In the

Supreme Court of the United States

HUGO ZACCHINI,

Petitioner,

v.

SCRIPPS-HOWARD BROADCASTING COMPANY,

Respondent.

No. 76-577

Washington, D.C.
April 25, 1977

Pages 1 thru 44

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.

546-6666

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HUGO ZACCHINI, Petitioner, v. SCRIPPS-HOWARD BROADCASTING COMPANY, Respondent.	No. 76-577

Washington, D. C.,

Monday, April 25, 1977.

The above-entitled matter came on for argument at 11:12 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN G. LANCIONE, ESQ., Spangenberg, Shibley, Traci, Lancione and Markus, 1500 National City Bank Bldg., Cleveland, Ohio 44114; on behalf of the Petitioner.

EZRA K. BRYAN, ESQ., Baker, Hostetler and Patterson, 1956 Union Commerce Building, Cleveland Ohio 44115; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-577, Zacchini v. Scripps-Board Broadcasting Company.

Mr. Lancione, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN G. LANCIONE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LANCIONE: Mr. Chief Justice, and may it please the Court; I am John Lancione, arguing for the petitioner.

In this case we are here by virtue of the question involving the applicability of freedom of the press in the First Amendment as it is and has been applied to the right of publicity as expressed by the Ohio State Supreme Court.

In our case, a public performer, a man who has an act known as the human cannonball, was performing at a local fair and I believe the critical facts in this case revolve around the way the news media ended up putting his performance on its news show, and that is a newspaper reporter, a free-lance reporter, went to the fair and made an inquiry of Mr. Zacchini concerning the filming of his act and was told specifically that this privilege was rejected and that he did not wish his act to be filmed by the reporter.

The reporter returned and spoke to the news manager and was told by way of affidavit to go out and film the act, and indeed he did, and the act takes 15 seconds for Mr. Zacchini to complete. That is his only professional show, and that is

the entirety of his performance. He is shot out of a cannon and travels several hundred feet in the air, lands in a net, in 15 seconds, and that is the end of it. It is dramatic, it is unusual, and that is why I take it that he has been able to sell this act around the country and make a living.

The Supreme Court of Ohio, in response to our motions, stated that there is indeed a right of publicity that inheres in a professional entertainer's act, that he has a property right to govern how, when and where his performance is published.

QUESTION: Do they identify it as a property right?

MR. LANCIONE: A proprietary interest, I believe, Your Honor.

QUESTION: That is not -- is that in the syllabus?

MR. LANCIONE: I --

QUESTION: Well, they call --

MR. LANCIONE: Syllabus, yes.

QUESTION: A performer has a right to the publicity value of his performance.

MR. LANCIONE: Well, the invasion of privacy in syllabus one, Your Honor, refers to the benefit of the name and likeness of another being subject to liability to the other for invasion of his privacy, and then they refer to this right of the publicity value in his performance. I think in the language they say proprietary interest but, in any event, it is

a substantial right that an individual has, a private individual who seeks to become an entertainer. And they say that this right of publicity inheres in his performance.

Now then they go, they take a step further and in the third syllabus they say the First Amendment, however, allows the press to report in a newscast matters of legitimate public interest.

QUESTION: Well, would you call this reporting or reproducing?

MR. LANCIONE: I would call this a verbatim reproduction. They went in with a TV camera and they filmed everything he had to show. The only reason that it occurred, I would suggest, is because it was a 15 second act and he specifically rejected their proposal to put it on the news show.

QUESTION: We have been told a good many times in Ohio cases when they come here that the law of the case is the syllabus, the head note, not the opinion. Is that binding on -- is that law of Ohio?

MR. LANCIONE: Yes, it is, Your Honor.

QUESTION: Now, is that particular concept of Ohio law binding on this Court in a First Amendment case?

MR. LANCIONE: I don't think so. I think that this Court must look behind the bare syllabus, the three paragraphs that summarize what happened and determine what the facts were.

QUESTION: Well, we have accepted it tacitly I think as binding for some purposes, that is why --

MR. LANCIONE: Yes.

QUESTION: -- I focused on -- I focus on the proposition is it binding on this Court when we are dealing with a First Amendment case which is the First Amendment not being the exclusive property of the courts of Ohio.

MR. LANCIONE: I think for that purpose that is true. I was suggesting that to determine what actually happened and what the court is saying, the court must take into consideration the facts, but I think syllabus three is what we are dealing with.

QUESTION: Mr. Lancione, in that respect, I notice that the Court of Appeals opinion, in looking at page A28, in paragraph 3 -- I guess these are head notes, is that so?

MR. LANCIONE: No, that is not. The only binding --

QUESTION: That court says "A performer's 'act' is the product of his talent. As such it is property entitled to the same protection under the common law as any other property right." Does that holding have any significance in this case in light of the absence of some similar statement from the syllabi?

MR. LANCIONE: I don't think so, Your Honor, because in the Court of Appeals the head notes are not the law of the case in Ohio, but --

QUESTION: So we may ignore that and concentrate on the syllabi one, two, three, is that it?

MR. LANCIONE: No, I am contending that it is a property right. I believe it is --

QUESTION: What I am suggesting is certainly it is not stated as explicitly by the Supreme Court in its syllabi as is stated by the Court of Appeals.

MR. LANCIONE: That is true, Mr. Justice Brennan, it is not.

