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### Author

Wilde, Edward C.

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# The Scope of Liability Under California's Right of Publicity Statutes: Civil Code Sections 990 and 3344

By Edward C. Wilde<sup>1</sup>

## I. INTRODUCTION

In California, a celebrity has a legal right to control the use of his own identity.<sup>2</sup> This power to control use of celebrity identity is known as "the right of publicity."<sup>3</sup> Confusion concerning the right of publicity and its relationship to the right of privacy has prompted courts to note that this area of law is like a "a haystack in a hurricane."<sup>4</sup> Nu-

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<sup>1</sup> J.D., University of San Diego (*cum laude* 1989); B.A., University of California, Los Angeles (English Literature 1985). Mr. Wilde practices at Cooper, Kardaras & Scharf in Pasadena, California and would like to thank Mila Livitz for her efforts in conjunction with the publication of this article.

<sup>2</sup> There is both a common law and statutory right of publicity under California law. See *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 347 (1983); CAL. CIVIL CODE §§ 990 & 3344. "The statutory cause of action complements rather than codifies common law [identity] misappropriation." *Montana v. San Jose Mercury News*, 40 Cal. Rptr. 2d 639, 640 (1995). The precise scope of this statutory right will be the focus of this paper.

<sup>3</sup> "[The right of publicity] is the right of a celebrity (or other person) to prevent others from using his or her name, likeness, or—in the view of Professor McCarthy and others—'identity' for commercial purposes without a license." Stephen R. Barnett, Comment, *The Right of Publicity Versus Free Speech in Advertising: Some Counter-Points to Professor McCarthy*, 18 HASTINGS COMM/ENT L.J. 593, 594 (1996).

<sup>4</sup> *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956) (originating the analogy, albeit not as a description of California law). The observa-

merous commentators have noted the difficulties in determining the precise parameters of the "right of publicity" tort.<sup>5</sup> Unfortunately, the problem in California has not been remedied by the enactment of California Civil Code sections 990 and 3344 which govern the "right of publicity" tort.<sup>6</sup> Various solutions have been presented to resolve cer-

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tion has been applied to the right of publicity in general, as recently noted by Professor Goodenough. "The bad news is that there are still lingering areas of muddle and confusion in the doctrine of publicity, and the Restatement often reflects these as well." Oliver R. Goodenough, *Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity*, 47 S.C. L. REV. 709, 715 (1996) (analyzing the American Law Institute's Restatement of the right of publicity).

The frustrations in this area of law arise from several sources, including the original derivation of the right of publicity from the right of privacy. Issues regarding the precise parameters of the "right of publicity" tort, its justification and its interaction with the current law of copyright, trademark, defamation and freedom of speech have been subject to much critical discussion and accompanying confusion. However, this article will focus solely on the scope of liability of California's statutory right of publicity.

<sup>5</sup> See, e.g., Stephen M. Lobbin, Comment, *The Right(s) of Publicity in California: Is Three Really Greater Than One?*, 2 UCLA ENT. L. REV. 157, 158 (1995).

[T]he development of the right of publicity in California has been sluggish, disjointed, and largely accidental. The three separate rights of publicity that have emerged—two statutory and one at common law—reveal the absence of a clear plan by the California courts or legislature to define the new right in a simple, or at least consistent fashion.

*Id.*

See also John R. Braatz, Note, *White v. Samsung Electronics America: The Ninth Circuit Turns A New Letter in California Right of Publicity Law*, 15 PACE L. REV. 161, 221 (1994) (discussing the decision in *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992)).

<sup>6</sup> This article will not discuss whether the right to publicity should be recognized as a cause of action by either the legislature or the courts. Assuming that the tort should exist, the article will analyze its proper parameters. However, it is interesting to consider whether the tort should exist at all.

Commentators, such as Professor Madow, have argued quite persuasively that the tort is intellectually suspect and that judicial approval of the tort rests more upon lack of proper judicial attention than sound reasoning. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (1993). Others have argued that the right of publicity not only rests upon dubious ground, but is actually detrimental to public discourse. See Steven C. Clay,

tain problems with the right of publicity.<sup>7</sup> This article will not propose model statute(s), but attempts to clarify the scope of actionable conduct under the existing statutes.<sup>8</sup>

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Note, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 506 (1994).

Protecting celebrity images may actually stifle real cultural growth. Although constituting only an indirect source of income to those already famous, exploitation of celebrity identity constitutes a direct source of revenue to such entertainers and artists as satirists, cartoonists, comedians, and advertisers, among others. The right of publicity discourages these artists while failing to provide additional incentive to celebrities, directly contravening the policy behind intellectual property law of stimulating creative output.

Additionally, the right of publicity elevates private benefits to the exclusion of public rights, further contradicting traditional intellectual property law. Implicit in other intellectual property protections is the notion that the rights exist to serve the public, and that the public eventually will control its products. The right of publicity, however, attempts to hold celebrity image from the public domain for as long as possible, yielding only to public influence with the utmost reluctance.

Furthermore, cultural development that opposes prevalent beliefs is exactly the type of cultural development we should encourage. Artists and others who exploit celebrity identities are likely to challenge "preferred meanings" of these identities. Celebrities, by contrast, attempt to preserve the status quo and thus their own incomes, to cultural development's detriment.

*Id.*

When determining just how far the tort should extend, the courts should realize that the basis for its very existence is questionable.

<sup>7</sup> See, e.g., Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 DEPAUL-LCA J. ART & ENT. L. 1, 30 (1995) (proposing a model right of publicity statute). Many similar examples exist. However, these proposed solutions may actually raise more problems than they resolve. See, e.g., David S. Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. INTELL. PROP. L. 67, 101 (1995).

The farther one gets from the core protection, the more indulgent the court should be of the use. To the extent that the parody does not simply borrow the star quality of the celebrity as a sales vehicle, there should be a presumption of legitimacy to that use. Where the use is a parody, that factor should weigh against finding a misappropriation. A parody is an expression independent of the celebrity image. In short, a much more searching inquiry of the nature of the use is required than most courts have been willing to give.

*Id.*

Welkowitz proposes an ambiguous sliding-scale solution, which means that a producer of celebrity images will not know if the use is permissible until after a

One source of confusion as to the scope of liability under the statutes comes from the existence of both a common law right of publicity and a statutory right of publicity. The scope of liability under the common law is different from the scope of liability under the statutes, which were poorly drafted. The relevant language comprising subdi-

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court makes that decision. These producers will limit even "legal expression" to avoid litigation, thus, causing a "chilling effect" on speech.

The need to avoid "chilling effects" on speech that stem from possible improper usage of intellectual property is also a consideration in copyright law. *See* *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d. Cir. 1980). Moreover, the argument for a parody exception in advertising has been advanced. *See, e.g.*, *Hartman & Kelly, Parody (of Celebrities, in Advertising), Parity (Between Advertising and Other Types of Commercial Speech), and (the Property Right of) Publicity*, 17 HASTINGS COMM/ENT L.J. 633 (1995). Of course, freedom of expression should be given the broadest possible protection and a parody exception for advertising uses may contribute to such a goal. However, the contents of a parody exception may hinge upon the court's sense of humor. For instance, the Vanna White "parody" in *White* did not seem funny "enough" to the Ninth Circuit to be protectible. 971 F.2d 1395 (9th Cir. 1992). Therefore, adding more exceptions to the right of publicity may not be the best method for refining it. Instead, perhaps it would be best to place clear limits on what constitutes actionable conduct or eliminate the tort altogether.

<sup>8</sup> The starting point of this analysis is the assumption that the statutes are capable of reasonably certain application. Statutes must avoid problems with vagueness and overbreadth according to the First Amendment. This doctrine has been explained as voiding a statute for "vagueness when it does not sufficiently identify the conduct that is prohibited." *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996).

Laws that are insufficiently clear are void for three reasons: (1) To avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms.

*Id.* (citation omitted).

The related doctrine of "overbreadth" has been explained by the California Supreme Court. *See In re, M.S.*, 896 P.2d 1365, 1370 (1995).

Under [the overbreadth] doctrine, litigants may challenge a statute not because their own rights of free expression are violated, but because the very existence of an overbroad statute may cause others not before the court to refrain from constitutionally protected expression. To succeed in a constitutional challenge based on asserted overbreadth, the minors must demonstrate the statute inhibits a substantial amount of protected speech.

*Id.* (citations omitted).

vision (a) of both sections 990 and 3344,<sup>9</sup> could readily create confusion. This article argues that the only wrongful conduct penalized by

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<sup>9</sup> Both statutes include subdivision (a) which, read as broadly as possible, could cover every use of a person's identity. "Any person who uses a deceased [in §3344, the person must be living] personality's name, voice, signature, 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." CAL. CIV. CODE § 990(a). The unfortunate use of the "or" between "merchandise" and "goods" makes the statutes unbelievably broad because almost everything that can be moved is a "good." See U.C.C. § 2-105(a). If "merchandise" and "products" are meant to include something other than "goods," then all uses of another's identity fixed in a tangible medium, such as the entire scope of copy-rightable materials as defined in 17 U.S.C.A. § 102, would be actionable unless some statutory exception applied.

A second problem exists due to the use of the word "or" prior to "for purposes of advertising." If the legislature had not used the word "or," the statute would only penalize goods "for purposes of advertising." As will be demonstrated in the article, this reading of both statutes is mandated by the legislative history, the remaining text of the statutes and the case law interpreting the statutes. If the "or" between "goods" and "for purposes of merchandising" creates two separate sets of actionable conduct, each separate from and in addition to the other, the statute would cover every use fixed in any tangible medium, including personal letters, biographies, and television news, and every "unfixed" use which involved an individual's opinion about a particular product. For example the statement "Didn't Marilyn Monroe like this perfume?" might be actionable as an unfixed use. Therefore, mentioning any person by name in a letter, thereby using an identity in a good, or indicating a preference for a particular product, which might be an advertisement or endorsement, could trigger liability for attorney's fees and statutory damages. Such absurd results are inevitable products of an expansive reading of the statute. The use of identity in personal transactions is especially dangerous, because a private person will have difficulty proving that the use is for "public interest" or that it is "newsworthy" in order to satisfy exceptions. Therefore, isolating the language of subdivision (a) from the rest of the statute, the legislative history, and the statutes continuing it can cause questionable results.

The fact that the statute was drafted by a committee with several members could explain the resulting ambiguity. The sort of ambiguity in the statute is the "fifth type" of ambiguity described by Professor Empson that "occurs when the author is discovering his idea in the act of writing, or not holding it all in his mind at once, so that, for instance, there is a simile which applies to nothing exactly, but lies half-way between two things when the author is moving from one to the other." William Empson, *SEVEN TYPES OF AMBIGUITY* 155, (3d ed. 1966). Each member failed to see the "big picture" of the statute. Such poor writing creates ambiguities that are potentially dangerous when contained in a law, due to the law's direct effect on ac-

the statutes is the identity appropriation of a person, typically a celebrity,<sup>10</sup> for the purpose of creating the false impression that the identified person has endorsed a product.<sup>11</sup>

## II. BACKGROUND: A SHORT HISTORY OF CALIFORNIA COMMON LAW PRIOR TO THE STATUTES

California Civil Code sections 990 and 3344 originated from the complaint of an unhappy constituent to his Assemblyman. The Assemblyman reacted to the complaint by writing a new law.

The complaint concerned computerized letters he and his neighbors received from *Reader's Digest*. These letters stated that the addressee and certain of his neighbors had been selected to participate in a sweepstakes contest. The constituent believed that this unauthorized advertising technique improperly associated his name with the contest. He resented the representation, which he believed was implicitly being made to his neighbors, that he endorsed or participated in the sweepstakes.<sup>12</sup>

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tual human beings. Professor Empson explains that the "fifth type" of ambiguity, unlike other types of ambiguity which can serve a communicative purpose, "is not worthy of respect" because:

[i]n so far as an ambiguity sustains intricacy, delicacy, or compression of thought, or is an opportunism devoted to saying quickly what the reader already understands, it is to be respected (in so far, one is tempted to say, as the same thing could not have been said in any other way). It is not to be respected in so far as it is due to weakness or thinness of thought, obscures the matter at hand unnecessarily (without furthering such incidental purposes as we have considered) or, when the interest of the passage is not focused upon it, so that it is merely an opportunism in the handling of material, if the reader will not easily understand the ideas which are being shuffled, and will be given a general impression of incoherence.

*Id.* at 160.

<sup>10</sup> This article will not determine the instant that misappropriation of a celebrity's "identity" occurs, nor will it delineate the elements constituting the protectible "identity" of a celebrity.

<sup>11</sup> Other scholars have reached a similar conclusion through different routes of analysis. See, e.g., Todd J. Rahimi, Comment, *The Power to Control Identity: Limiting A Celebrity's Right of Publicity*, 35 SANTA CLARA L. REV. 725, 750 (1995).

<sup>12</sup> Weinstein, *Commercial Appropriation of Name or Likeness: Section 3344 and the Common Law*, LOS ANGELES B.J., 430, 432 (March 1977). It is interesting to note that the origin of the right of publicity is commonly attributed to an incident involving unwanted publicity. In *Roberson v. Rochester Folding Box Co.*, a young

The Assemblyman's response implies that his constituent was without any legal redress. However, the constituent already had the requisite legal right under *Fairfield v. American Photocopy Equipment Co.*<sup>13</sup> The *Fairfield* case involved a defendant who manufactured and sold a photocopy machine. "[D]efendant, without the permission of plaintiff and for the purpose of promoting sales of the machine and for gain and profit, circulated among the legal profession in the United States a printed advertisement indicating that plaintiff was a satisfied user of [defendant's machine]"<sup>14</sup> The court concluded that based upon the plaintiff's right of privacy, he also had a right of publicity which could likewise be violated.

The doctrine that there is a legally enforceable right of privacy has been definitely settled in California. The right is distinct in and of itself and not merely incidental to some other recognized right for breach of which an action for damages will lie. Violation of the right is a tort.

