Case No. _____

IN THE SUPREME COURT OF FLORIDA

ERICA TYNE, BILLY-JO FRANCIS TYNE, individually, ERICA TYNE and BILLY-JO FRANCIS TYNE on behalf of decedent FRANK WILLIAM "BILLY" TYNE, JR., DEBRA J. TIGUE, individually, DALE R. MURPHY, JR., a minor, individually and on behalf of decedent DALE R. MURPHY, by and through his next of kin and guardian, JERILYNN M. AMRHEIN, and DOUGLAS EDWARD KOSKO, individually.
Plaintiffs/Movants,

v.

TIME WARNER ENTERTAINMENT CO., L.P., d/b/a WARNER BROS. PICTURES, a Delaware limited partnership, BALTIMORE/SPRING CREEK PICTURES, L.L.C, a Delaware limited liability company, and RADIANT PRODUCTIONS, INC., a Delaware corporation.
Defendants/Respondents

On a Certified Question from the United States Court of Appeals For the Eleventh Circuit
Case Number: 02-13281

MOVANTS' INITIAL BRIEF ON QUESTION CERTIFIED BY THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

Plaintiffs/Movants Erica Tyne, Billie-Jo Tyne, Dale R. Murphy, Jr., Debra Tigue and Douglas Kosko in their individual capacities and, with regard to Plaintiffs/Movants Erica Tyne, Billie-Jo Tyne, and Dale R. Murphy, Jr., in their additional capacities as the surviving children of decedent Frank William "Billy" Tyne, Jr. ("Tyne") and decedent Dale R. Murphy ("Murphy"), respectively, (collectively "Plaintiffs" or "Movants") commenced an action for commercial misappropriation and invasion of privacy against Defendants Time Warner Entertainment Co., L.P., d/b/a Warner Bros. Pictures, Baltimore/Spring Creek Pictures, L.L.C. and Radiant Productions, Inc. (collectively "Warner").

Decedents Tyne and Murphy were aboard the commercial fishing vessel, Andrea Gail, which was lost at sea during a violent storm in late October, 1991. Their saga and that of their families was portrayed in a motion picture by Warner entitled, The Perfect Storm ("Picture" or "film").

This diversity action was filed in the United States District Court for the Middle District of Florida and was brought pursuant to Section 540.08, Fla. Stat. and the common law of Florida. The Tyne and Murphy children filed a count of statutory misappropriation on behalf of their respective decedent fathers. The Tyne children had also alleged invasion of their own privacy arising from the false light depiction of

their father which is not at issue here.

The Second Amended Complaint (Doc. 133)[1] ("Complaint") alleged that the Picture was falsely held out by Warner as a true story and not a work of fiction (Doc. 133, pars. 27-28).[2] The Complaint alleged that the Picture was a fictionalization of the actual facts and was infected with material and substantial falsity, all of which was undertaken by Warner knowingly or in reckless disregard of the truth (Doc. 133, pars. 29-31). Accordingly, Plaintiffs contended that the Picture fell outside of the protection of the First Amendment (Doc. 133, pars. 44-45). It is undisputed that Plaintiffs did not provide consent for the use of their names or likenesses as required by Section 540.08 (Docs. 133 and 136, pars. 35; 37-40). It is also undisputed that other persons depicted in the Picture either consented to use of their names or likenesses or had their actual names changed. (Docs. 133 and 136, par. 42).

Both sides agreed that the Picture earned Warner gross revenues in excess of

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[1] "Doc." refers to the original document number assigned by the federal district court and noted on the docket sheet, which is set forth in Appellants' Record Excerpts filed in the Eleventh Circuit Court of Appeals and transmitted to this Court on July 9, 2003. Where appropriate, specific page or paragraph numbers are also used.

[2]The Second Amended Complaint is in all respects identical to its predecessor save the demand for punitive damages for which leave was granted on April 9, 2002 (Doc. 132). The Complaint was originally amended on October 16, 2000 as a matter of right (Doc. 6).

$150,000,000 (Docs.133 and 136, par. 48). According to Plaintiffs' theory, the Picture and its marketing and distribution represent activity which had a commercial purpose and the use of the names, depictions or other likenesses of Plaintiffs in furtherance of such commercial purpose, without their express consent, was a prima facie violation of Section 540.08 (Doc. 133, par. 45). The Complaint alleged that the Picture did not fall within the newsworthy exemption of Section 540.08(3)(a) or, alternatively, that such exemption was forfeited given Warner's calculated and undisclosed fictionalization **(**Doc. 133, pars. 43, 45).

On November 20, 2000, Warner moved to dismiss the Complaint (Doc. 9). On June 1, 2001, the district court denied Warner's motion stating, "[t]he issues presented in the Motion are more appropriately addressed at the Summary Judgment stage" (Doc. 47).

On January 28, 2002, after the close of discovery, Warner moved for summary judgment on the same grounds previously advanced in its earlier unsuccessful motion to dismiss **(**Docs. 76-78**)**. On that date, Plaintiffs moved to amend the Complaint to add a demand for punitive damages pursuant to Section 768.72, Fla. Stat. (Doc. 97). After reviewing the proffer of evidence in support of punitive damages, the trial court found the evidence to be sufficient and granted the amendment on April 9, 2002 **(**Doc.

132, p. 5). [3] On May 9, 2002, the trial court granted final summary judgment in favor of Warner on all counts (Docs.153, 154). Plaintiffs timely appealed. The Eleventh Circuit Court of Appeals rendered its decision on July 9, 2003 and, at the express request of Plaintiffs, certified to this Court a question of law regarding the reach and scope of Section 540.08, Fla. Stat. This initial brief is filed pursuant to Fla. R. App. P. 9.150 and within the mandated time for briefs under Fla. R. App. P. 9.150(d).

Statement of Facts

The Perfect Storm was a feature film produced and released in June of 2000, earning Warner revenues in excess of $150,000,000 (Docs.133 and 136, par. 48). The film tells the story of the sinking of the Andrea Gail off the coast of New England during an horrific storm in October of 1991 (Docs.133 and 136, par.26). Six men died, including the ship's captain, Billy Tyne, who left behind two small daughters, now of college-age, both of whom are Movants herein (Docs. 133 and 136, pars. 5-7; 26). Decedent Murphy left behind his estranged wife, Debra Tigue, and a small son,

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[3]The court found that Warner had improperly withheld approximately 170 documents in violation of Fed. R. Civ. P. 26(b)(5) **(**Doc.58, p. 4; Doc.132, p. 4). Certain of those documents when later produced revealed that Warner had a policy requiring the obtaining of consent from persons depicted in the Picture after providing such persons with pages or a synopsis of the script reflecting their depiction. *See* January 16, 2002 hearing transcript, pp. 18 - 20 (Doc.142). Previously, Warner had denied such a policy existed. *See* Padrick Deposition at p. 20 (Doc.118).

Dale R. Murphy, Jr., who is still a minor (Docs. 133 and 136, pars. 10-12; 26). Both of these individuals are Movants herein. The remaining Movant is Douglas Kosko, who served with Tyne aboard the Andrea Gail up until its last voyage, narrowly escaping the fate of his former crew (Docs.133 and 136, pars. 14; 34).

The Perfect Storm was based on the widely acclaimed and nonfictionalized book of the same name by Sebastian Junger (Docs. 133 and 136, par. 24). However, as admitted in the depositions of the filmmakers excerpted below, substantial portions of the Picture were fictionalized. These individuals admitted that the fictionalization was not limited to merely those things which may have occurred after the Andrea Gail left port, but also included the fictionalization of numerous scenes, portrayals and dialogue which occurred on land and for which an accurate historic record existed. Consider the following:

Wolfgang Peterson, the film's Director and Executive Producer, testified as follows:

> Q: ...You fictionalized the events and dialogue which took place on board the ship after it left port, correct?
> A: **Yes**.
> Q: Did you fictionalize the character portrayals as they were revealed during that voyage?
> A: ... **I mean, the way characters speak defines the character. So yes**.
> Q: So if you fictionalize dialogue, then you fictionalize character portrayals, correct?

A: **Yes**.
Q: Did you fictionalize anything that is reflected in the film prior to the men getting on board and leaving the dock for the last voyage?
A: **Oh yeah**. … **For example, the situation with Linda Greenlaw, that there was a little bit of a flirtatious situation, in a very subtle way, going on between the two of them.** ***We added that***. …
Q: But she told you [referring to a letter Greenlaw had written] that she did not have the sort of relationship with Billy Tyne in reality that–as the relationship was portrayed in the film, correct?
A: **That's correct.**

. . .

Q: Now, in doing some of the fictionalization that you've acknowledged today, did you fictionalize, amongst other things, some of the motivations that shaped the action as it unfolds on the screen?
A: **Yeah. For example, a very, very important thing for me was the decision when...they were forced to face the fact shall they now stay out there when the big storm is, so to speak, in their back or shall they really turn around and go through the storm–what they obviously did because they all died–and went for it.**
So nobody knows what really happened. ***So again, I had to fictionalize that.*** **[Emphasis added].**

Peterson Deposition pp. 18-20; 31 (Doc. 116).

