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Comment

Title Match: Jesse Ventura and the Right of Publicity vs. The Public and the First Amendment

*Erin Skold**

Minnesota Governor Jesse Ventura is taking a stand over the use of his commercial image. The former professional wrestler/movie actor, known as Jesse “the Body” Ventura, wants to protect the commercial use of his name and image, and any profits from these endeavors. He has spoken out publicly against the use of his image in an unauthorized movie about his life by NBC¹ and a fictitious book by fellow Minnesotan, Garrison Keillor, about a former professional wrestler elected Governor of Minnesota.² Most recently, during an appearance on “Meet The Press,” Ventura targeted the Republican National Committee for using his name and photo in a fundraising letter without his permission.³ Ventura threatened the Republican National Committee with legal action.⁴ The Republicans are not the only group threatened.

* The author wishes to thank professor Dan Burk and the many editors, including Ted Kittila, Timothy Cole, and Andrew Holly, who assisted her with this article.

1. See Patricia Lopez Baden, *Ventura Takes Image to Heart*, STAR TRIBUNE (Minneapolis, Minn.), Feb. 12, 1999, at A1.

2. See Mary Challenger, *Keillor vs. Ventura*, THE DES MOINES REGISTER, Mar. 25, 1999, at Travel pg. 1. Keillor offers a disclaimer that the book “should not be construed in any way as an autobiography of an actual governor of Minnesota, God bless him.” *Id.*

3. See YAHOO! NEWS, *Politics Headlines: Ventura Raps Republicans for Fund-Raising Letter* (Sunday, Feb. 27, 2000) <http://dailynews.yahoo.com/h/nm/20000227/pl/campaign_ventura_1.html> (“Ventura, speaking on NBC’s ‘Meet the Press’ program, said that although he was flattered by the campaign, his name and likeness are both trademarked from the days when he was known as ‘The Body’ and worked as a professional wrestler.”). While Governor Ventura’s comments in this article indicates a trademark rationale, this article will deal with a right of publicity rationale. For a brief likelihood of confusion analysis, which would be relevant in a trademark analysis, see *infra* notes 173-176.

4. See YAHOO! NEWS, *Politics Headlines: Ventura Raps Republicans for Fund-Raising Letter* (Sunday, Feb. 27, 2000) <http://dailynews.yahoo.com/h/nm/20000227/pl/campaign_ventura_1.html> (“I’m honored that I’m that powerful,” Ventura said. But ‘they did not get my permission to do that. It’s in

Some less well-known offenders, such as a brothel in Nevada, have received cease-and-desist letters from Ventura for Minnesota, Inc., a nonprofit organization that licenses Ventura products and seeks to prevent unauthorized users from using the Governor's image.⁵

One of the recipients of such cease and desist letters is Pat Helmberger, a 63-year-old secretary at the Minnesota State Capitol.⁶ Helmberger runs a small greeting card business in addition to her capitol position, and sells her cards in three small towns in Minnesota.⁷ In February of 1999, four months after Ventura was elected Governor,⁸ she produced a Valentine's Day card parodying Governor Ventura. The card is described as "featuring a grinning likeness of Gov. Jesse Ventura, clad in a wrestling leotard with pink heart and wrapped in a pink feather boa."⁹ The cease and desist letter said, "Governor Ventura and his assigns . . . own the exclusive rights to use his name and likeness for commercial purposes, . . . Unless you first obtained express written permission, you may be violating the law."¹⁰ Governor Ventura's interest in protecting his commercial image has raised a serious issue as to where the law draws the line between protecting the right of publicity of an entertainer-turned-politician and the public's First Amendment rights to exercise political speech. While no case or legal action has resulted to date from Ventura's attempts to assert publicity rights over his name and image,¹¹ this Valentine's Day card situation provides an opportunity to consider the issue of

the hands of my attorney right now.").

5. See BADEN, *supra* note 1.

6. See *id.*

7. See *id.*

8. See Dane Smith & Robert Whereatt, *Ventura Wins: Populist Campaign Brings out Throng of Young Voters*, STAR TRIBUNE (Minneapolis, Minn.), Nov. 4, 1998, at A1.

9. BADEN, *supra* note 1. The outside of the card reads, "Happy Valentine's Day, Honey!" The inside reads, "Get Ready to Rumble." *Ventura Not Loving This Valentine's Card*, THE BUFFALO NEWS, Feb. 14, 1999, at A10.

10. BADEN, *supra* note 1.

11. There may be several reasons no legal action resulted. Helmberger, secretary for the Senate Education Finance Committee, is quoted as saying "I found it very intimidating." BADEN, *supra* note 1. Admittedly, receiving a cease and desist letter from one's boss, let alone the Governor of Minnesota, is likely very intimidating. Engaging in legal action against this same person is even more daunting. Also, the costs associated with a lawsuit simply may not be worth it to Helmberger who says about \$200 worth of cards were sold. *Id.*

whether an entertainer-turned-politician can prevent the commercial use of a parody of his name and image under a right of publicity action, in light of the recent trend to increase the reach of publicity rights.¹²

This note seeks to reconcile the overlap between First Amendment rights and publicity rights in the context of celebrities turned elected officials. The background section provides the necessary foundation regarding the development of First Amendment analysis as it relates to intellectual property law, in particular right of publicity law.¹³ It is proposed here that under a balancing test, the First Amendment rights to political speech reserved to the public will outweigh the publicity rights of a public official.¹⁴ The note concludes, publicity rights will unjustly defeat firmly established First Amendment rights when enforced in favor of a politician, even politicians who were formerly celebrities in the entertainment business.¹⁵

I. DEVELOPMENT OF FIRST AMENDMENT ANALYSIS IN RELATION TO INTELLECTUAL PROPERTY LAW

The right of publicity is the right of a celebrity to have exclusive control over his name and likeness.¹⁶ This control specifically applies to the use of one's name and image for commercial purposes.¹⁷ The Supreme Court described the protection as one that "provides an economic incentive for him to make the investment required to produce a performance of

12. See generally Douglas J. Ellis, *The Right of Publicity and the First Amendment: A Comment on Why Celebrity Parodies are Fair Game for Fair Use*, 64 U. CIN. L. REV. 575, 579 (1996).

13. See *infra* Part I.

14. See *infra* Parts II.A-C.

15. See *infra* Part II.D.

16. "The right of publicity may be defined as a celebrity's right to the exclusive use of his or her name and likeness." *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.* 694 F.2d 674, 676 (11th Cir. 1983) (citing *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975); *Estate of Presley v. Russen*, 513 F.Supp. 1339, 1353 (D.N.J. 1981)) (listing cases defining the right of publicity).

17. "The right of publicity is the right of a person to control the commercial use of his or her identity." *Cardtoons, L.C., v. Major League Baseball Players Association*, 95 F.3d 959, 967 (10th Cir. 1996) (citing 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1.1 [A] [1] (1996)); see *Restatement (Third) of Unfair Competition* § 46 (1995).

interest to the public.”¹⁸ While most forms of intellectual property date back to the writing of the constitution,¹⁹ the right of publicity was not formally recognized at the federal level until 1953.²⁰

The right of publicity raises First Amendment red flags. While this is not particularly surprising, as intellectual property rights often are in conflict with the First Amendment, there is greater controversy when dealing specifically with the right of publicity. This is partly attributable to the fact that right of publicity is a relatively new cause of action available to protect intellectual property.²¹ In contrast, other intellectual property rights such as copyright and patent protection received recognition as early as the writing of the Constitution.²²

First Amendment analysis becomes necessary when a State in some way restricts speech,²³ which is what happens when a state recognizes the right of publicity.²⁴ This

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

19. “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

20. *See Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953) (using term “right of publicity” when holding that where plaintiff held exclusive contracts to use certain baseball player’s photographs on cards distributed with chewing gum, a competing chewing gum manufacturer could not use pictures of the same ballplayers). Other courts had previously recognized the concept, if not the formal label. *See U.S. Life Ins. Co. v. Hamilton*, 238 S.W.2d 289, 292 (Tex. 1951). *See also Flake v. Greensboro News Co.*, 195 S.E. 55, 64 (N.C. 1938) (holding that a singer’s picture may not be used to advertise bread without her permission because her image is a “valuable asset in connection with an advertising enterprise”); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364, 366 (Ky. 1909) (“It is a fraud on the public to publish indorsements of public men in publications of this character which are not genuine.”).

21. *See Diane Leenheer Zimmerman, Who Put the Right in the Right of Publicity?*, 9 J. ART & ENT. LAW 35, 37-38 (1998).

22. *See supra* note 19.

23. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

24. “The right of publicity puts the power of the state behind private individuals who want to control whether and how information about important people – for example, what they are called, or how they look, or how they sound – can be used by other people.” Zimmerman, *supra* note 21, at 53; *see generally* Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47 (1994) (discussing restrictions right of publicity may have on First Amendment rights). Ironically, in a case initiated by Jesse Ventura himself, the Eighth

recognition prohibits others from the commercial use of someone's name and image without permission from the celebrity.²⁵ If permission is denied, then the person's name and image must not be used: speech is clearly restricted.²⁶

First Amendment analysis in a right of publicity case raises many issues, including distinguishing between commercial and political speech,²⁷ and distinguishing between a public figure and a public official.²⁸ Where a public official is parodied, particularly if the parody contains political expression, it is asserted here that a balancing test must be used to weigh First Amendment rights against publicity rights.²⁹

First Amendment analysis distinguishes between commercial and political speech.³⁰ Political speech has always received a high level of protection because it is considered highly valued speech³¹ – the right to critique government is the essence of the First Amendment.³² First Amendment protection

Circuit concluded in *Ventura v. Titan Sports*, 65 F.3d 725 (8th Cir. 1995), that the state of Minnesota would recognize a right of publicity. Jesse Ventura brought an action against WWF for using his image as Jesse the Body without his permission on certain retail videotapes. The Eighth Circuit concluded that Minnesota courts would recognize a right of publicity. This case indicates what a key role Ventura has had in the development of right of publicity law in Minnesota. Ventura's obvious interest in his image is evident from his actions to defend the image even prior to his election. He believes in the potential commercial value embodied in a name and image.

25. See *supra* notes 16 and 24.

26. See *id.*

27. See *infra* note 30 and accompanying text.

28. See *infra* notes 46-53 and accompanying text.

29. See *infra* notes 70-71 and accompanying text.

30. See *Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 95 F.3d at 959, 969-70 (10th Cir. 1996).

31. See *Cohen v. California*, 403 U.S. 15, (1971) (finding protectable political speech in the wearing of a jacket bearing the words "Fuck the Draft"); *Whitney v. California*, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring) ("Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society."); See also *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) ("The vitality of civil and political institutions in our society depends on free discussion."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-71 (1964) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957), *Stromberg v. California*, 283 U.S. 359, 369 (1931), *Bridges v. California*, 314 U.S. 252, 270 (1941), *N.A.A.C.P. v. Button*, 371 U.S. 415, 429, *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943)).

32.

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended

of political speech ensures that leaders and policymakers are held accountable.³³ Political speech is considered the top-of-the-line speech in the marketplace of ideas.³⁴

This high value placed on political speech does not mean that political speech is limited to serious, well-articulated communications.³⁵ It is recognized that humorous speech can be an effective way to communicate serious ideas and opinions.³⁶ In addition, political speech is not restricted to written or verbal communications: “Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate.”³⁷ Following the recognition of the importance of alternatives, the reach of First Amendment protection does not stop at traditional forms of media such as newspapers, pamphlets, or books, but includes a wide variety of

to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen, 403 U.S. 15, 24 (U.S. 1971) (citing *Whitney*, 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring)).

33. See *supra* notes 31-32.

34.

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J. dissenting) (referring to political speech). See *supra* notes 31-32 (referring to the high value placed on and the high level of protection afforded to political speech).

35. See *Cohen*, 403 U.S. at 24 (1971) (holding the words “Fuck the Draft” is constitutionally protected political speech). See also *Cardtoons, L.C.*, 95 F.3d at 969 (citing *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir.), *appeal dismissed and cert. denied*, 483 U.S. 1013 (1987)) (distinguishing parody from speech that may be considered less sophisticated or advanced, as parody dates back to Greek antiquity and is used in literary works).

36. “The line between the informing and the entertaining is too elusive for the protection of that basic right [free speech].” *Winters v. New York*, 333 U.S. 507, 510 (U.S. 1948). See also *Estate of Presley v. Russen*, 513 F.Supp. 1339, 1357 n.16 (D.N.J. 1981); *Groucho Marx Productions v. Day and Night Co.*, 523 F.Supp 485, 493 (S.D.N.Y. 1981) (rev’d on other grounds).

37. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54 (1988).

mediums including clothing, dancing, flag burning, and baseball cards.³⁸

Commercial speech has traditionally been afforded less protection than political speech.³⁹ The primary justification for regulating commercial speech is to protect truth and accuracy within the market system.⁴⁰ The dissemination of information enhances the free enterprise system.⁴¹ Although commercial speech has been receiving more protection recently,⁴² there is still a distinction and the definition of commercial speech must be considered.⁴³ It is not necessarily commercial speech by the sole fact that a communication makes or attempts to make a profit;⁴⁴ rather, commercial speech communicates directly about economic exchanges.⁴⁵

Another important consideration in an analysis involving First Amendment protection and right of publicity involves who

38. See *Texas v. Johnson* 491 U.S. 397 (1989) (flag burning); *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (nude dancing); *Cohen*, 403 U.S. 15 (1971) (wearing a jacket bearing the words "Fuck the Draft"); *Cardtoons*, 95 F.3d at 959 (baseball cards).

39. "It was not until the 1970's, however, that this Court held that the First Amendment protected the dissemination of truthful and nonmisleading commercial messages about lawful products and services." 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (citing Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEXAS L. REV. 747 (1993)).

40. "In accord with the role that commercial messages have long played, the law has developed to ensure that advertising provides consumers with accurate information about the availability of goods and services." 44 *Liquormart, Inc.* 517 U.S. at 496. See also *supra* note 39.

41. "Even in colonial days, the public relied on 'commercial speech' for vital information about the market." 44 *Liquormart, Inc.* 517 U.S. at 495-496 (1996) (citing J. WOOD, *THE STORY OF ADVERTISING* 21, 45-69, 85 (1958); J. SMITH, *PRINTERS AND PRESS FREEDOM* 49 (1988); B. FRANKLIN, *An Apology for Printers, June 10, 1731*, reprinted in 2 WRITINGS OF BENJAMIN FRANKLIN 172 (1907)).

42. See 44 *Liquormart, Inc.* 517 U.S. at 512; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759 (1976); *Central Hudson Gas & Electric Corp., v. Public Service Commission*, 447 U.S. 557, 571-572 (1980).

43. See *Cardtoons, L.C., v. Major League Baseball Players Assoc.*, 95 F.3d 959, 969 (10th Cir. 1996) (addressing what constitutes commercial speech).

44. See *Virginia State Board of Pharmacy*, 425 U.S. at 761 (1976).

45. "The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp.*, 447 U.S. 557, 561 (1980). "Thus, commercial speech is best understood as speech that merely advertises a product or service for business purposes." *Cardtoons, L.C.*, 95 F.3d at 970 (citing 44 *Liquormart, Inc.* 517 U.S. at 495-496 (1996)).

is asserting publicity rights.⁴⁶ It is significant to consider whether the person asserting publicity rights is a politician/public official, versus a celebrity/public figure.⁴⁷ The Supreme Court recognizes a difference between public figures⁴⁸ and public officials.⁴⁹ Celebrities/public figures have less responsibility to the public.⁵⁰ This is due to the fact they are privately employed, and have usually put themselves in the

46. See *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*, 694 F.2d 674, 677 (11th Cir. 1983) (limiting holding to “public figures who are not public officials”).

47. See *id.*

48. The Supreme Court distinguished between three types of public figures.

Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

49. “[T]he ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

50.

The names of plaintiffs have become internationally famous, undoubtedly by reason of talent as well as hard work in perfecting [their talent]. This is probably true in the case of most so-called celebrities, who have attained national or international recognition in a particular field of art, science, business or other extraordinary ability. They may not all desire to capitalize upon their names in the commercial field, beyond or apart from that in which they have reached their known excellence. However, because they presently do not should not be justification for others to do so because of the void. They may desire to do it later . . . It is unfair that one should be permitted to commercialize or exploit or capitalize upon another’s name, reputation or accomplishments merely because the owner’s accomplishments have been highly publicized.

Palmer v. Schonhorn Enterprises, Inc., 232 A.2d 458, 462 (N.J. 1967).

For cases likening public figures to private citizens for publicity rights purposes, see *Martin Luther King, Jr., Center for Social Change, Inc.*, 694 F.2d 674, 680 (11th Cir. 1983) (holding there is right to prevent the appropriation of one’s name and likeness whether the person is a private citizen, entertainer, or “a public figure who is not a public official”) and *McQueen v. Wilson*, 161 S.E.2d 63 (Ga. Ct. App. 1968) (likening private citizens to entertainers for publicity rights).

public light for profit.⁵¹ On the other end of the spectrum, politicians/public officials have a great responsibility to the public.⁵² They have put themselves in the public light to act as a representative to the public and to serve the public as a policymaker.⁵³

Because the right of publicity is relatively new, courts have borrowed from developments in other areas of intellectual property.⁵⁴ However, when it comes to First Amendment issues, this has been more difficult.⁵⁵ Part of this difficulty is due to the fact that the areas of trademark and copyright law already have built-in means for dealing with First Amendment problems.⁵⁶ In proving infringement under trademark law, the holder of the trademark must prove a likelihood of confusion as to the source of the infringing item.⁵⁷ A parody is often a mockery of someone or something and as a result would not likely be attributed as coming from the holders of a trademark.⁵⁸ Because it is unlikely that the owner of the trademark will establish that a likelihood of confusion exists, an action for trademark infringement would not successfully prevent a parodist from exercising her First Amendment rights.⁵⁹

The fair use defense available in copyright infringement

51. See *supra* note 50.

52. "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (extending protection of First Amendment rights for libel purposes to cover false statements regarding public officials as long as not made with "actual malice").

53. See *supra* note 49 and accompanying text.

54. See *Cardtoons, L.C., v. Major League Baseball Players Assoc.*, 95 F.3d 959, 970-971 (10th Cir. 1996) (explaining the roles a likelihood of confusion requirement in a trademark infringement case and a fair use defense in a copyright infringement case have in protecting the First Amendment).