One concept of the right of privacy is the right of a person to be free from unauthorized and unwarranted publicity. The unauthorized use or publication of a person's name may constitute an actionable invasion of the right. The exploitation of another's personality for commercial purposes constitutes one of the most flagrant and common means of invasion of privacy.<sup>15</sup>

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woman, who found that her picture was being used in advertisements for flour, sued and lost because a New York court held that no right to privacy existed under New York common law. 64 N.E. 442 (1902). The New York Legislature responded by amending the Civil Rights Law to reflect a statutory right of privacy. *See, Rhodes v. Sperry & Hutchinson Co.*, 85 N.E. 1097 (1908).

<sup>13</sup> 291 P.2d 194 (1955). This was not the first case decided under California's common law right of privacy regarding actions based upon unwanted advertising usage. The first case regarding the right of privacy in California was *Melvin v. Reid*, "the case of the red kimono." 297 P. 91 (1931). The plaintiff, who had been a prostitute, was charged with murder and acquitted in a highly publicized trial. Years later, after she had married, a film was made about the incident, including the use of her maiden name. The *Melvin* court concluded that the right of privacy existed in California and ruled that the publication of facts surrounding the incident was a violation of the plaintiff's right of privacy. *See id.*

<sup>14</sup> *Fairfield*, 291 P.2d at 196.

<sup>15</sup> *Id.* at 196-97 (citations omitted).



Thus, the court explained that using one identity without his consent to endorse a product was actionable. The court's statement of the rule was conceivably broader than the factual parameters of the case because the court referred to "exploitation . . . for commercial purposes."<sup>16</sup>

Finally, the decision in *Fairfield* granted damages to compensate the plaintiff for loss of peace of mind.

The gist of the cause of action in a privacy case is not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation. The injury is mental and subjective. It impairs the mental peace and comfort of the person and may cause suffering much more acute than that caused by a bodily injury.<sup>17</sup>

Therefore, according to the case law, the constituent could also recover damages for mental anguish. However, the common law action was still somewhat ineffective to provide the constituent with the relief he needed. First, the common law did not provide for an award of attorney fees for the prevailing party. In *Fairfield*, the plaintiff was an attorney,<sup>18</sup> which negated the attorney fees problem. However, Assemblyman Vasconcellos' constituent would need to hire an attorney and would be sufficiently deterred from a lawsuit by the mere cost of litigation. Therefore, Assemblyman Vasconcellos placed an attorney's fees provision in the statute. Second, for an average citizen an action for unconsensual product endorsement presents the problem of defining damages. Assuming the misappropriated identity was not attached to some particularly loathsome, embarrassing or immoral product, it

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<sup>16</sup> *Id.* at 199. The undefined phrase "for commercial purposes" has been considered to mean something more than just advertisements or endorsements. Under a broad interpretation, it could include any speech done for money. Thus, usage of one's identity in a newspaper, a biography, or a television show, could be prohibited. Certainly, such results were not intended nor would they be permissible under state and federal protections of free speech. See U.S. CONST. Amend. I; CAL. CONST. Art. I, § 2.

<sup>17</sup> *Fairfield*, 291 P.2d at 197.

<sup>18</sup> See *id.* at 196.

will typically be difficult to demonstrate any damages. Thus, Assemblyman Vasconcellos' statute also provided for limited statutory damages. Therefore, the original purpose of the statute was to prevent unconsensual use of identity in an advertisement by making litigation more practical for everyone.<sup>19</sup>

### III. THE LEGISLATIVE INTENT, LEGISLATIVE HISTORY AND THE COURTS' FAITHFUL ADHERENCE TO BOTH

Proper analysis of the intended purpose of Civil Code sections 990 and 3344 requires an examination of the legislative history of the statutes. The California Supreme Court has stated that the "first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law."<sup>20</sup> However, even more important than the pre-enactment statements of intent is the word choice in the

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<sup>19</sup> The problem with making litigation possible where it previously had been impractical is that there seems to be little net social utility in fostering litigation and increasing the amount of lawsuits when the primary item of damages would be the attorney's fees. Because there is no legal requirement to settle an action rather than proceed to trial, a plaintiff's attorney has every motivation to overload the courts with lawsuits in which the plaintiff cannot even demonstrate injury. Of course, the plaintiff will claim some sort of emotional injury stemming from the use of his likeness in an advertisement. However, it is likely that the stress of litigation will be far more taxing on the plaintiff than the stress of seeing his name on a list of five potential winners of some sweepstakes.

One justification for the lawsuit, and the law in general, is the inherent wrong in creating false endorsements. Based on that justification, it seems that the lawsuits are important to protect the public. However, if it is public interest that is at stake, it does not seem necessary to bait an attorney with all the "reasonable fees" he can generate. Moreover, the relative harm to the public in seeing a neighbor's name in an advertisement would be outweighed by the inconvenience of an overloaded court docket caused by the neighbor's lawsuit.

Of course this paper does not assert that a lawyer is never justified in bringing a lawsuit. In theory, an attorney who has been hired by a client to pursue a cognizable action has every right to get what he can earn. When the California legislature made a determination that certain lawsuits are proper, the lawyer has every right to bill. Perhaps imposing the enormous cost of the lawyer's fees upon the wrongdoer is part of the calculated good for the public interest.

<sup>20</sup> *Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n*, 743 P.2d 1323, 1326 (1987).

statutes themselves. Thus, the process of deciphering the legislature's intent sensibly starts with the statute's language.

[A] court must look first to the words of the statutes themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose . . . . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.<sup>21</sup>

Thus, we will start with an examination of the statutes' language.

### A. *The Statutes' Language Only Targets Advertisements*

The language of the statutes demonstrates that the statutes' intended target is preventing false advertisement, not prohibiting constitutionally protected speech.<sup>22</sup> For instance, the language creating liability in sections 990(a) and 3344(a) describes advertising conduct. "Any person who uses [another's identity] on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services."<sup>23</sup> The language of the statute applies to the use of an identity for purposes of selling something. The language attempts to describe various forms of advertisements, whether part of the product itself ("on or in products"), or apart from the product ("for purposes of advertising").

This reading of the statutes is supported by subdivision (k) of section 990 and subdivision (e) of section 3344.

The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing the use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use [of the identity] was so directly connected with the commercial sponsorship or with the paid advertising

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<sup>21</sup> *Id.*

<sup>22</sup> Speech on items such as t-shirts, sold to the public for profit, is specifically protected by the First Amendment of the United States Constitution. See *Gaudiya Vaishnava Soc. v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1990) (finding that an ordinance restricting the sale of t-shirts which contained textual messages violated the First Amendment to the United States Constitution).

<sup>23</sup> CAL. CIV. CODE § 990(a).

as to constitute a use for which consent is required under subdivision (a).<sup>24</sup>

Thus, the crucial factual inquiry is whether the use is “directly connected with the commercial sponsorship or paid advertising.” Subdivision (k) of section 990 effectively requires the application of section 990(a) only to those engaged in sponsorship or advertising. Moreover, subdivision (j) of section 990 and subdivision (d) of section 3344 specifically exempt news, public affairs and sports broadcasts from penalty.<sup>25</sup> Also exempted are plays, books, magazines, newspapers, musical compositions, films, radio programs, television programs, any material that is political or newsworthy<sup>26</sup> and “single and original works of fine art.”<sup>27</sup> After exempting from consideration all of these separately enumerated categories of speech, the only category left is advertisement.

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<sup>24</sup> CAL. CIV. CODE § 990(k).

<sup>25</sup> See CAL. CIV. CODE § 990(j) (“[U]se of [an identity] 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 subdivision (a).”); CAL. CIV. CODE § 3344(d).

<sup>26</sup> The courts have specifically stated that to be “newsworthy,” the event at issue need not be current. See *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793, 40 Cal. Rptr. 2d 639, 640 (1995) (“[A] matter in the public interest is not restricted to current events but may extend to the reproduction of past events.”).

<sup>27</sup> CAL. CIV. CODE § 990(n) (“This section shall not apply to the use of [an identity] in . . . (1) A play, book, magazine, newspaper, musical composition, film, radio or television program . . . (2) Material that is of political or newsworthy value. (3) Single and original works of fine art. (4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2) or (3).”). There is no corresponding provision in §3344.

The legislature has defined the phrase “fine art” to mean, “any work of visual art, including, but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, a work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature), crafts . . . or mixed media.” CAL. CIV. CODE § 982(d)(1).

*B. The Legislative History Demonstrates That The Statutes Were Never Intended To Target Anything More Than Advertisements And Endorsements*

The only purpose of section 3344, later expanded to encompass the use of a deceased individual's likeness by section 990,<sup>28</sup> was to protect

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<sup>28</sup> If it is questionable whether a living person should have the right to sue for use of his likeness in advertising, the right as exercised by the dead is equally questionable. You cannot hurt a dead individual's feelings. Moreover, it is unlikely that the public can be fooled into believing that a particular product has been endorsed by a corpse. In fact, the deceased individual's right of publicity is controlled by someone who happened to have the fortune to possess a dead person's rights. There is no social benefit in controlling such rights. Therefore, the extension of the right of publicity from § 3344 to § 990 only creates additional litigation with little to no justification.

However, some have argued that the right of publicity should be permitted to descend to the heirs. See, e.g., Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 81-85 (1994). In support of her position, Kwall lists three interests of the heirs which this right would support: economic, emotional, and the desire to protect the decedent's reputation.

The financial interest of a decedent's relatives in her publicity rights "deserves no less recognition and protection" than their financial interest in the decedent's "other tangible assets." To the extent an individual's persona possesses commercial value, that individual's heirs and legatees are entitled to benefit economically from any commercial use, given their personal relationship to the decedent. The court in [Elvis Presley International Memorial Foundation v. Crowell, 733 S.W.2d 89 (1987)] also explicitly recognized the interest of assignees who have contracted with a celebrity to use that individual's persona.

In addition to the potential economic harm that relatives of a decedent can suffer by virtue of unauthorized appropriations of the decedent's persona, there is also the potential for emotional damage resulting from a use which the relatives find objectionable, or which they believe the decedent would have found unacceptable. One case which presents this situation is *Hicks v. Casablanca Records* [464 F. Supp. 426, 433 (S.D.N.Y. 1978)], in which the heirs and assignees of Agatha Christie sought to enjoin movie producers and a publisher from distributing a movie and book fictionalizing an actual eleven-day disappearance in the mystery writer's life. The works in question portrayed Christie "as an emotionally unstable woman, who, during her eleven-day disappearance, engages in a sinister plot to murder her husband's mistress, in an attempt to regain the alienated affections of her husband." Although the court in *Hicks* refused to enjoin the defendants' works on First Amendment grounds, the facts of the case clearly illustrate that relatives of a decedent can be harmed in noneconomic ways by unauthorized uses of a decedent's persona.

Moreover, sometimes the relatives of a decedent will want to protect the reputational interests of the persona. The assignees of a decedent may also have an interest in protecting the decedent's reputation since such damage might negatively impact upon the value of their assignment. After the death of Leonard Bernstein, his children began to license an array of merchandise such as coffee mugs, umbrellas, stationery, address books, T-shirts, and other items. In addition to generating money for one of Bernstein's pet projects, the merchandising efforts were intended to protect the commercial use of his persona and to provide a "preemptive strike" against competing items that would cheapen his image. The need to protect such interests on the part of Bernstein's relatives is especially compelling since now is the time when the historical value of Bernstein's musical contribution will be determined. If his persona is allowed to be cheapened and overexposed, it may be many generations before his work will be reexamined within the classical tradition.

*Id.* at 82-83 (footnotes omitted).

I find Kwall's arguments unpersuasive. First, she ignores the larger question of whether removing the use of dead celebrities' identities from the public domain is good for society. She also ignores whether such removal is even permissible under the First Amendment. Instead, her arguments presume that as long as the heirs can submit some argument in their favor, it is sufficient.

Second, Kwall's justifications are not persuasive in their own right. The contention that the heirs have a right to receive compensation begs the question of whether they should have such rights at all. Professor Kwall failed to discuss whether any social benefit is gained by giving the heir, which likely is some business entity, the right to collect revenue from a deceased's likeness.

Due to the social value in using deceased celebrities for intellectual commerce and public discourse, the California Supreme Court refused to extend the right of publicity to heirs. The right of publicity means that the reaction of the public to name and likeness, which may be either fortuitous or planned, endows the name and likeness of the person involved with commercially exploitable opportunities. The protection of name and likeness from unwarranted intrusion or exploitation is at the heart of the law of privacy. *See* *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (1979) ("If rights to the exploitation of artistic or intellectual property never exercised during the lifetime of their creators were to survive their death, neither society's interest in the free dissemination of ideas nor the artist's rights to the fruits of his own labor would be served.").

The California Legislature nullified *Lugosi* by the enactment of SB613, which created Civil Code section 990. However, there was insufficient evaluation of the societal rights recognized by the California Supreme Court.

The argument regarding heirs' emotional attachment to the deceased and heirs' right to protect the deceased reputation are two aspects of the same proposition. Heirs may be concerned with what people say about their dead relative. However, there are several problems with this proposition. First, while alive, the celebrity would have been able to prevent speech which harmed the his or her reputation or

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pained the feelings of family members only if the celebrity could demonstrate actual malice behind defamatory statements or intentional infliction of emotional distress. The heirs of the deceased should not be granted the ability to suppress speech without proving actual malice. To do so would give them greater rights than living plaintiffs. Secondly, if emotional rights of family members are protectable after the celebrity's death, it seems plausible that they should be permitted to exercise those rights always, even while the celebrity relative is still alive. This would be an unnecessary extension of the doctrine. Next, if a family member brings an action for wrongful death and seeks emotional distress damages from the purported tortfeasor, that family member is typically required to establish the requisite degree of emotional attachment to the decedent. If the decedent and family member had been estranged prior to the death, the family member is entitled to less or no compensation for emotional injury. The degree of emotional closeness between the decedent and the family member should be subject to examination in a right of publicity action also. Business entities owning such rights would find it difficult, if not impossible, to demonstrate this emotional damage. Lastly, the most basic justification for the right of publicity is the resulting emotional damage to an individual which derives from the earlier right of privacy. See *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 133-34 (1979). However, an interest in avoiding emotional damage would necessarily end with the death of the celebrity because the dead have no feelings. There are, of course, occasional moral arguments raised by the progeny of a dead individual. For instance, the descendants of Crazy Horse argued that they were seriously offended by the use of Crazy Horse's name on the label of a malt liquor.

