

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 03-1251

ERICA TYNE, et al.,

Plaintiffs/Movants,

v.

TIME WARNER ENTERTAINMENT CO., L.P.

D/B/A WARNER BROS. PICTURES, et al.,

Defendants/Respondents.

ON A CERTIFIED QUESTION
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 02-13281

***AMICUS CURIAE* BRIEF OF
THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.,
SUPPORTING DEFENDANTS TIME WARNER ENTERTAINMENT
CO., L.P. D/B/A WARNER BROS. PICTURES, ET AL.;
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF PENDING**

LOEB & LOEB LLP
DOUGLAS E. MIRELL (California Bar No. 94169)
JEAN-PAUL JASSY (California Bar No. 205513)
10100 Santa Monica Boulevard, Suite 2200
Los Angeles, California 90067-4164
Telephone:310-282-2000
Facsimile:310-282-2200

Attorneys for Amici Curiae
Motion Picture Association of America, Inc., et al.

IDENTITY OF *AMICI CURIAE* AND STATEMENTS OF INTEREST

Amici curiae are the Motion Picture Association of America, Inc. (“MPAA”), the Association of American Publishers, Inc. (“AAP”), the Freedom to Read Foundation (“FTRF”), the American Booksellers Foundation for Free Expression (“ABFFE”), the Publishers Marketing Association (“PMA”), the Video Software Dealers Association (“VSDA”), the Magazine Publishers Association (“MPA”) and the Comic Book Legal Defense Fund (“CBLDF”) (collectively, “*Amici*”).

MPAA is a non-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The MPAA’s members¹ produce and distribute the vast majority of entertainment in the domestic theatrical, television and home video/DVD markets, and have a substantial interest in any jurisdiction’s efforts to limit the use of names, likenesses and other indicia of personality in any types of expressive works.

AAP is the national trade association of the United States book publishing industry. AAP’s members² include most of the major commercial book publishers in the United States as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field –

¹ The members of the MPAA are Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Warner Bros., a division of Time Warner Entertainment Company, L.P., and an affiliate of The Walt Disney Company.

² The more than 300 members of the AAP include The McGraw-Hill Companies, Harvard University Press, The Library of Congress Publishing Office, Yale University Press, New England Journal of Medicine, University of California Press and the Oxford University Press, among many others. A complete list of AAP’s members can be found at www.publishers.org.

educational materials for the elementary, secondary, postsecondary and professional markets, computer software, and electronic products and services. The AAP represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

FTRF is an organization established in 1969 by the American Library Association. The purpose of FTRF is to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens.

ABFFE was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

PMA is a nonprofit trade association representing more than 3,000 publishers across the United States and Canada. PMA's members include small, independent publishers, non-profit and university presses who publish a variety of literary works including graphic novels, satire, parody, and nonfiction books on all topics. Its members' works contribute to the public debate on social and political issues, and provide a forum for creative talent that contributes to society's cultural enrichment. The importance of fictionalizations and related efforts against the expansion of the right of publicity is of paramount concern to PMA's members. PMA believes that an adverse decision in this case would burden the First Amendment rights of its members and would directly impair their ability to create works that depict contemporary events, symbols and people.

Due to the Northeastern blackout and its aftermath, *Amici* were unable to reach other potential *amici* in time to include them in their Request for Leave to File an *Amicus Curiae* Brief.³ However, there are other *amici*, listed below, whose interests are aligned with the above-mentioned entities, and who would like to participate in submitting the following Brief to this Court:

VSDA is the not-for-profit international trade association for the home entertainment industry. VSDA represents approximately 1,200 companies throughout the United States, Canada and a dozen other countries. Its members operate approximately 11,000 retail outlets in the U.S. that sell and/or rent DVDs, VHS cassettes, and console video games. Membership comprises the full spectrum of video retailers (from single-store operators to large chains), video distributors, the home video divisions of major and independent motion picture studios, and other related businesses that constitute and support the home video entertainment industry. VSDA members manufacture, distribute, sell and rent a wide variety of expressive works in the motion picture and video game formats.

MPA is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports,

³ That Request is still pending before this Court. Accordingly, this Brief is being submitted conditionally because of the imminence of the deadline for filing *amicus curiae* briefs in support of Defendants/Respondents pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure.

agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

CBLDF is a non-profit corporation dedicated to defending the First Amendment rights of the comic book industry. CBLDF members include over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians and readers located throughout the United States and the world. In 1986, CBLDF was founded on the principle that comics are an expressive medium deserving of the same First Amendment liberties afforded to film, literature and art. The ability of CBLDF's members to produce and enjoy content relevant to a wide variety of readers depends upon the exercise of rights guaranteed by the First Amendment.

