NEW TECHNOLOGIES ON THE BLOCK: *NEW KIDS ON THE BLOCK v. NEWS AMERICA PUBLISHING, INC.*

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[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.

—Justice White, *Red Lion Broadcasting Co. v. FCC.*[1]

Pretty soon, concerts will disappear because bands will just phone in their gigs.

—Ozzy Osbourne.[2]

I. INTRODUCTION

The New Kids on the Block (the "New Kids") is an extraordinarily successful musical group that emerged on the scene in 1988. Since then, the group has generated more money from licensing its name to merchandising ventures than from record sales.[3] The more than 500 New Kids items on the market range from dolls and posters to clothing and television shows.[4] In addition, the New Kids operate several pay-per-call telephone services. Their fans pay a fee for calling a "900"-prefix line to learn New Kids trivia, hear personal messages from group members and order merchandise. Of the many pay-per-call services recently established by artists and athletes, the New Kids' lines are

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1 395 U.S. 367, 386 (1969) (upholding a provision of the FCC's "fairness doctrine" that required radio and television broadcasters to provide free reply time to the victim of a personal attack).

2 Deane Stillman, *Heavy-Metal Mania: It's More Than Music*, N.Y. TIMES, May 12, 1991, § 2, at 1, 28.

3 The New Kids have sold more than 22.5 million records and generated $400 million in merchandise sales. Larry Rohter, *Pop Music Fashion Becomes a Sales Hit*, N.Y. TIMES, Jan. 8, 1991, at D1. *See also New Kids Sales Soar to $1 Billion*, BUS. WIRE, November 6, 1990, *available in* LEXIS, Nexis Library, BWIRE File (sales break down to 80 percent merchandise, 15 percent concert ticket sales and 5 percent actual music products).

4 John Leland, *When Kids 'R' Culture*, NEWSDAY, July 15, 1990, Part II, at 4, 5. Other New Kids merchandising items include bubblegum cards, sports bottles and school notebooks. Rohter, *supra* note 3, at D9.

among the most successful.[5]

Since the mid-1980s, print and broadcast media outlets have also increasingly used pay-per-call lines[6] for marketing and research purposes, especially in connection with the entertainment industry.[7] *Spin*, *The Village Voice*, *Spy* and *Entertainment Weekly* have 900 lines that let callers preview new music.[8] *Star* offers a 900 line game on entertainment trivia. Many newspapers and television stations use these lines to poll the public's opinion on various celebrities.

This growing competition from the news media threatens the success of 900 lines as a merchandising venture for performers. The media can use a performer's name to lure callers to their own 900 lines. The outcome of a recent Ninth Circuit case, *New Kids on the Block v. News America Publishing*,[9] indicates that when performers and the news media compete in this market, the courts will grant the media First Amendment protection. Since performers cannot control all the lucrative 900 lines that exploit their popularity, performers will need to offer unique audiotex services in order to ensure continuing profit.

The *New Kids* case involved the use of 900 lines by both *USA Today* and *Star* Magazine to conduct surveys to determine "which kid is the sexiest?" and "[w]ho's the Best on the Block?".[10] In addition, when readers called *Star*'s survey, they heard an advertisement for "Star Magazine's Entertainment Trivia Game," a separate 900 line. The New Kids objected to these 900 lines and sued *USA Today* and *Star*, alleging trademark infringement and misappropriation of publicity rights.[11] In September 1990, the

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[5] The New Kids have operated their 900 lines since March 1989. As of July 1990, over 4,700,000 calls had been made to their 900 lines. Appellant's Opening Brief at 5, New Kids on the Block v. News America Publishing, Inc., (9th Cir. 1991) (Nos. 90-56219 & 90-56258). One of their lines

> averages 100,000 calls a week, at $2 for the first minute, 45 cents [for] each additional minute. Each day an answering service plays a different personal message from the New Kids to their fans. Many groups have these 900 numbers. The most popular . . . are aimed at young audiences. . . . In the multimedia '90s, these 900 numbers, more than chart positions, may be the best indicators of an act's true juice.

Leland, *supra* note 4, at 5.

[6] These telephone information services are also known as "audiotex, voice mail or interactive publishing." Randall Rothenberg, *Newspapers and Magazines Dial 900 for New Revenues*, N.Y. TIMES, Apr. 22, 1991, at D1. It is interesting to note that since this industry is in a relatively early stage of its development, the term "audiotex" (or "audiotext") has no consistent spelling.

[7] *Id. See infra* text accompanying notes 69-77.

[8] SPIN, Nov. 1991, at 122-23; VILLAGE VOICE, Jan. 7, 1992, at 102-03.

[9] 745 F. Supp. 1540 (C.D. Cal. 1990).

[10] *Id.* at 1542.

[11] *Id.* at 1542-43.

trial court ruled in favor of the newspapers,[12] holding that the First Amendment protected the surveys because they were related to news gathering and publishing.[13] The New Kids are currently appealing the district court's decision.[14]

The trial court's conclusion was justified in part, since it considered 900 lines to be tools for journalism rather than merchandising and consequently granted them the same protection as other journalistic endeavors. Yet several issues merit further consideration. The court did not consider the extent to which a pay-per-call survey was an unusually inaccurate or profit-motivated research tool. Moreover, the court did not address whether publications' 900 lines competed with or economically harmed the New Kids' authorized 900 lines in a market that the New Kids had already established. The court did not discuss whether the First Amendment protected *Star*'s use of its survey to advertise its separate trivia game.[15] Finally, the court proposed an unnecessarily broad test to determine whether a 900 line merits First Amendment protection.

In general, the court did not acknowledge the extent to which this case differed from previous disputes between performers and the news media. By using 900 lines, the defendants profited from a commercial enterprise that was distinguishable from their traditional business of publishing and selling news.

This Article reviews the *New Kids* decision and explores the extent to which the news media may rely on First Amendment protection in operating their pay-per-call services. The right of publicity is given specific attention since it is still a developing area of the law. Part II of this Article discusses the background of the case including the tension between the right of publicity and the First Amendment. Trade practices of the audiotex industry

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[12] *Id.* at 1540.

[13] *Id.* at 1545-46.

[14] Appellant's Opening Brief at 5, *New Kids* (Nos. 90-56219, 56258). The Ninth Circuit heard the appeal on December 4, 1991. Telephone Interview with Joseph Williams, Deputy Clerk, 9th Cir. (Dec. 31, 1991).

[15] An independent issue is whether *Star*'s trivia game itself, if it included a question concerning the New Kids, infringed upon the New Kids' right of publicity. The New Kids did not raise this claim, perhaps in order to focus exclusively on the 900 line surveys in their pursuit of immediate injunctions against the surveys. This issue of the trivia game is not precluded from being litigated in the future. For a discussion of the issue of *Star*'s trivia game, see *infra* notes 165-76 and accompanying text.

The issue of the trivia game is relevant to this case, since an advertisement for an unlawful transaction is not entitled to First Amendment protection. *See infra* note 40 and accompanying text. If *Star*'s trivia game infringed upon the New Kids' publicity rights, then *Star*'s promotion of the game should have been enjoined. This issue is analyzed *infra* text accompanying notes 170-74.

are also reviewed. Part III delineates the district court's reasoning in *New Kids*. Part IV sets forth a critical analysis of that decision, exploring the issues from both a doctrinal and policy perspective and proposes alternative arguments that were not raised or addressed. Part V examines the impact of *New Kids* on both the audiotex industry and performers' licensing ventures. Finally, this Article concludes that while the court's decision in *New Kids* is justified in part, the First Amendment should not be extended to protect all audiotex services operated by the news media.

II. Background

A. *The Right of Publicity and the First Amendment*

The *New Kids* decision underscores the tension between the protection offered to celebrities under the evolving right of publicity and the deep-rooted protection of the news media under the First Amendment. Before analyzing this specific case, it is helpful to review both doctrines, as well as the Supreme Court's analysis of their interaction in *Zacchini v. Howard-Scripps.*[16]

1. The Right of Publicity

The right of publicity evolved from the "appropriation" branch of the right to privacy.[17] It protects a person's proprietary interest in his public identity—particularly, his right to benefit from his celebrity status.[18] In essence, the right of publicity protects a performer's exclusive right to sell the use of his name and likeness for commercial purposes.[19] Performers have successfully asserted right of publicity claims against defendants whose advertisements exploited the performers' identities in order to sell a product.[20]

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16 433 U.S. 562. For a discussion of this case, see *infra* text accompanying notes 54-64.

17 *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 117, at 851-52 (5th ed. 1984); William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 401-407 (1960). In contrast to the right of publicity, which protects pecuniary interests in preventing the unauthorized exploitation of one's celebrity status, the right to privacy protects personal interests, such as preventing the emotional harm and injury to feelings caused by unwanted publicity. *Id.* at 392.

18 The right was first expressly recognized in Haelan Lab. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). The right of publicity continues to evolve and is discussed in many cases. *See generally* J. Thomas McCarthy, The Rights of Publicity and Privacy (1987).

19 Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979) (Bird, J., dissenting).

20 *See, e.g.*, *Zacchini*, 433 U.S. at 562 ; Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974). The right of publicity should not be confused with the claim of unfair competition under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which

The right of publicity is state-created and may be governed by statute,[21] common law[22] or both. In California, where *New Kids* was decided, the right is found in both statutory[23] and common law.[24] The statute provides that:

> [a]ny person who knowingly uses another's name, . . . photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.[25]

2. First Amendment Protection of News and Commercial Speech

A primary rationale offered for the guarantee of freedom of the press emphasizes the necessity of providing members of a democratic society with sufficient information to exercise fully their political rights.[26] Following this rationale, some scholars suggest that politically-related news receives the most protection because such information is at the very "core" of the speech that the First Amendment was intended to protect.[27] Yet general, non-political information concerning public affairs, such as en-

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may also be alleged by a celebrity-plaintiff. The test for unfair competition is whether a defendant's advertisement has led consumers to believe that the plaintiff endorses the product being advertised. In contrast, the test for infringement of the right of publicity is whether the defendant has used an element of the celebrity's persona, such as his voice, name or likeness. *See* Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985) (actor's claim against look-a-like models).

