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## Fred Astaire Dances Again: California Passes the Astaire Celebrity Image Protection Act

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# FRED ASTAIRE DANCES AGAIN: CALIFORNIA PASSES THE ASTAIRE CELEBRITY IMAGE PROTECTION ACT

## INTRODUCTION

Actors in California may literally never die. That is to say, the protection of their image will extend beyond the grave. On October 12, 1999 Governor Gray Davis of California signed the Astaire Celebrity Image Protection Act<sup>1</sup> into law. The Act provides “greater protections to the heirs of deceased celebrities by broadening the right to publicity that is descendible to them, as specified.”<sup>2</sup> The debate over the Act centered on how much of the right of publicity for living celebrities could be extended to the heirs of deceased celebrities. Although the Act supposedly finds a solution to this controversial issue, the dispute continues. Part I of this article examines the background of the Act as well as the problems with the past legislation. Part II discusses the initial bill presented and the law that was passed. Part III examines the debates involved in the passage of the Act and Part IV offers a commentary on the Act’s potential impact.

## I. BACKGROUND

### *A. The Right of Publicity*

Debates over the rights of deceased celebrities stem from what is called the “right of publicity,” essentially a property interest in one’s personality.<sup>3</sup> In other words, a celebrity may exercise

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1 Hereinafter “the Act”

2 Senate Rules Comm., 1999-00 Reg. Sess., Senate Floor Analyses on SB 209 (Burton) As Amended 9/1/99 at 1-2 (Cal. 1999).

3 Diana Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL J. ART & ENT. LAW 35, 36 (1998).

control over others' use of her image for commercial purposes.<sup>4</sup> This legal property right for personal identity has evolved slowly through the years,<sup>5</sup> emerging from state common law as an invasion of privacy.<sup>6</sup> Historically, there were four privacy interests protected by common law:

- 1) Intrusion upon the plaintiff's seclusion or solitude;
- 2) public disclosure of private facts about the plaintiff's personal life;
- 3) publicity that places the plaintiff in a false light in the public eye; and
- 4) the appropriation of the plaintiff's name or likeness for commercial purposes.<sup>7</sup>

The fourth interest, from which the right of publicity originated, was codified into California law in 1971.<sup>8</sup> Civil Code § 3344 allowed the use of an individual's name or likeness only with that person's consent.<sup>9</sup> This right, however, ended upon death of the celebrity.<sup>10</sup> Furthermore, this right was not descendible under California common law<sup>11</sup> as illustrated in *Lugosi v. Universal Pictures*.<sup>12</sup> Lugosi's widow and surviving son sued Universal

4 *Id.* For example, Nike would not be allowed to take a picture of Michael Jordan wearing Nike shoes and use the picture for advertisement purposes without Jordan's permission. Should Jordan not have given permission to Nike, he would have the right to take legal action against Nike.

5 *Id.* at 37.

6 Senate Rules Comm., *supra* note 2, at 2. This differs from other intellectual property rights, such as Copyright, because there is no specification for it in the Federal Constitution. Erika Paulsrude, Note, *Not the Last Dance: Astaire v. Best Film & Video Corp. Proves California Right of Publicity Statutes and the First Amendment Can Co-Exist*, 18 LOY. L.A. ENT. L.J. 395, 399 (1998).

7 S. 1999-00 Reg. Sess., Senate Third Reading on SB 209 (Burton) As Amended 9/1/99 at 3 (Cal. 1999).

8 Senate Rules Comm., *supra* note 2, at 2.

9 Paulsrude, *supra* note 6, at 399.

10 *supra* note 7, at 3.

11 Descendibility is the "Capab[ility] of passing by descent, or of being inherited or transmitted by devise (spoken of estates, titles, offices, and other property)." BLACK'S LAW DICTIONARY 306 (6th ed. 1991).

12 *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979).