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals has asked this Court to evaluate the scope of Florida’s publicity rights statute, Fla. Stat. § 540.08 (“Section 540.08”), as applied to the facts of the above-captioned case. Because this case involves the use by Defendants/Respondents (“Defendants”) of the names and likenesses of real persons in an expressive work -- *The Perfect Storm* -- that is protected by the First Amendment to the United States Constitution, this Court’s decision *must* be guided by constitutional considerations. This Court should not focus upon any characterization of the content of the movie -- whether “nonfiction,” “fiction” or a blend of the two -- since *all* such expressive works merit full constitutional protection.

In responding to the Eleventh Circuit’s certified question, only an answer that precludes Defendants’ liability under Section 540.08 would be consistent with the United States Constitution, the Florida Constitution, previous decisions interpreting Section 540.08, the Restatement (Third) of Unfair Competition and the overwhelming weight of publicity rights jurisprudence. Indeed, unless Section 540.08 is read to maximize free expression, any motion picture or other expressive work that involves the unauthorized depiction of real persons would be exposed to liability (or, at the very least, to the prospect of costly and protracted litigation) under Florida’s publicity rights statute. Such a result would not only chill creative expression within this State, but would have profound nationwide -- indeed global -- ramifications on all such expressive works.

Throughout the centuries, countless works have used the personas of real people -- both living and dead -- in unauthorized biographies, novels, documentaries, docudramas and other similar settings. Plaintiffs/Movants (“Plaintiffs”) would have this Court hold that storytellers must choose either to confine their story to documented facts, to set their story in a wholly mythological world, or to submit to the censorship and pecuniary demands of real-life characters and/or their heirs.¹ Fortunately, however, the First Amendment guarantees that storytellers do *not* have to make this Draconian choice. *The Perfect Storm* provides a paradigmatic example of why this is so. There is no way the story of the *Andrea Gail*’s ill-fated voyage could be told without fictionalizing the feelings, motivations and dialogue of the crew since each of them was lost at sea. Under Plaintiffs’ theory, any fictionalized telling of their story (including all dramatizations of their statements and actions, as well as their inner thoughts and unarticulated motives) would be lost too on the claim that they are somehow “false.” Falsity, however, is a concept utterly foreign to publicity rights jurisprudence. Moreover, its invocation is particularly bizarre here since the film’s producers did not characterize *The Perfect Storm* as a “true story,” but rather accurately stated that it was a movie “based on a true story.”

Amici respectfully urge this Court to affirm the constitutional protection to which all expressive works are entitled, while simultaneously rejecting plaintiffs’ invitation to import any concepts of “falsity” into the analysis of this

¹ Indeed, if the position advanced by Plaintiffs had been law in the 1940s, there is a significant chance that such influential films as *Citizen Kane* (which dramatized unflattering parallels between the protagonist, Charles Foster Kane, and media magnate William Randolph Hearst) would never have been made for fear of ensuing litigation.

certified question. *Amici* also urge this Court to adopt a bright-line rule -- functionally indistinguishable from that articulated in several prior Florida state and federal court decisions -- that Section 540.08 applies only to the direct commercial misappropriation of a person's name or likeness for advertising or promotional purposes, and does not apply to the use of such indicia of personality in any expressive works that recount or dramatize real events. Under no circumstances should Section 540.08 be read to permit liability under the facts of the present case.

II.

SECTION 540.08 CANNOT OVERRIDE PROTECTIONS

AFFORDED BY THE U.S. AND FLORIDA CONSTITUTIONS.

This Court must interpret Florida's statutes in a fashion that is consistent with the federal and state constitutions. *State v. Globe Communications Corp.*, 648 So.2d 110, 113 (Fla. 1994) ; *Department of Revenue v. Kuhnlein*, 646 So.2d 717, 721 (Fla. 1994); *Gray v. Moss*, 156 So. 262, 266 (Fla. 1934) (“[a]ll statutes, *whether so expressed in the acts or not*, are subject to controlling provisions of both the State and the Federal Constitutions”) (emphasis added).