A grievance widely shared by many Indian people in the United States is the commercial appropriation of Indian names, images, stories, religious practices, and patterns. Seth Big Crow has invoked the Rosebud Sioux Tribal legal process to oppose one such practice, the marketing of a malt liquor named after his grandfather, a revered Lakota figure known as *Tasunke Witko*, or *Crazy Horse*. Acting on behalf of the estate of *Crazy Horse*, Seth Big Crow and his activist attorneys have deliberately constructed the legal case as part of a multiple strategy: to educate and to build opposition to the marketing of the malt liquor among Lakota people; as a vehicle to engender cohesion and community pride; as part of a broader effort to gain greater legitimacy for tribal courts within tribes, in part by encouraging greater use of tribal customary law in tribal courts; and to strengthen tribal court systems as centers of resistance to the jurisprudential influence of state and federal laws.

Nell Jessup Newton, *Rules of the Game: Sovereignty and the Native American Nation, Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1003-04 (1995) (footnotes omitted). However, cases such as *Crazy Horse Malt Liquor* are relatively rare. Moreover, California's right of publicity statutes would not have provided any relief to the descendants of *Crazy Horse*.

an individual against the use of his likeness in false endorsement and advertising.

The bill was suggested to the author by people who had their names used in connection with a magazine advertising scheme. The interest sought to be protected are two-fold: (a) publicity which places the injured party in a false light in the public eye, and (b) appropriation, for defendant[‘s] advantage, of plaintiff’s name and likeness.<sup>29</sup>

When he introduced it, Assemblyman Vasconcellos indicated that AB 826 (section 3344) was being introduced as part of a “package of bills to halt certain deceptive, mass-mailing advertising practices.”<sup>30</sup> The bill was analyzed by the Legislature in a statement of the history and digest of the bill, following the October 20 amendments to AB 826. “[It] makes any person who knowingly uses another person’s name, photograph, or likeness for purposes of advertising or soliciting the purchases of product, goods or services, without the prior consent of such person, liable for damages sustained by such other person.”<sup>31</sup>

An analysis of AB 826 provided to the Senate Committee on Judiciary explained that the bill was introduced to “provide[] practical recourse to individuals for the misappropriation of their identity for

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<sup>29</sup> Assembly Policy Committee Analysis, Assembly Committee on Judiciary, dated June 14, 1971, bill as amended May 21, 1971.

<sup>30</sup> Press release of Assemblyman Vasconcellos dated for release on Monday morning, March 8, 1971. The relevant portion is as follows:

Today I am introducing a package of bills to halt certain deceptive mass-mailing advertising practices.

The last bill, AB 826 [Civil Code §3344], is aimed at protecting individuals from having their names or likenesses used for commercial purposes without their consent. We now have Section 14493 of the Business & Professions Code, which makes it possible to halt the unauthorized use of a corporation’s name for commercial purposes. We also have Penal Code Section 556, which prohibits placing advertisements, i.e., signs or billboards, on private property without the consent of the owner. It seems strange that we prohibit these two activities while permitting the use of an individual’s name or picture for the same purposes.

Falsely implying that an individual endorsed a product was already actionable under law. Thus, the new bill did not create a new theory of liability, it merely created a new claim under the existing theory. The Assemblyman overstated his case.

<sup>31</sup> Senate Policy Committee Analysis, Senate Committee on Judiciary, amended October 20, 1971.



commercial uses by providing minimum damages and class action."<sup>32</sup> The "commercial use" was defined earlier, in answer to the question about the "source" of the bill. "The bill was suggested to the author by people who had their names used in connection with a magazine advertising scheme."<sup>33</sup> In a subsequent analysis of section 3344 by the Legislative Counsel of California, it was found that: "Subdivision (a) of Section 3344 of the Civil Code creates a cause of action in favor of a person whose name, photograph, or likeness is used in any many for advertising or solicitation purposes without such person's prior consent."<sup>34</sup>

Assemblyman Vasconcellos, the author of the bill, agreed with this characterization of his bill. In a letter to Governor Regan, requesting that the Governor sign his bill, Vasconcellos wrote that "[w]ith the increasing sophistication of the advertising industry and its never-ending search for new ways to promote products, it becomes imperative that the law be equipped to provide some sort of protection to the individual citizen from an invasion of his privacy."<sup>35</sup> Vasconcellos also wrote a letter regarding the legislative history of the statute, in which he explained that "[t]he bill was prompted by abuse of the unsolicited use of a person's name in a magazine promotional mailing."<sup>36</sup>

Even the Pacific Law Journal article, published for purposes of describing the effect of the statute, stated quite plainly that

the new section provides that anyone who knowingly uses another person's name, photograph or likeness in an advertisement or solicitation, without consent, is liable to the person for a minimum of \$300 . . . . Briefly summarized, the Civil Code now provides that anyone who knowingly uses another's name, photograph or likeness for purposes of

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<sup>32</sup> The undated analysis is entitled, "Senate Committee on Judiciary Background Information, AB 826."

<sup>33</sup> *Id.*

<sup>34</sup> Letter to John Vasconcellos dated December 3, 1976.

<sup>35</sup> Letter from John Vasconcellos to Ronald Regan, dated November 10, 1971 and written on official letterhead for the Assembly California Legislature.

<sup>36</sup> Letter from John Vasconcellos to Don D. Sessions, dated December 2, 1983.

advertising or solicitation is liable for any damages sustained by the person whose name is used.<sup>37</sup>

In 1984, SB 613 was introduced to make minor amendments to section 3344 and to create section 990, which made the statutory rights under section 3344 descendible.<sup>38</sup> The analysis of section SB 613 reiterated that the intent of the statutory right of publicity was to “codif[y] a person’s right to recover damages for the knowing use of his ‘name, photograph or likeness’ in commercial advertising or solicitation of purchases without his prior consent.”<sup>39</sup>

The Senate Democratic Caucus provided the following analysis of the statutory right embodied within section 990:

In existing law, Civil Code Section 3344 codifies a person’s right to recover damages for the knowing use of his/her “name, photograph, or likeness” in commercial advertising or solicitation of purchases without his/her prior consent. The statute is silent as to the rights of his/her heirs, and case law has held that those rights do not survive after the person’s death.<sup>40</sup>

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<sup>37</sup> Robert B. Miller, Comment, *Commercial Appropriation of an Individual’s Name, Photograph or Likeness: A New Remedy for Californians*, 3 PAC. L. J. 651, 665 (1972).

<sup>38</sup> Section 990 protects the right of those who live by exhibiting the dead. The strangeness of such a phenomenon was captured by James Joyce’s observation of Rome: “Rome reminds me of a man who lives by exhibiting to traveler’s his grandmother’s corpse.” Ellman, James Joyce, 225 Oxford University Press, New York (1982). By virtue of section 990, the exhibition of the dead has statutory status in California. The fact that our society gives special rights to those who live by exhibiting their “grandmother’s corpse” is quite odd and telling. Having idolized the portrayal of death in action movies, we now tour the dead and charge an entrance fee for an unending wake.

<sup>39</sup> Senate Policy Analysis: Senate Committee on Judiciary. Bill version: As amended on May 9, 1984.

<sup>40</sup> Senate Floor Analysis: Senate Democratic Caucus. Bill version: As amended on May 17, 1984. In *Fairfield v. American Photocopy Equipment Co.*, the court stated that the right to publicity, violated by nonconsensual advertising, protects a person’s privacy. 291 P.2d 194 (1955). See *supra* notes 13-18 and accompanying text. The injury to one’s privacy permits a recovery of damages for emotional injury. The *Fairfield* analysis would not apply when the “victim” is dead because you cannot hurt the feelings of the dead. One could argue that the relevant feelings at issue become the “feelings” of the heirs. This argument becomes moot when a corporation owns a decedent’s right of publicity because a corporation has no feelings.

A May 10, 1984 legislative analysis of SB 613 provided that: "§ 3344 and § 990 are first and foremost 'products and advertising statutes.'"<sup>41</sup> However, the analysis emphasized that the right of publicity could not "outweigh" the right to freedom of expression. "The First Amendment to the United States Constitution, which § 3344 and § 990 cannot and are not intended to supersede, protects the freedom of expression."<sup>42</sup>

A July 3, 1984 analysis of SB 613 for the Ways and Means Committee noted that, "[E]xisting law provides certain safeguards regarding the unauthorized use of one's name, photograph or likeness for purposes of advertising or solicitation."<sup>43</sup> The Digest of the SB 613 for the Third Assembly Reading, prepared by the Assembly Office of Research provided that "under existing law, any person who knowingly uses another living person's name, photograph or likeness for advertising or solicitation purposes without the consent of the person or the person's parents or guardian is liable for any damages in an amount of not less than \$300."<sup>44</sup> The bill under consideration expanded the definition of likeness and made the right of publicity descendible.

An analysis of SB 613 by the Senate Republican Caucus stressed that "the use of a person's name, photograph or likeness for advertising or soliciting purchases of goods or services without the person's consent is already prohibited."<sup>45</sup> The bill was then described with no

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The California Supreme Court had refused to make the right of publicity descendible. *See* *Lugosi v. Universal Pictures*, 603 P.2d 425 (1979). Thus, the legislature invested the dead with the economic rights of the living with SB 613. When the right of publicity is applied to decedents it becomes an intellectual fraud. While not unconstitutional, a tort to protect a corpse's feelings is absurd.

<sup>41</sup> Assembly Bill Analysis: Assembly Committee on Judiciary. Bill version: As amended on June 12, 1984.

<sup>42</sup> *Id.*

<sup>43</sup> Assembly Fiscal Committee Analysis: Assembly Ways and Means Committee. Bill Version: As amended on July 3, 1984.

<sup>44</sup> Assembly Floor Analysis: Assembly Office of Research third reading. Bill version: As amended on August 9, 1984.

<sup>45</sup> Senate floor analysis: Senate Republican Caucus. Bill version: As amended on August 9, 1984.

modification to expand the scope of wrongful conduct beyond advertising or solicitation practices.

Thus, the legislative history is clear on two points. First, the specific wrong targeted was the unauthorized use of one's likeness without consent. Second, the statutory right of publicity was not meant to abrogate First Amendment rights to freedom of expression.

C. *The Change in Language Under Section 3344(a): As It Was Originally Enacted and Then as Amended*

Civil Code section 3344(a) was amended in 1984 by SB 613. Under the original version, section 3344(a) provided in pertinent part that use of a person's identity "in any manner, for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of purchases of products, merchandise, goods or services without such person's consent." may subject one to liability.<sup>46</sup>

As originally written, the phrase "in any manner" was limited by two alternative clauses: (1) "for purposes of advertising products, merchandise, goods or services", or (2) "for purposes of solicitation of purchases of products, merchandise, goods or services."<sup>47</sup> Thus, the original version of the section 3344(a) applied to "advertising" or "solicitation."

That language was subsequently altered so as to create the present ambiguity. Potential revisions to the language of section 3344(a) were proposed during the debate over SB 613. The first revision proposal was to add the phrase, "or for any other commercial purpose for which consent is required under the common law" after the phrase, "in any manner, for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of purchases of products, merchandise, goods or services."<sup>48</sup> However, the language making the statutory right of publicity at least as broad as the common law was rejected during the amendment process and the first proposed revision never was enacted by the legislature.

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<sup>46</sup> Statutes of California, Chapter 1595, *An Act to add Section 3344 to the Civil Code, relating to the invasion of privacy*, as approved by the Governor on November 22, 1971.

<sup>47</sup> *Id.*

<sup>48</sup> Senate Bill 613, as introduced by Senator Campbell on February 28, 1983.

If the first proposed revision in SB 613 had been enacted, the statutory right of publicity under section 3344 would have been at least as encompassing as the common law. In fact, the implication of the disjunctive “or” at the beginning of the proposed addition (“or for any other commercial purpose for which consent is required under the common law”) is that the statute would encompass more conduct than the common law right of publicity. By rejecting the proposed additional language, the legislature refused to make the statutory right of publicity as broad as the common law right of publicity.<sup>49</sup>

After the first proposed revision to subdivision (a) had been rejected, the legislature considered a second version which read, “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.”<sup>50</sup> The second proposed revision was accepted and adopted as the final version of the statutory language of subdivision (a) for section 3344 and, later, for section 990.

The current version of subdivision (a) to sections 3344 and 990 attempts to follow the grammatical structure of the original by limiting the phrase “in any manner” by a pair of modifying clauses. In its current structure, the phrase “in any manner” is modified by the clauses: (1) “on or in products, merchandise, or goods” or (2) “for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services.”<sup>51</sup> The trouble with the current version of the statute is that it failed to retain the truly alternative structure of the original language.<sup>52</sup>

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<sup>49</sup> When determining the meaning of a statute, it is proper to consider the omission of language as well as the addition of language to a statute. *See Hammond v. McDonald*, 122 P.2d 332, 338 (1942) (“An omission may be as significant as an insertion or a substitution.”).

<sup>50</sup> Senate Bill 613, as amended in Assembly on March 7, 1984.

<sup>51</sup> CAL. CIV. CODE §§ 990(a), 3344(a).

