

man cannonball” in the context of the performer’s suit for damages against the company for having “appropriated” his act, thereby injuring his right to the publicity value of his performance. The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party’s right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information that would be made available to the public, whereas permitting this tort action would have an impact only on “who gets to do the publishing.”¹²⁹³ In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make the investment required to produce a performance of interest to the public.¹²⁹⁴

Publication of Legally Confidential Information.—

Although a state may have valid interests in assuring the confidentiality of certain information, it may not enforce this confidentiality by criminally prosecuting nonparticipant third parties, including the press, who disclose or publish the information.¹²⁹⁵ The case that made this point arose in the context of the investigation of a state judge by an official disciplinary body; both by state constitutional provision and by statute, the body’s proceedings were required to be confidential and the statute made the divulging of information about the proceeding a misdemeanor. For publishing an accurate report about an investigation of a sitting judge, the newspaper was indicted and convicted of violating the statute, which the state courts construed to apply to nonparticipants. Although the Court recognized the importance of confidentiality to the effectiveness of such a proceeding, it held that the publication here “lies near the core of the First Amendment” because the free discussion of public affairs, including the operation of the judicial system, is primary and the state’s interests were simply insufficient to justify the encroach-

¹²⁹³ 433 U.S. at 573–74. Plaintiff was not seeking to bar the broadcast but rather to be paid for the value he lost through the broadcasting.

¹²⁹⁴ 433 U.S. at 576–78. This discussion is the closest the Court has come in considering how copyright laws in particular are to be reconciled with the First Amendment. The Court emphasizes that copyright laws encourage the production of work for the public’s benefit.

¹²⁹⁵ *Landmark Communications v. Virginia*, 435 U.S. 829 (1978). The decision by Chief Justice Burger was unanimous, Justices Brennan and Powell not participating, but Justice Stewart would have limited the holding to freedom of the press to publish. *Id.* at 848. *See also* *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979).