Pictures for its use of Bela Lugosi's likeness as Count Dracula.<sup>13</sup> The trial court held that Lugosi's property right in his facial characteristics was descendible, meaning it did not end upon Lugosi's death and his heirs had acquired Lugosi's property rights.<sup>14</sup> The Court of Appeals of California reversed this decision, stating it was a personal decision to use or exploit one's own name or likeness and therefore the property right only applied during the artist's lifetime.<sup>15</sup> The Supreme Court of California adopted the Court of Appeals decision to reverse the trial court's ruling.<sup>16</sup> This common law notion against descendibility was codified in § 3344 by specifically giving the right of publicity to living celebrities and not to heirs.<sup>17</sup>

Several additional problems arose in using the right to privacy as a basis for a right of publicity.<sup>18</sup> For example, a celebrity with a right of publicity complaint effectively claims she has been uncompensated for her image.<sup>19</sup> The right of privacy, on the other hand, remedies "unwelcome publicity" since the celebrity has already dispersed her image throughout society.<sup>20</sup> This property right notion, however, was not new regarding right of publicity. For example in 1953, in *Haelan Laboratories v. Topps Chewing Gum*, a baseball player licensed his likeness to a manufacturing company.<sup>21</sup> This suggested the likeness of the baseball player was a property right.<sup>22</sup>

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13 *Id.*

14 *Id.* at 427.

15 *Id.* at 431.

16 *Id.*

17 Ping Hin Yu, *I. Intellectual Property, E. Publicity Rights, a) Deceased Personalities, Astaire v. Best Film v. Video Corp.*, 13 BERKELEY TECH. L. J. 319, 323 (1998).

18 Katherine L. Blanck, Comment, *Restricting the Use of "Sound-Alikes" in Commercial Speech by Amending the Right of Publicity Statute in California*, 26 SAN DIEGO L. REV. 911, 916 (1989).

19 Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C.L. REV. 603, 622 (1984).

20 *Id.*

21 *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953).

22 Blanck, *supra* note 18, at 917.

The California Legislature enacted Civil Code §990 in 1984 to counter the problems which arose from using the right of privacy as a basis for right of publicity claims by further extending the publicity right of celebrities to their heirs.<sup>23</sup> This shifted the right from one of privacy to one of property, which enabled its descendibility.<sup>24</sup> The rights created by §990 were intended to apply to situations in which individuals exploited and profited from the use of an artist's likeness, or when an artist was subjected to mockery as a result of products sold.<sup>25</sup>

## B. Civil Code § 990(n) Exceptions

### 1. Liability

The new law imposed liability when:

Any person who uses a deceased 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, without prior consent.<sup>26</sup>

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23 Senate Rules Comm., *supra* note 2, at 2.

24 *Id.*

25 Assembly Comm. on Judiciary, 1999-00 Reg. Sess., Bill Analysis on SB 209 (Burton) As Amended 3/3/99 at 5 (Cal. 1999). (citing Assembly Comm. on Judiciary, 1983-84 Reg. Sess., Bill Analysis on SB 613 (Campbell)). The SB 613 analysis stated the Act was 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 good or services or (b) a celebrity or public figure is subject to abuse or ridicule in the form of a marketed product. Such goods or services typically involve 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." *Id.*

26 Cal. Civ. Code § 990 (West 1998).

However, the above provision had a list of exceptions under subsection (n) of the statute.<sup>27</sup> The previous state law had imposed liability on those who used any aspect of a deceased personality's attributes such as name and likeness without the permission by the heirs or anyone else to whom the rights may have been licensed.<sup>28</sup> No consent was needed, however, for the same uses if they fell within the list of exceptions enumerated in subsection (n).<sup>29</sup>

## 2. *The Need for a Better Statute*

### a. Robyn Astaire v. Best Film & Video Corp.<sup>30</sup>

The 1984 law led to a series of well-publicized lawsuits, the most famous of which is *Astaire v. Best Film & Video Corp.*<sup>31</sup> In 1965, Fred Astaire ("Mr. Astaire") conveyed to Ronby Corporation an exclusive license to use his name with regard to the dance studios, schools and related activities Mr. Astaire had helped initiate in the 1950s.<sup>32</sup> Ronby Corporation ("Ronby") was entitled to use likenesses of Mr. Astaire, such as certain pictures and photographs, which he had approved in the agreement.<sup>33</sup> New photographs and licenses that Ronby wished to use were to be sent to Mr. Astaire for his written approval.<sup>34</sup> In 1989, two years after Mr. Astaire's death, Ronby entered into an agreement with Best

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27 Cal. Civ. Code § 990(n) (West 1998) The statute provides: "A) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

(B) Material that is of political or newsworthy value.

