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# Property / In Memory of Lost Heroes: Protecting the Persona Rights of Deceased Celebrities

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## *Property*

# **In Memory of Lost Heroes: Protecting the Persona Rights of Deceased Celebrities**

*Brent W. Stricker*

### *Code Sections Affected*

Civil Code §§ 3344.1 (new), 990 (amended and renumbered).  
SB 209 (Burton); 1999 STAT. Ch. 998

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## I. INTRODUCTION

The image of Dracula will forever be that of Bela Lugosi.<sup>1</sup> The piercing eyes, the arched brows, and the cryptic accent of that character will always be his. The actor became a symbol associated with that character, and though the character

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1. DRACULA (Universal Pictures 1931).

Dracula remains in the public domain, the characterization brought to life by the actor, Bela Lugosi, does not.

In 1979, the California Supreme Court disagreed with this premise, holding that a deceased celebrity's persona may be used freely.<sup>2</sup> The court held that though Bela Lugosi had control over his persona rights<sup>3</sup> during his life, these rights ended with his death.<sup>4</sup> This ruling prevented Mr. Lugosi's family from collecting profits from his persona as he had wished.<sup>5</sup> It also allowed entrepreneurs to use Lugosi's image without authorization from his heirs.<sup>6</sup> All of this changed in 1984, when the California Legislature enacted Chapter 1704, granting to heirs and assignees a property interest in deceased celebrities' persona.<sup>7</sup> However, since the implementation of Chapter 1704, related problems have emerged. Specifically, questions have arisen concerning the circumstances under which uses of a deceased celebrity's persona would be allowed, and the ways in which heirs and assignees could enforce their property rights in the celebrity's persona in court. Chapter 998 addresses these problems by redefining which uses of a celebrity persona are exempted under California law and by allowing heirs and assignees to protect these rights more easily.<sup>8</sup>

## II. LEGAL BACKGROUND

### A. *The Right of Publicity*

The right of publicity originated as a common law tort, securing "the right of every person to control the commercial use of his or her identity."<sup>9</sup> Half of the states recognize this right, through common law or state statutes.<sup>10</sup> The right of

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2. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 819, 603 P.2d 425, 428, 160 Cal. Rptr. 323, 326 (1979) (limiting persona rights to the duration of the celebrity's lifetime). The dispute arose over who held the proper rights to Lugosi's persona: Universal Studios, or the Lugosi family. Universal based its claim on a nearly half-century-old contract signed before the making of the film. *Id.* at 816 n.2, 603 P.2d at 426 n.2, 160 Cal. Rptr. at 324 n.2.

3. See CAL. CIV. CODE § 3344.1(a)(1) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998) (stating that persona rights include rights in a deceased celebrity's name, voice, signature, photograph, or likeness).

4. See *Lugosi*, 25 Cal. 3d at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329 (declaring that "the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime").

5. See *id.*, 603 P.2d at 431, 160 Cal. Rptr. at 329 (noting that Lugosi had willed these rights to his family).

6. *Id.*, 603 P.2d at 431, 160 Cal. Rptr. at 329.

7. 1984 Cal. Stat. ch. 1704, sec. 1, at 6169-72 (enacting CAL. CIV. CODE § 990) (current version at CAL. CIV. CODE § 3344.1).

8. See *infra* Part III (recounting the provision of the new law); see *infra* Part IV (analyzing the likely impact of Chapter 998).

9. J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995).

10. *Id.* at 132.

publicity is also recognized by the Restatement (Third) of Unfair Competition.<sup>11</sup> Because the right of publicity is a property right, it functions primarily to protect the commercial value of a celebrity's identity or likeness.<sup>12</sup> The right does not tend to protect against an informational or entertainment use of the celebrity's persona, such as might be produced in a news account, novel, film, or biography about the celebrity.<sup>13</sup> However, the right of publicity generally requires third parties to gain consent prior to instituting any commercial use of a celebrity's name, voice, signature, photograph, or likeness.<sup>14</sup>

At present, the unauthorized commercial use of a person's image can lead to both federal and state causes of action for misappropriation of the image.<sup>15</sup> A plaintiff may bring federal claims under the Lanham Act<sup>16</sup> for false designation of origin, false advertising, and trademark dilution.<sup>17</sup> California permits tort actions for unfair competition<sup>18</sup> and false and misleading advertising.<sup>19</sup> In addition, living individuals have a right to bring a right of publicity cause of action.<sup>20</sup>