QUESTION: Well, is there any significance in that the Supreme Court didn't use the same phraseology?

MR. LANCIONE: I don't think so. I don't see any particular significance to it. I think that they have created a substantive right, a tort remedy, the invasion of the right of publicity. To state it in terms of property, personalty or realty, I don't think is the intent of using the word "property" or proprietary interest."

QUESTION: And the right to the publicity value of his performance --

MR. LANCIONE: Yes.

QUESTION: -- is explicable only if they mean by that that it is tantamount to property?

MR. LANCIONE: Yes, I think they do mean that, but I don't think they have stated it specifically in the Supreme Court syllabus.

QUESTION: Could you give me the difference between the right of publicity and the right of privacy?

MR. LANCIONE: Yes, Justice Marshall. The right of privacy is the right to have those matters kept away from the public which the public has no right to know about. For example, in the Firestone case, I believe that the right of privacy was involved because the reporter cited the fact that a counterclaim had been dismissed when it dealt with adultery on the part of Mary Alice Firestone. And it also has -- the right of privacy prohibits those in the media or anyone else from giving a false light to facts which are known to the public. Where the right of publicity is almost the opposite.

An entertainer wants to be in front of the public, he wants to be publicized and advertised, and I am sure Mr. Zacchini would have appreciated the fact that they mentioned on their show or showed a picture of him and said "Hugo Zucchini is going to be shot out of a cannon." I mean be probably would loved to have Channel 5 put that on every half hour so he would get more people out there to enhance the value of his act.

QUESTION: So he does advertise?

MR. LANCIONE: Oh, yes.

QUESTION: His show?

MR. LANCIONE: Yes, he does.

QUESTION: Mr. Lancione, would you be here if there

had been just a still photograph of him in mid-flight rather than the 15-second tape?

MR. LANCIONE: No. No, Your Honor, I would not.

QUESTION: What is the difference?

MR. LANCIONE: I think that the news media has a right to publicize in an entertainment section, for example, they can advertise to the public that there is an entertainment section on their 11 o'clock news show, and they can tell about everyone of import or of little import who is performing in and about the area where their readers and listeners are concerned about.

But what we have here is the taking of an entire total performance.

QUESTION: Let me change my question then a little bit. Suppose this performance had been in a public square or in -- they used to have one in Cleveland -- suppose it had been there, free of charge, would it make any difference?

MR. LANCIONE: No, I do not believe that the media has the right under the First Amendment privileges as they have been enunciated and interpreted to publish, to capture and publish a performer's entire act. I think that is protected. His act in its entirety becomes his peculiar property, and I don't think that under any circumstances, unless there is a waiver, which the Supreme Court of Ohio declared there was not, that the news media can come in and say we call it news and

therefore we can do whatever we want to.

QUESTION: To what extent, however, is he subject to what the entrepreneur, the impresario does or does not do?

MR. LANCIONE: Well, if it was a private matter --

QUESTION: Would it make any difference?

MR. LANCIONE: -- between the people who have contracted for him to come in and perform, I don't think we are dealing with that. I think that whatever arrangement he makes, he may waive some right for the person who has purchased his act --

QUESTION: Well, let me read you what is at the bottom of performances, the program at the Kennedy Center here: "The taking of photographs and the use of recording equipment are not allowed in this auditorium." This is by the management of the Kennedy Center. Does this reflect at all on the situation? Suppose that statement were just the reverse, that the taking of photographs is permissible in the Kennedy Center?

MR. LANCIONE: Well, I think that if it did say that and there was probably nothing said to the persons who came into the fair in Burton County, Ohio, I don't think --

QUESTION: Or into Kennedy Center?

MR. LANCIONE: That's right -- I don't think the news medica can come in under the guise of the First Amendment and capture any performer's complete act unless there is a waiver. There may be a waiver in the circumstances that you are

discussing, if the performer knows that there will be persons in there recording his performance he may be held to waive, but news programs don't only take 15 minutes or half an hour, some programs take an hour. There are special news shows. And the point that puts this in an appalling perspective is that any time the news media calls it news under the third syllabus they are granted an indefeasible immunity and privilege by it.

QUESTION: Would you be here if Ohio had just said under our law there is no right in publicity, no property right or any other kind of right in this man?

MR. LANCIONE: Well, I don't think --

QUESTION: You don't think the First Amendment gives it to him?

MR. LANCIONE: No, I don't think it is a First Amendment --

QUESTION: So that is a matter of Ohio law?

MR. LANCIONE: I think it is a matter of Ohio tort law, like anything else.

QUESTION: What if the Ohio court had said, well, we recognize that there is a right, a property right of publicity or whatever you want to call it, but as a matter of Ohio law the press has a limited privilege of reporting it and they have not exceeded it in this case? Suppose that is what the third syllabus had said, you wouldn't be here either, would you?

MR. LANCIONE: If there was no interpretation of the First Amendment, I would not be here.

QUESTION: Well, then, how do we know how they -- if you just look at the syllabus here, it doesn't say, does it, whether it is a First Amendment -- they took a First Amendment approach, whether they thought the First Amendment required the privilege or whether they are just announcing a matter of Ohio law?

MR. LANCIONE: We are permitted, Mr. Justice White, to look into the body of the decision to interpret the syllabus of the case. And on page A13, the court clearly states that "The effect of this holding, and of that in New York Times Co. v. Sullivan, is that the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private." And then they go on and --

QUESTION: Excuse me, "this holding" does not refer to Time v. Hill?