Peterson admitted to having "fictionalized the character portrayal of all of them, all six of them" [referring to the six deceased crew members] and, "to a lesser extent," Doug Kosko, but could not recall whether the dialogue between Tyne's character and Kosko's character, wherein Tyne derides and humiliates Kosko for giving up his site on the Andrea Gail's last voyage, had been entirely made up without any support in Junger's book. Deposition pp. 30; 51-53 (Doc. 116). [No such dialogue exists in the

book. *See* Exhibit 4**,** Debra Tigue Deposition (Doc. 79).]

Peterson admitted that the film's depiction of Tyne's earlier lack of commercial success [an early scene in the film which sets up the balance of the storyline] was contradicted by the facts revealed in Junger's book. Deposition pp. 43-46 (Doc. 116). Peterson also admitted that the scenes depicting "tension" and "animosity" between Tyne and his crew, wherein Tyne berates the crew for wanting to turn back, were entirely fabricated. Deposition pp. 55-58 (Doc. 116).

Peterson explained his unique view of "truth" as follows:

> Q: So we can tell a greater truth if we exaggerate or distort the actual facts?
> A: **Absolutely, absolutely**.
> Q: History becomes just what you, as a filmmaker, choose it to be, in other words...correct?
> A: **This is not a documentary... . This is a motion picture, *largely fictionalized,* to tell a story about fishermen in Gloucester, Massachusetts...and how their life is, and *not an accurate recreation and retelling of every single element of the story*. Because if you do that–right?–you might have a story that is *accurate but not dramatic*... If you just go with the facts, very often–very, very often, you get a film that doesn't really get into your heart. ... *Is it correct in every single detail? Of course not, because we had to–made up a lot of things*. [Emphasis added].**
>
> . . .
>
> Q: ...[T]o tell your story, with all the impact and power and passion that you speak of, requires that you make up facts?
> A: **Oh, yeah, of course, you know.**
> Q: And was the movie marketed as something that was largely

fictionalized, to use your term?
A: **The way I remember, it was marketed as based on a true story.**

. . .

Q: And would it surprise you, given that testimony, that Warner Bros. in this lawsuit has denied that there was any fictionalization of this movie? ...
A: **If that's the case, it would surprise me.**

Peterson Deposition pp. 70-74 (Doc. 116).

Co-Producer Gail Katz of Radiant Productions echoed those admissions:

Q: Would you agree that, in fact, you had to fictionalize some of what happened?
A: **Yes.**
Q: And did that fictionalization include events which took place even before they left the dock–for the last voyage?
A: **Yes.**

Katz Deposition p. 34 (Doc. 112).

Co-Producer Paula Weinstein of Baltimore Spring Creek Pictures also admitted to substantial fictionalization of the character portrayals:

Q:[Reading from deposition exhibit]. "Dramatic license was taken with almost every character, principal and secondary. Billy Tyne, Bobby Shatford, Chris Cotter and Linda Greenlaw, for example, are different on screen from what they were or are in real life."
Would you agree with that statement?
A: **Mostly.**

Weinstein Deposition p. 24 (Doc. 111).

Weinstein also admitted to manufacturing scenarios and motivations for Tyne's

actions which led to his and the crew's demise and which had no support in the historical record:

> Q: Next bullet point [reading from deposition exhibit suggesting changes in the script]: "Perhaps the crew questions Billy's pushing of the envelope to bring in a bigger haul. However, once the crew finds the motherlode of swordfish, it should be clear that everyone is together and thrilled at the prospect of filling the hold."
> Again, this is not taken from any historical account. That's simply how the plot should be developed in your opinion?
> A: **Yes.**
> Q:To further dramatic appeal and audience interest, correct?
> A: **Probably the former rather than anything at this stage.**
>
> . . .
>
> Q: Next paragraph, "We think Billy should be a determined, capable captain whose lack of success in previous outings has created tremendous pressure on him to deliver the big haul." Do you remember discussing that point?
> A: **Yes.**
> Q: And would you agree that the film, even in its final cut, reflects Billy as having that sort of pressure on him because his last outing, in particular, was commercially unsuccessful?
> A: **Yes.**
> Q: Do you know whether there's any factual basis for that, either in the book or elsewhere?
> A: **I don't recall.**
> Q: Are you familiar with the scenes in the beginning of the movie when Tyne comes in with the Andrea Gail at the same time Linda Greenlaw is coming with the Hannah Boden?
> A: **Yes.**
> Q: And in the scene, as it develops, Billy has a rather small load of fish compared, at least, to Linda Greenlaw's load of fish, correct?
> A: **Correct.**
> Q: And there is some derision of Billy for that fact by the owner Bobby Brown, correct?

A: **Frustration, yes.**
Q: Well, frustration on the part of Tyne; derision on the part of Bobby Brown–
A: **Yes.**
Q: Do you know whether any of that has a factual basis?
A: **I'm not sure.**
Q: And yet that's an important scene in setting up the motivation of the crew to turn around very quickly and go back out again, correct?
A: **Yes.**
Q: And that's an important motivation in helping the audience understand why Billy is willing to take the boat seemingly further out than what might appear to be prudent or reasonable, out to the Flemish Cap, correct?
A: **Yes.**
Q: Do you know whether any of that ever happened, that he went out to the Flemish Cap?
A: **I don't recall.**
Q: In fact, didn't you become aware that Linda Greenlaw, who was obviously in that same storm during that same time, had maintained to Warner Bros. that she was 600 miles out further than Billy ever was?
A: **I don't recall.**[4]
Q: Is it fair for me to assume that in shaping these various motivations and developing the scene, you weren't interested in telling an historically accurate story as much as creating a very dramatic effect for the audiences?
A: **We were interested in creating a dramatic story that represented, in spirit, the book that we bought from Sebastian [Junger] –**
Q: You were not interested in telling a factually historic account, were you?
A: **It was impossible. ... Half of this story–once they're at sea, nobody knows what happened.**

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[4]In August, 1999, almost a year prior to the release of the Picture, Greenlaw sent a letter to the filmmakers which pointed out this and other inaccuracies in the script. Peterson Deposition at p. 77 (Doc. 116); *see* Exhibit 11A, p. 3 of Katz Deposition (Doc. 112).

Q: So therefore, you just made things up, correct?
A: **We dramatized.**
Q: You fictionalized.
A: **As I said earlier, Sebastian hypothesized what might have happened and we dramatized that.**
Q: You wouldn't say you fictionalized a good deal of those events?
A: **I would say they're fictionalized.**

Weinstein Deposition pp. 32-33; 36-40 (Doc. 111).

Weinstein also admitted that additional scenes, which supposedly took place between decedent Murphy and his family prior to the last voyage, were entirely fabricated[5]:

Q: Do you recall the scene with the Murphy boy, Dale Jr., coming into the bar with his dad?
A: **Yes.**
Q: Was that scene entirely fictionalized?
A: **Yes.**
Q: Do you recall the scene where Murphy is speaking to his then ex-wife, and it's a fairly tender moment, and she gives him back his child support payment saying she's got a job, "I really don't need it"? Do you remember that?
A: **Yes.**
Q: Was that entirely fictionalized?
A: **I believe–I believe it was.**
Q: Do you recall the scene where Murphy's having a father-and-son chat about the possibility that Mom may be moving on in another relationship?
A: **Yes.**

[5]The counts alleging common law invasion of privacy by publication of private facts were dismissed by the trial court on the grounds that the "private facts" were not true facts, but instead were entirely fabricated. Trial Ct. Order at 10-11 (Doc.153). The dismissal of these counts was not appealed.

Q: Was that entirely fictionalized?
A: **Yes.**

. . .

Q: [Referring to a deposition exhibit created by the witness] Let's turn to the second page, please. Under the heading "The Crow's Nest the scene with Dale Jr. brought some levity to the first scene in the bar, as did the running sexual exploits of Alfred Pierre [another crew member]." You're talking about the scene where Murphy brings his boy into the bar to shoot some pool?
A: **Yes. ... I don't know if he shoots pool, but he brings them in, yes.**
Q: And again, that scene was entirely fictionalized?
A: **Yes.**
Q: That scene carried over to the final cut, right? We see the boy in the bar, don't we?
A: **Yes.**
Q: Do we even know if the boy was in the state of Massachusetts at any relevant time?
A: **I don't know.**
Q: Did you make any effort to find out?
A: **I did not.**

Weinstein Deposition at pp. 47-49 (Doc.111).

Warner originally denied any such fictionalization of the very same scenes, character portrayals and dialogue both in its Answer and in response to requests for admissions. *See* Complaint and Answer at par. 29 (Docs. 133, 136); Warner's Response to Request for Admissions (Doc. 105).

In its Fifth Affirmative Defense, Warner specifically denied that it had knowledge of these now admitted fictionalizations. *See* Answer at p. 9 (Doc. 136).

