion to *Guglielmi v. Spelling-Goldberg Productions*,<sup>27</sup> the Chief Justice undertook an expanded analysis of the first amendment implications of the right of publicity. In *Guglielmi*, the nephew of Rudolph Valentino sued the producers of a fictionalized biographical drama which aired on national television. Plaintiff sought an injunction and damages claiming that this unauthorized use of Valentino’s life story in a fictional work misappropriated their right of publicity. Although the majority sustained a demurrer to plaintiff’s complaint, Chief Justice Bird concluded that the complaint stated a cause of action because it alleged (1) that plaintiff inherited Valentino’s right to publicity and (2) that the alleged appropriation occurred within fifty years of plaintiff’s death.<sup>28</sup> Chief Justice Bird argued, however, that the first amendment and article 1, section 2 of the California Constitution precluded a finding of liability.<sup>29</sup>

According to Chief Justice Bird, entertainment and works of fiction are entitled to the same constitutional protection as ideas, political treatises, or news stories.<sup>30</sup> Moreover, the right to publicity may not be used as a shield against caricature, parody, or satire.<sup>31</sup> Bird asserted that “prominence invites creative comment” and warned that “the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the

25. *Id.* at 828, 603 P.2d at 434, 160 Cal. Rptr. at 332.

26. *Id.* at 850-51, 603 P.2d at 448-49, 160 Cal. Rptr. at 346-47.

27. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

28. *Id.* at 864, 603 P.2d at 457, 160 Cal. Rptr. at 355.

29. *Id.* at 865-68, 603 P.2d at 458-60, 160 Cal. Rptr. at 355-57.

30. In *Guglielmi*, the Chief Justice stressed the importance of constitutionally protected freedom of expression for works of fiction:

Using fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed. What may be difficult to communicate or understand when factually reported may be poignant or powerful if offered in satire, science fiction or parable. Indeed, Dickens and Dostoevski may well have written more trenchant and comprehensive commentaries on their times than any factual recitation could ever yield. Such authors are no less entitled to express their views than the town crier with the daily news or the philosopher with his discourse on the nature of justice. Even the author who creates distracting tales for amusement is entitled to constitutional protection.

*Id.* at 867-68, 603 P.2d at 459, 160 Cal. Rptr. at 357. *But see* *Young v. American Mini Theatres*, 427 U.S. 50, 66-70 (1976).

31. 25 Cal. 3d at 869, 603 P.2d at 460, 160 Cal. Rptr. at 358.



imaginations of authors of fiction.”<sup>32</sup> Thus, on the basis of these first amendment considerations, Bird would have sustained the demurrer to plaintiff’s claim, both as to the motion picture drama and the accompanying advertisements.

The Bird doctrine of publicity limits liability to cases in which appropriation takes the form of things rather than words. Recovery in *Lugosi* was warranted because appropriation took the form of products such as “plastic toy pencil sharpeners, . . . , soap products, candy dispensers” and other items which “unlike motion pictures, are not vehicles through which ideas and opinions are regularly disseminated.”<sup>33</sup> This approach is similar to the “definitional balancing” tests employed by the United States Supreme Court in first amendment cases.<sup>34</sup> The analysis defines the expression appropriated as either protected by the first amendment or not; if it is protected speech, recovery under a theory of right of publicity or appropriation of name or likeness is unavailable. Where the expressive element in the disputed product is slight—as in a Dracula pencil sharpener—the first amendment arguably does not prevent the depicted celebrity, his heirs, or assigns from monopolizing the commercial return. Where the expressive element is manifest, as in a motion picture biography or in historic fiction, the public’s right to free expression prevents monopolization of the commercial rights. As in the fair use exception to copyright law, the courts must “subordinate the private interest in a maximum financial return to the greater public interest in the development of art, science and industry.”<sup>35</sup>

The Bird analysis advances the developing law of publicity in three important respects. First, it explicitly addresses the first amendment issues underlying the right of publicity. Second, a framework of “definitional balancing” helpful to courts deciding claims advanced under the right of publicity is presented and may be employed whether or not the right is held to be descendible. Third, because the analysis rests upon principles analogous to those of copyright law, the more integrated and consistent body of law proposed would reduce the uncertainty and fear of liability now facing creative writers.

It is somewhat difficult, however, to harmonize Chief Justice Bird’s

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32. *Id.*

33. *Id.* at 874, 603 P.2d at 463, 160 Cal. Rptr. at 361.