Section 540.08 addresses, in part, the principles of free expression embodied in the First Amendment and Florida's Constitution by exempting news material. Fla. Stat. § 540.08(3); *Department of Educ. v. Lewis*, 416 So.2d 455, 461 (Fla. 1982) (Article I, Section 4 of the Florida Constitution provides protection for expression that is coextensive with the First Amendment). By no means, however, does this statutory exception embody

the entire universe of constitutional defenses to a publicity rights claim. *See generally Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003) (right of publicity claims must be circumscribed by the First Amendment). This Court must conclude that constitutional provisions preclude liability under Section 540.08 for the use of names and likenesses in all expressive works even if, like *The Perfect Storm*, such works fictionalize various aspects of the persons depicted.²

III.

EXPRESSIVE WORKS THAT DEPICT REAL PERSONS ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION -- WHETHER THE WORKS ARE FICTION, NONFICTION OR A BLEND OF THE TWO.

A.

The First Amendment Protects Motion Pictures.

Over fifty years ago, the United States Supreme Court unequivocally concluded “that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). The Supreme Court explained its reasoning for this conclusion:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all

² The *amicus* brief filed by the Entertainment, Arts and Sports Law (“EAS”) Section of the Florida Bar presents a contested technical construction of Section 540.08. But no reading of this law (such as EAS’s flawed interpretation) is permissible if it cannot withstand constitutional scrutiny.

artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

Id. at 501 (footnote omitted); *see also* *Schad v. Mt. Ephraim*, 452 U.S. 61, 65 (1981) (“motion pictures ... fall within the First Amendment guarantee”).

B.

**The First Amendment Protects The Right To Portray And Discuss
Real Persons.**

Courts consistently hold that the First Amendment protects the depiction of real persons in nonfiction accounts, fictional stories and other expressive works, such as motion pictures, that blend fiction and nonfiction elements.

1.

**The First Amendment Protects The Depiction Of Real
Persons In Nonfiction Accounts.**

The First Amendment protects the use of names and likenesses in news accounts and reports on matters of public interest. *See, e.g., Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (N.Y. Sup. Ct. 1968) (the “right of publicity” must “bow” to “newsworthy events and matters of public interest”). This is consistent with Section 540.08(3)(a), which recognizes an exception to Florida’s publicity rights statute for uses in “news” and any “presentation having a current and legitimate public interest.”

The First Amendment protection for nonfiction accounts also extends to works of entertainment. For example, in *Rosemont*, 294 N.Y.S.2d at 127-29, the court explained that a factually-based biography of Howard Hughes could not give rise to a publicity rights claim. Also, in *Daly v. Viacom, Inc.*, 238

F.Supp.2d 1118, 1122-23 (N.D.Cal. 2002), the court rejected a misappropriation claim where defendants used images of plaintiff kissing a man in a bathroom stall as part of a documentary television program about music groups, and also used plaintiff's image to advertise the same program. The court explained that the broadcast was "an expressive work protected by the First Amendment," which precluded plaintiff from stating a misappropriation claim "based on the use of her likeness in the program or the advertisements for the program." *Id.* at 1123.

2.

The First Amendment Protects The Depiction Of Real Persons In Fictional Stories.

The California Supreme Court, in a concurring opinion adopted by a majority of justices, explained that real persons could be used in fictional accounts. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 462 (Cal. 1979) (Bird, C.J., concurring). The Guglielmi case involved a post-mortem publicity rights claim alleging that the defendants used deceased actor Rudolph Valentino’s “name, likeness and personality in a fictionalized film which did not accurately portray his life.” *Id.* at 456. Chief Justice Bird explained that “[i]t is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories,” and, as a consequence, “no distinction may be drawn in this context between fictional and factual accounts of Valentino’s life.” *Id.* at 459.³ Rejecting a claim that constitutional protections should not apply to fiction because it involves false speech, the opinion noted that “[n]o such constitutional dichotomy exists” in publicity rights cases “between truthful and fictional accounts” because “[t]hey have equal constitutional stature and each is as likely to fulfill the objectives underlying the constitutional guarantees of free expression.” *Id.* at 461. To the majority of justices the conclusion was simple: “[e]very fiction writer knows his creation is in some sense ‘false.’ That is the nature

³ Chief Justice Bird went a step further to explain her reasoning on this point, noting that “[c]ontemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality.” *Id.* at 460 (footnote omitted).

of the art. Therefore, where fiction is the medium . . . it is meaningless to charge that the author ‘knew’ his work was false.” *Id.*

Other courts have taken the same approach to fictional stories that use the names and likenesses of real people. *See, e.g., Hicks v. Casablanca Records*, 464 F.Supp. 426, 430 (S.D.N.Y. 1978). *Hicks* involved a fictionalized biography – and movie – of deceased author Agatha Christie. *Id.* at 428-31. In granting motions to dismiss, the Court held that “the right of publicity does not attach here, where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie[.]” *Id.* at 433.

