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Towards a Right of Biography:
Controlling Commercial Exploitation of Personal History

By Erik D. Lazar*

Introduction

The recognition of rights in personality has been one of the hallmarks of tort law in this century. Though the scope of defamation has narrowed with Constitutional rulings protecting publishers from liability for negligent misstatements in certain circumstances,¹ other doctrines have expanded to provide stronger shields against unwarranted intrusion and exploitation.² Since its inception in Samuel Warren's and Louis Brandeis's famous article,³ the law of privacy has developed to encompass four separate torts: intrusion into seclusion, public disclosure of embarrassing secrets, false light publicity, and misappropriation of name or likeness.⁴ In more recent times,

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3. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). According to one author, the excesses of Boston society columnists spurred the two lawyers to create a separate recognition for an interest in seclusion. See Mason, Brandeis, A Free Man's Life 70 (1946).

4. The law of privacy received its most comprehensive modern analysis in Prosser, Privacy, 48 Cal. L. Rev. 363 (1960). Prosser's breakdown of the cases into the four
the right of publicity, first recognized in 1953, has moved to protect economic interests in personality distinct from the realm of personal feelings.5

The field where the limits of personality rights are most severely tested is entertainment, where there has been a marked tendency to embellish real incidents or personal histories for purposes of docu-dramas and historical fiction.6 This deliberate blending of fact and fancy—fictionalization7—theoretically invades many of the interests that the privacy and publicity doctrines, in their broad terms, were created to protect.8 Dis-

categories has been invaluable for distinguishing the varied interests. Intrusion cases focus on physical invasion akin to nuisance or trespass. Id. at 392. The original concept is embodied in the public disclosure category, which guards reputational values. Id. at 392, 298. False light actions extend remedies to areas where disclosure may cause damage to aspects of the personality other than good name. Id. at 400. Although misappropriation of name or likeness was not originally included, courts have recognized that such exploitation may invade both personal and proprietary interests. Id. at 406.


5. The right of publicity recognizes an impersonal economic interest in the exploitation of name or likeness. Traditionally it has been applied where a name or photograph has been appropriated without consent for advertising or in connection with a commercial product. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953). See generally Nimmer, The Right of Publicity, 19 LAW & CONTEMP. PROB. 203 (1954); Treece, Commercial Exploitation of Names, Likenesses, and Personal Histories, 51 TEX. L. REV. 637 (1973). For special aspects of the right, see Comment, Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild, 22 U.C.L.A. L. REV. 1103 (1975); Pilpel & Schwartz, Mickey Mouse, Dracula, and the Rights of Parody and Privacy, PUBLISHER'S WEEKLY, Sept. 16, 1974, at 32; Rudell, Right of Publicity—Descendability, 1978 NEW YORK LAW JOURNAL 1. See notes 178-203 and accompanying text, infra.

6. Popularity of these works has not stemmed a significant rise in criticism concerning the excesses and dangers posed by films and books which take liberties with the personal details and historical truths. See generally Lukas, Bullets For Breslin, MORE, June, 1978, at 32 (critique of novel based on "Son of Sam" murders); Griffith, Playing With the Facts, TIME, Sept. 19, 1977, at 92; Scandal As Entertainment, TIME, Sept. 19, 1977, at 92; Maddocks, Now for the Age of Pest!, TIME, June 28, 1976, at 68; Rembar, Turning You Into Movies, ESQUIRE, April, 1977, at 75. See also Woodward, History's 50-Minute Hour, NEWSWEEK, April 18, 1977, at 96 (psychobiographies); Friedman, "Don't dare put me in your play," THE WRITER, June, 1969, at 16.

7. The term "fictionalization" throughout this note will mean the act of making into fiction or treating in the manner of fiction. Fiction is defined as the act of creating something imaginary: a fabrication of the mind. WEBSTER'S THIRD NEW INT'L DICT. 844 (14th ed. 1961).

tortion through fiction, purportedly done for artistic effect, can result, if not in reputational harm, in deep embarrassment or ridicule. Under a cloak of altered names or circumstances a skillful roman à clef may reveal personal idiosyncrasies or secrets. Moreover, by preempting the market with a successful production, a book or film can diminish an individual's opportunity to sell his story to writers or producers, thus depriving him of a tangible economic benefit. These concerns are relevant to both the living and their survivors, for a work that capitalizes on another's career may well reflect not only on his family but also on his intimate associates, whose interest in his portrayal will surely outlive him.

Despite their evident applicability to fictionalized biographies, judicial treatment under the privacy and publicity theories has been far from consistent. More than one commentator has called the present state of the law a "schizophrenia," 


15. Gordon, The Right of Property in Name, Likeness, Personality, and History, 55 N.W. L. Rev. 553, 590 (1960). The term "schizophrenia" was used to describe the failure of courts to distinguish between property and personal interests in suits under the
crippling in its uncertainties to both the writer and his subject.

Some courts have not allowed recovery for fictionalization unless the nature of the work was found so distorted or intrusive as to be shocking to the conscience.\textsuperscript{16} Others, applying strict privacy rules, have found that with regard to portrayals of public figures, the public interest was more important than any potential or actual invasion of the personality.\textsuperscript{17} In New York, working under a unique statutory scheme, the courts have accomplished a remarkable feat in giving the individual a measure of control over the presentation of his image while allowing some degree of latitude for inaccuracies. California courts have recently confronted the problem of whether recognition of property rights in personal history would create an undue burden on the arts by encouraging suits by heirs to whom these rights would descend.\textsuperscript{18}

Whether the law will reach a new synthesis in this turmoil
and recognize in effect what would be the right to control commercial exploitation of biography is of vast importance to writers, producers, and countless notable figures as well. It is here submitted that at least with respect to the utilization of actual names and histories in fictionalized dramas, there is a sound basis for the right. In order to determine the proper scope and purpose of the right, it is necessary to examine the theories now operating that grant some degree of control over personal histories and to dispense with several artificial concepts that still linger. Three distinct doctrines will be reviewed: the hybrid approach under the New York privacy statute, which implicitly acknowledges an economic as well as a personal interest in biography which has been exploited through fictionalization; a strict privacy interpretation as exemplified by a series of California cases; and the relatively new theory, scrutinized by New York and California courts, that additional control over exploitation of personality can best be achieved through application of property concepts to fictionalized biographies. Through comparison of cases in each area, it will become evident that a fresh, innovative outlook is needed to dissipate the judicial conflicts and confusion now reigning.

The New York Privacy Statute

The process of establishing a degree of control over exploitation of personal history under New York law is like fitting a square peg in a round hole. Faced with an early rejection of the broad common law right of privacy, courts wishing to fashion a remedy for fictionalization have found themselves confined to a narrowly drawn statute. The letter of the statute

19. Most of the litigation over use of personal traits and history with little if any reference to a real name has been unsuccessful. See cases cited in note 12, supra. Kelly v. Loew's Inc., 76 F. Supp. 473 (D. Mass. 1948) is a notable exception. The problem for litigants has been the obvious reluctance of courts to accept a character as identifiable, even when strong evidence points in that direction. See, e.g., Middlebrooks v. Curtis Publ. Co., 413 F.2d 141 (4th Cir. 1969). As a result of this attitude, the courts downplay, if not ignore, the rule that in both privacy and defamation actions, use of name is not necessary if identification is reasonable. Compare Restatement (Second) of Torts § 652A; Comments a, b, d (1976) with id. § 564.

20. The first extensive exposition of a property approach to biography was in Gordon, supra note 15. See also Treece, supra note 5; Donenfeld, Property or Other Rights in the Names, Likenesses, or Personalities of Deceased Persons, 16 Copyright Bull. 17 (1968); Comment, Why Not a Relational Right of Privacy?: Or Right of Property?, 42 U. MO. KAN. CITY L. REV. 175 (1973).

COMM/ENT refers to commercial appropriation, and it is designed to protect certain pecuniary interests of the person being exploited. In this it resembles the right of publicity which developed much later as a pure property right in name and likeness.\textsuperscript{22} The spirit of the law, however, derives from a desire to protect personal feelings from unwarranted invasions, stemming from the common law right of privacy. In applying the statute to fictionalized biographies, which involve an invasion of both personal and economic interests, the courts have stretched the language of the statute to bring these works under the necessary labels, while limiting actions through the application of several common law concepts. The most important has been the idea that a personal interest, though it may also be economic, must give way in the face of a valid need for publication of the work. The result has been the development of a hybrid action, which recognizes the right to damages for personal harm suffered by the misappropriation, yet denies recovery when the public's interest in the dissemination of the work is deemed paramount.

The flexibility inherent in this approach is evident from its beginnings in the dissent from a 1902 New York Court of Appeals decision, \textit{Roberson v. Rochester Folding Box Co.}\textsuperscript{23} When the majority denied a remedy to a young woman whose picture was used without her consent to advertise flour, Justice Gray in his well-noted minority opinion proposed that the law establish a new doctrine that would both recognize a property interest in name and likeness and guard against such unwarranted intrusions into personal privacy.\textsuperscript{24} Disturbed by the majority holding,\textsuperscript{25} the state legislature promptly heeded the suggestion and enacted at the next session a statute which has remained unchanged to this day.\textsuperscript{26} Entitled “The Right of Privacy,” it provides for civil and criminal sanctions against one who without authorization uses a person’s name, portrait, or picture for

\textsuperscript{22} See notes 178-203 and accompanying text, infra.
\textsuperscript{23} 171 N.Y. 538, 64 N.E. 442 (1902).
\textsuperscript{24} The property aspect of the plaintiff’s interest was stressed: “I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant’s commercial purposes, as she would have, if they were publishing her literary compositions.” \textit{Id.} at 564, 64 N.E. at 450 (Gray, J., dissenting).
\textsuperscript{25} Prosser, \textit{supra} note 4, at 385.
\textsuperscript{26} 1903 N.Y. Laws ch. 132.
advertising or for purposes of trade.\textsuperscript{27} Courts were given the power to enforce the statute through injunctions and other appropriate measures.\textsuperscript{28} The statute was designed to be, and has remained, the only possible source for an "invasion of privacy" claim in the jurisdiction, but its character was markedly different from the common law right.\textsuperscript{29}

Ostensibly, the legislation provided protection only against the form of exploitation present in \textit{Roberson}, where an aspect of personality was appropriated to further the commercial advertising interests of the defendant.\textsuperscript{30} In this respect the New York statute is almost identical to the safeguards under the "misappropriation" wing of common law privacy, which awards damages for use in advertising based on injury to personal feelings. The New York courts, however, were not inclined to construe narrowly what was essentially a remedial measure, since many justices saw laws of this kind as potentially broad measures to correct omissions of earlier archaic interpretations.\textsuperscript{31} As one eminent observer commented, the statute should be treated as "a guest to be welcomed and made at home . . . as a new and powerful aid in . . . accommodating

\begin{itemize}
\item \textsuperscript{27} N.Y. Civ. Rights Law § 50 (McKinney 1976). The term "privacy" was used only for the criminal section of the law:

\begin{quote}
A person, firm, or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or of a minor of his or her parent or guardian, is guilty of a misdemeanor.
\end{quote}
\end{itemize}

\textit{Id.}

\begin{itemize}
\item \textsuperscript{28} The civil section of the law sets out the available remedies:

\begin{quote}
Action for injunction and for damages—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 the last section, the jury, in its discretion, may award exemplary damages.
\end{quote}
\end{itemize}

\textit{Id.} § 51 (McKinney 1976).

\begin{itemize}
\item \textsuperscript{29} The constitutionality of the statute was upheld early on in the limited context of photographs. See Rhoades v. Sperry & Hutchinson Co., 193 N.Y. 223, 85 N.E. 1097 (1908), aff'd, 220 U.S. 502 (1911). For a recent critique, see Greenwalt, \textit{New York's Right of Privacy—The Need for Change}, 42 Brooklyn L. Rev. 159 (1975).
\end{itemize}

\begin{itemize}
\item \textsuperscript{30} See Bohlen, \textit{Fifty Years of Torts}, 50 Harv. L. Rev. 725, 731 (1937).
\item \textsuperscript{31} See discussion in Sarat Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937).
\end{itemize}
the law to social needs." The judicial expansion of the New York statute beyond the confines of the letter of the law soon followed its enactment.

The issue of whether a certain appropriation was for "purposes of trade" produced some major innovations in the case law. Most critical was the early recognition that despite the degree of public interest they involved, certain forms of communication could indeed invade an interest in personality by commercializing a portion or the entirety of an individual's life story. Fictionalization was the method through which biography, otherwise protectible as a form of news dissemination, could be transformed into a trade product for purposes of the statute.