[21] New York's right of publicity is embodied in the state's privacy statute. N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976 & Supp. 1991). The most important cases involving the right of publicity have been decided in New York and California. For a discussion of California's right of publicity, see *infra* text accompanying notes 23-25.

[22] *See* Restatement (Second) of Torts § 652C (1977).

[23] Cal. Civ. Code § 3344 (West 1982 & Supp. 1991). For a comparison of New York's and California's approach to the right of publicity, see Elaine Windholz, Comment, *Whose Voice is it Anyway?: Midler v. Ford Motor Co.*, 8 Cardozo Arts & Ent. L.J. 201, 208-13 (1989).

[24] *E.g.*, Eastwood v. Superior Court, 198 Cal. Rptr. 342, 346-47 (Cal. App. Dep't Super. Ct. 1983) (California has long recognized a common law claim for commercial appropriation, which does not need to give the appearance of an endorsement of the product or service in question).

[25] Cal. Civ. Code § 3344(a).

[26] New York Times v. Sullivan, 376 U.S. 254, 269-70 (1964) (in a libel action, the First Amendment immunizes a newspaper from liability for honest mistakes of fact concerning official conduct). *See generally* Thomas Irwin Emerson, The System of Freedom of Expression 6-7 (1970) (discussing the main premises underlying the system of free expression).

[27] Gerald Gunther, Constitutional Law 974 (11th ed. 1987); Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 26-28 (1971).

tertainment-related news, also enjoys First Amendment protection.[28] One reason is that there is a strong societal interest in facilitating access to information that enables people to discuss and understand contemporary issues.[29] A second reason is that courts are reluctant to decide "what is and what is not news,"[30] given the "elusive" nature of this distinction.[31] Nevertheless, entertainment news may not receive the same constitutional protection as news on government, defense or economics.[32] The public interest concerns underlying the First Amendment are generally less urgent regarding entertainment news than political news.[33]

Commercial speech traditionally receives less protection than any form of news-related speech.[34] Commercial speech has

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[28] Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("[T]he opening of a new play linked to an actual incident, is a matter of public interest."); Stephano v. News Group Publications, Inc., 64 N.Y.2d 174, 184, 485 N.Y.S.2d 220, 225, 474 N.E.2d 580, 585 (1984) (the newsworthiness exception to the right of publicity applies to articles of consumer interest, including events in the fashion industry); Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 459 (Cal. 1979) (holding that entertainment is entitled to constitutional protection "irrespective of its contribution"). This point concerns only entertainment-related news and should not be confused with the separate rule that the First Amendment protects the actual entertainment, such as films, fiction and works of literature. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977); Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 38 n.6 (Cal. 1971); Weaver v. Jordan, 411 P.2d 289 (Cal.), *cert denied*, 385 U.S. 844 (1966).

[29] *Time*, 385 U.S. at 388 (citing Thornhill v. Alabama, 310 U.S. 88, 102 (1940)). *See generally Zacchini*, 433 U.S. at 578; Winters v. State of New York, 333 U.S. 507, 510 (1948). *See also* Alexander Meiklejohn, The *First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57 ("[T]he choices we make when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomenon that surround us."); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 789 (1985)(an announcement of the bankruptcy of a local company is a matter of public concern and should, therefore, "receive First Amendment protection from the chilling potential of unrestrained presumed and punitive damages in defamation actions") (Brennan, J., dissenting).

[30] Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 561 (1985) (citation omitted) (instead of focusing on what constitutes "news," the Supreme Court noted that news reporting that intends to exploit the value of information gathered weighs against a finding of fair use).

[31] Winters v. New York, 333 U.S. 507, 510 (1948) (magazines of little value to society entitled to the same protection as well-regarded literature).

[32] "The difference is that the news about the Senator is information directly relevant to a voter in deciding issues of public importance, while the news about the movie star is probably 'politically' irrelevant, although it may be a moral object lesson in the uses and abuses of fame and wealth." MCCARTHY, *supra* note 18, § 8.2[B], at 8-13.

[33] Time, Inc. v. Firestone, 424 U.S. 448, 454-57 (1976)(distinguishing between news about public figures and news that is merely of interest to the public on the grounds that the latter "add[s] almost nothing toward advancing the uninhibited debate on public issues").

[34] *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) ("[T]he Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression."). *See also* Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978) ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.").

For earlier cases that deny any First Amendment protection for purely commercial speech, see Breard v. Alexandria, 341 U.S. 622 (1951) (upholding a ban on door-to-

been referred to as speech that "propose[s] a commercial transaction,"[35] such as an advertisement or a solicitation to buy a product. One reason given for this lesser protection is that it "does [not] contribute to political decisionmaking in a representative democracy."[36] A second reason holds that commercial speech is more durable because it is driven by economic incentives.[37]

A law that restrains commercial speech is valid if it furthers a "substantial" government interest and if the means used directly advance that interest.[38] Under this lower standard, commercial speech is not entitled to many of the protections that are applicable to other forms of expression. For example, a law regulating commercial speech cannot be invalidated because it is overbroad.[39] Similarly, an advertisement for an unlawful transaction is not protected.[40]

When news and commercial speech are combined, it becomes more difficult to determine what level of protection this hybrid speech should be accorded. For example, an advertiser may include news in an advertisement in order to make the message more persuasive and claim that this mixed speech is actually news, thereby entitling it to greater protection. The courts recognize the ease with which parties may seek to disguise commercial speech as news, and are therefore reluctant to character-

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door solicitation of magazines); Valentine v. Chrestensen, 316 U.S. 52 (1942) (affirming a ban on the distribution of advertising handbills in the street).

[35] Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relation Comm'n, 413 U.S. 376, 385 (1973)) (speech that does "no more than propose a commercial transaction" is not disqualified from First Amendment protection).

[36] Thomas H. Jackson & John Calvin Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 25 (1979).

[37] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 557 n.6 (1980) (invalidating a regulation that completely banned promotional advertising by an electrical utility).

[38] *Id.* at 566. The Court set forth the following four-part test. First, in order to receive protection, the expression must concern lawful activity and not be misleading. Second, the asserted governmental interest must be substantial. Third, if the first two inquiries yield affirmative answers, then the court must ask whether the regulation directly advances the governmental interest. Fourth, if the governmental interest can be sufficiently served by a more limited restriction on the speech, then the restriction fails. *Id.*

[39] Bates v. State Bar, 433 U.S. 350, 380 (1977) ("[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context."). *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1104 (1st ed. 1986).

[40] Hoffman Estates v. Flipside, 455 U.S. 489, 496 (1982) ("[commercial] speech proposing an illegal transaction" may be regulated or banned entirely); Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n, 413 U.S. 376, 388 (1973) (upholding a city ordinance that prohibited newspapers from displaying sex-designated employment advertisements).

ize the resultant combination as news.[41] The courts employ a "primary nature of the use" test to examine whether the combination of various factors provides strong support for a determination that the mixed speech is commercial.[42] These factors include: (1) the context of the speech; (2) whether the speech appears in a paid-for advertisement; (3) whether the speech promotes the purchase of a specific brand of a product; and (4) whether the speaker is in the business of selling this product.[43] Approached individually, none of these factors is determinative. For example, the mere fact that newspapers are sold for a profit does not subject them to a lower level of First Amendment protection.[44] Similarly, the fact that speech appears in an advertisement does not automatically cause it to be classified as commercial speech.[45]

3. Performers' Right of Publicity Claims Against the Media: An Analysis of *Zacchini v. Scripps-Howard Broadcasting*

In order to accommodate freedom of the press[46] the courts narrowly limit the right of publicity. The concern over the media's freedom to disseminate news without undue restriction is often held to outweigh the right of publicity.[47] Providing First Amendment immunity ensures the media that reporting on public persons is not "subject to censorship under the guise" of protecting the publicity value of a person's identity.[48] In addition, First Amendment immunity effectively limits the right of public-

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[41] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67-68 (1983) (characterizing as commercial speech a pamphlet published by a contraceptive manufacturer, even though the pamphlet discussed public health issues such as venereal disease and family planning); *Central Hudson*, 447 U.S. at 563 n.5 ("advertising that links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech).

Courts have found it difficult to draw an exact line between commercial speech and news. *See, e.g.*, R.J. Reynolds Tobacco Co., 5 TRADE REG. REP. (CCH) ¶ 22,522 (April 11, 1988).

[42] *See generally* MCCARTHY, *supra* note 18, § 8.11[B], at 8-82.

[43] *Bolger*, 463 U.S. at 66-67.

[44] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 459-60 (Cal. 1979).

[45] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 265-66 (1964) (political advertising is not commercial speech).

[46] *See, e.g.*, Ann-Margret v. High Soc'y Magazine, 498 F. Supp. 401 (S.D.N.Y. 1980) (the First Amendment protects a magazine from a misappropriation claim based upon the publication of a nude photograph); Stephano v. News Group Publications, Inc., 485 N.Y.S.2d 220, 474 N.E.2d 580 (1984) (the newsworthiness exception protects *New York* magazine's publication of a model's picture).

[47] *Guglielmi*, 603 P.2d at 454.