(C) Single and original works of fine art.

(D) An advertisement or commercial announcement for a use permitted by paragraph (A), (B), or (C)." *Id.*

28 *supra* note 7, at 2.

29 *Id.*

30 *Astaire v. Best Film & Video Corp.*, 166 F.3d 1297 (9th Cir. 1997).

31 *Id.*

32 Stan Soocher, *Astaire Clip Ruling May Muddy the Waters*, NEW YORK LAW J., September 19, 1997.

33 *Astaire*, 166 F.3d. at 1299.

34 *Id.*

Corporation (“Best”), a manufacturer of pre-recorded videotapes, to manufacture and distribute a video collection entitled “Fred Astaire Dance Series.”<sup>35</sup> Clips from Mr. Astaire’s films introduced the video.<sup>36</sup> Robyn Astaire, Fred Astaire’s widow, sued Best under § 990, claiming a violation of her rights since Best had not asked her permission to use the clips.<sup>37</sup> The district court concluded the film clips were not a § 990(n) exception.<sup>38</sup> The Ninth Circuit reversed the district court, holding the clips preceding the video were not a commercial appropriation of Mr. Astaire’s image and were thus protected under § 990(n). In other words, the court held the use of Mr. Astaire’s image was not simply for profit but was protected under § 990(n)(1) because it was inconsistent not to exempt a videotape when a film was exempted.<sup>39</sup>

The ruling exposed several loopholes in § 990. For example, film clips of Mr. Astaire’s movies were deemed an acceptable use because they were a portion of a video, protected under the statute’s exception for “film.”<sup>40</sup> However, to place a likeness of Mr. Astaire on a T-shirt for commercial use would be prohibited because a T-shirt was not protected under § 990(n).<sup>41</sup> In both situations, Mr. Astaire’s “likeness” was used; however, the protection only extended to the film clip.<sup>42</sup>

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35 *Id.*

36 *Id.*

37 *Id.*

38 *Astaire*, 166 F.3d at 1300. The district court held: “(1) Best’s use of the Astaire film clips was covered by § 990(a)’s ‘on or in products merchandise, or goods’ language; (2) Best’s use of the Astaire film clips was not a use for ‘advertising, selling, or soliciting’ in violation of § 990(a); (3) Best’s use of the Astaire film clips was not exempt under § 990(n); (4) Mrs. Astaire’s § 990 claim was not preempted by the federal Copyright Act; and (5) Best’s use of Astaire’s likeness was not protected by the First Amendment.” *Id.*

39 *Id.* at 1302.

40 *Id.*

41 *supra* note 7, at 3.

42 *Id.*

*b. Additional Loopholes*

During the debates regarding the Act, the Senate Rules Committee discussed additional loopholes in § 990.<sup>43</sup> The committee provided the following illustration of a loophole. The sale of photographs of the deceased actor, River Pheonix, in a magazine would be permitted under the statute because the magazine constitutes an enumerated protected product.<sup>44</sup> However, if the same pictures in the magazine were sold individually, without permission of the heirs of Mr. Phoenix, an enforceable claim could be alleged.<sup>45</sup> Seemingly, § 990(n) enabled the abuse of a deceased personality's rights in certain situations, if the form of the allegedly wrongful product was manipulated to fit the statute's provision.

## II. ANALYSIS: THE ASTAIRE IMAGE PROTECTION ACT

### *A. Initial Senate Bill 209<sup>46</sup>*

The first bill provided broad protection for the heirs of deceased celebrities.<sup>47</sup> This protection, however, was widely rejected by film studios as too restrictive on the entertainment industry.<sup>48</sup> Organizations and film studios such as Walt Disney Company, Universal Studios, Twentieth Century Fox, and the major broadcast television networks opposed this bill through the Motion Picture Association of America ("MPAA"), arguing the bill infringed on the First Amendment.<sup>49</sup>

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43 Senate Rules Comm., *supra* note 2, at 10-11.

44 *Id* at 11.

45 *Id*.

