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Sale of Merchandise in the Marketplace of Ideas: Titan Wrestlers Challenge Posters within Magazine

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SALE OF MERCHANDISE IN THE MARKETPLACE OF IDEAS: TITAN WRESTLERS CHALLENGE POSTERS WITHIN MAGAZINE

I. INTRODUCTION

In one corner stands the current challenger to freedom of the press, "The Titan Wrestlers!" The Titan Wrestlers will attempt to establish that publication of posters of professional wrestlers within a magazine, without consent, violates their right to control the commercial exploitation of their own names and likenesses. In the other corner, our current defender of freedom of the press, "Comics World." Comics World will attempt to establish that first amendment protection for freedom of the press protects the media's right to publish "magazine posters" which depict the Titan Wrestlers without their consent. Hold on to your seats, for the victory of either opponent could give new meaning to the "marketplace of ideas."

Under first amendment doctrine, the metaphor of the "marketplace


2. The Titan Wrestlers perform worldwide under the auspices of the World Wrestling Federation ("WWF"). Id. at 1317.

3. The defendants-appellees in Titan are Comics World Corporation (U.S.A.), Comics World, Inc., Starlog Group, Inc., O'Quinn Studios, Inc., corporations organized under the laws of the State of New York with their principal places of business in New York, Kerry O'Quinn and Norman Jacobs, officers and directors of Comics World Corp. and Starlog Group, Inc., and are both citizens and residents of New York (collectively "Comics World"). Defendants publish magazines such as "Wrestling Poster Magazine," "Wrestling All Stars," "Wrestling All Stars Super Giant Pin-Ups," "Superstar Wrestler Photo Album" and "Wrestling Scene," or published such magazines in the past. Id.

4. The court described defendants' product to include "[l]arge, folded photographic inserts variously known as 'magazine posters,' pin-ups, pullouts, centerfolds, or fold-outs, which are affixed by staples or otherwise to the inside of normal magazines, and often cannot be completely viewed without removing them entirely from the magazine. When pulled out and unfolded, defendants' inserts are approximately 16" x 22", or four-times the surface area of a normal 8" x 11" magazine page." Id.

of ideas”\(^6\) supports the constitutional guarantee of a free press. This concept embodies an idea that the “test of truth is the power of the thought to get itself accepted in the competition of the market . . .”\(^7\) In other words, truth can only emerge through the free dissemination of ideas and newsworthy matter within the public discourse. The underlying rationale is that through the free dissemination of ideas, our political system and a free society can be maintained.\(^8\) The significance of this rationale allows the media to exploit the dissemination of news and information through traditional communications media, like magazines, within the public domain.

A public figure,\(^9\) whether such person is an athlete, an entertainer or a well-known celebrity, exploits a different kind of market — a commercial market. In the course of a public career, a very valuable proprietary interest in a face or likeness will result.\(^10\) A public figure may invest years of practice and creative efforts in cultivating a marketable status.\(^11\) This marketable status has been analogized to a commercial entity’s right to profit from the “goodwill” it has built up in its name.\(^12\) Thus, traditionally, celebrities have found a very lucrative market in manufacturing and distributing merchandise such as T-shirts,\(^13\) sweatshirts,\(^14\) trading cards,\(^15\) and posters.\(^16\)

The very nature and character of a public figure will promote a pub-

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7. Id.
8. See supra note 5.
14. Id.
lic interest. Therefore, the activities of a public figure will always constitute news. However, "[w]hile one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege [of disseminating newsworthy matter] does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information."

In the balance of what constitutes the legitimate public interest, the right of privacy affords a public figure, often the subject of public interest, very little protection. The right of publicity, in contrast, "is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation."

In New York, early case law refused to recognize that private figures had the right to control the use of their name or likeness under a right to privacy. The courts soon recognized, however, that the complaining parties were upset not at the usage of their name or likeness, but because they were denied a share in the economic profits derived from the usage. The loss of profits became more evident when the complaining party was a well-known celebrity. Consequently, the right of publicity comes into play when the plaintiff has "achieved in some degree a cele-

17. Paulsen, 299 N.Y.S.2d at 507, 59 Misc. 2d at 449.
18. Id.
22. The right of privacy protects a "'person's right to be let alone,' with recovery being grounded on the mental strain, distress, humiliation and disturbance of the peace of mind suffered by such person. . . ." Paulsen, 59 Misc. 2d at 450, 299 N.Y.S.2d at 508. See also Haelan Laboratories, 202 F.2d at 868 ("[a] personal and non-assignable right not to have [your] feelings hurt. . . .").
23. See Gautier v. Pro-Football, Inc., 304 N.Y. 354, 361, 107 N.E.2d 485, 489 (1952) (J. Desmond, concurring); accord Paulsen, 299 N.Y.S.2d at 508, 59 Misc. 2d at 450 ("Privacy in its usual sense is hardly the goal of an entertainer or performer. What such a figure really seeks is a type of relief which will enable him to garner financial benefits from the pecuniary value which attaches to his name and picture.").
brated status."\textsuperscript{25}

The right of publicity protects "[t]he pecuniary value which attaches to the names and pictures of public figures, particularly athletes and entertainers, and the right of such people to this financial benefit."\textsuperscript{26} Thus, the right of publicity acknowledges that a commercial market exists for public figures to commercially exploit his or her name or face, "[a]nd such market — like any other — must have its recognized rules and experts."\textsuperscript{27}

This article argues that the first amendment does not protect an infringement on the right of publicity. The attempt to sell an item of merchandise within the confines of a magazine does not promote the free dissemination of ideas. While the protections afforded to the media under the first amendment are very significant, courts must recognize a limit on that right when the media seeks to enter a market in which it does not belong.

II. TITAN SPORTS, INC. V. COMICS WORLD CORP.

A. Background of Case

Titan owns the rights in the names and likenesses of professional wrestlers such as Hulk Hogan, Randy "Macho Man" Savage, Lou Albano, among others.\textsuperscript{28} The fame and notoriety of these wrestlers emanates from the national popularity of professional wrestling. The novelty of this sport is referred to as "Wrestlemania."\textsuperscript{29}

The wrestling matches and other services for Titan are performed under the sponsorship of the World Wrestling Federation ("WWF"). The "WWF wrestlers" make appearances throughout the United States and Canada. Their performances can be seen on regularly scheduled television broadcasting and cable television programs produced by Titan.\textsuperscript{30} Moreover, Titan continues to conduct sales and licensing of various products featuring the names and likenesses of the wrestlers, including posters. The parties have stipulated that the wrestlers are in fact "public figures."\textsuperscript{31}

\textsuperscript{26} See \textit{Rosemont Enter., v. Random}, 58 Misc. 2d at 6, 294 N.Y.S.2d at 129.
\textsuperscript{27} See \textit{Grant}, 367 F. Supp. at 881.
\textsuperscript{28} See supra note 1 and accompanying text.
\textsuperscript{29} Titan, 690 F. Supp. at 1317.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
Comics World, on the other hand, publishes such magazines as "Wrestling Poster Magazine," "Wrestling All Stars," "Wrestling All Stars Super Giant Pin-ups," "Superstar Wrestlers Photo Album" and "Wrestling Scene." Many of these magazines include 16" x 22" photographs or "magazine posters" of Titan's wrestlers. Comics World folds the posters into 8" x 11" squares and staples them into the magazine. Comics World also uses these photographs and the wrestlers' names in subsequent features of their magazine to solicit subscriptions or for the purchase of back issues of the magazine. This practice occurs without Titan's consent.