_Binns v. Vitaphone Co. of America_ is the seminal case propounding the theory that a certain degree of fictionalization may amount to an appropriation for commercial or, in the terms of the New York statute, "trade" use. The key was the court's perception that embellishment is clearly intended to enhance the value of the product for sale. John Binns, a wireless operator who had been involved in the first rescue at sea through the use of the telegraph, sued over a filmed reenactment of the heroic effort which employed actors and a

33. In order to prevent encroachment by the statute on press freedom, the courts made an early distinction between communications which were published primarily for profit and those motivated more by news purposes. Thus, the mere fact that a book or newspaper was sold for gain did not bring the item under the "trade purpose" rubric. See, e.g., _Jeffries v. New York EVENING JOURNAL PUBL. CO._, 67 Misc. 570, 124 N.Y.S. 780 (Sup. Ct. 1910); _Colyer v. Richard K. Fox Publ. Co._, 162 A.D. 297, 146 N.Y.S. 999 (1941); _Wallach v. Bacharach_, 192 Misc. 978, 80 N.Y.S.2d 37 (Sup. Ct. 1948). Although the goal of such cases was implicitly to protect access to matters of public interest, in accord with traditional privacy concepts, the statute made the test the extent of commercialization. For cases upholding appropriation in other jurisdictions on the basis of newsworthiness, see _Gordon_, supra note 15, at 572, 573. _See also Cordell v. Detective Publications, Inc._, 307 F. Supp. 1212 (E.D. Tenn. 1968); _Jenkins v. Dell Publ. Co._, 251 F.2d 447 (3d Cir. 1958).
34. The courts recognized that an actionable appropriation would have to make use of name and history. Thus, incidental mention of a name in a novel or a brief shot of a real person in a film would not be actionable. _See Damron v. Doubleday, Doran & Co._, 133 Misc. 302, 231 N.Y.S. 444 (Sup. Ct. 1928). The problem is akin to imposing liability in defamation for an arbitrarily chosen name. _See cases cited at note 19, supra_.
35. 147 A.D. 783, 132 N.Y.S. 237 (1911), aff'd, 210 N.Y. 51, 103 N.E. 1108 (1913).
36. The term "embellishment" throughout this note refers to a lesser yet still cognizable degree of fictionalization. In general, courts have used the term interchangeably with "fictionalization" to describe distortion of reality through use of the imagination. Thus, in this note "highly embellished" is synonymous with such terms as "major fictionalization."
purely fictional script. Binns, an Englishman, was particularly incensed by the film's ending, where his counterpart was shown gawking into the camera under the subheading, "Jack Binns and his Good American Smile."[37]

Binns argued, and the Appellate Division of the state Supreme Court agreed, that although the rescue was a matter of great public concern, the defendant could not rely on the defense of newsworthiness if he had in fact distorted the true story to enhance its potential marketability. The court noted that although the plaintiff could not prevent a reasonable factual account of the incident from being aired, he had every right to enjoin a fictionalized treatment clearly designed for selfish, commercial purposes.[38] "If the use of the plaintiff's name and picture as shown in this case is not within the terms of the statute," the court concluded, "then the picture of any individual can be similarly made and exhibited for the purpose of showing his peculiarities as of dress and walk, and his personal fads, eccentricities, amusements, and even his private life. By such pictures an audience would be amused and the makers of films and exhibitors would be greatly enriched. The greater the exaggeration . . . the greater the profit."[39] The test thus established hinged on the amount and degree of fictional distortion. A news event presented with minor inaccuracies could not have been actionable under the statute. However, major fictionalization would result in liability.[40] The court also indicated that liability would accrue even if the party was not named in the work but the presentation of the character was sufficiently accurate so as to identify him to the public.[41] This in effect established a second test—whether the plaintiff was reasonably identifiable.

37. 210 N.Y. at 53, 103 N.E. at 1109.
38. Id. at 57, 103 N.E. at 1110.
39. Id. at 58, 103 N.E. at 1111.
40. Although it refused to define the limits of non-actionable fictionalization, the court suggested strongly that any re-creation of a newsworthy event which employed a script and actors, as opposed to a documentary rendition, might fall under the statute: "In the case now before us, the series of pictures were not the pictures of a current event, but mainly a product of the imagination, based, however, largely upon such information relating to the actual occurrence as could be readily obtained." Id. at 56, 103 N.E. at 1110.
41. "A picture within the meaning of the statute is not necessarily a photograph of the living person, but includes any representation of such person." Id. at 57, 103 N.E. at 1110 (emphasis added). Later courts, noting the plaintiff's real name had been used, glossed over this passage in interpreting the statute to require a full name. See cases cited in note 50, infra.
Both these distinctions—between fact and fiction and between suggestion and identification—played an important role in the development of the Binns theory, necessitating constant reinterpretation. In effect, application of the tests made actionable fictionalization a matter of degree. Obviously, substantial fictionalization was required to transform the work in question to a trade product. But if the novel or screenplay was too fictionalized, to the extent that the plaintiff was not identifiable or bore no real relation to the character, it could not be considered a form of commercial exploitation. Instead it would be protected as itself, a work of “pure” fiction, divorced entirely from the concerns of any real person who might imagine himself as portrayed in the work. Early cases exemplified the uncertainty through inconsistent application of these concepts. For instance, courts denied recovery where the plaintiff’s name was used once in a 400 page novel and where from the total presentation it appeared a reenactment was accurate; nevertheless, a plaintiff could recover when his image was unnecessarily interjected into an entertainment film. At the same time, it should be noted, New York courts indicated a willingness to prevent similar exploitation in the area of defamation, holding several movie producers and novelists liable for derogatory portrayals of living persons in their works. Decisions in

42. Damron v. Doubleday, Doran & Co., 133 Misc. 302, 231 N.Y.S. 444 (Sup. Ct. 1928). In view of the fact that the plaintiff’s suit was predicated on privacy, not defamation, the court did not hesitate in finding the intrusion to be de minimis. Nevertheless, the court noted, “literary expediency may not be advanced as an excuse for violating the statute.” Id. at 303, 231 N.Y.S. at 446.

43. Humiston v. Universal Film Mfg. Co., 189 A.D. 467, 178 N.Y.S. 752 (1919). The case, involving a newsreel, clarified the difference between actionable and non-actionable film presentations: “There is a clear distinction between a newsreel and a motion picture photoplay. A photoplay is inherently a work of fiction. A newsreel contains no fiction, but shows only actual photographs of current events of public interest.” Id. at 470, 178 N.Y.S. at 755 (emphasis added). “In the Binns case . . . the presentation was not of pictures actually taken at the time of the occurrence of the events but the film was taken in a studio, with actors dressed for the occasion, in order to present a representation of what might have occurred. It was held to be pure fiction, and not fact, and as such was held to be within the act.” Id. at 475, 178 N.Y.S. at 758 (emphasis added). See also Merle v. Sociological Research Film Corp., 166 A.D. 376, 152 N.Y.S. 829 (1915).

44. Blumenthal v. Picture Classics, 261 N.Y. 504, 185 N.E. 713 (1933). The decision represents a strict attitude towards fictionalization by the New York courts of this era, since the film was substantially a documentary which employed actors for narration purposes. Compare lower court opinion in 235 A.D. 570, 257 N.Y.S. 800 (1932).

the initial period after Binns, then, remained relatively faithful to the idea that at some point an individual's interest in the accuracy of his portrayal becomes paramount. More often than not, the emphasis in these cases, consistent with the statute, was on the commercial nature of the invasion.

Interpretations of the statute began to change only when the courts recognized the serious potential impact on free speech values. Thus courts perceived a need to undertake a more adequate balancing of public and private interests. The focus turned away from the theory of commercial exploitation to that of realistic expectations of seclusion. Exemplificative is the opinion in Sarat Lahiri v. Daily Mirror, a case involving an unauthorized appropriation of a photograph to illustrate an unrelated piece of fiction. Justice Shientag noted that in drawing the line defining "trade purposes," it was critically important to maintain public access to information and news. He demanded that, in view of the overall function of a press in a free democracy, a clear legislative policy be established before the right of privacy was extended to cover news items and articles of general public interest, whether they were educational or merely informative.

In the succeeding years, the result of this concern was a gradual obfuscation of the basic rule of Binns and an introduction of a series of tests whose eventual effect was to reduce significantly the potential liability of purveyors of the type of products Binns was designed to control. Although creative expression was thus given more leeway, it was at the expense of affording the aggrieved individual a remedy. In a number of
clef about the New York court system, the noted maxim was voiced that "reputations may not be traduced with impunity whether under the literary forms of a work of fiction, or in jest." Corrigan v. Bobbs-Merrill Co., 228 N.Y. at 65, 126 N.E. at 262. In Broum the court found that a crime film purposely induced the belief that the characters and the plaintiff's family were one and the same. The requirement of reasonable identification is, of course, paramount in these cases. See Silver, supra note 9, 126 U. PA. L. Rev. at 1076, 1084.

46. 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937).
47. Id. at 782, 295 N.Y.S. at 388.
48. From time to time courts and commentators have relied on various Supreme Court decisions for the proposition that literary and artistic expression enjoy an exalted status under the First Amendment. See Towne v. Eisner, 245 U.S. 418, 425 (1917), where Justice Holmes argued for the necessity of viewing speech in its setting: "A word is . . . the skin of living thought and may vary greatly in color and context according to the time and circumstances in which it is used."

The constitutional protection of free expression vanishes on a showing that the expression falls into an unprotected category, e.g., libel, profanity, obscenity. The ques-
notable decisions concerning alleged misappropriation of personality through novels, courts interpreted the New York statute as requiring full use of a name, contrary to the *Binns* doctrine, effectively barring suits where similarity in names and descriptive details made identification an easy task.\(^49\) In this period, the *Binns* requirement of reasonable identification was transformed into an effective defense. Instead of fictionalization providing a basis for a cause of action, it became a basis for a defense.\(^50\)

\(^49\) See note 41, supra.

\(^50\) In this respect, it is important to reiterate the differences between the identification criteria for libel and privacy actions. An invasion of privacy, involving an unwarranted exposure to the public, generally requires that a larger group make the identification. Libel law requires only a limited communication and a much less widespread identification if reputational injury is actually suffered. *Compare Restatement (Second) of Torts* § 652, Comment a with id. § 564, Comments b, d (1976). Actions brought in New York under the libel rubric have therefore had somewhat more success. See, e.g., Brown v. Paramount Publix Corp., 240 A.D. 520, 270 N.Y.S. 544 (1934); Callahan v. Israels, 140 Misc. 295, 250 N.Y.S. 470 (Sup. Ct. 1931); Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966). In *Callahan* the court, despite a strong dissimilarity in names between the plaintiff Callahan and the fictional Ralph Halloran, found a good cause of action in the total presentation: "The background was made up of many allusions, not in and of themselves libelous, to incidents, circumstances, and facts in the life and associates of plaintiff and his wife. In the foreground was set forth the libelous statements... The combination... was the evil accomplished." *Callahan* v. Israels, 140 Misc. at 297, 250 N.Y.S. at 471. The *Fetler* court pointed out the narrower context of libel: "It is not necessary that all the world understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant." *Fetler* v. Houghton Mifflin Co., 364 F.2d at 651 (emphasis added).

*See* Wright v. R.K.O. Radio Pictures, 55 F. Supp. 639, 640 (D. Mass. 1944) ("The real question in this case is whether or not a considerable and respectable class in the communities where the defendant's picture was shown would identify the character as these two plaintiffs."). *See also* Middlebrooks v. Curtis Publ. Co., 413 F.2d 141, 142 (4th Cir. 1969).

Privacy actions for fictionalization outside of New York have generally sided with the more restrictive cases on the issue of identification. *See* e.g., Bernstein v. NBC, 129 F. Supp. 817 (D.D.C. 1955) (docu-drama based substantially on plaintiff's past involvement in a crime. No identification found despite wide publicity, and similarity of details); Wheeler v. Dell Publ. Co., 300 F.2d 372 (7th Cir. 1962) (most characters—except the plaintiff—found identifiable in the film *Anatomy of a Murder*).

This approach is typified by the decision in *Maggio v. Charles Scribner's Sons*, a statutory invasion of privacy suit brought by Joseph Anthony Maggio, for his alleged portrayal as soldier Angelo Maggio in James Jones’s World War II novel, *From Here to Eternity*. Despite the strong similarity in names, the court reasoned that most readers would not look to identify the characters, and even in that event, they would understand that the author was drawing from his general experiences. "The end result may be so fictional as to seem wholly imaginary, but the acorn of fact is usually the progenitor of the oak, which when full grown no longer has any resemblance to the acorn," the court said. "Since a novel is *not biography*, the details of the character's life and deeds usually have, beyond possible faint outlines, no resemblance to the life and deeds of the actual person known to the author."  

The *Maggio* rationale has some logic, in that there is a vast difference between a work that purports to be the truth and one that announces itself as fiction, a distinction the court made between "biography" and "novels." In terms of the statute, the latter should not be considered commercial exploitation of another since the character sprang solely from the mind of the author. On another level, however, the argument is simply too facile. It divides all literary creations into two categories without recognizing that most works, particularly those which capitalize on true stories, fall in between. Although many readers may not have equated the character Maggio with Jones’s actual wartime acquaintance, it was generally known that the author drew very closely from his own contacts. Moreover, where characters are based on famous individuals, not only may the connection between fact and fiction be reasonably made, but the work may in fact derive power from the strength of its suggestiveness. Thus modern artifacts of pop
culture such as *The Greek Tycoon* and *Washington Behind Closed Doors* sell less on their own literary merits than on their purported insights into the lives of Jacqueline Onassis and President Nixon’s inner circle. In this light, it is far from reasonable to conclude, as did the *Maggio* court, that misappropriation through fictionalization occurred any less so than in *Binns*.57

The inherent fallacy in dismissing such work as a necessary result of the creative process becomes clear when reviewing instances where New York courts, infected by the zeal to protect all forms of fictionalization, have applied the *Maggio* rationale to situations where a real name was intentionally appropriated for supposed artistic effect. This rationale is consistent with reinterpreting the statute along lines that would better benefit the general public, but it totally ignores the commercial exploitation at hand. *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.* is the classic case. There the defendant producers concocted a surrealistic farce

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56. When *Time* reviewed the latter work, based loosely on the Watergate affair, it made a direct equation between the characters and their real-life counterparts. For example, a photograph of actor Jason Robards was counterposed to Richard Nixon’s; Robert Vaughn was compared to H.R. Haldeman; and Cliff Robertson to Richard Helms. *Time*, Sept. 19, 1977, at 93.

57. “[T]ruth is not their object; their principal concern here seems to be commerce. And the maxim embodied is not Picasso’s (‘Art is lies that tell the truth’), but a much older and sleazier one: ‘Fraud is lies purveyed as truth.’” Lukas, *Bullets for Breslin*, *More*, June 1978, at 34.