55. "In resolving the tension between the First Amendment and publicity rights in this case, we find little guidance in cases involving parodies of other forms of intellectual property." *Id.* at 970.

56. See Lanham Act § 58, 15 U.S.C.S. § 1125 (1999) (trademark infringement and likelihood of confusion) and 1976 Copyright Act 17 U.S.C. § 107 (1988 ed. and Supp. IV) (fair use limitations on copyrights).

57. See Lanham Act § 58, 15 U.S.C. § 1125 (1999).

58. "[I]n the case of a good trademark parody, there is little likelihood of confusion, since the humor lies in the difference between the original and the parody." See *Cardtoons, L.C.*, 95 F.3d at 970.

59. See *supra* notes 57-58 (proving likelihood of confusion is necessary, but not likely "in the case of a good trademark parody").

actions serves to ensure against First Amendment violations.⁶⁰ This defense requires a balancing test considering four factors: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and, the effect the use has upon the potential market value of the original work.⁶¹ This is not an exhaustive list of factors, but suggests the kind of issues that must be considered in weighing the First Amendment rights of someone who uses copyrighted material with those rights held by the owner of the copyrighted material.⁶²

The circuits are split on whether parody is considered a fair use defense in the face of a right of publicity action. The Ninth Circuit, which is an influential circuit for intellectual property law since it covers the Hollywood community,⁶³ denied the use of a parody defense in *White v. Samsung Electronics America*.⁶⁴ Samsung created an ad with a robot in a blond wig and stylish dress standing on a game show set similar to the set used on the television show "Wheel of Fortune."⁶⁵ The text

60. This doctrine is widely recognized and is even codified at § 107 of the 1976 Copyright Act. It has been applied to parody uses in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-78 (1994) (finding the fair use defense applicable where 2 Live Crew's "Big Hairy Woman" parodied Roy Orbison's "Oh, Pretty Woman").

61. These four factors are those codified at § 107 of the 1976 Copyright Act.

In determining whether the use made of a work in any particular case is a

fair use the factors to be considered shall include –

- (1) the purposed and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

1976 Copyright Act 17 U.S.C. § 107 (1988 ed. and Supp. IV) (fair use limitations on copyrights).

62. See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) and H.R. Rep. 94-553, at 6, *reprinted in* 1976 U.S.C.C.A.N. at 5678.

63. "For better or worse, we are the Court of Appeals for the Hollywood Circuit. Millions of people toil in the shadow of the law we make, and much of their livelihood is made possible by the existence of intellectual property rights." *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993) (J. Kozinski dissenting from the order rejecting the suggestion for rehearing en banc).

64. 971 F.2d 1395 (9th Cir. 1992).

65. *Id.* at 1396.

of the ad read, “Longest-running game show. 2012 A.D.”⁶⁶ The ad was for a VCR and used humor in the hopes of conveying the message that while elements of popular culture may not have staying power, a Samsung VCR will.⁶⁷ The Ninth Circuit rejected a parody defense asserted by Samsung because, “[t]he ad’s spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad’s primary message: ‘buy Samsung VCRs.’”⁶⁸

Parody was accepted as a type of fair use defense to a right of publicity action in the Tenth Circuit. In *Cardtoons, L.C. v. Major League Baseball Players Ass’n*,⁶⁹ the court engaged in a balancing test of the free speech interests in parodies of baseball cards against the intellectual property interests of the baseball players.⁷⁰ The court considered a lengthy list of factors in its analysis, including confusion as to source, the value of parody, the role of celebrities in society, the likelihood that celebrities would license images for parody uses, economic goals such as stimulating achievement, the efficient allocation of resources, protecting consumers, safeguarding natural rights, securing fruits of celebrity labors, preventing unjust enrichment, and averting emotional harm.⁷¹ The Tenth Circuit engages in a comprehensive analysis, providing an invaluable tool for balancing publicity rights with First Amendment rights, which is imperative when a celebrity-turned-public official, like Jesse Ventura, seeks to enforce a right of publicity.

In finding that the trading cards would not cause confusion as to the source the court emphasized that it is more likely the baseball players and Major League Baseball Player’s Association (MLBPA) would be perceived as victims of a parody.⁷² Additionally, most of the cards have a disclaimer

66. *Id.*

67. *See id.*

68. *Id.* at 1401. The court summarized its position in stating, “[t]he difference between a ‘parody’ and ‘knock-off’ is the difference between fun and profit.” *Id.*

69. 95 F.3d 959, 970 (10th Cir. 1996) (trading cards with caricatures of active major league baseball players on front and humorous commentary about their careers on back not licensed by the MLBPA does not violate the publicity rights of the players or the MLBPA).

70. *See id.* at 971.

71. *See id.* at 971-976. For how the court used each of these factors in applying a balancing test see *infra* notes 72-114 and accompanying text.

72. “We agree that no one would mistake MLBPA and its members as anything other than the targets of the parody cards.” *Id.* at 967.

stating that the *Cardtoons* cards are not licensed by the MLBPA.⁷³

The Tenth Circuit found that a high value should be placed on parody for the ease in which it can “expose the foolish and absurd in society.”⁷⁴ It serves not only as a means of self-expression, but also acts as a social criticism.⁷⁵ The court characterizes celebrities as part of our public vocabulary.⁷⁶ The use of celebrity in parody does not only symbolize the celebrity as their person but also, usually, an idea or value that the public associates with that celebrity.⁷⁷ In this manner celebrities serve as a “valuable communicative resource.”⁷⁸

The *Cardtoons*’ opinion reveals a concern that celebrities would be particularly prone to refusing parodists access to their name and image as the nature of parody involves social commentary, and usually not in the most favorable light.⁷⁹ It is hard to imagine someone freely allowing their persona to be open to criticism, or used to criticize.⁸⁰ The Tenth Circuit questioned the value of allowing baseball players or the MLBPA⁸¹ to control or censor criticism, and the chilling effect on future celebrity parodies that would occur.⁸² If *Cardtoons*’

73. *See id.*

74. *Id.* at 972.

75. *See id.*

76. *See id.*

77. “*Cardtoons*’ trading cards, for example, comment on the state of major league baseball by turning images of our sports heroes into modern-day personifications of avarice.” *Id.*

78. *Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 95 F.3d 959, 972 (10th Cir. 1996).

79. *See id.* at 972.

80. The *Cardtoons* court uses support from a Supreme Court copyright parody case: “[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.” *Id.* at 972 (quoting *Campbell aka Luke Skywalker v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994)).

81. MLBPA serves as the collective bargaining agent for active major league players. It operates a group licensing program, and acts as assignee of the publicity rights for the active players. The most important licensing arrangements are those for baseball cards, which generate over seventy percent of the licensing revenue. MLBPA receives royalties from the sales and distributes money to the players. *See Cardtoons, L.C.*, 95 F.3d at 965.

82. “The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them.” *Cardtoons, L.C.*, 95 F.3d 959, 973 (10th Cir. 1996) (quoting *White v. Samsung Electronics America, Inc.*, 989 F.2d 1395, 1519 (9th Cir. 1992) (Kozinski, J., dissenting)).

trading cards were subject to MLBPA's consent, neither the cards, nor their "irreverent commentary" could be made openly available to the public.⁸³ Even if some sporting celebrities were to allow the use of their image in parodies, according to the court, celebrity approved parody does not benefit society.⁸⁴ There is a fear the celebrities who would approve of the use of their images in parodies would have an incentive to engage in the unsocial behavior that is subject to parody.⁸⁵ "Society does not have a significant interest in allowing a celebrity to protect the type of reputation that gives rise to parody."⁸⁶

The Tenth Circuit also addressed the economic incentive in protecting right of publicity in order to promote artistic, or in this case athletic, achievement.⁸⁷ MLBPA argued that encouraging the use of time and energies to develop talent benefits society by providing a better product, be it athletic or creative performances.⁸⁸ The *Cardtoons*' court believed these benefits are overstated. The activities themselves in which celebrities participate generate income, while "the commercial value of their identities is merely a by-product of their performance values."⁸⁹ Unlike copyright law, where an author is denied the economic reward for his product if copyright protection is abolished, celebrities still receive economic compensation for their "product" – their performances – if no right of publicity existed.⁹⁰ There is no additional income for celebrities derived from controlling the use of their image in parodies.⁹¹ Instead, according to the court, the only economic incentive would be to control any effect the use of the celebrity's image may have on the market for the authorized uses of the

83. *Id.* at 973.

84. *See id.* at 974.

85. *See id.*

86. *Id.* at 974.

87. *See id.* at 973.

88. *See id.*

89. *See Cardtoons, L.C., v. Major League Baseball Players Assoc.*, 95 F.3d 959, 973 (10th Cir. 1996) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c.). The court uses the following analogy. "Although no one pays to watch Conan McCarthy write a novel, many people pay a lot of money to watch Demi Moore 'act' and Michael Jordan play basketball." *Id.*

90. "Abolition of the right of publicity would leave entirely unimpaired a celebrity's ability to earn a living from the activities that have generated his commercially marketable fame." *Id.* (citing Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 209 (1993)).

