

CASE NO. 00-3584

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ETW CORP.,
Plaintiff-Appellant,

vs.

JIREH PUBLISHING, INC.,
Defendant-Appellee

***AMICI CURIAE* BRIEF OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND THE SOCIETY OF PROFESSIONAL JOURNALISTS
IN SUPPORT OF DEFENDANT-APPELLEE**

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
Ashley Gauthier
The Reporters Committee for
Freedom of the Press
1815 N. Fort Myer Dr., Suite 900
Arlington, VA 22209
Telephone: (703) 807-2100

Bruce W. Sanford, Esq.
Robert D. Lystad, Esq.
Bruce D. Brown, Esq.
Baker & Hostetler LLP

1050 Connecticut Avenue NW, Suite 1100
Washington, DC 20036
(202) 861-1500
Counsel for Society of Professional Journalists

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Under Rule 26.1 of the Sixth Circuit, the Reporters Committee for Freedom of the Press and the Society of Professional Journalists make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? NO
2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

(Signature of Counsel)

(Date)

TABLE OF CONTENTS

INTEREST OF THE *AMICI CURIAE*

..... 1

SUMMARY OF ARGUMENT

..... 2

ARGUMENT

..... 3

I. The tort action for violation of a right of publicity was never intended to limit speech protected by the First Amendment, but is better understood as a protection against fraudulent use of an individual's image.

..... 4

A. The general rule is that First Amendment freedoms prevail; the right of publicity is a narrow exception to the First Amendment, not vice versa.

.....4

B. The right of publicity is a narrow exception to the First Amendment that is designed to prevent consumer fraud by barring the use of a person's name, likeness or image to falsely imply the endorsement of a product, the source or sponsorship of a product, or participation in the advertisement of the product.

..... 9

II. A broad right of publicity would raise serious constitutional

concerns by requiring courts to judge the artistic merit of the use of a celebrity's image.

.....14

III. A broad right of publicity would raise serious constitutional concerns because the "permissible" use of an image would be too vague.

.....19

CONCLUSION

.....22

TABLE OF AUTHORITIES

CASES

<i>Ann-Margret v. High Society Magazine, Inc.</i> , 498 F. Supp. 401 (S.D.N.Y. 1980)	5, 8, 10, 16, 17, 18
<i>Current Audio, Inc. v. RCA Corp.</i> , 337 N.Y.S.2d 949 (NY App. 1972).....	5, 11, 12
<i>Feist Publications v. Rural Telephone Service</i> , 499 U.S. 340, 111 S. Ct. 1282, 113 L.Ed. 2d 358 (1991)	9
<i>Frosch v. Grosset & Dunlap, Inc.</i> , 427 N.Y.S.2d 828 (NY App. 1980).....	17
<i>Gugliemi v. Spelling-Goldberg Prods.</i> , 603 P.2d 454 (Cal. 1979).....	8, 17
<i>Haelan Labs. v. Topps Chewing Gum</i> , 202 F.2d 866 (2d Cir. 1953).....	5
<i>Hoffman v. Capital Cities/ABC, Inc.</i> , 33 F. Supp. 2d 867 (C.D. Cal. 1999).....	16
<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group</i> , 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).....	15
<i>Midler v. Ford Motor Co.</i> , 849 F. 2d 460 (9th Cir. 1988).....	9
<i>New Kids on the Block v. Gannett Satellite Information Network, Inc.</i> , 745 F. Supp. 1540 (C.D. Cal. 1990).....	5, 13,

<i>Parks v. LaFace Records</i> , 76 F. Supp. 2d 775 (E.D. Mich. 1999).....	3, 5, 8, 11, 13, 16, 17, 18, 19
<i>Paulsen v. Personality Posters, Inc.</i> , 299 N.Y.S.2d 501 (NY App. 1968).....	5, 8, 10, 15, 16, 17
<i>Rosemont Enter., Inc. v. Random House, Inc.</i> , 294 N.Y.S.2d 122 (NY App. 1968).....	6, 9, 15, 18
<i>Smith v. California</i> , 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959).....	19
<i>Time, Inc. v. Hill</i> , 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed. 2d 456 (1967).....	8, 15
<i>Trademark Cases</i> , 100 U.S. 82 (1879).....	5
<i>Valentine v. CBS, Inc.</i> , 698 F.2d 430 (11th Cir. 1983).....	5
<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).....	19
<i>Vinci v. American Can Co.</i> , 591 N.E.2d 793 (Ohio App. 1990).....	12, 13
<i>Waits v. Frito-Lay, Inc.</i> , 978 F.2d 1093 (9th Cir. 1992).....	9
<i>White v. Samsung Elecs. Am., Inc.</i> , 971 F.2d 1395 (9th Cir. 1992).....	11

