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## MPT-1: *Jackson v. Franklin Sports Gazette, Inc.*

July 2009

**FRANKLIN RIGHT OF PUBLICITY STATUTE**

**§ 62 RIGHT OF PUBLICITY—Use of Another's Persona in Advertising or Soliciting without Prior Consent**

(a) Cause of Action. Any person who knowingly uses another's . . . photograph, or likeness, in any manner on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.

(b) Definitions. As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

> (1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

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(d) Affirmative Defense. For purposes of this section, a use of a . . . photograph, or likeness, in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subsection (a).

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(g) Preemption of Common Law Rights. This section preempts all common law causes of action which are the equivalent of that set forth in subsection (a).

## EXCERPTS FROM LEGISLATIVE HISTORY

**Franklin State Assembly, Committee on the Arts and Media, Report No. 94-176 (2008), pp. 4–5, on F.A. Bill No. 94-222 (Franklin Right of Publicity Act of 2008)**

The common law of Franklin has recognized an individual's "right of publicity" for many decades. Starting in the 1950s, Franklin's courts recognized that an individual has both a property right and a personal right in the use of his or her "persona" for commercial purposes.

It is important to note that the right of publicity differs from, and protects entirely different rights than, a copyright. A copyright protects the rights of reproduction, distribution of copies to the public, the making of derivative works, public performance, and public display in an original work of authorship. Thus, for example, the copyright owner of a photograph may prevent others from reproducing the photograph without authorization. But the right of publicity protects the interests of an individual in the exploitation of his or her persona—the personal attributes of the individual that have economic value, which have nothing to do with original works of authorship. Thus, for example, even if authorization to use a copyrighted photograph is obtained from the copyright owner, commercial uses of that photograph which exploit the persona of the photograph's subject could infringe upon the subject's right of publicity. It is also important to note that the right of publicity is exclusively a matter of state law—unlike copyright, which is exclusively within federal jurisdiction. There is no federal right of publicity.

As developed by Franklin's courts, the elements of a common law cause of action for appropriation of the right of publicity are (1) the defendant's use of the plaintiff's persona, (2) appropriation of the plaintiff's persona to the defendant's commercial or other advantage, (3) lack of consent, and (4) resulting injury. Even after 50 years of development, the boundaries of Franklin's common law right of publicity are necessarily ill-defined, as the courts can deal only with the specific facts of individual cases that come before them. Given the expansion of our "celebrity culture," the opportunities for individuals to exploit this right have increased exponentially in recent years. Accordingly, the Committee concludes that there is a need to codify this increasingly important economic right.

While the Committee agrees with, and the proposed legislation codifies, the basic elements of the cause of action as understood at common law, the Committee is of the view that some of the common law cases went too far in upholding individual claims, while others did not go far enough. The Committee therefore intends that the legislation set forth the full extent of the right, thus preempting the common law cause of action in this area. Obviously, to the degree that prior common law decisions accord with the legislation's provisions, they continue to constitute good precedent which the courts may use for guidance in applying the legislation.

The legislation would achieve several goals in clarifying the law:

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- The case law has, in a few opinions, dealt with the specificity with which an individual needs to be identifiable when his or her photographic image is used without consent. It is important that a single standard be used for such analysis. Accordingly, the legislation includes a subsection which explicitly sets forth the requirements for that identification.

- There has been some uncertainty as to whether news reporting organizations were liable for infringement of the right of publicity when they included an individual's picture or other indices of persona in ancillary uses. It is the Committee's view that the important right of freedom of the press, found in both the Franklin Constitution and the First Amendment to the United States Constitution, must supersede any individual claims based on "any news, public affairs, or sports broadcast or account, or any political campaign." Hence, the legislation includes an express exemption for such uses of an individual's persona.

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The legislation is hereby favorably reported to the Assembly.

**Holt v. JuicyCo, Inc., and Janig, Inc.**
Franklin Supreme Court (2001)

The right of publicity, which exists at common law in Franklin, has been defined as the protection of an individual's persona against unauthorized commercial use. Since we recognized this right some 50 years ago, there has been an increasing number of cases dealing with it, reflecting the similarly increasing economic importance of the right.