91. *See Cardtoons, L.C.*, 95 F.3d at 974.

celebrity's identity.⁹² For example, in *Cardtoons* defendants argue that the plaintiff's trading cards will compete with the cards created by licensed users.⁹³ However, as the court points out, it is hard to imagine that a typical baseball card collector would accept a trading card mocking their favorite sports stars for the more traditional cards celebrating career achievements,⁹⁴ hence there is no substitutive effect.⁹⁵

Another economic argument asserts that publicity rights support the efficient allocation of resources.⁹⁶ It is argued that without publicity control, a celebrity's image may be overexposed, reducing value.⁹⁷ For example, in advertising, a celebrity who frequently uses his or her image to sell products may experience a drop in the economic value of his or her image.⁹⁸ While the *Cardtoons* court found this persuasive within the more specific context of advertising, it was not persuaded by the frequency of appearances argument when applied to non-advertising uses.⁹⁹ Also, instead of using publicity rights to control parody and the frequency of the use of their image, the rights would be asserted to control the type of information conveyed by the use, "and thus permanently remove a valuable source of information about their identity from the marketplace."¹⁰⁰

One rationale that has been offered in support of publicity rights is based on the concept that allowing a celebrity the right to control the use of his name and image protects a celebrity's "natural rights."¹⁰¹ A natural rights argument "implies a degree of control over a celebrity's image that would

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.* at 974-975.

98. *See Matthews v. Wozencraft*, 15 F.3d 432, 437-438 (5th Cir. 1994) (citation omitted).

99. "It is not clear, for example, that the frequent appearance of a celebrity's likeness on t-shirts and coffee mugs will reduce its value; indeed, the value of the likeness may increase precisely because 'everybody's got one.'" *Cardtoons, L.C.*, 95 F.3d at 975 (citing Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 222 (1993)).

100. *Cardtoons, L.C.*, 95 F.3d at 975.

101. *See ELLIS, supra* note 12, at 609 (citing Michael Madow, *Private Ownership and Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 135(1993)).

impermissibly limit society's ability to comment on or criticize that image."¹⁰² The Tenth Circuit dismissed a natural rights argument in *Cardtoons* as it felt there was little to back up the concept that there is an innate sense of fairness dictating that celebrities should be afforded the right to control the use of their name and image.¹⁰³

The court rejects the argument that publicity rights allow celebrities to enjoy the fruits of their labors.¹⁰⁴ The court likened this argument to the right of a company to benefit from the goodwill it has generated in its name.¹⁰⁵ Just as a corporation may generate value in its name by providing good customer service or superior quality, a celebrity can generate value in his or her name by choosing good scripts or producing popular albums. Independent influences have too large a role on a celebrity's popularity and success.¹⁰⁶ For example the media may look favorably upon a particular celebrity's performance, or the fans or audience may rally behind a particular celebrity for a variety of reasons, often reasons having nothing to do with a celebrity's performance.¹⁰⁷

The court also rejected right of publicity based on the argument that prohibiting parody would prevent unjust enrichment.¹⁰⁸ The court says that a parody use "is not merely hitching its wagon to a star."¹⁰⁹ A parody use involves the addition of a "significant creative component" that results in the creation of a new product.¹¹⁰

As for preventing emotional injuries, the court says that function is not appropriately allocated to publicity rights, which

102. ELLIS, *supra* note 12, 64 U. CIN. L. REV. at 609 (1996).

103. *See id.* But see Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTING L.J. 853, 858 (1995), Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

104. *See id.* (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977); *Uhlaender v. Henricksen*, 316 F.Supp. 1277, 1282 (D. Minn. 1970)).

105. *See Cardtoons, L.C.*, 95 F.3d at 975 (citing *Ali v. Playgirl, Inc.*, 447 F.Supp. 723, 728-29 (S.D.N.Y. 1978)).

106. *See Cardtoons, L.C.*, 95 F.3d at 975.

107. The court did indicate that when dealing with athletes there may be less subjective influences, and popularity is more likely to be based on objective qualities such as pure ability or performance. *See id.* at 975.

108. *See id.* at 976.

109. *Id.*

110. "Indeed, allowing MLBPA to control or profit from the parody trading cards would actually sanction the theft of *Cardtoons'* creative enterprise." *Id.*

are meant to protect against financial loss.¹¹¹ Instead the court points to unfair competition laws and laws prohibiting the intentional infliction of emotional distress.¹¹² The court also asserts that “fame is a double-edged sword” and seems to indicate that criticism is to be expected when one enjoys celebrity status.¹¹³

In response to the argument that prohibiting parody would protect consumers from confusion, the court reiterates that it is unlikely anyone would assume a celebrity authorized the use of their image for parody purposes, as it often results in a mocking use.¹¹⁴

Considering the above factors in *Cardtoons*, the Tenth Circuit found the publicity rights of major league baseball players and the MLBPA were not violated by the sale of trading cards with caricatures of the players and humorous commentary.

*White*¹¹⁵ and *Cardtoons*¹¹⁶ can be distinguished. In *White*, Samsung attempted to use parody within an advertisement for a specific product, while in *Cardtoons* the parody was actually embodied in the product itself. The different treatment by the circuits of a parody defense may be due to the fact that right of publicity is still such a relatively new area of law, with many new developments and variations.¹¹⁷

Both *White*¹¹⁸ and *Cardtoons*¹¹⁹ have been subject to criticism. *White* is specifically criticized in *Cardtoons*.¹²⁰

111. See *Cardtoon, L.C.*, 95 F.3d at 976 and *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1987) (holding that public figures and public officials may not recover for the tort of intentional infliction of emotional distress without showing that the publication contains a false statement of fact made with “actual malice”).

112. See *Cardtoons, L.C.*, 95 F.3d at 976.

113. *Id.*

114. *Id.* at 975 (citing Restatement (Third) of Unfair Competition § 46 cmt. c; 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 2.4 (1996); Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1600 (1979)). The court also asserts, the Lanham Act already provides protection at a national level against false or misleading representations in connection with product sales. *Id.* at 975.

115. 971 F.2d 1395.

116. 95 F.3d 959.

117. See *supra* note 20.

118. 971 F.2d 1395.

119. 95 F.3d 959.

120. “We disagree with the result in that case for reasons [see below]

Cardtoons has been limited by other cases and is often distinguished, rather than followed. For example, in *Elvis Presley Enterprises v. Capece*, the court held that where direct parody of society does not attempt to parody the celebrity himself the fair use defense does not apply.¹²¹

The criticisms of *White v. Samsung* asserted by Judge Kozinski¹²² and Judge Alarcon¹²³ are persuasive. Intellectual property is supposed to protect creative and innovative endeavors, subsequently enriching the environment from which intellectual property flows.¹²⁴ When the protection afforded celebrities by the right of publicity becomes too broad it hinders creative endeavors by cutting off access to a significant segment of the public domain.¹²⁵ *White v. Samsung* goes too far – denying the public of a rich piece of the public domain.¹²⁶

Not only does *White v. Samsung* fly in the face of the basic goals behind intellectual property rights, but it offends the First Amendment.¹²⁷ The decision denies a parody exception to the right of publicity, forbidding a powerful means of

discussed in the two dissents that it engendered.” *Cardtoons, L.C.*, 95 F.3d at 970. See also *White v. Samsung*, 971 F.2d at 1408 (9th Cir. 1992) (Alarcon, J., dissenting) (dissenting because “no reasonable consumer could confuse the robot with Vanna White or believe that, because the robot appeared in the advertisement, Vanna White endorsed Samsung’s product,” and “we must prevent the creation of a monopoly that would inhibit the creative expressions of others”), and *White v. Samsung*, 989 F.2d 1512, 1517-21 (9th Cir. 1993) (Kozinski, J., dissenting) (dissenting from the order rejecting the suggestion for rehearing en banc) (arguing that *White* went too far in protecting a right of publicity because it conflicts with the Copyright Act, the Copyright Clause, and raises serious First Amendment problems).

121. See *Elvis Presley Enterprises v. Capece*, 141 F.3d 188, 200 (5th Cir. 1998).

122. *White v. Samsung*, 989 F.2d at 1517-21.

123. *White v. Samsung*, 971 F.2d at 1408 (9th Cir. 1992) (Alarcon, J., dissenting).

124.

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it’s supposed to nurture.

White v. Samsung, 989 F.2d at 1513. (citing Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1556-57 (1993)).

125. See *id.* at 1513, 1516-1517.

126. See *id.* at 1514 (“The panel’s opinion is a classic case of overprotection.”).

127. See *id.* at 1519.

communication where the subject of the parody is a celebrity.¹²⁸

Parody, humor, irreverence are all vital components of the marketplace of ideas. The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them, or from “evok[ing]” their images in the mind of the public.¹²⁹

The court in *White v. Samsung* denies the value embodied in commercial speech. Not only is commercial speech is protectable speech,¹³⁰ but it “has a profound effect on our culture and our attitudes.”¹³¹ Because of the weaknesses found in *White v. Samsung*,¹³² this paper will only apply the *Cardtoons* analysis.

Now Jesse Ventura seeks to exercise exclusive control over his name and likeness – for example, by preventing Pat Helmberger from using a cartoon image of Governor Ventura on a greeting card. By allowing Ventura this type of control, do we restrict commercial or political speech? Does Ventura fit into the categories of public official or public figure? We must apply the balancing test from *Cardtoons* to determine whether the public’s interest in parodying Governor Ventura outweighs Ventura’s interest in protecting his publicity rights. The next section will apply the analysis from *Cardtoons* to the case of Jesse Ventura, a celebrity-turned-public official, and his attempts to enforce publicity rights.