58. Professor Silver in his most recent article offers what is, in this view, a weak justification for such exploitation when he states, “If both popular and serious culture sanction an inquisitiveness about public figures’ private lives, then the scope of artistic license must be delineated more broadly than it has been. Community standards have always been relevant to a determination of precisely what is libelous. . . .” Silver, *supra* note 9, 126 U. Pa. L. Rev. at 1082. Public interest, of course, has never justified unwarranted intrusions or invasion of personal interests. Compare Warren and Brandeis, *supra* note 3, at 196:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual. (Emphasis added.)

about college football,\textsuperscript{60} freely using without consent the names of Notre Dame University and Father Hesburgh, its president, as well as Notre Dame emblems. Although the court did not cite \textit{Maggio}, it employed the same theory, discounting the blatant appropriation and asking instead whether a viewer could reasonably equate the incidents in the film with life at the Indiana campus. From this point of view the conclusion was inevitable that "\textit{[n]obody is deceived. Nobody is confused.}\textsuperscript{61} The Court of Appeals affirmed without comment. But Justice Burke, dissenting from the lower court, appropriately noted that the majority had erroneously interjected principles of unfair competition into a strict misappropriation case.\textsuperscript{62} Under the privacy statute, the proper issue, Burke said, was not whether the producers had deliberately implied that the University had sponsored the project—a "passing off" situation—but whether a valuable right in name had been taken without consent and remuneration. Noting the argument that enforcing the New York statute in this case might chill lampoonery, satire, and other forms of entertainment, Burke nevertheless maintained what had remained undisputed since \textit{Binns}—that private interests would prevail where commercial aspects of a work dominate its purported public worth as a disseminator of news or commentary.\textsuperscript{63} The crux was the recognition that exploitation of valuable names and symbols would not be justified as literary criticism. As Burke stated, "the facts of this case . . . do not serve as examples of opinion, information, education or comment about a real institution. Rather, what is before the court is simply a fictional story with the \textit{real} name of an institution affixed to it and the symbols

\begin{itemize}
\item \textsuperscript{60} Briefly, the plot of the movie in question, \textit{John Goldfarb, Please Come Home}, involved the plans of a mythical Arabian king to seek revenge on Notre Dame because his son was denied a place on the football team. He forms his own squad whose star is Goldfarb and blackmails the State Department into urging the college to send its players to his country. There, after being weakened by an all night feast, Notre Dame loses an incredible game that ends with an oil gusher erupting on the field. 22 A.D.2d at 453-54, 256 N.Y.S.2d at 303-04.
\item \textsuperscript{61} \textit{Id.} at 455, 256 N.Y.S.2d at 305. \textit{See also} Middlebrooks v. Curtis Publ. Co., 413 F.2d 141 (4th Cir. 1969).
\item \textsuperscript{62} Since Notre Dame’s suit was partially based on N.Y. GEN. BUS. LAw § 397 (McKinney 1976), which extended the protection of the privacy statute to certain business organizations, the suit in the majority view was in the nature of an infringement on trademark. For a case similar to \textit{Notre Dame} in the trademark area, see Girl Scouts of America v. Personality Posters Mfg. Co., 304 F. Supp. 1228 (S.D.N.Y. 1969).
\item \textsuperscript{63} University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 15 N.Y.2d at 932, 207 N.E.2d at 516, 259 N.Y.S.2d at 842 (Burke, J., dissenting).
\end{itemize}
used in it for the sake of capitalizing on the publicity value and reputation which the real institution has given those names and symbols.\textsuperscript{64}

The Notre Dame decision, despite its novel interpretation of the New York statute, did not, however, herald a new, permissive attitude towards dramatic license. Instead, for a time, courts continued to be divided over the extent of fictionalization necessary for a valid action. The subtest of reasonable identification, as enunciated in Maggio, retained continuing importance.\textsuperscript{65} The contextual approach of Notre Dame, whereby the purpose as well as the fact of the actual appropriation had to be examined and balanced against private interests, also remained relevant.\textsuperscript{66} More often, where real names and personal histories were used in an embellished account, the courts divided over the central issue, whether the work on the whole was factual and protectible as a matter of public interest or so distorted as to give rise, under the Binns doctrine, to a statutory action.

In Molony v. Boy Comics Publisher's, Inc.,\textsuperscript{67} a young man whose heroic role in an air disaster was transformed into a comic book scenario found his suit dismissed because the court found basic accuracy behind the colored panels.\textsuperscript{68} The writer in Koussevitzsky v. Allen, Towne & Heath, Inc. likewise escaped liability, the court finding that minor inaccuracies did not transform the unauthorized biography of a famous conductor into a work of fiction.\textsuperscript{69} On the other hand, despite strong public interest, the courts refused in a number of cases to dismiss actions against romance magazines that indulged in fantasizing or excessive exaggeration when recounting obvi-

\textsuperscript{64} Id. at 953-54, 207 N.E.2d at 517-18, 259 N.Y.S.2d at 842-43 (Burke, J., dissenting).

\textsuperscript{65} Recent cases include Wojtowicz v. Delacorte Press, 58 A.D.2d 45, 395 N.Y.S.2d 205 (App. Div. 1977) (though the plaintiff's "character" was in the movie for 5 minutes and the film announced the events had actually occurred, no liability was found); Waters v. Moore, 70 Misc. 2d 372, 334 N.Y.S.2d 428 (Sup. Ct. 1972). See also cases discussed in note 50, supra.


\textsuperscript{67} 277 A.D. 166, 98 N.Y.S.2d 119 (1950).

\textsuperscript{68} It should be noted that the court still applied the fiction-as-trade doctrine, but merely found the form not fictional: "It does not follow that the plaintiff's exploit has been fictionalized merely for the reason that it has been told through a form of picture-writing, which is as old as the human race." Id. at 171, 98 N.Y.S.2d at 123. Compare Humiston v. Universal Film Mfg. Co., 189 A.D. 467, 178 N.Y.S. 752 (1919).

\textsuperscript{69} 188 Misc. 479, 68 N.Y.S.2d 779, aff'd, 69 N.Y.S.2d 432 (1947).
ously newsworthy stories.\textsuperscript{70} Similarly, in \textit{Youssoupooff v. Columbia Broadcasting Systems, Inc.},\textsuperscript{71} a television company was found potentially liable when it made a historical drama based on the assassination of the monk Rasputin that seriously misrepresented the role of the plaintiff, who happened to be living at the time of the broadcast.

This line of cases lends itself to no singular interpretation or rule of law with respect to works of "pure fiction," where no real names are used, or to accounts that remain predominantly faithful to the facts. During the past decade, however, two cases seem to have resolved the validity of the \textit{Binns} approach, as originally applied, in situations where a personal story was deliberately distorted for apparent commercial purposes. The cases, \textit{Spahn v. Julian Messner, Inc.},\textsuperscript{72} and the United States Supreme Court decision in \textit{Time, Inc. v. Hill},\textsuperscript{73} indicate that where blatant exploitation is present, the courts will look more to the commercial interests protected by the statute and less to balancing privacy values against the need for public information. These decisions gave the courts a chance to settle the constitutional questions raised by cases such as \textit{Maggio} and \textit{Notre Dame}, at least in the context of fictionalized stories.\textsuperscript{74}


Cases in other jurisdictions involving detective magazines have reached opposite conclusions. In each decision, contrary to the cases noted above, a critical finding was the basic accuracy of the presentation. The cases are thus distinguishable. \textit{See, \textit{e.g.}}, Cordell v. Detective Publications, Inc., 307 F. Supp. 1212 (S.D. Tenn. 1968); Jenkins v. Dell Publ. Co., 251 F.2d 447 (3d Cir. 1958); Mahaffey v. Official Detective Stories, Inc., 210 F. Supp. 251 (W.D. La. 1962). See text accompanying note 150, \textit{infra}.

\textsuperscript{71} 48 Misc. 2d 700, 265 N.Y.S.2d 754 (Sup. Ct. 1965).


\textsuperscript{73} 385 U.S. 374 (1967).

\textsuperscript{74} The argument favoring a wider application of \textit{Time, Inc. v. Hill} to false light privacy actions based on matters of public interest has been questioned in light of \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323 (1974). \textit{See generally} Pember & Teeter, \textit{Privacy and the Press Since Time, Inc. v. Hill}, 50 WASH. L. REV. 57 (1974); Comment, \textit{Tri-
Spahn, while important in itself, also provides a wider framework for analyzing the limits of the statutory approach, since the Supreme Court relied on it for its construction of New York law. As in Binns, the focus was on the deliberate commercialization of another's story, this time in the form of a substantially fictionalized children's "biography" of a famous baseball pitcher. Since a publisher could not be prevented from disseminating an essentially factual communication, the Appellate Division of the New York Supreme Court found it only relevant to consider whether the public interest in the personality created a special privilege. Reviewing the defendant's contentions, the court recognized that as a public figure, Spahn was not protected against invasion of privacy through accurate items of news, literature, and even commentaries, despite the profit-making nature of such enterprises. But the court declined to adopt the proposition that dramatic license was so critical to children's biographies as a genre that an independent right existed to distort an individual's private life and public career without compensation. At stake were personal as well as economic interests: "[Not] only a matter of price is involved. It is true, as it ought to be, that a public figure is subject to being exposed in a factual biography, even one which contains inadvertent or superficial inaccuracies. But surely, he should not be exposed, without his control, to biographies not limited substantially to the truth." In short, by distinguishing blatant misappropriation which invades economic and personal interests from essentially factual presentations, the court found that the New York statute struck an adequate balance between free speech and the right of an individual to the integrity of his identity.  


76. "[I]t is conceded that use was made of imaginary incidents, manufactured dialogue and a manipulated chronology. . . . This liberty, for example, was exercised with respect to plaintiff's childhood, his relationship with his father, the courtship of his wife, important events during his marriage, and his military experience." Spahn v. Julian Messner, Inc., 23 A.D.2d 216, 218, 260 N.Y.S.2d 451, 454 (1965).
79. Id. at 219, 260 N.Y.S.2d at 453.
80. The appellate division decision was far more substantive than the brief affirmance by Judge Keating in the Court of Appeals the next year. That decision, cited by
In *Time, Inc. v. Hill*, the United States Supreme Court had a clear opportunity to overrule the *Spahn* rationale in a constitutional setting. Instead it focused on the extent of proof required to satisfy the test which determined a writer's liability—substantial fictionalization. The *Hill* case, an appeal from a decision relied on in *Spahn*, involved a *Life* magazine article that depicted an upcoming Broadway melodrama as a substantial re-creation of the ordeal suffered by the plaintiff and his family when, three years prior to the publication, they had been held hostage in their country home by a band of escaped convicts. Despite the newsworthiness of the topic, the Appellate Division of the New York Supreme Court found the magazine liable under the statute. The article's patently false description of the play as a re-enactment led, the court reasoned, to the "inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase the present and future magazine circulation as well." The underlying rule again was that deliberate falsity motivated by commercial interest is not protectible speech.

Against the background of *New York Times Co. v. Sullivan*, where the standard of constitutional malice was established to govern libel suits by public officials, the Supreme Court held that the same quantum of proof—knowing or reckless falsity—was essential to cases arising under the New York statute. In so doing, the Court expanded constitutional safeguards into the entire area of privacy, imposing them where stories concerned any matter of public interest, not just actions of public officials. The Court expressly refused, however, to rule the

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81. 385 U.S. 374 (1967).
82. "Material and substantial falsification is the test. However, it is not clear whether proof of knowledge of the falsity or that the article was prepared with reckless disregard for truth is also required." 385 U.S. at 386-87.
84. Id. at 487, 240 N.Y.S.2d at 290.
86. 385 U.S. at 394.
87. In the area of defamation it is now settled that private citizens need only meet...
New York statute or the prevailing interpretation unconstitutional, reiterating the long settled principle that calculated falsehood falls outside of First Amendment protections and is subject to sanctions. Resting on this narrow ground, the decision essentially ratified the Binns approach to fictionalization problems. Although publishers of essentially journalistic reports such as the Life article can rightfully claim mere negligence in making errors and thus escape liability under the "actual malice" standard, substantial fictionalization as occurred in Spahn will always qualify as calculated falsehood, albeit for purported artistic effect. That this indeed was the law in New York became clear the following year when the Court of Appeals, reconsidering Spahn in light of Hill, found that the author's "all pervasive distortions, inaccuracies, invented dialogue, and the narration of happenings out of context" fully satisfied the constitutional requirement of knowing or reckless disregard of the truth. In summary, the Court stated that, "to hold that this research effort entitles the defendant to publish the kind of knowing fictionalization presented here would amount to granting a literary license which is not only unnecessary to the protection of free speech but destructive of the individual's right... to be free of commercial exploitation of name and personality."


89. "The New York Court of Appeals, as the Spahn opinion demonstrates, has been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press... Any possible difference with us as to the thrust of the constitutional command is narrowly limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article." 385 U.S. at 397 (emphasis added).
91. Id. at 129, 286 N.Y.S.2d at 836.
92. For a pre-Hill interpretation, see Silver, Privacy and the First Amendment, 34 FORDHAM L. REV. 553 (1966). Silver argued, somewhat anomalously, that despite its glaring inaccuracies, the Spahn biography had protectible value as entertainment or as a piece of historical romanticism that might aid the moral education of youth. Id. at 566. In his view, these hypothetical benefits outweighed private interests in accuracy and freedom from exploitation. Conceding the difficulties of determining how much fictionalization would then be permissible, he offered a test akin to the holding in Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937), whereby liabil-
interpretations that have developed in response to these holdings deserve some consideration here.

One aspect of the controversy has focused on the application of the knowing and reckless disregard standard to an intentionally fictionalized work. Justice Bergen described the crux of the problem in his dissent in the final Spahn decision when he noted, "all fiction is false in the literal sense that it is imagined rather than actual. It is, of course, 'calculated' because the author knows he is writing fiction and not fact; and it is more than a 'reckless' disregard for the truth . . . ." Professor Silver and others have relied on this point to urge that a new standard, if not some form of immunity, be applied in suits against a creative writer. However, while there may be some merit in that theory with respect to novels or romans à clef, which rely on suggestion rather than explicit identification, a rule of immunity, even if somewhat qualified, becomes unworkable when applied to cases like Spahn where the equation
between a created character and the real individual is intentional and complete. The New York statute as now interpreted requires only a differentiation between substantial fictionalization and minor inaccuracy. A rule protecting "creative" biographies would necessitate a further distinction between lazy or malicious journalism and artful writing, and that is a hazy distinction at best. The result would most likely be a more arbitrary and subjective judgment of creative works than critics claim now exists under the New York system. What standards would guide a court in deciding whether a degree of falsity was injected for aesthetic effect or merely to "fill the gaps," as in Spahn? When Joe Esterhasz, one of the foremost practitioners of the new journalism, painted a grossly distorted picture of an easily recognizable family living in the aftermath of a bridge disaster, the Supreme Court declined to be drawn into such a murky decision-making process. Instead, in Cantrell v. Forest City Publishing Co., it found that regardless of his personal designs, the writer was clearly reckless. In this light, the better remedy appears to be the statutory proposal—the price of taking excessive liberties with the facts is consent or remuneration.

Another objection centers on damages. Professor Treece has suggested that non-defamatory falsehood, as was present in Spahn, should not give rise to liability since it inflicts no

96. "The factual reporting of newsworthy persons and events is in the public interest and is protected. The fictitious is not. This is the heart of the [New York] cases . . . ." Spahn v. Julian Messner, Inc., 18 N.Y.2d at 328, 274 N.Y.S.2d at 879.