The evidence proves otherwise. In a March 16, 2000 memo to Warner's marketing executives, Bradley Ball and Dawn Taubin, from Warner's vice president of publicity, John Dartigue, Warner executives discussed at length certain "filmmaker concerns" prior to the film's release:

> "They [referring to the filmmakers] do feel... that we may be open to criticism for the changes they made in the nature of the characters and in various events... Gail Katz [producer and partner of director Wolfgang Peterson] told me they did not do a lot of research; they went by the little tidbits they heard here and there. ...Dramatic license was taken with almost every character, principal and secondary. Billy Tyne [and others] for example, are different on screen from what they were/are in real life. Ditto the members of the crew, where one person's trait[s] may have been assigned to another because it worked better. The filmmakers were seeking to capture types, not specifics of actual people." [Added] [Previously excerpted in Doc. 97, pp. 5-6] .

Warner Inter-office memo at p. 1 (Doc. S-1, filed under seal 4/26/02).

The full extent of the fictionalization was so pervasive and substantial as to confuse even Warner executives and Peterson himself, as to which portions were fictionalized. Nonetheless, Warner remained intent on marketing the film as a true story, knowing that the vast majority of the film's intended audience would have not read the book and, thus, would be unaware of the film's falsifications[6]. Consider the

[6]Warner conducted audience screenings prior to the release of the Picture to gauge potential audience reaction. The screenings confirmed that more than 90% of the target audience had not read the book. Ball Deposition, pp. 14-16 (Doc.

testimony of Bradley Ball, Warner's President of Domestic Marketing:

> Q: Were you aware, as you saw the first cut of the film, of any factual differences between the film that you saw and the book, as you read it?
> A: **Nothing that I could point to other than the obvious fact that the book is significantly more detailed and longer than the movie could ever afford to be.**
>
> . . .
>
> Q: Did you plan on marketing the film as a true story, or something along those lines?
> A: ***It was very important to us to market the film based on a true story*** **and based on the history that took place relative to the magnitude of the storm and the people involved** ***and not as fiction*** **or something that was, you know, in the mind-set of a great screenwriter. [Emphasis added].**
>
> . . .
>
> Q: And 90 percent of the people would have no way of knowing whatever deviations may have existed between what's portrayed in the film versus what was portrayed in the book?
> A: **Probably 90 percent of the audience would have no way of knowing anything about the story, deviations or not.**

Ball Deposition at pp. 11, 16 **(**Doc. 110). Despite being the primary recipient of the Dartigue memo regarding "filmmaker concerns" about falsification of the characters and the storyline, Ball admitted that "we really went out of our way to include him

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110). Tellingly, Warner attempted to exploit the vulnerability of the audience and its lack of familiarity with the underlying story by requesting from its media contacts "cooperation in not revealing the end of this film to their readers, viewers or listeners". Exhibit 8, p. 1 of Taubin Deposition (Doc. 117). Warner spent $30-35 Million in advertising and marketing the film, an amount "certainly on the top end of our budgeting." Ball Deposition, pp. 6-7 (Doc. 110).

[Junger] as a marketing element to bring the authenticity of the story to the screen". Deposition at p. 17 (Doc. 110).

John Dartigue, the Warner vice president who authored the March 16th internal memo, expressed his concerns about the film's infidelity to the actual facts:

> Q: Did you have any special concerns about being criticized by press in the New England area?
> A: **Yes, I did have concerns. I expressed them here [referring to memo].**
> Q: And would those concerns relate to the fact that the New England media might be more specifically and better informed about the actual circumstances and facts surrounding the sinking of the Andrea Gail than would the media in the rest of the country?
> A: **That is correct.**
> Q: And they would be, therefore, in a better position to exploit or criticize you for this so-called credibility gap that you referred to in your memo, correct?
> A: **They could.**
> Q: And so you had a plan to minimize the likelihood of that happening, did you not?
> A: **Yes.**
>
> . . .
>
> Q: But your whole intent and purpose at the time you wrote this memo was to minimize any potential muckraking over this credibility gap, correct?
> A: **Yes, I didn't want to run the risk that we would have a Hurricane situation [referring to the film about Rubin "Hurricane" Carter, starring Denzel Washington, as being factually inaccurate] on our hands.**
> Q: And you were specially concerned with the Boston-based media, who, quote, "may be more familiar with the subject than we want them to be," correct?

A: **Correct.**

. . .

Q: Well, it seems to me you had three possible solutions facing you with respect to this credibility gap, as you called it. The first possibility was to actually have the story told on the screen more faithful to the truth, right?
A: **By that time, its too late.**
Q: ... Second option, change the names of all the characters and call it a work of fiction. Also, too late?
A: **Also too late.**
Q: Third approach was to just have an effective publicity and marketing campaign and hope to ride the storm out, so to speak. No pun intended.
A: **No, I think it's to anticipate what your problems can be and then be prepared in case anything should happen.**

Dartigue deposition at pp. 72-76 (Doc. 109).

Interestingly enough, even Mr. Dartigue had trouble recalling which specific depictions had been fictionalized. Consider his testimony in deposition:

Q: [Reading from a document which Warner circulated to certain members of the media prior to the release of the film] Turn to page 2, sir. The first full paragraph starting with "For centuries" reads as follows: "For centuries, Gloucester, Massachusetts, has been one of the major fishing ports in the North Atlantic. In October 1991, it is home to a swordfishing boat called the Andrea Gail, captained by Billy Tyne," in parens, "Clooney, a veteran fisherman who had had a run of disappointing catches."
Do you know whether the book provided any support for the proposition that Mr. Tyne had had a run of disappointing catches?.
A: **I don't remember.**
Q: Do you know whether anyone researched that assertion to determine whether it was actually true or not?
A: **I don't know if they did or not.**

. . .

Q: "It docks beside the Hannah Boden, captained by Linda Greenlaw," in parens, "Mastrantonio," who was the actress, "which has been hugely successful with recent hauls. Both vessels are owned by the unpopular Bob Brown," in parens, "Michael Ironside, who takes every opportunity to deride Billy for his recent failures."
Do you know whether the book suggested that the owner, Bobby Brown, had derided Billy Tyne for alleged recent failures?
A: **I don't remember.**

. . .

Q: Let's continue with the production note, that same page, skipping a paragraph, starting off with the term "Tyne." "Tyne is convinced that he can change his luck by going beyond the normal reach of New England fishing boats to the Flemish Cap, a remote area known for its rich fishing prospects. He's heard about the storm building offshore. But unlike Greenlaw, who plays it safe, Billy thinks he can beat the storm back to Gloucester, taking an enormous catch with him."
That's obviously, how the movie is being pitched[7] at this point in time in this particular document, correct?
A: **Yes.**
Q: Do you know whether there's any support for that portrayal of that characterization either in the historical record or even in Junger's book?
A: **I do not.**

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[7]The falsely contrived message of the filmmakers was not lost on the film critics who saw Clooney's Tyne as a captain who "has hit a dry patch" and whose last catch "is dwarfed by that of rival captain Linda Greenlaw (Mary Elizabeth Mastrantonio) and scorned by the greedy boat owner (Michael Ironside). Desperate, Tyne decides to head straight out again, despite the weariness of his men and the treacherous October weather. ... More convincing is Tyne's dilemma: after pursuing the fish with Ahab-like obsessiveness, he faces a choice of either waiting out the storm and losing the catch or facing it and perhaps losing all of their lives." *See* Peter Keough, "Sea Plus, *The Perfect Storm* is Downgraded", *The Boston Phoenix*, June 29, 2000, Exhibit 5 of Taubin Depo. (Doc. 117).

Dartigue Deposition at pp. 36-37; 40-41 (Doc. 109).

Director Wolfgang Peterson, who claimed "full responsibility for everything we see on screen", had trouble himself recalling fictionalizing those scenes which his colleague Weinstein admitted had been fictionalized.

> Q: Weren't all of those scenes depicting that young boy and the ex-spouse of Dale Murphy [referring to Plaintiffs Tigue and Murphy], weren't all of those scenes entirely fictionalized?
> A: **I don't remember.**
> Q: Well, there were some fairly poignant scenes where he's saying good-bye to his son. Do you recall that??
> A: **I remember the scene but I don't recall exactly if that was taken completely out of, or part out of, Sebastian's book. That I don't remember. The scene I remember very well.**

Peterson Deposition at pp. 10; 20-21 (Doc. 116).

Contrary to the manner in which Plaintiffs were treated, Warner changed the names of persons who protested their depictions and use of their real names or, in other cases, obtained written consent from those whose real names were used (Doc. 133 and 136, par. 42). Warner acknowledged receiving prior to the film's release, a letter from Tyne's counsel protesting the depictions in the film for which no consent was sought or provided. Katz Deposition at pp. 75-76 (Doc. 112).

SUMMARY OF ARGUMENT

The question before this Court is whether unprotected and arguably harmful speech is actionable under Florida's commercial misappropriation statute. The scope

of Section 540.08, Fla. Stat., which explicitly prohibits the unauthorized use of a person's name or other likeness "for purposes of trade or for *any commercial* or advertising *purpose*," is a matter for which there is no direct precedent by this Court.

