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Commercial or Advertising Purpose Under *Florida Statutes* Section 540.08 Demystified

Michael L. Richmond

Nova Southeastern University - Shepard Broad Law Center, richmondm@nsu.law.nova.edu

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COMMERCIAL OR ADVERTISING PURPOSE UNDER *FLORIDA STATUTES SECTION 540.08* DEMYSTIFIED

MICHAEL L. RICHMOND*

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I. INTRODUCTION

Golfer John Daly had an exceptional year in 2001.¹ Since 1995, when he won the British Open, Daly had not won a tournament.² In 1999, “Daly’s career was at a low point, when he struggled on the course, returned to drinking and blew a lucrative endorsement deal with Callaway that prohibited him from drinking and gambling.”³ By the end of 2000, free from drinking for a few months, Daly signed a three-year endorsement with Hippo Golf Company (Hippo)⁴ and another with 84 Lumber Company.⁵ In 2001, Daly won the

* Professor of Law, Shepard Broad Law Center of Nova Southeastern University. J.D., Duke University; M.S.L.S., The University of North Carolina at Chapel Hill; A.B., Hamilton College. Portions of this article were prepared for a panel discussion presented by the NSU Sports and Entertainment Law Society.

1. See Gerry Dulac, *Daly’s Buick Win Boosts 84 Classic*, PITTSBURGH POST-GAZETTE, Feb. 17, 2004, at B7 [hereinafter Dulac, *Daly’s Buick Win Boosts 84 Classic*].

2. Jim Gordon, *The Anti-Fan: John Daly Is Only Fooling John Daly*, SANTA FE NEW MEXICAN, July 17, 2000, at B2.

3. Clifton Brown, *Daly’s Swing and His Life Straighten Out*, N.Y. TIMES, Sept. 6, 2001, at D2.

Daly’s drinking has cost him . . . his endorsement with Wilson Golf. It cost him a \$3 million deal with Callaway Golf, more money than his combined earnings on the PGA Tour. It probably didn’t help any of his three marriages, the last of which ended in divorce in 1997 after Daly trashed a hotel room and wound up in a hospital, unsure where he had been or how he had gotten there.

Gordon, *supra* note 2.

4. John Daly Enters., L.L.C. v. Hippo Golf Co., 646 F. Supp. 2d 1347, 1348 (S.D. Fla. 2009). The agreement began on January 1, 2001. *Id.* A 2002 agreement licensed “Daly’s name, likeness, and marks to [Hippo] for use in the sale of golf clubs and related equipment.” *Id.*

5. Gerry Dulac, *Daly’s Drive Helps Fulfill Hardy’s Wish For Top-Notch Field*, PITTSBURGH POST-GAZETTE, Sept. 22, 2004, at C1 [hereinafter Dulac, *Daly’s Drive Helps Fulfill Hardy’s Wish*].

BMW International Open, a tournament on the European Tour.⁶ Daly seemed on his way back from a nightmarish spiral of alcohol and gambling.⁷ Yet, in 2003, another reverse found Daly “carted off the course during the second round of the 84 Lumber Classic because of what was termed dehydration.”⁸

Joe Hardy, founder and owner of 84 Lumber Company, kept faith in Daly and saw him through the hard times of 2003, finally rejoicing when Daly won the 2004 Buick Invitational Tournament—his first win on the PGA tour in nine years.⁹ In contrast, Hippo and Daly did not renew their contract.¹⁰ By September of 2004, Daly’s second recovery had netted him a sponsorship with Dunlop and saw him ranked nineteenth on the tour’s money list.¹¹

Yet Daly’s dramatic turn of fortune had one negative result: Hippo continued using Daly’s name and picture on its website and products well after the end of its contracts with Daly, without Daly’s permission.¹² Needless to say, with Daly promoting Dunlop’s clubs, the continuing use of his name by Hippo created a conflict uncomfortable at best.¹³ To make matters worse, Daly received nothing by way of royalties from Hippo.¹⁴ Daly sued Hippo, seeking damages on several counts, including a violation of *Florida Statutes* section 540.08,¹⁵ alleging that Hippo had used his name and likeness for advertising and commercial purposes.¹⁶

6. Dulac, *Daly’s Buick Win Boosts 84 Classic*, *supra* note 1.

7. See Brown, *supra* note 3. Fellow golf pro, Hal Sutton, said of Daly: “[W]hen you’re on the way down, you don’t know where rock bottom is until you get there. It takes a lot inside to climb back up. John’s a good guy.” *Id.*

8. Dulac, *Daly’s Buick Win Boosts 84 Classic*, *supra* note 1.

9. *Id.*; Dulac, *Daly’s Drive Helps Fulfill Hardy’s Wish*, *supra* note 5.

10. *John Daly Enters., L.L.C. v. Hippo Golf Co.*, 646 F. Supp. 2d 1347, 1349 (S.D. Fla. 2009). “The contract period ended on December 31, 2003, but because [Hippo] had inventory remaining, [Daly] gave it until March 31, 2004, to divest itself of all John Daly-branded merchandise in its possession.” *Id.*

11. Dulac, *Daly’s Buick Win Boosts 84 Classic*, *supra* note 1; Dulac, *Daly’s Drive Helps Fulfill Hardy’s Wish*, *supra* note 5.

12. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1348–49.

13. See Dulac, *Daly’s Buick Win Boosts 84 Classic*, *supra* note 1.

14. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1349, 1352.

15. FLA. STAT. § 540.08 (2004).

Unauthorized publication of name or likeness:

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:

(a) Such person; or

(b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of her or his name or likeness; or

In 1967, the Florida Legislature passed an expansive act¹⁷ dealing with the branch of privacy known as “commercial appropriation.”¹⁸ The statute prohibited non-consensual publication of a natural person’s “name, portrait, photograph or other likeness” “for purposes of trade or for any commercial

(c) If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of her or his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of her or his surviving spouse and surviving children.

(2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

(3) The provisions of this section shall not apply to:

(a) The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;

(b) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof; or

(c) Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.

(4) No action shall be brought under this section by reason of any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person.

(5) As used in this section, a person’s “surviving spouse” is the person’s surviving spouse under the law of her or his domicile at the time of her or his death, whether or not the spouse has later remarried; and a person’s “children” are her or his immediate offspring and any children legally adopted by the person. Any consent provided for in subsection (1) shall be given on behalf of a minor by the guardian of her or his person or by either parent.

(6) The remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of her or his privacy.

Id. Compare FLA. STAT. § 540.08 (2004), with FLA. STAT. § 540.08 (2011).

16. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1348–49. John Daly Enterprises, LLC, also joined Daly as a plaintiff in the suit for claims other than those under *Florida Statutes* section 540.08. See *id.* at 1348. This article will refer only to Daly himself, as the statute only protects natural persons, and the corporation is not a natural person. *Id.* at 1351 (quoting FLA. STAT. § 540.08(1) (2011)).

17. See generally Act effective July 1, 1967, ch. 67–57, § 1, 1967 Fla. Laws 135 (codified as amended at FLA. STAT. §§ 540.08–.10 (1967)).

18. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 20, at 851 (5th ed. 1984).

or advertising purpose.”¹⁹ A later amendment in 1997 did nothing more than change certain language to make the statute gender-neutral.²⁰ A second amendment ten years later added the present subsection three relating to the military.²¹ The title of the statute, as originally passed, indicates rather clearly the legislature’s intent to protect natural persons from unwanted commercial exposure: “An act . . . prohibiting the unauthorized publication of . . . name . . . or other likeness; authorizing action to enjoin such unauthorized publication; authorizing action to recover damages; [and] providing limited exemptions from such liability”²²

Daly moved for summary judgment arguing that Hippo’s continued use of his name and likeness beyond the contract date and agreed extension violated the statute.²³ Hippo countered by arguing that its website postings constituted “fair use.”²⁴ Hippo’s website listed several golfers, among them Daly, who had previously endorsed Hippo products.²⁵ However, it posted a picture of Daly accompanied by the following text:

The twice major winner and golfing superstar, John Daly, will continue to be synonomous [sic] with Hippo. Renowned as the longest hitter in the professional game, Daly truly had the power of Hippo behind his game, working closely with the Hippo design teams over the years to produce some of the most technologically advanced woods to hit the golf market.²⁶

19. FLA. STAT. § 540.08(1) (1967); *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351. The statute also provided that the prohibition transcended the death of the person and licensees or the person’s immediate family could assert the rights created by the statute for forty years subsequent to the person’s death. FLA. STAT. §§ 540.08(1)(c), .08(4). It provided for causes of action both legal and equitable, including punitive damages. *Id.* § 540.08(2). It also provided for situations in which the statute would not apply, including newsworthy publications and publications “in connection with the initial sale or distribution” of the otherwise offending use. *Id.* § 540.08(3)(b). Significantly, the statute also provided that it did not curtail the common law right of privacy. *Id.* § 540.08(6).

20. Act effective May 24, 1997, ch. 97–103, §§ 751–52, 1997 Fla. Laws 1756, 2120–21 (amending FLA. STAT. §§ 540.08–.09 (1967)).

21. Act effective July 1, 2007, ch. 2007–164, § 2, 2007 Fla. Laws 1528, 1528 (amending FLA. STAT. § 540.08(3) (1997)); *see also* FLA. STAT. § 540.08(3) (2011).

22. Act effective July 1, 1967, ch. 67–57, § 1, 1967 Fla. Laws 135.

23. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351.

24. *Id.* The statute does not include “fair use” in its list of exempted uses. FLA. STAT. § 540.08(4). However, as the court found Hippo’s act to fall well outside of any possible “fair use” at common law, it did not discuss whether “fair use” is indeed a common law defense that might apply to causes of action under the statute. *See John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351.

25. *Id.*

26. *Id.* (citations omitted).

The court rejected Hippo's argument, finding that claiming Daly "will continue to be synonymous with [Hippo] directly promotes [Hippo's] products."²⁷ Thus, the court effectively concluded that the nonconsensual use to promote products constituted a "use for purposes of trade or for any commercial or advertising purpose," and as Hippo had violated the statute, the court granted partial summary judgment to Daly on the issue of liability.²⁸

John Daly's case, only one of several discussing the meaning of "any commercial or advertising purpose," involved a blatant attempt to capitalize on the fame of a well-known and well-liked public person.²⁹ The court had no trouble in rejecting out of hand Hippo's claim that it simply stated the truth—that Daly formerly endorsed its products.³⁰ Other cases involving Florida substantive law, however, found it more difficult to interpret the language of the statute.³¹ This article discusses them and determines when the statute will sustain a cause of action and when courts will reject the statutory action.

The cases seem to fall into clearly defined categories whose boundaries follow closely those governing defamation cases. The first, like that involving Daly, deals with people whose identity commands the interest of consumers.³² These individuals all satisfy the public figure analysis found in *Curtis Publishing Co. v. Butts*³³—whether general purpose or limited purpose, all have become persons of interest.³⁴ The second category of cases deals with everyday people who found themselves embroiled in "public is-

27. *Id.*

28. *Id.* at 1351, 1354 (quoting FLA. STAT. § 540.08(1)). As the court found questions remained regarding the extent of Daly's damages, it did not grant Daly's motion for full summary judgment. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1353. The court also granted partial summary judgment finding liability on Daly's claims of trademark infringement and breach of contract. *Id.* at 1348.

29. *See id.* at 1351. "Even in his darkest days, John Daly was always loved by the galleries." Brown, *supra* note 3.

30. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351.

31. *See, e.g., Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

32. *Id.* at 154–55.

33. 388 U.S. 130 (1967).

34. *See id.* at 155. One may attain the status of general purpose public figure:

[B]y position alone and [one may attain the status of limited purpose public figure] by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both [must command] sufficient continuing public interest and [have] sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.

Id. (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

sues”, as the concept first appeared in *New York Times Co. v. Sullivan*.³⁵ The final category involves neither persons nor concerns of any particular public interest, much like the litigants in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*³⁶ In all cases which resulted in victories for the plaintiffs, the defendants involved the plaintiffs’ names and/or pictures in commercial ventures—whether directly or in a promotional context. The commercial exploitation for profit present in these cases makes the comparison with defamation cases particularly relevant, for these publications, like those in *Dun & Bradstreet, Inc.*, are “solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others.”³⁷

II. PUBLIC FIGURES

Other than John Daly, the most recognizable plaintiff in cases interpreting *Florida Statutes* section 540.08 was Cecil Fielder, the Hall of Fame first baseman for the Detroit Tigers.³⁸ Fielder had sued a former interior designer for using Fielder’s name in advertising materials without his consent.³⁹ Although the designer, Robert Weinstein, agreed to an injunction prohibiting him from using Fielder’s name, an article in *Florida Design* regarding Weinstein mentioned that he had worked for the Fielder family.⁴⁰ Further, Weinstein had brochures printed containing the *Florida Design* article, but never distributed them.⁴¹ At trial, the judge refused Weinstein’s motion for a directed verdict and the jury found for Fielder.⁴² The Fourth District Court of Appeal considered whether, given Weinstein’s admission that he violated the provisions of section 540.08, the jury should have been allowed to consider the article and the brochures in determining the extent of the violation.⁴³

Without question, *Florida Design* as a quarterly trade magazine qualified as a media outlet, and the evidence showed that the article was classified

35. 376 U.S. 254 (1964). “Thus we consider this case against the background of a profound national commitment to the principle that *debate on public issues should be uninhibited, robust, and wide-open*, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 270 (emphasis added).

36. 472 U.S. 749 (1985).

37. *Dun & Bradstreet, Inc.*, 472 U.S. at 762.

38. *See Cecil Fielder*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/f/fieldce01.shtml> (last visited Nov. 13, 2011).

39. *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 993 (Fla. 4th Dist. Ct. App. 2004).

40. *Id.* at 993, 998.

41. *Id.* at 996, 999.

42. *Id.* at 993, 999.

43. *See id.* at 993, 998–99. Weinstein did not dispute that other publications of his violated the statute. *Weinstein Design Grp., Inc.*, 884 So. 2d at 996.

as an editorial and written by a *Florida Design* reporter.⁴⁴ On the other hand, Weinstein was given a proof of the article to approve, and “use of Fielder’s name in the article came about exclusively through information supplied by Weinstein, not from any independent research by the article’s author.”⁴⁵ Thus, the court agreed that the trial court properly placed before the jury the question of whether the article represented inappropriate advertising under section 540.08 and thus fell outside the exception of section 540.08(3)(a).⁴⁶ As to the brochures, the court found that even though not a single one had ever left Weinstein’s hands, since they were patently advertising and since the statute prohibits *printing* a person’s name in violation of the statute, the trial court properly allowed “the jury to consider them in determining any damage award.”⁴⁷

*Weinstein Design Group, Inc. v. Fielder*⁴⁸ represents two truly unusual results. At first, the case recognizes that the finder of fact may determine that an article placed in a legitimate media outlet nonetheless constitutes advertising purposes even where the article is of public concern.⁴⁹ Second, merely printing material to be used in advertising will violate section 540.08 even when the material has not reached a single person.⁵⁰ Taken together, these results demonstrate the commitment of the Fourth District Court of Appeal to interpret the statute as protecting individuals from deliberate attempts to improperly cloak advertising material in the garb of newsworthiness.⁵¹

Courts from other jurisdictions have had occasion to interpret Florida law.⁵² A federal district court in Ohio granted a preliminary injunction

44. *See id.* at 998.

45. *Id.*

46. *Id.* at 999. At the time of the case, the language exempting a “bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes” was found in subsection (3)(a). FLA. STAT. § 540.08(3)(a) (2004) (codified as amended at FLA. STAT. § 540.08(4)(a) (2011)).