[48] *Id.* at 454-60. In *Guglielmi*, an heir of actor Rudolph Valentino sued the producers of a film that was a fictionalized version of Valentino's life. *Id.* at 455. The California Supreme Court held that the right of publicity bars the unauthorized use of one's name

ity, which, unlike a trademark infringement claim under the Lanham Act,[49] does not require a likelihood of consumer confusion.[50]

This broad exception for the news media is incorporated into California's right of publicity statute, which expressly permits the "use of a name, . . . photograph, or likeness in connection with any news, public affairs, or sports broadcast or account" without the consent of the individual concerned.[51] Other states that recognize the right of publicity also grant similar exceptions for uses in "publications concerning newsworthy events or matters of public interest."[52] Despite these First Amendment concerns, however, performers often prevail in right of publicity claims against the media.[53]

The United States Supreme Court has considered a performer's right of publicity claim against the news media in only one case: *Zacchini v. Scripps-Howard Broadcasting Co.*[54] In that case, the plaintiff's "human cannonball" act was filmed in its entirety and broadcasted on a television news program in Ohio, all without the plaintiff's consent. Zacchini sued the station, seeking damages for the " 'unlawful appropriation of "his" professional property.' "[55] The Ohio Supreme Court recognized that Zacchini had a right to prevent others from exploiting the publicity value of his performance, but held that the station's broadcast was protected because the event was a matter of public interest.[56]

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or likeness, but the right is not descendible and expires upon the death of that person. Id.

[49] 15 U.S.C. § 1125(a) (1988).

[50] Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989). The *Rogers* court noted that the right of publicity is potentially more expansive than the more restrictive Lanham Act, which requires the likeliness of consumer confusion. Therefore, the court reasoned that it may be necessary to limit the right of publicity in order to accommodate First Amendment concerns. *Id.* (citation omitted).

[51] CAL. CIV. CODE § 3344(d) (West 1982 & Supp. 1991).

[52] *See, e.g.*, Stephano v. News Group Publications, Inc., 64 N.Y.2d 174, 184, 485 N.Y.S.2d 220, 224, 474 N.E.2d 580, 584-88 (1984) (the newsworthiness exception in N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1984) protected *New York* magazine's publication of plaintiff's picture).

[53] *See, e.g.*, Cher v. Forum Int'l Ltd., 692 F.2d 634, 638-39 (9th Cir. 1982) (the First Amendment did not insulate a magazine from liability for infringing on Cher's right of publicity when it falsely advertised that Cher had given it exclusive information not told to a rival magazine); Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983) (magazine which used Clint Eastwood's name, photograph and likeness could not use First Amendment immunity as a defense for its conduct).

[54] 433 U.S. 562 (1977).

[55] *Id.* at 564.

[56] Zacchini v. Scripps-Howard Broadcasting Co., 351 N.E.2d 454 (Ohio 1976). The Ohio court relied on Time Inc. v. Hill, 385 U.S. 374 (1967) in stating the following standard: "[If] the matters reported were of public interest . . . the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report

The United States Supreme Court reversed the decision of the Ohio court and held that the First Amendment did not immunize the media when it broadcasted Zacchini's entire act.[57] It distinguished *Zacchini* from right to privacy cases in which the state's interest is in protecting the reputation of its citizens.[58] By contrast, since Zacchini was a performer, the state's interest was in protecting the proprietary interest in his performance "to encourage such entertainment." This interest is analogous to the goals of patent and copyright law.[59] The Court found that the media's use "pose[d] a substantial threat to the economic value of that performance."[60] The effect of the media's "broadcast of the performance [was] similar to preventing [the] petitioner from charging an admission fee."[61]

The Court listed several rationales for protecting a performer's publicity rights. Most significantly, it recognized the importance of providing economic incentives for performers to create works of interest to the public.[62] A related policy consideration was that the appropriation of a performer's entire act, unlike the mere incidental use of his name, had a more severe effect on his ability to earn a living as an entertainer.[63] Finally, the Court wished to prevent "unjust enrichment by the theft of good will."[64]

The Court's analysis in *Zacchini* has not proven useful in deciding subsequent disputes involving the right of publicity and the First Amendment.[65] Courts tend to limit its application to its unusual set of facts, which concerns the reproduction of a per-

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the performance, but, rather, to appropriate the performance for some other private use." *Zacchini*, 433 U.S. at 570 n.5.

[57] *Zacchini*, 433 U.S. at 578-79.

[58] *Id.* at 578 (citing Time Inc. v. Hill, 385 U.S. 374 (1967)).

[59] *Id.* at 573.

[60] *Id.* at 575.

[61] *Id.* at 575-76. The Court noted that the "economic value [of the plaintiff's act] lies in the 'right of exclusive control over the publicity given to his performance'; if the public can see the act free on television, it will be less willing to pay to see it." *Id.* at 575 (citation omitted).

[62] *Id.* at 576.

[63] *Id.*

[64] *Id.* (quoting Kalven, *Privacy in Tort Law-Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROBS. 326, 331 (1966)).

[65] *See* MARC A. FRANKLIN & DAVID A. ANDERSON, MASS MEDIA LAW 468-69 (4th ed. 1990); MCCARTHY, *supra* note 18, at § 8.4[B][3]. Justice Powell's dissent in *Zacchini* emphasized the following three problems in the Court's decision. First, the majority's ruling provided no clear guidelines for the media, other than the "repeated incantation of a single formula: 'a performer's entire act.' " *Zacchini*, 433 U.S. at 579 (Powell, J., dissenting). Second, the majority's holding would result in media self-censorship. The media would become reluctant to cover newsworthy events, for fear they might be subjected to liability for misappropriation. *Id.* at 580-81. Third, the station's broadcast of Zacchini's act was part of its routine news reporting. *Id.* at 581.

former's entire live act.[66] By contrast, most right of publicity claims target the use of a discrete element of a plaintiff's persona, such as his or her name or likeness.[67] Despite its limitations, *Zacchini* does direct a court to consider the economic harm to a performer, and not merely whether a defendant's use occurred in a context that should be protected, such as the dissemination of news.[68]

B. *The Audiotex Industry*

The audiotex industry, which includes 900 lines, has been increasingly utilized by newspapers as a method of news gathering and providing various services to its readers. It is unclear, however, whether such services, which a newspaper may operate at a profit, should receive the same First Amendment protection as other more traditional methods of news gathering.

The audiotex industry earned $250 million in 1989 and it is growing at such a rapid rate that analysts predict its earnings may reach $2-3 billion by 1992.[69] There are currently over 10,000 programs available through 900 lines.[70] Three common types of pay-per-call programming are "information" lines, "interactive service" lines and "entertainment" lines. Information lines provide various services, including stock reports, news updates, horoscopes and ski conditions. Interactive lines enable callers to participate by "talking back" to the services, which range from legal advice[71] to personal classified advertisements.[72] Entertainment lines allow callers to play trivia games or hear information about popular celebrities. Currently, performers ranging from baseball player Jose Canseco to pop singer Tiffany have licensed their names for pay-per-call systems. Alex Trebek hosts the pay-per-call game show "Phone Jeopardy."[73]

Television networks first employed 900 lines in 1980 in order to poll viewer opinion regarding the perceived winner of the presidential debates.[74] Since then, the media has increasingly utilized 900 lines. *The New York Times* operates a 900 service that

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66 FRANKLIN & ANDERSON, *supra* note 65, at 467.

67 See *supra* notes 19 and 20 and accompanying text.

68 MCCARTHY, *supra* note 18, at § 8.4[B][3].

69 Tom McNichol, *Dialing for Dollars*, WASH. POST, June 24, 1990, Magazine, at W23.

70 Nathan Cobb, *Say Hello to 900*, BOSTON GLOBE, May 26, 1991, Magazine, at 12.

71 *Id.* at 13. In California, Tele-Lawyer Inc. charges $3 per minute to answer "little questions about federal tax law, immigration, copyright and the like." *Id.*

72 Thomas Palmer, *Newspaper Seeking Profit*, BOSTON GLOBE, April 21, 1991, (Business), at 75.

73 Cobb, *supra* note 70, at 12; McNichol, *supra* note 69, at W24.

74 McNichol, *supra* note 69.

provides solutions to its daily crossword puzzles.[75] *The New Republic* has established a 900 line to take readers' letters and opinions.[76] The Cable News Network uses 900 lines to poll viewer opinion. Various magazines have services that allow callers to hear new records by musicians.[77]

The billing schedule for 900 lines is determined to some extent by the rates that phone companies charge audiotex companies. Typically, phone companies bill audiotex companies at flat rates. For example, AT&T, a long-distance carrier, bills services that utilize recorded messages at a rate of thirty cents per minute. There are other costs involved, including the costs of collection, producing the program, as well as installing and maintaining the 900 lines.[78]

III. The *New Kids* Decision

On February 6, 1990, *USA Today* published two articles on the New Kids. Alongside these articles, the newspaper printed the group's logo and announced that it would conduct a 900 line survey, inviting callers to select either a favorite group member or to vote on whether they liked the group at all. *USA Today* charged callers fifty cents per minute to participate in this survey. On February 9, 1990, the newspaper published the results of its survey.[79] *USA Today* later stated that it was donating all profits from its survey to charity.[80] On March 6, 1990, *Star Magazine* published an article on the New Kids. The article asked "which Kid is the sexiest" and listed a 900 line that readers could use to cast their vote. The charge for the call was ninety-five cents per

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75 Rothenberg, *supra* note 6, at D11.

76 Pamela Sebastian, *Business Bulletin: Briefs*, WALL ST. J., Mar. 7, 1991, at A1. *The New Republic* attempted to avoid the appearance of commercialism by announcing that proceeds will be used to fund "internships and other special editorial projects." *Id.*

77 *Entertainment Weekly* started a 900 line that enables readers to hear music selections reviewed in their magazine. Rothenberg, *supra* note 6, at D1. Other music promotion numbers, which are often sponsored by an advertiser, have come under fire by participating artists who did not consent to this use of their music. Typically, the artist's record company provides the 900 line operator with the tape of the music. Recently, four artists asked to have their music withdrawn from Budweiser Band Notes, a promotion that runs in The *Village Voice*, claiming that the arrangement falsely suggests that the artists are endorsing Budweiser. James Ledbetter, *Media Blitz: This Item's for You*, VILLAGE VOICE, Aug. 20, 1991, at 9.

78 Telephone Interview with James Escobar, Senior Account Executive, Advanced Telecom Services (August 20, 1991). Advanced Telecom Services maintains 900 lines for various publications, including *USA Today*, *The Los Angeles Times*, the *Tribune Media Syndicate* and the *United Media Syndicate*.