II. FIRST AMENDMENT ANALYSIS OF A CELEBRITY-TURNED-POLITICIAN’S ATTEMPT TO CONTROL THE COMMERCIAL USE OF HIS IMAGE

Jesse Ventura’s emergence as a celebrity-turned-politician has raised a serious issue as to where the law draws the line between protecting the right of publicity of an entertainer-turned-politician and the public’s First Amendment rights to exercise political speech. His attempts to prevent the use of his name and image for commercial purposes has brought the issue to the point where it must be addressed.

128. *See id.*

129. *White v. Samsung*, 989 F.2d 1512, 1519 (9th Cir. 1993). In a footnote following this language, Judge Kozinski warns, “[t]he majority’s failure to recognize a parody exception to the right of publicity would apply equally to parodies of politicians as of actresses.” *Id.* at 1519 n.29.

130. *Id.* at 1519. *See also supra* notes 39-45.

131. *White v. Samsung*, 989 F.2d at 1520.

132. *See infra* notes 122-131 and accompanying text.

Specifically, the action taken by the Governor and his representatives in sending a cease and desist letter to Pat Helmberger, a 63-year-old secretary at the State Capitol, provides an excellent test case to analyze the relevant issues. To refresh, Helmberger, who used Ventura's image in a Valentine's Day card,¹³³ received a letter warning, "Governor Ventura and his assigns . . . own the exclusive rights to use his name and likeness for commercial purposes . . . Unless you first obtained express written permission, you may be violating the law."¹³⁴ The image used was a "grinning likeness of Gov. Jesse Ventura, clad in a wrestling leotard with pink hearts and wrapped in a pink feather boa."¹³⁵ The outside of the card reads, "Happy Valentine's Day, Honey!" The inside reads, "Get Ready to Rumble."¹³⁶

A. PUBLIC FIGURE VS. PUBLIC OFFICIAL

First, the issue that must be addressed is whether Ventura can be plugged into a celebrity/public figure category, or a politician/public official category.¹³⁷ Clearly "Jesse the Body" is a celebrity. In fact he is a celebrity whose image has already been deemed worthy of protection by a court.¹³⁸ On the other hand, "Jesse the Governor" is an elected public official – one who holds a significant public office as Governor of Minnesota.

One attempt to resolve this conflict would be to try to separate the images, affording protection to Jesse the Body, the professional wrestler or Jesse Ventura the actor, while allowing for more public use of the Jesse the Governor persona. For example, Helmberger's card used an image of the Governor in a feather boa, which represents Jesse Ventura, the professional wrestler. Under this proposed approach her card would be afforded less protection, while more regard would be given to Ventura's publicity rights. If the image on the card had been Jesse Ventura in a suit standing behind a podium with the Minnesota State Seal, this would clearly represent Jesse Ventura, Governor of Minnesota. In this case more protection

133. *Id.*

134. BADEN, *supra*, note 1.

135. *Id.*

136. *Ventura Not Loving This Valentine's Day Card*, THE BUFFALO NEWS, Feb. 14, 1999 at A10.

137. *See supra* note 30 and accompanying text.

138. *See supra* note 24.

would be given to Helmberger's card, and less to Governor Ventura.

This is probably not a practical solution. Ventura, himself, has too often melded his many images.¹³⁹ His own use of the celebrity images proves that it is a useful way to convey messages about Jesse the Governor in a quick, concise, and humorous way.¹⁴⁰

Not only is it impractical, it is not desirable to separate people into distinct personalities or personas. Even political figures who did not lead a public life as an entertainer prior to holding public office are subject to scrutiny regarding their past actions and careers which is brought out in most campaign coverage presented to the public. Society does not separate their personality and life into a pre-candidacy persona and post-candidacy persona. This would be akin to saying that, for speech purposes (at least commercial speech purposes)¹⁴¹ commentary on those holding a public office must be limited to political acts alone. While some may argue it is desirable to allow our public officials to live their private lives completely separate from their lives as a public officer, this approach is not espoused by the majority of our society. It would be resisted by many, and enforcement would be a nightmare. The scandal involving President Clinton and Ms. Lewinsky illustrates the difficulty in separating private lives from public activity. Marital infidelity and sexual activity are very much private matters. On the other hand, some of these sexual encounters at issue took place in the President's office, and Ms. Lewinsky was an intern working at the White House. This type of incident, and the characterization of personalities in general, appears as an element of many products offered for commercial sale, from greeting cards to the Clinton growing nose wrist watch.

Another possibility is to approach the problem temporally. Perhaps a compromise could be reached where less protection is afforded while Ventura is in office, returning full protection when no longer in office. Again, this is not practical. Just

139. See *supra* notes 1-5 and accompanying text.

140. Images allow for this quick, concise form of communication in a similar manner in which parodies communicate, often through humor and by allowing the recipient to quickly associate a larger range of values and ideas in a less complicated format, than say a scholarly article. See *Cardtoons, L.C.*, 95 F.3d at 972.

141. See *supra* note 39.

because he is out of office does not mean his “reign” will not be significant to history or society.¹⁴² Jesse Ventura especially is likely to leave a lasting mark on our social fabric. The national attention focused on Ventura compared to governors in other states indicates the impact of the social phenomena many consider Ventura. The lessons to be learned from a dialogue about Ventura’s campaign and term in office do not become any less important or relevant simply because he is no longer in office.¹⁴³

In considering public figure/celebrity versus public officer/politician, the expectations of the public or constituents needs to be taken into account. It appears that the citizens of Minnesota believe that by virtue of running for office, Governor Ventura has sacrificed some intellectual property rights along with other sacrifices made when he left private life.¹⁴⁴ Although Governor Ventura clearly has characteristics of a public figure,¹⁴⁵ by running for office he has intentionally given up whatever protection should be afforded a non-public-official public figure.¹⁴⁶ The importance of public office holders in a democracy means that hybrid people must be treated as public officials.¹⁴⁷

142. “[W]ith the passage of time, an individual’s identity is woven into the fabric of history as a heroic or obscure character of the past. In that sense the events and measure of his life are in the public domain and are questionably placed in the control of a particular descendant.” *Bela George Lugosi v. Universal Pictures*, 603 P.2d 425, 446 (Bird, C.J., dissenting) (Cal. 1979).

143. *Id.*

144. Margaret G. Smith of Roseville, Minnesota writes, “Jesse Ventura ought to be ashamed of himself, bringing down the weight of the law on a hard-working secretary at the Capitol who sold a few homemade greeting cards featuring a sketch of him.” Christine Etem Litsey of Golden Valley, Minnesota writes, “The legacy of a political, public figure is not measured by the income generated by licensing his or her persona. It is hard to imagine President Theodore Roosevelt claiming a percentage of each stuffed ‘Teddy’ bear sold. Perhaps Gov. Ventura should be much less concerned with the quantity of dollars his action figures and T-shirts generate and much more concerned with the quality of public policy he creates while in office.” And finally, from Angela Schwab from Andover, Minnesota, “I couldn’t help but notice the uncanny resemblance between Mr. Potato Head on page E14 of the Feb. 13 Variety section and our image-conscious governor. Be careful, you may get a cease and desist order too.” *Letters From Readers*, STAR TRIBUNE (Minneapolis, Minn.), Feb. 17, 1999, at 14A.

145. See *supra* note 138 and accompanying text.

146. See *generally* notes 139-144 and accompanying text.

147. See *supra* notes 52-53 and accompanying text.

B. POLITICAL VS. COMMERCIAL SPEECH

An attempt should be made to determine whether the greeting card qualifies as commercial or political speech.¹⁴⁸ Initially it may appear the card is commercial speech since Ventura's image is used to sell a commercial product. While Ventura's image was not used to make a statement about quality or any other type of endorsement, greeting cards are not purchased for physical qualities such as card stock or printing quality as much as for the message and the successful delivery of that message through the visual effect. Here the message, "Happy Valentine's Day Honey! Get Ready to Rumble,"¹⁴⁹ seems to be a personal one between those involved in an intimate relationship, and it is the use of Ventura's image that makes the delivery successful through humor and recognition. This is not enough to qualify as commercial speech however, since commercial speech is not solely about an attempt at financial gain, it must communicate directly about economic exchanges.¹⁵⁰ It is more likely the card would be considered political speech.

There are several characteristics of this greeting card that support a finding that the card is an exercise of political speech, rather than commercial speech. First, the humor is specifically linked to Jesse Ventura and his experience. While the image used is one from his professional wrestling days, the impact of the message would not be successful if a different well-known professional wrestler was pictured in Ventura's place. Part of the humor is the initial response to seeing an image of the governor wrapped in a boa reminiscent of his wrestling regalia. In fact, the message seems to be less of a personal communication between two people, and more of an attempt to tie the card into the holiday for which it was created. It is hard to imagine an intimate exchange coupled with an image of a professional wrestler. Some would say that would feel as awkward to them as seeing their governor in spandex and feathers. Many political messages could be taken from this. Some may say the image is ridiculous and mirrors the sentiment many feel in having a former professional wrestler in such a high profile political office. Others may say the image

148. See *supra* note 30.

149. *Ventura Not Loving This Valentine's Day Card*, THE BUFFALO NEWS, February 14, 1999 at A10.