Prevailing rules of statutory construction strongly suggest that Section 540.08, Fla. Stat., is not limited to only that category of commercial purpose which involves extraneous product promotion or advertising. First, the plain meaning of the statute calls for such an interpretation. The Eleventh Circuit, in its decision certifying this case, noted that the use of three separate terms "trade," "commercial" or "advertising purpose" is itself a strong argument for their being given distinctive applications to avoid an interpretation that leaves them surplus and redundant. Likewise, the use of two exceptions for newsworthiness and artistic works argues for a broader interpretation of Section 540.08 than mere product endorsement.

The reasoning (but not the result) of the Fourth District Court of Appeals in *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1981), regarding the scope of the statute has been called into doubt by a more recent decision from that court which gave a broader reading to the statute. *See Facchina v. Mutual Benefits Corp.*, 735 So. 2d 499 (Fla. 4th DCA 1998) (legislature's use of unqualified terms "any person" and "any loss or injury" evidences intent not to apply common law or judicial limitations to the new statutory cause of action).

Warner's interpretation of Section 540.08 fails to take into account the plain meaning of the statutory language. Warner's reliance upon *Loft v. Fuller* is misplaced in that *Loft* involved protected speech. Warner reads the post-*Loft* decisions in *Facchina v. Mutual Benefits, Corp.*, 735 So.2d 499 (Fla. 4th DCA, 1998) and *Comptech International, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219 (Fla. 1999) too narrowly. These cases stand for the principle that a statute should be interpreted as broadly as its plain language permits, without judicial limitations derived from the common law which the statute was expressly designed to enhance and supplement. Section 540.08(6) articulates an intent by the legislature to supplement both the rights and remedies of the common law of privacy. These principles of statutory interpretation and deference to legislative prerogative were recently affirmed by this Court in *Florida Convalescent Centers v. Somberg*, 840 So. 2d 998 (Fla. 2003).

Evidence of calculated falsehood or undisclosed fictionalization is directly relevant as to whether the publication is exempt under the protected speech or newsworthiness doctrine. As a matter of law, the newsworthy exemption is forfeited when a publisher engages in calculated falsehood which is the essence of undisclosed fictionalization. *Time, Inc. v. Hill*, 385 U.S. 374, 389-390 (1967) (New York's right of privacy statute may constitutionally redress false reports of matters of public

interest where a defendant published the report with knowledge of its falsity or in reckless disregard of the truth).

The test for the actionability of the fictionalized account is whether defendant published the fictionalized account in knowing or reckless disregard of the likelihood that the audience would accept the portrayal or depiction as true. *People's Bank & Trust Co. v. Globe Intl' Publ'g*, 978 F.2d 1065, 1070 (8th Cir. 1992) (citing *Time v. Hill*, 385 U.S. at 389); *see also Messenger v. Gruner + Jahr Printing and Publ'g*, 727 N.E.2d 549, 554 (N.Y. 2000) ("although an unauthorized, truthful biography of plaintiff would be newsworthy, the protection of the newsworthiness doctrine did not extend to a substantially fictitious biography").

In the federal proceedings below, compelling and uncontradicted evidence was presented to permit a jury to consider whether Warner deliberately and substantially falsified the depictions of Plaintiffs and their decedents, in knowing or reckless disregard of the likelihood that the audience would accept the depictions as true, in order to promote the commercial success of the Picture. Such intentional falsehoods enjoy the protection of neither the First Amendment nor any exemption created by Section 540.08. Indeed, the facts of this case come squarely within the scope of Section 540.08. This Court should find that Warner's unauthorized use of Plaintiffs' names and identities for a commercial purpose is outside of any statutory exemption and is therefore actionable.

STANDARD OF REVIEW

This Court determines questions of law *de novo*, including questions of law certified to it by a federal circuit court of appeals or the United States Supreme Court.

CERTIFIED QUESTION PRESENTED

To what extent does Section 540.08 of the Florida Statutes apply to the facts of this case?

Plaintiffs respectfully contend that The Perfect Storm, which does not qualify under the newsworthiness doctrine because of substantial and undisclosed fictionalization, is actionable under Section 540.08, Fla. Stat. as a result of the unauthorized use of the actual names and likenesses of Plaintiffs and their decedents where such use was intended to increase audience appeal and the commercial success of the film.

In 1967, the Florida legislature enacted Section 540.08 which expanded the tort of invasion of privacy by prohibiting the unauthorized use of a person's name or likeness.[8] The scope of Section 540.08, Fla. Stat., which expressly prohibits the

[8]It is noteworthy that Section 540.08 does not use the term misappropriation or right of publicity anywhere in its text or title. Instead, the Section employs the term "unauthorized publication of name or likeness". In addition, paragraph (6) of the statute refers to supplementing the "remedies and rights of any person under the common law against the invasion of his or her privacy". Section 540.08. Hence, any effort by Warner to pigeonhole or limit the statute, notwithstanding its broad language, to simply that branch of invasion of privacy otherwise referred to as

unauthorized use of a person's name or other likeness "for purposes of trade or for any commercial or advertising purpose," is a matter which has never been directly addressed by this Court.

I. THE RULES OF STATUTORY CONSTRUCTION AND APPROPRIATE DEFERENCE TO LEGISLATIVE PREROGATIVES REQUIRE BROADER INTERPRETATION OF THE TERM "ANY COMMERCIALPURPOSE"

Prevailing rules of statutory construction require that Section 540.08, Fla. Stat. not be limited to only that category of commercial purpose which involves extraneous product promotion or advertising. The reasoning of the Fourth District Court of Appeals in *Loft v. Fuller*, 408 So. 2d 619 (4th DCA 1981), *rev. denied*, 419 So. 2d 1198 (Fla. 1982),[9] upon which the federal trial court heavily relied in limiting the scope of the statute and which the Eleventh Circuit Court of Appeals believed was distinguishable on First Amendment grounds, has been called into doubt by a more recent decision from the Fourth DCA which gave a broader reading to the statute.

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commercial misappropriation or right of publicity is problematic.

[9]The appellate jurisdiction of the Florida Supreme Court had been greatly limited by a 1980 constitutional amendment, which abolished certiorari review and limited other forms of review of district court judgments. See Fla. Const. art. V, sec. 39 (b); Fla.R.App.P. 9.030 (a)(2) (1980). Thus, the denial of review by this Court in *Loft* should not be considered to be an endorsement of the decision below.

In *Facchina v. Mutual Benefits Corp.*, 735 So. 2d 499 (Fla. 4th DCA 1998), the Fourth District Court of Appeals held that the legislature's use of unqualified terms "any person" and "any loss or injury" in Section 540.08 evidences an intent not to apply common law or judicial limitations to the relatively new cause of action. In *Facchina*, the court rejected the defendant's contention that the remedies under the statute were limited by the economic loss rule and stated as follows:

> "When the legislature creates a statutory cause of action, as it has expressly done in section 540.08, it is presumed to know the common law of contract and tort and the limitations on such remedies created by judges. ELR [economic loss rule] is one of those judicial limitations on the common law remedies in tort and contract. *In crafting new statutory causes of action, the legislature is master of the elements and boundaries on the new cause of action*. Hence, the legislature's use of unqualified terms–'any person' and 'any loss or injury'– in the text of such a statute evidences to us *its intent not to apply judicial limits on common law remedies to the new statutory cause of action*."

Id. at 502. [Emphasis added].

In *Comptech International Inc. v. Milam Commerce Park Ltd.*, 753 So. 2d 1219, 1223 (Fla. 1999), this Court quoted with approval the above excerpt from *Facchina*. Rejecting the application of the economic loss rule as improperly abrogating the statutory cause of action for a building code violation under Section 553.84, Fla. Stat., this Court stated as follows:

> "It is undisputed that the Legislature has the authority to enact laws creating causes of action. If the courts limit or abrogate such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the Legislature's right to act in this area."

Id. at 1221 (citations omitted). The court noted that both Section 553.84, the statute at issue in *Comptech*, and Section 540.08 contain express language stating that the statute is to apply "notwithstanding any other remedies". 753 So. 2d at 1221. Section 540.08 (6) provides:

> "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 his privacy."

See also Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602, 609 (Fla. 2d DCA 1997) (courts do not have the right to limit or abrogate expanded remedies under a legislatively created scheme by allowing judicially favored doctrines to override a legislative policy pronouncement).

Thus, the federal trial court's reliance upon the *Restatement (Third) of Unfair Competition* was entirely misplaced. *See* Trial Ct. Order, at 6 (Doc. 153). Firstly, the *Restatement* of the right of publicity does not use the term "commercial purpose" as does the Florida statute. Secondly, the *Restatement* contains a blanket exemption for works of fiction or non-fiction, unlike the Florida statute. Said exemption is

independent of whether the challenged work involves protected speech. The exemption in the Florida statute is explicitly tied to the newsworthy doctrine which is forfeited in the case of culpable falsehood or undisclosed fictionalization. *Messenger v. Gruner + Jahr USA Publ'g*, 994 F. Supp. 525, 531 (S.D.N.Y. 1998); *see Time v. Hill*, 385 U.S. 374, 389-390 (1967)*; People's Bank & Trust v. Globe, Int'l*, 978 F.2d 1065, 1070-1071 (8th Cir. 1992).

