

# The Burger Court Opinion Writing Database

## *Zacchini v. Scripps-Howard Broadcasting Co.*

433 U.S. 562 (1977)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



M

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 17, 1977

Re: 76-577 - Zacchini v. Scripps-Howard  
Broadcasting Co.

Dear Byron:

I join. If the longhand note on the attached copy of page 7 interests you, I grant you the right to copy my entire "performance" sans royalties.

Regards,

WBOB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 21, 1977

RE: No. 76-577 Zacchini v. Scripps-Howard Broadcasting

Dear Lewis:

Please join me in your dissent in the above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", written in dark ink.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

June 1, 1977

76-577, Zacchini v. Scripps-Howard

Dear Byron,

I am glad to join your opinion for  
the Court in this case.

Sincerely yours,



Mr. Justice White

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 5-31-77

Recirculated: \_\_\_\_\_

FIRST DRAFT

No. 76-577 — Zacchini v. Scripps-Howard  
Broadcasting Co.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September, 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a free lance reporter for Scripps-Howard Broadcasting Company, the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 6-7-77

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-577

Hugo Zacchini, Petitioner,  
v. } On Writ of Certiorari to the  
Scripps-Howard Broadcasting } Supreme Court of Ohio.  
Company.

[June —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September, 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a freelance reporter for Scripps-Howard Broadcasting Company, the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and videotaped the entire act. This film clip, approximately 15 seconds in length, was shown on the 11 o'clock news program that night, together with favorable commentary.<sup>1</sup>

<sup>1</sup> The script of the commentary accompanying the film clip read as follows:

"This . . . now . . . is the story of a *true spectator sport* . . . the sport

pp 3-5, 15-16

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 6-23-77

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-577

Hugo Zacchini, Petitioner,	} On Writ of Certiorari to the	
v.		Supreme Court of Ohio.
Scripps-Howard Broadcasting Company.		

[June —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September, 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a freelance reporter for Scripps-Howard Broadcasting Company, the operator of a television broadcasting station and respondent in this case, attended the fair. He carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and videotaped the entire act. This film clip, approximately 15 seconds in length, was shown on the 11 o'clock news program that night, together with favorable commentary.<sup>1</sup>

<sup>1</sup> The script of the commentary accompanying the film clip read as follows:

"This . . . now . . . is the story of a *true spectator sport* . . . the sport

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 22, 1977

Re: No. 76-577, Zacchini v. Scripps-Howard

Dear Lewis:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CLERK OF  
JUSTICE HENRY A. BLACKMUN

June 6, 1977

Re: No. 76-577 - Zacchini v. Scripps-Howard  
Broadcasting Co.

Dear Byron:

I am with you. \*

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 1, 1977

No. 76-577 Zacchini v. Scripps-Howard  
Broadcasting Co.

Dear Byron:

In due time I will circulate a dissent.

Sincerely,

*Lewis*

Mr. Justice White

Copies to the Conference

LFP/lab

lfp/ss 6/20/77

4FP  
Please join me  
JWP

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: ~~JUN 20 1977~~

Recirculated: \_\_\_\_\_

No. 76-577 ZACCHINI v. SCRIPPS-HOWARD

MR. JUSTICE POWELL, dissenting.

Disclaiming any attempt to do more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: "a performer's entire act." The holding today is summed up in one sentence:

"Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."  
Ante, at 12.

I doubt that this formula provides a standard clear enough<sup>1</sup> even for resolution of this case. In any event, I am not persuaded that the Court's opinion is appropriately sensitive to the First Amendment values at stake, and I therefore dissent.

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JUN 23 1977

*printed*  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-577

Hugo Zacchini, Petitioner,  
v.  
Scripps-Howard Broadcasting  
Company. } On Writ of Certiorari to the  
Supreme Court of Ohio.

[June —, 1977]

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Disclaiming any attempt to do more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: "a performer's entire act." The holding today is summed up in one sentence:

"Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." *Ante*, at 12.

I doubt that this formula provides a standard clear enough even for resolution of this case.<sup>1</sup> In any event, I am not

<sup>1</sup> Although the record is not explicit, it is unlikely that the "act" commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later. One may assume that the actual firing was preceded by some fanfare, possibly stretching over several minutes, to heighten the audience's anticipation: introduction of the performer, description of the uniqueness and danger, last-minute checking of the apparatus, and entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the "entire act" in its 15-second newsclip—the Court's opinion then would afford no guidance for resolution of the

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 3, 1977

Re: No. 76-577 - Zacchini v. Scripps-Howard

Dear Byron:

Please join me.

Sincerely,



Mr. Justice White

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens  
JUN 9 '77

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

76-577 - Zacchini v. Scripps-Howard Broadcasting Co.

MR. JUSTICE STEVENS, dissenting.

The Ohio Supreme Court held that respondent's telecast of the "human cannonball" was a privileged invasion of petitioner's common law "right of publicity" because respondent's actual intent was neither (a) to appropriate the benefit of the publicity for a private use, nor (b) to injure petitioner.<sup>\*/</sup>

As I read the State court's explanation of the limits on the concept of privilege, they define the substantive reach of a common law tort rather than anything I recognize as a limit on a federal constitutional right. The decision was unquestionably influenced by the Ohio court's proper sensitivity to First Amendment principles, and to this Court's cases construing the First Amendment; indeed, I must confess that the opinion can be read as resting entirely on federal constitutional grounds. Nevertheless, the basis of the State court's action is sufficiently doubtful that I would remand the case to that court for clarification of its holding before deciding the federal constitutional issue.

<sup>\*/</sup> Paragraph 3 of the court's syllabus reads as follows:

"A TV station has a privilege to report in its news-casts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual."

✓  
Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: JUN 13 1977

*Printed*  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-577

Hugo Zacchini, Petitioner,  
v.  
Scripps-Howard Broadcasting  
Company. } On Writ of Certiorari to the  
Supreme Court of Ohio.

[June —, 1977]

MR. JUSTICE STEVENS, dissenting.

The Ohio Supreme Court held that respondent's telecast of the "human cannonball" was a privileged invasion of petitioner's common law "right of publicity" because respondent's actual intent was neither (a) to appropriate the benefit of the publicity for a private use, nor (b) to injure petitioner.\*

As I read the state court's explanation of the limits on the concept of privilege, they define the substantive reach of a common law tort rather than anything I recognize as

\*Paragraph 3 of the court's syllabus reads as follows:

"A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual."

In its opinion, the court described the "proper standard" in language which I read as defining the boundaries of a common law tort:

"The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. 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."