<sup>52</sup> It may be that the legislature merely intended to change the phraseology, not to change the meaning of the statute. Based upon the attempt to retain the grammatical structure of the original statute, and due to the lack of any specific statement by the legislature that it intended to so dramatically increase the scope of liability under the statute, it is reasonable to infer that no change in the scope of liability was intended. *See Hammond*, 122 P.2d at 338 (“[A] mere change in phraseology, incident to a revision of Constitution or statute, does not result in a change of meaning unless the intent to make such a change clearly appears.”).

In the original version of section 3344, the phrase “in any manner” was modified by two clauses which both limited its scope and concerned alternative conduct. The current version of the language maintains the “or” of the original statute, but does not maintain the use of two modifying clauses.

The first modifying clause “on or in products, merchandise, or goods” fails to satisfy either the requirement of limitation, or conduct which is different than the next clause (“for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services”). The language “on or in products, merchandise, or goods” does nothing to limit the phrase “in any manner.” Every use of another’s identity—other than pure oral communication<sup>53</sup>—would be actionable. Moreover, the first modifying clause (“on or in products, merchandise, or goods”) is actually broader than the second clause (“for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services”). As the first clause is broader than the second clause, the disjunctive “or” makes no grammatical sense<sup>54</sup> because an “or” can only act to coordinate alternatives. Yet, under the current version of subdivision (a) for sections 990 and 3344, the first clause and the second clause do not concern alternative conduct.<sup>55</sup>

A further incongruity regarding the language arises when it is recalled that the legislature refused to make the statutory right of publicity as broad or broader than the common law right of publicity.<sup>56</sup> The

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<sup>53</sup> Even a recording of an oral communication would constitute use “on or in products, merchandise, or goods.” Thus, under the first modifying clause, the only non-actionable conduct would be an unrecorded oral statement. However, if that pure oral communication could act to induce the purchase of a product, it arguably would be “advertisement” or “solicitation,” and thus actionable under the second modifying clause.

<sup>54</sup> Due to the difficulty caused by the “or,” it is tempting to avoid the general rule of construction that “each word should be given some value.” *In re Kent’s Estate*, 57 P.2d 901, 905 (1936).

<sup>55</sup> The only possible conduct under the second clause which would not be included under the first clause would be the unrecorded oral solicitation to purchase which utilized another’s identity as part of the solicitation.

<sup>56</sup> The difference between the common law and the statutory rights was again recognized by the court in *Montana v. San Jose Mercury Press* a full nine years after the enactment of SB 613 which modified the language of §3344(a). 40 Cal. Rptr. 2d

implication of the legislature's decision is that the statutory right of publicity, providing for attorney's fees and minimum damages which are not available under the common law,<sup>57</sup> is meant to be narrower than the common law right. However, if one retains and reads the full force of the word "or" between the clauses, one must disregard the legislature's decision to refuse the first proposed amendment to section 3344(a).

The grammatical difficulty caused by the "or" leads one to a logical impasse. The only way out of the logical impasse is to recognize the "or" for what it is, a mistake caused by committee drafting.<sup>58</sup>

D. *The Courts Have Specifically Noted That Proving a Violation of the Statutory Right of Publicity Requires a Finding That the Defendant Engaged In Advertising*

The cases which have discussed the scope of liability under the publicity statutes have clearly indicated that liability under the statutes for "commercial misappropriation" refers to advertisements, endorsements or sponsorship.<sup>59</sup> For instance, the court in *Eastwood v. Superior Court*<sup>60</sup> expressly stated that liability for a violation of section 3344 requires a finding of use of a likeness in advertising. "[T]o plead the statutory remedy provided in Civil Code section 3344, there must also be an allegation of a knowing use of the plaintiff's name, photograph or likeness for purposes of advertising or solicitation of pur-

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639, 640 (1995) ("The statutory cause of action complements rather than codifies common law misappropriation.").

<sup>57</sup> See *supra* part II.

<sup>58</sup> It is an elementary canon of judicial construction that a statute should be interpreted so as to "avoid an absurd result." *Soil v. Superior Ct.*, 64 Cal. Rptr. 2d 319, 321 (1997) See also *People v. Jenkins*, 893 P.2d 1224, 1231 (1995) ("We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.").

<sup>59</sup> There can be no claim for a common law right of publicity because the right of publicity is not descendible, according to the California Supreme Court. See *Lugosi v. Universal Pictures*, 603 P.2d 425 (1979).

<sup>60</sup> 198 Cal. Rptr. 342 (1983).

chases.”<sup>61</sup> Therefore, only commercial speech in the form of advertisements and endorsements can create liability under the right of publicity statutes.

The decision in *Eastwood* came prior to the enactment of SB 613, which amended the language of subdivision (a) of section 3344.<sup>62</sup> Despite the enactment of SB 613, no California court after *Eastwood* has overruled or distinguished the *Eastwood* court’s interpretation of section 3344.<sup>63</sup> In particular, no court has ever seen fit to give the notorious “or” in subdivision (a) its possible nonsensical reading.<sup>64</sup> The courts have adhered to sound reasoning, the clear intent of the legislature and the protection of free expression afforded by the California and United States Constitutions,<sup>65</sup> and have maintained the reasoning of *Eastwood*.

The only case which has attempted to interpret the scope of liability under section 990 is *Astaire v. Best Film & Video Corp.*<sup>66</sup> In that action, film clips of the late Fred Astaire were inserted at the start of a dance training video. The widow of Astaire,<sup>67</sup> brought suit for violation of Fred Astaire’s right of publicity. The district court considered which types of actions would constitute a violation of section 990 and found in favor of the widow on summary judgment. The Ninth Circuit

<sup>61</sup> *Id.* at 347.

<sup>62</sup> *See supra* part III.C (discussing the amendment to the language of §3344(a)).

<sup>63</sup> *See, e.g.,* *Maheu v. CBS*, 247 Cal. Rptr. 304 (1988) (referring to the language in §3344(a), as amended in 1984 by SB 613, then citing the *Eastwood* decision as the controlling authority for determining actionable conduct under Section 3344, implying that *Eastwood* still controlled).

<sup>64</sup> *See, e.g.,* *Newton v. Thomason*, 22 F.3d 1455 (9th Cir. 1994) (refusing to find that use of a singer’s name in a television series was actionable under §3344(a), negating the need to determine whether the use was exempted by some other provision of the statute).

<sup>65</sup> Potential constitutional questions are properly considered in determining legislative intent and the interpretations of a statute. *In re Marriage of Bouquet*, 128 Cal. Rptr. 427, 429-30 (1976).

<sup>66</sup> 116 F.3d 1297 (9th Cir. 1997), *modified*, 1998 WL 67329.

<sup>67</sup> The chagrine of Astaire’s widow may be explained by the use of her departed husband’s identity as an introduction of a dance lesson rather than some other product for which the widow would presumably be paid. The arguments concerning the violation of a decedent’s memory are so often belied by the pure mercenary gusto of those in possession of the right to the deceased’s likeness.



reversed the district court, finding that the use of the clips was not actionable under section 990 because use in a videotape was not advertising. This holding was consistent with the *Eastwood* decision. The *Astaire* court clarified the the language of section 990(n)<sup>68</sup> by offering examples of its application.

Example 1. Suppose someone writes a magazine article about the history of television that uses a deceased personality's name without authorization. Neither the writer nor the magazine publisher could be sued under §990: the writer's use of the deceased personality's name would be exempt from § liability pursuant to subsection (n)(1).

Example 2. Suppose that an automobile manufacturer wanted to advertise its latest model in the same magazine with a splashy color layout that included the picture of a deceased personality. Although the use appears in a magazine, the use of the deceased personality's photograph would not be exempt under subsection (n)(1) because it appears in an advertisement. The use is not permitted in subsections (n)(1), (n)(2), or (n)(3), so it is not exempt under subsection (n)(4).

Example 3. Suppose that the magazine publisher from Example 1 wanted to advertise its magazine by referring to various articles that had appeared within its pages, including the article about the history of cinema. If that advertisement used the deceased personality's name, that use would be exempt under subsection (n)(4), because the advertisement was for a magazine, a use permitted by subsection (n)(1).<sup>69</sup>

Both the *Astaire* and *Eastwood* courts concluded that according to the language of the statute and its legislative history, only use of a likeness in advertising is penalized. In all likelihood, such an inter-

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<sup>68</sup> See Cal Civil Code § 990(n).

This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:

- (1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).
- (2) Material that is of political or newsworthy value.
- (3) Single and original works of fine art.
- (4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

*Id.*

<sup>69</sup> *Astaire*, 1998 WL 67329, at \*6. For a more in depth discussion of the interpretation of § 990(n) and its application to the specific *Astaire* facts, see *id.* at \*5-7.

pretation is also the only way to avoid a fatal conflict with the United States Constitution.<sup>70</sup>

#### IV. ART: THE INTERACTION BETWEEN THE FIRST AMENDMENT AND THE STATUTORY RIGHT OF PUBLICITY

The statutory right of publicity has always been subservient to the freedom of expression. A legislative analysis of SB613 shows that there was no intent to supersede the right to freedom of expression.

This bill would recognize property rights as to the use of a deceased personality's name, voice, etc. on or in products or for advertising goods or services. The bill would state, moreover, that it shall not be construed to derogate from constitutional rights of free speech and press . . . . Irrespective of this stated intent, a defendant who has used a person's name, voice, etc. without authorization may assert a First Amendment privilege.<sup>71</sup>

A similar indication was included in another part of the SB 613 analysis,<sup>72</sup> where specific reference was made to the concurrence of Chief Justice Bird in *Guglielmi v. Spelling-Goldberg Productions*.<sup>73</sup> In that action, heirs of deceased film star Rudolph Valentino sought damages and injunctive relief against film makers who made a movie about the former movie star. The Chief Justice directly considered the interaction between the right to free expression and the right of publicity, and firmly sided with the freedom of expression.<sup>74</sup> This legislative analysis then concluded that "the primary focus of the right of

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<sup>70</sup> The Constitution of the United States is "the supreme law of the land". See U.S. CONST. art. VI; *People v. Ortiz*, 38 Cal. Rptr. 2d 59, 63 n.2 (1995) ("A statute does not trump the Constitution"). Likewise, the California Constitution's protection of expression prevails over any contrary statute. See *City of Albany v. Meyer*, 279 P. 213, 215 (1929).

<sup>71</sup> Assembly Bill Analysis: Assembly Committee on Judiciary. Bill version: As amended on July 12, 1984.

<sup>72</sup> Assembly Committee Analysis; Assembly Committee on Judiciary. Bill version: As amended on June 12, 1984; as prepared for Republican Caucus.

<sup>73</sup> 160 Cal. Rptr. 352 (1979).

<sup>74</sup> *Id.* at 359-60 ("Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression.").

publicity is commercial use of names and likenesses, not freedom of expression."<sup>75</sup>

The legislature never intended to encroach upon the freedom of expression because the express legislative intent was only to regulate activities which were not protected by the freedom of expression. Yet, the end of the above-quoted excerpt poses the inquiry regarding how far the legislative analyst believed the rights under the First Amendment actually extended. More specifically, did the First Amendment protect use of celebrity likeness on items of "merchandise"?

The interaction between free expression and the right of publicity was discussed in another section of the legislative review. After the analysis reached the conclusion that First Amendment rights were not abrogated by the statutory right of publicity, a question was raised regarding the use of celebrity identity in "art."

Is the phrase "similar medium of expression" as used in the bill intended to include other tangible art works, namely paintings, drawings, sculpture, and related art forms as opposed to products? For example, under the bill: Would a painting or sculpture in the likeness of a deceased personality be a protected item? Would the artist be immune from liability if he sells the artwork? Would such protection apply to multiples or reproductions of the original artwork when they are marketed?<sup>76</sup>

However, this analysis only raised the question, failing to provide an answer. There are difficult issues concerning the use of an image in artwork: First, does it matter whether the relevant use constitutes "art," and what does the term "art" really mean? Second, does "art" lose protection, becoming non-art, when either replicated or placed on a non-traditional media (something other than oil paint on canvas).<sup>77</sup>

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<sup>75</sup> See *supra* note 71.

<sup>76</sup> Assembly Policy Committee; Analysis Assembly Committee on Judiciary. Bill version: As amended on June 12, 1984.

<sup>77</sup> See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION. See also, Goodenough, *supra* note 4, at 719-20. Goodenough noted that potential uses of a likeness or image fall into five categories:

(1) informational use, (2) creative use, (3) advertising use, (4) icon use, and (5) performance use. The first four are common to all of the modes of mass media; the fifth depends to a large degree on the electronic media born in the twentieth century. . . . [The] icon use is clearest in the sale of pictures, figurines, and other pure representations of the person venerated. It also underlies the sale of T-shirts, lunch

Third, are uses in artwork “intended” to be actionable and thus fall within the scope of the statute? For example, would a silk screen by Andy Warhol be “merchandise?” Does “art” become “merchandise” if taken out of the frame and placed on plastic (to be used as a placemat)? Does a framed placemat become art if displayed upon a wall in a gallery or museum? More importantly, is a judge in any position to answer this question? Answering these questions will require a review of authorities outside the legislative history.

### A. *Can a Judge Be an Art Critic?*

A sensible court will stay far away from the rabbit-hole and never consider or attempt to judge whether the material before it is “art.” Answering the question at all requires remarkable pride; a “sane” person will stay far away from it.<sup>78</sup> In *Finley v. National Endowment for the Arts*,<sup>79</sup> Judge Kleinfeld captured the insurmountable difficulty of defining term and general vagueness in this field of inquiry.

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boxes, and other utilitarian items which bear the likeness of the venerated or desirable person. Eventually such a use can overlap into advertising, but there is enough clarity in the core difference to provide a usefully separate category.

*Id.*

Professor Goodenough considered such iconic use to be similar enough to “advertising” to constitute a violation of the right of publicity. However, the Restatement’s position on iconic use suffers from improper analysis because the authors of the Restatement failed to properly address First Amendment protections over non-traditional artistic formats.

<sup>78</sup> Standing tiptoe a man loses balance.