99. The Apellate Division in the Spahn case spelled out the equity of the solution: "It may well be, as defendants urged, . . . that juvenile biography requires the fillip of dramatization, imagined dialogue, manipulated chronologies, and fictionalization of events. If so, the publication of juvenile biographies of living persons . . . may only be effected with the written consent of such persons. And if it also be true . . . that such persons use the consent as a lever for obtaining a price for it, then it is no more than charging a price for taking liberties, otherwise unwarranted, with one's personal history." Spahn v. Julian Messner, Inc., 23 A.D. 2d at 221, 260 N.Y.S.2d at 455.

100. The trial court decision indicates that although the distortions did not necessarily injure the plaintiff's reputation, they still subjected him to ridicule. Spahn v. Julian Messner, Inc., 43 Misc. 2d at 250, N.Y.S.2d at 531.
harm. The only possible interest such an action could protect, he argues, is accuracy, but neither is the penalty commensurate with the harm nor do damages compensate the injury. This argument is more conclusory than substantive, however. It ignores the fact that distortion, whether libelous or not, can cause severe mental distress or embarrassment, although this is not always evident in the cases Treece selects for his theory. Moreover, the interest in accuracy itself is an important goal which the law of defamation already protects somewhat by imposing sanctions for reputational harm. Although legitimate concerns have been expressed that false light privacy, which may impose liability for distorted yet potentially truthful depictions, could "swallow up" the entire law of defamation, such a broad sweep is not suggested here. Under the New York statute, liability is based on gross distortion through fictionalization. Such a doctrine can in no way be considered overbroad.


103. The cases, Annerino v. Dell Publ. Co., 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958), and Varnish v. Best Medium Publ. Co., 405 F.2d 608 (2d Cir. 1968), cert. denied, 394 U.S. 987 (1969), are distinguishable from the cases in note 102, supra, in that the fictionalization bore little or no causal relation to the harm caused by the publication. In Annerino the fictionalization involved related to another participant in the crime narrated, not to the plaintiff whose picture was used to illustrate the article. In Varnish the fictionalization consisted of an omission which, if published, would have harmed the plaintiff equally. In most cases in this area, truthful publication would have avoided the harm alleged. In some instances, of course, the distortion may be so innocuous as to cause no harm to the feelings. This does not settle the issue of awarding damages for commercial interests in exploiting biography, however. See Cason v. Baskin, 159 Fla. 31, 30 So.2d 635 (1947) (nominal damages awarded only, as no substantial injury was found).

104. While acknowledging much fictionalization is intentional, Treece nevertheless proposes that a mere requirement of correction is an adequate remedy. Treece, supra note 104, at 659. Query: is this a realistic deterrent?

105. See Prosser, supra note 4, at 401; see also note 17, supra.
Other criticisms have less basis under existing law. The fair comment privilege, which grants conditional immunity to commentary about public affairs,106 has generally only applied to official conduct and in no case has been construed to protect intentional falsehoods.107 Moreover, where the defense has been raised in cases involving exploitation of personality through fictionalization108 or misappropriation for commercial trade use,109 it has been firmly rejected. Because fair comment applies to matters of public interest, courts have found it particularly inapplicable to works that deal not with the facts but with largely fictional circumstances. As has been noted by the New York courts, the right to comment on aspects of a public figure's life does not encompass the right to exploit his personality through fictional distortion.110

Similarly, it is difficult to construe substantial fictionalization as protected opinion, as some observers have suggested.111 Al-

106. The common law rule generally protects comments made in good faith. Therefore the qualified privilege is lost on showing of ill will, spite, or knowing falsity. See generally, Restatement (Second) of Torts §§ 606-610 (1976); W. Prosser, Torts, 791-92 (1964). Since the retreat by the Supreme Court from its expansion of the constitutional privilege, this lesser standard is likely to apply where non-public figures are involved. It has been demonstrated that fictionalization tends to meet the more rigid standard of knowing or reckless falsity. See notes 80-91 and accompanying text, supra.

107. Comments are not protectible if they are based on facts known by the defendant to be false. Kapiloff v. Dunn, 270 Md. App. 514, 343 A.2d 251 (Ct. App. 1975), cert. denied, 426 U.S. 907 (1976); Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) (results of poll edited to produce finding of instability in a presidential candidate). See also Maidman v. Jewish Publications, 54 Cal. 2d 643, 7 Cal. Rptr. 617 (1960), where, under a common law standard, highly vituperative criticism motivated by ill will was found actionable.


109. See, e.g., Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279, 284-285 (S.D.N.Y. 1977) (defense of newsworthiness applicable to sale of Elvis Presley memorabilia in derogation of plaintiff's exclusive right to produce them). In both Factors and Marx, defendants relied unsuccessfully on Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968), where a manufacturer marketed a humorous poster of plaintiff, a comedian who ran an offbeat campaign for President. The court found the use sufficiently newsworthy to deny relief. In Marx, the Court found the Paulsen rationale did not apply to fictional distortion, while in Factors, no similar newsworthiness was present. Moreover, the Factors court noted, Paulsen has been limited to its facts. See also Rosemont Enterprises, Inc. v. Urban Systems, Inc., 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct.), modified, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1st Dept. 1973) (impermissible infringement on right to exploit name and personality of Howard Hughes).

110. See text accompanying notes 88-91 supra.

111. Brief for Appellant, Bindrim v. Mitchell, Civ. No. 52133 (Cal. Ct. App., 2d Dist.). The appellant claimed that statements about conduct of plaintiff, contained in the ro-
though certain defamatory words in a public debate may be protected when used in an appropriate context, this privilege does not apply where the speaker implies the truth of his assertion. In most cases, it is the implication of truth that makes fictionalized biographies attractive to readers or moviegoers. Where, on the other hand, the author disclaims any connection between his characters and real individuals, similarities between the two make his motive as well as his craft suspect as conscious exploitation. If he means to create fiction, there should be no absolute right to appropriate another's personality or life history to comment on matters which are purportedly unrelated to the living character. Logically, the writer should have to pay for the benefit if he takes so much of the personality necessary for audience recognition in order to boost the financial viability of the product.

The New York statute was designed to inhibit serious intrusions into the integrity of one's identity and not to inhibit fair exchange on matters of public importance. A writer is left with the option of either paying closer attention to the facts or conceiving a more artfully designed fictional world. Far from eradicating free speech, the securing of rights in the control of biographical presentation, through introduction of a test which hinges on the degree of fictionalization, results in a delicate balance between the private interest in freedom from exploitation and the public's right to information and entertainment. The recent cases of Ali v. Playgirl, Inc., and Polakoff v. Harcourt Brace Jovanovich have affirmed the validity of the doc-

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112. The context that cloaks vituperative, even defamatory, statements in privilege is generally a heated debate on important public issues. See, e.g., Greenbelt Cooperative Publ. Ass'n v. Bresler, 398 U.S. 6 (1969) (term "blackmail" clearly used in a hyperbolic sense at an open hearing); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) ("fascist" protectible as an expressive idea); Buckley v. Vidal, 327 F. Supp. 1051 (S.D.N.Y. 1971) (description of a book as pornography is protectible when made by a literary critic).

113. "The legal effect of attacks on motives must be carefully distinguished from accusations that an individual has committed a crime or is personally dishonest. No First Amendment protection, of course, enfolds the latter charges." Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 604, 131 Cal. Rptr. 641, 646 (1976). See also Greenbelt Cooperative Publ. Ass'n v. Bresler, 398 U.S. at 13, 14, where the Supreme Court noted that outside of the debate arena the offending term could well be actionable.

114. The extent to which one's personal history can be considered a property right is another matter entirely and will be considered in the third section of this note.


116. 67 A.D. 571, 46 N.Y.2d 606 (1979). Although a new trial was granted on the issue of damages, see note 103 supra, an invasion of privacy claim was sustained where an
trine, the former involving a preliminary injunction against a derogatory illustration of the famous boxer, and the latter entailing a statutory violation where a novelist depicted a living attorney as connected with the underworld. While it may be fruitful analytically, it is not necessary, as some have suggested,\textsuperscript{117} to predicate recovery under the New York statute on purely economic or personal grounds in order to establish a more uniform statutory interpretation. The law at present protects the individual from two harms threatened by substantially false histories—bruised feelings, which are compensated through the award of damages, and threats to economic interest that result from misappropriation of personality in a commercial context. The broad scope of the doctrine secures the remedy, but this is not to say that either a privacy or property theory alone is insufficient for recovery. Other courts have focused separately on the personal and economic interests involved. The difficulty has been expanding these theories to meet the exigencies of the problem.

The California Cases: A Privacy Perspective

Since the protection of private feelings has been one of the two main grounds for judicial interpretation of the New York statute, the other one being economic, any narrowing of the scope of these personal rights necessarily affects how a court will view the issue of exploitation of personality through fictionalized biographies. California's treatment of the right of privacy exemplifies the resistance New York's broad approach has met in other jurisdictions.\textsuperscript{118}

It is helpful first to note some of the reasons underlying the difference in perspectives. California courts were never faced with the kind of explicit commercial exploitation which the attorney who had once represented a famous mobster was pictured in the novel, \textit{The Algonquin Project}, as part of an attempt to assassinate General George Patton.\textsuperscript{117} See generally Gordon, \textit{supra} note 15.

New York courts encountered in *Roberson*. When they did focus on the privacy question, California courts instead showed much more concern with the prevalent doctrine put forth by Warren and Brandeis, the "right to be let alone."119 Here the interests involved were not as clear as those of a misappropriation case, where there is an obvious attempt to profit from another person. Rather, concerns were focused on cases that required a balancing of priorities, situations where private facts were disclosed, persons were placed in "false light," or someone intruded into an area of seclusion. It thus became proper to consider not whether a certain taking of name and likeness constituted an actionable misuse, but whether the value of the information presented outweighed an interest in seclusion. In this context the application of a privilege to publish, and not the abuse of it, became the center of judicial inquiry. The preference for speech over individual rights would, it should be noted, invariably affect later inspections of property rights in personality.120

The shift in emphasis from the degree of exploitation to the quantum of public interest is evident in *Melvin v. Reid*,121 the first case to give privacy a halting introduction to California common law. It concerned "The Red Kimono," a film based on the life of Gabriella Darley, who had abandoned her life as a prostitute eight years before the production and had been rehabilitated into society. The producers, not content to use the outline of her life as the basis for a screenplay, took whole incidents from the public records and identified Darley as the central character, both in the film and advertisements.122

In the context of privacy law as it then stood, the court was faced with a dilemma. Two of the primary tenets of the doctrine were that privacy rights could be waived by intentionally submitting oneself to the public spotlight and that the individual's rights could be outweighed by legitimate public interest.123 Darley's story fit both these categories neatly. Obviously respecting the principles of the law, the court nevertheless recognized an outrageous invasion and felt bound to

120. These categories were developed, of course, much later, but are applicable to the interests Warren and Brandeis intended to protect. *See generally* Prosser, *supra* note 4.
122. *Id.* at 292, 297 P. at 93.
123. *Id.* at 290, 297 P. at 93. *See generally* discussion of cases in note 17, *supra*. 
provide a remedy. Since it was not tied to the strict letter of privacy, California not yet having recognized it, the court improvised a solution. Looking to the state constitution's guarantee of the right to pursue happiness, the court found that the plaintiff's interest in her restored reputation and the state's interest in the rehabilitation of criminals far outweighed the public's right to know the true identity of the character in the film. The transgression, then, had been committed not in exploiting her personality but in invading her private life by coupling a depiction with her real name. A balancing approach thus came into being that far exceeded the scope of the protections offered by conventional privacy rules. Even a public figure could be guarded from "ruthless and needless" invasion if the facts disclosed had been forgotten and important societal goals were at stake.

In its condemnation of the producer's commercial motive, Melvin resembles Binns. For instance, the court specifically decried the "expectation of private gain" as the sole excuse for the film. Yet in Melvin, unlike the New York case, liability did not hinge on the extent of commercialization or distortion. Instead it was the disclosure of private facts that was critical. Moreover, the court specifically rejected the theory that property interests were invaded in the production of a fictionalized biography. Although Binns and its progeny did not expressly recognize property interests, New York courts on the whole were more explicit in acknowledging the economic side

124. "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." CAL. CONST. Art. I, § 1.

125. 112 Cal. App. at 291, 297 P. at 93.

126. Most jurisdictions have eschewed consideration of the social value inherent in the work, concentrating on newsworthiness instead. Thus, when the NEW YORKER magazine exposed an obscure clerk as a former child prodigy, the Second Circuit held that despite the lapse of time, the article remained a proper subject of public interest: "[W]hen such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day." Sidis v. F-R Publ. Corp., 113 F.2d 806, 809 (2d Cir. 1940). See generally Pember & Teeter, supra note 74, at 78-82. See also note 17, supra.

127. 112 Cal. App. at 292, 297 P. at 93.

128. The Court stated, "[T]he other causes of action of the complaint are based upon a supposed property right in her name and in the incidents of her life. We have found no authorities sustaining such a property right in the story of one's life. Appellants cause of action must rest on tort and tort alone." Id.
of misappropriation. 129

Following Melvin, California courts continued to look to a variety of factors, including the extent of the injury, the degree of public interest, the purpose served, and the medium of expression employed. 130 The emphasis, however, remained on the public right as the constitutional rationale disappeared and the courts moved to adopt the privacy doctrine. 131 Although a federal court interpreting state law in Mau v. Rio Grande 132 recognized a cause of action for damages stemming from a dramatization of a crime in which the plaintiff had been a victim a year prior to broadcast, the grounds for recovery were not on any theory of misappropriation of personality. As in Melvin, the court protected an interest in seclusion. 133

Stryker v. Republic Pictures Corp. 134 was the first California case to deal substantially with the issue of fictionalization of personal history, something only touched on in Melvin. 135 In Stryker the plaintiff complained that the characterization of him as "Sergeant Stryker" in the popular film, The Sands of Iwo Jima, had invaded his privacy, both through its fictionalization and through representation of his actual deeds during


131. Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N.D. Cal. 1939) was the first case to interpret California law as recognizing the right. The court relied on the decision in Melvin, strangely, since that decision did not adopt the privacy doctrine. In Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942), the right was finally brought into the state common law. Again, the court assumed that Melvin had already made the transition, at least implicitly. Id. at 210, 127 P.2d at 578.

