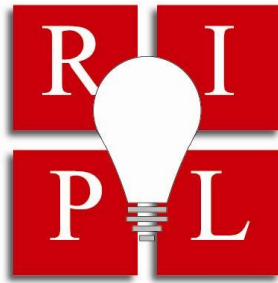


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



AS SEEN ON TV: YOUR COMPROMISING CAMEO ON NATIONAL REALITY PROGRAMMING

RYAN WESTERMAN

ABSTRACT

The pop-culture phenomenon of reality television has taken over national programming. With the click of a remote, viewers can gain an inside look into the daily lives of celebrity families, toddler pageant queens, wealthy housewives, even pregnant teenagers. Reality television also profiles different professions: repo-men, pawn shop owners, and real estate agents all have television time slots. While it seems everyone is desperate for their fifteen minutes of fame, there are still those who wish to avoid the public spotlight. However, a recent Illinois ruling may make avoiding prime-time attention impossible for certain individuals caught on tape in compromising, and potentially humiliating, situations. This Comment addresses how the questionable ruling in *Best v. Berard* may steer right of publicity jurisprudence in a disastrous direction by granting reality show producers the right to televise people committing insignificant legal infractions without their consent. By conceding First Amendment protection in such situations, producers may sensationalize such incidents to the detriment of the individual's reputation without fear of liability. Yet preventative measures can be found in existing legal canons. As this Comment explains, copyright fair use doctrine provides a solution to this potential problem.

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Cite as Ryan Westerman, As Seen on TV: Your Compromising Cameo on National Reality Programming, 12 J. MARSHALL REV. INTELL. PROP. L. 403 (2013).

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AS SEEN ON TV: YOUR COMPROMISING CAMEO ON NATIONAL REALITY PROGRAMMING

RYAN WESTERMAN*

INTRODUCTION

A famous newscaster once said, “The one function TV news performs very well is that when there is no news we give it to you with the same emphasis as if there were.”¹ Perhaps David Brinkley was making an omniscient prediction to the future of television programming.² He lived to see the humble beginnings of reality television, its subsequent evolution, and its pop-culture proliferation beginning in 2000.³ During this time, *Survivor*⁴ rocketed to television superstardom, and in the process cemented the reality television genre into American culture.⁵ However, the arguable brilliance of broadcasting the “realities” of toddler pageant contestants, self-involved housewives, and admittedly talentless celebrity offspring, was beginning to achieve recognition around the same time as Brinkley’s passing.⁶

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¹ *William Ferraro Is The Employee Of The Year*, THE DAILY PLANT (May 7, 2012), <http://www.nycgovparks.org/news/daily-plant?id=22661>.

² See generally Clayland H. Waite, *Brinkley, David*, THE MUSEUM OF BROADCAST COMM., <http://www.museum.tv/eotvsection.php?entrycode=brinkleydav> (last visited Mar. 7, 2013) (“[B]rinkley has not only reported the news; he has also helped to shape the industry of television news.”).

³ Compare *id.* (chronicling Brinkley’s career as a newscaster in the entertainment industry beginning in the 1940s through the end of the twentieth century), with Jennifer L. Blair, *Surviving Reality TV: The Ultimate Challenge for Reality Show Contestants*, 31 LOY. L.A. ENT. L. REV. 1, 18 (2010) (reporting the popularity of reality television remains “unabated”).

⁴ See Complaint ¶ 13, *Stillman v. CBS Corp.*, No. 318613 (Cal. Super. Ct. Feb. 5, 2001), 2001 WL 34129688 (describing the premise of *Survivor* as a show where 16 contestants compete for a one million dollar prize by participating in challenges and contests with one another for immunities and rewards).

⁵ See Claire E. White, *What Really Happened on the Survivor Island: A Conversation with Peter Lance*, WRITERS WRITE, <http://www.writerswrite.com/features/lance.htm> (last visited Mar. 7, 2013) (responding to the popularity and proliferation of reality television: “The reality T.V. phenomenon is here to stay.”).

⁶ See *id.* (“Reality programming has just about taken over the airwaves.”); *David Brinkley*, ENCYC. BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/889071/David-Brinkley> (last visited Feb. 20, 2013) (dating Brinkley’s death as June 11, 2003).

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It is doubtful that any reasonable person would have difficulty distinguishing between a reality show like *Survivor* and a news program hosted by David Brinkley.⁷ Public discourse indicates the *Jersey Shore* audience is not viewing the show for its intellectual summation of current events.⁸ Logically, it follows that the networks airing reality shows and news programs would have no trouble differentiating the two. Surely, Rupert Murdoch recognizes the entertainment value of artificially dramatic *Hell's Kitchen* from the informative worth of *Fox News*.

While laymen of the world easily decipher programs airing matters of public concern from those created purely for entertainment, brilliant legal scholars have trouble cracking this same code.⁹ Courts have made clear their refusal to determine what is considered “news,”¹⁰ and judges are hesitant to relinquish constitutional protection to media expression simply because of subjective opinions pertaining to quality.¹¹ Courts, including the Supreme Court, have declined to formulate a precise analysis to determine when expression has forfeited the First Amendment cloak, tailored for safeguarding newsworthy information in the right of publicity context.¹²

This Comment uses the questionable ruling in *Best v. Berard* to emphasize the need for courts to distinguish a legitimate news program entitled to use the newsworthy exception, from reality shows which insincerely tout this defense to justify the commercial use of a private citizen’s identity without consent or compensation.¹³ Part I discusses litigation concerning reality shows, the development of the right of publicity and its relationship with the First Amendment, the fair use doctrine under copyright law, and the questionable ruling of *Best v. Berard*. Part II then describes the courts’ historic dilemma with distinguishing entertainment from news. This judicial dilemma is then contrasted with the ease by

⁷ See Waite, *supra* note 2 (stating Brinkley was professionally associated with several news programs including “NBC Nightly News” and “ABC’s World News Tonight”).

⁸ See generally Travis Fedschun, *Hoboken Denies Film Permit for ‘Jersey Shore’ Spinoff Starring JWOWW and Snooki*, NJ.COM (Jan. 31, 2012, 2:58 PM), http://www.nj.com/hobokennow/index.ssf/2012/01/hoboken_denies_filming_permit.html (denying a film permit for the “Jersey Shore” spin off show, Hoboken Mayor Dawn Zimmer stated his decision was “based on protecting public safety and quality of life concerns for Hoboken residents.”).

⁹ See *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998) (“It is in the determination of newsworthiness—in deciding whether published or broadcast material is of legitimate public concern—that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom.”); *Brown v. Entm’t. Merchs. Ass’n.*, 131 S. Ct. 2729, 2733 (2011) (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)) (“[I]t is difficult to distinguish between politics from entertainment . . .”).

¹⁰ See *Harper & Row v. Nation Enters.*, 471 U.S. 539, 562 (1985).

¹¹ See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000) (“The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed.”).

¹² See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 570 (1977). In the dissenting opinion, Justice Powell criticizes the majority opinion’s lack of a clear standard to distinguish between media reports protected by First Amendment and those that are not. *Id.* at 579–80 (Powell, J., dissenting); see also *Rogers v. Grimaldi*, 875 F.2d 994, 1007 (2d Cir. 1989); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1407 (9th Cir. 1992); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1189 (9th Cir. 2001); see also *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001) (citing *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 422 (1983)) (“However, the [First Amendment] defense is not absolute; we must find ‘a proper accommodation between [the] competing concerns’ of freedom of speech and the right of publicity.”).

¹³ *Best v. Berard*, 776 F. Supp. 2d 752 (N.D. Ill. 2011).

which the corporate and public realms identify news and entertainment programs. Part III proposes a solution to the courts' trouble of distinguishing entertainment from news, specifically, for an application of a reality television show in a right of publicity cause of action.