MR. LANCIONE: Yes, Your Honor. Yes, it does.

QUESTION: The effect of that holding and of Sullivan?

MR. LANCIONE: Yes, Your Honor.

QUESTION: Excuse me.

MR. LANCIONE: Then it goes on to analogize the reasoning and to say that the rights as enunciated, which give privilege of freedom of speech, freedom of the press, freedom to

speak out on issues that are public, and in the dissent in the Gertz case it was pointed out, I believe by Mr. Justice White, that he would have found differently because this was a comment upon a judicial proceeding. So that all of the privilege that has been granted has been granted so far to expression first of all about public officials and then in Hill about a public interest which is the opening of a new play, then we go to the Butz case involving a football coach, and to Gen. Walker's speaking out on public issues -- this bears no resemblance I submit to a matter like we have here.

This is a private individual, a private citizen who has certainly subjected himself to criticism by the press. I think that he stands in the same shoes as Gen. Walker or any other entertainer.

QUESTION: Suppose in the two syllabi, two and there, there had been a final phrase on there "under Ohio law," under two and three?

MR. LANCIONE: I don't think, Your Honor, that this would have --

QUESTION: Well, you admit that two is under Ohio law?

MR. LANCIONE: Yes. This is a tort created as a common law right in Ohio.

QUESTION: And three is also under Ohio law, a TV station has a privilege to report, where would you be there?

MR. LANCIONE: Well, I think we would be in the same exact position we are now, and that is --

QUESTION: There would be no federal question, would there?

MR. LANCIONE: I think there would be. I think there would be, Your Honor, because behind that syllabus, syllabus two and three, still lies the facts and circumstances and the reasoning, the express reasoning of the court. We can't reject that.

QUESTION: Well, I assume that Mr. Justice Marshall's question presupposes that you would not have that material on page 13 that explicated the federal aspect

MR. LANCIONE: I think if there was no reliance whatever on the First Amendment, then we would not have the question that we have here, and that is exactly what you had in Gertz. On page 330 of the opinion in Gertz, they said this case is here because the petitioner contests the applicability of the First Amendment to the facts and circumstances of Mr. Gertz.

QUESTION: Do you get some support for your position from that Footnote 5 at the bottom of page 14, "the gravamen of the issue in this case is not whether the degree of intrusion is reasonable, but whether First Amendment principles require that the right of privacy give way to the public right to be informed of matters of public interest and concern." The concept of privilege seems to be a more useful and appropriate one?

MR. LANCIONE: Yes. I think that --

QUESTION: You said that the syllabus may be --

MR. LANCIONE: Yes, Your Honor.

QUESTION: -- by the opinion?

MR. LANCIONE: Yes.

QUESTION: And so you may you rely on Footnote 5?

MR. LANCIONE: Yes, as part of the opinion, Your Honor, yes, we may.

QUESTION: Let me pose a hypothetical to you, and I am going to ask your friend to comment on the same hypothetical later on when his turn comes. When Mohammed Ali engages in one of his professional exhibitions of prize fighting, I understand that the ratio is about ten-to-one or more, that the TV rights are many, many times the income he receives from the persons who are present at the arena.

Suppose surreptitiously either one of the networks or an outlaw group filmed the entire fight and then tried to put it on the air. Do you analogize your client's situation to what that would be with Mohammed Ali?

MR. LANCIONE: Yes, I do, Your Honor. I feel that --

QUESTION: I assume that you have TV rights, your client?

MR. LANCIONE: I don't know that for a fact, Your Honor.

QUESTION: Well, Mohammed Ali does.

MR. LANCIONE: I am sure that he does. In fact, as a legal proposition he does. Whether he has some program for that, I do not know. But I think that it would be the very same situation if on a program on fine arts the media would go into the concert hall and tape the eighth symphony, Beethoven's Eighth Synphony, which synphony doesn't take more than half an hour, and play the entire synphony.

The difference in our case is stronger because Hugo Zacchini only has one performance. He doesn't play any different tune like a violinist. He has one 15-second act, and they have captured that and they have captured that with his -- over his specific objection, which I think is very important.

Now, it has been stated that this is a limited privilege, but under the statement made in the Supreme Court --

QUESTION: How was his objection made in advance? I have lost track of that.

MR. LANCIONE: There was an affidavit -- the free-lance TV photographer came out and asked him if he could film his act and Mr. Zacchini said no.

QUESTION: Before he did it, I see.

MR. LANCIONE: Before he did it. And then the reporter went back and discussed this with his superios and the superiors apparently said or the affidavit states in substance "go back and do it," and he did surreptitiously do that.

QUESTION: Well, surreptitiously, wasn't it in a

public place at which no admission was charged?

MR. LANCIONE: Yes, but he did it this time without permission and over the specific objections, I mean that he did not get his permission when he went back again.

QUESTION: But if no permission was necessary, he could be there. You said he never asked to do it, presumably he could have done it without anybody objecting and nothing surreptitious or off the record about it, is it any different from doing something in a public park? I think you have already answered that to Justice Blackmun.

MR. LANCIONE: I think it is the same. I just point out that here it was --

QUESTION: The objection really has no legal significance in the case?