132. 28 F. Supp. 845 (N.D. Cal. 1939). The plaintiff, a chauffeur, became distressed when a radio program revealed his name in the reenactment of the holdup in which he had been involved. Since personal feelings had clearly been harmed, the court found, "it follows that the plaintiff's right to be let alone, has been violated . . ." (emphasis added). Id. at 847.

133. See also Cohen v. Marx, 94 Cal. App. 2d 704, 211 P.2d 320 (1949) (boxer who publicly adopted the name "Canvassback Cohen" couldn't complain of privacy invasion when comedian Groucho Marx made light of him in a routine); Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942), where advertisers, using plaintiff's name in a risque film advertisement, were held liable for "pluck[ing] her from her regular routine of life and thrust[ing] her before the world. . . ." Id. at 210, 127 P.2d at 578. Note, however, that imposing liability in circumstances where choice of name is inadvertent may well violate present constitutional standards. See note 19, supra.


135. In Melvin the court recognized the formation of "a plot," but did not elaborate on the significance of that act. 112 Cal. App. at 291, 297 P. at 93. Compare the holding in Binns v. Vitagraph Co. of America, 210 N.Y. 51, 103 N.E. 1108 (1913), which interpreted this process as the first step in misappropriation.
the invasion.\textsuperscript{136} Using the \textit{Melvin} balancing approach, the court found that as a soldier, Stryker was in part a public figure whose heroics were legitimately in the public arena.\textsuperscript{137} As a result, it rejected the suggestion that "mere use of his name along with a re-enactment of part of his life history, in part real and in part fictionalized for private gain, \textit{ipso facto}, without more, spells out an invasion of his right of privacy."\textsuperscript{138} While acknowledging the commercial motive, the court still required what had made \textit{Melvin} actionable, a showing of "unwarranted intrusion."\textsuperscript{139} Thus the common law criteria of the disclosure, in terms of the nature and character of the facts revealed, was substituted in the fictionalization equation for New York's inquiry into the degree or amount of distortion. Whether the portrayal in \textit{Stryker} provided this new element was not determined, however, because the plaintiff in his pleading failed to distinguish those parts allegedly fabricated from the accurate content.\textsuperscript{140} Some possibility remained, therefore, that under this conventional privacy approach some types of distortion through fictionalization might be actionable under a false light theory.\textsuperscript{141} Yet the limits on that alternative soon became apparent.

\textit{Smith v. National Broadcasting Co.}\textsuperscript{142} made it evident that mere use of a script and actors in place of documentary footage would not constitute actionable distortion if the dramatization,

\begin{itemize}
\item \textsuperscript{136} 108 Cal. App. 2d at 193, 238 P.2d at 671. The plaintiff seemed primarily to rely on a misappropriation theory akin to New York's, although this is not entirely clear from the decision.
\item \textsuperscript{137} Compare \textit{Kelly v. Loew's Inc.}, 76 F. Supp. 473 (D. Mass. 1948), where in a defamation suit, the court said of the plaintiff war hero, "[C]ommander Kelly agreed to sacrifice for the nation's good his privacy, as he would have sacrificed his life. But he was never asked to and never agreed to sacrifice his reputation [through the film based on his exploits] as a 'chevalier sans peur et sans reproche.'" \textit{Id.} at 489; \textit{Maggio v. Charles Scribner's Sons}, 205 Misc. 818, 823, 130 N.Y.S.2d 514, 520 (1954): "The complainant [a soldier allegedly depicted in a novel] was not a public or well known personality, but like most of us, an obscure member of society."
\item \textsuperscript{138} 108 Cal. App. 2d at 193, 238 P.2d at 671.
\item \textsuperscript{139} \textit{Id.} at 197, 238 P.2d at 673.
\item \textsuperscript{140} "The question at issue is not primarily one of the law of privacy . . . but rather one of the law of pleading." \textit{Id.} at 192, 238 P.2d at 671.
\item \textsuperscript{141} Many courts have required that the intrusion exceed "the limits of decency." See, e.g., \textit{Gill v. Hearst Publ. Co.}, 40 Cal. 2d 224, 253 P.2d 441 (1953). In view of the overlapping of false light and defamation theories, California has recently required pleading and proof of actual malice and compliance with \textit{CAL. CIV. CODE} § 48(a) in such privacy actions. \textit{Kapellas v. Kofman}, 1 Cal. 3d 20, 81 Cal. Rptr. 360 (1969). The result has been to restrict severely false light as a broader alternative to defamation.
\item \textsuperscript{142} 138 Cal. App. 2d 807, 292 P.2d 600 (1956).
\end{itemize}
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despite invented dialogue, was essentially truthful. Moreover, the court in that case, which involved a reenactment of a ten-month-old crime in the *Dragnet* television series, suggested in strongly worded dicta that a creative reproduction of an event of public interest could never be actionable, no matter how embellished. As the court stated, "[i]t is a characteristic of every era, no less than of our contemporary world, that events which have caught the popular imagination or incidents which have aroused the public interest, have been frequently revivified long after their occurrence in the literature, journalism, or other media of communication of a later day. These events, being embedded in the communal history, are proper material for such recounting." *Smith* dealt with a factual dramatization of the public aspects of a crime without using a real name and is thus distinguishable from other cases where public and private aspects of a personal story have been fictionalized. Nevertheless the dictum does represent the importance which most courts outside of New York have attributed to such entertainment.

Cases stemming from detective and fan magazine articles exemplify the effect of this theory. Under New York law and in several other jurisdictions, courts were prone to make gross distortion in such magazines actionable on grounds that this type of falsification served no legitimate interest. Typical of this line of decisions is *Hazlitt v. Fawcett Publications, Inc.*, where a publisher was found liable for a highly fanciful "reconstruction" of a crime in which a famous racing car driver had been involved. The court specifically declined to rule the story nonactionable on grounds that it was informational and ex-

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143. New York courts, as mentioned, found strong evidence of distortion in any use of a screenplay. See generally text accompanying notes 43-44, *supra*. Compare particularly Blumenthal v. Picture Classics, 261 N.Y. 504, 185 N.E. 715 (1933). The complaint in *Smith* may have succeeded on more specific pleading, however. As the court noted, "There is no allegation that any fictional embellishments were added to the incident." 138 Cal. App. 2d at 813, 292 P.2d at 603.

144. *Id.* at 814, 292 P.2d at 604.

145. The absence of an explicit identification of the plaintiff made the case distinguishable from Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931), which also involved the reenactment of a crime. More importantly, under the balancing approach, the court still found great current news value in the three-month-old story in addition to a lack of compelling interest, such as rehabilitation, to protect. Smith v. NBC, 138 Cal. App. 2d at 813-14, 292 P.2d at 604.

146. *See, e.g.*, cases cited at note 118, *supra*.

147. *See* cases cited at note 70, *supra*.

cited public interest. Rather, the court found, "to the extent that the defendant indulged in fictionalization, the inference gathers strength that the dominant characteristic of the story was not genuine information but fictional readability conducive to increased circulation for the magazine . . . . [T]he published story was in essence not a vehicle of information but rather a device to facilitate commercial exploitation."149

When the identical issues were raised in California, by contrast, the courts were much more impressed by the popularity of the product than by the manifest invasion of personality. In Carlisle v. Fawcett Publications, Inc.,150 the attitude of "that's entertainment" was applied in the extreme. The plaintiff was featured in a fan magazine article recounting in highly sensational fashion his brief childhood affairs with the girl who later became movie star Janet Leigh.151 He sued for defamation, intrusion upon seclusion, and false light invasion of privacy through fictionalization. The court dismissed the defamation count, seeing nothing injurious of reputation in the piece, since "all the world loves a lover."152 Furthermore, with regard to the privacy counts, the court held that Leigh's future success gave the magazine broad license to exploit the private past of both her and her friends. The rationale was that the public was not merely entitled to publication dealing with current events; it also had a legitimate interest in other media forms such as books, radio, and television, which could inform and entertain through the reproduction of past events, travelogues, and biographies.153 Although the court added that the privilege may be

149. Id. at 545. This conclusion was not inconsistent with the principles of Sidis v. F-R Publ. Corp., 113 F.2d 806 (2d Cir. 1940), since the court found that a "fair news account" of the incident fictionalized would have been protectible, though it had occurred two years prior to the publication.


151. The title of the article in question was "Janet Leigh's Own Story—I Was a Child Bride at 14!" According to the court, it described the brief affair in coy, suggestive language that implied the experience had almost left Leigh "frigid" and a "tramp." Id. at 736, 20 Cal. Rptr. at 408.

152. Id. at 739-40, 20 Cal. Rptr. at 409-10.

153. Id. at 746, 20 Cal. Rptr. at 414. The wording is quite similar to the analysis in Sarat Lahiri v. Daily Mirror, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937), which offered a solicitous interpretation of the New York statute: "Newspapers publish articles which are neither strictly news items nor strictly fictional in character . . . . Such articles include, among others, travel stories, stories of distant places, tales of historic personages and events, the reproduction of items of past events, and surveys of social conditions . . . . As a general rule, such cases are not within the purview of the statute." 295 N.Y.S. at 389.
limited to some extent by an obligation to be accurate, the writer was not restricted to "a cold recital of skeletal facts."\footnote{154} Here on the basis of the Smith rule, it was stressed again that fictionalization did not create a tort unless it could be deemed outrageous in the sense of purporting to reveal highly offensive or deeply private facts.\footnote{155}

Few cases in the privacy area have suggested a different view, and those that have seem to have had little impact on potential fictionalization actions. Interpreting the cases, a federal district court in Strickler v. National Broadcasting Co.\footnote{156} ruled that a naval officer involved in an air crash who had been portrayed in a television drama about the incident as wearing a Hawaiian shirt, smoking a pipe, and praying, had the right for a jury\footnote{157} to determine if such distortions were offensive.\footnote{158} This was more a loose interpretation than a refutation of existing law, however. Dictum in Leavy v. Cooney\footnote{159} contradicted the assertion of the court in Carlisle, the Janet Leigh case, that fictional re-creation of a newsworthy event was a protected form of speech; yet the proposition that such ventures were "purely commercial,"\footnote{160} hence actionable, appears to have

\footnote{154. 201 Cal. App. 2d at 748, 20 Cal. Rptr. at 414.}
\footnote{155. "We do not believe that the imagination of the writer of the article as exercised here creates a tort that would otherwise exist, and we call attention to the fact that there are no 'so-called revelations of any intimate details which would tend to outrage public decency.'" Id.}
\footnote{156. The social value test, which balances potentially greater societal interests against freedom of the press, has produced some disparate results. Compare Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 118 Cal. Rptr. 370 (1974) with Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 93 Cal. Rptr. 866 (1971). Both cases involved truthful disclosures of plaintiffs' involvement in past newsworthy incidents. In Briscoe, however, the court, as in Melvin v. Reid, found a greater weight in the rehabilitative interest of the state.}
\footnote{157. 167 F. Supp. 68 (S.D. Cal. 1958).}
\footnote{158. Although there is some dispute as to whether offensiveness is a question of law or fact, in California it seems to be settled that unless the court finds the publication incapable of such an interpretation, the jury should settle the issue. Gill v. Curtis Publ. Co., 38 Cal. 2d 273, 280, 239 P.2d 630, 635 (1952). In defamation cases court decisions on the issue of actual malice have been favored at the preliminary stage to avoid a chilling effect on the press. See, e.g., Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438 (9th Cir. 1974).}
\footnote{159. 214 Cal. App. 2d 496, 29 Cal. Rptr. 580 (1963). In this case, an attorney who had appeared in defendant's film based on one of his trials sued for an injunction and damages when the defendant breached a contract limiting the distribution to television. The court found a tortious invasion of privacy, partly on the ground of commercialization of plaintiff's role without his consent. Rendering an opinion similar to the New York cases, the court rejected a defense based on newsworthiness.}
\footnote{160. Id. at 502, 29 Cal. Rptr. at 584.}
been an isolated instance of such an assertion. Moreover, where misappropriation of name or likeness is in issue, the California courts have followed basically the same privacy formula, regarding the invasion as causing injury solely to personal feelings, not the pocketbook, and, like the Stryker court, have balanced the intrusion against the public interest in the product.

California's interpretation has been persuasive in other jurisdictions as well, and its effect has been to relegate exploitation of personal history to the narrow confines of a traditional privacy action. There it is constrained by the requirement of considering the public interest and the necessity of finding in the nature of the disclosure a "shocking" degree of falsity for liability. While this may provide a proper solution in regard to incidental use of names or facts from personal histories, the rationale does not adequately confront the problem of deliberate manipulation of identity in large scale commercial ventures such as present-day films. Both private and public figures may have no legitimate means of preventing the disclosure of much factual information about them; however, a more balanced test would take into account valid interests in freedom from intentional distortion and exploitation. In recent cases, it has been strongly suggested that the best way to ensure these rights is through recourse to a pure property theory.

161. See, e.g., Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955), where the manufacturer defendant in a widely circulated advertisement listed the plaintiff as a satisfied user when, in fact, he had returned the machine. Said the court, "The gist of the cause of action in a privacy case is . . . a direct wrong . . . to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community." Id. at 86, 291 P.2d at 197.

162. Compare Gill v. Curtis Publ. Co., 38 Cal. 2d 273, 239 P.2d 630 (1952) with Gill v. Hearst Publ. Co., 40 Cal. 2d 224, 253 P.2d 441 (1953), where the California Supreme Court, in cases involving the same facts, reached different conclusions on whether there was a legitimate public interest in seeing a photograph of plaintiffs embracing in public used as an illustration for a magazine article. The first court found an unnecessary intrusion while the latter body, without overruling the earlier decision, thought the plaintiffs had voluntarily waived their privacy. In his concurring opinion in Hearst, Justice Carter was particularly sensitive to the effects of misappropriation by a commercial medium: "By plaintiffs' doing what they did in view of a tiny fraction of the public, does not mean that they consented to observation by the millions of readers in defendant's magazine." 40 Cal. 2d at 232-33, 253 P.2d at 446 (Carter, J., concurring).

163. See cases cited at note 118, supra. Most of those cases, it should be noted, involved special circumstances which may have weighed in the defense's favor.