I. BACKGROUND

The exponential expanse of reality programming, and the ensuing growth of litigation involving reality television shows, exemplifies the need for clearer right of publicity laws. This section chronicles the proliferation of reality programming, explains the body of law surrounding the right of publicity, and details the newsworthy exception's constitutional underpinnings. Parallels between right of publicity law and copyright law are brought to light, followed by a summary of the copyright fair use defense. Finally, the case of *Best v. Berard* and its problematic ruling are summarized.

A. *The Proliferation of Reality Programming*

Although the first reality show aired over forty years ago, the genre only recently became a ubiquitous part of the television experience due to its enormous commercial success.¹⁴ Audiences have embraced reality shows with open arms, increasing viewership and advertising revenue for production companies that are simultaneously saving money by airing reality TV shows.¹⁵ One reason for the decrease in expenses is the cheap cost of labor that comes with hiring "participants," rather than actors with significant celebrity status.¹⁶

As more reality shows are produced, litigation involving such programs is on the rise.¹⁷ Consequently, questions pertaining to right of publicity law are at issue in

¹⁴ See, e.g., Dorothy Pomerantz, *TV's Biggest Moneymakers*, FORBES (Apr. 10, 2012), <http://www.forbes.com/sites/dorothypomerantz/2012/04/10/tvs-biggest-moneymakers-2/> (reporting that American Idol ad revenue generates \$6.64 million every half-hour while X-Factor generates \$5.5 million every half-hour).

¹⁵ See Chad Raphael, *The Political Economic Origins of Reali-TV*, in REALITY TV: REMAKING TELEVISION CULTURE 123–39 (Susan Murray & Laurie Ouellette eds., N.Y. Univ. Press 2d ed. 2009) (rising production costs have forced the TV industry to seek programming with non-celebratory participants and that bypass entertainment unions).

¹⁶ Tara Brenner, *A "Quizzical" Look Into The Need For Reality Television Show Regulation*, 22 CARDOZO ARTS & ENT. L.J. 873, 876 (2005) (emphasizing the appeal of reality TV shows to networks comes from the shows' cheaper production costs compared to the costs incurred to make scripted programs and allows the networks to "create" celebrities); see also Brian Stelter, *With New Stars, Reality Shows See Costs Rise*, N.Y. TIMES, July 26, 2010, at B1 ("Reality television became a force because viewers like it and because, without celebrities or big salaries, it was cheap.")

¹⁷ See Sharp, J. Matthew, *The Reality of Reality Television: Understanding the Unique Nature of the Reality Genre in Copyright Infringement Cases*, 8 VAND. J. ENT. & TECH. L. 177, 186 (2005) ("[T]here have been a number of lawsuits filed on infringement grounds [pertaining to reality television shows]. This is due to the uniqueness of reality television in comparison to other television genres."); e.g., *Conrad v. NBC Universal, Inc.* 536 F. Supp. 2d 380, 387 (S.D.N.Y. 2008) (bringing suit for the suicide of arrestee that was arrested in a dramatic fashion for police show); *Best v. Berard*, 776 F. Supp. 2d 752, 753 (N.D. Ill. 2011) (airing of plaintiff's image on nationally televised

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reality show lawsuits.¹⁸ Additionally, statistics indicate the reality genre will be a staple in television for years to come.¹⁹ Available mediums for reality shows will exponentially increase with the imminent debut of YouTube channels.²⁰ Litigation will continue to rise and squander judicial resources without a test to detect programs that disregard right of publicity concerns on an illegitimate First Amendment basis.

B. The Right of Publicity Cause of Action

The right of publicity is an individual's right to control the commercial use of his or her identity.²¹ "[P]ublicity rights . . . promote creativity by offering financial incentive to those choosing to cultivate a unique persona."²² While the right of publicity is historically associated with celebrity plaintiffs, individuals outside the limelight's rays also have an interest in protecting the unauthorized use of their image.²³

reality show after plaintiff refused to consent to such use); Vicki Hyman, *'The Bachelor' Racist? Popular Reality Show May Be Slapped with Class-action Lawsuit*, NJ.COM, http://www.nj.com/entertainment/celebrities/index.ssf/2012/04/the_bachelor_racist_popular_sh.html (last updated Apr. 17, 2012, 5:19 PM) (discussing suit against reality show "The Bachelor" in federal court involving racial discrimination claims); *Lawsuit Filed Against Broward County "Police Women"*, CBS MIAMI (July 21, 2011, 6:08 PM), <http://miami.cbslocal.com/2011/07/21/lawsuit-filed-against-broward-county-police-women/> (reporting suit against the reality show *Police Women of Broward County* regarding claims that the motive for some arrests were based on their entertainment obligations to the show); Judd Pritchard, *Reality TV Lawsuit: Star of TV's Big Rich Texas Sues for Defamation*, BARLOW GARSEK & SIMON, LLP (Apr. 4, 2012, 4:43 PM), <http://www.bgsfirm.com/media-communications-and-the-law/reality-tv-lawsuit-star-of-tvs-big-rich-texas-sues-for-defamation> (discussing case where "Big Rich Texas" cast member filed suit for defamation against reject participants for harassment through social media).

¹⁸ See *Best*, 776 F. Supp. 2d at 753; *Messenger v. Gruner + Jahr Printing & Pub.*, 208 F.3d 122, 122 (2d Cir. 2000); *Greenstein v. Greif Co.*, No. B200962, 2009 WL 117368, at *1 (Cal. Ct. App. Jan. 20, 2009); *Zglobicki v. Travel Channel, LLC*, No. 11 C 6346, 2012 WL 725570, at *1 (N.D. Ill. Feb. 2, 2012); *Arenas, Jr. v. Shed Media U.S., Inc.*, No. 11-56622, 2011 WL 6367729, at *710 (9th Cir. Dec. 19, 2011); *Wojtowicz v. Delacorte Press*, 374 N.E.2d 129, 130 (N.Y. 1978); *Howell v. Tribune Entm't Co.*, 106 F.3d 215, 217 (7th Cir. 1997).

¹⁹ *10 Years of Primetime: The Rise of Reality and Sports Programming*, NIELSENWIRE (Sept. 21, 2011), http://blog.nielsen.com/nielsenwire/media_entertainment/10-years-of-primetime-the-rise-of-reality-and-sports-programming/.

²⁰ See Marco R. della Cava, *YouTube Spends \$100 Million to Redefine TV*, USA TODAY (Jan. 12, 2012), <http://www.usatoday.com/life/television/news/story/2012-01-11/youtube-channels/52501780/1> (spending \$100 million to redefine "television" by making it more interactive); *A War To Watch: YouTube Takes On Television*, NPR (Jan. 12, 2012, 10:26 AM), <http://www.npr.org/2012/01/12/145099987/a-war-to-watch-youtube-takes-on-television> (developing more than 100 new professional content streams with partners like Amy Poehler, Madonna, and Shaquille O'Neal so that YouTube can align itself to compete with cable networks).

²¹ *Parks v. LaFace Records*, 329 F.3d 437, 459 (6th Cir. 2003).

²² DONALD E. BIEDERMAN ET AL., *LAW AND THE BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 210 (5th ed. 2007).

²³ See 1 J. THOMAS MCCARTHY, *RIGHTS OF PUBLICITY AND PRIVACY* § 4:14 (2d ed. 2012) ("[T]he majority of commentators and courts hold that everyone, celebrity and noncelebrity alike, has a right of publicity.").

The right to publicity is a relatively new entitlement²⁴ and arose tangentially out of the constitutional right to privacy.²⁵ The right to privacy is itself a synthesized descendent of four individual torts.²⁶ Like the peppered moth, the right of publicity has evolved differently based on geography.²⁷ Being a creature of state law, there is irregular creation and application of this right across the country.²⁸ This includes how the law interacts with the First Amendment right to freedom of expression.²⁹

C. The First Amendment Newsworthy Exception

The freedom of expression is a fundamental right embedded in the First Amendment of the United States Constitution.³⁰ Americans zealously guard the freedom of expression because of its indispensable function in democracy.³¹ “There is . . . little doubt that the First Amendment was meant to prohibit licensing of

²⁴ See generally *Cabaniss v. Hipsley*, 151 S.E.2d 496, 504 (Ga. Ct. App. 1966) (recognizing the commercial exploitation of a right of publicity as distinct from other right of privacy torts); *BIEDERMAN ET AL.*, *supra* note 22, at 210 (“The . . . right of publicity is a fairly recent development.”).