150. See *supra* notes 44-45.

makes a statement about the governor's approach to his situation – he's not making any apologies for his former career, and in fact is proud of it and the words "Get Ready to Rumble" indicate his willingness to take the office by storm. Still others may identify with the card as conveying an image of an uncomfortable confrontation, a potential recurring pattern during Ventura's term. All of these interpretations convey a political message, albeit it one conveyed through humor. Often political speech is presented through humor, and a humorous approach does not in any way make it non-political speech.¹⁵¹

As far as political speech is concerned, this is not a heavy-hitting, critical statement. Instead, it seems to convey a message linking Governor Ventura to themes such as fun and affection. This does not make it any less political speech, however, as political speech is not limited to serious, well-articulated communications.¹⁵²

The majority of the message conveyed about Governor Ventura is received through the picture, rather than any text. The text of the card, "Happy Valentine's Day! Get Ready to Rumble,"¹⁵³ is the part of the card that ties the political message into the Valentine's Day theme. While it may enhance the humor, the card needs the image to be effective. Again, this does not lessen the value of the political speech. It is recognized that cartoons or caricatures have historically played a significant role in political speech in this country, and continue to do so.¹⁵⁴ Many times political cartoons have sparked heated debate, maybe more effectively than if a textual argument had been presented.¹⁵⁵

The fact that the speech appears as part of a greeting card also does not take it out of the realm of First Amendment protection. Whether commercial or political speech, protection has been extended not only to traditional print media, but less traditional means of expression as well, including clothing, dancing, flag burning, and trading cards.¹⁵⁶ Trading cards seem

151. See *supra* note 36 and accompanying text.

152. See *supra* note 35 and accompanying text.

153. *Ventura Not Loving This Valentine's Day Card*, THE BUFFALO NEWS, Feb. 14, 1999 at A10.

154. "Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate." *Hustler Magazine v. Falwell*, 485 U.S. 46, 54 (1988).

155. *Id.*

156. See *supra* note 38 and accompanying text.

particularly analogous to greeting cards, and it is easy to imagine that greeting cards would also fall in the realm of forms of expression deserving of First Amendment protection.

The distinction between commercial and political speech may be less relevant in light of the increasing protection of commercial speech for First Amendment purposes.¹⁵⁷ What is important is that affording First Amendment protection to this greeting card would not conflict with any of the goals in protecting either commercial or political speech. The card makes a statement about a prominent elected official, becoming part of the marketplace of ideas and sparking public debate.¹⁵⁸ In addition, the card does not make false claims about the final product or the relationship of Ventura to the product, which would run counter to the goals of promoting truth and accuracy within the market system.

Even if the greeting card is political speech, the public's First Amendment rights must be balanced with Ventura's publicity rights.¹⁵⁹ In light of the goals of First Amendment protection, is it fair for Helmberger to use Ventura's image in a format that is meant to bring in a profit? An excellent starting point is to apply the balancing test found in *Cardtoons*.¹⁶⁰

C. *CARDTOONS* BALANCING TEST

In applying the *Cardtoons* balancing test, several factors should be considered.¹⁶¹ First, does the use of Ventura's image cause any confusion as to the source of Helmberger's greeting card?¹⁶² Is there value in the expression found in Helmberger's card that merits protection?¹⁶³ Does Ventura occupy a role as a symbol of society?¹⁶⁴ Is there a chance that Ventura would license his image to those who want to use it for purposes of

157. See *supra* note 42 and accompanying text.

158. In this case the debate has centered around issues most likely never contemplated by Helmberger, such as those in this article, but important nonetheless. An author (or illustrator) cannot control the public response to his or her work and issues may arise that the original author never contemplated. This is how the public benefits from First Amendment protection. See *supra* note 29 and accompanying text.

159. See *supra* note 70.

160. See *supra* note 71.

161. *Id.*

162. See *supra* notes 72-73 and accompanying text.

163. See *supra* notes 74-75 and accompanying text.

164. See *supra* notes 76-78 and accompanying text.

parody?¹⁶⁵ Can economic incentives, such as promoting future achievement, be gained in allowing Ventura protection of his name and image under a right of publicity rationale?¹⁶⁶ Does allowing Governor Ventura to profit from the use of his name and image have the benefit of resulting in a more efficient allocation of resources?¹⁶⁷ Would protecting Ventura's control of the commercial use of his name and image better protect consumers?¹⁶⁸ Would inherent or natural rights be violated if Ventura was not allowed to control the use of his name and image?¹⁶⁹ Should Ventura be allowed to control the use of his name and image as it would allow him to secure the fruits of his own labor?¹⁷⁰ Would stopping unauthorized users access to Ventura's name and image prevent unjust enrichment?¹⁷¹ Should Ventura be allowed to control his name and image in order to prevent emotional harm?¹⁷² Each of these factors are to be looked at first individually and finally in the aggregate in order to determine whether Ventura's right of publicity outweigh the public's First Amendment rights.

Is there any confusion as to source resulting from the use of Jesse Ventura's image in Helmberger's Valentines's Day card?¹⁷³ This question is problematic. It seems unlikely that many consumers would think that the card is being distributed by the Governor's office. On the other hand, some may think the card is coming from the organization Ventura for Governor, Inc., the group responsible for marketing Ventura merchandise, such as action figures and t-shirts.¹⁷⁴ Confusion may exist as it is widely publicized that Ventura seeks to control where his name and image appears.¹⁷⁵ Knowing these efforts are in force may lead consumers to assume that he or his agents have authorized the use of his name and image wherever it appears. Furthermore, there is no disclosure on the greeting card

165. See *supra* notes 79-86 and accompanying text.

166. See *supra* notes 87-95 and accompanying text.

167. See *supra* notes 96-99 and accompanying text.

168. See *supra* note 100 and accompanying text.

169. See *supra* notes 101-103 and accompanying text.

170. See *supra* notes 104-107 and accompanying text.

171. See *supra* notes 108-110 and accompanying text.

172. See *supra* notes 111-113 and accompanying text.

173. See *supra* note 72 and accompanying text.

174. Initially the proceeds from this merchandise were used to fund Ventura's campaign, and are currently distributed to local charities. BADEN, *supra* note 1, at A15.

175. See *supra* note 144.

regarding the lack of official endorsement as there was on the trading cards at issue in *Cardtoons*.¹⁷⁶ On the other hand, the source on the back of the card would be attributed to Helmberger's business, and not the Governor's office, or Ventura for Governor, Inc. It is unlikely that consumers would believe that the card was a product distributed by Ventura or Ventura for Governor, Inc.

What kind of value is found in the expression in Helmberger's card? It is relevant to emphasize the value the Tenth Circuit placed on parody in the *Cardtoons* case.¹⁷⁷ The court stressed the importance of parody as a means for engaging in social criticism, as well as self-expression.¹⁷⁸ While Helmberger asserts there was no criticism intentionally put into her card and the card can be received in good humor,¹⁷⁹ greeting cards have an additional communicative effect. While many products, such as t-shirts and coffee mugs, may have an additional communicative effect, greeting cards are traditionally designed not only to convey a message from producer to purchaser, but also from the purchaser to the recipient. This is especially true with cards employing parody, as it is a less direct form of communication and a person may receive a totally different message than the author conveyed.¹⁸⁰ A consumer may purchase a card and give it to another with whom they have a personal relationship that allows for a shared message completely different from Helmberger's original message.¹⁸¹ This message may be one of contempt, rather than fun and humor. Then Helmberger's self-expression

176. See *supra* note 73 and accompanying text.

177. Much of this is addressed in the First Amendment discussion *supra* Part II.B. See *supra* notes 74-75 and accompanying text.

178. See *supra* note 75 and accompanying text.

179. "We planned to do a whole series of [greeting cards], birthday cards, St. Patrick's Day cards. Just something cute and funny. Not a put-down in the bunch." See BADEN, *supra* note 1.

180. "If there is no real desire on the part of the manufacturer to make a statement, there is no symbolic speech and hence no first amendment protection. The situation changes, however, when the people who purchase the items, rather than the manufacturers, are considered to be the speakers." Eileen R. Rielly, *The Right of Publicity for Political Figures: Martin Luther King, Center for Social Change, Inc. v. American Heritage Products*, 46 U. PITT. L. REV. 1161, 1174 (1985) (footnotes omitted).

181. "Determinations will have to be made on a case-by-case basis to determine whether the item serves the need of the public to express itself or whether it is simply a windfall to the defendant." *Id.*

is transformed into social criticism.¹⁸²

While social “criticism” was the quality emphasized in *Cardtoons*,¹⁸³ and the potential is here for such a message, perhaps social “commentary” is a more appropriate term. It does not seem appropriate to limit the value of a communication to the negative commentary, though it does seem parody is most often used to critique.¹⁸⁴ Parody used to make positive, or lighthearted statements is still important in achieving societal awareness. The value placed on parodying public figures such as professional baseball players¹⁸⁵ can certainly be extended to parodying public officials such as state governors. Whether social criticism or social commentary, it follows that the expression found in Helmberger’s card is valuable to society.