47. *Weinstein Design Grp., Inc.*, 884 So. 2d at 999.

48. 884 So. 2d 990 (Fla. 4th Dist. Ct. App. 2004).

49. *See id.* at 998–99. The New York Court of Appeals has indicated in dicta that given proper proof, a plaintiff may have a jury consider whether an article nevertheless constitutes advertising. *Stephano v. News Grp. Publ'ns, Inc.*, 474 N.E.2d 580, 586 (N.Y. 1984). Although the Florida and New York statutes are very similar (“[t]he Florida statute relied upon is quite similar to Sections 50 and 51 of the New York [civil rights law].” *Messenger ex rel. Messenger v. Gruner & Jahr USA Publ'g*, 994 F. Supp. 525, 531 (S.D.N.Y. 1998), *vacated*, 208 F.3d 122 (2d Cir. 2000)) as the New York statute is in derogation of common law, it is strictly construed. *See, e.g., Stephano*, 474 N.E.2d at 584–85.

50. *See Weinstein Design Grp., Inc.*, 884 So. 2d at 999.

51. *See id.* at 998–99.

52. *See, e.g., Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 919 (N.D. Ohio 2004).

against further publication in the case of a well-known television reporter who was filmed engaging in a wet t-shirt competition in Florida.⁵³ Unbeknownst to her, the competition was filmed and her performance found its way to the Internet and into two versions of a video.⁵⁴ The defendants promoted both the websites and the video by “emphasizing the appearance of Catherine Bosley or the ‘naked anchor woman.’”⁵⁵ Bosley’s picture and name appeared on the video’s cover as well as on the website which sold her performance to its subscribers.⁵⁶ The court had little trouble in finding the defendants liable under the Florida statute, which the court found prohibited “using a person’s name or likeness to directly promote a product or service. Indeed, Defendants are using the images of Catherine Bosley to directly promote the sale of videos and memberships.”⁵⁷

The court continued to find that the promotional material did not constitute “expressive works, as they do not contain any creative components or transformative elements.”⁵⁸ The court also discussed the question of Bosley’s consent to the filming of the contest, noting that the defendants introduced evidence which might have cast doubt on her protestation that she had no idea cameras were present and rolling.⁵⁹ However, as the statute requires “express written or oral consent,”⁶⁰ and the defendants introduced no evidence of Bosley having expressly given consent, their argument failed.⁶¹

Sony Music Entertainment Incorporated (Sony) issued eight CD recordings of the music of Harold Melvin and the Blue Notes.⁶² The outside covers of three of the CDs displayed the picture of Jeremiah Cummings.⁶³ Sony had not received Cummings’ consent for the use of his picture, and when Cummings sued Sony, he moved for judgment on the pleadings.⁶⁴ Applying Florida law, the court held “by placing Plaintiff’s likeness on merchandise mar-

53. *Id.* at 917, 936.

54. *Id.* at 917.

55. *Id.*

56. *Id.* at 922.

57. *Bosley*, 310 F. Supp. 2d at 921–22 (citations omitted).

58. *Id.* at 922. Compare *id.*, with *infra* notes 134–44 and accompanying text.

59. *Bosley*, 310 F. Supp. 2d at 931. Signs abounded in the areas of the contest, and some pictures showed Bosley scant feet from the camera looking directly at it. *Id.*

60. FLA. STAT. § 540.08(1) (2011).

61. *Bosley*, 310 F. Supp. 2d at 931.

62. *Cummings v. Sony Music*, No. 01Civ.4375RCCKNF, 2003 WL 22271189, at *1 (S.D.N.Y. Sept. 30, 2003).

63. *Id.* at *3. The court held that the cause of action as it related to five of the CDs was time barred. *Id.* at *1. Cummings was the lead tenor of the Blue Notes and today is a well-known evangelical preacher. Jeremiah Cummings, *For His Glory International*, RIGHT BRAIN MEDIA, <http://wicctv.org> (last visited Nov. 13, 2011).

64. *Cummings*, 2003 WL 22271189, at *1.

keted by Defendant, without Plaintiff's permission, Defendant has publicly used Plaintiff's photograph for commercial purposes."⁶⁵

Thus, *John Daly Enterprises, LLC v. Hippo Golf Co.*,⁶⁶ *Bosley v. Wildwett.com*,⁶⁷ and *Cummings v. Sony Music*⁶⁸ establish that, under the *Florida Statutes*, one cannot seek to capitalize on the associative value of a well-known personality in marketing a product.⁶⁹ Unquestionably, consumers will purchase products based on celebrity endorsements even where the endorser may have no apparent relation to the product itself.⁷⁰ Equally obvious, consumers rush to buy and view pictures and videos of the famous.⁷¹ Clearly, section 540.08 of the *Florida Statutes* in part exists to protect "celebrities and other public figures [who] have come to rely on the right of publicity to protect them from the intrusion of others."⁷² It should come as no surprise that the same protection extends to those who have not achieved substantial pub-

65. *Id.* at *3.

66. 646 F. Supp. 2d 1347 (S.D. Fla. 2009).

67. 310 F. Supp. 2d 914 (N.D. Ohio 2004).

68. No. 01Civ.4375RCCKNF, 2003 WL 22271189, at *1 (S.D.N.Y. Sept. 30, 2003).

69. *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 997–98 (Fla. 4th Dist. Ct. App. 2004); see FLA. STAT. § 540.08; see *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351; see also *Bosley*, 310 F. Supp. 2d at 920; *Cummings*, 2003 WL 22271189, at *3. "[T]he right of publicity is a proprietary right based on the identity of a character or defining trait that becomes associated with a person when he gains notoriety or fame." *McFarland ex rel. Estate of McFarland v. Miller*, 14 F.3d 912, 923 (3d Cir. 1994) (applying New Jersey law). Another suit involving a well-known personality and the *Florida Statutes* was brought by Anna Kournikova, the tennis player, against the publisher of *Penthouse Magazine* for printing a photograph falsely purporting to represent her sunbathing in the nude. *Kournikova v. Gen. Media Commc'ns, Inc.*, No. CV 02-3747 GAF (AJWx), 2002 WL 31628027, at *1 (C.D. Cal. Aug. 9, 2002). Her first amended complaint included a count alleging violation of the *Florida Statutes*. *Id.* at *4. Plaintiff's motion for preliminary injunction was denied. *Id.* at *10. However, a later complaint appeared to have abandoned the Florida claim, and the case proceeded under a theory involving the Lanham Act. *Kournikova v. Gen. Media Commc'ns, Inc.*, 278 F. Supp. 2d 1111, 1114–15 (C.D. Cal. 2003).

70. *Ramson v. Layne*, 668 F. Supp. 1162, 1166 (N.D. Ill. 1987). For example, in *Ramson*, an investor sued movie actors Lloyd Bridges and George Hamilton, who had endorsed the purchase of a mortgage note which she had never received. *Id.* at 1163.