²⁵ *Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1205 (11th Cir. 2009).

²⁶ See *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 325 (6th Cir. 2001). Professor William Prosser viewed the right of privacy as a combination of four torts: (1) intrusion upon another’s seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts; (3) publicity which places another in a false light in the public eye; and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness. William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 388–90 (1960). “Prosser’s analysis was subsequently incorporated into the Restatement (Second) of Torts §§ 652A–652I (1977)”. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

²⁷ Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM. LAW. 14 (2011) (“Different states have widely divergent right of publicity laws.”)

²⁸ See *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622–23 (6th Cir. 2000); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (stating that not every state has enacted a right of publicity statute and listing those states that had passed such a statute prior to the date of publication).

²⁹ See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 702 (Ga. 1982) (establishing the right of publicity as inheritable and devisable in Georgia). See also Interview with Jonathan Jennings, Practicing Attorney, Adjunct Professor, & Contributing Author to the IRPA Statute, Pattishall McAuliffe, in Chicago, Ill. (April 18, 2012).

[In drafting the IPRA], we looked to all the other states’ [right of publicity] statutes and common law in attempting to adopt what we saw as the good provisions and trying to avoid the bad ones. [W]e decided upon a 50-year post mortem right because we thought 100 years was too long, which is the current term under Indiana’s statute for example. We thought the terms in some of the other state statutes were too short . . . We also decided that the statute should be the complete account of what Illinois’ law should be, and so decided to have it supersede common law.

Id.

³⁰ See U.S. CONST. amend. I.

³¹ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 542, 586 (1977) (stating free speech checks the abuse of power by public officials).

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publication such as existed in England and to forbid punishment for seditious libel.”³² Yet, the intent of the Framers is unclear beyond these prohibitions.³³ This provides strong evidence as to why the Supreme Court expends minimal effort discerning the Framers’ intent when deciding First Amendment cases, as compared to the Framers’ influence on the rulings of other constitutional provisions.³⁴

The freedom of expression is not an absolute.³⁵ Certain categories of speech receive less or no constitutional protection.³⁶ The Supreme Court considers these classes of speech unessential to the “exposition of ideas and of such slight social value that any benefit possibly derived from them is clearly outweighed by the social interest in order and morality.”³⁷ Commercial speech is among the categories receiving a lower grade of constitutional protection.³⁸

The right of publicity is not an absolute either. It clashes with First Amendment rights at a legal nexus known as the “newsworthy exception.”³⁹ The newsworthy exception applies to a right of publicity violation “where an incident is a matter of public interest, or the subject matter of a public investigation.”⁴⁰ However, the right of publicity gives way to the First Amendment when an individual’s image is part of newsworthy subject matter.⁴¹

The Supreme Court only considered the right of publicity once.⁴² As a result, there is no clear-cut test to determine what is a “public interest” entitling TV shows to circumvent the right of publicity and to use an individual’s image without

³² ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 923–24 (3rd ed. 2006).

³³ *Id.* at 924 (quoting 1 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1–18 (1994)) (“[O]ne can keep going round and round on the original meaning of the First Amendment, but no clear, consistent vision of what the framers meant by freedom of speech will ever emerge.”).

³⁴ *Id.*

³⁵ *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

³⁶ *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (allowing states to punish individuals that use words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 399 (1992); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (finding the First Amendment permits a State to ban “true threats”); *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985) (finding the First Amendment does not protect the right to publish speech owned by another).

³⁷ *Chaplinsky*, 315 U.S. at 572.

³⁸ *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501–02 (1996); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (finding that only truthful commercial speech is constitutionally protected).

³⁹ *See* 2 MCCARTHY, *supra* note 23, § 8:60.

People who have found themselves part of a newsworthy event, either voluntarily or involuntarily, have sometimes asserted a claim of . . . the right of publicity. The general rule is that those involuntarily thrust into the public eye, such as those who are victims of a crime or survivors of a fire or plane crash, lose their privacy in favor of the public’s “right to know” . . .

Id.

⁴⁰ *Waters v. Fleetwood*, 91 S.E.2d 344, 348 (Ga. 1956).

⁴¹ *Toffoloni v. LFP Publ’g. Grp., LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009).

⁴² *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

consent.⁴³ Only broad legal benchmarks stated in appellate court decisions are available for guidance.⁴⁴ Furthermore, the Supreme Court has not yet heard a case involving the pop-culture phenomenon of reality television. Considering the genre's staying power, fiscal clout, and litigious nature, a test is needed to determine when a reality show touts itself as a public interest to excuse right of publicity violations in lieu of profit. Copyright doctrine can provide a solution.

D. Copyright Law and the Fair Use Doctrine

Copyright law is grounded in the U.S. Constitution⁴⁵ and is governed by the Copyright Revision Act of 1976.⁴⁶ "Copyright law offers legal protection to the fruits of human creativity so that the public as a whole may benefit."⁴⁷ Legal protection is granted to authors⁴⁸ of creative works, such as television shows, for a limited time period, to prevent unauthorized parties from profiting off the creative work.⁴⁹ To receive a copyright, creative works need to be sufficiently original⁵⁰ and "fixed in a tangible medium of expression."⁵¹ Authors are entitled to certain rights over their creative works, such as granting the author a finite monopoly from which to profit.⁵²

"Fair use" of a creative work, however, is one such limitation on the copyright monopoly.⁵³ Courts look to the four federally codified factors to determine whether a

⁴³ *Shulman v. Grp. W. Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998) ("It is in the determination of newsworthiness—in deciding whether published or broadcast material is of legitimate public concern—that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom.").

⁴⁴ *See, e.g., Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd*, 32 A.D.2d 892 (N.Y. App. Div. 1969) ("Just as a public figure's 'right of privacy' must yield to the public interest so too must the 'right of publicity' bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest."); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988). "The purpose of the media's use of a person's identity is central. If the purpose is 'informative or cultural' the use is immune; 'if it serves no such function but merely exploits the individual portrayed, immunity will not be granted.'" *Midler*, 849 F.2d at 462 (quoting Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596 (1979)).

⁴⁵ U.S. CONST. art. I, § 8, cl. 8.

⁴⁶ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

⁴⁷ CRAIG ALLEN NARD ET AL., *THE LAW OF INTELLECTUAL PROPERTY* 367 (3rd ed. 2011).

⁴⁸ *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) ("An author . . . is 'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.'").

⁴⁹ *See Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (upholding the validity of the Copyright Term Extension Act which granted authors copyright protection for their entire lives plus 70 years of post-mortem protection).

⁵⁰ *See Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("Original . . . means only that the work was independently created by the author (as opposed to copied from other works), and that it possess at least some minimal degree of creativity.").

⁵¹ 17 U.S.C. § 101 (2012).

⁵² *See, e.g., id.* § 114 (creating a compulsory license in sound recordings for digital, non-interactive services); *id.* § 115 (creating a compulsory mechanical license for making and distributing phonorecords).