The issue in this case is whether an individual's persona, as reflected in certain aspects of his visual image, is identifiable in an audiovisual work—and thus actionable if the other elements of the common law cause of action are met—even if his face and other more common identifying features are unseen.

Ken Holt, a Franklin resident, is a noted downhill skier, participating on the World Cup Ski Tour. He has a devoted fan following, due in large part to his dashing good looks and winning personality. As is the custom in downhill skiing races, when he is competing, Holt is completely covered up: he wears a body-clinging "slick" suit, boots, gloves, and a helmet with a tinted faceplate. In competition, Holt always wears a distinctive and unique gold-colored suit with purple stripes, adorned with patches from his sponsors. His name is emblazoned in large gold letters on his purple helmet. And, as do all competitors, he wears a bib with his assigned number for that particular competition, so that he may be distinguished from other competitors.

JuicyCo manufactures a sports drink called PowerGold, which ostensibly aids in maintaining energy during athletic activity. JuicyCo markets PowerGold nationwide to consumers. Janig is its advertising agency.

In 1999, Janig produced a television commercial for PowerGold, using a video clip of a two-man race between Holt and another skier, for which it acquired the rights by license from the broadcast network that covered the race and owned the copyright in the clip (the network had obtained no rights from Holt, nor did it need to, as its coverage was newsworthy and authorized by the World Cup Ski Tour). Neither Janig nor JuicyCo sought permission from Holt or the other skier to use their images in the commercial. Janig used digital technology to modify aspects of Holt's appearance in the video clip: it deleted the patches on his suit, deleted his bib number, deleted the name "HOLT" from the helmet, and inserted the PowerGold logo on his helmet and chest. Voice-over narration was added describing the attributes of PowerGold.

Holt brought this action for violation of his common law right of publicity, claiming that his likeness was used for commercial purposes without his consent. He claimed that the use implied his endorsement of PowerGold, depriving him of endorsement fees from JuicyCo and precluding his endorsing competing sports drinks.

JuicyCo and Janig argued that there was no way to identify the skier in the commercial as Holt, given that his face, name, bib number, and sponsors' patches were not visible. JuicyCo and Janig moved to dismiss for failure to state a cause of action.

In considering a motion to dismiss for failure to state a claim, a court must accept the complaint's well-pleaded allegations as true and construe them in a light most favorable to the plaintiff. Dismissal of the complaint is proper if it appears certain that, under applicable law, the plaintiff is not entitled to relief under any facts which could be proved in support of the claim.

The district court dismissed the action on the grounds that Holt was not identifiable in the video clip, holding that he was unrecognizable as his face was not visible and his name, sponsors' patches, and bib number were deleted. The court of appeal affirmed. If the courts below were correct that, as a matter of law, the plaintiff was not identifiable, then in no sense has his right of publicity been violated.

We agree with the district court that Holt's likeness—in the sense of his facial features—is itself unrecognizable. But the question is not simply whether one can recognize an individual's features, but whether one can *identify* the specific individual from the use made of his image.

We hold that the lower courts' conclusion that the skier could not be *identifiable* as Holt is erroneous as a matter of law, in that it wholly fails to attribute proper significance to the distinctive appearance of Holt's suit and its potential, as a factual matter, to allow the public to identify Holt as the skier in the commercial. The suit's color scheme and design are unique to Holt, and their depiction could easily lead a trier of fact to conclude that it was Holt, and not another wearing that suit, appearing in the commercial and endorsing PowerGold. Whether it did or not is a factual, not a legal, question that will have to be decided at trial.

Reversed and remanded.

**Brant v. Franklin Diamond Exchange, Ltd.**

Franklin Court of Appeal (2003)

Barbara Brant was the star of the Franklin University intercollegiate diving team that won the national collegiate championships in 1995. She was the only diver in the championships to score a perfect "10" in a dive from the 10-meter board. She has retired from competitive diving and now lives in Franklin City, where she practices law.