### B. The Legislative Response to the Lugosi Case

Chapter 1704<sup>21</sup> was enacted in 1984 by the State Legislature to address the holding in the *Lugosi*<sup>22</sup> case,<sup>23</sup> discussed *supra* at Part I. With Chapter 1704, California recognized a right to a celebrity's persona that survived the celebrity's death.<sup>24</sup> While California had previously recognized this right's existence during a celebrity's lifetime,<sup>25</sup> prior to Chapter 1704, the right ceased to exist upon that person's death, thereby exposing the celebrity's persona to exploitation in

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11. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

12. See generally Michael Madlow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 130 (1993) (offering a critical analysis of the right of publicity).

13. *Id.*

14. CAL. CIV. CODE § 3344 (West Supp. 1999).

15. See, e.g., *Cairns v. Franklin Mint*, 24 F. Supp. 2d 1013, 1022 (C.D. Cal. 1998) (outlining various state and federal claims brought by the Estate of Diana, Princess of Wales, against unauthorized producers of plates, dolls, and sculptures depicting her image).

16. Pub. L. No. 106-73, 60 Stat. 427 (codified at 15 U.S.C.A. §§ 1051-1127 (West Supp. 1999)).

17. 35 U.S.C.A. §§ 43(a), 1125 (West 1997).

18. CAL. BUS. & PROF. CODE § 17200 (West 1997).

19. *Id.* § 17500 (West 1997).

20. See CAL. CIV. CODE § 3344 (West Supp. 1999) (establishing that living celebrities have a property interest in their personae).

21. 1984 Cal. Stat. ch. 1704, sec. 1, at 6169-72 (enacting CAL. CIV. CODE § 990) (current version at CAL. CIV. CODE § 3344.1).

22. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

23. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 2 (Sept. 7, 1999) (noting that the Legislature enacted Chapter 1704 to create a descendible property interest in a celebrity's persona rights).

24. 1984 Cal. Stat. ch. 1704, sec. 1, at 6169-72 (enacting CAL. CIV. CODE § 990) (current version at CAL. CIV. CODE § 3344.1).

25. *Supra* note 22 and accompanying text.

advertising or other media without compensation to the celebrity's heirs.<sup>26</sup> Prior to Chapter 1704, a deceased personality's likeness could be used to promote an item without the compensation that the celebrity would have received if she or he had been alive to give the endorsement herself or himself.<sup>27</sup> The family of the deceased would neither receive nor be entitled to any payment.<sup>28</sup>

Chapter 1704 was amended in 1988 with the enactment of Chapter 113.<sup>29</sup> As amended by Chapter 113, existing law prevents the use of a deceased person's name, voice, signature, photograph, or likeness for any activity that has commercial value without permission from that celebrity's heirs or assignees.<sup>30</sup> Existing law creates a system for claimants—either heirs or assignees—to register as holders of the celebrity's right to control the decedent's persona.<sup>31</sup> This right to control the persona exists for fifty years after the celebrity's death.<sup>32</sup> Damages for unauthorized use of the celebrity's persona may include the greater of \$750 in nominal damages or actual damages incurred.<sup>33</sup> In addition to this, a defendant will be held responsible for the profits earned as a violating party and for reasonable attorney's fees.<sup>34</sup>

Chapter 113 provided certain exceptions to the above rule.<sup>35</sup> Liability would not lie for the use of the celebrity's persona in a play, book, magazine article, newspaper article, musical composition, or in a program—whether presented via film, radio, or television—where the material has political or newsworthy value, or where the use is a work of art.<sup>36</sup> Furthermore, Chapter 1704 had already provided that an advertisement or announcement for any of the above uses, even though it uses or refers to the celebrity persona, was also exempted.<sup>37</sup>

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26. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 819, 603 P.2d 425, 428, 160 Cal. Rptr. 323, 326 (1979).

27. *Id.* at 823, 603 P.2d at 425, 160 Cal. Rptr. at 328.

28. *Id.*, 603 P.2d at 425, 160 Cal. Rptr. at 328.