Walking astride he has no pace,  
Kindling himself he fails to light,  
Acquitting himself he forfeits his hearers.  
Admiring himself he does so alone.  
Pride has never brought a man greatness  
But, according to the way of life,  
Brings the ills that make him unfit.  
Make him unclean in the eyes of his neighbor,  
And a sane man will have none of them.

LAOTZUO, *THE WAY OF LIFE* 52 (Witter Bynner, trans., 1972).

<sup>79</sup> 100 F.3d 671 (9th Cir. 1996). The action before Judge Kleinfeld concerned performance artist Karen Finley’s assertion that the NEA could not refuse to fund her work based upon the “decency and respect” language imposed upon NEA grants

Philosophers have no way to distinguish art from non-art, or good art from bad art. There is not even a useful vocabulary for most of the distinctions we need to identify "artistic excellence":

In certain kinds of writing, particularly in art criticism and literary criticism, it is normal to come across long passages which are almost completely lacking in meaning. Words like *romantic*, *plastic*, *values*, *human*, *dead*, *sentimental*, *natural*, *vitality*, as used in art criticism, are strictly meaningless, in the sense that they not only do not point to any discoverable object, but are hardly ever expected to do so by the reader. When one critic writes, "The outstanding feature of Mr. X's work is its living quality," while another writes, "The immediately striking thing about Mr. X's works is its peculiar deadness," the reader accepts this as a simple difference of opinion. If words like black and white were involved, instead of the jargon words dead and living, he would see at once that the language was being used in an improper way.

The most used art history text points out the vagueness of the entire NEA grant scheme:

But if we must give up any hope of a trustworthy rating scale for artistic quality, can we not at least expect to find a reliable, objective way to tell art from non-art? Unfortunately, even this rather more modest goal proves so difficult as to be almost beyond our powers.

It took a century and a half for most critics to agree that photography could be art. Some have not yet admitted jazz to the pantheon, many,

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by Congress. The majority analyzed the "decency and respect" language as a content based restriction upon speech, thus requiring the statutory language not to be overly broad or unconstitutionally vague. Judge Kleinfeld argued that Ms. Finley's speech was not prohibited, just not funded. Therefore, the constitutional requirements for statutes which limit speech did not apply to Ms. Finely's claim.

In his analysis, Judge Kleinfeld argued that the First Amendment analysis was being inverted ("First Amendment law has taken some odd turns lately. We now live in a legal context prohibiting display of a cross or menorah on government property. But if a cross is immersed in urine, a government grant cannot be withheld on the ground that the art would offend general standards of decency and respect for the religious beliefs of most Americans."). *Id.* at 684 (citations omitted). Judge Kleinfeld then went on to explain that "decency and respect" language in the statute was necessarily vague, because the entire concept of what constitutes "art" is likewise impossibly vague. Hence, the courts should side-step the issue altogether.

rock and roll. Some disagree on whether Bernstein's West Side Story is art or mere entertainment, let alone excellent art. If the constitutional law principle prohibiting vague laws relating to speech applied to NEA grants, then we could no more let the government give out grants for excellent art, than let it censor literary and artistic expressions which in the opinion of some customs agent or policeman (or art critic) were bad art.<sup>80</sup>

The issue becomes even more convoluted when a judge considers what "art" means. Some instructive comments were made by a philosopher.

Since Warhol's Boxes [exhibited at the Stable Gallery in 1964] were ostensibly indistinguishable from real Brillo cartons, the question of what differentiates artworks from real things was posed in the most naked and unambiguous fashion, or, as Danto has, "its true philosophic form." And the answer emerged as follows. It is only an atmosphere of theory which differentiates artworks from other things. The essence of what art is does not consist in some perceptible property or set of properties, but rather in art's institutional setting. Broadly speaking, the artwork is what the artist designates as such, on the basis of some theory about art . . . . [In] the modern epoch, art practice has been taken to its logical limit. For once what counts as art is determined by artistic intention alone—rather than by possession of specifiable phenomenal characteristics—then we have reach a point beyond which there can be no new kinds of artwork. Anything and everything is admissible in the context of artistic theory and intention . . . . Postmodern art is fundamentally empty and a product of market forces. . . . We have, in other words, a new form of art whose very pictorial means embody a skepticism as to the possibility of high art.<sup>81</sup>

Therefore, even art experts cannot define art as "high" or "low." As a practical matter, it is difficult to tell whether something is art except when the artist proclaims that to be "art." Drafting any criteria which would satisfy everyone is impossible in this area. For example, should "art" or "high art" or "fine art" mean a different degree of difficulty and dazzle?<sup>82</sup> According to the great American philosopher

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<sup>80</sup> *Finley*, 100 F.3d at 688 (Kleinfeld, J., dissenting) (citations omitted).

<sup>81</sup> Paul Crowther, *Postmodernism in the Visual Arts: A Question of Ends*, in POSTMODERNISM, A READER 181, 182, 188 (Thomas Docherty ed., 1993).

<sup>82</sup> Those who believe that 20th Century art has been complexity without repentance should consider the poem *The Fascination of What's Difficult* by Nobel Prize Winner, Samuel Butler Yeats:

Ralph Waldo Emerson, difficulty and dazzle preclude a work from the pantheon of great art.

I found that genius left to novices the gay and fantastic and ostentatious, and itself pierced directly to the simple and true; that it was familiar and sincere; that it was the old, eternal fact I had already met in so many forms, - unto which I lived; that it was the plain *you and me* I knew so well, - had left at home in so many conversations. . . It had traveled by my side; that which I fancied I had left in Boston was here in the Vatican, and again at Milan and at Paris, and made all traveling ridiculous as a treadmill. I now require this of all pictures, that they domesticate me, not that they dazzle me. Allston's St. Peter is not yet human enough for me. It is too picturesque, and like a bronzed cast of Socrates or Venus.<sup>83</sup>

In comparison, philosopher Arthur Koestler believed that art, in its fundamental aspect, does not differ from science or the practical joker. He stated that "[all] creative activity—the conscious and unconscious processes underlying the three domains of artistic inspiration, scientific discovery and comic inventiveness—have a basic pattern in common: the co-agitation or shaking together of already existing but previously separate areas of knowledge, frames of perception or universes of discourse."<sup>84</sup>

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The fascination of what's difficult  
 Has dried the sap out of my veins, and rent  
 Spontaneous joy and natural content  
 Out of my heart. There's something ails our colt  
 That must, as if it had not holy blood  
 Nor on Olympus leaped from cloud to cloud.  
 Shiver under the lash, strain, sweat and jolt  
 AS though it dragged road metal. My curse on plays  
 That have to be set up in fifty ways,  
 On the day's war with every knave and dolt,  
 Theatre business, management of men.  
 I swear before the dawn comes round again  
 I'll find the stable and pull out the bolt.

<sup>83</sup> SELECTIONS FROM RALPH WALDO EMERSON 136 (Stephen E. Whicher ed., 1960).

<sup>84</sup> ARTHUR KOESTLER, THE GHOST IN THE MACHINE 195 (1976).

The popular conception that great art is something which creates confusion, but not pleasure, for the viewer is not upheld by philosophers.<sup>85</sup> According to Herbert Marcuse, it would be impossible to limit the designation for "high art" the works which make us scratch our collective head, but fail to provide any "entertainment" value.<sup>86</sup> Moreover, the aesthetic quality of enjoyment, even entertainment, has been inseparable from the essence of art, no matter how tragic or uncompromising the work of art is.<sup>87</sup> Indeed, much of the greatest art was extremely accessible to all levels or stratas of society. In literature, Homer, Shakespeare, and Dickens appealed to all classes. Music is democratic and cross-cultural, while imagery is accessible to anyone who is not blind. The fundamental power of the image, which has been recognized and protected by the courts,<sup>88</sup> is the power to communicate far beyond the limits of any other type of speech.<sup>89</sup>

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<sup>85</sup> Such a view does not belong to the poet either: Wallace Stevens wrote in his great poem, *Notes Towards A Supreme Fiction*, that the Supreme Fiction (the greatest art), "Must Give Pleasure."

<sup>86</sup> HERBERT MARCUSE, *EROS AND CIVILIZATION, A PHILOSOPHICAL INQUIRY INTO FREUD* 145 (1966).

<sup>87</sup> *Id.*

<sup>88</sup> The Second Circuit soundly criticized a district court for labeling visual art sold on street corners as mere "merchandise" (a view also held by the legislative analysts of SB613):

The City apparently looks upon visual art as mere "merchandise" lacking in communicative concepts or ideas. Both the court and the City demonstrate an unduly restricted view of the First Amendment and of visual art itself. Such myopic vision not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression. Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. Indeed, written language is far more constricting because of its many variants—English, Japanese, Arabic, Hebrew, Wolof, Guarani, etc.—among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court has reminded us, visual images are "a primitive but effective way of communicating ideas . . . a short cut from mind to mind."

*Berry v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

<sup>89</sup> Consider the proverb, "A picture is worth a thousand words." Consider also the words of Oscar Wilde, who may have best summed up the contradictions and difficulties involved in defining art by writing:

The artist is the creator of beautiful things.

To reveal art and conceal the artist is art's arm.



If courts remove images of people out of the area of protected art, they will delete that which makes art so powerful. The art of the image sounds the ancient belief that the image, the shadow, and the reflection hold the soul. "But the spiritual dangers I have enumerated are not only the ones which beset the savage. Often he regards his

The critic is he who can translate into another's manner or a new material his impression of beautiful things.

The highest, as the lowest, form of criticism is a form of autobiography.

Those who find ugly meaning in beautiful things are corrupt without being charming. This is a fault.

Those who find beautiful things in beautiful things are the cultivated. For these there is hope. They are the elect to whom beautiful things mean only Beauty.

There is no such thing as a moral or an immoral book. Books are well written, or badly written. That is all.

The nineteenth century dislike of Realism is the rage of Caliban seeing his own face in a glass. The nineteenth century dislike of Romanticism is the rage of Caliban not seeking his own face in a glass.

The moral life of man forms part of the subject matter of the artist, but the morality of art consists in the perfect use of an imperfect medium.

No artist desires to prove anything. Even things that are true can be proved.

No artist has ethical sympathies. An ethical sympathy in an artist is an unpardonable mannerism of style.

No artist is ever morbid. The artist can express everything.

Thought and language are to the artist the instruments of an art.

Vice and virtue are to the artist materials for an art.

From the point of view of form, the type of all arts is the art of the musician. From the point of view of feeling, the actor's craft is the type.

All art is at once surface and symbol. Those who go beneath the surface do so at their peril.

It is the spectator, and not life, that art really mirrors.

Diversity of opinion about a work of art shows that the work is new, complex, and vital.

When critics disagree the artist is in accord with himself.

We can forgive a man for making a useful thing as long as he does not admire it. The only excuse for making a useless thing is that one admires it intensely.

All art is quite useless

OSCAR WILDE, THE PORTRAIT OF DORIAN GRAY (1891).

shadow or reflection as his soul, or at all events as a vital part of himself, and as such it is necessarily a source of danger to him."<sup>90</sup>

It is interesting that celebrities' claims to a right of publicity could be viewed in context of a fear that someone using their images could injure their souls.

As with shadows and reflections, so with portraits; they are often believed to contain the soul of the person portrayed. People who hold this belief are naturally loath to have their likenesses taken; for if the portrait is of the soul, or at least a vital part of the person portrayed, whoever possesses the portrait will be able to exercise a fatal influence over the original of it.<sup>91</sup>

Thus, the image of the portrait—irrespective of the medium upon which it appears has a profoundly powerful impact. This impact is what makes the portrait an essential item of expression.<sup>92</sup> Therefore, defining art to exclude the image of a likeness would be a fundamental philosophical error. Even defining art as "fine" or "low" depending upon content or medium, would itself be error.

The most practical definition of "fine art" is included in California's Civil Code section 982, which defines "fine art" as "any work of visual art."<sup>93</sup> Therefore, a court in California can at least safely sidestep the thicket of indecipherable philosophical opinion<sup>94</sup> and assume that visual "art" is at least a picture.

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<sup>90</sup> SIR JAMES GEORGE FRAZIER, *THE GOLDEN BOUGH, A STUDY IN MAGIC AND RELIGION* 220 (Abridged ed., Macmillan 1950) (1922))

<sup>91</sup> *Id.* at 223-24.

<sup>92</sup> After all, it was the advance of portraiture that significantly contributed to western art, and Greek graphic arts began in earnest with the portrait. See SEYFFERT, *THE DICTIONARY OF CLASSICAL MYTHOLOGY, RELIGION, AND ART* 443 (1995).

<sup>93</sup> CAL. CIV. CODE §982(d)(1).

<sup>94</sup> See A.C. DANTO, *THE STATE OF ART* 217 (1987). There have been more projected definitions of art, each identified with a different movement in art, in the six or seven decades of this modern era, than in the six or seven centuries that preceded it. Each definition was accompanied by a severe condemnation of everything else as *not* art.

### B. *The Scope Of First Amendment Protection*

Although the legislature can create a right of action, and judges can enforce it, they cannot abrogate a constitutional right.<sup>95</sup> Thus, the musings of a legislative analyst or the over-enthusiasm of a celebrity-worshipping judge must give way to the power of the freedom of expression.<sup>96</sup> The case law regarding freedom of expression establishes that (1) art is fully protected by the First Amendment<sup>97</sup> and (2) the sale of art is likewise protected by the First Amendment.<sup>98</sup> Moreover, the

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<sup>95</sup> See *supra* note 71.

<sup>96</sup> Legislative preferences cannot overcome the freedom of expression. See, e.g., *Gonzales v. Superior Court*, 226 Cal. Rptr. 164, 167 (1986) ("Mere legislative preferences or beliefs regarding matters of public convenience may not support the diminution of such vital rights as the exercise of free speech in our democracy.") (citations omitted).