B. Statement of Facts

Titan brought suit in the United States District Court for the Southern District of New York. Titan alleged that the oversized photographs violate Section 51 of the New York Civil Rights Law. This section prohibits the use of names and likenesses in any and all media "for advertising purposes or for the purposes of trade" without written consent. In order to prevail under this section, a plaintiff must establish three elements: (1) that the defendant used plaintiff's name, portrait or picture within the state, (2) that such use was for purposes of advertising or trade, and (3) the use occurred without first obtaining plaintiff's written consent. Comics World conceded that the names and pictures of Titan's wrestlers were used within New York and without first obtaining Titan's written consent. As a result, the dispositive issues in the lower court were whether the magazine posters were used for purposes of

32. See supra note 3 and accompanying text.
34. Id.
35. Id.
36. Id.
37. Id. at 1315.
39. N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1988) states 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 as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.
40. Titan, 690 F. Supp. at 1319.
advertising or trade.\textsuperscript{41}

Comics World argued that folding and stapling the posters into their magazine does not violate Section 51 because the inserts are part of the magazine which depicts newsworthy subjects and thus are protected under the first amendment.\textsuperscript{42} Comics World also claimed that a corresponding news article appears in every issue of their "poster magazines,"\textsuperscript{43} further precluding an advertising or trade purpose under the statute.

Both Titan and Comics World filed motions for summary judgment on the grounds that there was no material issue of genuine fact and thus each was entitled to judgment as a matter of law.\textsuperscript{44}

The district court found that Comics World's product was a "bona fide newsstand publication."\textsuperscript{45} The court held that because the photos bear a direct relationship to the newsworthy topic of the magazine which in turn bears a direct relation to articles and news information contained in the magazine, the use of the oversized photos are protected by the first amendment guarantee of freedom of the press.\textsuperscript{46} The court further stated that "the constitutional protection of the freedom of the press does not stop at 8" x 11").\textsuperscript{47} Accordingly, the court granted Comics World's motion for summary judgment and dismissed Titan's complaint with prejudice.\textsuperscript{48}

On appeal, the Second Circuit,\textsuperscript{49} however, disagreed. Titan did not contest that Comics World's use of the magazine posters was not for advertising purposes.\textsuperscript{50} Titan's appeal thus proceeded on the narrower issue of whether the alleged improper usage was for "purposes of trade."\textsuperscript{51}

Under New York case law, the media is immunized from the reach of Section 51 if the article illustrates a "newsworthy" item regarding a matter of public interest that is not merely incidental to a commercial

\textsuperscript{41} Id.
\textsuperscript{42} Id. at 1318.
\textsuperscript{43} Id.
\textsuperscript{44} FED. R. CIV. P. 56(c).
\textsuperscript{45} Titan, 690 F. Supp. at 1319.
\textsuperscript{46} Id. at 1323.
\textsuperscript{47} Id. at 1322.
\textsuperscript{48} Id. at 1323.
\textsuperscript{49} Titan filed an appeal in the United States Court of Appeals for the Second Circuit, Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989).
\textsuperscript{50} Titan, 870 F.2d at 87.
\textsuperscript{51} Id.
Since the wrestlers are public figures, the court of appeals held that a genuine issue of material fact existed as to whether the oversized photographs were used for "purposes of trade" and, therefore, not entitled to first amendment protection. The court reversed the district court's grant of summary judgment in favor of Comics World and remanded the case for further proceedings.

III. REASONING OF THE COURT

A. District Court's Analysis

The principal issue before the district court was the extent of the coverage of Section 51 of the New York Civil Rights Law as it related to the publication of the magazine posters depicting the professional wrestlers without their prior consent. Since both parties filed cross-motions for summary judgment, resolution of the issue required that the court review the substantive law to ascertain the material facts. The court would then decide whether a material issue existed as to a material fact.

1. Bona Fide Newsstand Publications

The court found that the defendant's magazines, with or without the photographic inserts, are bona fide newsstand publications. It stated that the magazines in question, including all the articles and photographs, are devoted solely to the sport of professional wrestling. In addition, the magazines containing the inserts are manufactured and distributed in the same manner as most magazines in the industry intended for newsstand sale.

2. Newsworthiness of Wrestlers

The court found that New York state and federal courts have interpreted Section 51 to exempt publications in magazines that are "newsworthy" and matters of public interest. Under *Stephano v. Newsstand*...
Publications, Inc., the New York Court of Appeals stated that this exception reflects federal and state constitutional concerns for free dissemination of news and other matters of public interest.

In applying this newsworthiness exemption to the WWF wrestlers, the court noted how the sport of wrestling and the WWF wrestlers have become significantly newsworthy in recent years. Based on the regularity of the wrestlers’ national performances and the fact that they are subjects of regularly published magazines, regularly scheduled broadcasts and television programs, the court found that the wrestlers are truly public personalities of both sports and entertainment. Based on these findings and the parties’ stipulation that the wrestlers are public figures, the court concluded that the WWF wrestlers are proper subjects of newsstand publications.

3. Application of Section 51

As noted above, to establish a violation under Section 51, the plaintiff must show that “(1) the defendant used plaintiff’s name, portrait or picture within the state, (2) for purposes of advertising or trade, and (3) without first obtaining plaintiff’s consent.” The court initially found that Titan had established “use” within the state. The parties also stipulated that the defendants used the photos without the consent, written or otherwise, of the wrestlers or Titan. Thus, there were no genuine or material issues of fact with regard to the first and third prong of Section 51.

a. Advertising Purposes

Titan argued that defendants violated the advertising prong of Section 51 by using the pictures, portraits and names of the wrestlers in their advertisements for soliciting the purchase of back issues of defendants’ “poster magazines” by reference to the large photo inserts included in them. The court, however, stated that in order to constitute use for advertising purposes, “the use must appear in or as part of an advertise-

63. Id.
64. Titan, 690 F. Supp. at 1317.
65. Id. at 1320.
66. Id.
67. Id. at 1319. See also supra note 39 and accompanying statutory text.
68. Titan, 690 F. Supp. at 1318.
69. Id. at 1317.
70. Id. at 1320.
ment or solicitation for patronage."  

The court found that the advertising prong of Section 51 would not be violated where the use was not designed primarily to solicit purchasers for defendants' products. The court reasoned that since the original publication of the magazines involved dissemination of matters of public interest, and thus not originally used for "advertising purposes," later solicitations for subscriptions or the sale of back issues, would also not constitute an improper use for advertising purposes. The court did not find any significance in defendants' use of the names of the wrestlers, whose pictures had appeared in past issues containing the large photo inserts, to solicit subscriptions of their magazines. The court, therefore, concluded that use of the photos in advertisements to solicit the purchase of back issues constituted a republication of samples of the newsworthy content of defendant's magazines, and was thus protected.

b. Trade Purposes

The court cited the Second Circuit's interpretation of what constitutes purposes of trade under prong two of Section 51. Under Lerman v. Flynt Publishing Co. ("Lerman"), when the unconsented use of plaintiff's photo is in conjunction with a matter of public interest, to prevail, the plaintiff must satisfy any one of the following: (1) that use of plaintiff's name or likeness has no relation to the discussion, and is thus an advertisement in disguise, or (2) that defendant's use was infected with material and substantial fiction or falsity thus forfeiting the privilege for reporting public interest matters. The court stated that the second alternative did not apply because there was nothing to suggest that Comics World's use was anything other than a bona fide photographic representation of the WWF wrestlers. As to the first alternative, the court found that defendants'
magazines are entirely devoted to professional wrestling.\textsuperscript{81} In addition, each issue contains news about wrestling, excerpts from interviews with the wrestlers, and a full-page report about each of the wrestlers featured in the large photographic insert section.\textsuperscript{82} The court therefore found that the location of the inserts in the center of the magazine, stapled to preclude full viewing without removal, does not alter the fact that the photographs correspond to dissemination of matters of public interest.\textsuperscript{83}