29. 1988 Cal. Stat. ch. 113, sec. 2, at 464-67.

30. CAL. CIV. CODE § 3344.1 (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See 1988 Cal. Stat. ch. 113, sec. 2, at 464-67 (amending CAL. CIV. CODE § 990) (current version at CAL. CIV. CODE § 3344.1) defining enumerated exceptions to the prohibition for unauthorized use of a celebrity's persona).

36. *Id.*

37. *Id.*

C. *Problems with the Application of Chapter 113*

1. *The Astaire Case*

The *Astaire v. Best Film & Video Corp.*<sup>38</sup> case demonstrated the perceived problem with the exemptions found in Chapter 113, and provided the impetus for Chapter 998.<sup>39</sup> In *Astaire*, Robyn Astaire, as the registered claimant of the rights to her husband's persona, sued defendant Best for the unauthorized use of Fred Astaire's image.<sup>40</sup> Best had produced a dance instructional video that purported to teach one how to dance with the skill of Mr. Astaire, and the Best video used unauthorized images of the famous star taken from various movies in which he had danced.<sup>41</sup> In a decision that outraged many in Hollywood,<sup>42</sup> the Ninth Circuit ruled that the video segment was a use exempt from persona rights protection under Chapter 113,<sup>43</sup> and dismissed Mrs. Astaire's claim.<sup>44</sup> The court noted that Chapter 113 protects a *film* from liability for using a deceased celebrity's persona,<sup>45</sup> and noted the foolishness of not updating that language to include a *videotape clip*.<sup>46</sup>

Mrs. Astaire argued that the video segment should not be afforded protection because it was included in the final product merely to "make [it] more attractive and salable."<sup>47</sup> Her argument proposed that the Legislature meant for Chapter 113's exemptions to apply only to "legitimate historical, biographical, and fictional works."<sup>48</sup> Though this interpretation is a fair reading of Chapter 113, particularly in light of the statute's exemption for political or newsworthy material, the court rejected this interpretation and held that the exemption applied to all enumerated uses found in Chapter 113 regardless of the purpose of the use.<sup>49</sup>

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38. 116 F.3d 1297 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 161 (1998).

39. See SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 1 (Apr. 1, 1999) (crediting Mrs. Fred Astaire and the Screen Actor's Guild as the source of SB 209).

40. *Astaire*, 116 F.3d at 1299.

41. *Id.*

42. See SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 6-9 (Sept. 7, 1999) (giving a list of 83 actors and entertainment associations who support Chapter 998's correction of the Ninth Circuit's decision in *Astaire*).

43. See *supra* notes 35-37 and accompanying text (outlining the uses not prohibited by deceased celebrities persona rights law).

44. *Astaire*, 116 F.3d at 1300.

45. *Id.* at 1301; see also *supra* notes 36-37 and accompanying text (providing a list of exemptions under Chapter 113).

46. *Astaire*, 116 F.3d at 1301-02.

47. *Id.* at 1302.

48. *Id.*

49. *Id.* at 1303.

## 2. *Princess Diana and the Cairns Case*

In *Cairns v. Franklin Mint Co.*,<sup>50</sup> Federal District Court Judge Paez described Diana, Princess of Wales, as “one of the most beloved celebrities” in recent history, but further stated that California law was unable to protect her memory.<sup>51</sup> The executors of the estate of the Princess and the trustees of her memorial fund had sued several defendants for the unauthorized use of the Princess’ name and image in violation of California law protecting deceased celebrities’ persona rights.<sup>52</sup> The defendants were engaged in producing and selling Princess memorabilia, including dolls, plates, and jewelry, without the permission of her estate—and such production and sales are the types of activities that the law protecting deceased celebrity persona rights was enacted to prevent.<sup>53</sup>

The defendants succeeded in arguing to the court that British law, or the lack thereof in this case, should apply instead of California law.<sup>54</sup> The United Kingdom has no equivalent of Chapter 113, allowing heirs or assignees to control the use of a celebrity’s persona.<sup>55</sup> Following California common law, the court ruled that where “there is no law to the contrary,” the law of one’s domicile controls.<sup>56</sup> Finding no legislative intent behind Chapter 113 to suggest that California law should apply instead of the law of the celebrity’s domiciliary state, the court chose to follow the common law rule in this case.<sup>57</sup> Diana, who was domiciled in the United Kingdom during her lifetime, would have her persona rights controlled by British law instead of California law.<sup>58</sup> Because persona rights are not transferable at death under British law, the defendants had not violated any British law.<sup>59</sup> For Chapter 113 to apply in future cases, *Cairns* required that the celebrity have been domiciled either in California or in another forum that grants descendible persona rights.<sup>60</sup>

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50. 24 F. Supp. 2d 1013 (C.D. Cal. 1998).