MR. LANCIONE: I think it makes a stronger case because the right as it may be defined, the right of the press as it may be defined is to act in a reasonable and responsible fashion in fulfilling their obligation to report news. I think when you can establish that they go beyond that -- now here I do want to point out that in the third syllabus this is described as a limited privilege, I don't think it is. They have the right to report in their newscasts matters otherwise privileged unless it is for a non-privileged use. But once you establish that it is on a news program, it cannot be for a non-news use and therefore --

QUESTION: Do you think the Supreme Court of Ohio would have reached a different result in your example of the taping of the eighth synphony played at Kennedy Center?

MR. LANCIONE: The Ohio Supreme Court would not have.

QUESTION: Even though that were put on an educational television station, not billed as news but just said, you know, here is a brand new performance of Beethoven's Eighth?

MR. LANCIONE: Well, I think if it was outside of a news showing, the Supreme Court of Ohio may very well have come to a different conclusion. But what they have said relates to news programs, as I read the third syllabus, and that the only exception is when it is a non-news use, which seems to me to be a non sequitur. You can't have -- you can't fit into the right that depressed Getz under the First Amendment by the Supreme Court by putting it on your news if it is a non-news use. In other words --

QUESTION: Did he have a contract to fulfill?

MR. LANCIONE: At the Burton County Fair, yes, he did, Your Honor, but that is --

QUESTION: I gather from what the Supreme Court said at page 15, no issue of disregard to contract rights is involved here?

MR. LANCIONE: That's right, there is no actual --

QUESTION: This is just purely whether or not this was the report of a news event or the appropriation of a right?

MR. LANCIONE: That's right, and the other --

QUESTION: And under contract I assume he was paid?

MR. LANCIONE: I presume he was.

QUESTION: And that is critical I suppose to the Supreme Court -- to the Ohio rule of a right of -- if Mr. Zacchini had just done this for the fun of it in a county park or in a public square, just like they do it every now and then, a --

[Laughter]

And if a TV news camera had gone out there and reported that as news, there would be no proprietary right that had been appropriated, would there, because there was certainly no monetary right?

MR. LANCIONE: I don't think that you would be able to establish any damages under the Ohio law because he would have no commercial value if he did not perform as a professional entertainer.

QUESTION: It was a property right for which he was paid?

MR. LANCIONE: That's correct.

QUESTION: Under contract. And that is critical, isn't it?

MR. LANCIONE: Yes, it is. He is a professional entertainer and that is to whom the right applies, the right of publicity applies to an entertainer or to a professional

athlete or to anyone who has developed some commercial value in the use of their name and their image and their success.

QUESTION: Suppose he had performed in the square in front of the TV station for the general public to see?

MR. LANCIONE: If he voluntarily performed in front of the TV cameras and knew that he was going to be put on the program, I think that that would be a different factual situation.

QUESTION: Why?

MR. LANCIONE: Because he --

QUESTION: Could you leave out all of that which was added to my question and answer it? If he performs in front of the TV station in a public square, can the TV station photograph it and put it on the news program?

MR. LANCIONE: I don't think they could film his entire act.

QUESTION: If it is right in their backyard?

MR. LANCIONE: It is different than doing it --

QUESTION: In their frontyard, rather.

MR. LANCIONE: It is different than doing it in his frontyard. If he was doing it as a commercial act and TV cameras were there --

QUESTION: If he was doing it and he was being paid because as he got shot out of the cannon he had "Buy Blatz Beer" on his back, could they publish that?

MR. LANCIONE: No, I don't think they could publish his entire act under any circumstances.

QUESTION: If they shot it in the TV window, could they do it then?

MR. LANCIONE: Yes, I think that would be an exception because --

QUESTION: The difference is?

MR. LANCIONE: The difference is --

QUESTION: The difference is in the performance, isn't it?

MR. LANCIONE: The difference is that it is not his performance any more, Mr. Justice Marshall, it is then an untoward event, as the event which I suggested in my brief, where he would miss the net and break his legs, then I think it becomes something different than his professional act. It is no longer his professional act because something untoward has occurred. So I think that is a different situation.

QUESTION: Let me ask you, in light of the colloquy with my Brother Stewart, if you might look at A15, what is the significance in the last sentence in that carryover paragraph: "It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here."

MR. LANCIONE: I'm sorry, page --

QUESTION: Page A15.

MR. LANCIONE: Page A15.

QUESTION: It is the last sentence in that carryover paragraph, just before the last paragraph of the opinion.

MR. LANCIONE: I take it that they are referring to the fact that if there was a contract between Mr. Zacchini and the persons who hired him that his act was not to be filmed, that it would raise a different question, but that is not the question raised here.

QUESTION: He doesn't have to take the trouble to exclude people, on the theory of your case, only those who take the television pictures who have paid for that right, who have contracted with him for that or contracted with the county.

MR. LANCIONE: To film the entire act I believe he would have to give permission. He would have to give them permission.

QUESTION: That is what Mohammed Ali does, makes a separate contract, he doesn't rely on chance. He makes a separate contract for the television rights.

MR. LANCIONE: That is especially necessary in his case, I would think.

The other point I wanted to make about the limited, so-called limited privilege was that they have excepted a news media presentation with actual intent to harm, and I think that that is also without any effect because in this case there

was specific objection and they put his act on anyhow and therefore I don't know how they --

QUESTION: Do you think that doing the showing though, you can't appreciate this on TV, go see it --

MR. LANCIONE: Yes, they did.