The court stated that magazines regularly divide up articles in the front and back of magazines in order to force the reader's attention to latter portions of the magazines and the advertisements therein.\textsuperscript{84} The court said that this method merely makes the enjoyment of newsworthy matters a little more difficult.\textsuperscript{85} As a result, the court found plaintiff's argument that placement of the photos separate from a news article caused the photos not to correspond to the topic of the magazine without merit.\textsuperscript{86}

4. Posters Not Protected Under Section 51

Titan argued that the photo inserts are posters and therefore should not be afforded exemption from the coverage of Section 51.\textsuperscript{87} Titan relied on two cases where the first amendment freedom of the press did not apply to posters of entertainment figures. In \textit{Brinkley v. Casablancas} ("\textit{Brinkley}")\textsuperscript{88}, model Christie Brinkley prevailed under Section 51 to prevent the unconsented publication of posters made from an unapproved shot at a prior photo session.\textsuperscript{89} Also, in \textit{Factors Etc., Inc. v. Pro Arts, Inc.} ("\textit{Factors}")\textsuperscript{90}, the owners of Elvis Presley's right of publication prevailed in enjoining the unconsented publication of a poster which depicted the singer and the words, "In Memory," three days after Elvis' death.\textsuperscript{91} However, the court found that both \textit{Brinkley} and \textit{Factors} were distinguishable on their facts.\textsuperscript{92}

The court first noted that in both \textit{Brinkley} and \textit{Factors} the posters were printed on high quality paper and constituted a type suitable for

\begin{itemize}
\item \textsuperscript{81} \textit{Id.} at 1319.
\item \textsuperscript{82} \textit{Id.} at 1321.
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Titan, 690 F. Supp. at 1322.}
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} 80 A.D.2d 428, 438 N.Y.S.2d 1004.
\item \textsuperscript{89} \textit{Titan, 690 F. Supp. at 1322.}
\item \textsuperscript{90} 579 F.2d 215 (1978).
\item \textsuperscript{91} \textit{Titan, 690 F. Supp. at 1322.}
\item \textsuperscript{92} \textit{Id.}
\end{itemize}
framing.93 Secondly, defendants were not engaged in the sale of magazines containing large pull-outs and photo inserts that could double as wallhangings for some readers.94 The court also noted that the defendants in Brinkley did not contest the fact that the picture of Ms. Brinkley was used for trade purposes under Section 51.95 Consequently, the court reasoned that these factual differences indicated that the first amendment freedom of the press was not really at issue in Brinkley and Factors.96

The court then discussed the purchasers' desires to remove photographs from the magazines and pin them up on walls. It felt that the "poster magazines" were merely following this industry trend in response to reader demand.97

Finally, the court found that since magazines come in all shapes and sizes, defendants could easily publish a magazine that is 16" x 22" or larger.98 The court stated that "[c]onstitutional protection of the freedom of the press does not stop at 8" x 11"."99

Thus, the court held that defendants' magazines used photos that bear a direct relationship to the newsworthy topic of the magazines, which bear a direct correspondence to the articles and news information contained therein.100 Therefore, the use of the oversized photos are protected by the first amendment and the defendant's publication of the wrestlers' photographs did not violate Section 51.101 Accordingly, the plaintiff's motion for summary judgment was denied and defendants' motion for summary judgment dismissing plaintiff's complaint was granted with prejudice.102

**B. Appellate Court's Analysis**

The United States Appellate Court for the Second Circuit disagreed, and found that a genuine issue of material fact did exist as to whether the

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93. Id.
94. Id.
95. Id.
97. For example, the pin-up of Betty Grable during World War II, Marilyn Monroe during the 1950's, and Playboy's fold-outs. Id. But cf. Reply Brief for Appellant at 6, Titan Sports, Inc. v. Comics World, 870 F.2d 85 (2d Cir. 1988) (No. 88-7734) ("[I]t is common knowledge that the models for the centerfolds in magazines such as Playboy... are not only [consented] to but are extremely well paid for the use of their photographs... .")
99. Id.
100. Id. at 1323.
101. Id.
102. Id.
oversized photographs of professional wrestlers, folded and stapled inside defendants' magazines, constituted use for "purposes of trade," and thus were not entitled to first amendment protection. Hence, the appellate court reversed the district court's ruling.

1. Background of Section 51

The appellate court stated that Section 51 provides remedies for the commercialization of an individual's personality without his consent. The court also agreed that New York courts, recognizing first amendment considerations, have held that "purposes of trade" do not apply to "publications concerning newsworthy events or matters of public interest." In addition, the court acknowledged that an insignificant public interest aspect of a "publication" cannot exempt it from the reach of Section 51 where the primary aspect of the product is commercial. Thus, in determining usage for purposes of trade, the court must consider whether the public interest aspect of the publication is merely incidental to its commercial purpose.

In particular, the appellate court stated that New York courts have recognized that presentation of an item within a publication generally entitled to first amendment protection may constitute use for purposes of trade. Thus, a photograph accompanying an article concerning a matter of public interest may still be considered a use for purposes of trade if "it has no real relationship to the article . . . or . . . the article is an advertisement in disguise." Also, in contrast to the treatment of newsworthy items, the court held that photographs marketed as posters are used for purposes of trade.

Further, the court stated that the New York Court of Appeals has recognized that "[w]hile one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality

103. Titan, 870 F.2d at 88-89.
104. Id.
106. Id.
107. Titan, 870 F.2d at 87.
108. Id. at 87-88 (citing Davis, 90 A.D.2d at 379-80, 457 N.Y.S.2d at 313).
109. Titan, 870 F.2d at 88.
110. Id. (citing Stephano, 64 N.Y.2d at 185, 474 N.E.2d at 585, 485 N.Y.S.2d at 225).
111. Id. at 88.
112. The New York Court of Appeals is the highest court in the state of New York.
through a form of treatment distinct from the dissemination of news or information.” 113

The court also cited to Brinkley for the proposition that “[a] public figure does not, however, surrender all right to privacy.” 114 Although his privacy is necessarily limited by the newsworthiness of his activities, he retains the “independent right to have [his] personality, even if newsworthy, free from commercial exploitation at the hands of another.” 115

The court felt that a determination that a product is a “bona fide newsstand publication” does not resolve this controversy. 116 The court said that there are items included within a bona fide newsstand publication that may have value for purposes of trade, despite an incidental value for dissemination of news. 117 The court noted that just because the item is physically attached within the covers of a magazine does not provide automatic exemption from the scope of “purposes of trade” or automatic protection under the first amendment. 118

In addition, the court stated that the first amendment does not protect “a subterfuge or cover for private or commercial exploitation.” 119 To illustrate, the court stated that Comics World could not staple a T-shirt of a Titan Wrestler within the magazine covers and expect exemption from Section 51. 120

In order for the trial court to decide whether large photos folded and stapled into Comics World’s magazines are distributed for purposes of trade and thus not entitled to first amendment protection, the court offered the following guidelines: (1) whether the photos are included primarily for their “public interest aspect” or (2) whether the public interest aspect “is merely incidental to [the distributors] commercial purpose.” 121 In addition, it stated that courts should consider a variety of factors including, but not limited to the following: (1) the nature of the item, (2) the extent of its relationship to the traditional content of the magazine, (3) the ease with which it may be detached from the magazine, (4) whether it is suitable for use as a separate product once detached, and (5) how the publisher markets the item. 122

113. Titan, 870 F.2d at 88 (citing Gautier, 304 N.Y. at 359, 107 N.E.2d at 488).
114. Titan, 870 F.2d at 88.
115. Id. at 88 (quoting Brinkley, 80 A.D.2d at 433, 438 N.Y.S.2d at 1008).
116. Titan, 870 F.2d at 88.
117. Id.
118. Id.
120. Titan, 870 F.2d at 88.
121. Id. at 88-89 (citing Davis, 90 A.D.2d at 379-80, 457 N.Y.S.2d at 313).
122. Id. at 89.
In conclusion, the appellate court held that there remains a genuine issue of material fact as to whether Comics World's publications were used for purposes of trade.\textsuperscript{123} Accordingly, it reversed the district court's grant of the defendant's summary judgment and remanded the case for further proceedings consistent with the appellate court's decision.\textsuperscript{124}