46 S. 209, 1999-00, Reg. Sess. (Cal. 1999).

47 Adam Eventov, *California Senate Bill Would Protect Use of Celebrity Images*, KRTBN KNIGHT RIDDER TRIBUNE BUSINESS NEWS, September 6, 1999, available in 1999 WL 22012768.

48 *Id*.

49 David Finnigan, *Face Value*, HOLLYWOOD REPORTER, August 31, 1999, available in 1999 WL 22806935.



The bill confines any use of the celebrity's image in creative works whether they were fictional or nonfictional."<sup>50</sup> In other words, filmmakers and journalists were required to obtain a license whenever they used a celebrity's name or likeness.<sup>51</sup> The bill even applied to historians who composed a creative nonfictional work.<sup>52</sup> For example, under the proposed bill, Oliver Stone would have been required to seek permission from former President Nixon's heirs to create the film "Nixon."<sup>53</sup> The heirs could have then denied Stone's usage of Nixon's likeness or name if they did not approve of the content.<sup>54</sup> Stone's only other option would have been to initiate court action to seek approval that his use of Nixon's persona was protected under the First Amendment.<sup>55</sup>

The bill gained some support, however, from organizations the like Screen Actors Guild ("SAG") and individuals such as Robyn Astaire. Additionally, numerous other actors supported the bill.<sup>56</sup> SAG described the bill as a mechanism for protecting the "commercial value of an actor's celebrity status."<sup>57</sup> Commercial value cannot be undervalued in Hollywood, where a Federal judge awarded Dustin Hoffman three million dollars for the misappropriation of his likeness.<sup>58</sup> In 1998, Los Angeles Magazine had used a photo of Hoffman's from the 1982 film "Tootsie" in a fashion layout without asking his permission.<sup>59</sup> Hoffman sued, and the court found his visage in the "Tootsie" character had the commercial value of \$3 million.<sup>60</sup> This holding exemplifies the commercial importance of a celebrity's image to the celebrity and her family.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 Finnigan, *supra* note 50.

55 *Id.*

56 Lynda Gledhill, *Heirs of Celebrities Fight to Control Use of Stars' Image/Burton Measure Intends to End Law's Exceptions*, THE S.F. CHRON., available at 1999 WL 2682436.

57 Finnigan, *supra* note 50, at 1.

58 *Id.*

59 *Id.*

60 *Id.*

*B. The Astaire Celebrity Image Protection Act*

The initial bill was far too difficult to pass through the legislature. A new bill with compromises was next presented.<sup>61</sup> The new bill allowed for the “safe harbor” exceptions of restricted liability for defamation lawsuits for journalists, filmmakers, and historians.<sup>62</sup> The MPAA supported the addition of the “safe harbor” exceptions.”<sup>63</sup> Thus, with the compromise, the Astaire Celebrity Image Protection Bill was signed into law.

The modified bill provides for several changes.<sup>64</sup> First, California Civil Code § 990 is renumbered as § 3344.1.<sup>65</sup> In other words, the provisions of § 990, which pertained to “commercial use of one’s image after death” were combined with § 3344, pertaining to the “commercial use of one’s image during life.”<sup>66</sup> Originally, § 990 extended § 3344 to a post-mortem right of publicity but the statutes were virtually identical in all other aspects of the right of publicity.<sup>67</sup> Section 990(n), however, was an exception to post-mortem rights.<sup>68</sup> Claims like defamation or

61 *Id.*

62 Finnigan, *supra* note 50, at 1.

63 *Id.*

64 Astaire Celebrity Image Protection Act. CAL. CIV. CODE § 3344.1 (West 1999).

65 *Id.* “SECTION 1. Section 990 of the Civil Code is amended and renumbered to read:” *Id.*

66 Senate Judiciary Comm., 1999-00, Reg. Sess., Bill Analysis on SB 209 (Burton) As Amended 3/3/99 at 1 (Cal. 1999).

67 Paulsruide, *supra* note 6, at 399. For example:

1) “Both statutes prohibit the unauthorized use of an individual’s name, voice, signature, photograph, or likeness.”

2) “Both Statutes also exempt from liability uses of these personal attributes related to any news, public affairs or sports broadcast, or any political campaign.”