QUESTION: -- you have to see it to appreciate it?

MR. LANCIONE: Yes, they did, but I don't know how the court could ever expect anyone to establish intent to harm if intent to harm is not established by the news media people putting this on the show after he has objected. I think that the standards as they have been enumerated in New York Times and Hill and further in Gertz especially, and in Firestone, should not be applied to the right of publicity. I don't think there is any logic to it. I don't think there is any similarity to capturing an entire entertainer's performance and putting it on a news program.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Bryan.

ORAL ARGUMENT OF EZRA K. BRYAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BRYAN: Mr. Chief Justice, and may it please the Court:

I still am perplexed after hearing my eminent oopponent here really as to how we got here. When I first heard that certiorari had been granted in this case, I was at least

seriously puzzled and, as a matter of fact, had the apocryphal thought that perhaps we had slipped back of the looking glass with Lewis Carroll with Alice.

Now, the explanations this morning in answering the Court's questions get us no place, it seems to me, either as to fundamental facts or fundamental law that raises a serious federal question that should be here.

In the factual area, there is emphasis on the originality of an artist's act and that sort of thing. There is a book on circus that was written quite a few years ago that is an historical authority apparently on the subject by Marion Murray, and in that book great credit is given to the Zacchinis as inventors, as trapize artists, as riders. And one of the things that first got them to notice in this country was the invention of a better mechanism for a cannon to project a human being by Hugo's father and his brother, and Hugo was the first man who did it apparently with that mechanism, a better one. But P. T. Barnum shot Mademoiselle Zarzelle out of a cannon for sixty feet back in 1879 and called it the human cannonball act.

QUESTION: There is nothing very original about the performances of the eighth symphony, but do you suggest that if someone came in and covered it at Kennedy Center without the consent of the performers, the conductor and the members of the orchestra, that they could put it on television?

MR. BRYAN: No, sir, and I don't think that this --

QUESTION: Then what does the history have the act have to do with it?

MR. BRYAN: -- I don't see how this theory of a unique little situation of a 15-second act can apply on any broad principle to the kind of question that you are raising, sir.

QUESTION: Well, what is the difference whether it takes 15 seconds or 30 minutes for the performance of Mr. Zacchini?

MR. BRYAN: It would make a serious difference under the definition of the media privilege by the Ohio Supreme Court. They have said that the media may use it for news contents but they may not appropriate the benefit of the publicity for some non-privileged private use. You can't make a news program, in my judgment, that is going to stand up in the court of Ohio in the face of that out of a full synphony.

QUESTION: Well, that wouldn't be a non-privileged private use, it would be a use on the news program, the precisely the same use that was made of the cannonball act here, wouldn't it?

MR. BRYAN: Well, I --

QUESTION: In the hypothetical question?

MR. BRYAN: Well, I really --

QUESTION: It wouldn't be private use.

MR. BRYAN: Mr. Justice Stewart, I don't see how we are going to be able to conceive that the entire long performances of those people who are protecting themselves, they are protected by the notice on the ticket, there are contract arrangements that are made and performers like Mr. Zacchini enter into contracts with people at fairs, at the ball park when they put on acts. They have contracts which limit the right of anybody to come in and take it, and I would say that in answer to the question that Mr. Chief Justice asked about Mohammed Ali, that there isn't any possibility in my judgment that that would get by the State of Ohio.

The State of Ohio is not saying you can go in and steal things and break contracts.

QUESTION: Well, some of Mohammed Ali's performances last only about fifteen seconds. Does that --

[Laughter]

Does that mean that the performance would be open to any surreptitious coverage by a television camera?

MR. BRYAN: Incidentally, this was not surreptitious.

QUESTION: Well --

MR. BRYAN: The TV people, along with others, were invited free in order to do this and my eminent colleague --

QUESTION: Not by Mr. Zacchini though?

MR. BRYAN: No, but he contracted to put on a performance for some promoters who did invite these people and he

did not have an agreement with them that would prevent the taking of pictures. As a matter of fact, the only facts in this record do not support my eminent counsel's position with respect to the matter of Zacchini seeking out the photographer and objecting. There is an affidavit --

QUESTION: Mr. Bryan, before you get into that, your preceding remark in response to the Chief Justice as to a different rule obtaining in Ohio if the promoters had excluded the TV people, it is my impression that at least your colleague contends that the Supreme Court of Ohio felt constrained to reach the result it did here because of the First Amendment, that is that we are not judging Ohio's choice of policies but that Ohio might have produced a different result here had it not been for the First Amendment.

MR. BRYAN: Well, Mr. Justice Rehnquist, I cannot find that doubt in what the court did. Now, if this Court does find it, then I think the proper approach would be to ask the Ohio Supreme Court. The funny thing about all this relying upon the --

QUESTION: What about what I read your colleague from Footnote 5?

MR. BRYAN: I beg your pardon?

QUESTION: What about what appears in Footnote 5, that "the gravamen of the issue in this case is not whether the degree of intrusion is reasonable, but whether First Amendment

principles require that the right of privacy give way to the public right to be informed of matters of public interest and concern"?

MR. BRYAN: Absolutely, and from the point or view of --

QUESTION: I am addressing

MR. BRYAN: Understand --

QUESTION: But you have just said that there is no First Amendment right.