IV. PRIOR LEGISLATIVE AND CASE HISTORY

A. Sections 50 and 51 of Right to Privacy Statute

1. Background

Section 51 was enacted in New York in response to the controversial 1902 decision of Roberson v. Rochester Folding Box Co. ("Roberson").\textsuperscript{125} In Roberson, the defendant distributed thousands of posters for a flour advertisement which depicted plaintiff without her consent.\textsuperscript{126} The court of appeals defined plaintiff's claim as "the claim that a man has . . . to pass through this world, if he wills, without having his picture published . . . or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers . . ."\textsuperscript{127} After an examination of various authorities, the court concluded that the "so-called 'right of privacy' has not yet found an abiding place in our jurisprudence."\textsuperscript{128} In response to the public outcry against the Roberson decision, the New York legislature enacted Sections 50 and 51 of the Civil Rights Law and entitled it the "Right of Privacy."\textsuperscript{129}

The purpose of Sections 50 and 51 of the New York Civil Rights Law\textsuperscript{130} ("statute") is to prevent the commercial misappropriation of a person's name or picture.\textsuperscript{131} Section 50 provides criminal penalties for use of a person's name, picture or likeness for advertising or trade pur-
poses without consent. Section 51 affords equitable relief in the form of an injunction against such use, and compensatory and exemplary damages.

Sections 50 and 51 created a statutory right to privacy in New York. However, in light of the court's refusal in Roberson to acknowledge a common law right to privacy, the legislature drafted the statute very narrowly. The application of the statute was considered limited to the circumstances of Roberson, that is, "only the commercial use of a person's name or likeness without permission is prohibited."

2. Newsworthy Exception

The constitutional protections of freedom of the press and media, however, required a careful delineation of the statute. In order to give proper recognition to these constitutional concerns, application of the statute has been restricted "to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest."

In particular, the courts adopted a newsworthy exception to the statute. The newsworthy exception essentially states that if the picture illustrates an article on a matter of public interest the use is not considered a use for purposes of trade or advertising under the statute, unless the picture does not have a real relationship to the article, or unless the article is an advertisement in disguise.

The New York courts have freely defined the term "public inter-

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132. See supra note 39.
133. See supra note 39.
134. Lerman, 745 F.2d at 129; Gautier, 304 N.Y. at 358, 107 N.E.2d at 487.
135. Arrington, 55 N.Y.2d at 439, 434 N.E.2d at 1321.
136. Id. ("Legislature confined its measured departure from existing case law to circumstances akin to those presented in Roberson. In no other respect did it undertake to roll back the court-pronounced refusal to countenance an action for invasion of privacy.") See also Time, Inc., 385 U.S. at 381.
137. Davis, 90 A.D.2d at 378, 457 N.Y.S.2d at 312; Arrington, 55 N.Y.2d at 439, 434 N.E.2d at 1321.
139. See Brinkley, 80 A.D.2d at 432, 438 N.Y.S.2d at 1007. See also Gautier, 304 N.Y. at 359, 107 N.E.2d at 488 ("It has long been recognized that the use of name or picture in a newspaper, magazine, or newsreel, in connection with an item of news or one that is newsworthy, is not a use for purposes of trade within the meaning of the Civil Rights law.").
140. See generally, Paulsen, 59 Misc. 2d at 448, 299 N.Y.S.2d at 506 (citing Gautier, 304 N.Y. at 359, 107 N.E.2d at 488).
In *Arrington v. New York Times* ("Arrington"), plaintiff's photograph was taken while he walked along a New York street. Without the plaintiff's consent, the picture was published in a magazine of the New York Times illustrating an article regarding "the role of the expanding black middle/professional class in today's society." Despite plaintiff's asserted disagreement with the views expressed by the article regarding the black middle class, the court held that the article related to a subject of public interest. This result immunized the publishers from the reach of Sections 50 and 51.

However, the New York courts have recognized that “[p]resentation of an item within a publication generally entitled to first amendment protection may constitute a use for purposes of trade, which is not entitled to first amendment protection.” To illustrate, the Second Circuit stated that "Comics World could not staple a T-shirt bearing the likeness of a Titan Wrestler between magazine covers and claim exemption from Section 51 and first amendment protection for a ‘wrestling T-shirt magazine.’

**B. Right to Privacy v. Right to Publicity**

Although Sections 50 and 51 are conjunctively entitled “Right to Privacy,” the statute encompasses both a right of privacy and the right of publicity. In some cases the two concepts are blended together for recovery under the statute. However, the interests protected under each right are entirely different.

In a conventional sense, the right to privacy involves a "person's right to be let alone." Any recovery for this right is grounded on "mental strain, distress, humiliation and disturbance of the peace of mind . . . ." As stated in *Grant v. Esquire* ("Grant"), the right to privacy permits damages for "injured feelings and general embarrass-

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144. *Id.* at 433, 434 N.E.2d at 1320.
145. *Id.*
146. *Id.* at 440, 434 N.E.2d at 1322.
147. *Id.* at 443, 434 N.E.2d at 1323-24.
149. *Id.*
151. See *Paulsen*, 59 Misc. 2d at 450, 209 N.Y.S.2d at 508; see also W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971).
ment if for purposes of trade he is unjustifiably subjected to the harsh and — to him — unwelcome glare of publicity.” 154 The right to privacy has always been considered a purely personal right, enforceable only by the party seeking redress for injuries under the statute. 155

However, the New York courts recognized that some parties’ real complaints under the statute were “[f]ar from having their feelings bruised through public exposure of their likenesses.” 156 For instance, in Gautier v. Pro-Football, Inc., 157 (“Gautier”) plaintiff, a well-known trainer of animals, performed during halftime at a professional football game. 158 Plaintiff alleged a violation of his right of privacy for the unauthorized telecasting of his performance. 159 The court held that there was no use for advertising or trade purposes under Section 51. 160 However, the concurring judge in Gautier expressed difficulty in finding an invasion of a right of privacy. 161 He thought that the plaintiff’s real complaint, and “perhaps a justified one,” 162 was that plaintiff was not paid for the telecasting of his show. 163

Similarly, in Paulsen v. Personality Posters, Inc. 164 (“Paulsen”) a well-known comedian had a comedy routine in which he proposed to run for the presidency. 165 An unpublished photograph of the comedian was marketed as a poster with the addition of the words “for President” at the bottom, without the comedian’s consent. 166 Plaintiff moved for a preliminary injunction which was predicated on an invasion of his right of privacy under Section 51. 167 The court held that plaintiff was not entitled to the injunction in view of the apparent privilege derived from the public interest character of the picture. 168

However, the court noted that it was not plaintiff’s privacy at all that concerned him. The court stated that “[p]rivacy in its usual sense is

154. Id. at 880.
155. Rosemont Enter., Inc. v. Random House, 58 Misc. 2d at 7, 294 N.Y.S.2d at 129.
156. Haelan, 202 F.2d at 868.
158. Id. at 357, 107 N.E.2d at 487.
159. Id. at 356-57, 107 N.E.2d at 486-87.
160. Id. at 359, 107 N.E.2d at 488.
161. Id. at 361, 107 N.E.2d at 489.
163. Id.
165. Id. at 445, 299 N.Y.S.2d at 503.
166. Id.
167. Id. at 447, 299 N.Y.S.2d at 505.
168. Id. at 451, 299 N.Y.S.2d at 509. It should be noted, however, that “The Paulsen case is unique to its facts and must be so considered.” Rosemont Enter., Inc. v. Urban Sys., 72 Misc. 2d at 790, 340 N.Y.S.2d at 146 (1973).
hardly the goal of an entertainer or performer.”