<sup>97</sup> See, e.g., *Berry v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (following the U.S. Supreme Court, explaining that expression wholly devoid of political content (including entertainment), was fully protected by the First Amendment). See also *Winters v. New York*, 333 U.S. 507, 510 (1948) ("The First Amendment shields more than political speech and verbal expression; its protections extend to entertainment"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (applying First Amendment to film); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (applying to theater); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (applying the First Amendment to music, without regard to words).

The First Amendment guarantees of freedom of speech and expression extend to all artistic and literary expression, whether in music, concerts, plays, *pictures* or books. See, e.g., *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (noting, in the context of non-obscene nude dancing, that "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."). See also *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567 (9th Cir. 1984) ("[M]usic is a form of expression that is protected by the first amendment."); *Spiritual Psychic Science Church v. City of Azusa*, 39 Cal.3d 501, 512, 217 Cal.Rptr. 225 (1985) ("[T]he life of the imagination and intellect is of comparable import to the presentation of the political process; the First Amendment reaches beyond protection of citizen participation in, and ultimate control over, governmental affairs and protects in addition the interest in free interchange of ideas and impressions for their own sake, for whatever benefit the individual may gain."); *McCollum v. CBS, Inc.*, 249 Cal.Rptr. 187 (1988).

<sup>98</sup> The physical act of sale of visual art was protected by the First Amendment. See *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 & 768 (1988). See also *Riley v. Nat'l Fed'n of Blind of North Carolina*, 487 U.S. 781, 801 (1988) ("It

degree of protection afforded by the right to freedom of expression is not affected by the sale of the speech.<sup>99</sup> (3) The use of speech on "merchandise," such as t-shirts, is thus protected by the First Amendment.<sup>100</sup> (4) The rights to freedom of expression are broader under the California Constitution than under the Federal Constitution.<sup>101</sup>

Full protection of all visual art is also consistent with the language of the publicity statutes themselves. No logical purpose would be served by distinguishing amongst a picture on the cover of a magazine,

is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

<sup>99</sup> Constitutional protection does not hinge upon whether the speech is distributed free of charge or is sold. If the speech is protected, it is protected irrespective of the distribution mechanism. The California Supreme Court has stated that

it is manifest that speech does not lose its protected character when it is engaged in for profit. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. . . . Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. The idea is not sound. . . . that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge. . . . that an organization for which the rights of free speech and free assembly are claimed is one "engaged in business activities" or that the individual who leads it in exercising these rights receives compensation for doing so.

*Spiritual Psychic Science Church of Truth, Inc. v. Azusa*, 217 Cal. Rptr. 225, 228-29 (1985) (citations omitted).

<sup>100</sup> See *Gaudiya Vaishnava Soc. v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir. 1991) (ruling that "merchandise," such as a t-shirt, which showcased textual expression, was protected as speech).

<sup>101</sup> The freedom of expression guaranteed by the First Amendment of the U.S. Constitution and made applicable to the States by the Fourteenth Amendment, is protected with greater force and broader scope in the California Constitution: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." *Gilbert v. National Enquirer, Inc.*, 51 Cal. Rptr. 2d 91, 96-97 (1996) (citing CAL. CONST. art. I §2(a)). This provision is "more definitive and inclusive than the First Amendment." *Wilson v. Superior Court*, 119 Cal. Rptr. 468 (1975). Even mere "entertainment" is entitled to the same constitutional protection as the exposition of ideas. *Guglielmi v. Spelling-Goldberg Productions*, 160 Cal. Rptr. 352, 356-57 (1979) (Bird, C.J., concurring). In fact, there is nothing in the California Constitution which requires that the speech be factual or scientifically valid, probably correct, or anything else—only that it be a "sentiment."

a picture in a book, or a picture sold alone.<sup>102</sup> There is no constitutional difference between the pictures. Moreover, the intent of the statutes (to penalize unauthorized use of an image in advertising while steering clear of the First Amendment) directs that art should be fully protected.

However, there is an exemption under section 990 for “single and original works of art.”<sup>103</sup> These two apparently understandable words turn out to be nearly incomprehensible in the context of the statute. First, the word “original” defined in four ways:

1. Existing or belonging at or from the beginning or earliest stage; primary, initial, innate. Earliest in original sin, below.
2. That is the origin or source of something from which another is copied, translated, etc.
3. Proceeding directly from its source; not derivative or imitative; spec., make, composed, etc., by a person himself or herself.
4. Given to or displaying independent exercise of the mind or imagination; inventive, fresh creative.<sup>104</sup>

The first definition is easily discarded. There is no reason to believe that this exemption applies only to some archaic artwork. The second definition could be relevant if “original” was not coupled with the word “single” in the statute. If by “original,” the drafters mean the first version of artwork, as opposed to the second version of the artwork, or the “copy” of the artwork, there is an “anti-redundancy” problem<sup>105</sup> for reading the pair of words. If original merely means the first, the meaning of “single” is unclear. Obviously, there cannot be a second “first,” thus the word “single” would be redundant. Assuming that the phrase cannot be interpreted as “single and single” or “first and first,” the second definition of “original” is difficult to justify.

Moreover, defining “original” as that from which the others are copied is extraordinarily problematic when it comes to art. Graphic artists often make at least several sketches, which are called “stud-

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<sup>102</sup> A film is just a series of individual pictures shown in rapid succession. Thus, treating a lithograph different from a film is to effect a penalty on the artist for having made too few images.

<sup>103</sup> CAL. CIV. CODE §990(n)(2).

<sup>104</sup> THE SHORTER OXFORD ENGLISH DICTIONARY (1995).

<sup>105</sup> ACL Technologies, Inc. v. Northbrook Property and Casualty Ins. Co., 22 Cal. Rptr. 2d 206, 214 (1993) (holding that terms are not to be read as redundant).

ies.”<sup>106</sup> The final work of art, which is exhibited to the public, is not an “original,” but the sketches are the “original” review of the work. Certainly, the legislature did not intend to protect the sketches, which the public hardly ever sees, leaving the public work of art vulnerable to attack.

Another problem arises from forms of fine art which do not have any true “original.” For instance, in the context of a metal sculpture, the “original” is a cast into which the metal is poured. The first sculpture out of the cast or mold is not an “original,” because the second sculpture is not a copy of the first sculpture. The same problem exists in the context of other forms of art such as silkscreens or lithographs. There are simply no true “original” works of art.

Likewise, the third definition is not very helpful. Under this definition, an artist could not claim the exemption for his artwork, unless the artist actually made the artwork himself. While the proposition appears to be logically necessary, it is superfluous because only an artist who actually created the artwork in the first place could be a potential defendant.

The fourth definition would require a judge to be a judge of not just art, but the degree of inventiveness apparent in the artwork. The judge would determine if the artwork was sufficiently novel or inventive such that it would warrant protection. The problems with that standard for protection are extraordinary. The subject of analysis could be technique, genre, or something else and determining whether the work is “unique” enough for protection, or unique at all, is an especially nebulous and onerous judicial task.

Another potential meaning for the word “original” is borrowed from copyright law, where it merely delineates works sufficiently different from other works to be copyrightable.<sup>107</sup> As there is a rather low threshold for copyrightable works, every work (even a collage) would

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<sup>106</sup> “Study: . . . a preliminary painting or drawing of a work of art . . . .” THE NEW LEXICON WEBSTER’S DICTIONARY (1988).

<sup>107</sup> See Edward C. Wilde, *Replacing the Idea/Expression Metaphor With a Market Based Analysis in Copyright Infringement Actions*, 16 WHITTIER LAW REVIEW 793, 794-803 (1995).

constitute an original work of art.<sup>108</sup> Yet, again, this meaning is unsatisfactory.

Moreover, if the word "original" means the source for subsequent copies (which is itself problematic), the word "single" cannot logically refer to only one copy because of the anti-redundancy principle. However, the word "single" also suffers from other logical constraints. An artist may make a series of works on a particular subject and it is unclear whether the statutes limit an artist to only one "single, original" work, total, on a subject.

If the work is reproduced in a book in a museum program, or on a television program, the work loses its protection, because it has been reproduced. Does the work then, as displayed in the museum program, subject the artist (or the museum) to liability? Why should a picture which originally appears in a book be freely reproduced, while a picture which originally appears on a canvas be limited to only one copy? The word "single" raises confusion without providing any useful meaning. There is also the problem with such artworks as lithographs,<sup>109</sup> silkscreens, and metal sculptures, where the work is developed specifically because multiple "originals" (of a sort) are created. In fact, the meaning of the work is tied to the manner of production and the medium of expression. The work means something different if there are a billion prints, a thousand prints, or a single print.<sup>110</sup> Therefore a public mural and an oil painting hanging in a private library "mean" completely different things. Thus, the creation of multiple originals may not have even been considered by the legislature when drafting the statutory phrase.

The right to reproduce speech and then sell that speech for a profit is assumed. The U.S. Constitution does not limit an author to a "single" book or a publisher to a "single" printed copy of a newspaper. As there is no constitutional difference between a film (which consists of thousands of individual pictures shown in rapid succession) and a

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<sup>108</sup> See *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991) (declaring the standard for originality in copyright law).

<sup>109</sup> The number of lithographs actually printed affects the meaning of the work of art.

<sup>110</sup> On this point, the statutory right to reproduction of graphic materials under California Civil Code section 982 is relevant.

lithograph (which is one picture), there is no constitutional difference as to the number of "originals" which may be sold. An artist should not be forced to comply with an artificial restriction of only "one" painting, while a film-maker can make thousands of copies of his film (each film consisting of thousands of pictures).<sup>111</sup>

Thus, the phrase "single and original" reflects a collapse of thinking on the part of the statute's drafters. The phrase is linguistically problematic and runs afoul of the constitutional protections provided for freedom of expression. Section 990 is flawed when analyzed as an analog of the other exemptions because there is no sound reason to differentiate between two books and two lithographs. The phrase fails under every form of analysis or definition. As the phrase is nonsensical, it cannot properly be relied on by a court as the basis for suppression of any speech. Neither can a court justify application of this phrase on any other grounds because no court can be certain of what the phrase truly means. Thus, the legislature should remove this unhappy language from the statute, and provide a plain exemption for "works of art."

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<sup>111</sup> There are no single speech examples of permissible conduct even though there are limited categories of speech which do not have full constitutional protection. These include obscenity, defamation, incitement, "or situations involving some grave and imminent danger the government has the power to prevent." *See, e.g.,* *Simon & Schuster v. New York Crime Victims Board*, 502 U.S. 105, 127 (1991). *See also* *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa*, 217 Cal.Rptr. 225, 231 (1985). There is no such thing as a single copy exception for unprotected speech. A single photograph of child pornography kept in the privacy of one's own home is not protected speech. A single defamatory statement is not protected, i.e., it is not necessary to sell thousands of copies of a defamatory statement for the statement to become unprotected. The same is true for any other form of unprotected speech. Inciting a riot on one occasion is unprotected and there is no need to start riots on several occasions for the speech to become unprotected. A single act to conspire to commit a criminal act is unprotected. Thus, there is no such thing as a "single copy" protection under the First Amendment. Where speech is unprotected, it is always unprotected in a single copy or in multiple copies without a difference in standard.



### C. *The Issue of "Merchandising"*

The use of celebrity images in "merchandising," a use which the Restatement (Third) of Unfair Competition termed "iconic,"<sup>112</sup> presents interesting issues in relation to the scope of protection provided for "art." Although the legislative history for the right of publicity statutes merely presents the issue of merchandising usage as a question without an answer, the cases indicate that "iconic" use of celebrity should not constitute a violation of the right of publicity. This result is inevitable on the assumption that the protection of the freedom of expression extends to speech included in merchandise, and exempts it from the scope of the statutes.<sup>113</sup> In the alternative, the assumption that all speech protected by the First Amendment simply does not fall within the scope of statutory liability would lead to the same conclusion.

The interaction between the First Amendment and the use of a celebrity in "merchandise" was considered to some degree in *Astaire v. Best Film & Video Corp.*<sup>114</sup> In *Astaire*, the widow of dancer Fred Astaire argued to limit the reading of the exemptions under section 990 to "legitimate" types of protected expression, as opposed to "trivial" uses such as the dance instruction video at issue in the case.<sup>115</sup> In its analysis of the statutory right of publicity, the Ninth Circuit included a detailed review of section 990's legislative history, as it relates to the exemptions provided under section 990 and the First Amendment:

On June 12, 1984, section 990(n) appeared for the first time in the amended legislation. It read:

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<sup>112</sup> See *supra* note 77.

<sup>113</sup> See *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996) (interpreting the Oklahoma right of publicity statute, which is "virtually identical" to the California statutes). *Id.* at 968. *Cardtoons* had manufactured baseball cards which contained the names and likenesses of baseball players. The court ruled that the baseball cards violated the Oklahoma right of publicity statute. *Id.* However, the court held that the First Amendment outweighed any claim for violation of the right of publicity. See also Rebecca Kwok, *Cardtoons v. Major League Baseball Players Association: Fair Use or Foul Play?*, 5 UCLA ENT. L.R. 315 (1998).

<sup>114</sup> 116 F.3d 1297 (9th Cir. 1997).

<sup>115</sup> *Astaire v. Best Film & Video Corp.*, 1998 WL 67329 at \*7.

Nothing in this section shall be construed to derogate from any rights protected by constitutional guarantees of freedom of speech or freedom of the press, such as the right to use a deceased personality's name, voice, signature, photograph, or likeness in a play, book, magazine, newspaper, film, television program, or similar medium of expression, to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press.

A staff report on this version of SB 613 criticized this language for being superfluous: "[i]rrespective of this stated intent, a defendant who has used a person's name, voice, etc. without authorization may assert a First Amendment privilege." Shortly thereafter, §990(n) was amended to its current version, which does not contain the language explicitly limiting the scope of its exemption to constitutionally protected uses.