MR. BRYAN: All they say is that there is principle involved here, that is what they were seeking and that footnote is in connection with their seeking, and I was going to go into exactly what they sought and found very briefly.

QUESTION: But you say what they did was fashion a state rule even though under the influence of First Amendment principles, is that what you are saying?

MR. BRYAN: Well, absolutely, Your Honor. We have in the State of Ohio constitutional provisions that are relatively comparable.

QUESTION: Well, it would have been easy for all of us if they had rested on the Ohio Constitution and not on the Federal Constitution.

MR. BRYAN: Well, one of the curious things, Mr. Justice Brennan, is that there is so much looking toward Washington any more, I wonder if we will all start to bow to

the east one of these days.

QUESTION: I have said things about this myself.

MR. BRYAN: And on the First Amendment, I don't think there is any doubt about it. But when you track on what occurred here on that subject, you find that the Ohio court merely -- they studied Time v. Hill, Inc. And then my eminent counsel has on his petition page brief, for guidance on that issue, the media privilege, the court turned to the rulings in Time, Inc. v. Hill and New York Times Company v. Sullivan, drawing from the two cited authorities, the concept that the news media possesses a privilege to disseminate news of matters of public interest.

Now, if you turn to his brief, on pages 9 and 10, you will find that he concedes that this great high principle which they drew from this study of these cases and the restatement is exactly the same thing. I have great difficulty distinguishing where he says that there is no question that the broadcast media has the privilege and right to report newsworthy events of public interest.

His quarrel is with the line that the Ohio State Supreme Court drew in his -- and I submit rather minor sort of tort claim case.

QUESTION: Don't you think that the performer has something to say about whether they have a right to coverage or not?

MR. BRYAN: No, sir, I do not. I would have to argue very strenuously that our --

QUESTION: Then you argue with the eighth synphony illustration, too? You said if the eighth synphony is being performed by --

MR. BRYAN: I'm sorry, sir, you are referring to the question of the full "entire performance"?

QUESTION: I am talking about the performance, whether it is 10 seconds, 15 seconds or 30 minutes or two hours. Does the performer not have something to say about whether it is going to be covered by television?

MR. BRYAN: Your Honor, in my judgment if there is a legitimate news use which our court is requiring under their test in this case, then the performers must rely on agreements and contracts. This is a request that this court under the guise of the First Amendment set up some new rights in lieu of contract rights, copylaw rights, patent rights --

QUESTION: Well, I thought it was quite the contrary. Your opponent feels that what the Ohio court otherwise would have held was a property right that was protected, is struck down by the First Amendment.

MR. BRYAN: Mr. Justice Rehnquist, I do not think that our court looked at this in any sense as a property right. And as a matter of fact, they knocked down a suggestion by Judge Day on our Court of Appeals suggesting that there was

conversion. I think they refer in their opinion to the fact that you can't have conversion because there is no property right here. They refer to it specifically as being in the -- as part of our right of privacy.

QUESTION: But that doesn't stem from the --

MR. BRYAN: -- which is a personal right in --

QUESTION: That doesn't stem from the First Amendment, does it?

MR. BRYAN: Of course not. There is nothing here that I see that stems from the First Amendment. That is essentially why I am bothered about how we arrived here, and I think that the time obviously is getting short. But I think that I submit, if the Court please, that upon reading--

QUESTION: Are you really suggesting that by the usual standards found in our cases as to whether or not a federal question was passed upon the state court that under this opinion we have no jurisdiction?

MR. BRYAN: Well, I think there are two points, if you please, Mr. Justice White. One point is that our court did not feel compelled by the decisions of this Court or by the First Amendment to hold the way it did. They held that in a common law case we will give this much right and no more. And I think that the second point is that this federal Court, I respectfully submit, should not be going beyond the point of dictating to the states what the minimum requirements are,

rather than saying that from now on we will set in certain common law situations, we will set exact standards. They ask in the terminology of specifics all the way through.

And I believe that my friend has been guilty of a procrustean distortion of Gertz in trying to apply the situation here. First off, Gertz did involve libel per se, and here you have a right of publicity case, a right of privacy-type action, in which the respondent was guilty only of broadcasting a brief and very flattering account of a public performer.

QUESTION: Let's begin on the proposition which I think that you would agree that the Ohio court has said there is in Ohio a common law right of publicity. It would have been a little more understandable to me if they had said there was a property right of a performer in his performance, of a professional performer in his performance, but they said there was a publicity right, that there is no -- that can be protected by acqusition by somebody else subject to the exception in paragraph three of the syllabus.

So you begin with this proprietary right that is protected against acquisition. What if there were a brand new hit record, a gramaphone record in which of course there is the same kind of proprietary right, and a news program on television said there is a brand new hit record, it leads all the lists everywhere in the country, and as a matter of news we are now going to play it in its entirety, would it be immune from

paying for copyright infringement, paying the usual fee for playing the record just because it is on a news program? Would there be anything in the First Amendment that would make it immune from paying the royalty?

MR. BRYAN: Well, I don't think we are arguing that far, Mr. Justice Stewart, that the First Amendment immunizes you from a --

QUESTION: Not me but a --

MR. BRYAN: I meant us.

QUESTION: No, not you, but your client, a news broadcaster.

MR. BRYAN: Well, the public generally --

QUESTION: A news broadcaster is the person who is immunized.

MR. BRYAN: I don't think that they are immunized from things that are covered by specific kinds of property law.