OTHER AUTHORITIES

Clay, Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Court, 79 Minn. L. Rev. 485 (1994).....7

Cordero, Cocaine-Cola, the Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons, 8 Fordham I.P., Media & Ent. L.J. 599 (1998).....7

Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 125 (1993)6, 7

Nimmer, Right of Publicity, 19 Law and Contemporary Problems 203.....10

INTEREST OF THE *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists is a voluntary non-profit journalism organization of nearly 10,000 members representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

Amici's interest here is in encouraging the Court to fully protect First Amendment rights in evaluating "right of publicity" claims. Journalists, as well as others, should be free to express ideas about celebrities without fear that they could be sued merely because the celebrity did not like that particular expression and deemed it "unnewsworthy." Journalists must be able to use an image with confidence, knowing exactly the scope of the right of publicity. Whatever publicity rights a citizen may have, they should be no stronger than, nor should they

invalidate, another citizen's constitutionally protected First Amendment rights.

All parties to this appeal have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The right of publicity, which is merely a common law or statutory right and not a constitutional right, cannot be construed to invalidate the constitutional protections of free speech and expression. Rather, the right of publicity is merely a narrow limitation that applies to false or misleading advertisements. Although a celebrity can prevent his name, image or likeness from being used to endorse a commodity or idea, he cannot halt expression of ideas about him or his place in history. While a celebrity may argue that any use of his image can be "misleading" or falsely imply an endorsement, any doubts must be resolved in favor of free expression, leaving few uses to fall outside the bounds of constitutionally protected activity.

The right of publicity should be narrowly construed to avoid scenarios where courts are required to judge the artistic merit of expressive works. Similarly, the celebrity whose image is used should not be the one to judge whether the work is sufficiently creative to warrant protection. Allowing the courts or the celebrities to subjectively decide whether they like any given expressive work would result in

such a vague standard that journalists, artists or others would never know whether their use is proper, resulting in a chilling effect on speech.

ARGUMENT

This suit was filed by ETW, the company that owns the publicity rights of Tiger Woods ["Woods"], a talented golfer who has made history many times over with his achievements. ETW has alleged that Jireh, Inc., a distributor of the artwork of artist Rick Rush, violated Woods' rights by distributing a painting of Woods.

Application of the First Amendment to the U.S. Constitution defeats all of ETW's claims. This case can be analogized to *Parks v. LaFace Records*, 76 F. Supp. 2d 775 (E.D. Mich. 1999) where the court held that Rosa Parks' right of publicity, trademark, and unfair competition claims should all be dismissed because none of those "rights" were stronger than the defendants' First Amendment rights. The court correctly noted that the First Amendment prevailed over all such "rights," as long as the use was not an advertisement or a "disguised commercial advertisement." *Id.* at 781-83. Similarly, in the present case, the First Amendment applies to defeat all of ETW's claims.

However, this brief will focus on the right of publicity, because it has greater implications for journalists who may use the names and likenesses of celebrities in

creative ways. Additionally, because journalists and media outlets generally make money from their efforts, there are potential implications from ETW's argument that any profit from the use of a celebrity's image violates their right to publicity.

The scope of the right of publicity must be properly limited to ensure that expressive activity protected by the First Amendment is not curtailed in the name of giving celebrities complete control over any uses of their names and reproductions of their likenesses.

I. The tort action for violation of a right of publicity was never intended to limit speech protected by the First Amendment, but is better understood as a protection against fraudulent use of an individual's image.

A. The general rule is that First Amendment freedoms prevail; the right of publicity is a narrow exception to the First Amendment, not vice versa.