The Franklin Diamond Exchange (the "Exchange") is a jewelry store in Franklin City. In 2002, it obtained the rights to reproduce a photograph of Brant's perfect dive from the copyright owner of the picture. The photograph shows Brant from the waist to the toes entering the water on the completion of her dive. Her head and torso, to her waist, have entered the water and are not visible. The picture does show her legs and the bottom of her bathing suit, which was a generic one-piece suit, of the same color, design, and cut as was required to be worn by all female divers who participated in the championships. Other than that part of Brant's body, the picture shows nothing but the surface of the swimming pool—there is no way to identify the venue, time, or event depicted. The Exchange used the photograph in an advertisement in the *Franklin City Journal* over the headline "Make a Splash! Give Her a Diamond!" with illustrations of four different diamond bracelets, their prices, and the name, address, and phone number of the Exchange.

Brant saw the advertisement and brought this action against the Exchange for violation of her common law right of publicity. The Exchange admitted that the photograph depicted Brant, but moved to dismiss for failure to state a cause of action. The Exchange argued that Brant's likeness was not identifiable from the photograph, and hence her right of publicity could not have been infringed. Brant opposed the motion, citing *Holt v. JuicyCo, Inc., and Janig, Inc.* (Fr. Sup. Ct. 2001) as authority for the proposition that one's face or similar identifying features need not be visible if the individual whose right of publicity is allegedly violated is nevertheless identifiable from the depiction used. The district court agreed and, after trial, awarded Brant $150,000 in damages. The Exchange appealed, alleging that the district court erred as a matter of law. For the reasons given below, we agree and reverse, with instructions to dismiss the complaint.

In *Holt*, the skier whose picture was used in a commercial advertisement was identifiable because of his unique uniform which,

though somewhat altered digitally, nevertheless remained basically the same and clearly visible in the depiction. Thus, the public to whom the advertisement was aimed could easily identify the figure depicted as Holt and no other skier.

Brant argues that, following *Holt*, there are two elements that can be used to identify the individual depicted in the picture as herself—her legs and the visible portion of her bathing suit. We disagree. *Holt* is inapposite and distinguishable on the facts before us. It strains credibility here to argue that Brant's legs, which have no unique scars, marks, tattoos, or other identifying features, are identifiable by the public compared to any other diver's legs. The only other visible element in the picture is her bathing suit from the waist down. But that suit was identical in color, design, and cut to those worn by every other diver in the meet.

In sum, even though the Exchange does not contest that it is Brant who appears in the photograph, there is no way that the public could conclude that this was a picture of Brant as opposed to any other diver. Neither her likeness nor any other identifying attribute was present in the photograph. Thus, there is no possibility that Brant could prove facts which support her claim under the law. Her right of publicity was not infringed.

The judgment of the district court is reversed, and the case remanded with instructions to dismiss the complaint for failure to state a cause of action.

**Miller v. FSM Enterprises, Inc.**

Franklin Court of Appeal (1988)

Jan Miller, a resident of Franklin City, is a world-class figure skater, an Olympic champion now on the professional tour. FSM Enterprises, Inc., is the publisher of *Figure Skating!* Magazine ("FSM"), a national monthly which is devoted to the sport. In the course of its normal news coverage of the sport, FSM ran a story on Miller's appearance at the World Professional Figure Skating Championships in January 1987, and included a photograph of Miller seemingly frozen in midair in one of her jumps off the ice (the "Photo").

In February 1987, FSM placed an advertisement soliciting subscriptions in several national sports magazines, all of which were distributed in Franklin. The advertisement included the Photo over text extolling the quality of FSM's coverage of the sport of figure skating. There was no mention of Miller's name in the text. Miller sued, alleging that the use of her image in that advertisement violated her common law right of publicity.

The defendant moved to dismiss for failure to state a cause of action, claiming that the use was for newsworthy purposes. The district court denied the motion, holding that the advertisement soliciting subscriptions was not for such purposes, but was rather for a commercial use wholly detached from news coverage. After a bench trial, the district court found that Miller's right of publicity had been infringed, and awarded damages of $250,000. This appeal followed, and we are called upon to decide an issue of first impression: the use of an individual's image in an advertisement by and for a news medium under Franklin's common law right of publicity.