The Legislature's removal of the language "to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press" from SB 613 is a telling clue as to the Legislature's intent. By deleting this language, the Legislature demonstrated an intent to adopt a broader exemption that was not limited to constitutionally protected uses. In other words, the evolution of subsection (n) demonstrates that the interpretation of the statute we conclude is required by the plain language is consistent with the Legislature's intent.<sup>116</sup>

Thus, the court implied that the intent of the legislature was to provide a zone of protection for speech that was broader than the protection provided by either the Constitution of California or the Constitution of the United States. On that basis, the court continued to examine the types of conduct that the legislature intended to be actionable:

The same staff report on SB 613 describes the bill generally as follows:

[T]he bill is intended to address circumstances in which (a) commercial gain is had through the exploitation of the name, voice, signature, photograph, or likeness of a celebrity or public figure in the marketing of goods or services or (b) a celebrity or public figure is subjected to abuse or ridicule in the form of a marketed product. Such goods or services typically involved the use of a deceased celebrity's name or likeness, e.g., on posters, T-shirts, porcelain plates, and other collectibles; in toys, gadgets, and other merchandise; in look-alike services.

To the extent these reports reflect the Legislature's intent when it enacted §990, our conclusion that Best's use of the Astaire film clips is

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<sup>116</sup> *Astaire*, 1998 WL 67329 at \*7-8 (citations omitted).

exempt from liability is not inconsistent with this expressed intent. Best's use in no possible way subjects Fred Astaire to abuse or ridicule. Best's use is also nothing like the exploitative marketing uses described in these legislative staff reports.

We recognize, however, that Best placed these film clips in its videotapes for a reason: to make the videotapes more salable. Nevertheless, neither the statute nor the legislative history provides any support for treating Best's use of the Astaire film clips any differently from the use of the same clips in a documentary about dance in film, a use that Mrs. Astaire concedes would be exempt from liability. In short, whether the use is included to increase the marketability of a product cannot be the test of whether it is exempt from §990 liability. . . .

[We] conclude that the legislative history does not support Mrs. Astaire's contentions that the exception for use in a "play, book, magazine, newspaper, musical composition, film, radio or television program" is limited to "legitimate historical, fictional, and biographical accounts of deceased celebrities." . . . Best's use of the Astaire film clips is accordingly exempt.<sup>117</sup>

Thus, even use of a celebrity likeness to make a product more salable is not actionable under §990. However, the *Astaire* court did note that there was an issue regarding the statute's differentiation between different types of products.

The videotape in *Astair* was "merchandise" because it was a product which was sold. However, the clerical distinction between books and t-shirts, the former constituting a legitimate medium while the latter does not, is meaningless and reflects a lack of critical thinking. A t-shirt bearing text is merely speech written on cotton. Like cotton cloth, paper can contain cotton fibers too. For these purposes, there is no legally significant differences between speech imparted on t-shirts, as opposed to speech contained in books.

Moreover, "abuse or ridicule" of a celebrity cannot form the basis for an actionable tort (defamation), unless there is a finding of actual malice.<sup>118</sup> A celebrity is most often considered to be a public figure under the *New York Times* standard.<sup>119</sup> Permitting a public figure

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<sup>117</sup> *Id.* \*8-9 (citations omitted).

<sup>118</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>119</sup> *Id.* See also *Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 392 F.2d 417 (9th Cir. 1968). "'Public figures' are those persons who, though not public offi-

plaintiff to avoid defamation and proceed on an alternative theory, in order to avoid the actual malice hurdle, is unconstitutional. In fact, the United States Supreme Court held in *Hustler Magazine, Inc. v. Falwell*<sup>120</sup> that the First Amendment *requires* a finding of “actual malice” for liability when a public figure brings an action based upon disagreeable speech. Likewise, an action for “abuse or ridicule” exhibited on a t-shirt would be subject to the constitutional requirement of “actual malice.”

The commentators have argued both for and against the value of “merchandise,” like t-shirts, in public discourse. For example, one author argues that merchandising has no social value in discourse:

The argument that enforcing the right of publicity may conflict with artistic expression and the communication of ideas is least persuasive in cases involving merchandising uses of celebrity identity. After all, plastic pencil sharpeners, bubble gum cards, and board games are hardly vehicles through which ideas and opinions are traditionally disseminated. In terms of information or entertainment value, a Howard Hughes T-shirt and a fictionalized autobiography of Hughes are quite distinguishable. Appropriation of name and likeness to sell a product rather than tell a story or inform the public seems intuitively wrongful, perhaps because speech that proposes a transaction between seller and buyer in theory contributes little to the Holmesian marketplace of ideas.<sup>121</sup>

There is a fundamental flaw in the reasoning of commentators who attempt to distinguish between “merchandise” and traditional media of communication. The conclusion is assumed and then used to prove the argument in what amounts to “begging the question.” All speech in books is not necessarily better than all speech on t-shirts. A t-shirt could bear a reprint of the Declaration of Independence, the Mona Lisa, or any other “legitimate” text or graphic, while untold numbers

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cials, are ‘involved in issues in which the public has a justified and important interest.’ Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done.” *Id.* at 419.

<sup>120</sup> 485 U.S. 46 (1988).

<sup>121</sup> Fred M. Weiler, Note, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 261-62 (footnotes omitted) (1994).

of books have been filled with intellectual nonsense. Moreover, speech on a t-shirt often may be more powerful due to its necessary brevity, not unlike visual art "merchandise," which can be far more valuable as expression than as written language.<sup>122</sup>

Therefore, differentiation between mediums of communication ultimately derives from pure snobbery. For example, a book about X contains information about X. Those with better educations and more money tend to like information from books. Hence, such people decide that their preferred source of information is a privileged medium of communication.

Other people also want information about X. However, these other people tend to like visual, as opposed to written or verbal, information packages. In addition, these other people often do not have as much money as lawyers. Thus, they may prefer a postcard of an image over a book, as a source of communication. Images on coffee cups, posters and t-shirts, tend to embody positive imagery. After all, the products are sold to people who like the celebrity. However, this positive expression would be "merchandise." Any society which permits negative imagery, as long as it is in book format, and yet suppresses affirmative imagery, because it is communicated on a coffee mug, is perverse.

Argument that merchandising per se has no value in the realm of public discourse disregards common experience. The ubiquity and semiotic value of "mere merchandise"<sup>123</sup> imbues it with the value of legitimate expression. In fact, references to celebrities, television shows, music and other items of the popular culture form the basis of much public discourse. Of course, recognition that "merchandise" has value in public discourse does not mean that all trademark, copyright and patent protection for expression and ideas should be extinguished.

Moreover, commentators support the position that merchandising can affect public discourse in profound ways. Professor Madow gives an example of how mere merchandising was used as a fundamental medium of symbolic expression for an entire subcultural community of people:

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<sup>122</sup> *Berry v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

<sup>123</sup> For a detailed and well-reasoned analysis of the semiotic value of common merchandise, see JACK SOLOMON, *THE SIGNS OF OUR TIMES* (1988).

In the mainstream culture of the 1940s and 1950s, Judy Garland was just "the girl next door." What she meant for most Americans was normality and ordinariness. That, presumably, was just what MGM wanted "Judy Garland" to mean. [It may also have been, though this is less clear, the meaning that Garland sought for herself.] . . . [A]fter Garland's firing by MGM and her suicide attempt, urban gay men found in Garland's image, particularly her androgyny and her fragile facade of normality, a powerful means of "speaking to each other about themselves." They reworked or recoded Garland in a way that served their own particular subcultural needs and interests. And, what is most important to see, this popular disruption and reorganization of meaning considerably increased the "publicity value" (market value) of Garland's image. The additional, alternative meanings that were popularly generated created whole new markets for Garland's image—for Judy Garland impersonators and Judy Garland merchandise—that would not otherwise have existed.

For instance . . . "[i]n 1982, Rockshots, a gay greetings card company, issued a card depicting Garland as Dorothy, in gingham with Toto in a basket, in a gay bar, with her opening line in *Oz* as the message inside." It is difficult to see how Garland, or MGM for that matter, could assert a plausible moral claim to *these* particular merchandising values. If these values were the product of something that can be called "labor" at all—a point that is not free from doubt or difficulty—had not the relevant labor, the semiotic work, really been done by Garland's gay male "fans" rather than by Garland herself (or MGM)?<sup>124</sup>

Professor Burnett also supports the conclusion that merchandise can be a vehicle for expression.

[P]roducts may serve as a means of self-expression. This has been demonstrated by the growing popularity of "merchandising properties" and the licensing business that has flourished as a result. A range of intellectual property laws may be involved in the management of the production and sale of these products, from trademark and unfair competition laws to copyright. . . . What social purpose is served by the use of a famous face on any of those items? Usually, these items of memorabilia derive their market value almost entirely from the fame of the person portrayed and are not frequently purchased for the informational or cultural message they convey. The associative value of the items is the basis of their commercial value. In *Memphis Development Foundation v. Factors Etc.*, the district court considered the expressive value of a statuette of Elvis Presley. . . . The court allowed the plaintiff to build the

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<sup>124</sup> Madow, *supra* note 6, at 194-95.

statue in tribute but prohibited the manufacture, distribution and sale of the statuettes. Although the first amendment analysis was not explicit, the decision rests on the assumption that the statuettes served no informational or cultural purpose. . . . The function of the item is regarded as exploitation of another's identity rather than expression of the creator's ideas about politics, entertainment or fame. Framing the question in another way, why should the creation of a sculpture of a particular person be treated differently from the creation of a play concerning that person?<sup>125</sup>

Other examples are also illustrative of the effect of merchandising on culture. Consider the semiotic value of "baseball cards," "toy-cigarettes," or "Barbie dolls."

The economic value of merchandising has become so powerful that it is not only an aspect of popular discourse, but can even affect the limits of such discourse.

Similarly, there are now movies created principally for their merchandising tie-ins. Studios have, for example, become keenly interested in comic strips because their characters—Batman, Casper, Dick Tracy—have "marketing prowess" in the form of licensing opportunities. As a result, the avenue of communication between producer and consumer is now so clogged with merchandising these images, the suspicion is that films with genuine artistic merit will not be able to attract public attention.<sup>126</sup>

If merchandising concerns independently limit speech, a potentially effective system of censorship could develop by itself.<sup>127</sup> Therefore,

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<sup>125</sup> Barbara A. Burnett, *The Property Right of Publicity and the First Amendment: Popular Culture and the Commercial Persona*, 3 HOFSTRA PROP. L.J. 171, 200-02 (1990) (footnotes omitted).

<sup>126</sup> Dreyfuss, *We are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 145-46 (1996) (footnotes omitted).

<sup>127</sup> The need to prevent censorship was noted by the California Supreme Court when it refused to extend the right of publicity so as to trample upon the right to freedom of expression:

While few courts have addressed the question of the parameters of the right of publicity in the context of expressive activities, their response has been consistent. Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity.

expansion of the right of publicity, particularly in the context of merchandising, will necessarily taint areas of disclosure that are guarded by freedom of expression.

A contrary argument indicates that:

there are legitimate policy reasons for protecting celebrities' rights. . . . Legislators and courts have found [it] worthy of protection . . . [T]he free speech and free press clauses of the First Amendment should not protect the media's merchandising of products, for whatever reason and regardless of whether or not the media seek a profit, when those products, if not merchandised by the media, would infringe on an individual's right of publicity.<sup>128</sup>

Such an argument is flawed because a law should be deemed constitutional before it is scrutinized for its public policy. However, the reverse is not true. Just because a law advances some public policy does not necessarily mean the law is constitutional.

According to the Ninth Circuit in *Gaudiya Vaishnava Society v. City and County of San Francisco*,<sup>129</sup> merchandise containing speech should be protected as speech. A pertinent description of the "speech" at issue follows:

All five of the nonprofit groups have over the past several years sold various message-bearing ("expressive") merchandise such as T-shirts, books, buttons, stuffed animals, jewelry and bumper stickers. . . . Gaudiya Vaishnava Society, a religious organization, performs sankirtan, a public ritual intended to disseminate the teachings of and win converts to Gaudiya Vaishnavism. In the course of sankirtan, members collect alms and offer clothing for sale, some of which bear messages related to the organization's religious beliefs. Greenpeace Pacific-Southwest, Inc., is a nonprofit political group which advocates numerous environmental causes. As part of its activities, Greenpeace sets up tables in the City of San Francisco to bring its message to the general public and solicit financial contributions and membership. At these tables Greenpeace sells a wide variety of merchandise, including

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*Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 871-72, 160 Cal. Rptr. 352, 359-60 (1979)

<sup>128</sup> Darren F. Farrington, Note, *Should the First Amendment Protect Against Right of Publicity Infringement Actions Where the Media is Merchandiser? Say It Ain't So, Joe*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 779, 819, 820 (1997).

<sup>129</sup> 952 F.2d 1059 (9th Cir. 1990).



message-bearing T-shirts. All of its merchandise is intended to transmit messages, verbally or symbolically, about the causes Greenpeace espouses. San Francisco Nuclear Weapons Freeze Campaign is an unincorporated political organization that advocates "freezing" and reversing the production of nuclear arms. The organization is engaged in a campaign to inform the public about its beliefs. The group communicates its message and solicits money by setting up tables in San Francisco to distribute literature, solicit signatures on petitions, and sell buttons, postcards, bumper stickers and T-shirts. San Francisco CISPES is the San Francisco chapter of the Committee in Solidarity with the People of El Salvador. [CISPES] is opposed to the United States foreign policy regarding El Salvador and other Central American countries. To raise funds and disseminate its message, CISPES operates street corner tables soliciting donations and offering for sale flyers, buttons, message-bearing T-shirts and literature. San Francisco Lesbian-Gay Freedom Day Parade and Celebration Committee, Inc. is a nonprofit educational organization which organizes civil rights events. The organization raises its operating budget by selling message-bearing buttons and T-shirts.<sup>130</sup>

The Ninth Circuit agreed that the sale of expressive items (such as t-shirts bearing speech) is protected by the First Amendment, even though the selling itself is a commercial activity. The court rested its decision on the dual nature of selling products in order to communicate a message.