It further stated that “[w]hat such a figure really seeks is a type of relief which will enable him to garner financial benefits from the pecuniary value which attaches to his name and picture.”

The court acknowledged this concept as the “right of publicity,” but found that the New York courts have not shown an inclination to adopt such a construction for Section 51. Moreover, the court stated that the clear purpose of the statute was to redress injury for invasions of a “person’s right to be let alone.”

In addition, a right of privacy is asserted where the violation results from an unauthorized publication involving substantial falsification or placing the plaintiff in a “false light in the public eye.” However, where such allegations are made against a media defendant by a public figure, the courts have imposed a rigorous standard on the plaintiff to protect the constitutional protections of freedom of the press and the media. In *Time, Inc. v. Hill*, a private family was involuntarily thrust into the media when they were held hostage in their home by escaped convicts. The family filed suit in the New York courts seeking damages under Sections 50 and 51 against Life Magazine for its publication of photos taken from a play that sensationalized the family’s experience. The plaintiffs argued that the article “mirrored the Hill family’s experience, which, to defendant’s knowledge ‘was false and untrue.’” The court held that “[c]onstitutional protections for free expression preclude applying New York’s statute to redress false reports of newsworthy matters absent proof that the publisher knew of their falsity or acted in total disregard of the truth.”

However, where the right of publicity does not involve a claim of falsification, it is often stated that a public figure’s right to privacy in-
cludes an "independent right to have [his] personality, free from commercial exploitation at the hands of another." In \textit{Brinkley}, fashion model Christie Brinkley alleged a violation of her right of privacy under Section 51 for the unauthorized sale of a poster without her consent. Brinkley had agreed to participate in a poster project, reviewed and discussed the selection of a suitable print and engaged in final retouching of the photograph. One of the defendants, however, proceeded to commercially distribute the posters without obtaining the customary written release authorizing distribution of the model's photograph or likeness.

The court noted at the outset that the sale of the poster was a use of plaintiff's photograph for trade purposes. The court found that plaintiff reserved the right, prior to their commercial exploitation, to reject or approve the use to which the photographs would be put. The court also stated that "[p]laintiff's photograph or the manner in which it was designed to be used [did not] involve a subject of general interest so as to bring it within the public domain as a newsworthy matter."

Currently, the New York courts hold that Section 51 encompasses the right of publicity as an aspect of the right of privacy. This right recognizes the pecuniary value which attaches to the names and pictures of public figures, particularly athletes and entertainers. It is often stated that the right of publicity protects the \textit{proprietary} interest in the profitability of the public reputation or "persona" of the public figure.

\begin{itemize}
  \item 179. \textit{Brinkley}, 80 A.D.2d at 433, 438 N.Y.S.2d at 1008 (citing Booth v. Curtis Publishing Co., 15 A.D.2d 343, 351, 223 N.Y.S.2d 737, 745 (1962). \textit{See also Gautier}, 304 N.Y. at 488, 107 N.E.2d at 359 ("While one who is a public figure or is presently may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information.").
  \item 180. \textit{Brinkley}, 80 A.D.2d at 429, 438 N.Y.S.2d at 1005.
  \item 181. \textit{Id.} at 429, 438 N.Y.S.2d 1006.
  \item 182. \textit{Id.} at 430, 438 N.Y.S.2d 1006.
  \item 183. \textit{Id.} at 433, 438 N.Y.S.2d 1008.
  \item 184. \textit{Brinkley}, 80 A.D.2d at 434, 438 N.Y.S.2d at 1008.
  \item 185. \textit{Id.} at 433-34, 438 N.Y.S.2d 1008.
  \item 186. \textit{Id.} at 439, 438 N.Y.S.2d at 1012 ("so-called right of publicity is subsumed in Sections 50 and 51 . . . "). \textit{See also Samuelson, Revising Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases}, 57 TUL. L. R. 836, 842 (1983) ("Another reason for the confusion about the proper way to characterize publicity rights is that many of the privacy cases involving commercial appropriations have been brought under New York's 'right of privacy statute,' which merges commercial appropriations of both privacy and publicity interests.").
  \item 187. \textit{Ali}, 447 F. Supp. at 728 (citing Zacchini, 433 U.S. at 562 (1976)).
  \item 188. \textit{Id.}
\end{itemize}
C. Restrictive Treatment of Trade Purpose

The New York courts have wrestled with what constitutes use of a person’s name, portrait or picture as a trade purpose.\(^{189}\) If the name, portrait or picture is used without consent to promote the sale of a collateral product, under a strict interpretation of the statute, an advertising purpose will result.\(^{190}\) However, in either case, whether or not a picture is used for advertising or trade purposes, is a question of fact to be decided at trial on the merits.\(^{191}\)

One well-settled rule in this area, is that a *profit motive* is not enough to determine the existence of a trade purpose.\(^{192}\) The rationale for this rule is that “[a] contrary rule would unreasonably and unrealistically limit the exception to a nonprofit or purely altruistic [organization]. . . .”\(^{193}\) It is also stated that the publication of a newspaper, magazine, or book which imparts truthful news or other factual information to the public does not fall within the purposes of trade provision under the statute, even though the publication is published and sold for a profit.\(^{194}\)

However, if a photograph of a well-known celebrity is included in a magazine “merely to attract attention,” the court will find that the publication was for purposes of trade.\(^{195}\) For example, in *Ali v. Playgirl, Inc.*\(^{196}\) ("Ali"), the former heavyweight champion sought relief under Section 51 for the unauthorized publication of an objectionable portrait of the former champion in a magazine.\(^{197}\) The portrait at issue depicted a nude black man seated in the corner of a boxing ring which unmistakably represented the plaintiff Ali.\(^{198}\) The court found that the phrase "portrait or picture," as used in Section 51, is *not* restricted to photographs, but “generally comprises those representations which are recognizable as likenesses of the complaining individual.”\(^{199}\) The court found that the portrait was clearly included in the magazine solely “for purposes of trade — e.g., merely to attract attention.”\(^{200}\) The newsworthy

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\(^{189}\) See generally *Davis*, 90 A.D.2d at 359, 457 N.Y.S.2d at 313; *Grant*, 367 F. Supp. at 879.

\(^{190}\) *Paulsen*, 59 Misc. 2d at 447, 299 N.Y.S.2d at 505 (1971).


\(^{192}\) *Davis*, 90 A.D.2d at 379, 457 N.Y.S.2d at 313 (citing *Arrington*, 55 N.Y.2d at 440, 434 N.E.2d at 1322).

\(^{193}\) *Stephano*, 64 N.Y.2d at 185, 485 N.Y.S.2d at 225.

\(^{194}\) *Rosemont Enter., Inc. v. Random House*, 58 Misc. 2d 6, 294 N.Y.S.2d at 128-29.

\(^{195}\) *Ali*, 447 F. Supp. at 727; *see also Grant*, 367 F. Supp. at 881.

\(^{196}\) *Ali*, 447 F. Supp. at 725.

\(^{197}\) *Id*.

\(^{198}\) *Id*.

\(^{199}\) *Id.* at 726.

