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FL ST s 540.08

West's F.S.A. s 540.08

**TEXT**

***WEST'S FLORIDA STATUTES ANNOTATED***

**TITLE XXXIII. REGULATION OF TRADE, COMMERCE, INVESTMENTS, AND SOLICITATIONS**

**CHAPTER 540. COMMERCIAL DISCRIMINATION**

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Current through End of 1998 2<sup>nd</sup> Reg. Sess.

**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.

#### **CREDIT**

CREDIT(S)

1998 Electronic Pocket Part Update

Amended by Laws 1997, c. 97-103, s 751, eff. July 1, 1997.

<General Materials (GM) - References, Annotations, or Tables>

#### **HISTORICAL NOTES—HISTORICAL AND STATUTORY NOTES**

##### ***HISTORICAL AND STATUTORY NOTES***

##### **1998 Electronic Pocket Part Update**

Laws 1997, c. 97-103, eff. July 1, 1997, removed gender-specific references applicable to human beings without substantive changes in legal effect.

## **1997 Main Volume**

Derivation:

Laws 1967, c. 67-57, s 1.

## **REFERENCES—FORMS**

### ***FORMS***

## **1997 Main Volume**

See West's Florida Legal Forms, Specialized Forms.

## **REFERENCES—LAW REVIEW AND JOURNAL COMMENTARIES**

### ***LAW REVIEW AND JOURNAL COMMENTARIES***

Privacy in personal medical information. 33 U.Fla.L.Rev. 394 (1981).

Your life as an open book: Has technology rendered personal privacy virtually obsolete? 48 Fed.Comm.L.J. 163 (1995).

## **REFERENCES—LIBRARY REFERENCES**

### ***LIBRARY REFERENCES***

## **1997 Main Volume**

Torts k8.5(6).

WESTLAW Topic No. 379.

C.J.S. Right of Privacy and Publicity ss 9 to 16, 39 to 45.

## **ANNOTATIONS—NOTES OF DECISIONS**

### ***NOTES OF DECISIONS***

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ANNOTATIONS (Notes of Decisions Index )

#### **1. Construction and application**

Florida statute exempting from liability publications on matters of public interest, regardless of how fictional use of plaintiff's name or likeness may be, did not bar model's commercial misappropriation claim against magazine for its use of her photograph to illustrate letter in sexual advice column about teenage girl who had sexual intercourse with multiple partners; statute did not foreclose liability for culpably false or fictionalized publications, even on matters of public interest, or immunize deliberate, reckless and irresponsible falsehood. *Messenger by Messenger v. Gruner* sK Jahr USA Pub., 1998, 994 F.Supp. 525.

Single publication-single cause of action rule under Florida commercial misappropriation statute did not bar model's claim against magazine for its use of her photograph to illustrate letter in sexual advice column about teenage girl who had sexual intercourse with multiple partners; rule was designed to prevent circumventing of valid defense to defamation by recasting essentially same facts into several different causes of action all meant to compensate for same harm, gravamen of model's misappropriation claim went beyond injury to reputation alleged in defamation claim, and magazine's defense to defamation claim did not similarly bar her misappropriation claim. *Messenger by Messenger v. Gruner sK Jahr USA Pub.*, 1998, 994 F.Supp. 525.

Republication of photograph in promotional brochure of three individuals standing near deck material in promotional brochure for deck, in which man wearing straw hat in center of photograph was shown standing behind stack of lumber with his head down, did not constitute unauthorized use of personality to promote product; none of men were named, size of man in photograph was ½ inch in height and width, man was unrecognizable, and man himself testified that no one had in fact recognized him in photograph. *Epic Metals Corp. v. CONDEC, Inc.*, M.D.Fla.1994, 867 F.Supp. 1009.

Unauthorized reception by owners of public restaurants and lounges of satellite transmissions of professional football games did not violate Florida statute [West's F.S.A. s 540.08] prohibiting unconsented use of individual's name and likeness, where the interception and display to customers was not done to promote a commercial product or service and was part of a presentation having

a current or legitimate public interest. *National Football League v. Alley, Inc.*, S.D.Fla.1983, 624 F.Supp. 6.

Parents of fugitive from justice had no cause of action for invasion of privacy arising out of publication of their names and addresses on wanted poster distributed by surety company after fugitive jumped bail where parents voluntarily involved themselves in matter of their son's bail bond by pledging collateral and signing indemnity agreement and where public had legitimate interest in securing fugitive's arrest, as to which poster played useful role in properly identifying fugitive. *Ewing v. A-1 Management, Inc.*, App. 3 Dist., 481 So.2d 99 (1986).

This section prohibiting use of one's name or likeness for trade, commercial or advertising purposes is designed to prevent the unauthorized use of a name to directly promote the product or service of the publisher; thus, the publication is harmful not simply because it is included in a publication that is sold for a profit, but rather because of the way it associates individual's name or his personality with something else. *Loft v. Fuller*, App. 4 Dist., 408 So.2d 619 (1981), review denied 419 So.2d 1198.