ETW has argued that the right of publicity is, in effect, a constitutional right that gives celebrities an absolute, unfettered right to control the use of their name, likeness and image in all circumstances, except for a very narrow exception for newsgathering and biographies. This contention is incorrect.

First, the right of publicity is not a constitutional right. It has expressly been held that trademarks are not constitutionally protected, nor are other forms of so-

called intellectual property. *Trademark Cases*, 100 U.S. 82, 86 (1879) (trademarks are not included in the Copyright Clause of the Constitution). The right of publicity is merely a common-law right first recognized in *Haelan Labs. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953). Although some states have statutes pertaining to the right of publicity, they are not elevated to the status of a constitutional guarantee.

More importantly, however, the First Amendment should not be viewed as a narrow exception to the right of publicity. Rather, the freedoms secured by the First Amendment are presumed to apply to protect expressive activity, and the right of publicity is a narrow exception to such freedoms.¹

The right of publicity gives celebrities (and others) control over which

¹ Many courts have recognized the priority of First Amendment rights. *Valentine v. CBS, Inc.*, 698 F.2d 430 (11th Cir. 1983) (a statute that broadly prohibits the use of a person's name or likeness raises grave constitutional concerns); *Parks v. LaFace Records*, 76 F. Supp. 2d 775 (E.D. Mich. 1999) (the right of publicity cannot be applied when the work is entitled to First Amendment protection, which would be any expression except a "disguised commercial advertisement"); *New Kids on the Block v. Gannett Satellite Information Network, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990) (First Amendment takes precedence over Lanham Act or misappropriation law, as long as the use does not falsely denote sponsorship or endorsement); *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980) (the First Amendment transcends the right of publicity); *Current Audio, Inc. v. RCA Corp.*, 337 N.Y.S.2d 949 (NY App. 1972) (the First Amendment supercedes any private pecuniary interest; attempting to control the use of a person's name or likeness would constitute an impermissible restraint on free expression); *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 506 (NY App. 1968) (any right of publicity must be construed in light of the primacy of constitutional protections for speech and press) (emphasis added); *Rosemont Enter., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122 (NY App. 1968) (there are definite limits on the right of publicity; namely, it applies only to advertising and not to expressive works protected by the First Amendment).

products or ideas they wish to endorse. They may try to present a certain image to the public and associate themselves with things that are consistent with that image. But, ultimately, the public will decide what it thinks of a certain person, his character or his place in history. The "idea" of a person such as Tiger Woods cannot be controlled, as each individual will have his or her own subjective impressions of him, which may or may not comport with the image that Woods has sought to project to the public. As one commentator aptly noted:

A celebrity . . . does not make her public image, her *meaning for others*, in anything like the way a carpenter makes a chair from a block of wood. She is not the sole and sovereign "author" of what she means for others. Contingency cannot be entirely erased. The creative (and autonomous) role of the media and the audience in the meaning-making process cannot be excised. . . . [A] celebrity like Madonna cannot say of her public image what the carpenter can say of his chair: "*I made it.*" And because she cannot say this of her public image, she cannot lay a convincing moral claim to the *exclusive* ownership or control of the economic values that attach to it.

Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 125, 195-96 (1993) (emphasis in original). Madow's article demonstrates the strange logic of granting a celebrity exclusive ownership of his or her image when the image is entirely contingent upon the public's perception and describes how many celebrities have come to symbolize ideas or events that the celebrity may not have anticipated or desired. In particular, he describes how urban gay men in the 1950's adopted the image of Judy Garland to communicate ideas

about urban gay lifestyle. *Id.* at 143. Similarly, the image of John Wayne has been used in both positive and negative contexts, much to the chagrin of Wayne's descendants. *Id.* at 144-45. Madow correctly concluded:

. . . the power to license is the power to suppress. When the law gives a celebrity a right of publicity, it does more than funnel additional income her way. It gives her . . . a substantial measure of power over the production and circulation of meaning and identity in our society . . . power, ultimately, to limit the expressive and communicative opportunities for the rest of us.

Id. at 145-46.²

In the present case, Woods seeks to prevent citizens from expressing their thoughts, ideas and subjective impressions of him without his approval and the payment of a fee. Such demand is wholly inconsistent with the First Amendment and should be rejected.