In another case, the motion picture *The Sandlot* contained a child character with a name and likeness that were remarkably similar to the name and former physical appearance of a plaintiff asserting a publicity rights claim. *Polydoros v. Twentieth Century Fox Film Corp.*, 79 Cal.Rptr.2d 207, 208-09 (1997) (the name in the movie was “Palledorous” and both the character and plaintiff, who was a former acquaintance of the movie’s screenwriter, wore similar eyeglasses and clothing as a child). Despite the similarities between plaintiff and the movie’s character – and the use of the character’s image in advertising the movie – the court held that the defendants “were creating a fictionalized artistic work,” that “their endeavor is constitutionally protected,” and that “[t]his right was not diminished when [defendants] advertised and then sold their work as mass public entertainment.” *Id.* at 212.

3.

**The First Amendment Protects The Depiction Of Real
Persons In Accounts Blending Fiction And Nonfiction.**

“Docudramas” -- *i.e.*, works that mix historical fact and fiction -- are entitled to “substantial latitude” under the First Amendment. *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995) (protecting a book and movie dramatizing real events). In *Seale v. Grammercy Pictures*, 949 F.Supp. 331, 334-35 (E.D.Pa. 1996), *aff’d without opinion*, 156 F.3d 1225 (3d Cir. 1998), a founder of the Black Panther Party claimed that a docudrama, “combin[ing] fiction with history,” violated his right of publicity. Although the film and its attendant advertising used the plaintiff’s name and likeness, the court granted summary judgment to the defendants on plaintiff’s publicity rights claim because “the Defendants’ use of the Plaintiff’s name and likeness was for the purpose of First Amendment expression” -- namely, “the creation, production, and promotion of a motion picture and history book which integrates fictitious people and events with the historical people and events surrounding the emergence of the Black Panther Party in the late 1960s.” *Id.* at 337. *See also Ruffin-Steinback v. de Passe*, 82 F.Supp.2d 723, 726, 728-731 (E.D. Mich. 2000), *aff’d*, 267 F.3d 457, 461-62 (6th Cir. 2001) (foreclosing publicity rights liability for television docudrama mixing factual and dramatized elements of a story about The Temptations); *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P.2d 177, 184 (Utah 1954) (dramatized biographical film not subject to publicity rights law).

4.

**The Applicability Of The First Amendment Does Not Turn
On Whether The Work Is Labeled As Fiction Or
Nonfiction, Or Constitutes A Blend Of The Two.**

The Fifth Circuit Court of Appeals, affirming the dismissal of a misappropriation claim based on the use of an individual’s persona in a book and subsequent motion picture dramatizing real events, agreed with a commentator who observed that: “[c]ourts long ago recognized that a celebrity’s right of publicity does not preclude others from incorporating a person’s name, features or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual’s identity in advertising infringes on the persona.” *Matthews v. Wozencraft*, 15 F.3d 432, 439 (5th Cir. 1994). The court explained that this principle is rooted in constitutional concerns; it is “immaterial” whether a work is viewed as “historical” or “fictional” – since, in either event, it is protected by the First Amendment. *Id.* at 440. The district court in *Ruffin-Steinback* similarly recognized that First Amendment protections apply to publicity rights claims since “[t]he scope of the right of publicity does not depend ... on the fictional or nonfictional character of the work.” 82 F.Supp.2d at 726.⁴

Plaintiffs implicitly concede, on page 45 of their Initial Brief to this Court, that “avowed fiction” is “protected under the First Amendment.” Movants’ Initial Brief (“MIB”) at 45; *see also id.* at 48 n.20. In other words, Plaintiffs

⁴ *See also* *Daly*, 238 F.Supp.2d at 1123 (“[u]nder the First Amendment, a cause of action for appropriation of another’s ‘name and likeness may not be maintained’ against ‘expressive works, whether factual or fictional’”); *Ruffin-Steinback*, 82 F.Supp.2d at 730 (“to the extent that courts have been reluctant to extend the right of publicity to depictions of life-stories based on First Amendment considerations, those considerations are no less relevant whether the work in question is fictional, nonfictional or a combination of the two”); *Guglielmi*, 603 P.2d at 461-62 (Bird, C.J., concurring) (“[w]hether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression”).