164. Interview with Vincent Chieffo, of Rudin & Perlstein, in Beverly Hills, Califor-
rejected this approach, the force of its logic still demands close attention.165

The Property Right

The idea that a life story can constitute a valuable, though intangible, asset is not new. For years writers and film producers in particular have recognized the potentially enormous value inherent in personal histories.166 Large sums have been paid to public figures and their families for the privilege of transforming their lives into fictionalized biographies. Although the payments have been viewed traditionally as consideration for a waiver of privacy and defamation rights by the persons who will be portrayed,167 the contractual nature of the arrangement has not obscured the profit motive nor the suggestion that a significant property right is being bartered. Indeed, the desirability of separating the personal aspects of the privacy right from the economic interests of the individual whose life is being exploited has a conceptual foundation in common law168 and statutory law,169 as well as scholarly criti-


166. Albert DeSalvo, while incarcerated for the Boston slayings, was paid over $18,000 for a release of all interests in any literary or biographical material concerning his life, as well as for a waiver of tort claims. The arrangement nevertheless resulted in a suit over the film The Boston Strangler. DeSalvo v. Twentieth Century-Fox Film Corp., 300 F. Supp. 742 (D. Mass. 1969). The wife of beat writer Neal Cassady recently received more than $70,000 for her interest in the film about her husband. Turan, Three on the Road, NEW WEST, Nov. 20, 1978, at 49.

In many cases it has been argued that for aspects of a personality to be valuable, the personality has to be conscientiously exploited by that person during his lifetime. This would result, in effect, in limiting the rewards of commercialization to the famous who actively seek to market their identity through appearances and products. Some courts have accepted this view. See, e.g., Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279, 284 (S.D.N.Y. 1977); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 160 Cal. Rptr. 323 (1979).


168. As noted by Prosser, the misappropriation branch of privacy necessarily confronts an invasion of economic interest. "The interest protected is not so much a mental as a proprietary one, in the exclusive use of plaintiff's name and likeness as an aspect of his identity." Prosser, supra note 4, at 406. Even courts which maintain that
As exemplified by California case law, privacy theory is pregnant with barriers to fictionalization actions. Moreover, there are obvious advantages to a pure property approach, particularly with respect to benefits for the next of kin, certainty of damages, and a degree of theoretical neatness. Nevertheless, to this date, courts continue to eschew recognition of a proprietary interest in commercialized fictional biographies. The reasons for this demand reexamination.

In many respects the problem of fictionalization under a property theory has involved an interest in search of a definition. Under New York and California privacy law, the focus of the inquiry is more clearly on how the method—intentional distortion—affects the individual. Under a property analysis, the question shifts to what the individual may own to the exclusion of others. Too often that interest has been confused with the mere control of facts. This is not the proper dispute, however, since facts have always been in the public domain. The basis of the action is a wrong to personal feelings recognize this. See, e.g., Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 87, 291 P.2d 194, 196 (1955), where the court stated, "It [an advertisement] was an unauthorized and unwarranted appropriation of plaintiff's personality as a lawyer for pecuniary gain and profit."


170. See Gordon, supra note 15; Nimmer, supra note 5; also Comment, The Right of Publicity: A Doctrinal Innovation, 62 Yale L.J. 1123 (1953). Both Gordon and Nimmer point out the inadequacy of privacy theory as applied to appropriation for commercial profit, since public exposure and embarrassment are not the harms suffered. A property approach, they suggest, would be more realistic in establishing definitive rights for the person exploited, and his family, as well as in providing a clearer standard for damages—the value to the defendant rather than the harm to the plaintiff.

171. Property is descendable and may be assigned. See text accompanying notes 236-52, infra for problems in relation to application to life histories.

172. Damages could be readily ascertained since profits from an appropriation, the value to the defendant, are accountable. In privacy actions, damages may be limited by the emotional harm to the plaintiff. E.g., Cason v. Baskin, 159 Fla. 31, 30 So. 2d 635 (1947).

173. See generally Nimmer, supra note 5, at 216-17.
and are not transferable in a personal sense. What commercializing of personal history through fiction does involve is the broader question of exploiting the personality, of which personal history is one important component. When a writer appropriates that history to mold his characters into recognizable figures—and sometimes merely a name is sufficient—he is in a very real sense trading on the identity of another to enhance his own work. Consequently, in fictionalization, what is valuable to the writer and properly classifiable as proprietary in nature is the right to exploit the personality by using so much of the background as is necessary to round out the fictional product. Acknowledgment of the process may have some inhibiting effect on the development of what are essentially commercial projects, but it has the important result of granting a fuller protection to the personality.

The law has already moved in this direction to a significant degree. Under various theories certain manifestations of personality have been shielded from exploitation through application of a property concept. The right of publicity has been the most recent innovation, establishing a property right in name and likeness for purposes of advertising and merchandising. For a longer period of time, actors, athletes, and other showmen have been able to prevent reproduction of their acts through enforcement of performance rights. Under the oldest such doctrine, copyright, the benefit from other artistic productions has been reserved for their creators, if only for a limited period of time. In addition, privacy statutes such as New York's inevitably contain a commercial component which describes the proprietary nature of certain forms of misappropriation. Under each of these doctrines, substantial protection is given to a pure economic stake in different aspects of the identity. By comparing them in relation to each other, it can be seen how the analogous interest in personal history is deserving of the same treatment.

The recognition of a property right in name and likeness in the area of publicity has been an important step.174 For it is

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174. See generally cases cited in Prosser, supra note 4, at 401-03. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) applied perhaps the broadest definition of "likeness" since the plaintiff was only identifiable through the distinctive painting design on his car. Id. at 827. In Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962), a dismissal of a claim by a famous actor whose voice was imitated in a commercial was reversed on unfair competition grounds. Although finding no "name or likeness" appropriated, the court held the use amounted to a "passing off" whereby
beyond dispute that knowledgeable use of these facets of personality can go a long way towards enhancing the commercial value of a product or merely attracting attention to it. People smitten by aggressive archetypes will more likely buy certain boots because Joe Namath professes to wear them. Similarly the mere appendage of a famous name is a sufficient attention-getter even if the relation to the product is not clear, for example, Sam Ervin hawking American Express cards. As applied to fictionalized biography, the process operates identically. The embellished film version of a rock star's life will draw more as the story of Buddy Holly than under a name to which the public attaches less importance. Conversely, while it may be argued that the name itself may not be so valuable where the facts of the story are more intriguing than the individual portrayed, the commercial value will still be enhanced by the audience's recognition that the characters are real. Despite some precedent to the contrary, however, the process by which the publicity right has expanded to approach encompassing even fictional works as a whole has been slow and tortuous. Initially courts dealt with misappropriation of property interests only with regard to commercial endorsements and advertising. This construction derived primarily from *Hae-lan Laboratories, Inc. v. Topps Chewing Gum*, the famous demand for similar uses of plaintiff's identity might be lessened. *Id.* at 259. Where the imitation was not of the plaintiff's identity, courts have found no such interference. *See* Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973); Sinatra v. Good-year Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970) (imitation of another's copyrighted song which plaintiff had popularized). For a critique on how certain comedic renditions of copyrighted works may be enjoined as unfair appropriation of property, see Nettivile, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225 (1962); Note, *Parody and Copyright Infringement*, 56 COLUM. L. REV. 585 (1956).


176. Film advertising often deliberately accentuates this aspect to lend more weight to the product. *E.g.*, 1978 Academy Award nominee *Midnight Express*, which was promoted as "The True Story of Billy Hayes"; an ad for *Agatha*, a totally fictional work based on an incident in writer Agatha Christie's life: "What may have happened during those 11 days is more suspenseful than anything she ever wrote." SAN FRANcIsCO CHRONICLE-EXAMINER DATEBOOK, Feb. 26, 1979, at 2 (emphasis added).

177. Warren and Brandeis fashioned the right to privacy from a number of cases recognizing various economic rights—in letters, artistic creations, and the like. 4 HARV. L. REV. at 193. The Supreme Court gave an expansive early definition: "A man's name is his own property and he has a right to its use and enjoyment as he has any other species of property." Brown Chem. Co. v. Meyer, 139 U.S. 540, 544 (1890). *See generally* Gordon, supra note 15, at 553-60.

178. 202 F.2d 866 (2d Cir. 1953).
case that first distinguished the personal privacy tort from the invasion of the publicity right, an impersonal economic interest in name and likeness. Since privacy rights under the New York statute were non-assignable, Judge Frank felt compelled to design a new remedy in face of a suit by a bubble gum manufacturer against a competitor for inducing a breach of contract by a famous baseball player who had granted the manufacturer exclusive rights to use his name and likeness in promoting its products. Rejecting the defendant’s contention that the contract represented merely a release from tort liability, the court recognized a purely commercial interest in identity that could be assigned in gross. Such a doctrine was necessary to protect the economic rights of famous figures because, “it is of common knowledge that [these persons], far from having their feelings bruised through public exposure of their likenesses, would feel solely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, busses, trains, and subways.” Thus defined, the right of publicity came to be initially restricted to the field of merchandising, the same area that gave rise to the traditional fourth branch of privacy, misappropriation of name or likeness.

As in Roberson, the Haelan court was reacting to an unauthorized use of a photograph on a marketable product. Many of the cases adopting a similar property rationale, however, have gone beyond this narrow scope to protect other aspects of identity from misappropriation. That name and likeness are equally valuable indicia of invasion of privacy was recognized early on. In a California case that predated Haelan, a lower court found that by virtue of his fame, a noted director had a transferable property interest in his name alone. Similarly, another early California case recognized that in certain cir-

180. 202 F.2d at 867.
181. Id. at 868.
183. 171 N.Y. 538, 64 N.E. 442 (1902).
cumstances showing films taken in public of a well-known personality could be a form of commercial exploitation.\textsuperscript{185} Cases relying on the New York "publicity" doctrine also moved towards a fuller protection of identity. A federal court in \textit{Cepeda v. Swift & Co.}\textsuperscript{186} found, for instance, that a baseball player had no justiciable claim arising from a merchandizing use of his name because he had already been compensated fully for the sale of property rights in his name, likeness, and signature. More significantly, in \textit{Uhlaeder v. Henricksen},\textsuperscript{187} the indication was that personal history is inherently tied to the publicity right. There a group of athletes sued to enjoin a game manufacturer from exploiting their names without compensation. The court extended the proprietary interest far beyond name and likeness to include substantive facts, as well as information that was a necessary product of a distinguished career. As the court stated, "A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, \textit{statistics and other personal characteristics}, is the fruit of his labors and a type of property."\textsuperscript{188}

With this broadening of interpretation over what is protected under the rubric of publicity, the law had also progressed beyond the early merchandising restriction to determine new areas where the right should be exercised. At present, misappropriations of property interests may be recognized in many other forms of communication, including books,\textsuperscript{189}

\textsuperscript{185} Douglas v. Disney, Civ. No. 664346 (Super. Ct., Los Angeles Cty., 1956). In this case the court upheld a claim by actor Kirk Douglas after the defendant had televised a "home movie" type of film he had made of Douglas and his family while they were visiting Disneyland. Because of the commercial value of Douglas's identity, the court limited exploitation of the film to the consent given.

\textsuperscript{186} 415 F.2d 1205 (8th Cir. 1969).


\textsuperscript{188} \textit{Id.} at 1282 (emphasis added). The critical conclusion that biographical material was protectible as property derived in part from Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 232 A.2d 458 (1967), where a group of golfers sued to enjoin dissemination of "profile" sheets the defendant distributed with a golf game. The court found that the proprietary interest was not extinguished by the public availability of the information: "[A]lthough the publication of biographical data of a well known public figure does not per se constitute an invasion of privacy, the use of the same data for the purpose of capitalizing upon the name by using it in connection with a commercial product other than the dissemination of news or articles or biographies does." 232 A.2d at 460.

films, and magazines. In this respect it is difficult to ignore the impact of the New York statute; for, since the Haelan decision, there has been a marked blurring of the distinction between what types of cases fall under the property and statutory doctrines. Theoretically there are sharp differences between the two, one protecting an assignable interest and the other a purely personal right. As the law has developed, however, the commingling of aims is not surprising. Rights under the New York statute become enforceable when dramatization becomes commercialized “trade” use. The right of publicity, with its protection against unauthorized appropriation of pecuniary assets, encompasses essentially the same values by protecting exploitation of name and likeness. Thus the connection many courts have drawn is consistent with Haelan’s recognition that “whether [the action] be labelled a ‘property right’ is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”

Thus, in cases involving published works that might otherwise be deemed protectible as purveyors of information, the property rationale has become entrenched. In Grant v. Esquire, Inc., the fashion section of a men’s magazine superimposed Cary Grant’s photograph on the torso of a model displaying the latest wares. The district court, interpreting New York law, was uncertain whether the use was sufficiently newsworthy to constitute actionable commercialization under the New York statute; still, it found a claim had been stated under the right of publicity. While the magazine could in no way be considered a product and was in some respects protectible as part of the media, the court con-

193. 202 F.2d at 868. See also Prosser, supra note 4 at 406. See text accompanying notes 37-43, supra.
195. Id. at 880.
cluded that "if . . . impelled to trade upon the name and reputation of a celebrity, it must pay the going rate."  

Reacting to the criticism that such a rule imposed undue restraint on First Amendment freedoms, the court referred to the notable decision in Taggart v. Wadleigh-Maurice, Ltd.  