Woods seeks to withdraw his image from the marketplace of ideas in our society from which writers, artists, commentators and others look for inspiration, but such a goal is untenable. *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) ("Once a person has sought publicity he

² See also Cordero, Cocaine-Cola, the Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons, 8 Fordham I.P., Media & Ent. L.J. 599 (1998) (explaining how cultural icons such as Coca-Cola, Elvis, and Barbie will inevitably be the subject of commentary and art due to their status as icons, even though some commentary or expression may be contrary to the interests of the trademark holder); Clay, Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Court, 79 Minn. L. Rev. 485 (1994)(advocating that the right of publicity should be severely curtailed because it stifles expression).

cannot at his whim withdraw the events of his life from public scrutiny"). As another court noted:

Prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons . . . were forbidden topics for the imaginations of authors.

Parks, supra, 76 F. Supp. 2d at 777, quoting *Gugliemi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 462 (Cal. 1979).

Woods has made history, and his accomplishments invoke feelings in other members of the community that may be expressed through words, pictures, stories, drawings or other media.³ The right of publicity was never intended to withdraw the idea of a person from that marketplace of ideas. Even copyright law, which is mandated and protected in our Constitution, does not purport to go so far. *Feist Publications v. Rural Telephone Service*, 499 U.S. 340, 111 S. Ct. 1282, 113 L.Ed. 2d 358 (1991)(copyright applies only to a particular expression, not to ideas in general). In essence, he is asking to own not only his own "name, likeness, and

³ This notion that a celebrity must accept that he will be the subject of expression has been recognized by numerous courts. See *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501 (NY App. 1968). "The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Id.* (citing *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed. 2d 456 (1967)). Accord, *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) ("the use of a person's name or picture in the context of an event within 'the orbit of public interest and scrutiny,' . . . a category into which most of the events involving a public figure (especially of plaintiff's stature) fall, can rarely for an actionable claim under [the right of publicity]") (citation omitted).

image" but also our ideas and impressions of him.⁴

B. The right of publicity is a narrow exception to the First Amendment that is designed to prevent consumer fraud by barring the use of a person's name, likeness, or image to falsely imply the endorsement of a product, the source or sponsorship of a product, or participation in the advertisement of the product.

The right of publicity may legitimately be used to prevent one's name or likeness from being associated with the advertisement of a product. *See, e.g., Midler v. Ford Motor Co.*, 849 F. 2d 460 (9th Cir. 1988); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992). In these cases, advertisers used sound-alikes to invoke the image of a celebrity singer to sell their product. Consumers could reasonably believe that the singers were endorsing the product, or at least participating in the production of the advertisement, even though the celebrity had nothing to do with the advertisement. Such false implications may be barred by the right of publicity because the First Amendment need not protect fraudulent commercial endeavors. Even if there is no outright lie in the advertisements, the false implications harm the interests of the exploited celebrity and defraud the

⁴ This concern was explicitly addressed in *Rosemont Enter. Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 128 (NY App. 1968), where the court rejected Howard Hughes' argument that the defendant could not publish a book about Hughes because it wasn't "correct" according to Hughes. The court ruled that, absent knowledge of falsity, the interest in free expression outweighs Hughes' interest in controlling all presentations of himself.

consumer.

Nevertheless, allowing the right of publicity in such contexts does not require extending the right to cover all uses of a celebrity's name, likeness or image. To do so would infringe upon the First Amendment rights of others to comment upon or express ideas about a person.