presumably would take no issue if *The Perfect Storm* had “avowed” that it was purely fictional. The movie’s introduction stated that it was “based on a true story,” and the film contained dramatized fictional⁵ elements interspersed with real facts and real persons’ names. For these reasons, Plaintiffs apparently contend that the presence of these “real world” elements gives rise to liability under Section 540.08. The same argument was rejected in another case where a motion picture was “suggested” by a crime (the infamous Leopold and Loeb murder) that the plaintiff had committed many years prior. *Leopold v. Levin*, 259 N.E.2d 250, 256 (Ill. 1970). In *Leopold*, the plaintiff advanced the following argument:

The plaintiff acknowledges that a documentary account of the Leopold-Loeb case would be a constitutionally protected expression, since the subject events are matters of public record. Also constitutionally protected, the plaintiff continues, would be a completely fictional work inspired by the case if matters such as the locale would be changed and if there would be no promotional identification with the plaintiff. [Plaintiff’s] claim is that the constitutional assurances of free speech and press do not permit an invasion of his privacy through the exploitation of his name, likeness and personality for commercial gain in ‘knowingly fictionalized accounts’ of his private life and through the appropriation of his name and likeness in the advertising materials.

Id. at 253. Though the Illinois Supreme Court generally recognized a misappropriation right, it also acknowledged the First Amendment limits upon such a right and then flatly rejected the plaintiff’s claim. *Id.* at 254-57. As with the plaintiff’s position in *Leopold*, Plaintiffs’ position is fatally flawed.

First, constitutional principles protect the depiction of real persons in nonfictional accounts. Therefore, to the extent the movie is “based on a true story,” which Plaintiffs do not and cannot contest, the First Amendment clearly

⁵ Since all fiction “is in some sense ‘false,’” constitutional protection from publicity rights claims for such fictional works can never be made to depend upon the existence or absence of alleged “falsity.” *See Guglielmi*, 603 P.2d at 461 (Bird, C.J., concurring).

precludes liability under Section 540.08. Second, First Amendment principles also protect the depiction of real persons in fictional stories. Thus, to the extent portions of the movie are dramatized – a concept implicit in the use of the word “based” in the phrase “based on a true story” – the film still is protected under the First Amendment. Third, just as the First Amendment protects the use of real persons’ names and likenesses in fiction and nonfiction accounts, so, too, does it protect such uses in a dramatized historical account that combines fictional and nonfictional elements. *The Perfect Storm* presents a “concededly dramatized account” of real events involving real people. *Tyne v. Time Warner Entertainment Co.*, 2003 WL 21538654 at *1. It is, therefore, protected under the First Amendment, and cannot give rise to a claim under Section 540.08.⁶

Although *The Perfect Storm* was accurately described by Defendants as a movie “based on a true story” (rather than as a literal “true story”), none of Defendants’ “disclaimers” were even necessary to defeat a publicity rights claim. As explained above, First Amendment protections apply to the use of

⁶ Notwithstanding this legion of unambiguous authority, Plaintiffs insist that such constitutional protection is not warranted because *The Perfect Storm* does not present itself as wholesale fiction. MIB at 45-48. To support their faulty argument, Plaintiffs rely on *Peoples Bank & Trust Co. v. Globe Int’l Publ’g, Inc.*, 978 F.2d 1065 (8th Cir. 1992). MIB at 45-47. In that case, a newspaper was found liable for false light invasion of privacy and outrage (intentional infliction of emotional distress) because it published an admittedly false article about a pregnant centenarian along with a photo of the elderly plaintiff. *Peoples Bank*, 978 F.2d at 1067. *Peoples Bank* is inapposite because it did not involve a publicity rights claim; but the decision still emphasized the need for First Amendment protections. *See also Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 571-72 (1997) (explaining that *Time, Inc v. Hill*, 385 U.S. 374 (1967), involved false light, not publicity rights, claims).

names and likenesses in expressive works *regardless* of the label (fiction, nonfiction or “faction”) they may bear. One rationale for this principle is that the viewing public is savvy enough to understand that dramatized expressive works obviously mix fact and fiction. Partington, 56 F.3d at 1154-55 (recognizing that viewers are familiar with docudramas, which “often rely heavily upon dramatic interpretations of events ... in order to capture and maintain the interest of their audience,” and audiences understand that “such programs are more fiction than fact”). Moreover, several courts have recognized that “disclaimers” do not affect the constitutional protection of a work. *See, e.g., Matthews*, 15 F.3d at 436, 439-40 (although work professed to be “fiction,” it fell “within the protection of the First Amendment” and it was “immaterial” whether it was “viewed as an historical or a fictional work”); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980) (although a book claimed to be a “biography,” the court reasoned that “it [did] not matter whether the book is properly described as a biography” since it was protected free expression whether described as a “biography, fictional biography, or any other kind of literary work”). Thus, from a publicity rights perspective, the protection accorded to expressive works by the First Amendment does not turn on the exact wording – or even the existence – of a disclaimer. A decision to the contrary would violate the Constitution, nullify a large body of case law from across the country, and create an impractical system where the protection of an expressive work would rely on the wording and/or location of “disclaimers” – whether placed at the beginning, the end or even *during* a motion picture. This is not and cannot be the law.