⁵³ *Id.* § 107.

use is in fact “fair.”⁵⁴ The first factor asks whether the use is commercial.⁵⁵ The second factor considers the nature of the copyrighted work.⁵⁶ The fourth factor evaluates the possible fiscal effects the fair use would have on a protected work’s relative markets.⁵⁷

The third factor is dissected by the court into important, distinguishable nuances.⁵⁸ The court first examines the quantitative and qualitative aspects of the infringed work.⁵⁹ In copyright infringement cases, this factor favors the infringed party when the accused has copied a protected work in its entirety and is analyzed in reference to the copyrighted work.⁶⁰ A qualitative analysis determines whether a taking used “the heart of the work.”⁶¹ A quantitative analysis looks at the portion of the work used.⁶² Importantly, courts are not restricted to the enumerated factors codified in federal law; a court should take into consideration any other factors it deems necessary to promote the policy embodied by the copyright statute.⁶³

E. Best v. Berard’s Problematic Right of Publicity Ruling

In *Best v. Berard*, the plaintiff’s name and image was impermissibly used on the reality TV show *Female Forces*.⁶⁴ This show documents the professional and personal lives of female police officers in Naperville, Illinois.⁶⁵ The show balances airtime between the professional duties of the officers with their family life, focusing on the extreme difference in character and disposition required for each role. While a central component of the show is the law-breakers who the officers must handle while on duty, no third-party source refers to the program as a legitimate news program.⁶⁶

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 540–42 (1985) (distinguishing whether the copyrighted work is fiction or non-fiction, published or un-published).

⁵⁷ 17 U.S.C. § 107(4) (2012); 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[4] (2011).

⁵⁸ *See, e.g., Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901) (“[T]he quantity and value of the materials used. . .”).

⁵⁹ *Id.*

⁶⁰ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (citing *New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.*, 904 F.2d 152, 158–59 (2d Cir. 1990)) (“We review this factor with reference to the copyrighted work, not the infringing work.”).

⁶¹ *See Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 146 (N.D. Cal. 1994) (stating that even a small taking may be actionable if it is uses “the heart” of the work).

⁶² *See Wright v. Warner Books, Inc.*, 953 F.2d 731, 738 (2d Cir. 1991) (finding that a quantitative analysis favors the copyright holder where the portion used formed a significant percentage of the copyrighted work).

⁶³ *Iowa State Univ. Research Found., Inc. v. Am. Broad. Co.*, 621 F.2d 57, 60 (2d Cir. 1980) (citing *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977)) (“[R]esolution of a fair use claim ‘depends on an examination of the facts in each case (and) cannot be determined by resort to any arbitrary rules or fixed criteria.’”).

⁶⁴ *See Best v. Berard*, 776 F. Supp. 2d 752, 754 (N.D. Ill. 2011).

⁶⁵ *Id.*

⁶⁶ *See Female Forces Promo*, INTERNET MOVIE DATABASE, <http://www.imdb.com/video/biography/vi2637301017/> (last visited Mar. 7, 2013); *Biography’s Female Forces Promo*, YOUTUBE, http://www.youtube.com/watch?v=c3lwg4ni6_Y (last visited Mar. 7, 2013); *CNN Presents on CNN*,

In February 2008, Eran Best was pulled over in Naperville, Illinois for driving with an expired license plate.⁶⁷ At this time, the city of Naperville participated in *Female Forces*.⁶⁸ After Best gave Officer Timothy Boogerd her license and registration, he requested *Female Forces* participant Stacy Berard to accompany him on scene.⁶⁹ Thirty minutes later, Berard and Boogerd informed Best she was driving on a suspended license.⁷⁰ Eventually, a small amount of marijuana and accompanying paraphernalia was found in her car.⁷¹

Show producers urged Best to sign a consent form to air her image, but Best refused.⁷² Despite this explicit refusal, the producers used footage of Best's arrest, with her face visible and her voice audible.⁷³ Best then filed suit after her featured episode aired thirty times and was offered for sale digitally.⁷⁴ One of the six claims brought against the defendants included a right of publicity claim for using her identity for commercial purposes without consent.⁷⁵

"[T]he boundaries of the public concern test are not well defined."⁷⁶ Despite recognizing this legal reality, the *Berard* court deemed the plaintiff's arrest to be a matter of public concern entitled to First Amendment protection from right of publicity attack, although admitting "there is no controlling authority" for the conclusion and that "other authorities are relatively sparse."⁷⁷ "[T]he Court found that because arrests are generally a matter of public concern, and the [*Female Forces*] Episode contained footage of Plaintiff's arrest, the *entire* broadcast of the Episode constituted a matter of legitimate public concern protected by the First Amendment."⁷⁸ The Court did not consider the disparaging editorials and sensationalized nature of the broadcast as a whole, and implicitly gave these components of the broadcast First Amendment protection equal to that of a legitimate arrest.⁷⁹ Undoubtedly, the capture and general circulation of crimes being

TV GUIDE, <http://www.tvguide.com/tvshows/cnn-presents/200563> (last visited Mar. 7, 2013) (describing news programs); *Female Forces on Biography Channel*, TV GUIDE, <http://www.tvguide.com/tvshows/female-forces/348175> (last visited Mar. 7, 2013) (leading television industry publication does not refer to *Female Forces* as a news program).

⁶⁷ Best v. Berard, 776 F. Supp. 2d 752, 754 (N.D. Ill. 2011).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 755.

⁷⁵ *Id.*

⁷⁶ *Id.* at 757 (citing *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011)).

⁷⁷ *Id.*

⁷⁸ Plaintiff's Combined Motion to Reconsider and Statement Opposing Dismissal of Counts III and IV of Plaintiff's First Amended Complaint at 4, Best v. Berard, 837 F. Supp. 2d 933 (N.D. Ill. Mar. 11, 2011) (No. 09 cv 8849), 2011 WL 928862.

⁷⁹ See *id.* at 3. (explaining how defendants staged a field sobriety test when the plaintiff was not arrested for driving under the influence and made "disparaging comments about Plaintiff relative to her clothing and vehicle that conveyed negative implications as to Plaintiff's character, and made those comments to the camera with the intent to humiliate her."). *But cf.* *Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 390–91 (S.D.N.Y. 2008) (declaring media involvement in dramatization of law enforcement operation may be improper and actionable where "the media overly intrudes into a law enforcement operation."); see also *Lauro v. Charles*, 219 F.3d 202, 213 (2d Cir. 2000) (stating that a "staged perp walk" is not a legitimate law enforcement purpose).

committed on tape is considered to be within the public interest, thus subject to First Amendment protection.⁸⁰ Problems arise, however, when the use of the name or image is no longer for the general benefit of the public interest.⁸¹ News programs routinely air the names and faces of convicted criminals, and crimes are often published in police blotters.⁸² Police blotters also publicize private information of law-breakers and inform the community of their misgivings to deter and prevent such conduct from happening again.⁸³ Reality television shows serve no such public interest purpose.

The *Berard* ruling threatens to add another form of punishment to those who behave in unlawful ways. Unlike news reports or police blotters, reality show producers have only a financial incentive in the unlawful conduct of third parties. Following *Berard*, producers of reality television shows may become unrelenting watchdogs, eager to catch or even encourage wrongdoers in action for the sake of advertising dollars, rather than public interest.⁸⁴ As the plaintiff's motion indicates, reality show producers have incentives to capture illegal activity and to further sensationalize the occurrence for the audience.⁸⁵

II. ANALYSIS

Unlike media conglomerates, programming executives, advertisers, and consumers, the judicial system encounters enormous difficulty in distinguishing entertainment from news when applying the First Amendment newsworthy exception.⁸⁶ The Supreme Court held that courts will not engage in the business of

⁸⁰ *Romaine v. Kallinger*, 537 A.2d 284, 293–94 (N.J. 1988) (“The ‘newsworthiness’ defense . . . is available to bar recovery where the subject matter of the publication is one in which the public has a legitimate interest. . . . Moreover, the facts surrounding the commission of a crime are subjects of legitimate public concern.”).

⁸¹ See, e.g., *Hilton v. Hallmark Cards*, 580 F.3d 874, 912 (9th Cir. 2009) (ruling in favor of Paris Hilton against Hallmark for using her name and likeness on birthday cards without her consent and striking down Hallmark’s “public interest” defense).