79 New Kids on the Block v. News Am. Publishing, Inc., 745 F. Supp. 1540, 1542 (C.D. Cal. 1990).

80 USA TODAY, Mar. 22, 1990, at 2B.

minute. When callers dialed this 900 line to vote, they also heard an advertisement for "Star Magazine's entertainment trivia game," a separate 900 line that also charged callers by the minute. *Star* never published the results of its survey because soon after the March 6 publication, the New Kids and the companies that operate the group's official 900 lines filed lawsuits against *USA Today* and *Star*, alleging trademark infringement and misappropriation of publicity rights.[81]

The district court's decision began by stating that the First Amendment issue was determinative. If the First Amendment protected the surveys, then the court would not need to address whether the publications infringed the New Kids' trademark or publicity rights.[82] The court subsequently granted the publications' motion for summary judgment on the ground that the New Kids did not raise a genuine issue of material fact that would deny the surveys' protection under the First Amendment.[83]

A. *Plaintiff's Trademark Infringement Claim*

We begin with an analysis of the New Kids' trademark infringement claim. The New Kids did not challenge the publications' right to conduct their surveys. Rather, they challenged the publications' right to profit from the surveys, and presented their case as one of remuneration, not communication.[84]

The New Kids alleged that since trademarks and publicity rights are property rights,[85] *Lloyd v. Tanner*[86] should apply as the correct test for evaluating property rights in relation to the First Amendment. In *Lloyd*, the Supreme Court held that a plaintiff's property rights may defeat a defendant's claim of First Amendment privilege "where adequate alternative avenues of communication exist[ed]."[87] The *Lloyd* test had been adopted in several cases involving trademarks.[88] The New Kids alleged that the

[81] *New Kids*, 745 F. Supp. at 1542.
[82] *Id.* at 1543.
[83] *Id.* at 1547.
[84] *Id.* at 1543.
[85] *See* Reddy Communications, Inc. v. Environmental Action Found., Inc., 199 U.S.P.Q. (BNA) 630, 634 (D.D.C. 1977) (a nonprofit environmental association had no First Amendment right to use a parody of an electric utility's trademark in a pamphlet that criticized the utility). *See, e.g.*, McCarthy, *supra* note 18, §§ 8.5[A][2], 10.2.
[86] 407 U.S. 551, 567 (1972).
[87] *Id.*
[88] *See* Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 402 (8th Cir. 1987) (a designer had no First Amendment right to use a parody of an insurance company's trademarks "Mutant of Omaha" where other avenues of expression existed); Interbank Card Ass'n v. Simms, 431 F. Supp. 131 (M.D. N.C. 1977) (a religious group could not use a credit card company's trademark in order to convey a religious message where there

publications had other available means to conduct their surveys, including toll-free lines, standard telephone lines and write-in campaigns. These methods would not have constituted a for-profit enterprise that infringed upon the New Kids trademarks.[89]

The publications argued that the court should adopt the balancing test used in *Rogers v. Grimaldi*.[90] In *Rogers*, the Second Circuit specifically rejected the Supreme Court's test in *Lloyd* in the context of artistic expression, because it did not provide sufficient leeway for literary expression.[91] Instead, the Second Circuit focused on whether the media's use of a performer's name was misleading. Under *Rogers*, the Lanham Act would "apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."[92] Therefore, the *Rogers* test would provide First Amendment protection unless the media's use has either no artistic relevance to the work, or has *some* artistic relevance to the work but explicitly misleads the consumer as to the sponsorship or content of the work.[93]

The *New Kids* court adopted the *Rogers* test, based on its finding that the publications were gathering news, an activity that involved the same First Amendment values that were central to the artistic expression in *Rogers*.[94] The court held that the publications' use of the New Kids trademarks was clearly related to the news gathering.[95]

The only remaining issue to be addressed under *Rogers* was whether the publications' use was explicitly misleading as to the content or sponsorship of the work. The New Kids, however, did not allege either such claim. Instead, they claimed that the publications' use *implicitly* represented an endorsement by the New Kids. The court held that the claim of implicit endorsement was not strong enough to outweigh the publications' rights under the

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were alternative ways to express that message); *Reddy Communications*, 199 U.S.P.Q. at 634.

89 *New Kids*, 745 F. Supp. at 1543.

90 875 F.2d 994 (2d Cir. 1989). In *Rogers*, the court found that the title of the film "Ginger and Fred" did not explicitly indicate that actress Ginger Rogers endorsed the film, and thus did not violate the Lanham Act. Furthermore, the title was so closely related to the film's content that it was not a disguised advertisement promoting the sale of goods, and thus did not violate Oregon's publicity law.

91 *Id.* at 999.

92 *Id.*

93 *Id.* at 1005.

94 *New Kids*, 745 F. Supp. at 1544-45.

95 *Id.* at 1545.

First Amendment and granted summary judgment in favor of the defendants.[96]

B. *Plaintiffs' Publicity Rights Claim*

The court's right of publicity analysis was less comprehensive than its analysis of the trademark claims. Rather, the court began by noting that the right of publicity has been increasingly narrowed to conform with freedom of the press. The publications argued that their use of the New Kids' identity was protected unless it was proven to be wholly unrelated to news gathering and dissemination activities. The court adopted this standard and sought to determine whether the publications' use occurred in the context of news gathering or that of "[t]otal commercial exploitation."[97] The court referred to the "purpose of the media's use," but did not actually apply any of the traditionally cited tests.[98] Subsequently, the court concluded that the publications' use of the New Kids' identity was consistent with the publications' ordinary activities of gathering and disseminating news.[99]

The court characterized the publications' use of the New Kids' name as merely "descriptive," and observed that the media may incidentally exploit a performer's identity for commercial purposes in the context of activities protected by the First Amendment, such as news gathering or advertising the sale of a publication.[100] In contrast, the court noted that "[t]otal commercial exploitation is not allowed."[101]

The New Kids argued that the pay-per-call services were collateral commercial enterprises, as distinguished from the daily operations of the publications. The court conceded that this was an "interesting issue," but held that "the fact that the use of the New Kids name was descriptive . . . and not merely commercial exploitation compels the conclusion that the activity is constitutionally protected."[102]

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[96] "The risk that some people might think that the New Kids implicitly endorsed or sponsored [the publications' services] is outweighed by the danger of restricting news gathering and dissemination." *Id.*

[97] *Id.* at 1546.

[98] *Id. See supra* text accompanying notes 42-45; *infra* text accompanying notes 124-35.

[99] *New Kids*, 745 F. Supp. at 1546.

[100] *Id.* at 1546 (quoting Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 462 (1979)). For a synopsis of *Guglielmi*, see *supra* note 48.

[101] *New Kids*, 745 F. Supp. at 1546 (citing Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988)).

[102] *Id.*

The court cited the well-established rule that the fact that newspapers are published for profit does not deprive them of First Amendment protection.[103] Finally, the court distinguished this case from *Zacchini*,[104] finding that the publications' 900 lines did not substantially threaten the value of the New Kids' name.[105] The court concluded that the First Amendment immunized the publications from the right of publicity claims.[106]

IV. An Analysis of *New Kids* and Alternative Arguments

The district court considered and rejected several arguments concerning the New Kids' efforts to enjoin the use of their name in pay-per-call surveys. In addition, several arguments that could have been raised by the New Kids were not, including the first of the arguments discussed below.[107]

First, the New Kids only sought to have the court regulate the publications' *conduct* with respect to the pay-per-call services. Consequently, any resulting restraints on news gathering would be incidental and minimal, thereby triggering only minor First Amendment concerns that would be easily outweighed by the regulatory interests at stake. Second, even if an injunction were to materially burden the news gathering process, it would nonetheless be justifiable because the pay-per-call surveys should have been characterized as commercial speech, entitled to only a low level of First Amendment protection. Third, even if the publications' activities were properly characterized as news gathering, rather than commercial speech, the rule in *Zacchini* should have controlled this case,[108] resulting in restitution. Fourth, even if the pay-per-call polls were fully protected, the other aspect of *Star*'s activity—the use of the survey to promote its separate trivia game—should not have been protected.[109]

In general, all of these arguments rest upon the premise that the district court did not consider the extent to which the publications' activities were severable.[110] The publications conducted surveys and also operated for-profit 900 lines. These are severa-

[103] *Id.* at 1546 (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454 (1979)).

[104] For a discussion of this case, see *supra* text accompanying notes 54-64.

[105] *New Kids*, 745 F. Supp. at 1547.

[106] *Id.*

[107] For a discussion of the second argument that the New Kids could have raised, see *supra* note 14 and accompanying text.

[108] *See supra* text accompanying note 68.

[109] *See supra* notes 26-40 and accompanying text.

[110] *See infra* text accompanying notes 132-33.

ble aspects of the overall activity. The New Kids challenged the legality of the 900 lines and not the surveys themselves.

A. *Content-Neutral Regulation of Conduct*

Under the First Amendment, a law that restricts speech on the basis of its content is subject to strict judicial scrutiny.[111] By contrast, a content-neutral law that regulates conduct yet also indirectly restricts speech is subject to a significantly lower level of scrutiny.[112] In *United States v. O'Brien*,[113] the Supreme Court held that such a law is valid "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[114]

In *O'Brien*, this test was used to determine the constitutionality of a statute that restricted symbolic expression—in that case the burning of a draft card.[115] Since then, the test has been broadly applied to "areas well beyond that of symbolic expression,"[116] as the basis for determining the validity of laws that regulate certain activities, yet also incidentally affect free speech.[117] Under *O'Brien*, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important

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[111] *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (a law prohibiting picketing within 150 feet of a school, except picketing involving labor disputes, is unconstitutional on the grounds that it distinguished between labor picketing and other picketing). *See supra* text accompanying notes 26-27.

[112] *See* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (upholding a statute that enabled residents to stop offensive home mailings); Breard v. Alexandria, 341 U.S. 622 (1951) (upholding a ban on the door-to-door sale of commercial magazines "without prior consent of the owners or occupants").