\(^{200}\) *Id.* at 727.
exception also did not apply because there was no such informational or newsworthy dimension to the unauthorized use. 201 In response to the defendant’s contention that the right of privacy does not extend to an athlete who chooses to bring himself to public notice, the court stated “[t]hat [plaintiff] may have voluntarily on occasion surrendered [his] privacy, for a price or gratuitously, [but] does not forever forfeit for anyone’s commercial profit so much of [his] privacy as [he] has not relinquished.” 202

D. Commercial Market for Right of Publicity

A definite commercial market exists for the exploitation of a public figure’s face. 203 As stated in Grant, the court can take judicial notice “[t]hat there is a fairly active market for the exploitation of faces, names and reputations of celebrities . . . .” 204 One common means of exploiting this market is the sale of T-shirts, sweatshirts and buttons. 205 By simply imposing a celebrity’s picture onto such tangible goods, the value of the good will increase. 206

Sometimes the distributor of a commercial product will provide the ingenuity to create new mediums that exploit this valuable market. For example, in Rosemont Enterprises, Inc. v. Urban Systems, Inc., 207 the defendant marketed and distributed an “adult educational career game” entitled “The Howard Hughes Game.” 208 The court was asked to decide whether such usage violated Sections 50 and 51 because the game restated, in another form, the events of Hughes’ career or whether it should consider this form of distributive publication as an act of appropriation. 209 In other words, where do you draw the line between the right of

203. See generally Brinkley, 80 A.D.2d 428, 438 N.Y.S.2d 1004; Paulsen, 59 Misc. 2d 444, 299 N.Y.S.2d 501. See also Onassis, 122 Misc. 2d at 607, 472 N.Y.S.2d at 258 (“[T]he picture of a well-known personality, used in an ad and instantly recognizable, will still serve as a badge of approval for that commercial product.”).
204. Grant, 367 F. Supp. at 881.
206. Id. See also Onassis, 122 Misc. 2d at 604, 472 N.Y.S.2d at 257 (“The use of a well-known designer name in marketing goods is to render the product distinctive and desirable, to impart to the product a certain cachet, and to create in the public a mind-set or overall impression so that the designer names are readily associated and become synonymous with a certain status and class of qualities.”).
208. Id. at 789, 340 N.Y.S.2d at 145.
209. Id. See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971)
the public "to know" and an act of appropriation.\textsuperscript{210} The court found that defendant's use of this medium did not constitute the dissemination of news nor were they educating the public.\textsuperscript{211} Instead, the court described the game as "merely the medium used to market a commodity familiar to us all in its varied types and forms."\textsuperscript{212}

Posters are also recognized by celebrities as a profitable means to exploit pictures of themselves on the commercial market. For example, the Dallas Cowboy Cheerleaders\textsuperscript{213} recognized this lucrative poster market. In 1977, the cheerleaders posed for a poster for commercial distribution and copyrighted it.\textsuperscript{214} Thus, when a group of former Dallas Cowboy Cheerleaders tried to mimick the poster in a topless state, the Dallas Cowboy Cheerleaders filed suit. In \textit{Dallas Cowboy Cheerleaders v. Scoreboard Posters, Inc.},\textsuperscript{215} the Fifth Circuit affirmed a preliminary injunction to prevent further distribution of the mimicking poster.\textsuperscript{216}

Similarly, in \textit{Factors}, two days after Elvis Presley's death, the defendant purchased a copyright of a photograph of Elvis and used the photo to publish a poster entitled "In Memory," bearing the dates "1935-1977."\textsuperscript{217} The defendant argued that the publication of the "memorial poster" was a newsworthy event. The court, however, held that plaintiff had acquired an exclusive right to exploit the Presley name and likeness encompassed under Elvis' right of publicity which survived the celebrity's death.\textsuperscript{218}

State and federal constitutional concerns for the first amendment protections of freedom of speech and press, make it difficult to draw the line between the right of the public to know and an act of appropriation.\textsuperscript{219} The "privilege of enlightening the public"\textsuperscript{220} encompasses a very vast and expansive range of subjects.\textsuperscript{221} However, the right of publicity

\textsuperscript{210} Rosemont Enter., Inc. v. Urban Sys., Inc., 72 Misc. 2d at 790, 340 N.Y.S.2d at 146.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Dallas, 600 F.2d at 1185-86 ("The Dallas Cowboy Cheerleaders are a group of women who perform as cheerleaders on the sidelines during games played by the Dallas Cowboys, a football team.").
\textsuperscript{214} Id. at 1186.
\textsuperscript{215} 600 F.2d 1184 (5th Cir. 1979).
\textsuperscript{216} Id. at 1188-89.
\textsuperscript{217} Factors, 579 F.2d at 217.
\textsuperscript{218} Id. at 222.
\textsuperscript{219} Rosemont Enter., Inc. v. Urban Sys., Inc., 72 Misc. 2d at 790, 340 N.Y.S.2d at 146.
\textsuperscript{220} Paulsen, 59 Misc. 2d at 448, 299 N.Y.S.2d at 506.
\textsuperscript{221} Id. ("The privilege of enlightening the public is by no means limited to dissemination
also protects a proprietary interest and a market that does not involve the dissemination of news, but the sale of commodities within a commercial market.

V. ANALYSIS

The wrestling match between the Titan Wrestlers and Comics World is about to begin. The Titan Wrestlers are bound and determined to establish that the 16” x 22” photographs that are stapled into Comics World’s magazines are commercial posters. Further, that the photographs infringe upon Titan’s right of publicity and thus constitute use for purposes of trade under Section 51. Comics World is just as determined to establish that the 16” x 22” photographs are newsworthy items and thus protected under the first amendment. The outcome of this match will determine whether Comics World’s use of the 16” x 22” photographs constitute use for purposes of trade under the statute. The decisive question is whether the public interest aspect of the 16” x 22” photographs is merely incidental to Comics World’s commercial purpose.222

"ROUND ONE"

A. Magazine Cover Does Not Provide First Amendment Protection

Although Comics World’s publications are bona fide newspaper publications that are normally entitled to first amendment protections, the Second Circuit correctly reasoned that the inquiry does not end here. As stated by the Second Circuit, the first amendment does not protect “a subterfuge or cover for private or commercial exploitation.”223 Thus, the fact that the 16” x 22” photographs are folded and stapled within a typical magazine cover, does not provide Comics World’s publications with automatic first amendment protection.

In addition, items within a publication that are generally entitled to first amendment protection may constitute use for purposes of trade, precluding protection under the first amendment.224 Therefore, as suggested by the Second Circuit, the nature of the enclosed item must be considered.225

of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.”).

222. Titan, 870 F.2d at 89.
223. Id. at 88 (quoting Zacchini, 433 U.S. at 581).
224. Id.
225. Id. at 89.
"ROUND Two"

B. Nature of the Item

In Rosemont Enterprises, Inc. v. Urban Systems, Inc.,226 the court held that the use of Howard Hughes' name, biographical data, etc., in selling an adult educational career game was an act of appropriation of property rights belonging to Howard Hughes.227 The court found that the use of Howard Hughes' name, biographical data, etc. in this context was not legitimate to the public interest.228 The court described the board game as "[m]erely the medium used to market a commodity familiar to us all in its varied types and forms."229

Posters are also a commodity that are familiar to us all. Quite ironically, the 1902 decision of Roberson v. Rochester Folding Box Co.,230 ("Roberson"), to which the enactment of the statute is attributed, provides evidence of the use of the conventional poster as we know it. In Roberson, a poster was used to advertise flour. Although the plaintiff whose picture adorned the advertisement did not prevail in her suit for invasion of her privacy, it is significant for our purposes that in 1902 the general design of an oversized photograph was referred to as a "poster" and recognized as a means of commercial advertisement.

More recently, this same concept flourishes. For example, in Brinkley v. Casablancas,231 fashion model Christie Brinkley utilized a poster to commercially exploit her marketable status. In Factors, Etc., Inc. v. Pro Arts, Inc.,232 a "memorial poster" of Elvis Presley was involved and in Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.,233 a poster was utilized by the cheerleaders for publicity purposes. The "poster" in all three modern instances involved an oversized photograph of approximately 16" x 22" used for commercial purposes as an item of display and decoration.