QUESTION: This is a specific kind of property law, created by the common law of Ohio.

MR. BRYAN: I respectfully disagree, Your Honor. They say this is a personal right because it is part of the right of privacy. This goes --

QUESTION: No, publicity. Publicity.

MR. BRYAN: Yes, but it grows directly out of -- they say that it grows out of privacy --

QUESTION: Whose right of privacy?

MR. BRYAN: Ohio's.

QUESTION: No, no, whose, your client's or your brother client's right of privacy? They are talking here about the right of publicity.

MR. BRYAN: Right, but the right of publicity is an outgrowth of the right of privacy and in the State of Ohio --

QUESTION: Well, the Ohio court has ruled opposite, hasn't it?

MR. BRYAN: Of course it sounds that way but in the State of Ohio the fact is that it is specifically recognized as being an outgrowth --

QUESTION: As a property right.

MR. BRYAN: I'm sorry, sir, they did not use that --

QUESTION: As a right when one is liable for acquiring without compensation.

MR. BRYAN: They turned down the Court of Appeals opinion of the majority in the Court of Appeals which was conversion, and one of the grounds in doing that I think was that there was no property, you can't convert anything. What have you lost? You have still got your face even if they have got the picture was sort of the approach.

QUESTION: Well, what is your answer? Do you think under the law of Ohio now that a news broadcaster could with impunity play a hit record in its entirety on the basis of this is leading all the lists and this is the news of tonight in the

entertainment field?

MR. BRYAN: I think those are all covered by contract and I don't think that our court is granting immunity to the contract rights. They recognize that they probably would not. That is referred to --

QUESTION: But the court doesn't have to stick to just the strictly contract approach, it can say the thing arises out of a common law property concept, can't it? And my impression is that they would have said that had they not felt forbidden to do so by the First Amendment.

MR. BRYAN: Well, Mr. Justice Rehnquist, I can't see that they felt compelled that way because they felt compelled to the extent of finding a concept and principle which my worthy opponent concedes, as I pointed out.

Now, the State of Ohio, I don't think there should be any doubt, if we look at the holding in Gertz there should be no doubt that the State of Ohio, in granting or recognizing a right of publicity -- this isn't something that is nailed into our constitution or fundamental statutory law, this is simply something that the court has granted and has put some strings on it.

I submit that our court could have granted it with an absolute prohibition against any right of ever recovering on the right of publicity from the news media or from TV or from radio or from newspapers. I mean, this is a common law right

they were creating, and I don't see how as long as they follow the dictate of the holding in Gertz thatthey may determine by common law what the liability will be for libel so long as they do not go below the standard of negligence. I mean, it is a minimum standard that should be fixed, in my judgment, if the Court please, in this situation.

I will simply for the sake of concluding suggest to the Court that the plaintiff entered the Ohio courts naked and emerged clothed with a new common law right that was fashioned by the Ohio Supreme Court. Now, he is satisfied with the cloth and the color, but most unhappy about the tailoring. He is seeking here to have this Court retailor his common law garment, and I submit that that lays open very large risks for the whole problem of the comity between state and federal courts in the future.

Thank you.

MR. CHIEF JUSTICE BURGER: You have one minute left. We will resume at 1:00 o'clock.

[Whereupon, at 12:00 o'clock noon, the Court was in recess until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Bryan, do you have something further?

MR. BRYAN: Mr. Chief Justice and if the Court please: I have not nearly used the time, but I would like to very briefly cover just four very quick points.

Number one, as a matter of fact, in this case there was no treaspass; and, in addition, there was no condition imposed by Zacchini in a way in which he could prohibit anyone from taking pictures. And the fact is that, as shown in the appendix at page 55, the only evidence before the Ohio courts on this subject was not what my worthy opponent says but because that is merely in the complaint and is never supported by an affidavit, which is required under Ohio procedure.

The only affidavit states that Zacchini seeing a cameraman with a television-type camer approached him and told him he did not want it done. There was no seeking out of Zacchini to obtain consent or permission. So it is no different than if Zacchini had gone up to a Scout master who was there with his Scout troop and wanted to take some pictures and said "I don't want you to take any pictures." I don't believe there is any way that --

QUESTION: Mr. Bryan, there is some difference. The Boys Scouts wouldn't be making use of that for commercial purposes for profit, whereas the television station would be.

Isn't there a difference?

MR. BRYAN: You are absolutely right, Your Honor, and if WEWS made a commercial use for profit of the film that they took, the film clip they used, then we are dead under the law of Ohio.

QUESTION: Didn't they?

MR. BRYAN: No, sir, they did not. They --

QUESTION: When a newspaper or a broadcaster reproduces something in its paper, it isn't doing it for profit?

MR. BRYAN: Your Honor --

QUESTION: What is the enterprise for?

MR. BRYAN: Your Honor, there is no doubt about that. But that, Your Honor, I think it has been recognized in our law to date, would be the first step to total censorship in this country. You cannot, without having media, except for throwaway free handbills -- now, if you want to have somebody who throws away free handbills -- there is otherwise recognized, and it has been recognized in decisions of this Court, that there is a profit motive in publishing newspapers, there is a profit motive in television, but if it is going to be the test of news as to whether or not it is via a medium that is making a profit, then, Your Honor, I submit that we are not far away from total government control, as in some countries, of news, so that you don't have any news except that which the ruling approves.