34. See generally Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180, 1184 (1970) [hereinafter cited as Nimmer].

35. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964).

concurrence with the United States Supreme Court's opinion in *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>36</sup> In *Zacchini*, a fifteen second human cannonball act was shown in its entirety in the course of a television news story about the county fair in which Zacchini appeared. The Court concluded that the broadcast posed a substantial threat to the economic value of Zacchini's act<sup>37</sup> and held that liability for this appropriation could be imposed in spite of the first amendment.<sup>38</sup> Although the Court confirmed that "entertainment, as well as news, enjoys First Amendment protection," and that "entertainment itself can be important news,"<sup>39</sup> it ultimately decided that the broadcast of the entire act simply went too far. The Court asserted that requiring compensation of performers whose acts are broadcast in entirety would not stifle information about the act, because "neither the public nor respondent will be deprived of his benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized."<sup>40</sup>

If *Zacchini* had been decided strictly according to Chief Justice Bird's analysis, the result would have been different. Although the human cannonball act itself consisted of conduct without words and was only minimally expressive,<sup>41</sup> its broadcast in the course of a news story about the county fair in which the act appeared arguably conveyed information worthy of first amendment protection. Thus, even if we accept the Supreme Court's finding that the broadcast diminished Zacchini's financial reward, the Bird analysis would preclude compensation for broadcast of the act.

The Court's finding that the broadcast adversely affected Zacchini's success in the entertainment market is open to question. The audience for local television news is not identical to the audience for live human cannonball acts. Indeed, the argument that the news broadcast in fact provided free publicity for Zacchini is more persuasive. If the act was newsworthy, as the majority conceded in *Zacchini*,<sup>42</sup> and if defendant's medium of communication was not in

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36. 433 U.S. 562 (1977).

37. *Id.* at 575.

38. *Id.* at 578-79.

39. *Id.* at 578.

40. *Id.*

41. *Cf.* *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (statute forbidding destruction of draft cards held not unconstitutional as abridging free speech where conduct combined both speech and nonspeech elements and a "sufficiently important governmental interest in regulating the nonspeech element . . . justifi[ed] incidental limitations on First Amendment freedoms").

42. 433 U.S. at 569.

competition with Zacchini, the award of damages to Zacchini was in error.

The opinion of the dissenting justices in *Zacchini* is more easily harmonized with Chief Justice Bird's position. This opinion by Justice Powell charges the majority with deciding only the narrow case before the court with the "repeated incantation of a single formula: 'a performer's entire act.'"<sup>43</sup> Although Powell does not address the danger to creative expression implicit in the majority opinion,<sup>44</sup> his proposed analysis is in accord with Chief Justice Bird's opinion. Powell would hold that "the first amendment protects the station from a 'right of publicity' or 'appropriation' suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation."<sup>45</sup> Having chosen to make his performance newsworthy, Zacchini could not complain of routine news coverage.<sup>46</sup>

The scant majority in *Zacchini*<sup>47</sup> hints that a showing of less than the entire act would have eliminated a finding of commercial harm to the plaintiff.<sup>48</sup> Because the opinion applied a specific Ohio statute to appropriation of an entire act, its general precedential value is minimal. The courts may follow the analysis of either Chief Justice Bird or Justice Powell in any right to publicity case in which only a portion of the act has been appropriated. In short, creative expression as well as news reporting may be preserved in all but the extraordinary case in which an entire act is appropriated.<sup>49</sup>

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43. 433 U.S. at 579 (Powell, J., dissenting).

44. *But see* Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 862, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 353 (1979) (Bird, C.J., concurring).

45. 433 U.S. at 581 (footnote omitted).

46. *Id.* at 582.

47. Five justices joined the majority opinion and four dissented.

48. "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." 433 U.S. at 574-75.

49. Some support for *Zacchini* may be found in copyright cases in which the defense of fair use is disallowed on the grounds that too much of the infringed work was reproduced by the infringer. *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979), provides a good example. MGM claimed that defendants' musical play, *Scarlett Fever*, infringed their motion picture, *Gone with the Wind*. Defendants admitted that their play was based on *Gone with the Wind*, but argued that their work was a parody falling within the fair use exception to the copyright monopoly. The court found the story line nearly identical and the dialogue almost verbatim. *Id.* at 356. Further, the court found that *Scarlett Fever* failed to parody or satirize any significant part of *Gone with the Wind*. *Id.* at 351-58. In short, although *Scarlett Fever* differed somewhat in tone from *Gone with the Wind*, the court found that defendants had essentially appropriated plaintiff's entire work.