C.

The First Amendment Also Protects The Use Of Real Persons’ Names And Likenesses In Advertising Expressive Works.

In *Guglielmi*, the defendants used Rudolph Valentino’s name in the title of a film, and in advertising for the same film. 603 P.2d at 455-56. Such uses did not, however, remove any constitutional protections since, as a majority of the justices explained, “[i]t would be illogical to allow [defendants] to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise.” *Id.* at 462 (Bird, C.J., concurring).⁷ Similarly, the Sixth Circuit Court of Appeals affirmed a lower court’s finding that a movie about the musical group The Temptations, which employed the “fictionalized likenesses” of plaintiffs, was “protected by the First Amendment” and that “the advertising incidental to such uses did not give rise to a claim for relief under the plaintiffs’ rights of publicity.” *Ruffin-Steinback*, 267 F.3d at 461-62.

As the foregoing cases illustrate, even if Defendants used Plaintiffs’ names to advertise their film – a fact not reflected in the record – such advertisements would likewise be protected under the First Amendment.

IV.

⁷ *See also Seale*, 949 F.Supp. at 337 (just as the use of plaintiff’s name and likeness in a docudrama was protected so, too, was the use of plaintiff’s name and likeness on the cover for the home video version of the film); *Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) (“[c]onstitutional protection extends to the truthful use of a public figure’s name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication”).

**THE CONSTITUTIONAL PROTECTIONS ARE REFLECTED IN
OTHER AUTHORITY.**

A.

**The Restatement Of Unfair Competition Counsels Against
Misappropriation Liability For Expressive Works.**

The most recent Restatement of Unfair Competition explains that misappropriation liability “does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.” Restatement (Third) of Unfair Competition § 47 (1995). A Comment to the Restatement explains that the “right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression.” *Id.* at cmt. c. “The scope of the activities embraced within this limitation on the right of publicity has been broadly construed,” and “extends to use in entertainment and other creative works, including both fiction and nonfiction ... [in an] unauthorized print or broadcast biography ... [and in a] motion picture.” *Id.* Consistent with the general constitutional principles discussed above, the Restatement recognizes the limitations of any publicity rights claim, and recognizes that the use of individuals’ names in a motion picture that intertwines factual and fictional elements should not give rise to a publicity rights claim. By strictly limiting itself to uses “for purposes of trade or for any commercial or advertising purpose,” Section 540.08 is consistent

with the Restatement and the First Amendment.⁸ Plaintiffs' interpretation, on the other hand, is inconsistent with both.

B.

**The Overwhelming Weight Of Authority Nationwide Already
Precludes Publicity Rights Liability For Expressive Works
And Their Attendant Advertising.**

Several states with publicity rights statutes *explicitly* exempt from liability expressive audiovisual works, such as the work at issue here, as well as the attendant advertising of such works.⁹ Courts in other states that have addressed the question also shield the use of names and likenesses in expressive works. For example, the Kentucky Supreme Court recently recognized that Kentucky's broadly-worded publicity rights statute, which has no explicit exemption for expressive works, is "fundamentally constrained by federal and state constitutional protection of the freedom of expression." *Montgomery v. Montgomery*, 60 S.W.3d 524, 528 (Ky. 2001). Recognizing that entertainment enjoys

⁸ See *Joseph Burstyn, Inc.*, 343 U.S. at 501-02 (motion pictures, books and other expressive are protected even though they are sold for a profit).