Most recently, in *Florida Convalescent Centers v. Somberg*, 840 So. 2d 998 (Fla. 2003), this Court rejected the Fourth DCA's restrictive interpretation of another statute, Section 400.023(1), Fla. Stat., which provides a statutory cause of action on behalf of injured or deceased nursing home residents. An undivided court found that the plain language of the statute explicitly created a new cause of action with damages beyond those authorized by the Wrongful Death Act. This Court stated that "when the language of the statute is clear and unambiguous, ... the statute must be given its plain and obvious meaning." *Id*. at 1000. This Court also relied on the "express language providing that the chapter 400 remedies were in addition to and cumulative of any other legal and administrative remedies available to a resident." *Id*. at 1001.

Section 540.08(1), in its use of the term "*any commercial* or advertising purpose," in the disjunctive, is clear and unambiguous and must be given its plain and obvious meaning. Furthermore, Section 540.08(6) expressly states that the remedies

therein "shall be in addition to and not in limitation of the remedies and rights of any person under the common law." Chief Justice Anstead, concurring in *Florida Convalescent Centers*, stated "when the legislature creates a statutory cause of action ... it is presumed to know the common law of contract and tort and the limitations on such remedies created by judges." *Id*. at 1007. Thus, sufficient reason exists for this Court to reject the restrictive construction of *Loft* which relied upon the existing common law in jurisdictions which had no comparable statute.

Ordinary rules of statutory construction, unfettered by the kind of "willy nilly" judicial intervention denounced by this Court in *Comptech*, demand a broader and more appropriate reading of the statute. 753 So. 2d at 1222.

A. Structural Analysis of Section 540.08 Supports a Broader Interpretation of the Term "Any Commercial Purpose" Beyond Mere Product Advertising

As noted in the Eleventh Circuit's opinion, a structural analysis of the statute supports the conclusion that the use of the term "commercial purpose" may include activity beyond mere product endorsement. *Tyne v. Time Warner Entertainment Co.*, No. 02-13281, slip op. at 9-10 (11th Cir. July 9, 2003) (*See infra*. Appendix). "Where the language of [the statute] is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of [the statute]." *Palm Beach County Canvassing*

Board v. Harris, 772 So. 2d 1220, 1234 (Fla. 2000); *see also Hechtman v. Nations Title Ins.* 840 So. 2d 993, 996 (Fla. 2003) ("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.") (citation omitted), *cited in Tyne*, slip op. at 9.

If the only kind of commercial purpose initially reached by Section 540.08 is that related exclusively to advertising or product endorsement, the term "any commercial purpose" becomes mere surplusage to the words "advertising purpose".[10] A reading of a statute that would render its language superfluous or redundant is disfavored. *See, e.g., Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999).

Nor would there be any need for a newsworthy or legitimate public interest

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[10]The definitions of the terms used substantiate this broad construction. As defined in the dictionary, "advertise" means "to call public attention to, especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize." *Webster's New Collegiate Dictionary* (1980). "Trade," though used here as an adjective, in noun form means "to engage in the exchange, purchase, or sale of goods." *Id*. Both of these meanings have a rather narrow definition that would come close to the definition used by the district court below. However, the third word used in the statute is "commercial." This word means "engaged in work designed for the market." *Id*. The further modification by the use of the word "any" highlights the intention of the legislature that the statute be broadly applied. The profit motive which is inherent in any major motion picture, and which indeed is openly acknowledged in depositions of Warner executives, would seem to suggest that some sort of "commercial purpose" was involved in making and distributing the film.

exemption if the statute reached only advertising or direct product endorsement as opposed to a wider range of potentially exploitive uses of a person's name or likeness. Firstly, the very existence of a newsworthy exemption renders unnecessary, from a constitutional standpoint, the unduly restrictive definition of "commercial purpose" urged by Warner. Such an exemption avoids the "substantial confrontation" with the First Amendment that would result from a broader view of the scope of the statute. *Loft*, 408 So. 2d at 623.

Secondly, the narrow interpretation of "commercial purpose" to mean nothing more than "advertising purpose" renders the newsworthy interest exemption in the statute entirely superfluous since that exemption, by its own terms, is negated if the presumptively exempted depiction is "used for advertising purposes". *See* Section 540.08 (3)(a), Fla. Stat. In other words, if only depictions which have an "advertising purpose" are prohibited by the statute, not only would there be little need for a newsworthy exemption as a practical matter, but the application of the exemption would be negated by the very advertising purpose which implicates the statute. The Eleventh Circuit made this same point:

> "Phrased positively, sec. 540.08(3)(a) asserts that the statute continues to apply to (i.e. consent *is* required for) the use of a person's name or likeness in news or public interest settings that involve advertising. But if sec 540.08(1) applies only to advertising or promotional purposes in all cases, then there would

> be no reason for sec. 540.08(3)(a) to limit the statute's applicability to uses that involve news media 'for advertising purposes.' *Id*. Subsection (3)(a)'s exemption provision would be unnecessary since *all* advertisements are covered by the main rule." (Emphasis in original.)

Tyne, slip op. at 10.

Similarly, there would be no need for the second exemption regarding the resale of literary, musical, or artistic productions where the initial sale has been authorized if, in fact, the only prohibited commercial purpose is direct product endorsement. *See* Section 540.08(3)(b), Fla. Stat. By clear implication, an expressive work–which is essentially involved here–for which no initial consent was provided is presumptively within the statute, subject only to considerations of freedom of expression. Stated differently, it makes no sense for the statute to have an exemption for the *resale* of expressive works if such expressive works are entirely outside the statute. *See Palm Beach County Canvassing Board*, *supra*, 772 So. 2d at 1234; *Hawkins*, *supra*, 748 So. 2d at 1000. The Eleventh Circuit shared this concern:

> "But it makes little sense for sec. 540.08(3)(b) to exempt the *resale* of artistic works if sec. 540.08(1) applies solely to advertisements. Thus, a narrow interpretation of sec. 540.08(1) as covering only uses that directly promote a product or service would render this second exemption superfluous."

Tyne, slip op. at 10.

The only logical reading of the statute and the exemptions is that certain

depictions for commercial purposes in addition to advertising are prohibited, as long as neither the newsworthy exemption (i.e. protected speech under the First Amendment) nor any other exemption applies. This view is reinforced when the statute's history and the jurisprudential context in which it was adopted are considered.

B. Florida's Adoption of New York's Right of Privacy Statute Requires Adoption of New York's Construction of Statute

The Florida statute was enacted to assure an individual the right to own, protect and commercially exploit his or her name, likeness or persona and was modeled after New York's statutory right of privacy,[11] which was the subject of discussion in *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *see Messenger v. Gruner + Jahr USA Publ'g*, 994 F. Supp. 525, 531(S.D.N.Y. 1998) (N.Y. Civil Rights Law Secs. 50-51 are "quite similar" to Section 540.08 with certain exceptions regarding descendability and codification of newsworthiness exemption). Notably, Florida enacted Section 540.08 on May 18, 1967, just four months after the Supreme Court's landmark decision in *Time v. Hill*. *See* Fla. Sen. Journal, p. 400 (May 18, 1967).[12]

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[11]New York Civil Rights Law Sections 50-51 are set forth in the Appendix along with the full text of Section 540.08, Fla. Stat.

[12]*Time v. Hill* was decided by the United States Supreme Court on January 9, 1967. It was an important case in its time and has since been cited, according to Lexis, on more than 600 occasions. Respondent Hill was represented before the

"It is well-settled that when the legislature of a state has used a statute of another state or country as a guide for the preparation and enactment of a statute, the courts of the adopting state will usually adopt the construction placed on the statute in the jurisdiction of its inception," *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P. 2d 177, 180 (Utah 1954). In *Donahue*, the Utah Supreme Court noted that its right of privacy statute had been enacted in 1909, approximately six years after the New York statute was passed in 1903. The *Donahue* court observed that at the time of Utah's enactment, the New York courts gave a right of action "only when the name was used in advertising or sales promotion schemes". *Id.* The more expansive interpretation given by the New York courts in later cases occurred only *after* Utah's enactment, and "would not have been known to and could not have been in the contemplation of our Legislature." *Id.* at 181.

Florida courts and federal courts applying Florida law have also held that when a new statute has the same language as the laws of another state, the interpretation given to the law by that state's highest court at the time of Florida's enactment is controlling. *See, e.g.*, *Crane Co. v. Richardson Constr Co.*, 312 F. 2d 269, 270 (5th Cir. 1963) (applying New York court's construction to Florida corporation law, patterned after New York law); *State v. Aiuppa*, 298 So. 2d 391, 394 (Fla. 1974)

Supreme Court by then former Vice President Richard M. Nixon.