## II. PRIVACY AND DEFAMATION

Claims of invasion of privacy or defamation arising out of creative expression also threaten to have a chilling effect on freedom of expression. Biographies or motion picture presentations of contemporary history are most vulnerable to claims from living persons offended by depiction of their lives. Although the law regarding factual accounts of public figures is fairly well established,<sup>50</sup> the law regarding fictional accounts is less clear.<sup>51</sup>

*Time, Inc. v. Hill*<sup>52</sup> did not squarely test the issue of first amendment protection for fictional accounts of newsworthy stories. In *Hill*, Life Magazine published an article about the play, *The Desperate Hours*. The play was based on a kidnapping incident involving plaintiff Hill and his family, but did not mention the family by name. The magazine article, however, suggested that the play was an accurate account of the incident when, in fact, fictional but non-defamatory changes had been made.<sup>53</sup> The court of appeals awarded damages to Hill for invasion of his privacy. The Supreme Court overturned this award holding that liability could be found only if the article had been published with knowing or reckless falsity.<sup>54</sup> Thus, although *Hill* involved a fictional version of the kidnapping, the holding was limited to the apparently factual news story.

Soon after *Hill* was decided, it was incorrectly applied to fiction under the New York Privacy Act.<sup>55</sup> Warren Spahn, a baseball player of considerable reknown, sued a biographer who had included dialogue, imaginary incidents, thoughts, and feelings in his portrayal of Spahn. The trial court found gross errors of fact and "all pervasive

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50. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1966). In *New York Times Co. v. Sullivan*, an elected official brought suit against a newspaper claiming that he had been libeled by an advertisement appearing in the newspaper. The Supreme Court held that under the first and fourteenth amendments, the public official was not entitled to damages for defamation relating to his official conduct unless he proves "actual malice," that is that the statement was made "with knowledge of its falsity or with reckless disregard of whether it was true or false." *Id.* at 279-80. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

51. See generally *Hill, Defamation and Privacy*, 76 COLUM. L. REV. 1205 (1976).

52. 385 U.S. 374 (1967).

53. *Id.* at 379. The novel and play depicted a family of four held hostage by three escaped prisoners who beat the son and father and subjected the daughter to sexual insults. In fact, James Hill and his family had been held hostage by prisoners but were released unharmed. *Id.* at 378.

54. 385 U.S. at 397-98.

55. *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967).

distortions, inaccuracies, [and] invented dialogue . . . ."<sup>56</sup> The court awarded damages to Spahn and granted an injunction preventing further publication and distribution of the book. The New York Court of Appeals affirmed, finding that this 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."<sup>57</sup> Although the biography apparently did not announce in bold type that the dialogue and thoughts attributed to Spahn were fictional, the fanciful nature of the portrayal must have been obvious from the presentation and marketing of the book for juvenile readers. Ironically, the court considered the finding that defendants "had no intention to follow the facts concerning plaintiff's life, except in broad outline and to the extent that the facts readily supplied a dramatic portrayal attractive to the juvenile reader," to be an admission of malice.<sup>58</sup>

The dissenting opinion by Judge Bergan pointedly noted the inappropriateness of applying the *Hill* analysis to a fictional work in that "[a]ll fiction is false in the literal sense that it is imagined rather than actual."<sup>59</sup> The decision in *Spahn* and its inevitable chilling effect upon creative writing was foreseen by Justice Douglas in his concurring opinion to *Time, Inc. v. Hill*.<sup>60</sup>

In contrast to *Spahn*, the court in *Leopold v. Levin*<sup>61</sup> observed the distinction noted by Judge Bergan and Justice Douglas, and found that the novel *Compulsion* and the play and motion picture based on that novel did not invade the privacy of the protagonist, Nathan Leopold. The plot in *Compulsion* was based on a murder committed by plaintiff Leopold. Although fictitious names were used, the book cover stated that the novel was "suggested by" the infamous act. Leopold's claim for damages from the exploitation of his name, likeness, and personality for commercial gain in "knowingly fictionalized accounts" of his

56. 43 Misc. 2d 219, 230, 250 N.Y.S.2d 529, 541 (1964).

57. 21 N.Y.2d at 129, 233 N.E.2d at 843, 286 N.Y.S.2d at 836.

58. *Id.* at 127, 233 N.E.2d at 842, 286 N.Y.S.2d at 835.

59. *Id.* at 131, 233 N.E.2d at 845, 286 N.Y.S.2d at 838.

60. 385 U.S. at 401-02. Justice Douglas concluded that a fictionalized treatment of a news event such as the Hill kidnapping was "as much in the public domain as would be a watercolor of the assassination of a public official." *Id.* at 401.