⁹ See, e.g., *Cal. Civ. Code* § 3344.1(a)(2) (an "audiovisual work ... shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment"); 765 Ill. Comp. Stat. 1075/35(6)(1) (the "Act does not apply to ... film or other audio, visual or audio-visual work"); *Ind. Code* § 32-36-1-1 (statute "does not apply to ... film ... [or] promotional material or an advertisement for ... an entertainment medium"); *Nev. Rev. Stat.* 597.790(2)(d) (no consent is required under the statute for a "use in an attempt to portray, imitate, simulate or impersonate a person in a ... film"); *Ohio Rev. Code Ann.* § 2741.09(A)(1)(a) (statute "does not apply to ... a dramatic work, fictional work, historical work, audiovisual work ... regardless of the media in which the work appears"); *Okla. Stat.*, tit. 12, § 1448(N)(1) ("[t]his section shall not apply to the use in ... film"); *Tex. Prop. Code Ann.* § 26.012(a) (use in "film" is permitted); *Wash. Rev. Code* § 63.60.070(2) (statute "does not apply to ... film").

protection, the court refused to impose liability on the use of a deceased person's name or likeness in a music video. *Id.* at 529.

Similarly, the Utah Supreme Court recognized that its publicity rights statute did not apply to a dramatized biographical motion picture that used a deceased person's name, even though the Utah statute does not contain an express exemption for such a use. *Donahue*, 272 P.2d at 184. Although the language of the statute did not give such explicit guidance, the Court "reject[ed] the idea that [the Utah] statute was meant to distinguish between educational and information [*sic*] as contrasted with fictional publications." *Id.* at 182. The Court recognized that the "public has an important interest to be served in free and uninhibited expression in all channels of public information, of which the movies are an effective medium," and also recognized that, faced with the choice of a broad or strict reading of the statute, only a reading that maximized free expression would be constitutional. *Id.* at 183, 184.¹⁰

Thus, whether in their statutes or case law, other states recognize that publicity rights must always be circumscribed by the dictates of the First Amendment.¹¹ Florida should not – and does not – reject that which the Constitution requires.

¹⁰ *See also Seale*, 949 F.Supp. at 337 (finding protection for movie's use of name and likeness under Pennsylvania law); *Doe v. Roe*, 638 So.2d 826, 829-30 (Ala. 1994) (book's fictionalized account of real murder does not give rise to misappropriation claim under Alabama law).

¹¹ Plaintiffs cite the district court opinion in *Messenger v. Gruner + Jahr USA Publ'g*, 994 F.Supp. 525, 531 (S.D.N.Y. 1998), for the propositions that the New York and Florida misappropriation statutes are "essentially equivalent" and that Section 540.08 does not "foreclose liability for culpably false or fictionalized publications, even on matters of public interest." MIB at 37. Even if New York's and Florida's publicity rights statutes were "essentially equivalent" – which is not the case – Plaintiffs' reliance on the district court decision should be given no weight because that ruling was reversed by the

Indeed, at least one Florida appellate court has already recognized that Section 540.08 applies only to the direct commercial misappropriation of a person's name or likeness for advertising or promotional purposes, and does not apply to the use of a name in a book or movie recounting and dramatizing real events. *Loft v. Fuller*, 408 So.2d 619, 622-23 (Fla. Dist. Ct. App. 1982) (book and subsequent movie recounted and dramatized plane crash and supposed appearance of ghosts of plane's flight crew).¹² To hold otherwise, the Court acknowledged, "would result in a

Second Circuit Court of Appeals. 208 F.3d 122 (2d Cir. 2000). Moreover, before the decision was reversed, the Second Circuit certified the following question to New York's highest court: "[m]ay a plaintiff recover under New York['s publicity rights law] where the defendant used the plaintiff's likeness in a substantially fictionalized way without the plaintiff's consent, even if the defendant's use ... was in conjunction with a newsworthy column?" *Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 440 (2000). The Court of Appeals of New York responded in the negative: "when a plaintiff's likeness is used to illustrate a newsworthy article, the plaintiff may not recover under [New York's publicity rights law] even if the use of the likeness creates a false impression about the plaintiff." *Id.* at 447.

Earlier this year, in *Altbach v. Kulon*, 754 N.Y.S.2d 709 (N.Y. App. Div. 2003), a New York court decided that an artistic caricature and parody was "entitled to protection under the First Amendment and excepted from New York's privacy protections," noting the "well-recognized exception for works of art and advertising that is undertaken in connection with a use protected by the First Amendment." *Id.* at 712 (internal quotes omitted). The *Altbach* opinion is consistent with the decision in *Hicks*, in which a federal court, interpreting New York law, explained that – despite the general language in New York's publicity rights statute – constitutionally-based exemptions and exceptions had been "engrafted" onto the statute throughout the years. *Hicks*, 464 F.Supp. at 430.