⁸² E.g., *CLEARMAP*, CHI. POLICE DEP’T, <http://gis.chicagopolice.org/> (last visited Mar. 7, 2013) (providing a database of reported criminal activities and respective locations, registered sex offenders and gun offenders, and community concerns such as narcotics, gangs, and prostitution).

⁸³ See, e.g., BINGHAMTON N.Y. POLICE DEP’T, <http://www.cityofbinghamton.com/department.asp?zone=dept-police> (last visited Mar. 7, 2013) (“Involving the community will enhance both police and residents knowledge of the nature and extent of the crime problem in the city. The police and community members working together against crime will be a major step in crime deterrence.”); *Police Blotter*, ASHEVILLE N.C. POLICE DEP’T, <http://www.ashevillenc.gov/Departments/Police/PoliceBlotter.aspx> (last visited Mar. 7, 2013) (stating police department policy of using police blotters to deter crime in Asheville, North Carolina).

⁸⁴ Brenner, *supra* note 16, at 874 n.3 (quoting *The Reality of Reality* (Bravo television broadcast Sept. 8–12, 2003)) (“[R]eality is boring. This is assisted reality, and the assists just keep coming.”).

⁸⁵ Plaintiff’s Combined Motion to Reconsider and Statement Opposing Dismissal of Counts III and IV of Plaintiff’s First Amended Complaint at 6–7, *Best v. Berard*, 837 F.Supp.2d 933 (N.D. Ill. Mar. 11, 2011) (No. 09 cv 8849), 2011 WL 928862.

⁸⁶ See *Shulman v. Grp. W. Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998) (“It is in the determination of newsworthiness—in deciding whether published or broadcast material is of legitimate public concern—that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom.”).

deciding what is and what is not “news” for purposes of a fair use analysis in copyright claims,⁸⁷ but the same conclusion has not been made for right of publicity cases. This section will analyze the snags courts have historically encountered in differentiating entertainment from news. Tribunal trouble is then compared to society’s simplistic method of solving the same problem, as well as the business model’s solution.

A. Justifying Judicial Determination of What Constitutes News

The Supreme Court indubitably stated courts have no role in determining what is considered to be “news” when applying the fair use test in copyright infringement cases.⁸⁸ This precedent is not binding on right of publicity causes of action.⁸⁹ Intrinsic dissimilarities between the two canons justify a court’s intervention to ensure that a television show is using an individual’s name, image, or likeness in a legitimate newsworthy manner.

The objective of copyright law compared to right of publicity law’s purpose distinguishes fair use doctrine’s application in each relevant scenario. The long term goal of copyright is to promote the progress of science and useful arts, and this is accomplished by enabling copyright creators to earn a living through a limited monopoly on the copyrighted work.⁹⁰ This monopoly includes an author’s right to choose the terms of when to publish or otherwise make public his or her copyrightable work.⁹¹ Granting news organizations the right to publish an unreleased photograph, image, or the like, would thus upset the purpose of this federal doctrine.

This is quite different from one of the purposes, and consequential effects, of right of publicity law. The economic incentive theory behind right of publicity jurisprudence intends to promote creativity by offering financial incentive to those choosing to create a unique persona.⁹² While the only Supreme Court case that touches upon right of publicity states this in a slightly different way,⁹³ other authorities directly establish this as a right of publicity policy.⁹⁴ Public exposure, and eventual notoriety, is what creates a unique persona and ideally a “monopoly” in

⁸⁷ See *Harper & Row v. Nation Enters.*, 471 U.S. 539, 569 (1985) (applying a fair use analysis to news).

⁸⁸ *Id.*

⁸⁹ See *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (“[I]n the absence of binding precedent—courts may forge a different path than suggested by prior authorities that have considered the issue.”)

⁹⁰ 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3.3 (2012).

⁹¹ See *Cnty. of Suffolk, N.Y. v. First Am. Real Estate Solutions*, 261 F.3d 179, 194 (2d Cir. 2001).

⁹² *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Adv. Media, L.P.*, 443 F. Supp. 2d 1077, 1098 (E.D. Mo. 2006), *aff’d*, 505 F.3d 818 (8th Cir. 2007).

⁹³ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (“[R]ight of publicity provides an economic incentive . . . to make the investment required to produce a performance of interest to the public.”)

⁹⁴ *C.B.C. Distribution & Mktg., Inc.*, 443 F. Supp. 2d at 1098; *Parks v. LaFace Records*, 329 F.3d 437, 445 (6th Cir. 2003) (“Celebrities . . . possess an economic interest in their identities. . . .”); *BIEDERMAN ET AL.*, *supra* note 22, at 210; 1 *MCCARTHY*, *supra* note 23, § 2:6.

that persona and the accompanying name, image, likeness, and so forth.⁹⁵ A news organization's use of one's name or face helps disseminate this name and increase public recognition. It can be reasonably argued that a news organization's use of another's image simply supplements the purpose of right of publicity.

Such dissension of each doctrine's purpose by the routine happenings of news organizations provides sufficient rationale to allow courts freedom to determine what is considered "news" for right of publicity cases while adhering to Supreme Court precedent for copyright actions. What each doctrine aims to protect from exploitation further justifies differential legal treatment. Copyright law protects works of various forms and media from unauthorized uses.⁹⁶ Right of publicity law protects more intangible matter—matter that is more delicate and valuable than a book or movie or painting and cannot be recreated through derivative works.⁹⁷ Publicity law protects one's name, face, and general persona from unauthorized exploitation.⁹⁸ Unconsented use of a copyrighted work can undoubtedly cause damage that may be rectified through financial compensation.⁹⁹ Conversely, an unpermitted use of one's face or name may have repercussions in ways money cannot amend.¹⁰⁰ Injury to one's reputation may not be quantifiable. Heightened judicial ability to protect the use of one's image is needed to combat such harm.

B. The Judicial Dilemma of Distinguishing Entertainment from News

The court system's grapple with applying the First Amendment defense to right of publicity scenarios is notorious.¹⁰¹ The Supreme Court has only heard one right of publicity suit and failed to establish any definitive method of determining when subject matter is newsworthy.¹⁰² Despite the brief appearance in Supreme Court precedent, attested avenues leading to right of publicity liability exist. Defendants accused of violating publicity rights by using a plaintiff's identify for advertising purposes are regularly held accountable.¹⁰³ Attaching a plaintiff's name or likeness

⁹⁵ 1 MCCARTHY, *supra* note 23, § 2:6 (entering the public eye by undertaking enriching and socially useful activities causes one's identity to become known and commercially valuable).

⁹⁶ 17 U.S.C. § 102 (2012).

⁹⁷ *See id.* § 101 (defining a "derivative work" as "a work based upon one or more preexisting works").

⁹⁸ 765 ILL. COMP. STAT. § 1075/30 (2012).

⁹⁹ 17 U.S.C. § 504.

¹⁰⁰ *See, e.g.,* Coton v. Televised Visual X-Ography, Inc., 740 F. Supp. 2d 1299, 1306 (M.D. Fla. 2010) (recounting plaintiff's testimony of the humiliation, shame, and extreme stress she suffered when defendant used her image on the packaging of a pornographic movie without her consent).

¹⁰¹ *See* Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1401 (9th Cir. 1992); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1183–85 (9th Cir. 2001); Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001) (citing Eastwood v. Superior Court, 149 Cal. App. 3d 409, 422 (1983)) ("However, the [First Amendment] defense is not absolute; we must find 'a proper accommodation between [the] competing concerns' of freedom of speech and the right of publicity.").

¹⁰² Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576–78 (1977).