There the plaintiff, a portable latrine installer, has been filmed commenting about his duties during the making of a documentary about the Woodstock music festival. He sought damages under the New York statute on discovering that the entire two minute conversation had been used as a comic counterpoint in the full-length feature on the event. Although the news value of the event was manifest, and the producers had not fictionalized the interview, the Third Circuit still found an actionable misappropriation. The theory was based primarily on the distortion inherent in such a use—a kind of fictionalization through overemphasis. "It would be one thing to photograph Taggart as he went about his duties at a newsworthy event and to include such a photograph in a factual description of the event," the court reasoned, "but quite another thing to deliberately draw him out in conversation for the purpose of making him an inadvertent performer in a sequence intended to be exploited for its artistic effect." The finding that the project was essentially motivated by "profit making commercial purposes" was critical, and, as noted, has been attacked as superficial. Nevertheless, it hearkens back to the established dichotomy between protectible news and actionable trade product appropriation established in Binns. Moreover, relying on this rationale the Grant court found Taggart's message clear: "The First Amendment does not absolve movie companies—or publishers—from the obligation of paying for their help." Muhammad Ali, having similarly found himself "drawn out" in a nude cartoon-like centerfold for Playgirl magazine, was recently able to obtain an injunction on the same principle—that his commercial property rights in identity were protected under both the New York statute and the right of

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196. Id. at 883.
197. 489 F.2d 434 (3d Cir. 1973).
198. Id. at 438 (emphasis added).
199. Id. at 436.
201. 367 F. Supp. at 884.
Having thus established that ascertainable property values exist in the use of name and likeness for commercial advertising as well as other forms of expression, it is important to recognize a second area where personality and property have legally intertwined: performance rights. This is perhaps the field where a famous individual's right to be compensated is most clear, for in these cases it is not merely the name and incidents which are exploited but also entire acts which may be the conscious product of years of skill and effort. In this respect, courts for a long time have not hesitated to draw lines between what is justifiably open to the public and what should remain in private control, although the rationale has varied from protecting performances to joining the interest with the right of publicity. For example, in *Ettore v. Philco Television Broadcasting Corp.*, the court upheld an appropriation claim by a boxer whose old fight films had been used in a television sports special. Since he had sold the films to a movie company before the invention of television, the plaintiff had no contractual remedy. Under a property concept, however, the court

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203. The impetus to provide protection for performers stemmed from the requirements of the old Copyright Act that performances be embodied in a record or medium that was reproducible. At first the controversy centered on appropriation of musical performances. See Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469 (1955); Waxman, *Performance Rights in Sound Recordings*, 52 TEX. L. REV. 42 (1973); Comment, *The Meaning of "Performance" Under the Copyright Act*, 7 U. TOL. L. REV. 765 (1976). In the Copyright Act of 1976, 17 U.S.C. §§102, 106 (1976), protection is extended to works of authorship "fixed in any tangible medium of expression," including dramatic and choreographic works. Performance rights are specifically reserved for productions so fixed. Where productions have not been copyrighted, the common law has moved to provide additional protection against those who attempt to appropriate another's work for their own profit. See cases cited at note 204, infra. See also text accompanying notes 208-11, infra.


205. 229 F.2d 481 (3d Cir. 1956).
found that he should still be able to recover for exploitation of his efforts: "The fact is that, if a performer performs for hire, a curtailment, without consideration, of his right to control his performance is a wrong to him. Such a wrong vitally affects his livelihood, precisely as trade libel, for example, affects the earnings of a corporation."²⁰⁶

More recently, employing the publicity rubric, a federal district court in New York enforced similar rights against attacks that their enforcement was precluded both by the public interest and by the absence of federal copyright protection. In Price v. Hal Roach Studios, Inc.,²⁰⁷ the court reasoned that states were not prevented from protecting intangible property rights outside the scope of federal statutes;²⁰⁸ moreover, these rights existed whether or not the celebrities—Laurel and Hardy—had chosen to reap their potential benefits during their lifetimes.²⁰⁹ In the companion case of Price v. Worldvision Enterprises, Inc.,²¹⁰ the reach of performance rights was amply demonstrated when a district court extended them to preclude release of a television series entitled "Stan and Ollie" that consciously sought to capitalize on the actors through impersonation of their performances, a distinct but volatile minority view.

But while this conclusion was radical in itself²¹¹ the

²⁰⁸. Id. at 846. The court relied primarily on the Supreme Court's holding in Goldstein v. California, 412 U.S. 546 (1973), which explicitly stated that the general goal of copyright law—to provide protection to authors for a limited time only—did not conflict with the state goal of preventing misappropriation. Id. at 559.
²¹¹. The essence of the Worldvision holding was that a publicity right in name and likeness alone is sufficient to enjoin an entire creative work (as opposed to commercial advertisement or product use) which actively employs the names of famous performers and mimics their acting styles, regardless of whether they are living. This obviously has enormous theoretical implications for cases based on a fictionalization claim, because it implies that mere imitation and use of a real name are sufficient to state a cause of action without alleging fictionalization at all. Under this extension, most docu-dramas, re-creating the lives of famous persons, could be enjoined, even if highly accurate or based on substantive research. More importantly, the right to bring such an action was expressly made descendable, giving heirs the right to sue over such a use. But see Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978) (publicity rights not applied to fictionalized treatment of a deceased writer's life).
Supreme Court has explicitly given performance rights an even wider scope, recently applying them in a news context. The case, Zacchini v. Scripps-Howard Broadcasting Co.,212 involved an action against a television station by a unique performer, the "human cannonball," for broadcasting his entire three-minute act without consent during a local news show. Applying Ohio law, the Court rejected the theory that such suits could be limited by the rules of privacy imposed by Time, Inc. v. Hill.213 Rather than protecting an interest against intrusion, Justice White noted, the right of publicity guarded an economic interest, in part to insure just compensation, and also to encourage entertainment in general.214 In this way the right of publicity was given much broader effect than in Roach, where the Second Circuit specifically denied the applicability of copyright concepts such as publication and notice.215 In contrast, the Supreme Court held in Zacchini that the "State's interest is closely analogous to the goals of patent and copyright law . . . . The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner . . . ."216 The defendant argued that such restraints imposed intolerable limits on editorial discretion; however, the Court found that on balance, the individual's interest required a remedy. Entertainment and news, endowed with certain First Amendment protections, would not be restrained if the performer were paid proper consideration.217

213. 385 U.S. 374 (1976). The Ohio Supreme Court had recognized petitioner's exclusive interest in controlling the display and exploitation of his work, but nevertheless erroneously interjected the criterion of public interest in the process of measuring the scope of that right. 433 U.S. at 562 n.4, 563 n.5.
214. Id. at 573-76.
216. 433 U.S. at 573, 575 (emphasis added).
217. The Court noted several cases that have roundly rejected First Amendment attacks on federal copyright law: Walt Disney Prod. v. Air Pirates, 345 F. Supp. 108 (N.D. Cal. 1972), aff'd, 581 F.2d 751 (9th Cir. 1978); Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972), rev'd on other grounds, 530 F.2d 1096 (1976). In both cases derivative productions which satirized or implicitly criticized the copyright owner's original works were found infringements, although no exact copying was performed. Disney involved an underground comic's pornographic rendition of the plaintiff's cartoon figures, while in Stigwood the subject was a play castigating the message of Jesus Christ, Superstar. The holdings tend to contradict the Court's assertion that free use of "ideas or concepts" is not prohibited, and that the defendants in Zacchini could freely divulge the facts concerning the plaintiff's act or even show
The copyright analogy provides a final useful framework for analyzing fictionalized biographies, for, as with Ettore's protection of performance rights,\textsuperscript{218} the law protects as property a certain definable manifestation of personality. Some critics have contended that copyright theories cannot be applied properly to encompass a portrayal of historical incidents alone, for there is no "work product" involved.\textsuperscript{219} In addition to commercialization of personal history, they argue, a wholesale appropriation of materials heretofore protected by common law copyright is needed.\textsuperscript{220} Under this line of argument, a claim for damages resulting from a dramatized version of the life of Elvis Presley, for example, could not be maintained unless, while drawing out the biography, the producers freely stole songs and lyrics that could not be deemed abandoned to the public domain. This theory was, in fact, the basis for Marvin Worth v. Superior Films Corp.,\textsuperscript{221} where a district court enjoined the distribution of a Lenny Bruce biography on grounds that, without consent or payment, the defendant made substantial use of copyrighted materials, including various routines owned by a competitor who planned to release his own film.\textsuperscript{222} The defendants were not able to support their contention that most of their material derived from their close association with Bruce, and, as a result, the court was able to find the substantial "taking" and interference required for infringement.\textsuperscript{223} The critical distinction drawn was that biographies about the famous could be suppressed if they made use of protected work without compensation, but otherwise they could deal freely with the facts and incidents surrounding their lives.\textsuperscript{224}

\textsuperscript{218} 229 F.2d 481 (3d Cir. 1956).
\textsuperscript{219} Supplemental Reply in Support of Demurrer and Motion to Strike, Bruce v. United Artists, Civ. No. C140-943 (Super. Ct., Los Angeles Cty., 1978). In the context of parody, see Netterville, note 174, supra, at 252-260, where it is argued that courts should distinguish between imitating a performance for entertainment purposes and appropriating the work itself for commercial use.
\textsuperscript{220} The Copyright Act of 1976 in effect abolished common law copyrights, 17 U.S.C. §§ 101-301 (1976). As pointed out above, however, protection may still arise under a misappropriation theory.
\textsuperscript{222} Id. at 1270.
\textsuperscript{223} Id. at 1274.
\textsuperscript{224} "Here what is sought is not restriction of the dissemination of information about Bruce, but a reasonable protection of his creative work." Id. at 1276. In reaching
However, if we are to accept the cornerstone of this theory, that a celebrity's work is protected as property despite First Amendment interests, it is necessary to examine again the nature of those other interests that have also acquired the property label. Under the publicity doctrine, a name or photograph alone becomes property when it is applied to an article of merchandise or advertisement. Similarly, the appropriation of a professional performance is deemed commercial exploitation even though the event may be eminently historical and newsworthy. On the one hand the name of the individual assumes independent value; on the other, the individual's action apart from the name is imbued with pecuniary worth. The law in effect has discerned a phantom distinction; for in reality the value in both cases derives from the personality to which the name and the act are integrally attached. Indeed, in publicity, performance, and copyright, it is the personality that creates the asset, and consequently the personality that is being ex-

this conclusion, the court necessarily determined that the appropriation was not a fair use. The factors involved in such an inquiry are generally (1) the substantiality of the taking; (2) the effect on the demand for the infringed property; (3) the public interest in the information disseminated; and (4) reliance on other materials which resemble the plaintiff's (i.e., other possible sources). In most infringement cases, courts have protected the owner's claim despite strong arguments based on public interest. See, e.g., Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723 (S.D.N.Y. 1974) (no discernible public interest in the dissemination of a Rudolph Valentino movie sufficient to justify infringement); Douglas Int'l Corp. v. Baker, 335 F. Supp. 282 (S.D.N.Y. 1971); United States v. Bodin, 375 F. Supp. 1265 (W.D. Okla. 1974) (no interests protected in usurping benefits of creative talent); see also note 217, supra.

In cases where courts have refused to apply copyright protection, there have been extraordinarily compelling circumstances. In Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1000 (1967), a case widely cited for the proposition that with regard to biographical works, owner's rights must be subordinated to public interest in the development of art and history, not only was the degree of infringement minute, but in addition the plaintiffs had actively sought to suppress any information of the material. Similar exceptions were made in Time, Inc. v. Bernard Geis Ass'n., 293 F. Supp. 130 (S.D.N.Y. 1968), where sketches of Kennedy assassination film were protected in light of the need for widespread dissemination of information, and in Meeropol v. Nizer, 361 F. Supp. 1063 (S.D.N.Y. 1973) (publication of letters by the Rosenbergs justified by continuing debate on controversy). But the Meeropol case was later reversed on the fair use issue. 560 F.2d 1061 (2d Cir. 1977). If the prevalent protectionist view were applied to property rights in personality, courts would again have to weigh several factors, most significantly the degree of appropriation and the presence, if any, of exigent circumstances. Once the pecuniary interest is recognized, as in copyright, the owner's rights would most likely prevail. In this context, then, use of "facts and incidents" concerning a personality in a commercialized vehicle would be as significant as appropriating the work itself. Under the more equitable misappropriation doctrine, such a stringent analysis would not be required. See text accompanying notes 202-10, supra.
The question then becomes whether that personality and the history surrounding it can be considered pecuniary assets. Because of manifest First Amendment interests, the law has recognized that certain verifiable facts cannot be considered property in themselves. It is for just this reason, however, that the recounting of personal history, in the classical sense of biography, is valued: they have been basically factual, with some leeway traditionally given for historical speculation. Moreover, as the case law has demonstrated, some degree of fictionalization is permissible both in a quantitative and qualitative sense. But First Amendment interests become much less critical and the case for judicial line-drawing much clearer when the writer is allowed to invade a personality by appropriating so many of those facts, combined with other indicia of identity, such as a name, in an intentionally distorted work so designed for his own commercial benefit. As in other cases where assets created by the personality have been taken, the process results in a potent economic product, the value of which should be shared among the exploiter and exploited alike. This, in effect, has been the philosophy underlying the prevailing interpretation of the New York appropriation statute, although it has been limited by inherent privacy concepts. For where a court has balanced the public need for dramatized biographies against the commercial content and concludes that the economic exploitation is actionable, it is, in effect, granting another type of copyright or property interest in the biographical aspects of personality. In that limited but definable context, the Supreme Court in Zacchini noted with respect to performance rights that the First Amendment cannot be used to sanction unconscionable misappropriation. The

225. Indeed, cases refer not so much to misappropriation of the product derived from the personality as to the exploitation of the personality as a whole. E.g., Price v. Hal Roach Studios, 400 F. Supp. 836, 846-47 (S.D.N.Y. 1970) (independent right to have one's personality, even if newsworthy, free from commercial exploitation at the hands of another); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 569 (1977) (recognizing the right of publicity gave "personal control over the commercial display and exploitation of his personality and the exercise of his talents"); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 129, 286 N.Y.S.2d 832, 836, 233 N.E.2d 840, 843 (1967) (right protected—"to be free of the commercial exploitation of his name and personality").

226. Liability under the New York statute is quantitative, predicated on the amount of fictionalization. See text accompanying notes 35-43, supra.

227. California, in contrast, determines liability qualitatively, relying on the type of fictionalization, on the nature and the character of the facts revealed. See notes 134-40 and accompanying text, supra.

228. See text accompanying notes 36-39, supra.
public would not be denied entertainment as long as the producer recognized the individual interest, contributing part of his profits as compensation. Writers would still be left with a variety of creative alternatives if they wished to avoid payment of fees. Obviously, they could confine themselves to a historical, factual approach; however, it is likely the same desired effects could be achieved by extrapolating from the subject even more, adding on another layer of fiction to distinguish the fictional characters from their models. The result would be that pure biographies and fictional works would continue to be produced with impunity; only in the narrow area of docudramas and other fictionalizations would proper consideration have to be given to the subject of the work or his assignees.