3) “[B]oth provide that uses in a commercial medium do not require consent simply because the material containing a celebrity’s persona is commercial sponsored or contains paid advertising.”

4) “The use of one’s persona ‘directly connected’ to a commercial sponsorship or paid advertising does, however, require consent.” *Id.*

68 *Id.* at 410.

other privacy rights were specifically reserved for living claimants and were not granted under § 990(n).<sup>69</sup>

The bill also broadens an heir's protection by rejecting the list of exceptions in § 990(n).<sup>70</sup> Additionally, it provides heirs protection in generally unprotected areas if the work is used for commercial gain, is changed by digital technology, or depicts false or has reckless disregard for the falsity of factual information pertaining to the celebrity.<sup>71</sup> Next, the bill requires that the Secretary of State of California keep a registry of heirs on the Internet.<sup>72</sup> This provision was intended to ease the burden of those obtaining a license and the bill's author, Senator Burton, contended the use of valid images of deceased personality will thus be simplified.<sup>73</sup> Further, the bill extends the period of protection after a

<sup>69</sup> *supra* note 7, at 3.

<sup>70</sup> Assembly Comm. on Appropriations, 1999-00 Reg. Sess., Bill Analysis on SB 209 (Burton) As Amended 6/29/99 at 1 (Cal. 1999). In other words, the statute “[q]ualifies the existing types of uses of a deceased celebrity’s name, voice, signature, photograph or likeness (image) which do not require consent of the heirs, by stating the use in a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works does not require the consent of the heir if the work is fictional or nonfictional entertainment or a dramatic, literary, or musical work. S., *supra* note 7, at 1.

<sup>71</sup> Assembly Comm. on Appropriations, *supra* note 7, at 1. In other words, “Provides that the use of a deceased celebrity’s image in a manner which otherwise would require the consent of an heir of the deceased celebrity shall not be exempt from the consent requirement simply because the use is contained in a protected medium in a work which is fictional or nonfictional entertainment, or a dramatic, literary, or musical work. Such use shall not be exempt from the consent requirement “if the claimant proves that the use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling or soliciting purchase of that product, article or merchandise, good or service by the deceased personality.” *supra* note 7, at 1-2.

<sup>72</sup> “Requires the Secretary of State to post on the internet its registry of persons claiming to be a successor-in-interest to the rights of a deceased celebrity or a registered licensee of such rights.” *supra* note 7, at 2.

<sup>73</sup> *Id.* This section did not draw any opposition. Senate Rules Comm., *supra* note 2, at 12

personality's death from fifty to seventy years.<sup>74</sup> Finally, to be actionable, the illegal appropriation of a likeness must occur in California.<sup>75</sup>

### III. ANALYSIS: THE PASSAGE OF THE NEW BILL

Discussions prior to the passage of the Act centered on whether there were inherent differences to justify keeping the laws separate.<sup>76</sup> Senator Burton, however, pointed out that although § 990 was a property interest and § 3344 was a privacy interest, “the use of image protection contained in Section 990 [was] a hybrid growing out the right of privacy contained in Civil Coded Section 3344.”<sup>77</sup> He stated that joining the two “appropriation of likeness sections” is therefore merely “common sense.”<sup>78</sup> Other debates regarding the bill included concerns regarding the First Amendment, the extent of the scope of the Act, extending the length of protection after the celebrity's death and finally who would be able to sue under the Act.

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74 S., *supra* note 7, at 2. “No action shall be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality. Astaire Celebrity Image Protection Act, Cal. Civ. Code § 3344.1(g) (West 1999).

75 S., *supra* note 7, at 2. Provides for the application of this California law if the liability, damage or other remedies sought arise from acts occurring directly in California. Acts giving rise to liability are limited to the use, on or in products, merchandise, goods, or services, or the advertising or selling, or soliciting purchases of products, merchandise, goods or services prohibited by this bill. Astaire Celebrity Image Protection Act, CAL. CIV. CODE § 3344.1(n) (West 1999).