As has been noted, "[w]hat such a figure really seeks is a type of relief which will enable him to garner financial benefits from the pecuniary value which attaches to his name and picture." *Paulsen*, 299 N.Y.S.2d at 508. That court pointed out that the right "does not invest a prominent person with the right to exploit financially every public use of name or picture. What is made actionable is the unauthorized use for *advertising* purposes in connection with the sale of a commodity." *Id.* (emphasis added).⁵ See also *Ann-Margret*, *supra*, 498 F. Supp. at 406 (the right of publicity does not invest a prominent person with the right to exploit financially every public use of his or her name or picture; the right of publicity only applies to advertising); *Parks*, *supra*, 76 F. Supp. 2d at 777 (same). *Current Audio, Inc. v. RCA Corp.*, 337 N.Y.S.2d 949 (NY App. 1972) (the right of publicity is limited and

⁵ In fact, the court in *Paulsen* specified that the right of publicity applies only to advertising, and any other use would be constitutionally protected and supercede any private pecuniary interest. *Id.* Even those scholars who argue that the right of publicity should be treated as a property right recognize that freedom of expression takes precedence. *Id.* at 509 (citing Nimmer, Right of Publicity, 19 Law and Contemporary Problems, 203, 216).

applies only to the unauthorized use of a name or picture for advertising purposes in connection with the sale of a commodity). Even *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), which is widely regarded as the most expansive "right of publicity" case, admits that the right should be limited to use in advertisements.

In warning of a first amendment chill to expressive conduct, the dissent reads this decision too broadly. . . . This case concerns only the market which exists in our society for the exploitation of celebrity to sell products Commercial advertising which relies on celebrity fame is different from other forms of expressive activity

White, 971 F.2d at 1401 n.3.

In *Current Audio*, Elvis Pressley's record company sued a "mixed-medium" publisher who sold a magazine that talked about popular musicians and included a recording of snippets of an Elvis press conference. The magazine also used photographs of Elvis. The record company argued that the magazine was merely a "commodity" for sale, which was trying to make money by trading on Elvis' image. The court, however, rejected that argument, finding that the right to freely communicate about public personalities outweighs any single person's right of publicity. *Current Audio*, 337 N.Y.S.2d at 956. The court noted that the magazine was not trying to "palm off" its product or the recording as one of Elvis performing. The court observed that the magazine included stories about many

personalities, not merely Elvis, which helped show that there was no deception regarding the source or sponsorship of the product. *Id.*

Current Audio is particularly instructive in the present case. Rick Rush's paintings are not marketed as anything other than Rick Rush paintings. There is no effort to "palm off" the paintings as being authorized by any athlete. Perhaps more importantly, his paintings are not of any one particular athlete, but of many, in various points in sports history, expressing numerous events in our history in which people have taken an interest. The First Amendment allows this type of expressive work and supercedes any pecuniary interest of any celebrity who may be a subject of such artwork. *Current Audio*, 337 N.Y.S.2d at 956.

An Ohio appellate court case addressed a similar issue. In *Vinci v. American Can Co.*, 591 N.E.2d 793 (Ohio App. 1990), several former Olympic athletes sued the maker of "dixie" cups who used images of such athletes along with information about their place in Olympic history on a series of disposable cups. The court found in favor of the defendants, ruling that the right of publicity was not applicable because the cups contained merely historical information, which included the likeness of the athlete. Preventing the reproduction and distribution of historical information was not the intent of the right of publicity. *Vinci*, 591 N.E.2d at 794.

Finally, this Court should reject ETW's theory of "implicit endorsement," as

it is insufficient to invalidate the First Amendment. Proof Brief of Plaintiff-Appellant, July 3, 2000, p. 39. Plaintiffs in other cases have argued that the public might think that a celebrity has endorsed an expressive use, even when there is no endorsement, any time the celebrity's name or image is used. However, courts have correctly noted that the risk that *some* people might be confused is not a legitimate reason to invalidate the freedom of expression. *New Kids on the Block v. Gannett Satellite Information Network, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990); *Parks, supra*, 76 F. Supp. 2d at 784 (even though some people may have been confused as to whether Parks endorsed a song with her name as the title, the album was clearly labeled as a product of the band "Outkast" and not as a product of Parks; thus, there is no fraud on the consumer, and the First Amendment outweighs any potential concern for confusion).