61. 45 Ill. 2d 434, 259 N.E.2d 250 (1970). *See also* Carlisle v. Fawcett Publications, Inc., 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962) (holding that a fictionalized article about Janet Leigh and her childhood boyfriend neither defamed nor invaded the privacy of the actress).

private life was denied.<sup>62</sup> Noting that Leopold was a public figure and that the novel was derived from matters of public record, the court specifically distinguished *Hill* on the grounds that that decision involved a "false but purportedly factual account of the Hill incident," whereas in *Leopold* the novel was "evidently fictional" although "suggested by" the crime of the plaintiff.<sup>63</sup> The Illinois court distinguished *Spahn* on the basis of the particular New York statute under which that action was brought.<sup>64</sup>

The significant clarification of the law contributed by *Leopold v. Levin* may have been erased or at least smudged by a recent decision of the California Court of Appeal. In *Bindrim v. Mitchell*,<sup>65</sup> the court extended the reasoning of the *Spahn* majority to the law of defamation. Novelist Gwen Davis Mitchell attended a nude encounter session directed by psychologist Paul Bindrim. Before attending the session, Mitchell signed an agreement not to "take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired."<sup>66</sup> Mitchell did, however, publish a novel, *Touching*, which portrayed characters participating in a nude encounter session.

Although the book was marketed as a work of fiction, Bindrim claimed that he was libeled by the author's characterization of "Dr. Simon Herford" as the psychiatrist who directed the nude encounter sessions. In the novel, Dr. Herford used profanity to bully a minister into bringing his wife to the encounter sessions. Tapes of the actual encounter sessions recorded by Dr. Bindrim showed that Bindrim politely tried to persuade a minister to bring his wife to the sessions.<sup>67</sup> Instead of treating Mitchell's more dramatic exchange as an author's fictional prerogative, the court found the innuendo to be defamatory and proceeded to apply the *New York Times Co. v. Sullivan* standard of malice.<sup>68</sup> Even though Dr. Herford was described in the novel as a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms," whereas Bindrim was clean shaven with short hair, the court found the similarities between the two characters to be clear.<sup>69</sup>

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62. The theoretical basis for Leopold's suit apparently rested upon the right of publicity as well as privacy.

63. 45 Ill. 2d at 445, 259 N.E.2d at 256.

64. *Id.* at 445-46, 259 N.E.2d at 256.

65. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979).

66. *Id.* at 69, 155 Cal. Rptr. at 33.

67. *Id.* at 70-71, 155 Cal. Rptr. at 34.

68. See note 50 *supra*.

69. 92 Cal. App. 3d at 75-76, 155 Cal. Rptr. at 37-38.

The test for identifying the plaintiff used by the *Bindrim* court was whether a third person who knew Bindrim could reasonably identify him with the fictional character.<sup>70</sup> This standard would effectively prohibit creative expression derived from contemporary reality which in any way disparaged a fictional character derived from an actual person. As long as some witness could be persuaded to testify that he identified plaintiff as the character in the book, liability could be found. Any novel traceable to reality would automatically fail the *New York Times Co. v. Sullivan* test of knowing falsity.<sup>71</sup> First amendment protection for fiction would, therefore, be substantially weaker than protection for news or nonfiction, and the chilling effect foreseen by Justice Douglas in *Time, Inc. v. Hill* would ensue.<sup>72</sup> At the very least, this chilling effect would extend to works of fiction about innovative occupations. In broader terms, the holding would stifle unflattering but fictional accounts inspired by any private or public figure.<sup>73</sup>

Although the California Supreme Court denied a hearing of the *Bindrim* decision,<sup>74</sup> the concurring opinion of Justice Bird in *Guglielmi v. Spelling-Goldberg Productions*<sup>75</sup> pointedly undercuts the conclusions of the *Bindrim* court.<sup>76</sup> The *Bindrim* decision may be only an unfortunate aberration in first amendment adjudication. It affects creative expression within the area of communication most protected by the first amendment—discourse about contemporary events vital to an in-

70. *Id.* at 75, 155 Cal. Rptr. at 37.

71. See *Time, Inc. v. Hill*, 385 U.S. 374, 401 (1967) (Douglas, J., concurring); *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 129, 233 N.E.2d 840, 843, 286 N.Y.S.2d 832, 836 (1967) (Bergan, J., dissenting).