Posters are simply another medium through which celebrities can exploit their names and likenesses similar to other commodities sold in the commercial market, like T-shirts and coffee cups. A market for posters is evident where sales occur for three quarter of a million copies at

226. 72 Misc. 2d 788, 340 N.Y.S.2d 144.  
227. Id. at 790, 340 N.Y.S.2d at 147.  
228. Id., 340 N.Y.S.2d at 146.  
229. Id.  
230. 171 N.Y. 538, 64 N.E. 442 (1902).  
232. 579 F.2d 215 (2d Cir. 1978).  
233. 600 F.2d 1184 (5th Cir. 1979).
an average retail price of $2.50.\textsuperscript{234} As shown in \textit{Brinkley}, a well-known celebrity will take care in selecting the proper photo and quality of the poster.\textsuperscript{235}

Similarly, the Titan Wrestlers utilize posters as a medium to exploit the value of their publicity as part of Titan's heavy merchandising campaign.\textsuperscript{236} Titan also sells and/or licenses the sale of action figures (dolls), T-shirts and other clothing, trading cards, programs, lunch-boxes, and other items.\textsuperscript{237} These items of merchandise are sold to provide income to Titan Wrestlers and to increase public interest and awareness in the World Wrestling Federation.\textsuperscript{238} In sum, a poster constitutes a commodity sold as a commercial product in a commercial market.

\textbf{"ROUND THREE"}

\textit{B. Public Interest Incidental to Commercial Purpose}

As stipulated by the parties, the Titan Wrestlers are public figures.\textsuperscript{239} Undoubtedly, "[t]he very nature and character of such status, evokes public interest in [their] doings and [their] activities are generally speaking always 'news.'"\textsuperscript{240} Consequently, any photograph, whether posed or live-action, taken of the Titan Wrestlers would fall under the newsworthy exception of the statute. Therefore, to assess whether the public interest is merely incidental to the commercial purpose of the unauthorized use of the wrestler's photographs, the court should \textit{not} consider whether the photographs are taken from a public performance.

In \textit{Brinkley}, the court rejected defendant's argument that since the picture of the fashion model was taken during a public performance with consent, it was removed from the sphere of any right of privacy.\textsuperscript{241} The court conceded that although the photograph was used during a public performance with the consent of the model, the particular photograph in question originated from an earlier photo session.\textsuperscript{242} Thus, a narrow holding of \textit{Brinkley} is that if the photograph is taken as part and parcel of an \textit{original} performance, any commercial use of the photograph would not violate the statute.

\textsuperscript{234} \textit{Dallas}, 600 F.2d at 1186.

\textsuperscript{235} \textit{Brinkley}, 80 A.D.2d 428, 438 N.Y.S.2d 1004.

\textsuperscript{236} Brief for Appellant at 9, Titan Sports, Inc. v. Comics World, 870 F.2d 85 (2d Cir. 1989) (No. 88-7734).

\textsuperscript{237} \textit{Id}.

\textsuperscript{238} \textit{Id}.

\textsuperscript{239} \textit{Titan}, 690 F. Supp. at 1317.

\textsuperscript{240} \textit{Paulsen}, 59 Misc. 2d at 449, 299 N.Y.S.2d at 507.

\textsuperscript{241} \textit{Brinkley}, 80 A.D.2d at 433, 438 N.Y.S.2d at 1008.

\textsuperscript{242} \textit{Id}. 

However, the purpose of the statute is to prohibit commercial misappropriation of a person's name or picture.\textsuperscript{243} Thus any blanket authorization to commercially distribute a photograph of a public figure merely because it was taken from an original public performance, would obviate this purpose.\textsuperscript{244}

In addition, the \textit{Brinkley} court held that a photograph that is designed for use as a poster does not involve a subject of general interest so as to bring it within the public domain as a newsworthy matter.\textsuperscript{245} The Second Circuit also found that "[i]n contrast to the treatment of newsworthy items, it seems clear that photographs marketed as posters are used for purposes of trade."\textsuperscript{246} Therefore, although photographs of the Titan Wrestlers, whether posed or live-action, are matters of public interest, the commercial purpose of the 16" x 22" photographs prevents the newsworthy exception from applying in this case. Instead, the correct focus is on the commercial aspect of the product at issue, its common design and treatment in the commercial market.

The district court also erroneously distinguished the poster in \textit{Brinkley} and \textit{Factors} as posters "of the type suitable for framing, and printed on high quality, heavy bond paper."\textsuperscript{247} In \textit{Brinkley}, fashion model Christie Brinkley reviewed color transparencies and was involved in the selection of the most suitable print for a poster.\textsuperscript{248} The court found that plaintiff reserved a right to reject or approve the use of the photographs prior to any commercial exploitation.\textsuperscript{249} Thus, under a right of publicity, the quality of a poster depends upon the discretion and control of the celebrity. By considering the quality of a 16" x 22" photograph folded and stapled into a magazine, the court ignores the commercial nature of this product.

For example, a T-shirt is commercially sold and distributed as wearing apparel. As stated by the appellate court in \textit{Titan},\textsuperscript{250} a T-shirt bearing the likeness of a Titan Wrestler illustrates the type of commodity which could not be stapled into Comics World's magazine.\textsuperscript{251} Similarly,

\begin{itemize}
\item \textsuperscript{243} \textit{Davis}, 90 A.D.2d at 381, 457 N.Y.S.2d at 314.
\item \textsuperscript{244} \textit{See} Bi-Rite Enterprises v. Bruce Miner Co., Inc., 757 F.2d 440, 445 (1st Cir. 1985) (Defendant's claim that performers who agree to pose at unrestricted photo sessions do so with the understanding that the photographers may use the resultant photographs however they choose was too broad.).
\item \textsuperscript{245} \textit{Brinkley}, 80 A.D.2d at 433-34, 438 N.Y.S.2d at 1008.
\item \textsuperscript{246} \textit{Titan}, 870 F.2d at 88.
\item \textsuperscript{247} \textit{Titan}, 690 F. Supp. at 1322.
\item \textsuperscript{248} 80 A.D.2d at 430, 438 N.Y.S.2d at 1006.
\item \textsuperscript{249} \textit{Id.} at 434, 438 N.Y.S.2d at 1008.
\item \textsuperscript{250} 870 F.2d at 85.
\item \textsuperscript{251} \textit{Id.} at 88.
\end{itemize}
the poster has a commercial purpose as a commodity sold for display or decoration. The quality of the 16" x 22" photographs is therefore irrelevant to the commercial purpose of this product.

Moreover, the language on the cover of Comics World’s magazines “10 FULL COLOR WRESTLING POSTERS! HUGE SIZE!” or “Wrestling All-Stars Poster Magazine” admits that the folded and stapled 16" x 22" photographs are commercial posters. Comics World’s use of the term “poster” is an obvious referral to what constitutes a traditional, commercial poster, regardless of the quality.

In addition, once removed and unfolded, there is nothing to prevent a wrestling fan to frame and display the 16" x 22" photograph in the same manner as the traditional poster sold in the retail market. Again, by Comics World’s own admission, they acknowledge that “EXCITING WRESTLING ACTION [IS] READY FOR YOUR WALLS!” Obviously, Comics World does not feel the quality inhibits the use of the photographs as a commercial poster.

In a practical sense, it is the lesser quality that enables Comics World to fold and manipulate the photographs into neat 8" x 11" squares. Comics World frankly admits that they “have discontinued referring to these folded out pages as ‘posters,’ and now call them ‘pin-ups.’” However, a different choice of reference, like the quality of paper, should not confuse an obvious attempt to participate in a commercial market.