71. See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800–01 (Cal. 2001). For instance, well after the demise of the members of the popular film trio, the Three Stooges, litigation proliferated seeking to prohibit the use of their images on various commercial products. *Id.*

72. Fla. S. Comm. on Commerce, CS for SB 116 (2007) Staff Analysis 2 (Mar. 7, 2007) [hereinafter Mar. 7, 2007 Staff Analysis], available at <http://archive.flsenate.gov/data/session/2007/senate/bills/analysis/pdf/2007s0116.cm.pdf> (discussing an amendment to section 540.08 of the *Florida Statutes* to include members of the armed forces in its protection).

lic recognition, but have garnered sufficient notice in their fields to make their name or image influential in marketing products to others.⁷³

Dr. Jey Jeyapalan was the proverbial big fish in a very small pond.⁷⁴ A renowned expert in a very narrow field of engineering, he received offers to consult and speak around the globe.⁷⁵ In 1991, he agreed to work with a Florida engineering firm on designing a specific project for a pipeline system in Florida.⁷⁶ When the firm used his name without his consent as part of a proposal for a different project in Broward County, he sued claiming violation of section 540.08 of the *Florida Statutes* and sought partial summary judgment on the issue of liability.⁷⁷ The court granted his motion, finding that, “‘commercial trade or advertising purposes’ is precisely the type of action in which [the defendant] has engaged here.”⁷⁸ Thus, the court adopted an expansive, albeit logical, interpretation of “advertising purposes” to include bidding to secure a contract.⁷⁹ Dr. Jeyapalan’s name would have enhanced the ability of the firm to win the bid, and so the defendant had sought to capitalize on his professional persona without his consent.⁸⁰

Professional models effectively thrust themselves into the limelight simply by performing their jobs.⁸¹ This does not make them general purpose public figures, nor does it accord them any particular degree of fame.⁸² Nothing points this out more forcefully than the case of Ting Ji, who sued Bose Corporation pursuant to the Florida statute.⁸³ In a preliminary matter, the trial court found:

Ji has provided no direct evidence that she enjoys any fame whatsoever. In support of her claim, she refers to her full-time work as a *professional model* and to the fact that she has appeared on multiple occasions in other advertisements for high-end electronic products. Bose counters that her income from modeling (\$19,500

73. See *Am. Ventures, Inc. v. Post, Buckley, Schuh, & Jernigan, Inc.*, No. C92-1817Z, 1993 WL 468643, at *5–6 (W.D. Wash. May 18, 1993).

74. See *id.* at *4.

75. *Id.*

76. *Id.* at *1.

77. See *id.* at *2–3.

78. *Am. Ventures, Inc.*, 1993 WL 468643, at *8.

79. See *id.*

80. See *id.* at *6.

81. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967). The Supreme Court has defined a limited purpose public figure as one who has “thrust himself into the ‘vortex’ of the controversy.” *Id.* at 146.

82. See *Ting Ji v. Bose Corp. (Ting Ji I)*, 538 F. Supp. 2d 349, 351 (D. Mass. 2008), *aff’d*, 626 F. 3d 116 (1st Cir. 2010).

83. See *id.* at 349, 353.

per year) and the dearth of news accounts mentioning her name demonstrate that she has no meaningful public identity.⁸⁴

The plaintiff later won a jury verdict in an action brought pursuant to the Florida statute, but only for a fraction of the damages she had claimed.⁸⁵ Evidently the jury agreed that she had not achieved any particular degree of fame.⁸⁶ On the other hand, her lack of substantial name or face recognition did not bar her action under the statute.⁸⁷ Bose had used her picture beyond the scope of their contract in displaying it on the packaging of one of their products.⁸⁸ In response to an interrogatory verdict, the jury found that Bose had violated her rights under the statute.⁸⁹

In another case involving a model claiming rights under the statute, Anheuser Busch (A-B) continued to use her picture subsequent to the expiration of their agreement.⁹⁰ Although the model, Jennifer Miller, had signed a release until January of 2003, the defendant continued to use her picture after that date.⁹¹ “Regardless of any prior consent Miller granted A-B, therefore, the evidence in the record indicates that A-B did not have Miller’s authorization to use her likeness from and after January 2003, as required by [section 540.08 of the *Florida Statutes*.]”⁹² Both *Ting Ji v. Bose Corp. (Ting Ji I)*⁹³ and *Miller v. Anheuser Busch, Inc.*,⁹⁴ involve plaintiffs whose stock in trade is their picture, and it should come as no surprise that they, like the famous, require the protection of the statute.⁹⁵ Indeed, the use of a model’s likeness will almost inevitably involve advertising purposes.

Sports figures, actors, politicians, and others whose personae can serve as a trigger to convince others to purchase a seller’s product are particularly susceptible to commercial exploitation.⁹⁶ Similarly, advertisers will find models easy prey for commercial abuse, for the very purpose of a model’s career is promotion of the products of another. As a result, the common law

84. *Id.* at 351 (emphasis added).

85. *Ting Ji v. Bose Corp. (Ting Ji II)*, 626 F.3d 116, 120–21 (1st Cir. 2010).

86. *See id.* at 120.

87. *See id.*

88. *Id.* at 119.

89. *Id.* at 120–21.

90. *Miller v. Anheuser Busch, Inc.*, 348 F. App’x 547, 549–50 (11th Cir.2009) (per curiam), *cert. denied*, 130 S. Ct. 2387 (2010).

91. *Id.*

92. *Id.* at 550; *See* FLA. STAT. § 540.08 (2011).

93. 538 F. Supp. 2d 349 (D. Mass. 2008), *aff’d*, 626 F.3d 116 (1st Cir. 2010).

94. 348 F. App’x 547 (11th Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 2387 (2010).

95. *See Miller*, 348 F. App’x, at 550–51; *Ting Ji II*, 626 F.3d at 119–21; *Ting Ji I*, 538 F. Supp. 2d at 349–51.

96. *See ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003).

tort cause of action for invasion of publicity developed to protect the commercial value of a person's persona, and the Florida Legislature enacted section 540.08 to clarify and enhance judge-made law.⁹⁷ That said, the legislature also intended the statute to protect those, whose names and images did not command the attention of the buying public.⁹⁸ This article now focuses on those "private persons."

III. "PRIVATE PERSONS" IN MATTERS OF PUBLIC CONCERN

While celebrities seek to prevent others from capitalizing on the reputations they have built over the years, those who have established no such associative monetary values still have a vital concern to protect: the right to privacy.⁹⁹ The Florida Legislature unquestionably intended to protect this right, as evidenced by the Senate Staff Analysis of the 2007 amendment to section 540.08: "The right to privacy is a long cherished American tradition. The Florida Constitution addresses the right of every natural person to be let alone and free from governmental intrusion into the person's private life."¹⁰⁰

On the other hand, just as with the ability to sue for defamation, the right to privacy must yield to the freedom of the press to report on matters of public concern.¹⁰¹ Accordingly, the Florida Legislature incorporated into the publicity statute an exception for:

The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate

97. See FLA. STAT. § 540.08 (1997). For example, at common law, courts frequently struggled with the question of whether the right of publicity will descend to a person's heirs. See *Loft v. Fuller*, 408 So. 2d 619, 623 (Fla. 4th Dist. Ct. App. 1981). Subsection 1(c) of the statute clearly establishes the right can devolve on the heirs and assigns of a decedent. FLA. STAT. § 540.08(1)(c).

98. Mar. 7, 2007 Staff Analysis, *supra* note 72, at 2. "Florida Statutes explicitly prohibit the last form of an invasion of privacy—appropriation—and provide a civil remedy for a violation of the statute." *Id.*

99. See *id.*

100. Fla. S. Comm. on Commerce, CS for SB 116 (2007) Staff Analysis 1 (Feb. 8, 2007) [hereinafter Feb. 8, 2007 Staff Analysis], available at <http://archive.flsenate.gov/data/session/2007/senate/bills/analysis/pdf/2007s0116.ms.pdf> (discussing an amendment to section 540.08 of the *Florida Statutes* to include members of the armed forces in its protection).

101. Mar. 7, 2007 Staff Analysis, *supra* note 72, at 2–3.

public interest and where such name or likeness is not used for advertising purposes.¹⁰²

Hence, all the cases discussed in the preceding section dealt with whether the defendant had capitalized on the persona of the plaintiff for advertising purposes.¹⁰³ Of necessity, any other mention of a celebrity's name would be a question of interest to the public by definition.¹⁰⁴ Cases involving private persons do not carry with them the automatic cachet of public interest, and thus fall into three categories: those which relate to matters of public concern, those which do not relate to matters of public concern but where the plaintiff has consented to the use by the defendant, and those which do not relate to matters of public concern and where the defendant has failed to secure the plaintiff's consent.¹⁰⁵

A significant difference between defamation cases and cases brought under section 540.08 occurs when dealing with private persons embroiled in matters of public interest.¹⁰⁶ Only where a defendant is at fault for publish-

102. FLA. STAT. § 540.08(4)(a) (2011).

103. See *supra* Part I.

104. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003). It is also possible that the picture of a celebrity can be sold specifically for its commercial value, rather than used for advertising purposes. *Id.* at 918, 938. In a case involving Tiger Woods, an artist painted a portrait of Woods after his first victory at the Masters Golf Tournament. *Id.* at 918. The artist then sought to market prints of the portrait, and the company to which Woods had licensed his right of publicity sued. *Id.* at 918–19. The artist won, but only because the portrait carried sufficient “transformative value” to qualify as a permissive use. *Id.* at 938 (applying Ohio law). The “transformative value” test has not always protected defendants, however. See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001).