¹⁰³ *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983); Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) (citing Peter L. Felcher and Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596 (1979)) ("The purpose of the media's use of a person's identity is central. If the purpose is 'informative or

to a product or service is another steadfast method for being held liable for a right of publicity violation in most jurisdictions.¹⁰⁴

Befuddlement occurs when the issue at hand is within the gray area between the black and white spectrum of commercial exploitation and public interest.¹⁰⁵ Confusion and erratic rulings will continue to occur due to the state-based nature of the right, as well as the federal legislature's failure to institute any guidelines for enforcement.¹⁰⁶ A need for nationwide uniform guidelines will become

cultural' the use is immune; 'if it serves no such function but merely exploits the individual portrayed, immunity will not be granted.'"); *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005) (finding that defendant's use of plaintiff's photograph beyond the contracted timeframe to advertise hair products violated plaintiff's right of publicity under Illinois state law); *Downing*, 265 F.3d at 1002.

Although the theme of Abercrombie's catalog was surfing and surf culture . . . there is a tenuous relationship between Appellants' photograph and the theme presented . . . We conclude that the illustrative use of Appellant's photograph does not contribute significantly to a matter of public interest and that Abercrombie cannot avail itself of the First Amendment defense.

Id.

¹⁰⁴ See *Carson*, 698 F.2d at 835 ("The theory of the right [of publicity] is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity."); *Martin Luther King Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 705 (1982) (11th Cir. 1982) (holding defendant liable for violating Martin Luther King, Jr.'s heirs' right of publicity by manufacturing and selling a bust of King's image); compare *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (finding that defendant's use of Elvis Presley's image on a poster was a right of publicity violation to the Presley estate), with *Arenas v. Shed Media U.S. Inc.*, 881 F.Supp.2d 1181 (C.D. Cal. 2011) (9th Cir. 2011) (unpublished) (finding that production company did not violate celebrity's right of publicity where it cast his former girlfriend in a reality show).

¹⁰⁵ See *Namath v. Sports Illustrated*, 48 A.D.2d 487, 488 (N.Y. App. Div. 1975) ("The use of plaintiff's photograph was merely incidental advertising of defendants' magazine . . ."). *But see id.* (Kupferman, J., dissenting) ("[T]he situation is one of degree. . . . There seems to be trading on the name of the personality involved in the defendants' advertisements."). See also *Zglobicki v. Travel Channel, LLC*, No. 11 C 6346, 2012 WL 725570, at *2 (N.D. Ill. Feb. 2, 2012) (defining "a television show that features a Chicago restaurant [as] 'a subject of general interest and of value and concern to the public.'"); compare *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1093 (8th Cir. 2008) (finding that factual data in the public domain concerning baseball players' name and performance statistics allow for a First Amendment defense to right of publicity suit despite defendant's profit-making use), with *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 968 (10th Cir. 1996) (finding that defendant's use of player's likeness in parody trading cards violated the right of publicity statute).

¹⁰⁶ See Interview with Jonathan Jennings, *supra* note 29.

I did take an active interest in trying to enact a federal right of publicity through the American Bar Association, but that effort stalled in part because of concerns brought by First Amendment attorneys and because of concerns over tort reform . . . The proposal was withdrawn from consideration in the ABA's House of Delegates because we didn't have enough support due to these concerns. There also was concern that if you adopt a federal right of publicity, it would lead to the filing of more suits that wouldn't otherwise be brought and that would chill people's First Amendment speech . . . Finally, some people argued against the federal statute in noting that there were not enough states recognizing the right

incontrovertible as technology continues to complicate legal doctrine that was contrived prior to any cognizance of the internet revolution.¹⁰⁷ Until then, courts should seek assistance from other spheres of society.

C. Public and Professional Recognition of News and Entertainment

At stark contrast to the muddled judicial inquiry of identifying First Amendment protected newsworthy items from those items of unprotected status is the ease with which the public and members of the media profession make such a determination. In fact, the American public is vocalizing concern with the constant presence of reality television and the societal effects of the programs.¹⁰⁸ News programs and other informative programs are not typically subject to such public criticism due to the important role a vigilant media machine plays in democracy.¹⁰⁹

The general television viewing public is unlikely to have trouble visually identifying a program and its content as one of entertainment worth or newsworthy value.¹¹⁰ It is a weak argument indeed to suggest that any rational individual maintains media dependence on a reality show to learn of current events.¹¹¹ It is the reason for tuning into a program, and logically the purpose of the show, that identifies whether a program is legally protectable news or commercially lucrative entertainment.¹¹² The inquiry need not pry beyond why the television is being turned on in the first place. Viewers turn on the news to be informed because they have an “information need.”¹¹³ While the reasons for choosing a particular news

of publicity; it therefore was too young a right [at the time] to justify national treatment.

Id.

¹⁰⁷ Lyria Bennett Moses, *Agents of Change: How the Law Copes with Technological Change*, 20 GRIFFITH L. REV. 763, 763 (2011).

¹⁰⁸ See Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs “Illegal Contests” In Violation of Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 141, 148 (2007) (listing the possible negative legal repercussions facing production companies that manufacture reality television shows); T.L. Stanley, *Parents Television Council Study: Anatomy of a Trend*, LOS ANGELES TIMES (March 21, 2012), <http://articles.latimes.com/2012/mar/21/entertainment/la-et-0321-tv-language-20120321>; *Reality on MTV: Gender Portrayals on MTV Reality Programming*, PARENTS TELEVISION COUNCIL, http://www.parentstv.org/PTC/publications/reports/MTV-RealityStudy/MTVRealityStudy_Dec11.pdf (last visited Mar. 7, 2013).

¹⁰⁹ Johann van der Westhuizen, *A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy*, 8 AFR. HUM. RTS. L.J. 251, 268 (2008) (“Independent courts and free independent media are essential ingredients of a democracy mutually dependent on each other to be able to fulfill their role properly.”).

¹¹⁰ See generally Tony Atwater, *News Format in Network Evening News Coverage of the TWA Hijacking*, 33 J. BROADCASTING & ELECTRONIC MEDIA 293, 293–304 (1989).

¹¹¹ See generally Thomas F. Baldwin et al., *Uses and Value for News on Cable Television*, 36 J. BROADCASTING & ELECTRONIC MEDIA 225, 226 (1992) (“Media dependence is a concept that demonstrates that people develop a reliance on certain channels (such as newspapers, television, radio, etc.) to satisfy certain needs.”).

¹¹² Fiona Chew, *Information Needs During Viewing of Serious and Routine News*, 36 J. BROADCASTING & ELECTRONIC MEDIA 453, 453 (1992).

¹¹³ See *id.* at 456.

source are more subjective, it is the need for information that initiates the hunt for knowledge.¹¹⁴

The television industry provides the content satisfying the public's information need. The television industry develops programming based on the wants and needs of certain demographic target markets.¹¹⁵ Each network brands itself, as well as its shows, to attract the specific demographic advertisers seek to reach.¹¹⁶ Because viewership ratings are the "life blood of television" due to their direct relation to advertising revenue, the fiscal survival of a television network is precisely correlated with the public's ability to easily identify a program's content.¹¹⁷ Clearly categorizing shows containing First Amendment protected newsworthy content designed to inform the public from shows created solely for entertainment purposes is an obligatory professional practice.

Necessarily, networks will clearly identify all news programs in order to lead members of the public with a satiable information need to a satisfactory source. Fox, NBC, ABC, and CBS all expressly label their news programs as such. Reality shows are also transparently labeled and marketed to inform the public of the show's premise.¹¹⁸ Despite the ruling in *Berard*, this practice of transparency with the viewer ceased when a non-news program overstepped both conventional and legal boundaries by airing an individual's image without consent to broadcast it.¹¹⁹

III. PROPOSAL

Traditionally, it is the identity of those arrestees featured on reality crime shows that parade behind protections, such as pixilation, to blur out the individual's face unless consent is obtained.¹²⁰ A new First Amendment application by the *Berard* court has the potential to perpetuate restricted protection for those featured on

¹¹⁴ See Hyuhn-Suhck Bae, *Product Differentiation in National TV Newscasts: A Comparison of the Cable All-News Networks and the Broadcast Networks*, 44 J. BROADCASTING & ELECTRONIC MEDIA 62, 64 (2000) (explaining Fox News' "conservative slant" due to the political personalities of Rupert Murdoch and Roger Ailes and MSNBC promotion as a "future- and technology-oriented" news network).