Admittedly, no court has gone this far and recognized a pure property interest in commercialized biography. The New York courts, while examining cases under their statute, continue to temper their recognition of economic exploitation with the application of privacy tenets. Similarly, the right of publicity, while it has been applied in the context of books, news, and television, has not yet been expanded to cover intentional distortions of personal history. In California, the courts, while recognizing that fictionalization can invade certain interests, have uniformly declined to "blaze the trail to establish causes of action based upon the right of publicity." Other jurisdic-

229. 433 U.S. at 575.
230. At this point it is worth noting that the recent Supreme Court decisions in the area of commercial speech do not pose any significant barriers to legal regulation of commercialized entertainment. Although the holding in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), expressly recognized some degree of protection for advertising and other "hard" commercial speech under the First and Fourteenth Amendments, it nevertheless stated that regulation was certainly permissible to the extent of governing time, place, and manner, as well as content. Id. at 771. In addition, because of its durability and verifiability, commercial speech may be more severely restricted than other forms of communication. It is subject to high standards of accuracy as well as prior restraint. Id. at 771 n.24. Under this view, courts recognizing certain films as pure commercial products might feel more compelled to impose limitations. See also Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977).
232. Strickler v. NBC, 167 F. Supp. 68, 70 (S.D. Cal. 1958). See also Melvin v. Reid, 112 Cal. App. 285, 292, 297 P. 91, 93-94 (1931) ("We have found no authorities sustaining such a property right in the story of one's life"). In a more recent case, Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 160 Cal. Rptr. 352 (1979), three justices joined in Chief Justice Bird's concurrence rejecting a property approach to fictionalization. This seems to leave plaintiffs with the option of pursuing recovery under the California privacy approach. See discussion in text accompanying notes 236-38, infra.
tions like Utah, armed with potentially more pliable misappropriation statutes, have also remained conservative in approach, invoking property theory only in the merchandising area. Moreover, the Internal Revenue Service in a limited context has cast doubt on the assessability of rights in exploitation of biography for tax purposes.

The hesitancy in adopting a property approach is obviously traceable in part to the enormity of the task. Several conceptual leaps of faith must be accomplished. First, it would be necessary to abandon the general restriction that publicity rights apply merely to commercial products; alternately, films would have to be recognized as commercial enterprises. Second, property rights would then have to expand beyond those indicia of identity which are already protected to personal history, the backbone of personality. Third, and perhaps most critically, the restrictions imposed by the privacy doctrine would have to be discarded. Offensiveness of portrayal, public interest in character, and voluntariness of exposure would all be irrelevant in determining the boundaries of the new right. Strictly interpreted, the property right would also inherit the attributes of ownership, including assignability and descendability. It is this last point which has proved to be the greatest stumbling block to judicial innovation in this area.

233. See note 169, supra.

234. When it declined to find that a fictionalized film biography fell within the “for purposes of trade” section of its statute, the Utah Supreme Court was faced with an unusual claim by the descendants of the figure portrayed. Donahue v. Warner Bros. Pictures Distribr. Corp., 2 Utah 2d 256, 272 F.2d 177 (1954). But compare Donahue v. Warner Bros. Pictures, 194 F.2d 6 (10th Cir. 1952), where in an earlier hearing of the case, the Tenth Circuit essentially followed the New York rule that excessive fictionalization would constitute trade use.

235. Miller v. Comm'r of Internal Revenue, 299 F.2d 707 (2d Cir. 1962); Runyon v. United States, 281 F.2d 590 (5th Cir. 1960). It is interesting to note that the reasoning in both cases is somewhat illogical. In Miller, the contract for assignment in rights to Glen Miller's story warranted that the wife was the "sole and exclusive owner" of the rights conveyed. 299 F.2d at 707. Yet the court, recognizing that "something was indeed sold," construed it to be "the chance that a new theory of 'property' might be advanced, and that a lawsuit predicated on it might be successful. It was a purchase, so to speak, of freedom from fear." Id. at 710. In Runyon, where the issue was capital gains treatment of sums received for the right to produce a film of plaintiff's father, the court found no room for such sale treatment under the New York privacy statute, but added that the taxpayer "had a property right in the name and story of his father's life. . ." 281 F.2d at 592.

The fear has been rampant that the passing on of such rights in fictionalized biography would constrict too severely the traditional wide protection given creative interpretation of the lives of deceased public figures.

Where the issue has been raised, four states have explicitly relied on this rationale to bar suits by personal representatives or kin for commercial appropriation of the life stories of the deceased. In Guglielmi v. Spelling-Goldberg Productions, the most recent decision on property rights in personal history, the California Supreme Court upheld a lower court order dismissing a claim by the sole heir of Rudolph Valentino stemming from the film, Valentino, A Historical Fiction. The plaintiff claimed that in fictionalizing the story, the film had infringed on property rights which had descended solely to her. In a terse opinion, the Court reasoned that because its decision in Lugosi v. Universal Pictures had foreclosed a descendable right of publicity, the plaintiff could not successfully argue for a similar right passing to her. However, three justices joined Chief Justice Bird's concurrence, detailing the reasons for the rejection.

The gist of the concurrence, which assumed, contrary to Lugosi, that the right of publicity is descendable, was that free speech interests and traditional support for modes of expression such as historical novels made it inappropriate to extend the right of publicity beyond collateral merchandising. As opposed to cases under the New York privacy statute, Chief Justice Bird argued that in the property area substantial fictionalization was an ineffective test to distinguish actionable intrusions from protectible speech, since publicity values could be equally diluted by truthful publications. Another important aspect was the implication that property rights in identity should not be extended where there is no threat to livelihood or invasion of a tangible work product, as in Zacchini, the "human-cannonball" case. While support for the concurrence is unclear, in effect the decision as a whole reiterated the long standing principle that in California there can be no cause of action for fictionalization without showing harm to reputation or to an interest in seclusion.

Guglielmi enjoyed some support in precedent. Although a

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descendability provision in its privacy statute would have permitted it, the Utah Supreme Court in Donahue v. Warner Brothers Pictures Distributing Corp. similarly refused to allow a misappropriation claim concerning the biography of a famous entertainer. The holding there, however, was predicated on privacy, not economic interests. Commercial rights were recognized by the dissenting judge in Maritote v. Desilu Productions, Inc., but the majority also refused to construe Illinois privacy law as creating a right for Al Capone's son to sue over a television series based on the mobster's exploits. The descendability issue also arose recently in Hicks v. Casablanca Records where a court was finally confronted with the task of separating the personal and economic protections provided by the New York statute.

At the center of the Hicks case was Agatha, a film consisting of "conjecture, surmise, and fiction" about the strange disappearance of mystery writer Agatha Christie during her early years. The heirs and assignee of the author sought a preliminary injunction solely on the right of publicity, claiming their inherited property rights in name and likeness had been

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240. See note 179, supra.

241. The court, in examining a claim for statutory misappropriation by the widow and daughters of the entertainer, grappled with the difficulty of determining how much fiction would be required to bring a film under the "for purposes of trade" label before deciding that "privacy, although of great value to individuals, does not contain the vital social implications for the whole of society that exist in the allowance of freedom of expression in motion pictures . . . and the like." 2 Utah 2d at 264, 272 P.2d at 183.

242. In viewing the extent of the invasion through wholly fictionalized episodes in the Untouchables series, Judge Duffy agreed that Illinois privacy law at the time provided no remedy, but noted: "The defendants have been profiting, not from Al Capone's life of crime, but from commercial exploitation of publicity values inherent in his name, likeness, and personality . . . ." 345 F.2d 418, 421 (7th Cir. 1965) (Duffy, J., dissenting) (emphasis added).

243. The reasoning was traditional: no invasion occurred since the plaintiffs were not portrayed and any rights that may have accrued to Capone were purely personal. Id. at 419. The result is in line with the decisions in two other cases where relatives of famous personalities long deceased have based their actions on a pure privacy theory. James v. Screen Gems, Inc., 174 Cal. App. 2d 650, 344 P.2d 799 (1959) (life of son of Jesse James); Schumann v. Loew's Inc., 135 N.Y.S.2d 361 (Sup. Ct. 1954) (composer Robert Schumann). Note, however, that in Schumann a property theory was also advanced. For purposes of argument the court accepted it, yet dismissed the action because plaintiffs had failed to allege facts showing the inheritance of it. Id. at 369.


245. Id. at 431.

246. "Mrs. Christie is portrayed as an emotionally unstable woman who . . . engages in a sinister plot to murder her husband's mistress, in an attempt to regain the alienated affections of her husband." Id. at 429.
abused. Interpreting New York law, the district court rendered a narrow and unelaborated opinion. Justice Pierce implicitly acknowledged that the right of publicity, in protecting economic interests in name and likeness, and the statutory sanctions against blatant commercial exploitation of personal history through fictionalization served identical purposes. Yet he avoided the question of whether a property right could be applied uniformly to fictionalized portrayals. Instead, he found that while the plaintiff had in fact inherited a descendable property right in name and likeness stemming from the fictionalization, First Amendment interests in such works prohibited the application of the theory in this case, where the work was so distorted that “it is evident to the public that the events so depicted are fictitious.”247 One of the shortcomings of the opinion is the court’s calculated reliance on the rationale of Notre Dame, which has been distinguished as a deviation from the course of New York statutory interpretation. As dissenting Justice Burke noted there, if one accepts the existence of a property interest, as Judge Pierce apparently did, the right to exploit it necessarily overrides free speech interests.248 Also, the Spahn case, which had allowed recovery for fictionalization but which the court distinguished as not based on a property theory, did in fact rest primarily on the importance of protecting the individual from commercial exploitation.249 More importantly, no standards were delineated to determine when a film is too fictionalized to be actionable. Having accepted that fictionalization could constitute misappropriation of property values in some cases, the decision rested on the debatable grounds of lack of audience identification between the real and fictional. The implication, as a result, is that a more deceptive

247. The court employed a three-step analysis. First, it explicitly rejected any notion that such a highly embellished work was protectible as biography, history, or fair comment. Id. at 431. Next, it questioned whether, as in false light privacy cases, there were any countervailing free speech interests which would weigh against application of the property right. Id. The crux of the decision lay in the third step, involving a distinction between the New York holdings in Notre Dame and Spahn. See text accompanying notes 59-79, supra. Because Agatha had not attempted to deceive the public into believing the events as depicted, the court reasoned, there was no compelling interest to protect. The defect of this conclusion is that it rests entirely on a false-light privacy theory. The question of recognizing property interests was thereby circumvented, even though initially accepted.

248. See text accompanying notes 62-63, supra.

blend of fact and fiction might run afoul of a property right, particularly if the individual portrayed is living.

A more profitable approach to the descendability issue is to focus first on whether fictional biographies can be classified as property before proceeding to an examination of the results of such an application. The decision in *Price v. Worldvision Enterprises, Inc.*,\(^{250}\) involving a claim by the widows of Laurel and Hardy stemming from an imitative television series, did this without examining the issue of fictionalization. As the case shows, the descendability of the right in this way becomes a secondary issue.\(^{251}\) Moreover, as the *Hicks* court itself noted, although the law, at least with regard to the descendability of the publicity doctrine, is far from settled, commentators and the weight of recent authority suggest that publicity rights may be passed on.\(^{252}\)

This being so, a balancing test should only be used to determine whether the right should extend, not if it exists. Defendants in these cases have argued that a multitude of injuries would ensue, including a form of prior censorship, a chilling effect on entertainment, and impossibility of establishing standards of review.\(^{253}\) Nevertheless for years movie producers have made contractual arrangements to secure similar rights from authors of copyrighted works or individuals in the form of "privacy" waivers.\(^{254}\) The price has been minute in comparison with most modern-day budgets for films or book promotions. The alternative would always exist, to produce documentary-type works, where substantial leeway for inaccuracy already exists or to extrapolate further and create a fully fictional account. On the other hand, a court could reasonably conclude, as in *Guglielmi*, that the passing on of such intangible rights might irrevocably damage artistic expression. This determination does not necessitate voiding recognition of property rights for the living, who would stand to gain more equitable compen-


\(^{251}\) See text accompanying note 210, *supra*.


\(^{253}\) See text accompanying notes 229-30, *supra*.

\(^{254}\) See note 166, *supra*. 
sation than is presently available under privacy or defamation actions. In sum, a theory based on property rights does provide a workable solution to the problem, although it is fraught with the difficulties of the present narrow interpretation.

**Conclusion**

The eagerness of writers and filmmakers to profit from the notoriety of public figures through fictionalized biographies has produced a serious confrontation between freedom of expression and the inherent right of the individual to be free from excessive intrusion and commercial exploitation. So far jurisdictions have varied widely in their approach to the conflict. Aside from defamation actions, which are limited by constitutional rules, three basic doctrines have developed.

Under New York's generic privacy statute, an individual may recover for personal harm suffered from a distorted biography if the court finds excessive commercialization as evidenced by the amount of fictionalization. This formula strikes a balance between recognizing both the personal and economic aspects of the injury and the public's right to varied sources of information and entertainment. It is presently the most workable solution. However, problems remain in distinguishing accurate depictions from fictionalized work and in granting at least some recognition to the rights of heirs, assignees, or next of kin, who are now ignored under statutory construction.

California cases are representative of the view that privacy theory is controlling. This theory restricts claims for fictionalization by imposing strict common law requirements, including offensiveness and lack of waiver. As a result, it is least suited to an equitable solution. Only recently have courts examined claims based on a distinct property right in controlling exploitation of personal history. Although courts so far have refused to engage in the substantial widening of existing rights in name, performance, and copyright that this approach would require, the property theory has the advantage of clarity and logic. Not only does it reward the individual for the inherent economic value of his story, it is also commensurate with the protections now given to other aspects of identity against misappropriation. The question of descendability, presented in

255. Since relief would be measured by the value to the appropriator rather than the harm to the plaintiff, damages would be readily ascertainable. See note 172, supra.
the recent cases of *Hicks v. Casablanca Records* and *Guglielmi v. Spelling-Goldberg Productions*, should not cloud the issue of whether a property right stemming from exploitation of personal history should be enforced for the living, as a balancing test may be appropriately applied. Deciding when fictionalization is sufficient to require compensation would not make courts, as some have suggested, any more literary arbiters than they are now in deciding privacy and defamation actions. Moreover, an incentive for accuracy would be created, one much needed in a field where, under present law, dramatic license is being abused.

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256. Based on copyright law policy, Chief Justice Bird in her dissent in *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 160 Cal. Rptr. 323 (1979), suggested extending the right of publicity a lifetime plus fifty years but only as to misappropriation for merchandising use. While in itself this solution would be an adequate compromise for establishing property rights in personal history, it also suggests that sound policy analysis could produce equally adequate alternatives. Clearly, the task of judicial line drawing is not insurmountable.