

FIRST AMENDMENT—REPRODUCTION IN POSTER FORM OF NEWSPAPER PAGES CONTAINING PLAINTIFF'S PHOTOGRAPH AND ARTIST'S RENDITION OF PLAINTIFF, AND SUBSEQUENT SALE OF POSTERS, WERE PROTECTED BY THE FIRST AMENDMENT FROM COMMON LAW AND STATUTORY COMMERCIAL MISAPPROPRIATION CLAIMS. *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (1995).

In *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639 (1995), former San Francisco 49'ers quarterback Joe Montana brought an action against the *San Jose Mercury News* ("*Mercury News*") for common law and statutory commercial misappropriation of his name, likeness, and photograph. *Id.* at 640. On January 22, 1989, Montana led the 49'ers to a comeback victory against the Cincinnati Bengals in Super Bowl XXIII. *Id.* at 639-40. The following day, the *Mercury News* ran a story on the victory which included a photograph of Montana and three other players. *Id.* at 640.

The next year, Montana again led the 49'ers to a Super Bowl victory. *Id.* The day after the victory, the *Mercury News* ran another story about the 49'ers which included a picture of Montana celebrating a touchdown pass. *Id.* The 1990 victory gave the 49'ers an unprecedented fourth National Football League championship in the decade. *Id.* To commemorate this event, in its February 4, 1990 edition, the *Mercury News* added a special "Souvenir Section" dedicated to the 49'ers and their accomplishments. *Id.* On the front page of the souvenir section, known as "Trophy Hunters", was an artist's rendition of Montana. *Id.*

Within two weeks of the publication of the "Trophy Hunters" section, the *Mercury News* had the artist's rendition of Montana made into poster form. *Id.* The *Mercury News* made the posters available to the general public. *Id.* About thirty percent of the posters were sold for five dollars each. *Id.* The remaining posters were distributed, without cost, to various area charities. *Id.* Approximately two years after the *Mercury News* produced the last poster, Montana instituted this lawsuit. *Id.* The *Mercury News* moved for summary judgment, arguing that the First Amendment and statute of limitations

barred Montana's action. *Id.* Judge Turrone of the Santa Clara County Superior Court granted the *Mercury News'* motion on First Amendment grounds. *Id.* Montana appealed the ruling to the California Court of Appeal. *Id.*

Justice Cottle, writing for the court, noted that in order for there to be a cause of action for common law misappropriation of a plaintiff's name or likeness, (1) the defendant must use the plaintiff's identity, (2) the misappropriation must be to the defendant's advantage (commercial or otherwise), (3) the defendant must lack plaintiff's consent, and (4) the plaintiff must be injured as a result of the misappropriation. *Id.*

The court went on to state that matters of public interest are exempt from a claim of common law misappropriation of plaintiff's likeness or name. *Id.* The court explained that when an issue is a matter of public interest, the public at large has a right to know and the press has the freedom to report the matter to the public. *Id.* Further, the court noted that a reproduction of a past event of public interest is afforded the same protection that the original publication received. *Id.*

After setting out the common law standard, Justice Cottle enunciated the requirements of the statutory cause of action for misappropriation of a plaintiff's name or likeness under CAL. CIV. CODE § 3344. *Id.* The court recognized that the statute did not codify the common law action, but rather complimented the common law claim. *Id.* The statute allows for a misappropriation action to lie when a plaintiff's name or likeness is knowingly used without the defendant's consent. *Id.* Similar to the common law action, the statute provides an express exemption for the reporting of matters in the public interest. *Id.* at 640-41.