The elements of a common law cause of action for violation of the right of publicity are (1) the defendant's use of the plaintiff's persona, (2) appropriation of the plaintiff's persona to the defendant's commercial or other advantage, (3) lack of consent, and (4) resulting injury.

The right is not without limitations, however. One of the most important is an exemption for news reporting. The guarantees of freedom of the press in the Franklin and United States Constitutions are such that no individual can complain of legitimate news reporting which reproduces any aspect of his or her persona—name, image, or the like. Thus, wisely, we think, Miller makes no complaint about the use of her image in the issue of FSM that reported on her participa-

tion in the skating championships, and explicitly agrees that the use of the Photo there was for a legitimate news report. She does, however, argue that the use in the advertisement soliciting subscriptions is a different matter, and one that is actionable.

Miller argues that this case is no different from *Jancovic v. Franklin City Journal, Inc.* (Fr. Sup. Ct. 1984). Jancovic was a star goalie for the Franklin City Foxes, a minor league hockey team. The Foxes had a rabid following in Franklin City, and had won the championship of their league. The *Journal* printed a special section devoted to the championship series, which featured many photographs of the team, including one of Jancovic making an acrobatic save of a shot by the opposition. The *Journal* then reprinted that photograph as a large poster, with no text on it whatsoever, and sold the poster to retail stores which then sold it to the public. Jancovic claimed that his common law right of publicity was violated by the *Journal*'s poster sales. The Franklin Supreme Court agreed.

The Court held that, notwithstanding that the poster was manufactured and sold by an entity which functioned as a news organization, the poster as sold to the public had no relationship whatsoever to that function. Hence, the use did not qualify for the common law exemption for news reporting.

We think that this case is distinguishable from *Jancovic*, and that the use of Miller's image in the Photo when reproduced in the advertisement did not violate her right of publicity. In *Jancovic,* there could be no relationship in the mind of the consumer between the poster and the newspaper, and more particularly the news dissemination function of the newspaper. No part of the news story about Jancovic or his team—not even a caption for the photograph—was reproduced on the poster. Indeed, the purchasers would not have known that the newspaper had anything to do with the sale of the poster. The poster could just as easily have been manufactured and sold by a business selling sports memorabilia, and if it had been, there would have been no doubt that Jancovic's right of publicity had been violated.

But here, the use of Miller's image was incidental to the advertising of FSM in relationship to its news reporting function. The use illustrated the way in which Miller had earlier been properly and fairly depicted by the magazine in a legitimate news account. It informed the public as to the nature and quality of FSM's news reporting. Certainly, FSM's republication of Miller's picture was, in motivation, sheer advertising and solicitation. But that alone is not determinative of whether her right of publicity was violated. We think that the common law must accord

exempt status to incidental advertising of the news medium itself. Certainly, that aspect of the exemption is limited—it can apply only when there can be no inference of endorsement by the individual depicted. So long as the Photo was used only to illustrate the quality and content of the periodical in which it originally appeared, and nothing more, Miller's rights were not violated. We might have concluded otherwise if the advertisement had somehow tied her explicitly to the solicitation for subscriptions (as, for example, by featuring her name in its headline or text) and thus implied an endorsement, for that implied endorsement would have met the requirement that the use of the persona be for the defendant's commercial advantage, beyond a reference to its newsworthy value. But such is not the case here.

Reversed and remanded with instructions to dismiss the complaint.

WEISS, J., dissenting:

I dissent. Miller is in part in the business of endorsing products, and this use implies her endorsement of the defendant's magazine. As the majority notes, if her name had been used in connection with the solicitation, there would have been no question that an endorsement was implied and her right of publicity violated. That her name was not used does not to my mind mean, as the majority would have it, that no endorsement was implied—a picture is, as we all know, worth a thousand words. The question of the use is one of degree, and here the use of her image seems to me to be trading on her persona for a purely commercial use as opposed to one that is intended to inform. I would affirm.