72. See note 60 *supra*.

73. Justice Files, dissenting in *Bindrim*, noted that the analytical problem with the majority opinion was "that it brands a novel as libelous because it is 'false,' i.e., fiction; and infers 'actual malice' from the fact that the author and publisher knew it was not a true representation of plaintiff." Moreover, the constitutional concern was "the chilling effect upon the publisher of any novel critical of any occupational practice inviting litigation on the theory 'when you criticize my occupation, you libel me.'" 92 Cal. App. 3d at 89, 155 Cal. Rptr. at 45 (Files, P.J., dissenting).

74. The United States Supreme Court also denied certiorari, with three justices dissenting. 444 U.S. 984 (1979).

75. See discussion in text accompanying notes 27-32 *supra*.

76. In *Guglielmi*, Chief Justice Bird commented:

Contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction.

25 Cal. 3d at 869, 603 P.2d at 460, 160 Cal. Rptr. at 358.

formed populace. Taken seriously, the decision would subject even novels or motion pictures about the presidency to liability because a living president would undoubtedly be identified by at least some readers or viewers.

### III. COPYRIGHT LAW

With rare exceptions, the common law of copyright has developed without fair regard for the first amendment issues underlying court decisions.<sup>77</sup> These first amendment considerations enter the analysis of a copyright infringement claim, at least implicitly, in three distinct issues: the issue of protectibility, the idea/expression dichotomy, and the fair use exception. However, unless the courts use these grounds to dispose of invalid copyright claims upon motion, the expensive process of litigation will chill expression that the first amendment was designed to protect.

A court should decide at the motion stage whether the allegedly copied scenes deserve copyright protection or are in the public domain. Stock words and phrases, clichés, and other standard elements of genre films or fiction are not protected by copyright law.<sup>78</sup> Thus, the court in *Alexander v. Haley*<sup>79</sup> correctly granted summary judgment against the author of *Jubilee* who claimed infringement of her novel by Alex Haley's celebrated novel and television series, *Roots*. Both works described the toils of slavery, with the consequent similarities of historical and factual themes, folk customs, scenes *a faire*, clichéd language, and

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77. See generally Note, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320 (1979). But see *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967).

78. See, e.g., *Warner Bros. Inc. v. Film Ventures Int'l.*, 403 F. Supp. 522, 525-26 (C.D. Cal. 1975) (finding no infringement of the character Regan or the special effects used in plaintiff's film, *The Exorcist*, in defendant's film, *Beyond the Door*, and accepting defendant's argument that "the use of flickering lights, raucous 'haunted-house type' noises, flying bodies and objects about a room, levitation and the changing of human features from placid to gruesome are theatrical tricks which have for many years been used in other films and stage plays"); *Bevan v. CBS, Inc.*, 329 F. Supp. 601, 606 (S.D.N.Y. 1971) (finding no infringement of plaintiff's play, *Stalag 17*, in defendant's television series *Hogan's Heroes* because the only similarities were "stock items, characteristic of the POW camp genre of literature"); *Warshawsky v. Carter*, 132 F. Supp. 758, 759-60 (D.D.C. 1955) (finding no infringement between two novels about women who become President of the United States because the similarities "are those which would normally occur in two stories dealing with a woman becoming president . . ."). But see *Goodson-Todman Enterprises Ltd. v. Kellogg, Co.*, 513 F.2d 913 (9th Cir. 1975) (reversing summary judgment that found no infringement of plaintiff's game show format of *To Tell The Truth* in defendant's cereal commercial, *Know Your Tiger*, because the idea rather than its expression was used).

79. 460 F. Supp. 40 (S.D.N.Y. 1978).



metaphors. Similarly, the court in *Reyher v. Children's Television Workshop*<sup>80</sup> affirmed the dismissal of an action claiming infringement of a children's story, *My Mother Is the Most Beautiful Woman in the World*. The evidence showed that both stories had been derived from folklore of Russian or European origin. Despite the substantial similarity of the two works, the court concluded that defendant's story was a derivative work "substantially copied from a prior work in the public domain" and not protected by copyright.<sup>81</sup> *Alexander* and *Reyher* correctly mark the perimeters of copyright protection. To assure that hackneyed themes are not protected at the expense of discouraging the artful portrayal of a common theme, a court must first examine the similarities and prevent recovery for elements in the public domain.