¹¹⁵ See BIEDERMAN ET AL., *supra* note 22, at 862 (discussing The Nielsen Company's role in television ratings).

¹¹⁶ *Id.* at 854–55 ("[T]he availability of multiple channels on [television] permits niche marketing to more specialized audiences.").

¹¹⁷ *See id.* at 854–55.

¹¹⁸ *See, e.g., Top Chef Show Homepage*, BRAVO, www.bravotv.com/top-chef (last visited Mar. 7, 2013) (regarding a cooking contest reality show); *Million Dollar Listing Show Homepage*, BRAVO, www.bravotv.com/million-dollar-listing (last visited Mar. 7, 2013) (regarding a reality show about real estate agents).

¹¹⁹ *See* Interview with Ryan Kelly, Videographer & Video Editor, Kean University, in Union, N.J. (Apr. 20, 2012) ("The common practice amongst the television industry is to blur out any distinguishing features of a party if that party refuses to grant the production company permission to use their identity.").

¹²⁰ *Id.*; *Cops: Show FAQ*, TV RAGE, http://www.tvrage.com/Cops/show_faq (last visited Mar. 7, 2013) (explaining that many participants on COPS refused to sign the release at first, but now many see it as their 15 minutes of fame and often consent to use of their identity).

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reality shows in Illinois doing anything unlawful.¹²¹ As subpart A explains, there is a need to create a judicial test to help private individuals protect the commercial use of their identity. The elements of the proposed test are presented in subpart B: a combination of factors borrowed from the television industry's standard practices and copyright law's fair use doctrine.¹²² Subpart C details how the proposed test would be applied in line with fair use doctrine precedent. Subpart D applies the proposed test to the scenario present in the *Berard* case.

A. A Common Law Test Needs to Be Established

The Illinois Right of Publicity Act¹²³ is presently interpreted to deny all citizens control of the commercial use of their identity if they commit any *de minimis* violation of the law on video, or are otherwise videotaped in conjunction with what a judge decides to be a matter of public interest.¹²⁴ Criminal activity is unquestionably a matter of public interest, justifying use of the law-breaker's identity in disseminating the information.¹²⁵ But to grant commercially motivated parties the right to broadcast the guilty party's identity is an unprecedented and problematic legal development that violates the basics of publicity jurisprudence.¹²⁶

The television industry's common practice in this situation was to pixilate or otherwise distort the un-consenting individual's image.¹²⁷ Now that the courts are progressing towards terminating this requirement for production companies, the right of citizens to control the use of their identity in Illinois needs legal safeguarding.¹²⁸ The proposed test will provide that safeguard by allowing the courts to determine what programs are commercially motivated enterprises from those programs considered to be legitimate disseminators of newsworthy information.

¹²¹ *Best v. Berard*, 776 F. Supp. 2d 752, 756 (N.D. Ill. 2011) (upholding First Amendment protection where a television production company televised a reality crime show depicting arrestee's identity without consent); *see also Zglobicki v. Travel Channel, LLC*, 11 C 6346, 2012 WL 725570, at *2 (N.D. Ill. Feb. 2, 2012) (upholding use of the plaintiff's identity on a televised restaurant reality show as lawful under the Illinois Right of Publicity Act, stating: "[A] television show that features a Chicago restaurant is 'a subject of general interest and of value and concern to the public.'").

¹²² 17 U.S.C. § 107 (2012).

¹²³ 765 ILL. COMP. STAT. 1075/1-60 (2012).

¹²⁴ *See Zglobicki*, 2012 WL 725570, at *2.

¹²⁵ *See Lamonaco v. CBS, Inc.*, No. 93-1975(DRD), 1993 WL 556536, at *7 (D.N.J. July 29, 1993), *aff'd*, 27 F.3d 557 (3d Cir. 1994) ("The commission of a crime . . . is a matter of public interest as a matter of law.").

¹²⁶ 1 MCCARTHY, *supra* note 23, § 6:57 ("The right to control and to choose whether and how to use an individual's identity for commercial purposes is recognized as each individual's right of publicity.").

¹²⁷ *See* Interview with Ryan Kelly, *supra* note 119 ("The common practice amongst the television industry is to blur out any distinguishing features of a party if that party refuses to grant the production company permission to use their identify. Often, we may have to digitally distort tattoos, scars, and other identifiable presences, like license plates.").

¹²⁸ *Best v. Berard*, 776 F. Supp. 2d 752, 759 (N.D. Ill. 2011) (ruling that IRPA's "public affairs" exemption for using an individual's identity without consent may be "reasonably" interpreted to cover the use of one's identity in an entertainment program that conveys truthful footage of an arrest).

B. The Proposed Test

The proposed test is designed to discover which television programs are sincerely utilizing First Amendment rights to use another's name, image or likeness in furtherance of a public interest, from shows peddling this First Amendment exception for convenience to ultimately pursue a commercial purpose. The test consists of four factors derived from copyright jurisprudence and the professional practices of the television industry. The logic in turning to copyright doctrine comes from the parallels between the underlying public policies of copyright law with the right of publicity law.¹²⁹ Renowned legal scholars also suggest that "First Amendment policies could be accommodated within the framework of the right of publicity by borrowing from copyright law's 'fair use' defense."¹³⁰ The lack of any substantial case law indicating how to make this distinction makes looking to the television production industry's practices for guidance appropriate. This is not an unprecedented practice.¹³¹ Previous right of publicity cases have considered business practices in their rulings as well.¹³²

The differences between reality shows and news castings are obvious and extensive. For instance, the "reality" in reality shows is often dramatized or artificially created with promotional, rather than informational, ends.¹³³ Reality shows are syndicated, while the implicit value of news comes from its timeliness making syndication a moot point.¹³⁴ An exhaustive list of differences is unnecessary and possibly impossible, but there are many characteristics to consider such as the focus on character development and production crew involvement in the creation of

¹²⁹ *Compare* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (granting copyright protection to motivate the creative activity of authors and inventors by the provision of a special reward, which is the copyright monopoly), *with* 1 MCCARTHY, *supra* note 23, § 2:6 ("[Right of publicity provides] an economic incentive to undertake socially enriching activities[.]").

¹³⁰ 1 MCCARTHY, *supra* note 23, § 8:38; Richard Ausness, *The Right of Publicity: A "Haystack in a Hurricane"*, 55 TEMP. L.Q. 977, 1048 (1982); Stephen R. Barnett, *First Amendment Limits on The Right of Publicity*, 30 TORT & INS. L.J. 635, 657 (1995).

¹³¹ *See, e.g., In re* L.A. Dodgers LLC, 457 B.R. 308, 313 (Bankr. D. Del. 2011) (referring to the judicial policy of deferring to the business judgments of corporate directors in the exercise of their broad discretion in making corporate decisions).

¹³² *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (looking to Ford's intent in "studiously acquir[ing] the services of a sound-alike and instruct[ing] the sound-alike to imitate Midler's voice"); *Waits v. Frito-Lay*, 978 F.2d 1093, 1097 (9th Cir. 1992) (finding that advertiser specifically sought a Tom Waits sound-alike).

¹³³ Brenner, *supra* note 16, at 873–74 n.3 (citing *The Reality of Reality* (Bravo television broadcast Sept. 8–12, 2003)). "The Reality of Reality, a five-part documentary series which aired September 8–12, 2003, examined the history of reality TV from the earliest days of the medium, the instant celebrity culture, and most significantly, the willingness of reality producers to use production techniques to create an illusion of reality." *Id.*; *see also* Plaintiff's Combined Motion to Reconsider and Statement Opposing Dismissal of Counts III and IV of Plaintiff's First Amended Complaint at 6–7, *Best v. Berard*, 837 F. Supp. 2d 933 (N.D. Ill. Mar. 11, 2011) (No. 09 cv 8849), 2011 WL 928862 (accusing defendants of "sensationalizing" the arrest for the television show).