105. See *Miami Herald Publ'g Co. v. Ane*, 423 So. 2d 376, 385–86 n.3 (Fla. 3d Dist. Ct. App. 1982); see, e.g., *ETW Corp.*, 332 F.3d at 929–31.

106. See, e.g., *Thomas v. Quintero*, 24 Cal. Rptr. 3d 619, 636 (Cal. Dist. Ct. App. 2005). Perhaps worthy of noting, Florida courts have not squarely confronted the question of what matters might be considered of “public interest.” See, e.g., *Miami Herald Publ'g Co.*, 423 So. 2d at 384 (citing *Firestone v. Time, Inc.*, 271 So. 2d 745, 747 (Fla. 1972), *quashed by* 305 So. 2d 172 (Fla. 1974), *vacated*, 424 U.S. 448 (1976)). Of substantial guidance in this regard is a five-prong test put forward by a California appellate court in a defamation case:

First, “public interest” does not equate with mere curiosity. Second, a matter of public interest should be something of concern to a substantial number of people. Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Third, there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort “to gather ammunition for another round of [private] controversy” Finally, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.

Thomas, 24 Cal. Rptr. 3d at 634–35 (citations omitted).

ing defamatory material relating to a private person¹⁰⁷ may the defamed plaintiff recover damages.¹⁰⁸ In contrast, a plaintiff claiming a violation of section 540.08 need only prove the use of name or likeness for public “use for purposes of trade or for any commercial or advertising purpose”¹⁰⁹ The defendant would bear the burden of raising and proving any statutory defenses.¹¹⁰ For example, the statute provides a defense to the publisher when the use is “part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes.”¹¹¹ Hence, the question of what constitutes a commercial or advertising purpose becomes crucial where the plaintiff is a private person.¹¹²

The leading Supreme Court of Florida case involving a private person and a matter of public interest involved the relatives of Billy Tyne, who was presumed to have died aboard a ship named the *Andrea Gail* in a storm in 1991.¹¹³ The magnitude of the storm received extensive media coverage and in 1997, a book entitled *The Perfect Storm* appeared chronicling the author’s version of what might have happened to Tyne and the rest of the crew.¹¹⁴ Three years later, the Warner Brothers movie, *The Perfect Storm*, was released.¹¹⁵ “Unlike the book, the Picture presented a concededly dramatized

107. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). “[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” *Id.* at 347.

108. *Id.* at 338–39. Florida has adopted a negligence standard as the test for a defendant’s liability in defamation cases involving private individuals: “The prevailing First Amendment and Florida law . . . is supported by the overwhelming weight of authority in the country on this subject which has followed a . . . standard of negligence in defamation actions where the plaintiff is neither a public official nor a public figure.” *Miami Herald Publ’g Co.*, 423 So. 2d at 385.

109. FLA. STAT. § 540.08(1) (2011).

110. *See id.* § 540.08(4)(a)–(c).

111. *Id.* § 540.08(4)(a).

112. *See Gertz*, 418 U.S. at 334. One might also note that in section 540.08 cases, plaintiffs do not claim the use of name or image did not portray them falsely; in defamation cases, however, an essential element of the plaintiff’s case is the falsity of the publication. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986). “Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.” *Id.*

113. *Tyne v. Time Warner Entm’t Co.*, 901 So. 2d 802, 803 (Fla. 2005).

114. *See SEBASTIAN JUNGER, THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA* (W.W. Norton & Co., 1997).

115. *THE PERFECT STORM* (Warner Bros. 2000), available at <http://perfectstorm.warnerbros.com/cmp/flash-thefilm-fr.html>.

account of both the storm and the crew of the *Andrea Gail*.¹¹⁶ The movie contained the actual names of the crew, and consequently, Tyne's surviving children, along with family members of the remaining crew, sued Warner Brothers for violation of section 540.08 of the *Florida Statutes*.¹¹⁷ The suit began in the United States District Court for the Middle District of Florida and the plaintiffs appealed that court's granting the defendants' motion for summary judgment.¹¹⁸ The United States Court of Appeals for the Eleventh Circuit certified a question of Florida law to the Supreme Court of Florida.¹¹⁹ The question as rephrased read: "Does the phrase 'for purposes of trade or for any commercial or advertising purpose' in section 540.08(1), *Florida Statutes*, include publications which do not directly promote a product or service?"¹²⁰ After discussing earlier cases from the lower Florida courts, the Supreme Court of Florida answered the question in the negative.¹²¹

The court first reviewed the First District Court of Appeal decision in *Loft v. Fuller*.¹²² *Loft* involved a suit brought under section 540.08 by the survivors of a man who perished in a plane crash—a crash that formed the basis of a later book and motion picture, both of which used the name of the decedent.¹²³ In upholding an order dismissing the complaint, the court reasoned so cogently that the Supreme Court of Florida approved of its opinion from which it quoted extensively:

In our view, section 540.08, by prohibiting the use of one's name or likeness for trade, commercial or advertising purposes, is designed to prevent the unauthorized use of a name to *directly promote the product or service of the publisher*. Thus, the publication is harmful not simply because it is included in a publication that is sold for profit, but rather *because of the way it associates the individual's name or his personality with something else . . .* We simply do not believe that the term "commercial," as employed by [s]ection 540.08, was meant to be construed to bar the use of people's names in [media discussions of public interest].¹²⁴

Significantly, the *Loft* court based its conclusion on whether the name of the plaintiff was directly used to promote the sale of a product, and the

116. *Tyne*, 901 So. 2d at 804.

117. *Id.*; FLA. STAT. § 540.08 (2011).

118. *Tyne*, 901 So. 2d at 804–05.

119. *Id.* at 803.

120. *Id.* at 806 (emphasis omitted).

121. *Tyne*, 901 So. 2d at 810.

122. 408 So. 2d 619, 620 (Fla. 4th Dist. Ct. App. 1981); *see Tyne*, 901 So. 2d at 806.

123. *Tyne*, 901 So. 2d at 806.

124. *Id.* at 806 (second and third emphasis added) (quoting *Loft*, 408 So. 2d at 622–23).

Supreme Court of Florida agreed.¹²⁵ Unlike cases involving celebrities, the use of Loft's name would not make it any more probable that potential viewers would rush to see the movie—the interest of the public lay in the plane crash and its aftermath, not the identity of the individual decedent.¹²⁶

The court next discussed *Valentine v. C.B.S., Inc.*,¹²⁷ in which Patty Valentine's name appeared in Bob Dylan's song about the arrest and conviction of Rubin "Hurricane" Carter.¹²⁸ "[Patty] Valentine testified as a witness at the highly publicized 1967 trial of prizefighter Rubin 'Hurricane' Carter and John Artis."¹²⁹ She sued the producer of the record on which the song appeared for violating the Florida statute.¹³⁰ The Eleventh Circuit affirmed a summary judgment for C.B.S., holding that the Carter trial continued to be of public interest and that "an interpretation that the statute absolutely bars the use of an individual's name without consent for any purpose would raise grave questions as to constitutionality."¹³¹

Finally, the court addressed *Lane v. MRA Holdings, LLC*,¹³² in which a young woman in Panama City consented to receive a strand of beads in time-honored Mardi Gras fashion—by exposing her breasts,¹³³ this time to the lens of a video camera.¹³⁴ The producers of *Girls Gone Wild* then used segments of Lane in their video and advertised it on paid television by showing brief, censored clips of Lane and others.¹³⁵ Lane sued for violation of section

125. *Id.*; *Loft*, 408 So. 2d at 622–23.