(obscenity statute patterned after Georgia statute should be given the same construction); *Flammer v. Patton*, 245 So. 2d 854, 858-859 (Fla. 1971) (involving restraint of trade statute substantially the same as laws in Oklahoma and California, and applying California precedent).

Accordingly, Florida's enactment of Section 540.08 in May, 1967 must then be viewed in the context of the existing case law pertinent to the New York statute. Certainly, the Supreme Court's January, 1967 decision in *Time v. Hill* (permitting recovery under New York statute for magazine's false depiction of an expressive work "as a true story" intended to increase audience appeal and profitability), to paraphrase *Donahue*, "would have been known to and within the contemplation of the Florida legislature".[13] 272 P.2d at 181.

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[13]An equally well-known case construing the scope of the New York privacy statute during this time period was *Spahn v. Messner*, 221 N.E.2d 543 (N.Y. 1966), *vacated on other grounds*, 387 U.S. 239 (1967), *adhered to on remand*, 233 N.E.2d 840 (1967), appeal dismissed, 393 U.S. 1046 (1968). There, the New York Court of Appeals held that the statute afforded relief to plaintiff, a famous major league pitcher, for an unauthorized biography which contained "dramatization, imagined dialogue, manipulated chronologies, and fictionalization of events." 221 N.E.2d at 545.

The New York statute, given "its social desirability and remedial nature have led to its being given a liberal construction consonant with its over-all purpose. [Citations omitted]. But at the same time, ever mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest." 221 N.E.2d at 544-545. *See also Binns v. Vitagraph, Co.*, 210 N.Y. 51 (1913) (defendant's film about

Time, Inc. v. Hill, 385 U.S. at 379, cited the reasoning of the New York appellate court which upheld the jury's verdict of liability under the statute:

> "Although the play was fictionalized, Life's article portrayed it as a re-enactment of the Hills' experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had or might have a proper interest." 240 N.Y.S. 2d 286, 290.

Just as in *Time v. Hill*, the promotion of the film here as a "true story" or "based on a true story" was intended to increase audience appeal and profitability. 385 U.S. at 379. Warner officials have all but admitted this.[14] *See supra,* pp. 13-14.

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plaintiff's role in rescuing passengers stranded on a ship-wrecked boat off the coast of Nantucket, although based on a true occurrence, contained fabrications and embellishments which triggered liability under the New York privacy statute).

The rationale underlying both *Binns* and *Spahn* was recently reaffirmed in *Messenger v. Gruner + Jahr Printing & Publ'g*, 727 N.E.2d 549, 554-555 (N.Y. 2000). *See infra,* note 17. Utah declined to give its privacy statute the same interpretation given by as New York in the *Binns* case, noting that the interpretation in *Binns* came some four years after the Utah legislature enacted its privacy statute. Here, Florida's enactment of its privacy statute came on the heals of both *Spahn* and *Time v. Hill*.

[14]Of course, it is true that mere profit does not take a publication outside of the First Amendment. *Loft v. Fuller*, 408 So. 2d 619, 623 (Fla. 4th DCA 1981); *See Messenger*, 727 N.E. 2d at 552 (content of article, not publisher's motive to increase circulation determines newsworthiness). However, unprotected speech, i.e. knowingly or recklessly uttered false speech, which exploits a person's name or persona without consent may well have a commercial purpose if the intent is to

C. Culpably False Publication is Not Immune Under Section 540.08

Loft v. Fuller, supra, relied upon by Warner, is simply not on point. *Loft* involved a claim by decedent's wife for the unauthorized use of her husband's name in a *factually accurate* account (in both book and television movie form) about the fatal crash of an airliner which her husband had piloted and resulting stories in the media about his "reappearance as a ghost"[15]. The court refused to find a "commercial purpose" under the statute, noting that plaintiff's view of the statute would inevitably result in a "substantial confrontation" with the First Amendment. 408 So. 2d at 623. The rationale for the decision has been criticized, although Plaintiffs

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unjustly enrich the offender. It is utter folly to suggest that a motion picture which has earned for Warner alone more than $150,000,000 in revenues, excluding sales of videos, DVDs, and related film merchandise, is not actionable under Section 540.08 purely because said venture somehow lacks a commercial purpose. Warner effectively admits that a motion picture is now a "product line" and that its "job is to make movies that make money for our shareholders [by] ... providing mass entertainment for mass consumption." *See In Warner Brothers' Strategy, a Movie Is Now a Product Line*, N.Y. Times, Feb. 11, 2002 at C1 (Exhibit 2 to Doc. 103). Even Warner would agree that the movie business has changed in the 20 years since *Loft*.

[15]Unlike the case at bar, the plaintiffs in *Loft* did not allege any false statements about the deceased or even that defendants invented or fictionalized any portion of the story, including the media reports regarding Captain Loft's "reappearance as a ghost". 408 So. 2d at 623. Indeed, no Florida court has considered the statute in the context of a publication, such as here, which is alleged to represent undisclosed and calculated fictionalization. *Messenger*, 994 F. Supp. at 531.

concur in the result given the lack of culpable falsehood.[16]

The Eleventh Circuit itself had occasion to apply Section 540.08, Fla. Stat. in *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983). There, plaintiff was a witness in the notorious trial of former boxer, Rubin "Hurricane" Carter. The publication at issue was a song by Bob Dylan in which plaintiff's name was mentioned along with references to her role and testimony at the trial. Plaintiff claimed defamation and that her name was being used in violation of the statute.

The Eleventh Circuit undertook a painstaking analysis of the content of the song which plaintiff had challenged. Finding no material or substantial falsity, the Eleventh Circuit held that the work was protected under the First Amendment. 698 F.2d at 432-

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[16]While *Loft* was correctly decided given the nonfictionalized and otherwise newsworthy nature of the challenged book and TV movie which accurately recounted media reports of Captain Loft's strange saga, the reasoning in that case has been criticized as flawed and, in light of the statute's explicit newsworthiness exemption, unnecessary. *See* Robert C. Sanchez, *Unauthorized Appropriation of an Individual's Name or Likeness–Florida's Appellate Courts and Sec. 540.08* , Fla.B.J. (July 1998), at 57. The court's restrictive interpretation of the statute's prohibitive activities, effectively requiring a finding of direct product endorsement, excludes or ignores "commercial purpose" as activity definitionally distinct from "advertising purpose". The statutory language, in fact, prohibits use of a person's name or likeness "for <u>any</u> commercial or advertising purpose" without consent, unless one of the statutory exemptions apply. The *Loft* opinion reasoned that only a certain kind of commercial exploitation–one that is indistinguishable from advertising or direct product endorsement–is actionable. This view has been challenged as appearing "to add a requirement for plaintiffs not mandated by the statute itself". Sanchez, at 59.

433. Surely, at least with respect to Section 540.08, there would be no need to determine the absence of falsity of the lyrics if the only issue was whether the song directly endorsed a product other than itself. In effect, *Valentine* held that the song fell within the statute's newsworthiness exemption and represented protected speech. That holding is not challenged by Plaintiffs. This case is clearly distinguishable, as the opinion of the Eleventh Circuit in this case apparently acknowledges.

Whether Section 540.08, Fla. Stat. provides relief for culpably false or fictionalized publications, even on matters of public interest, was directly addressed in *Messenger v. Gruner + Jahr USA Publ'g, supra*. In that case, the court observed that the New York and Florida statutes were essentially equivalent, save the fact that the Florida statute permits an action on behalf of a decedent while New York law does not and that the newsworthy exemption is specifically set forth in the Florida statute while the exemption in New York arises from case law. 994 F. Supp. at 31. Applying and interpreting Section 540.08 with respect to the publicity claims before it, the *Messenger* court stated as follows:

> "*Thus, while no Florida court appears to have considered the issue, this Court holds that Section 540.08(3) does not foreclose liability for culpably false or fictionalized publications, even on matters of public interest*. While the Florida legislature quite appropriately has recognized the need for 'breathing space' for publications on matters of public concern, its goal in doing so is fully achieved by precluding

> liability for innocent errors. There is no reason to suppose that it intended to immunize deliberate, reckless and irresponsible falsehood." [Emphasis added].

994 F. Supp at 531. *Messenger* cited both *Loft* and *Valentine* in support of its conclusion regarding the purpose of the newsworthy exemption, correctly determining that neither case involved knowing or reckless falsity. *Id.* at 531 n. 25. Hence, *Messenger's* analysis of Section 540.08 is harmonious with the results in *Loft* and *Valentine* in applying the statute and its exemptions.[17]

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[17]Some history is helpful. The plaintiff in *Messenger* sued the publisher for the unauthorized use of her photograph in connection with an article about teenage sex which created the false impression that the person in the photograph (plaintiff) had engaged in the sexual conduct described in the article, which was determined to be newsworthy. The parties disputed the continued viability under New York law of earlier precedents, most notably *Binns v. Vitagraph Co.*, 210 N.Y. 51 (1913) and *Spahn v. Messner*, 221 N.E.2d 543 (N.Y. 1966), which had held that substantial and material falsity or fictionalization defeated the newsworthy exemption required by the First Amendment. The United States Court of Appeals for the Second Circuit certified its questions of law to the New York Court of Appeals. 175 F.3d 262 (2d Cir. 1999).