Second, the trial court must examine the alleged similarities and decide whether the defendant has taken only the idea rather than the expression from plaintiff. Ideas are not protected by a copyright because of the obviously oppressive effect a monopoly on ideas would have on freedom of speech and the press. If only an idea rather than its expression is common to two works,<sup>82</sup> there is no infringement as a matter of law, and the case should be discarded on motion. For example, in *Musto v. Meyer*,<sup>83</sup> judgment was correctly granted on the pleadings. Musto had written and copyrighted a scientific article on the use of cocaine in the nineteenth century. In the article, he suggested that Sherlock Holmes and Sigmund Freud were probable users of the drug. Musto went on to say that during Holmes' disappearance from 1891 to 1894 he received curing treatments from Freud. The defendant explicitly acknowledged Musto's article in the preface to his book, *The Seven Percent Solution*, from which a film of the same name was derived. The book and the film, however, greatly expanded the circumstances suggested by Musto, building a mystery around Holmes' use of cocaine and his encounter with Sigmund Freud. Accordingly, the court found no infringement, holding that ideas, basic plots, and isolated incidents

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80. 533 F.2d 87 (2d Cir. 1975), *cert. denied*, 429 U.S. 950 (1976).

81. *Id.* at 90.

82. *See generally* Nimmer, *supra* note 34, at 1189-93.

83. 434 F. Supp. 32 (S.D.N.Y. 1977), *aff'd mem.*, 598 F.2d 609 (2d Cir. 1979). A similar case, *Rokeach v. Avco Embassy Pictures*, 3 MEDIA L. RPTR. (BNA) 1774 (S.D.N.Y. 1978), could have been decided without the necessity of a trial. In *Rokeach*, a professor of psychology sought damages from the distributors of a motion picture, claiming infringement of his scholarly study, *The Three Christs of Ypsilanti*. The disputed motion picture, and the book and play upon which it was based, excerpted verbatim lines of dialogue among three mental patients presented in Rokeach's scholarly work who were under the delusion that they were Christ. The court held that the motion picture had taken only the idea of a confrontation among deluded persons rather than the expression.

are not protectible as a matter of law.<sup>84</sup>

The third basis for disposition of an infringement action on a motion lies in the fair use exception to the copyright monopoly. Under the Copyright Act of 1976, this common law exception was restated with no intention to freeze the doctrine to the existing precedents.<sup>85</sup> Although the statute makes no reference to the first amendment, a number of courts have balanced first amendment considerations against the interests of the copyright holder in adjudicating the fair use exception where the copied material was newsworthy or biographical information. Perhaps the best example of such a case is *Rosemont Enterprises, Inc. v. Random House, Inc.*<sup>86</sup> In *Rosemont*, associates of Howard Hughes obtained the copyright to a magazine article about Hughes and sued to enjoin publication of a Hughes biography claiming infringement of copyright. The court did not address the distressing implication that the Hughes interests sought total suppression of information about Hughes. Instead, the court stated that competing biographies enjoy a preferred position in copyright adjudication.<sup>87</sup>

A balancing test was also employed to determine fair use in *Time Inc. v. Bernard Geis Associates*.<sup>88</sup> At issue was the deliberate copying of the copyrighted Zapruder film of the assassination of President Kennedy wherein exact sketches of certain frames of the Zapruder film were included in the copier's book, *Six Seconds in Dallas*. Although

84. 434 F. Supp. at 36.

85. 17 U.S.C. § 107 (1976) states:

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

86. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

87. In balancing the equities, the court concluded that the public interest should prevail over any damage to the owners of the copyright:

Biographies, of course, are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works. This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution, *e.g.*, so "that the world may not be deprived of improvements or the progress of the courts be retarded."

*Id.* at 307-09.

88. 293 F. Supp. 130 (S.D.N.Y. 1968).

evidence of copying and substantial similarity was abundant, the court found this use to be "fair."<sup>89</sup> As in *Rosemont*, the court balanced the public interest in discussion of the film against the copyright holder's interest in capturing financial return.<sup>90</sup> The court accordingly granted summary judgment based on its finding that sketches copied from the Zapruder film constituted a fair use of the film.<sup>91</sup> As a matter of law, the copying was not subject to liability.

Thus, protectibility, the idea/expression dichotomy, and fair use are questions of law that can be determined prior to trial on motions for dismissal or summary judgment. If they are not treated as analytically distinct from the question of infringement, confusing and inconsistent precedents are probable. Moreover, if the question of infringement is not circumscribed by these three considerations, first amendment considerations will be given short shrift. The consequential chilling effect on creative expression will particularly affect writers in the film industry.