126. *See* FLA. STAT. § 540.08 (2011); *Loft*, 408 So. 2d at 621.

127. 698 F.2d 430 (11th Cir. 1983) (per curiam).

128. *Tyne*, 901 So. 2d at 806–07; *Valentine*, 698 F.2d at 431. "Pistol shots ring out in the barroom night. Enter Patty Valentine from the upper hall. She sees the bartender in a pool of blood. Cries out, 'My God, they killed them all!'" *Valentine*, 698 F.2d at 432 n.1.

129. *Id.* at 431.

130. *Id.*

131. *Id.* at 433.

132. 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

133. *Tyne*, 901 So. 2d at 807; *see generally* *Mardi Gras History & Traditions*, MARDI GRAS NEW ORLEANS, <http://www.mardigrasneworleans.com/quartermardi.html#breasts> (last visited Nov. 13, 2011).

134. *Tyne*, 901 So. 2d at 807; *Lane*, 242 F. Supp. 2d at 1209. In point of fact, Lane's companion having received beads in the same manner during Mardi Gras in New Orleans two years previously, recited the encounter to Lane, adding that her photograph from the New Orleans venture later appeared in a men's magazine. *Lane*, 242 F. Supp. 2d at 1209.

135. *Id.* at 1210. "*Girls Gone Wild*, [is] a video that depicts a variety of young women exposing their buttocks and genitals in public places." *Id.* Lane argued that she had consented to the videotaping, but not to its use in *Girls Gone Wild*. *Id.* The trial court found her argument unpersuasive. *Id.* at 1220.

[T]he interactions between Lane and the cameraman were not private in nature. Lane exposed herself on a public street while several pedestrians were in the general vicinity. . . . Lane did not know the cameraman before whom she exposed herself. It is unreasonable to expect that a

540.08, but the trial court granted the defendants' motion for summary judgment, stating:

In this case, it is irrefutable that the *Girls Gone Wild* video is an expressive work created solely for entertainment purposes. Similarly, it is also irrefutable that while Lane's image and likeness were used to sell copies of *Girls Gone Wild*, her image and likeness were never associated with a product or service unrelated to that work. Indeed, in both the video and its commercial advertisements, Lane is never shown endorsing or promoting a product, but rather, as part of an expressive work in which she voluntarily participated.¹³⁶

The point in *Lane* not directly addressed by the Supreme Court of Florida in *Tyne v. Time Warner Entertainment Co.*,¹³⁷ is that an advertisement for a work protected under the First Amendment has the same protection as the work itself.¹³⁸ Thus, the advertisements for the *Girls Gone Wild* movie, which depicted Lane, could not form the basis of an independent cause of action.¹³⁹ *Tyne* does, however, address the issue in relation to a different case involving a movie representing the history of the Black Panther Party.¹⁴⁰ The court in that case held:

Moreover, use of a person's name and likeness to advertise a novel, play, or motion picture concerning that individual is not ac-

total stranger would limit the viewing of a video with shots of young women publicly exposing themselves to only those persons present at the time of the filming.

Lane, 242 F. Supp. 2d at 1220.

136. *Id.* at 1213. The trial court's conclusion that the video irrefutably constituted an expressive work invited the scorn of a later judge:

Lane is an anomalous case which holds that "it is irrefutable that the *Girls Gone Wild* video is an expressive work created solely for entertainment purposes." This Court cannot similarly hold that the images in question are expressive works, as they do not contain any creative components or transformative elements.

Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 922 (N.D. Ohio 2004) (citation omitted) (quoting *Lane*, 242 F. Supp. 2d at 1213). See also the implicit scathing criticism of the result in *Lane* by the recent Eleventh Circuit case, *Plaintiff B v. Francis*, 631 F.3d 1310, 1317–19 (11th Cir. 2011) (holding that minors in suits against the producers of *Girls Gone Wild* movies should be permitted to proceed anonymously).

137. 901 So. 2d 802 (Fla. 2005).

138. See *Lane*, 242 F. Supp. 2d at 1212–13; see also *Groden v. Random House, Inc.*, 61 F.3d 1045, 1048, 1050 (2d Cir. 1995) (holding no violation of publicity right by the publisher of a book on the assassination of John F. Kennedy, which advertised the book by comparing it to theories of other authors and displaying their pictures).

139. *Lane*, 242 F. Supp. 2d at 1215.

140. *Tyne*, 901 So. 2d at 809 (citing *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D. Pa. 1996)).

tionable as an infringement of the right of publicity. For example, the use of another's name and likeness in the title of a movie does not infringe on the right of publicity since such use "is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services or a collateral commercial product."¹⁴¹

Thus, the advertisements in *Lane* did not violate the Florida statute.¹⁴²

Before moving on, it is well to note a problem with the *Tyne* opinion. Surprisingly, the court misinterprets the California case involving the T-shirts with the sketch of the Three Stooges.¹⁴³ The *Tyne* court erroneously stated: "[T]he California Supreme Court held that an artist who sold lithographs and T-shirts bearing the image of the Three Stooges did not violate the plaintiffs' right of publicity because the case did not concern commercial speech."¹⁴⁴ Quite to the contrary, the Supreme Court of California created "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."¹⁴⁵ In accordance with this test, the court then held:

Turning to Saderup's work, we can discern no significant transformative or creative contribution. His undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame. Indeed, were we to decide that Saderup's depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements.

Moreover, the marketability and economic value of Saderup's work derives primarily from the fame of the celebrities depicted. While that fact alone does not necessarily mean the work receives no First Amendment protection, we can perceive no transformative elements in Saderup's works that would require such protection.¹⁴⁶

141. *Seale*, 949 F. Supp. at 336 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 1004-05 (2d Cir. 1989)).

142. *Lane*, 242 F. Supp. 2d at 1215.

143. *See Tyne*, 901 So. 2d at 809.

144. *Id.*

145. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

146. *Id.* at 811.

Accordingly, the Supreme Court of California upheld a judgment for damages, attorney's fees, and costs based on stipulated facts presented at trial.¹⁴⁷

Although Florida courts have not passed directly on the matter, as noted earlier, occasionally the image of a celebrity is marketed for its very commercial value.¹⁴⁸ Although truly unusual, the same can be true of the image of a private person.¹⁴⁹ Should such a case arise, it is likely the court will have to retreat from its present position that: "the term 'commercial purpose' as used in section 540.08(1) does not apply to publications, including motion pictures, which do not directly promote a product or service."¹⁵⁰ Rather, the court will in all probability, have to expand its holding to encompass cases of the direct sale of an image of an individual. That said, as *Tyne* also demonstrates, once people become embroiled in a matter of public concern, the "newsworthiness" provision of section 540.08(4) will continue to bar them from asserting a cause of action based on the right of publicity.¹⁵¹

147. *Id.* at 801, 811.

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

149. *Jenkins ex rel. Jenkins v. Dell Publ'g Co.*, 251 F.2d 447, 450 (3d Cir. 1958). The sale of a high-quality print of the very famous Eisenstadt photograph of the "kissing sailor" as a collector's item was held to create a jury issue on violation of the publicity rights of the sailor in the photograph under Rhode Island law. *Mendonsa v. Time, Inc.*, 678 F. Supp. 967, 968, 973 (D.R.I. 1988). The Second Circuit reversed the grant of a defense motion for summary judgment in a case alleging that a publication entitled *Wrestling All-Stars Poster Magazine* violated the publicity rights of the wrestlers. *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 86, 89 (2d Cir. 1989). The publication contained no textual material, and only posters bearing the pictures of the wrestlers stapled together inside the cover à la Playboy playmate pin-ups. *See id.* at 86. In each case, the court held the claim of First Amendment protection would not withstand the blatant use for trade purposes under statutes similar to Florida's. *Id.* at 87, 89; *Mendonsa*, 678 F. Supp. at 971.