51. *Id.* at 1021.

52. *Id.* at 1022.

53. *Id.*

54. *Id.* at 1028.

55. *Id.* at 1023.

56. *Id.* at 1025.

57. *Id.* at 1027.

58. *Id.* at 1029.

59. *Id.*

60. *Id.*

### III. CHAPTER 998

In response to the problems presented in *Astaire*<sup>61</sup> and *Cairns*,<sup>62</sup> the California Legislature passed Chapter 998,<sup>63</sup> entitled the Astaire Celebrity Image Protection Act.<sup>64</sup> The main changes brought by Chapter 998 were precipitated by the rulings in the cases involving Fred Astaire and Princess Diana.<sup>65</sup> Perceived injuries to these two celebrities led to legislative modification of Chapter 113.<sup>66</sup> The revisions include: (1) exemptions from the requirement that a user obtain authorization prior to using a deceased celebrity's persona; (2) standing-to-sue provisions; (3) extension of the protection period for persona rights from fifty to seventy years, bringing the period in line with another protected property right, the copyright;<sup>67</sup> and (4) access to personae registered with the State and the claimants who own these personae by way of the Internet.<sup>68</sup> Chapter 998 added another, smaller change: it renumbered the code section to appear after the section of California law protecting living celebrities' persona rights, doing so to provide continuity in the law's form.<sup>69</sup>

Chapter 998 changes the exemptions relating to the prohibited use of a deceased celebrity's persona. Existing law prevents exploitation of a celebrity's persona for commercial uses,<sup>70</sup> and Chapter 998 retains this prohibition by allowing any use of a deceased celebrity's persona as long as such use is not aimed at the advertisement, solicitation, or sale of a commercial product.<sup>71</sup> Furthermore, Chapter 998 anticipates future uses of a celebrity's persona by digital alteration, and forbids this digital alteration for any purpose without permission from the decedent's heirs and assignees.<sup>72</sup> The new law also prohibits the use of a celebrity's persona in a defamatory manner,<sup>73</sup> which prohibition is consistent with United States Supreme

61. See *supra* Part II.C.1 (discussing the holding of *Astaire*, which exempted the uses found in Chapter 113 regardless of their purpose).

62. See *supra* Part II.C.2 (discussing the *Cairns* holding that a deceased celebrity needs to have been domiciled in California to fall under this state's deceased persona rights law).

63. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 1 (Sept. 7, 1999).

64. 1999 Cal. Stat. ch. 998, sec. 1, at 94.

65. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 1, 16 (Sept. 7, 1999).

66. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 1, 16 (Sept. 7, 1999).

67. See CAL. CIV. CODE § 3344.1(g) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998) (extending the period of protected persona rights to 70 years after the celebrity's death).

68. *Id.* § 3344.1(f)(3) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

69. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 209, at 3 (Sept. 5, 1999).

70. 1988 Cal. Stat. ch. 113, sec. 2, at 464-67 (enacting CAL. CIV. CODE § 990) (current version at CAL. CIV. CODE § 3344.1).

71. CAL. CIVIL CODE § 3344.1(a)(1) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

72. *Id.* § 3344.1(a)(2) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

73. See *id.* § 3344.1(a)(3) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998) (prohibiting the use of a deceased celebrity's persona "in a manner that is false and known to be false, or with reckless disregard for the falsity of the use, where that use is portrayed as factual").