In *New Kids*, the plaintiffs, a singing group, objected to a newspaper's "900" telephone number that allowed readers to call and "vote" for their favorite member of the musical group. The plaintiffs argued that some people would incorrectly think that the band endorsed the poll. However, the court concluded that the risk that a few people might be confused is outweighed by the interest in protecting First Amendment rights. *New Kids*, 745 F. Supp. at 1545. The court also rejected the argument that the defendants should have attempted to use "alternative avenues

of communication." The plaintiffs attempted to argue that "communication" was protected by the First Amendment, but "remuneration" was not. Thus, the plaintiffs contended, people are free to discuss which member of the band was their favorite, but they cannot make a profit in doing so. The court rejected such theory, finding that such a standard did not "sufficiently accommodate the public's interest in free expression." *New Kids*, 745 F. Supp. at 1544. *See also, id.* at 1546 ("First Amendment protection does not hinge upon whether or not an activity is profitable or unprofitable").

II. A broad right of publicity would raise serious constitutional concerns by requiring courts to judge the artistic merit of the use of a celebrity's image.

Interpreting the right of publicity to protect all uses of a celebrity image except for narrow exceptions for newsgathering and biographies would require judges to evaluate the artistic or literary merit of a work. Courts have uniformly rejected such arguments, noting that they should judge neither the medium used nor the merit of the work.

Over time, the courts have recognized that the form of expression is of no relevance. Art is protected, just as books are protected. *Paulsen, supra*, 299 N.Y.S.2d at 506 (First Amendment covers all forms of written word or pictures,

including posters and handbills); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (paintings, music and poetry are unquestionable shielded by the First Amendment). Considering that a celebrity's right of publicity cannot be used to prevent the publication of truthful facts or stories about that celebrity,⁶ it is unimaginable why a visual portrayal would be improper. Clearly, the illustration at issue in this case would be unobjectionable if it were used to illustrate a book chronicling Woods' life.⁷ Woods cannot ask this Court for relief merely because the medium chosen by the artist, Rick Rush, is a painting rather than a book. The First Amendment makes no such distinction and neither should this Court.

Furthermore, the "merit" of the work should not be questioned. ETW has argued that the "right of publicity" contains only a narrow exception for things that are "newsworthy." But such a standard would clearly be problematic. A broad right of publicity with a narrow exception for "newsworthiness" would put judges in the position of deciding whether a use was sufficiently creative or newsworthy to be

⁶ *Rosemont Enter., Inc. v. Random House, Inc.*, 294 N.Y.S. 2d 122 (NY App. 1968); *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed. 2d 456 (1967).

⁷ ETW acknowledges that books about a celebrity are an acceptable use of a celebrity's image. Proof Brief of Plaintiff-Appellant, p. 24.

permitted. This would put judges in the role of editor, which would chill speech and expression.

It has been recognized that the First Amendment covers more than strict "news." The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general.

Paulsen, supra, 299 N.Y.S.2d at 506. It therefore does not matter whether an expressive work is "social criticism or pure entertainment;" an expressive work is constitutionally protected and deserving of substantial freedom. *Id. See also, Ann-Margret*, 498 F. Supp. at 405.⁸ The court in *Parks* also agreed that it would be improper to judge the creativity or social usefulness of any particular use:

If this analysis [whether a work is legitimate news or social criticism as opposed to mere entertainment] were used to determine whether an expression is entitled to constitutional protection, grave harm would result.

⁸ The *Ann-Margret* case is in stark contrast to *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999), where the judge ruled that a magazine's use of photos of Dustin Hoffman violated his right to publicity. In *Hoffman*, a magazine decided to use famous images from old movies and "update" them by portraying the actors in modern fashions through the use of computer manipulation. The article was called "Grand Illusions" and stated, "by using state-of-the-art digital magic, we clothed some of cinema's most enduring icons in fashions by the hottest designers."

In *Hoffman*, the image used did not represent a moment in history. An older photograph was updated with modern fashions. The judge in that case felt that such a use was not sufficiently creative and could lead a reader to falsely believe that Hoffman endorsed the clothing shown in the magazine. In the present case, the artwork at issue is a honest and truthful visual expression of a moment in history, without any false, implied "endorsements." Although the artist used the "Nike" logo on Woods' hat in the drawing, it is an honest representation, as Woods does endorse Nike sportswear and wear such a hat.

Courts would be required not merely to determine whether there is some minimal relationship between the expressions and the celebrity, but to compel the author to justify the use of the celebrity's identity. . . . Such a course would inevitably chill the exercise of free speech limiting not only the manner and form of expression but the interchange of ideas as well.