150. *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 810 (Fla. 2005).

151. *Id.* at 808; *see Ewing v. A-1 Mgmt., Inc.*, 481 So. 2d 99, 99 (Fla. 3d Dist. Ct. App. 1986) (per curiam) (holding that the use of a name on a wanted poster is newsworthy); *see, e.g., Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 807, 809 (2d Cir. 1940) (holding a "where are they now" article regarding a former child prodigy is in the continuing public interest). On the other hand, in construing its own statute, the New York Court of Appeals held that a young girl's picture used to illustrate an article on teenage sex fell within the newsworthiness exception even though the girl had engaged in none of the activity claimed in the article: "Notably, if the newsworthiness exception is forfeited solely because the juxtaposition of a plaintiff's photograph to a newsworthy article creates a false impression about the plaintiff, liability under [the statute] becomes indistinguishable from the common-law tort of false light invasion of privacy." *Messenger ex rel. Messenger v. Gruner & Jahr Printing & Publ'g*, 727 N.E.2d 549, 550, 556 (N.Y.) (per curiam), *vacated*, 208 F.3d 122 (2d Cir. 2000). The common law tort of privacy was not recognized in New York's jurisprudence. *Id.* at 551. However, Judge Bellacosa wrote a scathing dissent:

In sum, the practical and theoretical consequence of the negative answer justifies a too-facile escape valve from the operation of the statute, one that is also unilaterally within the

IV. "PRIVATE PERSONS" IN PRIVATE MATTERS

Where the picture or name of a private person is used outside of a matter involving the public interest, the cases involving section 540.08 do not differ in theory from defamation cases.¹⁵² The delicate balance between the First Amendment and private rights now tips more in favor of the plaintiff.¹⁵³ Typical of these cases is *Baucom v. Haverty*,¹⁵⁴ in which Ms. Baucom had retained attorneys to represent her after a fall at a restaurant.¹⁵⁵ The company that prepared a medical report for her attorneys later used that report when promoting itself to other law firms.¹⁵⁶ The report not only contained her picture, but confidential psychiatric information relating to her.¹⁵⁷ The trial court granted the defendant's motion for summary judgment based on the statute of limitations, but the Second District Court of Appeal reversed, holding that "a new cause of action accrued, and the statute of limitations began to run anew, the first time the report was read or shown to someone at each new potential employer."¹⁵⁸ While *Baucom* deals more with a procedural matter than the substance of the statute,¹⁵⁹ the facts parallel those in *American Ventures, Inc. v. Post, Buckley, Schuh, & Jernigan, Inc.*¹⁶⁰ In this instance, the identity of the plaintiff did not serve as an inducement for law

control of the alleged wrongdoer When an aggrieved person like Messenger reaches for the statutory lifeline, the newsworthiness notion dissipates it into a dry mirage. That is not fair or right.

Id. at 562–63 (Bellacosa, J., dissenting).

152. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 778 (1985) (Brennan, J., dissenting). "[D]efamation law does not differ from state efforts to control obscenity, ensure loyalty, protect consumers, oversee professions, or pursue other public welfare goals through content-based regulation of speech." *Id.* (citations omitted).

153. See, e.g., *Baucom v. Haverty*, 805 So. 2d 959, 960–61 (Fla. 2d Dist. Ct. App. 2001).

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression.

Dun & Bradstreet, Inc., 472 U.S. at 757. As noted earlier, Florida has steadfastly maintained the strong state interest in protecting privacy rights. See Mar. 7, 2007 Staff Analysis, *supra* note 72, at 2.

154. 805 So. 2d 959 (Fla. 2d Dist. Ct. App. 2001).

155. *Id.* at 960.

156. *Id.*

157. *Id.*

158. *Id.* at 960–61.

159. See *Baucom*, 805 So. 2d at 960–61.

160. No. C92-1817Z, 1993 WL 468643, at *1–2 (W.D. Wash. May 18, 1993); see *supra* note 73 and accompanying text.

firms to hire the defendant.¹⁶¹ *Baucom* thus demonstrates that the mere tangential use of a person's name or picture in connection with advertising may serve to violate the statute.¹⁶²

Yet another case found the producer of a *Girls Gone Wild* video defending a lawsuit when he placed a picture of a young woman at Mardi Gras on the cover of and in the advertisements for one of his videotapes.¹⁶³ The court had little trouble denying the defendant's motion to dismiss the complaint: "Plaintiff has squarely alleged that defendant published her photograph in Florida for commercial and advertising purposes—specifically on the package of defendant's videotape and in advertisements therefor[e]—and that defendant did so without her permission. This states a claim under [section] 540.08."¹⁶⁴

Although beyond this article's scope, it is noteworthy that the court also upheld a cause of action under Florida's Deceptive and Unfair Trade Practices Act (DUTPA).¹⁶⁵ Thus, plaintiffs suing under section 540.08 may also be able to raise claims under DUTPA as well as the Federal Lanham Act.¹⁶⁶ For instance, in Florida, the Lanham Act formed a count of the complaint in *Bossem v. Musa Holdings, Inc.*,¹⁶⁷ in which an eye doctor successfully moved for

161. See *Baucom*, 805 So. 2d at 960.

162. See *id.* at 960–61.

163. *Gritzke v. M.R.A. Holding, L.L.C.*, No. 4:01CV495-RH, 2002 WL 32107540, at *1 (N.D. Fla. Mar. 15, 2002). The operating procedure of the producer of the *Girls Gone Wild* videos is described in the Eleventh Circuit's factually accurate yet thinly-veiled contemptuous critique:

Joseph Francis is the creator and effective controlling officer of companies—including the three other named defendants in this case—that maintain the "Girls Gone Wild" franchise. Francis has made millions of dollars by going to places crowded with young, enthusiastic, and often-intoxicated women and filming them exposing their breasts, fondling each other, kissing each other, and sometimes engaging in more explicit sexual acts. Francis and his agents typically have the filmed women sign a release form affirming that they are over the age of eighteen and that the *Girls Gone Wild* franchise can use the footage. He and his companies then edit the films to create short scenes of women in various stages of undress and engaged in different types of sexual activities. Francis and his companies bunch the scenes together on pornographic DVDs that they sell online and through advertisements on television.

Plaintiff B v. Francis, 631 F.3d 1310, 1312 (11th Cir. 2011); see also *Pitts v. Francis*, No. 5:07cv169-RS-EMT, 2007 WL 4482168, at *1, *3, *26 (N.D. Fla. Dec. 19, 2007) (denying motion that judge recuse himself and discussing the *modus operandi* of the *Girls Gone Wild* producer).

164. *Gritzke*, 2002 WL 32107540, at *1.

165. See *id.* at *1, *4; FLA. STAT. § 501.201 (2011).

166. 15 U.S.C. § 1125 (2006); FLA. STAT. § 501.201; see, e.g., *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 617–18 (S.D.N.Y. 1985) (video club using Woody Allen look-alike in its advertising); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (Samsung using a robot dressed like Vanna White in a commercial for a videocassette recorder).

167. 46 So. 3d 42 (Fla. 2010) (per curiam).

partial summary judgment finding the defendant liable for using his name and likeness in its advertising.¹⁶⁸

What may well have proved the most blatant violation of the statute occurred in *Coton v. Televised Visual X-Ography, Inc.*,¹⁶⁹ where a young photographer posted a photograph of herself on a website “which [was] an on-line artistic community where photographers receive[d] feedback about, and s[old], their photographs.”¹⁷⁰ The photograph, still present on-line, shows the photographer fully dressed in a vest, long skirt and top hat, with her left shoulder bare.¹⁷¹ The defendant—or someone associated with the defendant—lifted the picture from the website and, without permission, used the picture on the cover of a pornographic film.¹⁷² The photographer sued for violation of the statute,¹⁷³ and received a default judgment in which the court found: “The undisputed evidence shows that the plaintiff’s self-portrait was placed, without her permission, prominently on the packaging of the Body Magic DVD for the purpose of marketing a pornographic movie with which she had no association. These facts constitute a violation of this statute.”¹⁷⁴ She recovered almost \$130,000 in damages, including compensatory damages of \$100,000 on the defamation claim.¹⁷⁵

Coton should serve as the harbinger of a new breed of cases—those which arise during the computer age.¹⁷⁶ Social networking sites mean photographs, names, and personal information are available to virtually anyone—or anyone virtual, for that matter.¹⁷⁷ We can expect the statute to be tested far more frequently where unscrupulous individuals simply take private personae from the internet and use them for commercial gain.