Court rulings concerned with the defamation of public figures.<sup>74</sup>

In response to the *Cairns* case,<sup>75</sup> Chapter 998 provides express legislative guidance on the issue of whether California's celebrity persona laws apply where the celebrity had been domiciled in another jurisdiction.<sup>76</sup> Chapter 998 resolves this situation by providing "*law to the contrary*," allowing plaintiffs to sue in California without encountering the problems noted in *Cairns*.<sup>77</sup> Heirs and assignees may assert claims of violation of persona rights if these violations occur "directly" in California.<sup>78</sup>

#### IV. ANALYSIS OF CHAPTER 998

##### A. Implications of Chapter 998

The first of Chapter 998's changes is perhaps among its least significant, but it defines the theme of Chapter 998, bringing clarity to the law.<sup>79</sup> This small revision is a simple renumbering of the code section,<sup>80</sup> so that it appears after its sibling section which protects the persona rights of living celebrities.<sup>81</sup> The remaining changes brought by the new law are of a similar tone.

The prohibition of commercial uses of a deceased celebrity's persona continues, and the new law reflects those types of works traditionally protected by the First Amendment: plays, books, magazines, newspapers, musical compositions, audiovisual works, radio and television programs, original works of art, and works found to have political or newsworthy value.<sup>82</sup> Indeed, the First Amendment acts as a check on Chapter 998 by protecting free expression and free speech. Nevertheless, the United States Supreme Court has recognized a limit on this freedom with regard to persona rights by protecting an individual's right to realize the economic value of her celebrity status.<sup>83</sup> In *Zacchini v. Scripps-Howard Broadcasting*,<sup>84</sup> the Court upheld a state tort claim brought by an individual who

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74. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964) (discussing defamation law concerning public figures); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (same); *Dun and Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751 (1985) (same).

75. See SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 16 (Sept. 7, 1999) ("The author asserts that this clarification of law is necessary in light of a recent decision, *Cairnes v. Franklin Mint*.").

76. CAL. CIV. CODE § 3344.1(n) (incorporating 1988 Cal. Stat. ch. 113, sec.2, at 464-67) (enacted by Chapter 998).

77. *Id.* § 3344.1 (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

78. *Id.* § 3344.1(n).

79. SENATE RULES COMMITTEE, ANALYSIS OF SB 209, at 3 (Sept. 5, 1999).

80. CAL. CIV. CODE § 3344.1.

81. See *id.* § 3344 (West 1997) (protecting the persona rights of living celebrities).

82. *Id.* § 3344.1(a)(2) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

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

84. 433 U.S. 562 (1977).

performed as a “human cannonball.”<sup>85</sup> The plaintiff had sued a broadcast company for televising his entire act as part of a television news report, claiming that the television broadcast eliminated the public market for live performances of his act.<sup>86</sup> Applying the First Amendment, the Supreme Court determined that protecting a right of publicity was necessary to “prevent unjust enrichment by the theft of good will.”<sup>87</sup> The Court did not articulate a test for assessing when a right of publicity might clash with the First Amendment, but the Court indicated that “[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, [the Court is] quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.”<sup>88</sup>

Another example of this limit on expression, directly related to a commercial use of a celebrity’s persona, comes from *White v. Samsung*.<sup>89</sup> Samsung had used an advertising campaign that made use of a robot dressing in a fashion similar to Vanna White and appearing on a set similar to the famous “Wheel of Fortune” television set.<sup>90</sup> The advertisement did not expressly use White’s name, but the Ninth Circuit found that the similarity was too close to real life.<sup>91</sup> The court held that Samsung had violated White’s persona rights.<sup>92</sup>

If White were deceased, this case would have fallen squarely within Chapter 998’s prohibition of commercial uses of a celebrity’s persona.<sup>93</sup> The enumerated exemptions in Chapter 998 would have provided clear guidance to Samsung and others in cases such as this by defining those uses exempt from Chapter 998’s prohibition based on their type.<sup>94</sup>

Chapter 998 uses two terms which may seem ambiguous on their faces: namely, the exemptions for works that have political or newsworthy value.<sup>95</sup> Case examples give meaning to the terms “political” and “newsworthy.” In *Dora v. Frontline Video*,<sup>96</sup> a California court held that a video production of a surfing documentary generated sufficient public interest to garner constitutional protection.<sup>97</sup> The court based this decision on a First Amendment freedom of speech construction,<sup>98</sup>

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85. *Id.* at 564.

86. *Id.* at 578.

87. *Id.* at 576.

88. *Id.* at 574-75.

89. 971 F.2d 1395 (9th Cir. 1992).

90. *Id.* at 1396.