Parks v. LaFace Records, 76 F. Supp. 2d 775, 777 (E.D. Mich. 1999) (quoting *Gugliemi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 462 (Cal. 1979)).

The courts should not, then, be forced to choose which forms of expression are acceptable and which are not. "It is not for this or any court to pass value judgments predicated upon ephemeral subjective considerations which would serve to stifle free expression." *Paulsen*, 299 N.Y.S.2d 501, 507 (NY App. 1968). See also, *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) ("it is not for the courts to decide what matters are of interest to the public"). *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828 (NY App. 1980) (it is not for a court to pass judgment on the merit of a literary work; as long as the work is not a "disguised commercial advertisement," the freedom of expression bars any application of a right of publicity); *Parks, supra*, 76 F. Supp. 2d at 780-81 ("It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases").

Further, it is not for the celebrity to decide which uses of his name or image

are acceptable and which should be punished. Once a person enters the spotlight, he or she may be the subject of expressive works. As one court has noted, "the fact that she does not like either the manner in which she is portrayed . . . or the medium in which her picture is reproduced . . . do[es] not expand her rights or create any cause of action under [the right of publicity]." *Ann-Margret, supra*, 498 F. Supp. at 405-06. Accord, *Parks, supra*, 76 F. Supp. 2d at 782 (although Rosa Parks did not want her name associated with music that, in her opinion, contained "profanity, racial slurs, and derogatory language directed at women," she had no valid claim where the First Amendment protected the musicians' right of free expression); *Rosemont Enter. Inc., supra*, 294 N.Y.S.2d at 128 (Howard Hughes had no right to control a book about his life).

Individuals should be permitted to express their impressions or ideas about a celebrity freely, without fear of being censored merely because the celebrity has enough status and money to silence the individual. As one court has noted, "the First Amendment . . . would be a poor refuge for free expression if public figures could censor the use of their names whenever they found the speech to be distasteful." *Parks, supra*, 76 F. Supp. 2d at 782.

III. A broad right of publicity would raise serious constitutional concerns

because the "permissible" use of an image would be too vague.

ETW would not deny that Tiger Woods' exploits are newsworthy, and certainly would not object to newspaper coverage. The company also does not dispute that such use is allowed, even though newspapers charge for their product. Its objection, therefore, is one of degree of use. If ETW prevails, those who engage in expressive conduct about clearly newsworthy activities in a medium that is sold to the public would be left wondering whether and when their work is stripped of its constitutional protection. Such vagueness in a rule that implicates speech would render its application unconstitutional. *Smith v. California*, 361 U.S. 147, 151, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1959) ("This court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982) ("Perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech . . . , a more stringent vagueness test should apply.")

The broad right of publicity advocated by ETW makes no sense when

applied in the real world. It makes no sense to allow a picture of a celebrity to be used only if there is some biographical news story attached to it, but not in other creative contexts.

For example, suppose a photographer at the Masters photographed Tiger Woods playing golf. According to ETW, the photographer could, without consequence, sell that photograph to the New York Times to accompany a news story announcing that Woods won the tournament. Possibly, ETW might allow the photographer to post that photograph on a web page, announcing "Tiger Woods wins the Masters." But ETW would apparently object to the photographer putting that same photograph in a gallery and selling it as art. Clearly, ETW would object if the photographer made copies of his photograph (in which the photographer owns a copyright and, under copyright law, has the right to copy and distribute) and offered them for sale. Why would it be acceptable for the photographer to make a profit if he sells the photograph to the New York Times, but unacceptable if he sells the photograph to any person who just appreciates the quality of the photograph?

Similar issues are raised by the use of cartoons. Chip Bok has made a career lampooning events in our nation's history for the *Akron Beacon Journal*. Most of his cartoons appear as "editorial cartoons" on the pages of our nation's finest

newspapers, and while they may distress their subjects, they are widely regarded as proper forms of expression under the First Amendment. Suppose, however, that Bok decided to compile all cartoons he has drawn of any given person, place them in chronological order on a large poster, and sell that poster for his own profit. Suppose that Bok uses an enlarged image of one of his drawings of that person as a "centerpiece" for the poster, to specify that all cartoons center around the idea of that person. Would such a poster be protected by the First Amendment or would the subject of the cartoons be permitted to censor it in the name of "publicity?"