168. *Id.* at 43, 46 (affirming the trial court’s grant of motion for summary judgment and reinstating the award of prejudgment interest).

169. 740 F. Supp. 2d 1299 (M.D. Fla. 2010).

170. *Id.* at 1303.

171. *No Easy Way Out*, DEVIANTART, available at <http://larafairie.deviantart.com/gallery/?q=no+easy+way+out> (last visited Nov. 13, 2011).

172. *Coton*, 740 F. Supp. 2d at 1303; *Teen Sues Over XXX-Video “Debut”*, THE SMOKING GUN, <http://www.thesmokinggun.com/documents/crime/teen-sues-over-xxx-video-debut> (last visited Nov. 13, 2011).

173. *Coton*, 740 F. Supp. 2d at 1310. She also put forward claims for “copyright infringement . . . defamation, and intentional infliction of emotional distress.” *Id.* at 1302.

174. *Id.* at 1310.

175. *Id.* at 1314, 1316. Although beyond the scope of this article, the court engaged in a meticulous discussion of the damages it awarded for each count of the complaint. *Id.* at 1311–16.

176. *See Coton*, 740 F. Supp. 2d at 1303.

177. *See, e.g.*, SAUL LEVMORE & MARTHA C. NUSSBAUM, *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* (2010).

An unusual case spawned by the Internet was *Almeida v. Amazon.com, Inc.*,¹⁷⁸ where the Internet retailer Amazon offered for sale a book entitled *Anjos Proibidos*.¹⁷⁹ A picture of the book's cover appeared together with a description of the book and its price, and the cover featured a picture of Almeida.¹⁸⁰ When she was a minor, Almeida's mother signed a release form permitting the use of Almeida's photograph in a gallery exhibition and in a book of photographs based on the exhibition.¹⁸¹ Nine years later, a second edition of the book appeared, but this time Almeida's photograph was reproduced on the cover of the book, which Amazon then offered for sale.¹⁸² The Eleventh Circuit affirmed the dismissal of Almeida's statutory cause of action against Amazon.¹⁸³

The instant section 540.08 action is brought against Amazon, an internet bookseller that provides services similar to a traditional bookseller. Amazon provides its online customers with a searchable book database with links to product detail pages for each book in its database. Each product detail page provides the book's cover image, the publisher's description of the book, and in many instances editorial and customer content. From the product detail page, customers may link to an order placement page, where they may complete their purchase and specify the shipping method. In this manner, Amazon's role as an internet bookseller closely parallels that of a traditional bookseller. Because internet customers are unable to browse through shelves of books and observe the actual book cover photos and publisher content, Amazon replicates the bookstore experience by providing its customers with online cover images and publisher book descriptions.¹⁸⁴

The court rejected Almeida's suit, for it recognized that the Internet required the rethinking of traditional rules.¹⁸⁵ While Amazon unquestionably sought to sell the book, the display was not of Almeida but instead of the book itself.¹⁸⁶

178. 456 F.3d 1316 (11th Cir. 2006).

179. *Id.* at 1319.

180. *Id.*

181. *Id.* at 1318–19.

182. *Id.* at 1319.

183. *Almeida*, 456 F.3d at 1328.

184. *Id.* at 1325.

185. *See id.* at 1326.

186. *See id.* at 1325.

Amazon's use of book cover images is not an endorsement or promotion of any product or service, but is merely incidental to, and customary for, the business of internet book sales.

Under the allegations of Almeida's complaint, we discern no set of facts by which an internet retailer such as Amazon, which functions as the internet equivalent to a traditional bookseller, would be liable for displaying content that is incidental to book sales, such as providing customers with access to a book's cover image and a publisher's description of the book's content. Accordingly, we affirm the district court's grant of summary judgment as to Amazon's right of publicity claim, but we do so on the ground that Amazon did not use Almeida's image for the purpose of directly promoting a product or service in violation of section 540.08.¹⁸⁷

Almeida thus represents an Internet version of *Tyne*: where the underlying product is protected, advertisements for sale of the product will share the protection.¹⁸⁸ We can expect courts to modify law established under traditional rules of commerce for the internet era.

V. DEFENSES UNDER THE STATUTE OTHER THAN PUBLIC INTEREST

Subsection four of the statute provides for three instances in which the statute will not apply: a) legitimate public interest or newsworthiness; b) consent; and c) incidental use of members of the public.¹⁸⁹ The first of these was discussed earlier, where newsworthiness would trump privacy concerns, but not if the defendant used the persona for advertising purposes.¹⁹⁰ As to consent, established case law regarding consent applies to the statute as well.¹⁹¹ For example, when restaurants intercepted private satellite broadcasts of Miami Dolphins football games, the court dismissed the team's claims under the statute.¹⁹² "Even if a prohibited use had occurred, the play-

187. *Id.* at 1326 (citation omitted).

188. *See Almeida*, 456 F.3d at 1324–25; *see also Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 808–09 (Fla. 2005).

189. FLA. STAT. § 540.08(4)(a)–(c) (2011).

190. *Id.* § 540.08(4)(a).

191. *See Nat'l Football League v. Alley, Inc.*, 624 F. Supp. 6, 10 (S.D. Fla. 1983).

192. *Id.*

ers' contractual consent to appear in game telecasts constituted waiver of their rights under the Florida statute."¹⁹³

The incidental use provision came into play where a plaintiff in a copyright action used a picture of the defendant in a marketing brochure.¹⁹⁴ The plaintiff had neither used the name of the defendant, nor displayed the picture with such definition that he could readily be recognized from among the three men portrayed.¹⁹⁵ When the defendant filed a cross-claim under the statute, the court granted the plaintiff's motion for summary judgment, holding:

Moreover, this photograph falls within the statutory "member of the public" exception. The three men in the photograph are not named, are not in uniform, and are not otherwise connected with the use of the photograph. Defendant Souliere appearing in the photograph is merely fortuitous. Therefore, this Court finds that no reasonable juror could find that the photograph of defendant Souliere in plaintiff's brochure constituted commercial exploitation or that it does not fall within the member of the public exception.¹⁹⁶

VI. CONCLUSION

Based on cases which have interpreted section 540.08 of the *Florida Statutes*, plaintiffs who live in the public eye cannot expect to recover under the statute for the use of their name or likeness unless the defendant has usurped their personae to promote a product or service. Similarly, private plaintiffs will lose their suits when the defendant has used them in connection with the public interest, when they have consented to the use, or when they happen to be just another "face in the crowd." However, when the defendant uses the plaintiff's name or likeness for promotional purposes, the plaintiff will be able to recover.

Two areas seem ripe for further development. First, we can expect the courts to continue to modify existing law to suit new problems raised by internet, e-marketing, and social networking. Second, it will be interesting to see how firmly the courts are wedded to the promotional language of *Tyne*

193. *Id.* The court also found the defendants protected under the statute as the matter was of legitimate public interest. *Id.* However, the court did find that the defendants had violated section 605 of the Federal Communications Act of 1934. *Id.* at 10-11.

194. *Epic Metals Corp. v. Condec, Inc.*, 867 F. Supp. 1009, 1014-15 (M.D. Fla. 1994).

195. *Id.* at 1016.

196. *Id.* at 1017 (citation omitted).

when confronted with a case involving the actual sale of a person's portrait or likeness.