76 Senate Rules Comm., *supra* note 2, at 12.

77 *Id.*

78 *Id.*

### A. First Amendment Concerns

Before the compromise, California Civil Code § 3344 did not provide for exemptions.<sup>79</sup> With the joining of § 990 and § 3344, the list of exemptions for deceased personalities and protection was provided for areas generally unprotected unless the work is used to “promote, sell, or advertise a commercial product.”<sup>80</sup>

Opponents raised the First Amendment concerns regarding the elimination of the exemptions.<sup>81</sup> First, opponents worried that by not limiting the rights of an heir of a deceased personality, heirs would control conceivably every aspect of a deceased personality.<sup>82</sup> The industry might, therefore, be harmed by the possibility of chilling free speech.<sup>83</sup> Universal Studios argued:

California’s post-mortem right of publicity statute is designed to allow the heirs of deceased persons to control the use of their names and likenesses in advertising and on consumer products. It is not designed to stop the creative community from portraying or referring to celebrities in expressive works, such as the portrayal of deceased celebrities in ‘Forrest Gump.’<sup>84</sup>

Second, opponents also argued that not only would creative works be stifled,<sup>85</sup> but without the exceptions there would be confusion for all parties.<sup>86</sup> Heirs could then pose a constant threat of litigation because there would be no direction of what was illegal.<sup>87</sup> Opponents refer to the exceptions enumerated in § 990 as providing guidance regarding the types of work to be protected,

79 CAL. CIV. CODE § 990 (West 1998).

80 *Id.*

81 Assembly Comm. on Judiciary, *supra* note 25, at 9.

82 *Id.*

83 Senate Rules Comm., *supra* note 2, at 13.

84 *Id.*

85 *Id.*

86 Assembly Comm. on Judiciary, *supra* note 25, at 9.

87 *Id.*

thereby giving notice to all parties.<sup>88</sup> Opponents contend that vague laws and confusion result from the fact that there is no bright line rule to determine whether permission from heirs was needed.<sup>89</sup> Thus, the outcome would be the initiation of numerous frivolous lawsuits.<sup>90</sup>

Opponents further noted there were no exceptions for living celebrities because protection for living celebrities could also be found in other laws and there was no confusion.<sup>91</sup> These other California laws, for example, included invasion of privacy as well as defamation laws,<sup>92</sup> which do not apply to a deceased personality.<sup>93</sup> Because these laws do not apply, the exceptions were ostensibly needed to give notice to the parties.<sup>94</sup> Furthermore, opponents noted the exceptions in § 990(n) balanced restrictions of free speech and prevented “true commercial exploitation of deceased personalities.”<sup>95</sup>

Finally, opponents pointed out that courts recognized exceptions to the right of publicity specifically to reconcile any free speech concerns.<sup>96</sup> For example, in *Guglielmi v Spelling-Goldberg Productions*, the court found a constitutional guarantee of free expression in fictional and biographical works.<sup>97</sup> Also, in *Time v. Hill*, the court noted that the First Amendment protects a playwright who takes facts to create an artistic work.<sup>98</sup>

The bill’s supporters, however, noted that § 3344 had no list of exemptions under this law, but neither had there been a constant threat of litigation.<sup>99</sup> Living celebrities had been protected since

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88 *Id.*

89 *Id.*

90 *Id.* at 14.

91 Assembly Comm. on Judiciary, *supra* note 25, at 9.

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.* at 14.

96 Assembly Comm. on Judiciary, *supra* note 25, at 14.

97 *Guglielmi v. Spelling-Goldberg Productions*, 606 P.2d 454 (Cal. 1979).

98 *Time v. Hill*, 385 U.S. 374 (1967).

99 S. 1999-00 Reg. Sess., Senate Third Reading on SB 209 (Burton) As Amended 3/3/99 at 12-13 (Cal. 1999).

1972 under § 3344 and the statute could be deemed “workable.”<sup>100</sup> Furthermore, § 990 has a “loser pays” provision providing attorneys’ fees and costs to the prevailing party, thus deterring frivolous claims.<sup>101</sup> The same rights living celebrities enjoyed could now be shared with their heirs.<sup>102</sup>