Drawing artificial distinctions between one expressive use and another serves no purpose other than further lining the coffers of already wealthy and powerful celebrities. It would create confusion among the press, the media and artists of all types in determining whether any given use would be acceptable, which would chill expression for fear of being sued. Courts have rightfully held that the very nature of celebrity invites public comment or the expression of thoughts. The First Amendment rights of free expression should not be subordinated to a celebrity's pecuniary interests. This Court should uphold that tradition of protecting free expression.

CONCLUSION

Due to the primacy of the First Amendment, the right of publicity must be narrowly construed. Publicity rights should apply only to those areas that are not protected by the First Amendment; namely, false and misleading advertisements that improperly use a celebrity's name, image or likeness to endorse a product or idea. In all other contexts, the constitutionally protected rights of free speech and expression must be given greater weight. This Court should therefore affirm the decision of the District Court.

Respectfully submitted,

Lucy A. Dalglish
Counsel of Record
The Reporters Committee for
Freedom of the Press
1815 N. Fort Myer Dr., Suite 900
Arlington, VA 22209
(703) 807-2100

Of counsel:

Gregg P. Leslie
Ashley Gauthier
The Reporters Committee for Freedom of the Press
1815 N. Fort Myer Dr., Suite 900
Arlington, VA 22209
(703) 807-2100

Bruce W. Sanford, Esq.
Robert D. Lystad, Esq.
Bruce D. Brown, Esq.
Baker & Hostetler LLP
1050 Connecticut Avenue NW, Suite 1100
Washington, DC 20036
(202) 861-1500
Counsel for Society of Professional Journalists

CERTIFICATE OF COMPLIANCE

Counsel of record for amici curiae certifies that this brief complies with the type-volume limitation specified in Rule 32(a)(7)(B). It is written in 14-point Times New Roman, and contains 5,610 words.

Lucy A. Dalglish
Counsel of Record for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 23st day of August, 2000, copies of the foregoing Brief Amici Curiae were sent via First Class U.S. Mail, to the parties listed below.

Lucy A. Dalglish
Counsel of Record for *Amici Curiae*

Terence J. Clark, Esq.
Thomas G. Kovach, Esq.
SQUIRE, SANDERS & DEMPSEY, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Attorneys for Plaintiff-Appellant ETW Corp.

Dennis J. Niermann, Esq.
4070 Mayfield Rd.
Cleveland, Ohio 44121-3031
Attorney for Defendant-Appellee Jireh Publishing, Inc.

Mark S. Lee, Esq.
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Boulevard
Los Angeles, California CA 90064
Attorneys for *Amici Curiae* Elvis Presley Enterprises, Inc.;
The Autry Survivors' Trust; Sheffield Enterprises, Inc.;
Wayne Enterprises, LLP; Experience Hendrix, Inc.;
Arnold Palmer Enterprises, Inc.; Jonesheirs, Inc.
and Global Icons, Inc.

continued on next page

Bruce S. Meyer, Esq.
Lynda M. Braun, Esq.
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10152
Attorneys for *Amici Curiae* National Football League Players
Association and National Football League Players Incorporated

Leo Geffner, Esq.
Joseph A. Kohanski, Esq.
GEFFNER & BUSH
A Law Corporation
3500 West Olive Avenue, Suite 1100
Burbank, California 91505
Attorneys for *Amicus Curiae*
Screen Actors Guild, Inc.

Russell S. Jones, Jr., Esq.
SHUGHART THOMPSON & KILROY, P.C.
120 West 12th Street
Kansas City, Missouri 64105
Attorneys for *Amicus Curiae*
Major League Baseball Players Association

Adam Liptak
THE NEW YORK TIMES COMPANY LEGAL DEPARTMENT
229 West 43d Street
New York, New York 10036
Attorney for *Amicus Curiae*
The New York Times Company

Diane Leenheer Zimmerman, Esq.
40 Washington Square South, Room 322
New York, New York 10012
Attorney for *Amicus Curiae*
Law Professors