For example, a production company intending to produce a film of a particular genre, such as science fiction, generally accepts submissions from a variety of writers. Similarities among the submissions are inevitable. Space vehicles, robots, advanced weaponry such as lasers, and remote planets with evil humanoid inhabitants are likely to recur in each submission. Despite these similarities, one submission may be remarkably superior to the others and more worthy of production. But if selection of the superior script opens the production company to myriad claims of infringement as to the stock paraphernalia of science fiction, and if these essentially nonactionable claims proceed to trial, the cost of legal defense will force production companies to limit submissions *ab initio*. As a result, creative expression will be discouraged to the detriment of the writers and the public.<sup>92</sup>

*Ideal Toy Corp. v. Kenner Products Division*<sup>93</sup> is a good example of a case decided at trial which should have been dismissed upon motion.<sup>94</sup> In *Ideal Toy*, plaintiff sought a declaratory judgment that its

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89. *Id.* at 146.

90. *Id.*

91. *Id.*

92. *But see* Berman & Boxer, *Copyright Infringement of Audiovisual Works and Characters*, 52 S. CAL. L. REV. 315 (1979).

93. 443 F. Supp. 291 (S.D.N.Y. 1977).

94. *But see* Twentieth Century-Fox Film Corp. v. MCA, Inc., No. 78-2437 (C.D. Cal. August 22, 1980) (granting partial summary judgment to defendant; defendant's motion picture *Battlestar Gallactica* not found substantially similar to plaintiff's motion picture *Star Wars*, despite presence of helmeted space figures, X-shaped fighter planes making abrupt

toys produced under the trademark "Star Team" did not infringe Twentieth Century-Fox's copyright of *Star Wars* characters, or the toy characters produced by Kenner as Fox's licensee. Although both sets of characters had elements in common, the court found they were not substantially similar under the lay observer test of copyright infringement. The court went on to find, irrespective of any similarity, that although the toy company sought to use the themes of *Star Wars*, the theme of a black-robed, helmeted figure in outer-space in conflict with humanoid and non-humanoid robots is not protectible.<sup>95</sup> This finding of unprotectibility as a matter of law could have supported judgment without the expense of trial. Such costly failures to dispose of the action on motion harms the public as well as the copyright holders.

Perhaps the court's reluctance in *Ideal Toy* to reach its decision before trial stems from the uncertain state of the law regarding the protectibility of characters. Thus far, two tests have been advanced. In *Warner Bros. Pictures, Inc. v. CBS, Inc.*,<sup>96</sup> the "Sam Spade" case, the court suggested that copyright protection is available only when a character "really constitutes the story being told" and is not merely a "chessman" or "vehicle" of the plot.<sup>97</sup> On the other hand, Judge Learned Hand in *Nichols v. Universal Pictures Corp.*<sup>98</sup> proposed a test of protectibility depending on the degree to which the character has been developed.<sup>99</sup> Under either test, however, few characters are worthy of protection. The copyright holder's character must be extraordinarily distinguished to be protected, and the usual rules of non-protectibility would prevent liability whenever the copied character is derived from a character accessible to both writers. Most importantly, both tests present questions of law susceptible to determination before trial.

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jetplane-like movements, and other elements of the science fiction genre in the public domain).

95. 443 F. Supp. at 304.

96. 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

97. *Id.* at 950.

98. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

99. Judge Hand concluded that the "less developed the characters, the less they can be copyrighted." *Id.* at 121. For example:

If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's "ideas" in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's Theory of the Origin of Species.

*Id.*

Professor Nimmer and other authorities<sup>100</sup> suggest that graphic characters are most worthy of copyright protection. The "Sam Spade" test<sup>101</sup> would probably protect animated characters such as Bugs Bunny or Mickey Mouse whose appearance and personality dominate the stock stories in which they appear.<sup>102</sup> The Learned Hand test<sup>103</sup> would offer equivalent protection to these characters simply because their appearance as well as their personalities are well developed. The fact that these characters are animated rather than filmed human characters makes them particularly definable; they are not literary characters portrayed by an actor but illustrations *qua* illustrations, delineated by a finite number of hand drawn strokes.

Even with regard to filmed graphic characters, however, a court must be on guard to disregard similarities which amount to unprotected stock elements of all cartoon figures. Otherwise, there is a danger that copyright protection of one cat or mouse will chill exploitation of the most popular children's themes. The recent case of *United Artists Corp. v. Ford Motor Co.*,<sup>104</sup> illustrates the sometimes subtle distinctions between characters that a court must make in order to preserve creative expression. United Artists owned the copyright to the Pink Panther, an animated character used in two motion pictures. United Artists sued Ford Motor Company alleging that the animated cat used to advertise the Lincoln-Mercury line of cars infringed its copyright. In light of the necessary similarities as to ears, tails, whiskers, and so on, the court had to consider whether the more distinctive characteristics of the Pink Panther had been copied. Cats are common subjects for animation; Felix the Cat, Top Cat, Snagglepuss, Tom from Tom and Jerry, Sylvester, and many others had been created before either the Pink Panther or the Lincoln-Mercury cat took shape. The court, therefore, compared the two characters as they appeared "in their totality," finding that the use of top hats, canes, and policemen's hats are stock props in animation and that the "double bounce" form of movement is a standard animation ploy.<sup>105</sup> Noting that both characters had human features, such as stomachs lighter in color than their bodies, and slender legs, the

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100. Nimmer, *supra* note 34, at 1197; H. HOWELL, *THE COPYRIGHT LAW* 39-41 (1979).