What role does Ventura play as a symbol of society? The *Cardtoons*’ court asserts celebrities serve as a “valuable communicative resource” because of an idea or value the public associates with that celebrity.¹⁸⁶ Not only does Ventura serve as a symbol as a celebrity, but he is a direct representative of the people of Minnesota as an elected official. There have been many values and ideas associated with Governor Ventura. Many of these have been positive, such as honesty and festivity.¹⁸⁷ Others have been negative, and many of these associations seem to be the more indirect ones found in *Cardtoons*.¹⁸⁸

A celebrity-turned-politician seems to convey, if not embody, very important messages about celebrities as symbols of societal trends. There is criticism that name recognition may

182. *Id.*

183. *See supra* note 75 and accompanying text.

184. *See supra* notes 72 and 73.

185. *See supra* notes 75-77 and accompanying text.

186. *See id.*

187. “Gov. Jesse Ventura’s penchant for calling things as he sees them elicited a bit of positive press from a *Time* magazine reporter who said Minnesota’s governor is more candid than 99 percent of politicians.” *Ventura Called More Candid Than 99% of Politicians*, STAR TRIBUNE (Minneapolis, Minn.), December 20, 1999, at B3.

188. “[S]ome national Reform Party leaders said they were looking forward to the departure of Ventura, who is perceived by some as a national embarrassment . . .” Dane Smith & Tom Hamburger, *Anxious Reform Party Officials Await Ventura’s Next Move*, STAR TRIBUNE (Minneapolis, Minn.), February 11, 2000, at 1A. *See also PolkOnline: Adventures with Jesse ‘The Body’* (visited Apr. 7, 2000) <http://www.polkonline.com/stories/110998/opi_ventura.shtml>.

get you further in an election than a well thought-out platform.¹⁸⁹ On the other hand there are also those who say recent celebrity election successes¹⁹⁰ may be the result of a rejection by the public of career politicians.¹⁹¹ Ventura, as an embodiment, in and of himself, of these thoughts and ideas, has become the subject of national media attention.¹⁹² Ventura has allowed himself to become a symbol, useful to the public for social commentary.

Is it unlikely that Ventura would license his image for parody use, denying the marketplace of ideas an entire category of speech? The court in *Cardtoons* found there was an unlikelihood that celebrities would authorize the use of their image for parody.¹⁹³ The current importance placed on the personal character of political candidates raises the stakes and provides at least as much motivation as a celebrity would have for protecting his or her image. Why seek control of the use of your image at all if one is going to give blanket permission for its use?¹⁹⁴ On the other hand, public reaction and media

189. Jesse J. Holland, *YahooNews! Politics Headlines: McCain Using Unknowns in NY Battle*, (Tuesday, Feb. 26, 2000 6:00 AM ET) <http://daily.news.yahoo.com/h/ap/20000229/el/friends_vs__nobodies_1.html> (predicting McCain will be hurt in New York because Bush will have support of famous Republicans, while McCain's supporters remain unrecognized).

190. Celebrities-turned-politicians include Ronald Reagan (former actor known for his Western movies), Sonny Bono (formerly of *Sonny and Cher* fame), Fred Gandy (Gopher on the show *Love Boat*), Fred Thompson (actor), and Steve Largent (played for the Seattle Seakawks in the NFL).

191.

Maybe [the celebrities seeking public office are] all arriving just in time to reawaken public interest in politics. A lower percentage of Americans is voting in elections than at any time since the roaring '20s, and, in the new "Newsweek" Poll, barely half — 54 percent — say that the two-party system is doing even "a pretty good job of addressing the issues that are most important." To many voters — especially young ones — traditional politics is not only beside the point, but dull beyond words. In a time of relative peace and prosperity, a cable-ready nation is looking for action and inspiration — and generally not finding either.

Howard Fineman, *Look Who's Running*, NEWSWEEK, Oct. 11, 1999, at 30.

192. National media attention has consisted of appearances on *The Today Show*, *Late Show with David Letterman*, *Meet the Press with Jim Ruskert*, and *The Tonight Show with Jay Leno* and cover articles for *Time* and *Newsweek*.

193. See *supra* notes 79-80 and accompanying text.

194. Another possible reason may be to access any profits resulting from the use. Ventura for Governor Inc. markets a Ventura doll, which is arguably a parody of the Governor, but does not embody the critique many normally associate with parody. *But see supra* note 152 and accompanying text (referring to Helmberger's card as "not a heavy-hitting, critical statement").

coverage provide a deterrent for politicians to deny the use of their image that does not exist for celebrities.¹⁹⁵ When right of publicity cases involving celebrities make the news, there seems to be a sense from the public that there is a natural justice in allowing a celebrity to profit from their own image.¹⁹⁶ This does not seem to be the case when it is a politician asserting publicity rights.¹⁹⁷ The public seems to feel that they have a “right” to the image of a public official that they don’t have with a celebrity.¹⁹⁸ Negative public reaction can deliver a significant blow to an office holder, whether it be reelection hopes or support for policy goals. If a politician feared a strong public backlash in response to his or her refusal to authorize the use of his or her image for parody purposes, it is marginally feasible to imagine a politician authorizing the use of his image for parody use in order to avoid damaging his or her current platform and approval ratings. Regardless, the best evidence we have that Ventura would be reluctant to license his image for parody use are the legal threats made to those who have dared to use his image for such purposes.¹⁹⁹

Are there economic incentives in protecting Ventura’s right of publicity in order to promote future achievement?²⁰⁰ This analysis is less relevant to Ventura’s role as Governor of Minnesota. On the other hand, Ventura may return to entertainment, and it would be desirable to stimulate his achievement and strive for progress.²⁰¹ Still, it does not seem logical that if Ventura were allowed to profit from the use of his

195. “That the proceeds from product licenses issues so far will go to charitable or educational causes ‘certainly takes the edge off,’ he said, ‘but there remains an uneasiness about the long-term pattern here. It certainly invites a high degree of scrutiny.’” BADEN, *supra* note 1 (quoting Lawrence Jacobs, University of Minnesota political science professor).

196. Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTING L.J. 853, 859 (1995); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

197. *See supra* note 144.

198. *See supra* notes 103 and 144 and accompanying text.

199. *See supra* notes 1-6 and accompanying text.

200. *See supra* notes 87-90 and accompanying text.

201. John Wodele, Ventura’s communications director, commenting on the cease and desist letter to Helmberger, referred to Ventura’s stint as Governor as an “interim” activity. “Being that his business relies heavily on his name and persona, it’s in his interests to protect them during this interim period in which he’s governor.” Patricia Lopez Baden, *Ventura Takes Image to Heart*, STAR TRIBUNE (Minneapolis, Minn.), Feb. 12, 1999, at 1A.

image he would do a better job as Governor in order to gain more popularity so that proceeds from Ventura products and appearances would increase. Even if this were true, it is part of America's value system that holding public office stems from a desire to serve the public and is not a profit-oriented venture.²⁰² Politics are too subjective for this kind of incentive. Should Congress give the President a performance based raise? It is not good public policy to link political performance to economic rewards.

Does allowing Governor Ventura to profit from the use of his name and image have the benefit of resulting in a more efficient allocation of resources?²⁰³ The *Cardtoons*' court asserts this argument loses any weight it has outside of the advertising arena, where the economic value of a celebrity's image may drop if used to promote too many different products.²⁰⁴ This argument holds even less influence when dealing with a public official. Where public officials profit from their appearances, or promote products in advertising, conflict of interest issues arise.²⁰⁵ It is assumed that at least some of the interest in a prominent government official results in a large part because of his or her election to public office.²⁰⁶ The name recognition and popularity of Jesse Ventura increased dramatically after he announced his run for Governor.²⁰⁷ Ventura should not receive personal rewards from public efforts including voters, staff, and legislators.²⁰⁸

202. "[In proposing what is now the Twenty-Seventh Amendment, Madison] realized that there existed an appearance of impropriety and indecorum in allowing a body of men to increase their own salaries from the public pocket." JoAnne D. Spotts, *The Twenty-Seventh Amendment: A Late Bloomer or a Dead Horse?*, 10 GA. ST. U. L. REV. 337, 340 (1994) (footnote omitted).

203. See *supra* note 96 and accompanying text.

204. See *supra* notes 97-100 and accompanying text.

205. For example, there was much public controversy when Ventura appeared as a guest referee at a World-wide Wrestling Federation event, even where some of the proceeds went to charities. Dane Smith, *Complaint Contends Ventura's Ref Stint May be a Conflict*, STAR TRIBUNE (Minneapolis, Minn.), Aug. 19, 1999, at B3.

206. "None of this – the book deals, the movie deals, even these cards – would have happened but for the fact that voters put him into high elective office,' Jacobs said, '[t]here is at least the appearance that he is overly concerned about the private gain to be made from his public office.'" BADEN, *supra* note 1 (quoting Lawrence Jacobs, University of Minnesota political science professor).

207. *Id.*

208. Cf. Dane Smith, *State Memo: Ventura's Actions a Conflict of Interest*,

Would consumers be better protected if Ventura was allowed control of the commercial use of his name and image? This question is a closer call. On one hand, we still have a situation where there may be some source confusion.²⁰⁹ On the other hand, people express their ideas through their retail purchases. T-shirts and bumper stickers exclaiming, “My governor can beat up your governor,” were distributed by Ventura for Minnesota, Inc.,²¹⁰ and were quite popular immediately following Ventura’s election. Presumably someone displaying or purchasing such a product supports Ventura’s victory. Shouldn’t those who are not pleased with Ventura’s success have access to products reflecting their opinion? If only pro-Ventura merchandise is available it would be unfair. Instead of protecting consumers, we would be limiting their ability, of at least some, to express themselves through their retail purchases.