The New York Court of Appeals answered the certified question in the negative. In a lengthy opinion, the New York Court of Appeals stated that "*Binns* and *Spahn* concerned a strikingly different scenario from the one before us." 727 N.E.2d 549, 555 (N.Y. 2000). The court stated that in the earlier cases "defendants invented biographies of plaintiffs' lives"... which were "substantially fictional works"...and "nothing more than attempts to trade on the persona of Warren Spahn or John Binns." *Id.* By contrast, *Messenger* involved an article which "was concededly newsworthy". *Id.* The court reaffirmed that "under *Binns* and *Spahn*, an article may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception". *Id.*

Movants contend that the outcome here is controlled by the rationale of

D. The Remedial Nature of Section 540.08 Supports a Broad Interpretation of its Scope

Another important rule of statutory construction reinforces the need for a broader interpretation of the term "commercial purpose" than that erroneously (and unnecessarily) provided in *Loft*, which involved, unlike here, protected expression. Remedial statutes should be interpreted liberally to accomplish their purpose and achieve the objectives identified by the Legislature.[18] *See, e.g., Florida Convalescent*

Spahn and *Time v. Hill* .

[18]If Warner is correct, and the statute reaches only extraneous product endorsement, then the only persons likely to be aggrieved are celebrities. There is little or no likelihood that an advertiser would misappropriate the name or likeness of an unknown member of the public in promoting its product. By its express terms, Section 540.08 applies to any natural person, including any person deceased within the past forty years. Unlike the law in other jurisdictions, the statute has no requirement that the plaintiff establish his celebrity or that his name or likeness had commercial value at the time of injury. *Cf.* Cal. Civ. Code sec. 3344.1(h) (1999); *but see Villalovos v. Sundance Associates, Inc.*, 2003 WL 115243, 31 Media L. Rep. 1272 (N.D. Ill. Jan 13, 2003) (Illinois right of publicity statute applies to all persons, regardless of lack of prior commercial exploitation). It would seem anomalous if the statute, which protects virtually all citizens, were limited to a kind of harm likely to be experienced by only an extremely small fraction of the population, i.e., celebrities.

On the other hand, there is a substantial market and potential for motion picture studios to commercially exploit the life stories of private individuals caught up in newsworthy tragedies. The fictionalized depiction of Plaintiffs in The Perfect Storm, a movie with gross box office receipts of $300 Million, is but one example. There is a whole genre of films being produced by Hollywood which entail a seamless blending of fact and fiction involving private individuals who, like Plaintiffs, have not voluntarily placed themselves in the public eye. Under Warner's

Centers v. Somberg, 840 So. 2d at 1007 (Anstead, C.J., concurring) (noting that when a statute is remedial in nature, it should be construed liberally to give effect to the legislation); *Stern v. Miller*, 348 So.2d 303, 308 (Fla. 1977); *Nolan v. Moore*, 88 So. 601, 605 (Fla. 1921).

In this case, the statute does not derogate from the common law, which might require strict construction. Rather, Section 540.08(6) states that its rights and

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view, their stories could be sensationalized, embellished, distorted and, at times, outright fabricated yet marketed as "true" or "authentic", all for the purpose of achieving greater dramatic appeal and commercial success. These liberties with the truth would not be limited to just that portion of their lives which can be considered newsworthy. Should Warner prevail, the private lives, thoughts, relationships and motivations of ordinary citizens could be altered or fictionalized, all toward generating greater audience appeal and box office response. Other than First Amendment concerns, already addressed herein, no reason exists why such unauthorized and harmful exploitation for commercial gain should be immunized by the statute. *See Messenger*, 994 F. Supp. at 531.

Contrary to Warner's hyperbolic assertion in the federal proceedings that a reversal of the decision below would give individuals the ability to "censor and control the telling of the story," established business practices of major film studios, including Warner, routinely involve obtaining life-story consents from persons who are depicted in even a partially fictionalized manner. In this case, certain documents which were improperly withheld during discovery by Warner, and only produced after an order to show cause, revealed that Warner had a policy requiring the obtaining of consent from persons depicted in the Picture after providing such persons with pages or a synopsis of the script reflecting their depiction. *See* January 16, 2002 hearing transcript, pp. 18-20 (Doc. 142); (Doc. S-1). Previously, Warner had denied such a policy existed. *See* Padrick Deposition at p. 20 (Doc. 118). Where such consent was not forthcoming, Warner replaced such persons' actual names with fictitious names. (Docs. 133 and 136, par. 42). Absent such consent, the only "censor" should be the legal obligation to avoid culpable falsehood.

remedies are "in addition to and not in limitation of" those existing under common law.

The statute is clearly remedial in nature and should be liberally construed by this Court to effect legislative intent, subject only to its statutory exemptions.

E. Section 540.08 Does Not Require Extraneous Product Endorsement

A more thoughtful application of Section 540.08, Fla. Stat. is found in *Ewing v. A-1 Management, Inc.*, 481 So.2d 99 (Fla. 3d DCA 1986). In that case, the Third District Court of Appeals, citing the Eleventh Circuit's decision in *Valentine v. C.B.S., Inc., supra*, denied a right of privacy claim predicated on Section 540.08 where plaintiffs' names and addresses, as parents of a fugitive from justice, appeared on a wanted poster distributed by the defendant surety after the son jumped bail. The parents had pledged certain assets to secure the bail bond. The court struck the Section 540.08 claim on the grounds that the wanted poster fell within the newsworthiness exemption of the statute. There was no mention by the court that the claim failed for lack of any extraneous product endorsement. It appeared that the defendant surety did use plaintiffs' names for a commercial purpose (i.e., locating the fugitive and avoiding forfeiture of the bond); however, such use fell within the statutory exemption.

The Ninth Circuit Court of Appeals decision in *Solano v. Playgirl, Inc.*, 292

F.3d 1078 (9th Cir.), *cert. denied*, 123 S. Ct. 1078 (2002) is instructive both with respect to the limitations of protected speech in the case of culpable falsehood and, at least under California law, the elements of common law and statutory commercial misappropriation. The *Solano* court overturned a lower court ruling that the newsworthiness doctrine exempted Playgirl's conduct from liability under California's commercial misappropriation statute. *Solano*, relying on the actual malice test of *Times v. Sullivan*, stated as follows:

> "The district court found that the public affairs/public interest newsworthiness protections exempted Playgirl from liability for using the photographs of Solano and thereby granted summary judgment for Playgirl on these claims. Even though the exemptions are to be broadly construed, the newsworthiness privileges do not apply where a defendant used a plaintiff's name and likeness in a knowingly false manner to increase sales of the publication. The First Amendment does not protect knowingly false speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). "[W]e do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of 'news.' We therefore hold that Civil Code section 3344, subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." [Citation omitted] [emphasis added].

292 F.3d at 1089.

The Ninth Circuit held that Playgirl's unauthorized use of "plaintiff's name and likeness in a knowingly false manner to increase sales of the publication" falls directly

within the California statute and outside of the statute's newsworthiness exemption. 292 F.3d. at 1089; *see Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997) (holding that defendant publisher violated California misappropriation statute by knowingly conveying false impression that actor granted interview to defendant and that such falsity was for purpose of increasing circulation); *Eastwood v. National Enquirer, Inc.*, 149 Cal. App. 3d 409 (Cal. Ct. App. 1983) (viable claim for commercial misappropriation under both California common law and statute exists where defendant published false, but not defamatory, article about actor's personal life for purpose of increasing sales of publication).

It is noteworthy that courts in both New York and California, each of which have statutory enactments which supplement their common law, have rendered decisions which fully support Movants' interpretation of the Florida statute. These jurisdictions are undoubtedly centers for the publishing and entertainment industries and between them have developed the most extensive case law in this area. Their statutes have been construed to not require extraneous product endorsement; increased circulation of the offending publication is sufficient to establish a violation. The *Solano* case represents the most recent analysis of the California misappropriation

statute, California Civil Code, Section 3344.[19] *Messenger v. Gruner + Jahr Printing and Publ'g*, 727 N.E.2d 549, 554 (N.Y. 2000), decided by the New York Court of Appeals on a certified question from the Second Circuit Court of Appeals, has confirmed that "an article may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception", (citing *Binns v. Vitagraph Co.*, 210 N.Y. 51 (1913) and *Spahn v. Messner*, 221 N.E.2d 543 (N.Y. 1966)).