101. See text accompanying note 97 *supra*.

102. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom. O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979) (finding copyright infringement of Disney's Mickey Mouse graphic character in defendant's graphically identical character that differed as to plot, theme, and character).

103. See note 99 *supra* and accompanying text.

104. 483 F. Supp. 89 (S.D.N.Y. 1980).

105. *Id.* at 95.

court concluded that the similarities did not suggest copying and "even if they did that they are not of such magnitude as to constitute an infringement."<sup>106</sup> In short, the similarities between the two cats could be dismissed as elements in the public domain, unprotected as a matter of law.

In contrast, the court in *Sid & Marty Krofft Television Production, Inc. v. McDonald's Corp.*<sup>107</sup> did not discuss the extent to which any of the similarities between the disputed characters were unprotected as a matter of law. Evidence of copying and of abundant similarities was carefully detailed by the court; but in its haste to conclude that an ordinary observer would not distinguish between the two sets of characters, the court never asked whether the similarities were protected.<sup>108</sup> The court's assertion that a jury could certainly find these similarities of expression substantial only underscores its misunderstanding. The point is that however similar the sets of characters may be, copyright law does not protect the hackneyed expression of common themes. To find infringement because the works similarly depict a castle, a talking tree, or characters with large Charlie Brown style heads forever limits the scope of creative expression of such details.

It is unfortunate that in cases such as *Krofft*, where the imitation may seem to be deliberate, the defendant carries the burden of advancing arguments in support of free expression and the first amendment. The inclination from the bench may well be to balance the equities between the parties without regard for the constitutional issue which is entailed in any decision involving expression.<sup>109</sup> In the long run, how-

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106. *Id.* at 96.

107. 562 F.2d 1157 (9th Cir. 1976).

108. Examination of the similarities perceived by the court, however, reveals fairly standard children's fare:

The "Living Island" locale of Pufnstuf and "McDonaldland" are both imaginary worlds inhabited by anthropomorphic [sic] plants and animals and other fanciful creatures. The dominant topographical features of the locales are the same: trees, caves, a pond, a road, a castle. Both works feature a forest with talking trees that have human faces and characteristics. The characters are also similar. Both lands are governed by mayors who have disproportionately large round heads dominated by long wide mouths. They are assisted by "Keystone cop" characters. Both lands feature strikingly similar crazy scientists and a multi-armed evil creature.

*Id.* at 1167 n.9.

109. One commentator has suggested that the burden of proof be reversed in infringement cases to account for first amendment concerns. See Rosenfield, *Constitutional Dimensions of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790 (1975):

Without its constitutional dimension and protection, fair use has been relegated to the status of an affirmative defense, with the user being required to carry the burden of proof that the use was not an actionable infringement. Thus, the whole

ever, both the writers and the viewing public will suffer from the inevitable chilling effect wrought by overbroad construction of the copyright monopoly.

#### IV. CONCLUSION

The trend of judicial decisions in the areas of right of publicity, privacy, defamation, and copyright law threatens to chill creative expression either directly, by imposing liability on expression which should be protected, or indirectly, by raising the cost of defending meritless claims. The emerging right of publicity poses a monopoly on expression akin to copyright, but with no defense of fair use to safeguard first amendment guarantees. Privacy and defamation cases which continue to impose liability against creators of fiction may restrict motion pictures and novels based on the reality of contemporary history to trite themes and hackneyed characters. Courts deciding copyright infringement cases may further deplete our creative resources by failing to avoid costly litigation with timely pretrial decisions of law.

Viewed together, these trends are indeed alarming to motion picture, publishing, and broadcast companies forced to tailor their script and editorial decisions to the evanescent line between protected and unprotected speech. This chill on creativity is costly not only in legal fees but in the diminution of expression caused by disregard for first amendment considerations in early stages of litigation.

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defense of the public interest and constitutional right is thrown on the alleged infringer.

*Id.* at 804.