Would protecting Ventura’s publicity rights be in effect safeguarding natural rights? The *Cardtoons*’ court rejected this concept, as they did not feel there was any evidence presented that supported the idea.²¹¹ Even if there were a shared sense by the population that celebrities have the right to profit from their own persona and image,²¹² it is already seen that at least some Minnesotans strongly disagree with the idea that a public official has an inherent right to profit from his own image or name.²¹³ At the same time, at least in the U.S. cultural experience, there is a strong sentiment among the public that citizens have the right to self-expression, especially as it relates to politics.²¹⁴ Hence, if allowing Ventura the right to control the use of his name and image would act in any way to inhibit anti-Ventura sentiment, this would violate natural rights the public believes it holds.

Would protecting Ventura’s publicity rights secure for him the fruits of his own labor?²¹⁵ Again, the labor here deals with public service work, not work motivated by profit. Also, the

STAR TRIBUNE (Minneapolis, Minn.), Sept. 10, 1999, at B2 (reporting a high-ranking state ethics adviser suggested it was wrong for Ventura to use state security guards, provided by the public, for his personal book tour).

209. See *supra* text accompanying notes 173-176.

210. See *supra* note 5 and accompanying text.

211. See *supra* note 103 and accompanying text.

212. See *id.*

213. See *supra* note 144.

214. See *supra* 31-34 and accompanying text.

215. See *supra* note 104 and accompanying text.

Governor's labors are part of a partnership with the citizens of Minnesota, the legislature, his staff, and many more. This collective effort echoes the goodwill a business has generated in its own name analogy in *Cardtoons*.²¹⁶ But just as this is not applicable to an individual celebrity, it is not applicable to Ventura. Often a celebrity's "goodwill" is subject to too many outside influences which are not a result of the celebrity's efforts. Ventura's "goodwill" is similar in that many of those people who may aid in his success in one area, may operate to stifle other projects he supports. It is not a cumulative collective effort, but a series of individual collective efforts. There are too many outside forces acting on the Governor's success, or lack thereof, to say that providing the Governor with publicity rights would secure for Ventura the fruits of his own labor.²¹⁷

Would stopping unauthorized users access to Ventura's name and image prevent unjust enrichment?²¹⁸ This is closely related to the natural rights analysis. Again, a sense of justice is less clear. As a celebrity, Jesse the Body may deserve those profits, but as Jesse the Governor, at least some people adamantly sway the other way.²¹⁹ If the two identities are indeed inseparable, as they seem to be, it does not seem just that Ventura should profit from his name and image.

Would allowing Ventura the right to control the use of his name and image be a way in which Ventura could avert emotional harm?²²⁰ Just as one is to expect criticism when one enjoys celebrity status,²²¹ we expect our elected officials to have a thicker skin. After all, they made a conscious decision to enter an election, hopefully armed with the knowledge of what kind of scrutiny political candidates are subject to.²²² Even if Ventura could control the commercial use of his name and

216. See *supra* note 105 and accompanying text.

217. See *supra* notes 106-107 and accompanying text.

218. See *supra* notes 108-109.

219. See *supra* note 144.

220. See *supra* note 111 and accompanying text.

221. See *supra* note 113 and accompanying text.

222.

An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

image, there would still be criticism or embarrassing revelations in the news media. Emotional harm could never be entirely, or even mostly averted. The expression rights of the general public outweigh the little benefit gained by an elected official in controlling the commercial use of his persona as a means to avert emotional harm.

D. SUMMARY

Ventura appears to fit in a hybrid category of both a public figure and a public official, but as it is not practical to separate these two images we must treat Helmberger's Valentine's Day card as a parody of a public official.²²³ Because Helmberger's card did not use Ventura's name and image to promote her card, but rather as a communicative tool capable of delivering a variety of political messages, Helmberger's expression must be protected as political speech.²²⁴ While there is some question as to confusion of source, if the court were to establish a precedent in favor of protecting the right to parody a public official, any potential confusion could be cleared up.²²⁵ If the court were to establish precedent that would support Ventura's publicity rights, the consumers would continue to be confused as to whether a particular parody was authorized by Ventura, or simply not yet detected by his enforcers.²²⁶ Helmberger's card parodies Ventura in a way that provides valuable social commentary useful to consumers in favor or disdaining of Governor Ventura.²²⁷ Ventura has allowed himself to become a symbol, embodying thoughts and ideas regarding celebrities-turned-politicians, through his many public appearances and interviews.²²⁸ Motivation for Ventura to control the use of his image in order to protect his reputation and frame his image as one beneficial to his career is very strong, and allowing him to act upon that motivation stifles the marketplace of ideas.²²⁹ It is not good policy to allow Ventura to use his performance in office as a way to stimulate economic rewards.²³⁰ Ventura

223. See generally *supra* Part II.A.

224. See generally *supra* Part II.B.

225. See generally *supra* notes 173-176 and accompanying text.

226. See *id.*

227. See generally *supra* notes 177-185 and accompanying text.

228. See generally *supra* notes 186-192 and accompanying text.

229. See generally *supra* notes 193-199 and accompanying text.

230. See generally *supra* notes 200-205 and accompanying text.

should not be allowed to profit individually from group efforts involving everyone from voters on up to legislators.²³¹ Consumers deserve access to products that reflect their opinions, even if they are anti-Ventura.²³² First Amendment political speech rights are safeguarded and held as natural rights.²³³ The right of a public official to control the use of his name and image runs up against this and is far from the status of a natural right.²³⁴ The societal expectation is that elected officials should be able to endure criticism and public scrutiny, and there is no need to enforce publicity rights in order to prevent Governor Ventura from suffering emotional harm.²³⁵ For these reasons, it should be concluded that Helmberger was within her First Amendment rights in creating a greeting card parodying Governor Jesse Ventura, and Ventura should not be allowed to stifle such expression based on a right of publicity justification.

Jesse Ventura, professional wrestler turned Governor of Minnesota, wants to stop the commercial use of his name or image if the use is not authorized by him or his surrogates.²³⁶ Control over a celebrity's commercial image is recognized as the right of publicity.²³⁷ The problem is that his definition of commercial use is not limited to unauthorized product endorsements, but includes parodies.²³⁸ These parodies, even though they exist in a commercial product, serve as valuable sources of communication, often embodying political speech.²³⁹ The right of the public to engage in political speech is safely guarded under the First Amendment.²⁴⁰ Where the celebrity seeking to enforce publicity rights is a celebrity-turned-elected-official, publicity rights come head-to-head with First Amendment rights and one of the two rights will have to bend to the other.²⁴¹

Where a commercial product parodies a celebrity-turned-

231. See generally *supra* notes 215-217 and accompanying text.

232. See generally *supra* notes 209-210 and accompanying text.

233. See generally *supra* notes 31-34.

234. See generally *supra* notes 211-214, 218-219 and accompanying text.

235. See generally *supra* notes 220-222 and accompanying text.

236. See *supra* notes 1-10 and accompanying text.

237. See *supra* notes 16-18 and accompanying text.

238. See generally *supra* notes 2, 6-10 and accompanying text.

239. See generally *supra* Part II.B.

240. See *supra* notes 31-34.

241. See generally *supra* notes 23-26 and accompanying text.

elected-official, there is the potential for First Amendment and publicity rights to conflict.²⁴² When this happens it must first be determined the use of the image is truly political speech, and not commercial speech, in the sense of an endorsement.²⁴³ It also must be determined that the parody is of a public official, and not a public figure.²⁴⁴ If the parody is not commercial speech in the sense of an endorsement (which few parodies are) and the parody is one of a public official, a balancing test must be applied.²⁴⁵ *Cardtoons* has presented a useful model.²⁴⁶ Factors to be considered in applying this balancing test, include (but are not limited to): confusion as to source, the value of parody, the role of celebrities in society, the likelihood the public officials would license their image for parody purposes, economic goals such as stimulating achievement, the efficient allocation of resources, protecting consumers, safeguarding natural rights, securing fruits of the official's labors, preventing unjust enrichment, and averting emotional harm.²⁴⁷ It is the conclusion here that under such a balancing test, the First Amendment rights to political speech reserved to the public will outweigh the publicity rights of a public official. Publicity rights defeat firmly established First Amendment rights when enforced in favor of a politician, even politicians who were formerly celebrities in the entertainment business.

CONCLUSION

The political arena is growing, and as more celebrities are getting into the ring, we must determine where to draw the line when celebrity lives and political lives overlap. Society places a high premium on the right to engage in debate and dialogue regarding current political issues and the people who are implementing public policy. A celebrity who has decided to become a public servant by holding political office must give up any publicity rights that hamper the exchange in the marketplace of ideas. An unchecked right of publicity, when applied to political figures, seriously threatens the First

242. See *supra* note 29 and accompanying text.

243. See *supra* note 148 and accompanying text.

244. See *supra* note 137 and accompanying text.

245. See *supra* note 29 and accompanying text.

246. See *supra* note 160 and accompanying text.

247. See *supra* notes 161-172 and accompanying text.

Amendment. Thus, the right to engage in political commentary must be protected from an overreaching right of publicity.