The other point that I wanted to be sure and clarify was this matter of the right of privacy into the right of publicity. The original, the first recognition of the right of privacy in this country was in New York by statute, after it had been held that a little girl who had her picture used on a flower sack, if I remember rightly, had no right of recovery and they passed the commercial appropriation theory of the right of privacy.

Now, Prosser has expanded into other areas that are somewhat related. The right of publicity was first recognized as a name, as I recall it, by Judge Jerome Frank in the Tops Trading Card case, the baseball players' pictures and statistics, and he called -- he said it might be more appropriately known as the right of publicity. So that even in New York state, where the right of privacy is still controlled by the same statute, they have a common law right now of publicity. But the common law right of publicity that has been recognized has been recognized as a right which can be exercised only when there is some commercial use in most places.

Our court actually has given a performer a greater right under the right of publicity because the defense of the media's privilege is circumscribed a little more than it would be where the complainant would have to prove that there was a commercial appropriation.

And the final point that I would like to make, if the

Court please, is that this is a situation which in my judgment very clearly if this narrow interest plea of this plaintiff is recognized as having any First Amendment or constitutional breadth or rights would be an act of beating the shield of the First Amendment for free speech and free press into a sword, and that sword would chop down the historic right of the states to determine their common law, subject to not violating some federal law.

And in this case an area has always been not violating the minimum standards determined by this Court applicable to the First Amendment privilege.

Thank you.

QUESTION: Mr. Bryan, before you sit down, may I just ask you about the footnote that Justice Brennan directed counsel's attention to in the Ohio Supreme Court's opinion, Footnote 5. He read a portion of the sentence that talks about the gravamen and the issue, and the sentence ends with the words "the concept of privilege seems the more useful and appropriate one." Do you know what I have in mind?

MR. BRYAN: Yes, Your Honor, I do. That is where, if I remember rightly, that is where the court was looking to the restatement of torts for guidance along with New York Times v. Sullivan and Time v. Hill, if I remember rightly.

QUESTION: Yes, and the question --

MR. BRYAN: And what the court is doing there, as I

understand it, is referring to the fact that the restatement after the time that they had written the restatement number 13, which was the one that the court was using for guidance, had come up with restatement number 21 and in that one they re-jiggered the language and approach a good deal and went from privilege to something about reasonable --

QUESTION: Well, they were debating a choice between whether the rule that would make the appropriation an unreasonable invasion of privacy on the one hand or a question of whether it was privileged on the other.

MR. BRYAN: Right, sir.

QUESTION: And then they end up with the language I called your attention to, the concept of privilege seems the more useful and appropriate one. And the question I wanted to ask you is whether in your view the word "privilege" in that sentence is used in the sense of a constitutional privilege or as an exception as a matter of state law from a tort doctrine?

MR. BRYAN: Well, I think, sir, it could be both. As a matter of fact, we have a constitutional privilege, too, which they could have pointed to and we probably would not be here if they had done that.

QUESTION: Well, if it is the constitutional privilege then is it not fair to infer that the word "privilege" used in the third paragraph of the court's syllabus is also the constitutional privilege? That is what I am trying to get at.

MR. BRYAN: Well, I think as a practical matter in dictating the common law of Ohio that they can use the word "privilege" as the practical result that they are imposing. There isn't any doubt that the court in Ohio felt that there had to be a privilege by reason of the First Amendment. They use that in some respects as their antecedents. But on the other--

QUESTION: So you say --

MR. BRYAN: But on the other hand, these specific privilege granted by the state of Ohio was not dictated as we read it by anything that they found in the decisions of this Court.

QUESTION: Well, would you say the privilege as a matter of Ohio law is coextensive with the privilege commanded by the First Amendment?

MR. BRYAN: Your Honor, we submit that in our judgment in an appropriate case we could be up here fighting that it is not, that the Ohio court particularly in the intent to injure has probably gone beyond what we feel should be the First Amendment minimum privilege.

MR. CHIEF JUSTICE BURGER: Mr. Lancione.

ORAL ARGUMENT OF JOHN G. LANCIONE, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. LANCIONE: Mr. Chief Justice, and may it please the Members of the Court:

I would like to point out that the Ohio Supreme Court on that very same page where Note A5 is located on A14 in the record, they say specifically in the second paragraph that under the standards articulated by the Court -- and they are referring to the Supreme Court -- and they say Time v. Hill, and they go on to describe the privilege. And then they go over once again in discussing these cases, they say that the same privilege exists in cases where appropriation of a right of publicity is claimed.

They are talking about the First Amendment privilege that has been discussed, and that was discussed by them in New York Times v. Sullivan and Hill, and I don't think there is any question that they feel constrained, just as the Seventh Circuit I believe in Gertz felt constrainted by Rosenbloom to say that the standards of New York Times v. Sullivan had to apply to a private individual because they said it dealt with an issue of public interest.

And the court there, because my most worthy opponent has raised the question of how we get here and why we were here, the court stated in Gertz that the petitioner appealed to contest the applicability of the New York Times standard to this case, and that is why they were here in Gertz, and that is why we are here.

In his brief he also points out that a new trial cannot be ordered, but I think on page 352 of Gertz the Supreme

Court suggested that a new trial should take place and remanded to the lower court for proceedings not inconsistent with the decision.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:11 o'clock p.m., the case in the above-entitled matter was submitted.]

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