[113] 391 U.S. 367 (1968).

[114] *Id.* at 377.

[115] *Id.* at 382.

[116] GUNTHER, *supra* note 27, at 1170. *O'Brien* provides the "basis for a two-track theory regarding the strength of justifications necessary to validate governmental restraints." *Id.* The first track of the *O'Brien* test addresses whether the government's interest said to be served by the measure is substantial. Century Communications Corp. v. FCC, 835 F.2d 292, 298 (D.C. Cir. 1987) *cert. denied*, 486 U.S. 1032 (1988). The second track focuses on the relationship between the means chosen by the government and the end it seeks to achieve. *Id.* at 299.

[117] An *O'Brien* analysis is used in several cases involving the cable television industry. *See* Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1548 (7th Cir. 1989) (citation omitted) (upholding a provision in a franchise agreement that required cable companies to broadcast four and one-half hours per week of local programming geared to Chicago); *Century*, 835 F.2d at 304 (FCC "must-carry" rules are not necessary to advance a substantial government interest under an *O'Brien* analysis). *See also* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) (invalidating an earlier version of the "must-carry" rules as incompatible with the First Amendment), *cert. denied*, 476 U.S. 1169 (1986). *See generally* STONE ET AL., *supra* note 39; FRANKLIN & ANDERSON, *supra* note 65, at 895-97.

governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[118]

O'Brien can be invoked to justify regulating pay-per-call surveys. First, an injunction against the use of a 900 line would only incidentally burden news gathering while it would further other important government interests such as the right of publicity. As the Supreme Court noted in *Zacchini*, the state has an interest in providing economic incentives for performers to create works of interest to the public.[119] The unauthorized use of a performer's identity in a 900 line survey detracts from his ability to exploit his persona. Furthermore, the state has an interest in preventing the media's unjust enrichment through the appropriation of a performer's goodwill.[120]

Second, the government's interest in protecting the right of publicity is unrelated to the suppression of the content of the media's message. For instance, the publications could still conduct identical surveys on the New Kids by using alternative methods such as the commonly used 800 line survey.[121] There is no evidence that by enacting right of publicity statutes, the legislatures are seeking to interfere materially with the media's ability to gather news.

Finally, the incidental burden on news gathering that might result from prohibiting the 900 line survey is no greater than necessary to further the state's interest.[122] If *USA Today* and *Star* were forced to use a toll-free 800 line survey, they could still publish the results of the survey and retain all of the profits from the sale of the newspapers. These profits are protected under a separate, well-established rule.[123]

B. *The Publications' Use of a 900 Line As Commercial Speech*

If a court were to find that enjoining the use of a 900 line would directly and materially burden news gathering, such an in-

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118 *O'Brien*, 391 U.S. at 376, *cited with approval in* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 495 (1986) (First Amendment interests were implicated when a city denied a franchise to a cable company on the grounds that it would overburden the city's streets and public utility facilities).

119 Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977).

120 *Id.*

121 *See infra* text accompanying notes 149-51.

122 Professor Alfange noted that in *O'Brien*, "[i]n view of the fact that the amendment does not punish dissent per se, but merely forbids one very specific means of conveying the expression of dissent, it cannot seriously be contended that the amendment's effect upon speech is anything but minor." STONE ET AL., *supra* note 39, at 1209 (citing Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case* 1968 SUP. CT. REV. 1, 27).

123 *See supra* text accompanying notes 42 and 97; *infra* text accompanying note 140.

junction is nonetheless appropriate when a publication's 900 line polls are properly characterized as commercial speech and are subsequently entitled to less protection than traditional forms of news gathering. This conclusion is supported by invoking the "primary purpose of the media's use" test, and by specifically considering two characteristics uniquely associated with 900 line polls: their potential profitability and their inherent inaccuracy. In analyzing the surveys, it is important to note that each characteristic alone need not be determinative. Rather, the standard is that "[t]he combination of *all* these characteristics . . . provides strong support for the . . . conclusion that . . . [the speech is] properly characterized as commercial speech."[124]

1. The Primary Purpose of the Media's Use

As previously noted, the district court focused on the publications' purpose in using the New Kids' identity in the unauthorized surveys. The court found that such "use of the New Kids name and likeness is protected by the First Amendment unless such use is wholly unrelated to . . . news gathering and dissemination."[125] The court concluded that the media's purpose was to gather "information for dissemination to the public."[126] The court rejected the New Kids' argument that defendants' 900 lines were "collateral" commercial enterprises, distinguished from the commercial enterprise of running the publication itself. The court found the activity to be constitutionally protected.[127]

The facts, however, do not compel this conclusion. Even if the surveys did concern news gathering, the court's analysis should not have ended there. As the court held in *Titan Sports, Inc. v. Comics World Corp.*,[128] if the " 'public interest aspect' [of the publication] 'is merely incidental to [its] commercial purpose,' " then the media's use is not protected.[129] In that case, the Second Circuit stated that the "presentation of an item *within* a publica-

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124 Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983). For a discussion of this case, see *supra* note 41.
125 New Kids on the Block v. News Am. Publishing, Inc., 745 F. Supp. 1540, 1545-46 (C.D. Cal. 1990). *See supra* text accompanying note 96.
126 *Id.* at 1546.
127 *Id. See supra* text accompanying note 101.
128 870 F.2d 85 (2d Cir. 1989). In *Titan Sports*, professional wrestlers sued a sports magazine that published and distributed poster-sized photographs of the wrestlers, folded and stapled inside an issue of the magazine. *Id.* at 86. The court held that a genuine issue of material fact existed as to whether the photographs were for "purposes of trade," and not entitled to First Amendment protection. *Id.*
129 *Id.* at 88 (citing Davis v. High Soc'y Magazine, Inc., 90 A.D.2d 374, 380, 457 N.Y.S.2d 308, 313 (2d Dep't 1982)).

tion generally entitled to first amendment protection may constitute a use for purposes of trade, which is not entitled to first amendment protection."[130]

A court considers various factors in determining whether an identity is used primarily for its public interest value or for a commercial purpose. For example, in *Stephano v. News Group Publications, Inc.*,[131] the court held that a photograph accompanying a news article fulfills a commercial purpose if " 'it has no real relationship to the article . . . [or if] the article is an advertisement in disguise.' "[132] In general, severability is an important factor in determining whether speech is commercial or noncommercial.[133] In *Titan Sports*, in order to determine whether a wrestler's identity was used primarily for a commercial purpose, the Second Circuit applied the following factors: "the nature of the item, the extent of its relationship to the traditional content of a magazine, the ease with which it may be detached from the magazine, whether it is suitable for use as a separate product once detached, and how the publisher markets the item."[134]

These factors can be applied to *New Kids* to determine whether the publications' primary purpose was to find out which New Kid was the most popular, or to profit through a 900 line by exploiting the New Kids' persona. One factor that favors the publications is that the topic of the polls was related to the many articles that both *USA Today* and *Star* have published on the New

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[130] *Id.* Although *Titan Sports* relied on New York law, the New York and California publicity statutes both treat the issue of whether the media's purpose was for trade or news in a similar manner. *See* Eastwood v. Superior Court, 198 Cal. Rptr. 342, (Cal. App. Dep't 1983).

[131] 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984). In *Stephano*, a magazine published a photograph of a model without his consent. *Id.* at 179, 474 N.E.2d at 582, 485 N.Y.S.2d at 221. The court held that where the picture accompanied an article on the model's clothing, the photograph depicted a newsworthy event and was not used for trade or advertising purposes. *Id.* at 184, 474 N.E.2d at 585, 485 N.Y.S.2d at 225. Such disputes between models and the media rarely occur because these issues are usually covered by a contractual arrangement.

[132] *Id.* at 185, 474 N.E.2d 585, 485 N.Y.S.2d at 225 ((quoting Murray v. New York Magazine Co., 27 N.Y.2d 406, 409, 318 N.Y.S.2d 474, 267 N.E.2d 256 (1971)) (quoting *Dallesandro v. Holt & Co.*, 4 A.D.2d 470, 471, 166 N.Y.S.2d 805 (1957))). The "advertisement in disguise" model is also used in Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989). For a synopsis of *Rogers*, see *supra* note 90 and accompanying text.

[133] Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989). In *Fox*, the defendant distributed pamphlets about housekeeping while selling appliances. The defendant argued that the pure speech and the commercial speech were so "inextricably intertwined" that the entirety should be considered noncommercial. The Court rejected this argument, stating there was nothing inextricable about this combination. "No law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares." *Id.* at 474.

[134] *Titan Sports*, 870 F.2d at 89.

Kids and therefore could be considered part of the publications' traditional coverage of public interest news.

Other factors, however, favor the New Kids. First, evidence indicates that *USA Today* does not ordinarily conduct pay-per-call surveys as a means of news gathering. In 1989, it conducted 126 telephone surveys, yet only eight of these utilized 900 lines. The rest used toll-free 800 lines.[135] As the Supreme Court has noted, "[t]he selling . . . brings into the transaction a commercial feature."[136] Moreover, *USA Today* and *Star* charged rates that were sufficiently higher than the operating costs of their 900 lines, giving rise to the presumption that the primary purpose of conducting their 900 surveys was to profit by exploiting the New Kids' own successful pay-per-call market. An examination of both the actual and potential earnings and expenses associated with the publications' lines could indicate an underlying profit motive and hence commercial exploitation.[137]

An application of *Titan's* third factor, the ease with which the item may be detached from the publication, suggests that the publications' activities in connection with the 900 lines were severable. In the present case, the activities should not be required to be physically severable as the poster and magazine were in *Titan Sports*. Rather, severability should be found to exist where the polls could have been easily and accurately conducted without 900 lines.