Therefore, the commercial purpose is not inherent in the quality of Comics World’s product, but in the nature and form of treatment that is identical to the traditional commercial poster sold on the commercial market. Thus, in the balance between the public interest and a commercial purpose of Comics World’s product, the primary value of Comics World’s product is commercial.

“ROUND FOUR”

C. Newsworthy Exception Does Not Apply

1. No Real Relationship

As stated above, a photograph accompanying an article concerning

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252. Id. at 86 (emphasis added).
253. Id. (emphasis added).
a matter of public interest may still be considered a use for the purposes of trade if "it has no real relationship to the article . . . or . . . the article is an advertisement in disguise." 256 For example, in Arrington, a photograph of a man walking down the street was "prominently displayed" across the cover of a publication, without his knowledge, for an article regarding the black middle class. 257 The court held that the subject of the article was of public interest, and further, that the plaintiff could be perceived to be a member of the black middle class. 258 Therefore, plaintiff's assertions that no real relationship existed based on his inconsonant views with the author of the article was denied.

In Titan, up to ten posters are stapled into the center of each publication and cannot be viewed in their entirety, unless unstapled and removed. 259 Unlike in Arrington, the folded photographs are not "prominently displayed" in a manner to enable the reader to perceive any association between the depicted wrestlers and any corresponding news article. Thus, any real relationship between the photo and the article is physically impossible.

In one of defendants' publications containing 10 posters, one page appears that contains text and photographs about each featured wrestler, but makes no reference to the posters nor does the page have any proximity to the poster. 260 In this particular publication, unlike the publication in Arrington, the photographs do not exhibit, represent, or explain an accompanying article of public interest. Therefore, even if this one page of text constitutes a matter of public interest, there is no real relationship whatsoever between the one page of text and the posters.

2. First Amendment Does Not Protect Sale of Commodities

In Titan, the commercial purpose inherent in Comics World's product prevents application of the first amendment in this case. As one commentator notes, "[i]n several cases in the past five years, defendants have brandished the first amendment as a shield against liability for interference with the plaintiff's publicity rights." 261

The privilege of disseminating news and information to the public is not without its limits. As stated in Gautier, "[w]hile one who is a public

256. Titan, 870 F.2d at 88.
257. Arrington, 55 N.Y.2d at 433, 434 N.E.2d at 1320.
258. Id. at 440-41, 434 N.E.2d at 1322.
259. Titan, 870 F.2d at 86.
figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news and information.”

In *Titan*, “A poster presents a somewhat closer case because news photos as such are entitled to the full protection of the first amendment.” However, the commercial nature and purpose will distinguish Comics World’s product from the dissemination of news and information. As stated by the Second Circuit, “[i]n contrast to the treatment of newsworthy items, it seems clear that photographs marketed as posters are used for purposes of trade.”

In addition, under first amendment analysis, the critical question is “[whether] . . . the mere threat of litigation — would tend to inhibit this defendant — or any other publisher who might learn of the decision — in the untrammeled exercise of any right guaranteed by the First Amendment?” In *Titan*, “poster magazines” are novel publications. It is also “common knowledge that the models for the centerfolds in magazines such as Playboy, High Society, Penthouse and Playgirl not only consent to but are extremely well paid for the use of their photographs.” Therefore, a decision which grants relief to the Titan Wrestlers will not affect a publisher’s editorial initiative to either engage in poster publications or to do so without providing compensation to the appropriate party.

Moreover, a favorable decision for the Titan Wrestlers will inform other prospective media defendants that a commercial nature and purpose will distinguish a product sold in the commercial market from the dissemination of news and information. In addition, if a prospective media defendant desires to appropriate the name or likeness of a celebrity to sell a commercial product, they will do so with knowledge that consent must first be obtained.

Finally, the media’s immunity from false or fictional reports unless published with knowledge of their falsity or in reckless disregard of the truth, does not apply in this case. For example, in *Time, Inc.*, the

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264. *Id.*
267. *See Lerman*, 745 F.2d at 135 (“One who gives publicity to a matter concerning another that places the other before the public in a false light . . . .”).* See also *Time, Inc.*, 385 U.S. at 387-88 (“We hold that the constitutional protections for speech and press preclude the application of the New York Statute [Sections 50 and 51] to redress false reports of matters of
plaintiff’s alleged damages under Sections 50 and 51 on “allegations that the Life article was intended to, and did, give the impression that the play mirrored the Hill Family’s experience, which, to the knowledge of defendant ‘... was false and untrue.’”268 Also, in Lerman, where a magazine misidentified plaintiff as an actress that appeared topless and in an “orgy” scene, the court found the degree of falsity was severe.269 However, in false light claims, the first amendment protects against the “risk of [saddling] the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person’s name, picture or portrait ....”270 In Titan, we are not confronted with any alleged misrepresentation of facts associated in any corresponding news articles or anything but clear representations of the Titan Wrestlers. Thus, any attendant risks of burdening the press with verifying certainty of facts or any representation of the Titan Wrestlers is non-existent in this case.

The Titan Wrestlers also do not seek to suppress any truthful accounts of their lives from the public. In these cases, it is clear that Sections 50 and 51 does not give a public figure the right to suppress truthful accounts of their lives.271 It is also clear that the oversized photographs in Titan, are not involved in projecting the Titan Wrestlers into any political scene which under Paulsen, caused the posters to fall under the newsworthy exception.

VI. CONSEQUENCES

The law under Sections 50 and 51 is still in the process of development. As stated in Brinkley, “[t]he state of law in the right of privacy area ‘is still that of a haystack in a hurricane ...’”272 Titan allows the New York courts to establish that the commercial nature and purpose will distinguish a product from the dissemination of news and information under a right of publicity pursuant to Sections 50 and 51.

A decision in favor of Comics’ World will provide media defendants

public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.”).  

268. Id. at 378.  
269. Lerman, 745 F.2d at 133. Also citing Time, Inc. and Zacchini for the proposition that “it is essential to analyze ‘trade purposes’ claims under Section 51 to determine whether First Amendment concerns surrounding this false light tort are implicated. If not, the press is entitled only to the limited First Amendment protection afforded under Zacchini.” Id. at 135.  
272. Brinkley, 80 A.D.2d at 436, 438 N.Y.S.2d at 1010.
with a very large loophole to undermine the statute under the auspices of disseminating news and information. A media defendant with the ingenuity to alter or manipulate the form of a commercial product, especially paper products, will enjoy immunity under the statute. Unless the commodity involved is a T-shirt, sweatshirt, button or like product that is difficult to alter, the right of publicity will be seriously undermined. Consequently, any established proprietary interest in a celebrity's likeness and reputation will receive minimal protection similar to that afforded by the right of privacy.

Further, a decision adverse to the Titan Wrestlers will result in many other magazines including large photographs into their publications. Under the cloak of a newsworthy event, oversized photographs taken from original, public performances will surface as common features in magazines.

VII. CONCLUSION

The Titan Wrestlers are definitely in the business of providing a unique form of entertainment. Their creative efforts have not only catapulted the sport of professional wrestling into national popularity, but the wrestlers have also garnered themselves a special place in the entertainment industry. Their ability to reap the rewards from their marketable status should be protected under the right of publicity subsumed within Sections 50 and 51 of New York Civil Rights Law.

In Titan, it is clear that the commercial nature of the 16" x 22" photographs precludes any real relationship to any corresponding news article, and thus constitute use for purposes of trade under the statute. In addition, even though the Titan Wrestlers are newsworthy subjects, the public interest involved is merely incidental to the commercial purpose of Comics World's product. Hence, Comics World cannot use the first amendment as a shield against liability in this case.

The dissemination of news and information occurs within the marketplace of ideas, while the sale and promotion of commercial products takes place within a commercial market. While true that constitutional protections do not end at 8" x 11", such protections must end where the media attempts to market a commercial item as a newsworthy idea.

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