### B. Scope Concern

Debate also arose as to the scope of protection afforded under the new bill. Opponents argued § 990 provided a clear understanding of the scope of protection, while proponents argued, on the other hand, that the list enumerated in § 990(n) “protect[ed] both too little and too much.”<sup>103</sup> Too little protection may have existed because of advancements in technology, but sometimes too much protection is awarded for the exploitation of the deceased personality’s work.<sup>104</sup> SAG contends that technological advances create the possibility of “unlimited manipulation of images and their instantaneous distribution and that this manipulation will not be easily controlled by their heirs.”<sup>105</sup> Once images have been stolen, the value of an artist’s career and reputation can be irreplaceably damaged.<sup>106</sup> Richard Mansur,<sup>107</sup> President of the Screen Actors Guild, has stated that actors work for years to be recognized and the lucky actors who become famous realize the value of this recognition.<sup>108</sup> Protection is needed to maintain the value of the recognition, which can be easily tainted.<sup>109</sup> The

100 Assembly Comm. on Judiciary, *supra* note 25, at 13.

101 Senate Rules Comm., *supra* note 2, at 11.

102 Senate Judiciary Comm., *supra* note 68, at 6.

103 Assembly Comm. on Judiciary, *supra* note 25, at 13.

104 *Id.* For example, with technological advances it is much easier to digitally alter photographs, which may be used to the detriment of the actor.

105 Senate Rules Comm., *supra* note 2, at 10.

106 *Id.*

107 Mr. Mansur is also an actor, best known for his roles in “Risky Business” and “Fire Down Below.”

108 Gledhill, *supra* note 57.

109 *Id.* “Every actor invests years in the development of his or her craft. Over time an actor builds a body of work, and with perseverance and a lot of luck, a very few of us achieve recognition. That recognition, having been hard

Consumer Federation of California asserted that “one of the strongest interests consumers have is the use over their own name, voice, signature, photograph, and likeness. This bill would benefit consumers by providing additional protection against unauthorized commercial use after a personality’s death.”<sup>110</sup>

Also, the ACLU and AFL-CIO argued that artists should “enjoy the fruits of their labor,”<sup>111</sup> and declared celebrities should receive compensation for their likenesses because they have worked to receive the fame they have achieved.<sup>112</sup> Furthermore, others should not benefit from the work and reputation of the actors without permission of the actors or their descendants.<sup>113</sup> Finally, the Act protects the heirs of a celebrity from losing compensation, which for many is their sole livelihood.<sup>114</sup>

### *C. Extending Length of Protection after Death*

The Act also extends the protection from 50 years to 70 years after the death of a celebrity.<sup>115</sup> Opponents argued this provision extended the chilling effect already perpetrated by the Act.<sup>116</sup> Proponents, on the other hand, argued the extension is consistent with copyright law.<sup>117</sup> The legislative history of the original bill, enumerating fifty years of protection, was drafted to create a consistency between the two laws.<sup>118</sup> While this bill was not drafted in conjunction with copyright law, it was used as guidance

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won, has tremendous value. That value however, is extremely fragile and can be easily diluted, diminished, or destroyed.” *Id.*

110 Senate Rules Comm., *supra* note 2, at 11.

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

115 Astaire Celebrity Image Protection Act, CAL. CIV. CODE § 3344.1(g)

116 Senate Rules Comm., *supra* note 2, at 14. Columbia Pictures argues, “Extension of the right of publicity from 50 to 70 years further perpetuates the chilling effect of SB 209 by reaching back into history and removing from public view or subjecting to private control another 20 years worth of historical figures.” *Id.*

117 Senate Rules Comm., *supra* note 103, at 14.

118 *Id.* at 15.



by the drafters of the bill. This resemblance was further illustrated when in 1984, the drafters of § 990 considered affording protection for one hundred years.<sup>119</sup> The California assembly, however, decided against the one hundred years after using copyright law as guidance.<sup>120</sup> Therefore, since the protection granted under copyright law has been extended,<sup>121</sup> it is appropriate to extend right of publicity protection.<sup>122</sup>

It must be noted, opponents of the Act dismiss using copyright law as guidance by focusing on the differences of the laws.<sup>123</sup> However, proponents argued the Supreme Court decision in *Zacchini v. Scripps-Howard Broadcasting*<sup>124</sup> had stated the “encouragement of personal achievement to encourage creative activity for the ultimate benefit of society, is closely analogous to the rationale for copyright protections under the U.S. Constitution.”<sup>125</sup> Therefore, because the Supreme Court compared the two laws, it is appropriate to use copyright principles as a basis for the right of publicity.