¹³⁴ *See* Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 903 (2d Cir. 2011) (citing *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918)) (upholding the "hot news" misappropriation doctrine which finds that "[u]nfair use of another's labor, skill, and money, and which is salable by complainant for money" is a form of free-riding).

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televised “reality.”¹³⁵ It may also be wise to include public perception, a familiar component in intellectual property law analyses.¹³⁶

Borrowing three elements of copyright fair use doctrine, courts should also consider the nature and purpose of the program, the nature of the use of the identity, and the amount and substantiality of the identity used.¹³⁷ Good faith should also be taken into account.¹³⁸ “If the primary purpose of the unauthorized use is dissemination of ideas or information, the right of publicity [must] give way to the First Amendment.”¹³⁹ Where the predominant purpose of the use is commercial, the First Amendment should give way to the individual’s right to control the use of their identity.¹⁴⁰ The nature of the identity’s use would undergo a similar analysis, except the focus would be on the individual’s image or likeness rather than the program it is featured in.¹⁴¹

The court should examine the quantitative and qualitative aspects of the individual’s persona that was misappropriated.¹⁴² Translated into a right of publicity context, the qualitative inquiry would look at whether the taking used “the heart” of an individual’s image, such as their face. The quantitative inquiry would look at what percentage or fraction of an individual’s identity was used.¹⁴³ The qualitative and quantitative sub-factors also question whether the taking used an individual’s likeness that a large portion of the population would recognize as belonging to the individual.¹⁴⁴ By balancing these different elements, the courts can then determine whether the program using an individual’s image is a profit-driven reality show, or a news program, whose basis for existence is on the dissemination of information that is of public concern.

¹³⁵ See Beth Seaton, *Reality Programming*, THE MUSEUM OF BROADCAST COMMS., <http://www.museum.tv/eotvsection.php?entrycode=realityprogr> (last visited Mar. 7, 2013) (discussing reality shows use of product placement to increase revenue and absence of scripts to decrease costs while news programs do not use either of these practices).

¹³⁶ See *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 207–08 (1942) (finding the mindset of the ordinary purchaser relevant in determining liability for trademark infringement); *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 100 (2d Cir. 1999) (“[T]he test for substantial similarity [in copyright infringement cases] is the “ordinary observer test,” which queries whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.”).

¹³⁷ 17 U.S.C. § 107 (2012).

¹³⁸ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 540 (1985) (“Fair use presupposes good faith.”).

¹³⁹ DAVID C. HILLIARD ET AL., *TRADEMARKS AND UNFAIR COMPETITION* 614 (8th ed. 2010).

¹⁴⁰ See, e.g., *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 999–1000 (9th Cir. 2001) (finding that despite clothing catalogue’s surfing theme, depiction of plaintiff professional surfers was used in an advertising context to sell clothing and violated right to publicity).

¹⁴¹ Cf. 17 U.S.C. § 107(2) (focusing on the protected work).

¹⁴² See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006), (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

¹⁴³ E.g., *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736–38 (2d Cir. 1991) (using one percent of a copyrighted work was not quantitatively significant).

¹⁴⁴ See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (“We hold that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.”).

C. Judicial Application of the Proposed Test

After considering the television industry and general public's label of the particular program, the court will consider the nature and purpose of the particular program: is it a purely commercial enterprise or is a legitimate news program?¹⁴⁵ Next, the nature of the use of the identity will be deliberated: Is the individual doing something of public concern? Is the individual's image being exploited primarily for economic gain?

Finally, the amount and substantiality of the identity used is considered: Was the person's image or likeness the main subject matter of the scene or was it a fleeting use? How much of the person's image was used? Is the individual a celebrity or other well-known member of society, or are they a private citizen? This final question is an important one. Famous individuals may be identified by a sole characteristic.¹⁴⁶ A private citizen, like the plaintiff in *Berard*, would need a significant portion of their image to be aired in order to have a right of publicity cause of action, simply because they would not be recognized otherwise.

D. Applying the Proposed Test to the Berard Scenario

Had the court in *Berard* utilized the proposed test, a very different conclusion would have been reached. Plaintiff would have found the first factor to be in their favor. Unlike television programs such as *Crime Stoppers* or *America's Most Wanted*, which serve an important public interest, *Female Forces* is produced to show America a police force with a "female touch," focusing the show's attention on the cast rather than the criminals they apprehend.¹⁴⁷

The proposed test's second factor would also have weighed in favor of plaintiff's right to control the commercial use of her identity. How *Female Forces* intends to use individuals' identities is clearly stated in the show's promotional ventures, in media categorization of the show, even in the judge's opinion in *Berard*.¹⁴⁸ There is no reasonable argument that the nature of using Eran Best's identity was to disseminate information of public concern.¹⁴⁹

Nor can the final factor be sensibly argued to favor the defendants. Defendant production companies went beyond using Best's physical appearance for commercial

¹⁴⁵ HILLIARD ET AL., *supra* note 139, at 620 ("Were [sic] the predominant purpose of the use is commercial, First Amendment rights may give way to a plaintiff's right of publicity."); *see, e.g.*, *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 413 (9th Cir. 1996); *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 910, 913 (D.N.J. 1986); *Mendonsa v. Time, Inc.*, 678 F. Supp. 967, 971-72 (D.R.I. 1988).

¹⁴⁶ *See e.g., Midler*, 849 F.2d at 462.

¹⁴⁷ *See Biography's Female Forces Promo*, YOUTUBE, http://www.youtube.com/watch?v=c3lwg4ni6_Y (last visited Mar. 7, 2013).

¹⁴⁸ *Best v. Berard*, 776 F. Supp. 2d 752, 754 (N.D. Ill. 2011) ("Female Forces is an unscripted "reality" television series that follows female police officers as they perform their duties and interact with members of the public."); *Biography's Female Forces*, *supra* note 147 ("Sisters in blue bringing a woman's touch to keeping the peace.").

¹⁴⁹ *See Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 421 (1983) ("Publication of matters in the public interest, which rests on the right of the public to know, and the freedom of the press to tell it, cannot ordinarily be actionable [under the right of publicity].").

purposes. Appallingly, the *Female Forces* episode featuring Best aired a slew of personal information in addition to her face and voice.¹⁵⁰

Judicial matters involving copyright fair use require a balancing of factors.¹⁵¹ When all factors of a court's inquiry favor one party, there can only be one conclusion. Had the proposed test been used, the defendants' deceptive use of the First Amendment newsworthy exception to cloak themselves from legal liability would have been revealed.

CONCLUSION

Right of publicity jurisprudence is a volatile body of law. Each state has its own laws which vary widely in codification and application. However, states often look to other states when developing their own right of publicity law.¹⁵² Many states have not codified a right to publicity, making the symptoms of *Berard* potentially contagious to other jurisdictions.¹⁵³

While this tainted jurisprudence is a theoretical hazard to legal health, the pop culture canker of reality television has infected every facet of the country. The contamination shows no signs of relenting. Litigation surrounding reality programming will continue to increase. Presently there is no legal remedy to ensure private citizens adequate protection over the commercial exploitation of their persona. The judicial balancing test proposed in this Comment will prevent television producers from preying on private citizens in their pursuit of profit.

¹⁵⁰ *Best*, 776 F. Supp. 2d at 755 (“At one point [during the episode], the camera focuses on a dashboard computer, on which information about Best—including her date of birth, height, weight, driver’s license number, and brief descriptions of previous arrests and traffic stops—is displayed.”).

¹⁵¹ *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 350–51 (S.D.N.Y. 200).

¹⁵² See Interview with Jonathan Jennings, *supra* note 29 and accompanying text.

¹⁵³ NARD ET AL., *supra* note 47, at 1049–50 (“About half of the states have a comparable common law cause of action to enforce the *right of publicity*.”).