The publications' strongest argument against a finding of severability may be that the use of 900 lines reduced their research costs. Since the polls were conducted at the height of the New Kids' popularity it is conceivable that if 800 lines were utilized, problems of repeat callers and the like could have driven up the publications' research costs. However, as a solution to that problem, the survey could have been terminated after a certain number of callers had voted.[138]

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[135] Appellant's Opening Brief at 22 n.15, New Kids on the Block v. News Am. Publishing, Inc. (9th Cir. 1991) (Nos. 90-56219 & 90-56258).

[136] Breard v. Alexandria, 341 U.S. 622, 642 (1951) (upholding a ban on the door-to-door sale of magazines, the Court distinguished this case from one that permitted the door-to-door distribution of religion-related pamphlets on the grounds that such distribution did not involve commercial elements).

[137] Potential earnings should be examined because, although the venture failed, *Star* may have intended to earn a profit.

[138] Media publications may argue that such a solution is inadequate because it would not permit them to obtain the largest possible response. Yet this argument ignores a basic problem with the use of the 900 line survey method. Since each caller is charged for participating in the survey, many fans of the New Kids are precluded from calling

2. Profitability as a Factor

The New Kids argued that the First Amendment did not provide immunity because the publications operated their 900 lines for a profit. The district court rejected this argument, noting a well-settled rule that the First Amendment is applicable regardless of whether a publication operates for a profit.[139]

New Kids is distinguishable, however, because in this case the activity was not the publication and sale of newspapers for profit, but rather the operation of a pay-per-call service for profit. The profit-making aspect of this activity was neither necessary to the news gathering or the publication, nor essential for incentives to engage in either activity. The publications could have gathered the information without utilizing a for-profit 900 line. As discussed above, they frequently employ other methods to gather similar information.[140] Under these circumstances, profiteering should weigh against First Amendment protection.

3. Accuracy of Pay-Per-Call Lines as a News Gathering Tool

Earning a profit does not, by itself, exempt a newspaper from First Amendment protection. However, if its news gathering activities are profit-motivated to the extent that they compromise the accuracy of the information, such blanket protection should be questioned. A 900 line is an inaccurate method of news gathering. The incremental value of its employment is so minimal that when weighed against the New Kids' publicity rights, the 900 line should not be granted First Amendment immunity.

a. The Relevance of Accuracy

The *New Kids* court did not discuss the inherent inaccuracy of the surveys as a factor in granting First Amendment immunity, perhaps because ordinarily, the media is not legally required to use accurate survey methods when gathering news.[141] Courts are

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because either they themselves do not want to pay the charge, or are prohibited from calling by their parents.

Finally, the New Kids might have also argued that *Star*'s survey functioned as an "advertisement in disguise" to attract callers to its trivia game. This argument, however, is problematic and would probably not be determinative. For further discussion of *Star*'s use of its survey to promote its trivia game, see *infra* text accompanying notes 164-75.

[139] *See supra* text accompanying notes 42 and 97.

[140] *See supra* text accompanying notes 89 and 135.

[141] In contrast, when the media is researching ratings, it should be required to use accurate survey methods.

reluctant to prescribe editorial procedures and prerogatives.[142] For example, newspapers often conduct man-in-the-street interviews, which do not accurately reflect the opinion of the general public.[143] *USA Today* argued that its 900 line survey was analogous to a man-in-the-street interview.[144]

A pay-per-call survey is distinguishable, however, from a man-in-the-street interview. Publications do not need to justify the latter because no other party loses money as a direct result of this activity. The interviewee presumably consents to be interviewed, and does not expend his own money to participate in a man-in-the-street interview. Nor does the publication directly profit from conducting the interview. By contrast, a pay-per-call survey charges the caller for participating and as such the newspaper stands to profit substantially. In addition, a celebrity who is the subject of the survey may suffer a pecuniary loss if the newspaper's 900 line competes with his own.[145]

A man-in-the-street interview is impressionistic by nature and purports to be nothing more than the opinions of those few individuals who are surveyed. In this case, however, the publications made the broad assertion that their use of the 900 line was justified in order to accurately research which member of the New Kids was the public's favorite.[146]

The accuracy of the polling method is relevant in this case

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142 This reluctance is demonstrated in libel cases in which the Supreme Court has expressed concern for the dangers of self-censorship by the citizen-critic. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 150-51 (1967) (free discussion of public matters is prevented when citizens fear economic retribution for voicing an opinion); Rosenblatt v. Baer, 383 U.S. 75, 95 (1966) (free speech is inhibited when citizens, out of fear of libel judgments, decline to exercise their right to criticize a public figure); New York Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964) (free speech is "chilled" when citizens are subject to damage awards for voicing their opinions on public matters).

143 Philip Meyer, Precision Journalism: A Reporter's Introduction to Social Science Methods 2 (2d ed. 1979). Journalists "are overly susceptible to anecdotal evidence. Anecdotes make good reading, and we are right to use them whenever we can. But we often forget to remind our readers—and ourselves—of the folly of generalizing from a few interesting cases."

144 Reply of Defendant Gannett Satellite Information Network, Inc. in Support of Defendant's Motion for Summary Judgment at 6 n.7, New Kids on the Block v. News Am. Publishing, Inc., 745 F. Supp. 1540 (C.D. Cal. 1990).

145 For a discussion of the potential economic harm to the New Kids, see *infra* text accompanying note 160.

146 *New Kids*, 745 F. Supp. at 1545. An alternate view is that the publications did not even care whether the 900 line polls led to reliable results. It might be argued that the publications' actual purpose in conducting the poll was simply to produce yet another article about the New Kids that would attract their fans. Furthermore, one may argue that the publications' readers were aware of the polls' inaccuracies and realized that, at best, the surveys reflected the opinions of only some of the group's fans. Telephone Interview with Mark Fischer, Entertainment Attorney, Wolf, Greenfield & Sacks (May 15, 1991).

because it shows how necessary the method is to the First Amendment-protected activities of news gathering and publication. If, as in this case, the polling method is unreliable and alternative methods are both more reliable and less economically harmful to the New Kids, the First Amendment should not protect the polling method, especially when the primary purpose is commercial and the profit substantial.[147]

b. The Inaccuracy of the 900 Line Survey

The use of a 900 line is an unreliable method of gauging the public's opinion. The 900 number was utilized by the publications as a profit-making scheme rather than as a means of gathering information. Nevertheless, the publications maintained that a 900 line was a "legitimate" method for polling public opinion.[148] They argued that 900-number surveys reduced the problem of repeat calling.[149] The publications further claimed that had they used standard phone lines, the results would be geographically skewed, because callers who lived locally would be more likely to call since they would not be charged for a long-distance call.

These arguments are not persuasive since evidence indicates that *USA Today* utilized 800 lines in over ninety per cent of its surveys.[150]

Despite the claims made for it, a 900-line poll is vulnerable to similar inaccuracies. First, the results are economically skewed, in that it only registers the opinions of those fans who are willing to pay to participate in the survey. As a result, the pool of respondents is much smaller, since many people will not participate in a survey that costs money. Finally, a 900-line poll is still vulnerable to repeat calling by the group's more devoted and affluent fans.[151] For these reasons, publications presently use 900 lines primarily for the purposes of marketing and disseminat-

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[147] *See supra* text accompanying notes 26-27.

[148] Brief for Defendant Gannett Satellite Information Network, Inc. in Support of Defendants Motion for Summary Judgment at 2, New Kids on the Block v. News Am. Publishing, Inc., 745 F. Supp. 1540 (C.D. Cal. 1990).

[149] *Id.* at 6. *See supra* text accompanying note 138.

[150] *See supra* text accompanying note 135.

[151] Such repeat calling, however, whether through 800 lines or 900 lines, may be screened out through the phone company's billing records, which indicate the caller's phone number. It may also be argued that such repeat calling should be permitted because it is a measure of the fervor of a fan's position, although allowing such data would change the meaning of the poll. Regardless, repeat calling remains a problem in both toll-free and pay-per-call surveys.

ing news, rather than news gathering.[152] Had *USA Today* and *Star* called random readers or invited readers to mail in their choices, the polls would have reached a broader sampling of the population and would have arguably been more reliable. However, such news gathering techniques lack the capacity to generate the revenue that 900 lines can.[153]

C. *The Applicability of* Zacchini: *The Extent and the Effect of the Media's Appropriation*

Even if a court were to conclude that the publications' use of 900-line services could be characterized as news gathering, rather than commercial speech, a proper application of *Zacchini* to the facts of this case should have resulted in a judgment favorable to the New Kids.[154]

The district court briefly discussed *Zacchini*, distinguishing it from the facts in *New Kids* solely on the basis that in *Zacchini*, the media broadcasted a performer's entire act.[155] The court mentioned only one of the three policy rationales that were noted in *Zacchini*—the extent to which the media's use affected a performer's right to earn a livelihood.[156] *Zacchini* did not control, the court concluded, because the surveys in the instant case did not pose a "similar substantial threat to the economic value of the New Kids name."[157]

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[152] *See supra* text accompanying notes 74-76. Several magazines, such as *The New Republic*, have begun to use 900 lines to solicit readers' opinions. Cobb, *supra* note 70, at 12, 22. This use is closer to the man-in-the-street interview than are *USA Today*'s and *Star*'s statistically-oriented surveys because it specifically records opinions and does not infringe upon publicity rights.

[153] Newspapers may argue that they often make editorial decisions that are profit-motivated and may compromise the accuracy of their news content. For example, a newspaper may decide to publish a story before it is completely confirmed, in order to "scoop" its competitors. Such decisions, however, are subject to governmental regulations, such as copyright and libel laws. Moreover, *New Kids* can be distinguished because the publications' activities infringed upon a celebrity's publicity rights.

This Article does not examine whether the content of these 900 surveys was newsworthy. As discussed above, however, entertainment news may not receive the same protection as news regarding the government, defense or economics. *See supra* notes 32-33 and accompanying text.

[154] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). For a discussion of the facts of this case, see *supra* notes 54-64.

[155] *New Kids*, 745 F. Supp. at 1547.