¹² See also *Valentine v. CBS, Inc.*, 698 F.2d 430, 433 (11th Cir. 1983) (recognizing that the proper interpretation of Section 540.08 requires the plaintiff to prove that the defendants used a name or likeness to directly promote a product or service); *Lane v. MRA Holdings, Inc.* 242 F.Supp.2d 1205, 1212-13 (M.D. Fla. 2002) (same); *Epic Metals Corp. v. Condec, Inc.*, 867 F.Supp. 1009, 1016 (M.D.Fla. 1994) (same); *National Football League v. The Alley, Inc.*, 624 F.Supp. 6, 7 (S.D.Fla. 1983) (same).

substantial confrontation between [Section 540.08] and the first amendment to the United States Constitution guaranteeing freedom of the press and of speech.” *Id.* at 623.

The Eleventh Circuit similarly cautioned that an interpretation of Section 540.08 which “absolutely bars the use of an individual’s name without consent for any purpose would raise grave concerns as to constitutionality.” Valentine, 698 F.2d at 433 (involving the use of plaintiff’s name in a song discussing the arrest and conviction of boxer Rubin “Hurricane” Carter).¹³ Thus, like most states, courts interpreting Florida law *already* recognize – as they should – that First Amendment protections for expressive works must be engrafted onto a publicity rights statute. This Court should not disturb that recognition, which is rooted in fundamental and sound First Amendment principles.

V.

¹³ In a recent case interpreting Section 540.08 another court determined that a video, depicting a young woman voluntarily exposing her breasts, was an “expressive work” created “solely for entertainment purposes” and did not give rise to any liability. Lane, 242 F.Supp.2d at 1213. The EAS Brief (at 16-18) claims that Lane will introduce a “parade of horrors.” But EAS’s discussion has nothing to do with the constitutional interpretation of Florida’s publicity rights statute. While Lane’s facts differ from the present case, the controlling constitutional principles are the same; moreover, there was a plethora of alternative grounds -- other than Section 540.08 -- under which the *Lane* plaintiffs could have sought relief. Finally, *Lane* further stands for the unremarkable point that where a person is used within an expressive work, it is permissible to use a clip containing the person in advertising for the work to inform the public of its contents. 242 F.Supp.2d at 1213-14.

CONCLUSION

Section 540.08 cannot apply to the facts of this case. Whether characterized as fiction, nonfiction or a mix of the two, *The Perfect Storm* – and its use of Plaintiffs’ names and likenesses – remains fully protected by the First Amendment. A ruling in Plaintiffs’ favor would be an unconstitutional interpretation of Section 540.08, and would turn this State into a magnet for misappropriation litigation and a pariah for the distribution and sale of expressive works. Thus, *Amici* respectfully urge this Court to determine that Section 540.08 does not give rise to liability under the facts of this case.

Dated: August 23, 2003
Respectfully submitted,

LOEB & LOEB LLP
DOUGLAS E. MIRELL
JEAN-PAUL JASSY

By: _____
By: _____

DOUGLAS E. MIRELL
JEAN-PAUL JASSY

Attorneys for *Amici Curiae*
Motion Picture Association of America, Inc.,
Association of American Publishers, Inc.
Freedom to Read Foundation
American Booksellers for Free Expression
Publishers Marketing Association
Video Software Dealers Association
Magazine Publishers Association
Comic Book Legal Defense Fund

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *AMICUS CURIAE* BRIEF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL., SUPPORTING DEFENDANTS TIME WARNER ENTERTAINMENT CO., L.P. D/B/A WARNER BROS. PICTURES, ET AL. was this 25th day of August, 2003, forwarded to the following via U.S. Mail:

Stephen J. Calvacca, Esquire
38 East Pine Street
Orlando, FL 32801

George Freeman, Esquire
Associate General Counsel
New York Times Company
229 West 43rd Street
New York, NY 10036

Jon L. Mills, Esquire
Timothy McLendon, Esquire
2727 N.W. 58th Boulevard
Gainesville, FL 32606

Charles A. Carlson, Esquire
Barnett, Bolt, Kirkwood & Long
601 Bayshore Boulevard, Ste. 700
Tampa, FL 33606

W. Edward McLeod, Jr., Esquire
284 Park Avenue North
Winter Park, FL 32789

Gregg D. Thomas, Esquire
100 N. Tampa Street, Suite 4100
Tampa, FL 33602

John F. Bradley, Esquire
1215 East Broadway Blvd.
Ft. Lauderdale, FL 33301

David S. Bralow, Esquire
Tribune Company
600 N. Orange Avenue
Orlando, FL 32801

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this *Amicus Curiae* Brief, typed in 14 point (proportionately spaced) Times New Roman, complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Attorney

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