## 2. Deceased persons

Given that under California law right of publicity of name of individual survived death of individual, right did not pass into public domain at individual's death, and thus, no taking in violation of due process occurred when, after individual's death, this section was enacted which provided for recovery of damages for infringement of right to publicity. *Acme Circus Operating Co., Inc. v. Kuperstock*, C.A.11 (Fla.)1983, 711 F.2d 1538, 221 U.S.P.Q. 420.

Plaintiffs failed to state cause of action under this section prohibiting unauthorized publication of name or likeness of any person, for trade, commercial or advertising purposes, which requires consent for such publication from surviving spouse and children when the person is deceased, where name of deceased person was not used to directly promote the product or service of the publisher. *Loft v. Fuller*, App. 4 Dist., 408 So.2d 619 (1981), review denied 419 So.2d 1198.

Under Florida law, personal representative of playwright's estate had no enforceable property right in playwright's name, where playwright did not have surviving spouse or child and did not issue license during his lifetime; thus, personal representative was not entitled to injunction precluding theater owners from using playwright's name to designate their theater. *Southeast Bank, N.A. v. Lawrence*, 1985, 66 N.Y.2d 910, 498 N.Y.S.2d 775, 489 N.E.2d 744, 227 U.S.P.Q. 1054, reargument denied 67 N.Y.2d 647, 499 N.Y.S.2d 1032, 490 N.E.2d 558.

## 3. Federal actions

Under Florida long-arm statute, federal district court sitting in Florida had in personam jurisdiction over nonresident defendant incorporated and having its principal place of business in Pennsylvania, even though defendant was neither actually present in Florida nor deemed to be present on basis of repeated contacts with Florida, where suit arose out of defendant's alleged shipping of samples of product to Florida corporation which, according to complaint, gave rise to claim that defendant was utilizing unauthorized pictures of one of plaintiffs and one of plaintiffs' products, thereby placing plaintiffs at commercial disadvantage. *Cal-Mar Industries, Inc. v. Wilson Research Corp.*, S.D.Fla.1977, 442 F.Supp. 796.

## 4. Waiver

Professional football players' contractual consent to appear in game telecasts constituted waiver of their rights under Florida statute [West's F.S.A. s 540.08] prohibiting unconsented use of individual's name and likeness, even if prohibited use occurred in connection with unauthorized interception of satellite transmissions of live game broadcasts. *National Football League v. Alley, Inc.*, S.D.Fla.1983, 624 F.Supp. 6.

## 5. Limitations

Four year all inclusive statute of limitations applied to statute prohibiting unauthorized use of personality to promote product, where statute provided for statute of repose terminating right to

bring action if commercial use of likeness did not transpire within 40 years after death of individual, but did not provide its own limitations period. *Epic Metals Corp. v. CONDEC, Inc.*, M.D.Fla.1994, 867 F.Supp. 1009.

Republication of photograph in promotional brochure, which photograph had previously been published in a prior brochure, resulted in separate cause of action for unauthorized use of personality to promote product from use which had previously occurred which was barred by four-year statute of limitations, and thus statute of limitations did not bar action based upon republication. *Epic Metals Corp. v. CONDEC, Inc.*, M.D.Fla.1994, 867 F.Supp. 1009.

#### 6. Pleadings

Where writers of song which depicted celebrated murder trial and mentioned female witness did not use female witness' name to directly promote product or service, nor did companies which published sheet music of song and manufactured and distributed record of song use her name for such purpose, female witness failed to state cause of action against those parties under Florida statute which prohibits the unauthorized use of person's name or likeness for commercial, trade or advertising purposes. *Valentine v. C.B.S., Inc.*, C.A.11 (Fla.)1983, 698 F.2d 430.

Recovery of punitive damages under statute governing actions for unauthorized publication of name or likeness was subject to general statutory procedure for amending pleading to assert punitive damages. *WFTV, Inc. v. Hinn*, App. 5 Dist., 705 So.2d 1010 (1998).

Television station was entitled to have news program subject's claim for punitive damages struck from complaint alleging unauthorized publication of name or likeness based on station's use of videotape featuring subject to advertise its news program, as subject did not first seek leave to amend complaint or show reasonable basis for claim; even if evidence presented at hearing on motion to strike, that station admitted that it continued to run advertisement after being requested to stop, was sufficient to show reasonable basis for punitive damages, trial court did not indicate that in its denial of motion. *WFTV, Inc. v. Hinn*, App. 5 Dist., 705 So.2d 1010 (1998).

Petition, filed by condominium doorman whose picture was used in promotional advertisement depicting building where he worked, sufficiently alleged commercial exploitation and legal damage so as to state a cause of action for unauthorized publication of likeness. *Nottage v. American Exp. Co.*, App. 3 Dist., 452 So.2d 1066 (1984).

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