[156] *Id.* (citing *Zacchini*, 433 U.S. at 575). The court did not consider the remaining two issues that were addressed in *Zacchini*—preventing the media's unjust enrichment and providing an economic incentive for a performer to create works of interest to the public. *See supra* text accompanying notes 59-61. For a discussion of whether the publications were unjustly enriched by the polls, see *supra* text accompanying note 137. For a discussion of whether the media's operation of 900 lines could create a potential disincentive for performers who operate their own 900 lines, see *infra* text accompanying notes 181-87.

[157] *New Kids*, 745 F. Supp. at 1547.

The court's analysis of *Zacchini* was unnecessarily formalistic. By focusing exclusively on *Zacchini*'s ban on the use of a performer's "entire act,"[158] the district court avoided discussing the *Zacchini* Court's more general concern with the media's ability to substantially harm a performer's livelihood.[159] The New Kids earn their livelihood from numerous activities, including the sale of records, concert tickets, and merchandise, as well as the operation of 900 lines. The district court did not acknowledge that the publications' 900 lines could be economically harmful to the New Kids' own 900 lines. Arguably, many New Kids fans would be unable to distinguish between the authorized lines and the competing lines operated by *USA Today* and *Star*. Consequently, the New Kids' own phone services could suffer economic harm.[160]

By restricting the application of *Zacchini* to only those uses by the media that threaten a performer's "right to earn a livelihood,"[161] the district court seemed to imply that *Zacchini* may only protect performers who are so small-scale that a single appropriation would substantially damage their ability to earn a livelihood. In fact, the Supreme Court never limited *Zacchini* in this way, and expressly noted that the same rule would prevent the media from broadcasting a prize fight or a baseball game "where the promoters or the participants had other plans for publicizing the event."[162]

The district court also failed to acknowledge that the publications' surveys could potentially injure other parties in addition to the New Kids. The plaintiffs' 900 lines are separate commercial entities, operated by independent companies that pay for an exclusive license to use the New Kids' name and likeness. These other companies were also plaintiffs in the lawsuit.[163] The dis-

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[158] *Id.* (quoting *Zacchini*, 433 U.S. at 575).

[159] *See supra* text accompanying note 63.

[160] Furthermore, the New Kids use their 900 lines to promote other business activities, including the sale of merchandise and concert tickets. By causing a reduction in the number of calls to the New Kids' 900 lines, the publications have a general harmful effect on the New Kids' other business activities.

The publications might respond that had they used a direct-dial line or a toll-free line, the New Kids' 900 lines would still have been economically harmed. In the alternative, the publications could argue that their surveys provided a different service than the New Kids' phone services, and thus did not compete with them. The publications' surveys offered the group's fans the opportunity to give their opinions, whereas the group's 900 lines merely enabled fans to order merchandise or to hear news about them. Yet even if the publications' surveys were functionally dissimilar to the performers' 900 lines, consumers, the group's young fans, are not always sensitive to these differences.

[161] *New Kids*, 745 F. Supp. at 1547.

[162] *Zacchini*, 433 U.S. at 575.

[163] The other plaintiffs include Info-Tainment, Inc. (which operates and holds rights to use the New Kids' name and trademark in a 900 line), Winterland Concessions Co.

trict court chose to limit its analysis to whether there was a "substantial threat to the economic value of the New Kids name," rather than whether there was a threat to those separate companies with direct economic interests in the success of the New Kids' 900 lines.

In rejecting the applicability of *Zacchini*, the court cited the rule that a publication may incidentally exploit a public figure's name in the context of its advertising activities.[164] This rule, however, is not applicable to *New Kids*. *Star* and *USA Today* were not advertising the sale of their publications. Furthermore, the publications' exploitation of the New Kids was central, not incidental—it was the essence of the activity at issue. Finally, *Star*'s use of the survey to promote its trivia game was a purely for-profit activity.

D. *Star's Use of Its Survey To Advertise Its Trivia Game*

When readers called *Star*'s survey, they also heard a recorded message that advertised *Star*'s separate pay-per-call game on entertainment trivia. Even if the district court was correct in concluding that the publications' 900 line surveys were protected as news-gathering activities, *Star*'s use of the survey to advertise its trivia game should not have been protected. The court addressed the issue of *Star*'s trivia game only once, in a footnote:

> Star Magazine's case is somewhat distinguishable from USA Today's in that Star Magazine took the opportunity to solicit the caller's participation in "Star Magazine's entertainment trivia game," a separate 900 number service. Notwithstanding this fact, the Court still finds Star Magazine's activity within the broad scope of constitutional protection afforded to First Amendment activities.[165]

The court was justifiably troubled by the media's potential for misappropriating a celebrity's identity while claiming First Amendment protection. For example, a newspaper could operate numerous pay-per-call services that solicit its readers to call in and express their opinions on various celebrities, even if the newspaper never

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Inc. (an authorized distributor of New Kids' merchandise), Big Step Productions, Inc. (which holds rights to use the New Kids' name), and Dick Scott Entertainment, Inc. (the New Kids' manager).

[164] *New Kids*, 745 F. Supp. at 1546 (citing Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454 (1979)). For a discussion of *Guglielmi*, see *supra* note 48.

[165] *New Kids*, 745 F. Supp. at 1545 n.5.

intends to publish these findings.[166] To avoid such results, the court proposed a test that sought to narrow the effect of its decision. It illustrated its test with the following hypothetical situation in which the media's use of a 900 line would not be constitutionally protected.

> Had the plaintiffs shown that USA Today or Star Magazine began running a 900 number in a manner that was wholly unrelated to news gathering and reporting, the First Amendment would provide no protection. For example, if the defendants provided 900 number services that had no relation to any proposed article . . . plaintiffs could sustain their burden of showing that a defendant's use of the New Kids name was not related to a protected First Amendment activity and constituted commercial exploitation.[167]

It is ironic that the court's hypothetical closely resembles *Star*'s actual conduct in using the survey to direct customers to its trivia game.

In essence, the court maintained that there must be a tangible relationship between a newspaper's 900 line and an article that it publishes. In *New Kids*, there was such a relationship with respect to the surveys, because the publications intended to publish the results of the surveys. *Star*'s trivia game, however, was not similarly related to any article and thus the advertisement for the trivia game should not have been protected by the First Amendment. A party may not immunize unprotected activities by "bootstrapping" them onto protected activities.[168]

Star might defend the use of its survey to advertise its trivia game by demonstrating that this activity is analogous to a newspaper that publishes an article about a celebrity on the same page that it prints advertisements. In both of these situations, the newspaper conducts its news-related activities alongside its advertising activities. *Star* would argue that the First Amendment should similarily protect the newspaper in both of these situations.[169] In the alternative, *Star* could argue that magazines often conduct surveys that simultaneously promote the magazine itself or a related product.

The greatest flaw in these defenses is that *Star*'s trivia game it-

[166] This aspect of the *New Kids* decision is further discussed *infra* text accompanying notes 184-86.

[167] *New Kids*, 745 F. Supp. at 1547.

[168] *See* McCarthy, *supra* note 18, § 8.11[C], at 8-84 (discussing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67-68) ("[T]o paraphrase the Court, advertisers should not be permitted to immunize [an] infringement of the Right of Publicity simply by including references to public issues.") For a discussion of the *Bolger* case, see *supra* note 41.

[169] Cal. Civ. Code § 3344(d) (West 1991). *See supra* text accompanying note 48.

self is most likely an unlawful infringement of the New Kids' right of publicity. Consequently, the First Amendment should not protect the advertisement for the trivia game.[170] The New Kids did not raise this argument.[171] A game is closer to merchandise such as T-shirts and posters than to books and magazines and consequently should not be protected. *Star* could argue that its game serves the same informational purpose as its magazine and should therefore receive the same protection.[172] In the alternative, *Star* might argue that its trivia game is so closely related to its magazine that both activities are protected by the same First Amendment umbrella.[173] While a full analysis of these defenses is beyond the scope of this Article, neither should prevail.[174]

If a court did conclude, however, that the trivia game did not infringe upon the New Kids' right of publicity, then *Star*'s newspaper analogy should fail because the First Amendment protection of *Star*'s survey is tenuous and should not extend to protect the trivia game advertisement.[175]

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[170] *See supra* text accompanying note 39.

[171] *See supra* note 15 and accompanying text.

[172] Consider, for example, that a question in the game may be "what happened to the New Kids on March 26, 1990?" and the answer is "they performed in Japan for the first time." *Star* might argue that this is functionally similar to an article that reports the same news. If the game covers entertainment in general, then *Star* has a stronger argument for protection. First, it is less likely to compete with the New Kids' own games or pose a threat to the New Kids' ability to earn a livelihood. Second, the news dissemination value of the game is stronger when it concerns entertainment in general.

If a court should find that a trivia game could be protected because it is merchandise that disseminates news, the limits of such a ruling would be troubling. One may imagine a situation in which *Rolling Stone* magazine markets a T-Shirt that features a picture of a magazine cover with a photograph of the New Kids and a headline that reads "New Kids Sell 50 Million Records." This T-shirt disseminates news and thus falls within the scope of First Amendment immunity that was established in *New Kids*. The T-shirt is not physically severable the way that the poster and the magazine were severable in Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989). Similarly, poster manufacturers might seek to rely on *New Kids* in order to avoid paying licensing fees to performers by producing posters that contain a minimum of what may be considered news, such as a short biography of the performer.

[173] This argument would fail under Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989). For a synopsis of the *Fox* Court's rejection of the "inextricably intertwined" defense, see *supra* note 133. Similarly, in *New Kids*, a caller may play the trivia game without reading *Star*, or read *Star* without playing the game.

[174] *See supra* notes 169-70 and accompanying text.

[175] *See supra* text accompanying notes 165-69. If *Star*'s trivia game were found to be fully protected, however, a non-media company that produced a trivia game might seek First Amendment protection by selling the game along with a book about the New Kids. A court should reject such an attempt under *Fox*'s "inextricably intertwined" test. *See supra* note 133. Such an attempt should also fail under *Titan Sports,* because the book is easily severable from the game. *See supra* text accompanying note 134.