[The plaintiffs] sell their merchandise in conjunction with other activities in order to disseminate their organizations' message. The nonprofit groups inform individuals of their causes through distributing their literature, engaging in persuasive speech, and selling merchandise with messages affixed to the product. This "informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," is fully protected speech. Where the pure speech and commercial speech by the nonprofits during these activities is inextricably intertwined, the entirety must be classified as noncommercial and we must apply the test for fully protected speech. Accordingly, the district court correctly found that the San Francisco Ordinance impermissibly regulates protected speech in a public forum.<sup>131</sup>

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<sup>130</sup> *Id.* at 1060.

<sup>131</sup> *Id.* at 1065 (citations omitted). For a more in depth discussion of the precedent cases supporting the Ninth Circuit's decision, see *id.* at 1063-65.

Moreover, the California courts have implicitly utilized the same analysis when determining whether speech embodied in “merchandise” is protected. In *Montana v. San Jose Mercury News*,<sup>132</sup> the defendant created some posters (commonly referred to as “merchandise”) which depicted photographs and drawings of Joe Montana, a public figure. Montana sued the defendant for misappropriation of name and likeness. The appellate court ruled that such “speech” about a public figure was protected by the First Amendment, as supported by analogous case law.

[In *Paulsen v. Personality Posters, Inc.*,] comedian Pat Paulsen sought a preliminary injunction to bar a poster marketer from selling posters of him with the words “FOR PRESIDENT” written at the bottom. Paulsen had conducted a mock campaign for the presidency in 1968. In discussing whether Paulsen’s statutorily defined “right of privacy” had been abridged, the court observed “that the statute was not intended to limit activities involving the dissemination of news or information concerning matters of public interest . . . [S]uch activities are privileged and do not fall within ‘the purposes of trade’ contemplated by Section 51 [New York’s equivalent of California Civil Code section 3344], notwithstanding that they are also carried on for a profit. Thus, it was early held that newspapers, magazines, and newsreels are exempt from the statutory injunction when using a name or picture in connection with an item of news or one that is newsworthy and such privileged status has also been extended to other communications media including books, comic books, radio, television and motion pictures. Indeed, it is clear that any format of ‘the written word or picture,’ including posters and handbills will be similarly exempted in conjunction with the dissemination of news or public interest presentations.”

[W]hen Joe Montana led his team to four Super Bowl championships in a single decade, it was clearly a newsworthy event. Posters portraying the 49’ers’ victories are, like the poster in Paulsen, a “form of public interest presentation to which protection must be extended.”<sup>133</sup>

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The decision in *Winterland Concessions Company v. Sileo*, 528 F. Supp. 1201 (N.D. Ill. 1981) is distinguishable. The court found that selling “bootleg” t-shirts bearing trademarks of various rock ‘n’ roll bands was actionable under a common law right of publicity and not protected by the First Amendment.

<sup>132</sup> 40 Cal. Rptr. 2d 639 (1995).

<sup>133</sup> *Id.* at 641 (citations omitted).

Therefore, both the Ninth Circuit and the California courts agree that the protection of speech is not dependent upon the medium on which the speech appears.

V. THE ONLY WAY TO RECONCILE THE RIGHT OF PUBLICITY WITH THE FREEDOM OF EXPRESSION IS TO CONCLUDE THAT THE PUBLICITY STATUTES ONLY APPLY TO ADVERTISING AND ENDORSEMENTS

When the publicity statutes were drafted, the legislature was fully aware of the ever-existent freedom of expression. The legislature would have been aware that only a very few narrow categories of speech are not protected by the First Amendment. Therefore, the legislature clearly had no intent to abrogate the freedom of expression, nor did the legislature ever believe that the right of publicity would supersede the First Amendment in any way. Finally, the legislature would have been aware that the First Amendment applies to nearly every type of communication describable.<sup>134</sup> In light of the grand scope of the freedom of expression and the limited number of categories which were not protected, the legislature could target only “commercial speech” or advertising.<sup>135</sup>

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<sup>134</sup> See discussion in Section IV.

<sup>135</sup> The courts have expressly stated that the test for commercial speech is whether the use of the name and image is in the form of an advertisement for a product wholly unrelated to the person where identity is captured. However, the mere sale of speech does not transform speech into “commercial speech.” See *supra* note 99.

Although sales may seem to transform the speech commodity into “commercial” speech, the opposite is actually true. “Commercial speech,” for purposes of First Amendment analysis, is not speech which is “bought and sold.” In fact, the act of buying and selling speech as a commodity, precludes a finding that the speech is “commercial speech.” The Supreme Court has defined “commercial speech” as speech which is both contained in an advertising format and seeks to induce a consumer to purchase something *other than* the speech at issue. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983). Where the speech constitutes the product itself, the speech is not commercial. For instance, in *U.D. Registry, Inc. v. State*, 40 Cal. Rptr. 2d 228 (1995), the court considered whether the relevant speech was “commercial” merely because it was sold. The court explained that sale of speech does not make the speech “commercial speech”:

The test for identifying commercial speech is whether the expression at issue proposes a commercial transaction. The fact that UDR sells the information does not

Limiting the scope of the "right of publicity" statute to commercial speech would meet the requirements of the U.S. Constitution because a statute that affected only commercial speech would not implicate categories of speech that enjoy full constitutional protection. Moreover, a statute which affected only false advertisement might pass the intermediate scrutiny test for limitations on commercial speech.<sup>136</sup> In this way, the legislature could protect against deceptive advertisements<sup>137</sup> by simply allowing a celebrity to sue when an advertisement falsely proclaimed that a particular celebrity endorsed a product.<sup>138</sup> Thus, with existing law in mind, the legislature targeted certain types of deceptive advertising by drafting a statute which attacked only the deceptive advertising, while purposefully avoiding penalizing activities protected by the U.S. Constitution.

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transform it to commercial speech any more than the fact that a magazine or newspaper is sold makes its contents commercial speech. "Some of our most valued forms of fully protected speech are uttered for a profit."

*Id.* at 230 (citations omitted).

<sup>136</sup> The test for limitations on commercial speech was recently described in *Destination Ventures, Ltd. v. F.C.C.*, 844 F. Supp. 632, 635 (D. Or. 1994) ("More recently, the Supreme Court has said that restrictions on commercial speech must: (1) implement a substantial governmental interest; (2) directly advance that interest; and (3) be narrowly tailored to achieve the desired objective.") See *Board of Trustees v. Fox*, 492 U.S. 469, 109 S.Ct. 3028 (1989).

<sup>137</sup> See, e.g., *Oxycal Laboratories, Inc. v. Jeffers*, 909 F. Supp. 719, 723 (S.D. Cal. 1995).

<sup>138</sup> Alternatively, falsely imputing an endorsement to a celebrity could create defamation concerns. For example, while a non-defamatory newspaper article about a public figure would be privileged, a newspaper article which falsely attributed a quotation or an opinion to that same public figure could very well become the basis for liability based on defamation. See, e.g., *Mason v. New Yorker*, 501 U.S. 496 (1991). The cases which have held that liability existed for misappropriation of name and likeness have uniformly included an implied finding that the defendant falsely imputed speech to the plaintiff. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (declaring liability based upon the defendant's creation of a false implication that Waits endorsed Frito-Lay products).

## VI. CONCLUSION

In order to provide the constitutionally-mandated “breathing space” for the freedom of expression, courts have been very careful to limit right of publicity victories to cases based upon false product endorsement.<sup>139</sup> All other speech relating to public figures is protected. A very simple one-question test has been applied to determine whether the speech falls within the narrow ambit of the right of publicity statute: What is the relationship between the product and the person? If the product is itself about the public figure portrayed, there is no actionable conduct. For example, a poster of Joe Montana does not violate Montana’s right of publicity because it is about Joe Montana.<sup>140</sup> A baseball card is protected because it includes information about the player depicted on the card.<sup>141</sup> A sculpture of a model is protected because it is about the model.<sup>142</sup> In cases where the speech was about a celebrity, both in California and in other jurisdictions, courts routinely found that the First Amendment protected that communication.<sup>143</sup>

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<sup>139</sup> For example, in *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072 (C.D. Cal. 1994), the court found that Carl Sagan failed to state a cause of action for violation of his right of publicity under the Civil Code based upon the allegation that, “Defendant changed the ‘code name’ on its personal computer from ‘Carl Sagan’ to ‘Butt-Head Astronomer’ after Plaintiff had requested that Defendant cease use of Plaintiff’s name.” *Id.* at 1075. The court explained that there was no appropriation of Carl Sagan’s identity for a “commercial purpose.” In reaching its decision, the court cited *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984) for the proposition that California Civil Code §3344 is limited to appropriation for purposes of advertising or soliciting purchases. 874 F. Supp. at 1078. Conversely, in *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996), Kareem Abdul-Jabbar’s allegation that his identity was utilized in a beer commercial was sufficient to state a claim for violation of the right of publicity under Civil Code §3344. The court noted that, “[U]nlike the common law cause of action, section 3344 is apparently limited to commercial appropriations.” *Id.* at 414.

<sup>140</sup> *Montana v. San Jose Mercury News*, 40 Cal. Rptr. 2d 639 (1995).

<sup>141</sup> *Cardtoons v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996).

<sup>142</sup> *Simeonov v. Tiegs*, 602 N.Y.S.2d 1014 (1993).

<sup>143</sup> See, e.g., *Rogers v. Grimaldi*, 695 F. Supp. 112 (S.D.N.Y. 1988), *aff’d* 975 F.2d 994 (deeming movie about plaintiff to be protected); *Ann-Margaret v. High Society Magazine*, 498 F. Supp. 401 (S.D.N.Y. 1980) (holding photographs of plaintiff to be protected); *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768 (1980)

These cases bear out the notion that non-advertising usage of a celebrity's image should not be actionable under the California publicity statutes.

If the public figure's likeness is artificially juxtaposed with the product in an advertisement for the product, the conduct is actionable under the statutory right of publicity. The few cases which have found liability all include the following scenario: A product is created. That product contains no information about the public figure. Later, a public figure's likeness is arbitrarily juxtaposed with the product in an advertisement for the product. For example, in *Midler v. Ford Motor Company*,<sup>144</sup> Ford arbitrarily juxtaposed Bette Midler's voice in an advertisement for an automobile. The conduct was actionable because the automobile "contained" no information about Ms. Midler. The same scenario occurred in *White v. Samsung Electronics America, Inc.*<sup>145</sup> As a Samsung microwave (the product advertised) was not about Vanna White (the celebrity who's right of publicity was violated), Ms. White was arbitrarily juxtaposed with the product.<sup>146</sup>

Although not decided under California law, the decision in *Seale v. Gramercy Pictures* is also instructive.<sup>147</sup> There, the court distinguished

(deeming biography to be protected); *Pagan v. New York Herald Tribune, Inc.*, 32 A.D.2d 341 (1969), *aff'd*, 26 N.Y.2d 941 (1970) (deeming photograph to be protected); *Everett v. Carvel Corporation*, 334 N.Y.S.2d 922 (1972) (holding that photograph of infant eating ice cream did not violate right of publicity); *Murray v. New York Magazine Company*, 27 N.Y.2d 406 (1971) (ruling that photograph of plaintiff at parade did not violate plaintiff's right of publicity).

<sup>144</sup> 849 F.2d 460 (9th Cir. 1988).

<sup>145</sup> 971 F.2d 1395 (9th Cir. 1992).

<sup>146</sup> The courts have expressly stated that the relevant test in this area is whether the use of the name and/or image is in the form of an advertisement for a product wholly unrelated to the person. In *Joplin Enters. v. Allen*, 795 F. Supp. 349 (W.D. Wash. 1992), the court, applying California law, held that a play about the plaintiff did not violate Civil Code section 990 because the right of publicity "applies by its language and by legal authority only to the exclusively commercial use of Ms. Joplin's persona in merchandise, advertising or endorsements." *Id.* at 351. See also *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 506 (1968) ("What is made actionable is the unauthorized use for advertising purposes in connection with the sale of a commodity.")

<sup>147</sup> 949 F. Supp. 331 (E.D. Pa. 1996).

between protected speech and false advertisements. In *Seale*, the defendant made a movie about the Black Panthers and used the plaintiff's name and persona in the movie. The plaintiff sued for violation of his right of publicity. The court found that the movie was clearly about the plaintiff; the movie was therefore protected.<sup>148</sup>

The *Seale* court also addressed the defendant's use of the plaintiff's name and image on the CD cover for the soundtrack of the movie. Even though the soundtrack contained songs used in the movie, the songs were not necessarily about the plaintiff. Therefore, the court ruled that use of the plaintiff's image on the soundtrack jacket might be tortious because the soundtrack was not about plaintiff.<sup>149</sup>

Finally, the analysis specifically focuses upon the relationship between the public figure and the product, not the public figure and the creator of the product. Hence, the newspaper story about Clint Eastwood is analyzed by examining Mr. Eastwood's relationship to the article including his name and photograph. The analysis does not hinge on the relationship between Mr. Eastwood and the publisher of the newspaper article or the relationship between Mr. Eastwood and the author of the article.<sup>150</sup>

Thus, the language of the statute, the legislative history, the case law, and the constitutional considerations all lead to the conclusion that liability under California Civil Code sections 990 and 3344 should be found only if there is an advertisement or an endorsement which utilizes the name or likeness of an individual without that individual's consent.

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<sup>148</sup> *Id.* at 337.

<sup>149</sup> In reaching this decision, the court relied largely upon section 47 of the Restatement of Torts regarding the right of publicity:

Comment c to §47 makes clear that the use of a person's name and likeness in news, entertainment, and creative works does not infringe on the right of publicity. In particular, comment c states that "[u]se of another's identity in a novel, play, or motion picture is also not ordinarily an infringement . . . . However, if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability . . . ."

*Id.* at 336.

<sup>150</sup> *Eastwood v. Superior Ct.*, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1984) (holding that the use of Clint Eastwood's photograph and name to sell newsnewspapers was subject to first amendment protection).