Earlier this year, in *Villalovos v. Sundance Associates, Inc.*, 2003 WL 115243, 31 Media L. Rep. 1274 (N.D. Ill., Jan. 13, 2003), a claim was upheld under Illinois' recently enacted Right of Publicity Act, which, like the Florida statute, prohibits the

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[19]Under what appears to have been intense lobbying by the entertainment industry, in 1999, California amended Civil Code section 3344.1 to expressly exclude, in the case of decedents, any action for unauthorized use of name or likeness which appears in a fictional or nonfictional expressive work, irrespective of such work's newsworthiness. This exclusion does not impact upon the unauthorized use of name or likeness of a living person under California Civil Code section 3344. More importantly, no such blanket exclusion appears in the Florida statute, other than under those circumstances protected by the newsworthiness exemption.

It seems that Warner is seeking an interpretation of Section 540.08, Fla. Stat. that would exclude from the statute's ambit, any unauthorized use of name or likeness which may be contained in a fictional or nonfictional expressive work, regardless of whether such work is entitled to protection under the First Amendment or the newsworthiness doctrine. While the Florida legislature, in the exercise of its police powers, could undoubtedly accommodate Hollywood in this regard and decline to make actionable that which is unprotected speech, this has not happened.

use of an individual's name or identity "for commercial purposes" without his consent. There, plaintiff alleged that defendant publisher had used her name and identity without permission in a sexually explicit magazine for purposes of increasing sales of the publication. The court noted that the Illinois statute was broader in scope than the common law and protected both personal and property rights. *Id.*, 2003 WL 115243, at *5. Like its New York and California counterparts, the Illinois privacy statute requires no extraneous product endorsement. Section 540.08, Fla. Stat. should be viewed no differently.

II. THIS CASE DOES NOT INVOLVE AVOWED FICTION, WHICH WOULD BE PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

Any reliance by Warner upon the First Amendment's protection of expressive works of fiction would be misplaced. For example, such cases as *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454 (Cal. 1979) and *Hicks v. Casablanca*, 464 F. Supp. 426 (S.D.N.Y. 1978), are inapposite in that the films in said cases, while fictional, were marketed as avowed fiction and were <u>not</u> capable of being reasonably understood by the public as truthful accounts.

More applicable to the instant case is *People's Bank & Trust Co. v. Globe International Publishing, Inc.*, 978 F.2d 1065 (8th Cir. 1992). There, the court was confronted with defendant's publication of plaintiff's name and photograph as a

ninety-seven year old woman who was forced to quit work because of her pregnancy. The defendant argued that its readers could not reasonably believe the story represented true facts or events because it is biologically impossible for a woman of that age to become pregnant, and therefore, as a matter of law, no reasonable person could have believed that the story represented true facts about the plaintiff. The Eighth Circuit Court of Appeals disagreed.

The court held that "the test is not whether the story is or is not characterized as 'fiction', 'humor', or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated." 978 F. 2d at 1068-1069. The court noted that while the assertion of pregnancy might not reasonably be believed, it rejected the claim that the entire story was an obvious, non-actionable fiction since other aspects of the story–such as the implication of sexual impropriety and of plaintiff quitting her job–are subject to reasonable belief. The court suggested that "even the report of pregnancy, a physical condition, and not an opinion or metaphor, could be proved either true or false" and thus might be actionable. *Id*. at 1069.

The Eighth Circuit held that the readers could reasonably believe that the story portrayed actual facts and events about plaintiff. The court rejected the Globe's reliance upon a general disclaimer about certain other items appearing in the

publication. Absent a more specific disclaimer on the admittedly fictionalized "news" stories, the court concluded that the Globe intended its readers to believe that the published material is factual. The court reaffirmed that such undisclosed fictionalization "is the kind of calculated falsehood against which the First Amendment can tolerate sanction without significant impairment of its function." *Id*. at 1070 (citing *Time v. Hill*, 385 U.S. at 389).

Since fiction is by definition false, the court reasoned, "the constitutional analysis for works of fiction, therefore, must first determine what factual assertions, if any, are held out as true." *Id*. at 1070-71. As with the Globe report, many scenes in the Picture are acknowledged as false. Much like the case below, Globe officials and writers "could not tell which stories were true and which stories were completely fabricated". *Id*. at 1071. Here, both Warner officials and the filmmakers could not fully recall which particular scenes had been fabricated and which had not been, acknowledging that an audience which had not even read the book would be even less able to detect any deviations from the actual truth. *See supra*, pp. 13-18. Indeed, Warner was banking on that very fact and, therefore, wanted to keep the ending [the Andrea Gail sinks and its entire crew is lost] a "secret". *See supra*, note 6. Under these circumstances, any reliance by Warner upon its "disclaimer" at the end of the

film is futile.[20]

In sum, Warner's unauthorized use of Plaintiffs' names and likenesses "in a knowingly false manner to increase sales of the [film]" falls directly within the scope of Section 540.08, Fla. Stat. and outside the statute's newsworthiness exemption. *See Solano v. Playgirl*, 292 F.2d at 1089. Any other construction of the statute would

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[20]The following disclaimer appears at the very end of the film after all of the end credits are run: "THIS FILM IS BASED ON ACTUAL HISTORICAL EVENTS CONTAINED IN 'THE PERFECT STORM' BY SEBASTIAN JUNGER. DIALOGUE AND CERTAIN EVENTS AND CHARACTERS IN THE FILM WERE CREATED FOR THE PURPOSE OF DRAMATIZATION." *See* Exhibit 29, Katz Deposition, p. 15 (Doc. 112).

Warner's disclaimer appears on the screen for approximately five seconds at the tail-end of the closing credits, or nearly seven full minutes after the film has ended and most of the audience has left the theatre. Nothing in the language of the disclaimer suggests which characters or events "were created for the purpose of dramatization." (Note: The Eleventh Circuit's opinion misstates the wording of the film's disclaimer. *See Tyne*, slip op. at 4. The word "fictionalization" does not appear anywhere.) Nor does the disclaimer state that certain actual persons' characters (such as Plaintiffs and their decedents) were altered or fictionalized.

If Warner's defense is that this film represents avowed fictionalization, it has not argued that case. Beyond denying in its Answer the Complaint's allegations of calculated fictionalization (Docs.133, 136), Warner also denied, in response to requests for admissions, having fictionalized the same scenes, character portrayals and dialogue to which it now freely admits (but only after the filmmakers admitted in deposition that the Picture was "largely fictionalized". *See supra*, pp. 7-8; 9-13). *See* Warner's Response to Requests for Admissions (Doc. 105). Nor would the facts support such a defense. Warner marketing executives admitted hyping the "authenticity of the story" and the film's "not as fiction" quality despite concerns by the filmmakers "that we may be open to criticism for the changes [we] made in the nature of the characters and in various events." *See supra*, pp. 13-14.

frustrate legislative intent and immunize harmful speech that falls outside the protection of the First Amendment and the statutory exemptions.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question from the Eleventh Circuit Court of Appeals by finding that Section 540.08 provides broad protection for Florida citizens from misappropriation of their names and likenesses not only for advertising and product promotion purposes, but for all manner of "commercial purposes" unless expressly exempted by the statute, and that the facts presented by the instant case therefore come within the scope of Section 540.08.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) true and correct copies of the foregoing Movants' Initial Brief on Question Certified by the Eleventh Circuit have been furnished by Federal Express, postage prepaid, to: Gregg D. Thomas, Holland & Knight, LLP, P.O. Box 1288 (33601-1288), 100 N. Tampa Street, Suite 4100, Tampa, Fl 33602-3644 and Robert C. Vanderet, O'Melveny & Myers, 400 S. Hope St., Suite 1060, Los Angeles, CA 90071-2899; on this day of July, 2003.

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CERTIFICATE OF COMPLIANCE

This brief is submitted under Rule 9.210 of the Florida Rules of Appellate Procedure and the undersigned hereby certifies that the brief complies with the font and other requirements set forth in Rule 9.210(a).

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Fla. Stat. §§ 540.08

LexisNexis (TM) Florida Annotated Statutes

*** THIS DOCUMENT IS CURRENT THROUGH THE 2001 LEGISLATIVE SESSION ***

TITLE XXXIII REGULATION OF TRADE, COMMERCE, INVESTMENTS, AND SOLICITATIONS
CHAPTER 540 COMMERCIAL DISCRIMINATION

Fla. Stat. §§ 540.08 (2001)
540.08 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

(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.

NY CLS Civ R §§ 50

*** THIS SECTION IS CURRENT THROUGH CH. 91. 06/12/2002 ***
*** WITH THE EXCEPTION OF CHS. 2-4, 50-51, and 53 ***

CIVIL RIGHTS LAW
ARTICLE 5. RIGHT OF PRIVACY

NY CLS Civ R §§ 50 (2002)
§§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

NY CLS Civ R §§ 51

CIVIL RIGHTS LAW
ARTICLE 5. RIGHT OF PRIVACY

NY CLS Civ R §§ 51 (2002)
§§ 51. Action for injunction and for damages

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait, picture or voice of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith; or from using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith. Nothing contained in this section shall be construed to prohibit the copyright owner of a sound recording from disposing of,

dealing in, licensing or selling that sound recording to any party, if the right to dispose of, deal in, license or sell such sound recording has been conferred by contract or other written document by such living person or the holder of such right. Nothing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law.