V. Impact on the News Media's Operation of Audiotex Services

The *New Kids* decision will have a significant impact on both the audiotex industry and the licensing ventures of performers. Those 900 lines operated by the news media are particularly affected since it is the first time that a court has expressly approved the use of 900 lines to recover the costs of news gathering. Until now, the media has only expended money in the process of gathering news, whether by paying reporters' salaries or through other expenses of investigation. The 900 line can now provide the media with a rare opportunity to recover their research costs.

A technologically-oriented observer may argue that the media's use of 900 lines is simply the latest step in a progression that has seen the media's reliance on the printed page decrease and its reliance on other forms of communications increase. Audiotex is a fledgling industry, comparable to where television was in 1950. If it continues to expand, the telephone could soon resemble a cable television receiver that provides numerous pay-per-use services. In fact, some analysts project that 900 lines will soon be made obsolete by new telecommunications services that will enable consumers to receive news, advertising and other information through personal computers, telephones or cable lines.[176] Yet 900 lines are still a viable growth industry, especially for home use, given that many more households have telephones than have computers.

Although the facts of *New Kids* specifically concerned the use of 900 lines in news gathering, the court adopted a significantly broader standard.[177] That standard will impact the audiotex industry in several significant ways. It will greatly restrict a performer's ability to license his persona in connection with 900 lines and therefore limit his opportunity to earn a livelihood. The performer will lose an incentive to create new works of interest to the public. Finally, the synergistic relationship between performers and the media will be disrupted.

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[176] *See* John A. Farrell, *In Telecommunications, Markey Tries to Mold a Happy Medium*, BOSTON GLOBE, June 24, 1991, at 1.

> Eventually, each person's telephone, video and data services are expected to be supplied by one provider. . . .
>
> . . . .
>
> Can [a newspaper] industry that relies on harvested forests and fleets of trucks for once-a-day delivery survive into the 21st century? Or will newspapers be supplanted by cheap and portable terminals that can summon news and advertising from telephone or cable lines instantaneously?

Id.

[177] *See supra* text accompanying note 167; *infra* text accompanying note 182.

Until now, performers and the news media have co-existed in their respective, well-defined territories. The media reports on the activities of musicians, actors, artists and athletes. Performers license their identities to non-media ventures to produce such items as posters and apparel. This division of markets is not perfect because performers occasionally publish their own "fanzines" or write autobiographies for profit and promotional purposes.[178] Performers rarely sue the media for infringement of publicity rights for two reasons. First, the First Amendment broadly protects the media's activities.[179] Second, the performers benefit greatly from the media exposure.[180]

The *New Kids* decision gives the media a great deal of latitude. The district court's opinion imposes only two limits on the media's ability to operate a pay-per-call service that utilizes a performer's identity. First, the line must be related to news gathering and dissemination.[181] Thus, a publication cannot operate a 900 line that encourages readers to express their opinions on various performers if it does not intend to print the results. Second, the line cannot mislead "as to content, or falsely and explicitly denoted authorship, sponsorship, or endorsement"[182] by the performer.

As the *New Kids* decision indicates, the media can easily meet these two requirements. Although the court held that such a line may only be used for *news gathering* if it relates to a proposed article,[183] the publication is given complete discretion to determine how the results of their survey will be published. For instance, the court's limitation would not prevent a publication from saturating the market by simultaneously conducting several surveys on a "hot" performer and then burying the results by printing them in its back pages as a token compliance with the court's rule.

Performers would argue that these requirements are not sufficiently restrictive. The court's limitations do not even apply to 900 lines used to *disseminate* news. For example, a publication could now operate a 900 line playing recorded information about

[178] Edwin McDowell, *They Sing, They Dance, and Now They're in Books*, N.Y. TIMES, May 17, 1990, at C24 (New Kids will publish an official autobiography that will be used as a promotional item for the group's fourth album).

[179] *See supra* text accompanying notes 28-33.

[180] "It is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live." *Zacchini* v. *Scripps-Howard Broadcasting*, 433 U.S. 562, 575 n.12 (1976).

[181] *New Kids*, 745 F. Supp. at 1541.

[182] *Id.* at 1541-42.

[183] *Id.*

Madonna and promote it as "News on Madonna." The First Amendment would protect such a 900 "news" line, because essentially, it would provide "taped articles."

In fact, one interpretation of the *New Kids* decision is that 900 lines need not be affiliated with a news organization at all in order to to receive First Amendment protection. Any 900 line that provides information is qualified, as long as it does not falsely claim that it is endorsed by the performer.[184]

The result is that *anyone* may operate a 900 "news" line on a popular performer or athlete. A 900 line that provided "taped articles" about Jose Canseco or Hammer could directly compete with, and economically harm, those performers' authorized lines. Further financial loss might result since performers often use their 900 lines to promote the sale of records, concert tickets and merchandise.[185]

Additionally, under the *New Kids* decision, the media may also avoid paying licensing fees to performers, in the same way that a publication need not pay a royalty when it prints an article on a performer. Consequently, the news media can charge lower rates for their 900 lines. By contrast, the performers' authorized lines are run by third-party companies that have higher operating costs because they must pay licensing fees to the performers. As a result, if the quality of the media's 900 lines is strong, they will draw callers away from the performers' lines because of the lower rates charged.

With these few restrictions, artists find themselves in a relationship with the news media much like that shared by celebrities and the book publishing industry. An unauthorized biography about a celebrity is protected, even though it might saturate the market and eliminate the demand for an *authorized* biography or other books on the same subject. Yet the celebrity still has

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[184] At the same time that the New Kids filed suit against *USA Today* and *Star*, they also sued two other companies that operated 900 lines that used the New Kids' name and likeness without their consent. These non-media defendants settled out of court. Carol Baker, *New Kids Suits Dismissed Against USA Today*, *Star*, UPI, Sept. 10, 1990, *available in* LEXIS, Nexis Library, UPI file. Both of these services allowed callers to leave messages for members of the New Kids. This activity is not entitled to the same First Amendment protection as providing "taped articles." Furthermore, it would have been easier to prove a claim of explicit endorsement by the New Kids against a service that implied that the callers' messages would be heard by members of the group.

[185] In response to this problem, performers would probably need to advertise more. It is possible, therefore, that the same magazines that economically harmed the New Kids by operating 900 lines that exploited their popularity would further benefit by causing the New Kids to buy more advertising in their pages. This situation creates additional incentives for the magazines to operate 900 lines.

unique advantages if he or she subsequently authorizes a biography or writes an autobiography.

Similarly, the key to the continued success of performers' authorized 900 lines is their unique access to the performers. For example, Bette Midler can appear in advertisements or record personal messages for her 900 line. In contrast, the media could not use Bette Midler or even hire a sound-a-like actress to advertise their 900 lines due to unfair competition laws.[186] Moreover, only the performers can link their 900 lines with other merchandising ventures, such as the sale of records or concert tickets. Performers can also advertise their 900 line as the "authorized" line and promote the number in record albums, "fanzines" and other merchandise.[187]

Artists must also ensure that their 900 lines have quality and substance. These lines are not a passing fad but are part of the next wave of telecommunications services that will let consumers receive news, advertising and other information through a network of personal computers, telephones and cable lines. Artists must develop long-term strategies, using their 900 lines to provide exclusive interviews, special contests, or preview new or rare songs before they are commercially released.

Essentially, the *New Kids* court treated 900 lines the same way that courts treat more traditional media: with a "laissez-faire" approach. The court chose to view 900 lines as a tool for journalism, rather than merchandising, recognizing that 900 lines are inherently different from other licensing ventures. In the end, the burden is on the artists to make their 900 lines stand out in an increasingly crowded market.

The court's two restrictions on the media are not adequate to prevent harm to performers. The news media should not have the unrestricted ability to advertise other activities through their news-related 900 lines. For example, a magazine should not be able to advertise a separate activity that unlawfully appropriates a performer's identity, as may have occurred in *New Kids* with respect to *Star*'s trivia game. A more difficult case would arise if the news content of the message is so insignificant in relation to its promotional content that the 900 line is essentially commer-

[186] *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[187] Performers might argue that newspapers hold the advantage of being able to advertise their own services within their own media. For example, *USA Today* can promote its 900 lines in the pages of *USA Today*. However, if the publications are forced to forego other advertising revenue for such self-contained advertising, the advantages seem less significant.

cial speech under the "advertisement in disguise" theory.[188]

VI. Conclusion

With respect to the 900 line surveys, the court erred in holding that the First Amendment protected *Star*'s use of its survey to advertise its trivia game. Genuine issues of material fact remain as to whether both publications' primary purpose was to gather news or to profit by entering the pay-per-call market that the New Kids had successfully established. There is also a genuine issue of material fact as to whether the primary purpose of *Star*'s survey was to advertise its trivia game. As a result, the granting of summary judgment in *New Kids* was improper.

It would be shortsighted to view *New Kids* as simply another right of publicity case which states that performers cannot monopolize the right to present information about themselves. The case involves nascent technologies and marketing techniques that are just now beginning their growth into multi-billion dollar industries. The court's decision will allow *any* individual to set up a 900 line that provides information about celebrities. This ruling has the effect of greatly harming performers' abilities to earn income from licensing their identities to pay-per-call services. This ruling has the additional effect of redrawing the division of markets between performers and the media and upsetting their current co-existence.

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[188] Although a company that gathers or disseminates information can rely on a First Amendment defense, other companies cannot. Thus, any company considering an entertainment-related 900 line must examine the content of its programming, in particular the extent to which it exploits a performer's name or likeness. The company should determine whether the rights to exploit that name, likeness, trademark or copyright are controlled by someone else, such as the performer or his licensees. *See generally* Linda A. Newmark, *Dialing for Dollars: The Use of Music in 900-Number Telephone Programming*, *in* 1990 Entertainment, Publishing and the Arts Handbook 213 (1990).