Finally, the extension of the protection after death also recognizes the “longevity of celebrities and their heirs,”<sup>126</sup> which is consistent with today’s society in which parents tend to rear children later in life.<sup>127</sup> The enacted Act contained the initial version of the of the term extension of seventy years.

#### *D. Acts Must Occur in California*

Damages and other remedies apply if the illegal appropriation of the likeness occurs in California, regardless of whether the

119 Assembly Comm. on Judiciary, *supra* note 25, at 10. Copyright protection extends to the life of the author plus 70 years. 17 U.S.C. § 302(a).

120 *Id.*

121 17 U.S.C. § 302(a).

122 Assembly Comm. on Judiciary, *supra* 25, at 10.

123 Senate Rules Comm., *supra* note 2, at 14. For example the MPAA stated the “likening publicity to copyright is like comparing apples to oranges.” *Id.*

124 *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562 (1977).

125 Assembly Comm. on Judiciary, *supra* 25, at 10.

126 Senate Rules Comm., *supra* note 2, at 14.

127 *Id.*

decendent was domiciled in California at the time of her death. Time Warner voiced its opposition of this provision by stating that “the bill would allow all heirs to sue in California under California Law irrespective of whether the decease celebrity had connection whatsoever with California.”<sup>128</sup> Furthermore, the MPAA argued this broad standing could lead to a congestion of the California Courts.<sup>129</sup> The Act which was passed, however, continued to focus on where the illegal act occurred rather than the decedents domiciled at the time of death.

#### IV. IMPACT

On its face, this Act appears to correct the loopholes in § 990. After all, the Act seemingly affords heirs greater protections than had been previously available. However, as illustrated throughout this article, the Act was not an overnight success and while members on both sides of the issue agreed the loopholes in the current law had to be corrected, it took time for a satisfactory compromise to be achieved.

The Act’s title, The Celebrity Image Protection Act, does just this for a living celebrity. However, protection for a living celebrity was not its sole purpose. The Act’s purpose was to correct the injustices to heirs, for example, Robyn Astaire’s lack of compensation for the use of her husband’s image as illustrated in *Astaire v. Best Film & Video Corp.* The protection provided for an image was intended to benefit heirs by providing compensation for the image as would be conferred to a living celebrity.

However, because this bill was a compromise, the Act was narrowly drawn and protections for the heirs are limited. In fact, as mentioned earlier, the heirs have virtually no control unless the image is used for commercial gain, is changed by digital technology, or depicts false or has reckless disregard for the falsity of factual information pertaining to the celebrity. This leaves a

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<sup>128</sup> *Id* at 17.

<sup>129</sup> *Id.*

variety of uses not covered by the Act for which an heir receives no protection. For example, again, creative nonfictional works such as Oliver Stone's "Nixon" may be created without the permission from the heirs. Also, creative fictional work using celebrity images such as Robert Zemeckis' "Forrest Gump" do not need an heir's permission. This is not the same protection provided for a celebrity during her lifetime and the injustice the Act intended to correct remains. Consequently, the Act has a minimal impact on the entertainment industry and does not afford the compensation to heirs as it originally intended.

## V. CONCLUSION

Overall, while this Act is one step in providing more protection for heirs, it falls short of providing the same protection to which the celebrity was entitled in her lifetime. The debate between celebrities and heirs of the celebrities with the entertainment industry will continue despite the Act's passage. Even Robyn Astaire foresees the continuation of this debate. The day the Act was passed, Robyn Astaire stated, "I intend to continue my efforts to ensure that artists and their families can control the artistic integrity of their work and unique identities for future generations to enjoy."<sup>130</sup> While this Act has extended California's 1984 law, it fails to provide heirs the same protections as a living celebrity.

*Alana-Seanne M. Fassiotto*

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130 Nick Madigan, *Coogan, Astaire Bills Signed by Gov. Davis, Child Actors, Celebrity Identities Get Protection*, VARIETY, October 12, 1999 at 2.