Justice Cottle then turned to the issue of whether the posters reported on a matter of public interest. *Id.* at 641. The court noted the significance of Montana's achievements with the 49'ers, and concluded that the *Mercury News'* front page reported a newsworthy event. *Id.* The court further held that the reproduction of the front page in poster form, even if for commercial purposes, received First Amendment protection since Montana's achievements constituted matters of public interest. *Id.*

The court stated that although there were no cases directly on point, three cases illustrated the First Amendment implica-

tions of the sale of posters or movies of individuals without consent. *Id.* The New York state case of *Paulsen v. Personality Poster, Inc.*, dealt with a misappropriation claim made by comedian Pat Paulsen who ran a mock campaign for the United States Presidency in 1968. *Id.* (citing *Paulsen v. Personality Poster, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968)). Personality Poster sold posters with Paulsen's picture and the words "For President" at the bottom of them. 40 Cal. Rptr. 2d at 641. Paulsen sued Personality under New York's misappropriation statute. *Id.* (citing *Paulsen v. Personality Poster, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968)). Justice Cottle noted that the New York court held that since Paulsen's actions were of a public interest, the First Amendment protected the reporting of the actions, even if the medium was a poster. *Id.* at 641 (citing *Paulsen v. Personality Poster, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968)). The court analogized the Paulsen posters with the Montana posters and held that the Montana posters reported on a matter of public interest. 40 Cal. Rptr. 2d at 641.

The court next considered *Jackson v. MPI Home Video*, where the Reverend Jesse Jackson sued over the sale of Jackson's copyrighted speech given at the 1988 Democratic National Convention. *Id.* (citing *Jackson v. MPI Home Video*, 694 F. Supp. 483 (N.D. Ill. 1988)). The court granted Jackson an injunction on his copyright claim, but stated that his misappropriation claim probably would not succeed since MPI claimed it was engaged in reporting news. *Id.* at 641-42 (citing *Jackson v. MPI Home Video*, 694 F. Supp. 483 (N.D. Ill. 1988)). Justice Cottle noted that the *Jackson* court held that public figures do not have a right to prevent the media from using their name or likeness when reporting on newsworthy events. *Id.* at 642 (citing *Jackson v. MPI Home Video*, 694 F. Supp. 483 (N.D. Ill. 1988)).

Justice Cottle then discussed *Dora v. Frontline Video, Inc.*, where a famous surfer, sued the defendant for making a documentary using his likeness without his permission. *Id.* at 642 (citing *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790 (1993)). Justice Cottle noted that the *Dora* court ruled that since the documentary reported on a newsworthy event, surfing, it fell within the public interest exception to misappropriation. *Id.* (citing *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d

790 (1993)). Justice Cottle noted that the same public interest considerations that applied to surfing also applied to professional football. 40 Cal. Rptr. 2d at 642.

Justice Cottle then went on to note that the *Mercury News* had a right to republish stories of newsworthy events in order to exhibit the quality of its product. *Id.* The court determined that a person's photograph that was originally protected as a newsworthy event may be republished as an advertisement for the periodical itself. *Id.* The only restriction on this type of advertising is that the advertisement may not declare that the public figure endorsed the periodical unless the publisher previously obtained written consent from the individual. *Id.* at 643.

Applying this standard, Justice Cottle concluded that the *Mercury News* clearly used the front page reproductions as a means of advertising the quality and content of the newspaper, and that the reproduction was exempt from the common law and statutory prohibition on misappropriation. *Id.* The court noted that the posters were exact reproductions containing no additional information. *Id.* Further, the *Mercury News* did nothing to imply that Montana endorsed the paper. *Id.* Finally, the court noted that since the event was newsworthy and a matter of public interest, the fact that some posters were sold was irrelevant to the case. *Id.* at 643, n.2.

The court summarized its holding by stating that the posters were protected because they depicted a newsworthy event of public interest, and because the *Mercury News* had a right to promote itself by reproducing the original protected work. *Id.* at 643. Finally, the court concluded that pursuant to the statute, the *Mercury News* was entitled to attorney's fees. *Id.*

The court's decision allows for a periodical to profit from a newsworthy event of public interest while still affording protection from misappropriation to public figures. The fairness of this decision allows the First Amendment and the free market system of the United States to coexist harmoniously.

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