91. *Id.* at 1399.

92. *Id.*

93. CAL. CIV. CODE § 3344.1(a)(1) (incorporating 1988 Cal. Stat. ch. 113, sec.2, at 464-67) (enacted by Chapter 998).

94. *Id.* § 3344.1(a)(2) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

95. *Id.*

96. 15 Cal. App. 4th 536, 18 Cal. Rptr. 2d 790 (1993).

97. *Id.* at 542, 18 Cal. Rptr. 2d at 792.

98. *Id.* at 542-43, 18 Cal. Rptr. 2d at 792.

allowing slight intrusions into a celebrity's persona rights if an amount of "social value" comes from the intrusion.<sup>99</sup> In that case, the surfing documentary fed the public's interest in that subject, thereby meeting the social or political value requirement. Celebrities by their very nature generate public interest, and one has to wonder whether any production or piece that is meant to feed this interest will always receive such an exemption.

*Montana v. San Jose Mercury News*<sup>100</sup> gives meaning to the exemption for newsworthy works. The Sixth District Court of Appeal of California held that a newspaper was not liable for a violation of persona rights even though it had produced and sold posters bearing the image of famous San Francisco 49ers Quarterback Joe Montana in commemoration of a recent Super Bowl victory.<sup>101</sup> The court, quoting *Dora v. Frontline Video*,<sup>102</sup> stated that a privilege existed in the case of "publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it."<sup>103</sup> A fact that apparently was integral to this holding was that the poster appeared as part of a promotion of the coverage of the Super Bowl in the newspaper. The court held that a periodical like the *San Jose Mercury News* had a First Amendment right to promote itself by using a celebrity's image in reference to an earlier article or piece concerning the celebrity that had appeared in the periodical.<sup>104</sup> That key fact from *Montana* appears in Chapter 998's exemptions for advertisements for works having newsworthy value.<sup>105</sup>

Chapter 998 appears to be sound in its construction. The enumerated uses provide clear guidance to persons seeking protection from Chapter 998's prohibition on the use of a deceased celebrity's persona, and the references to political or newsworthy works are clearly enunciated in established court rulings.<sup>106</sup> Chapter 998 recasts and fortifies these principles in statutory form.

### B. Response to Cairns: Standing to Sue

Because of the federal district court's ruling in *Cairns*, Princess Diana's heirs were not able to sue under California law to prevent others from using her persona

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99. *Id.* at 543, 18 Cal. Rptr. 2d at 793.

100. 34 Cal. App. 4th 790, 40 Cal. Rptr. 2d 639 (1995).

101. *Id.* at 794, 40 Cal. Rptr. 2d at 640-41.

102. 15 Cal. App. 4th 536, 18 Cal. Rptr. 2d 790 (1993).

103. *Id.* at 793, 40 Cal. Rptr. 2d at 643 (quoting *Dora v. Frontline Video Inc.*, 15 Cal. App. 4th 536, 542 (1993)).

104. *Id.* at 796, 40 Cal. Rptr. 2d at 646.

105. CAL. CIV. CODE § 3344.1(a)(2) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

106. See *supra* text accompanying notes 96-105 (discussing the impact of *Dora v. Frontline Video Inc.*, 15 Cal. App. 4th 536, 542 (1993), and *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790, 40 Cal. Rptr. 2d 639 (1995), on California deceased celebrity persona law).

to sell commercial items.<sup>107</sup> The heart of that ruling, as noted above,<sup>108</sup> turned on whether the celebrity lived in California or another domicile granting the right to devise persona rights after death.<sup>109</sup> California common law required the law of the celebrity's domiciliary state to control the availability of this right, unless the California Legislature provided an exception.<sup>110</sup> Chapter 998 provides such an exception.<sup>111</sup>

However, the phrasing of Chapter 998 is open to interpretation. The California Legislature chose to use the term "directly" to describe the prohibited acts occurring in California.<sup>112</sup> Any attempt to give meaning to this term would be speculative in the absence of a case so elaborating, and the meaning of "direct[]" is likely to be highly fact-specific. Nevertheless, the term probably simply relates to the need for a high level of activity in California before jurisdiction can be granted in California courts.<sup>113</sup>

### C. Extension of the Protection Period

Chapter 998 extends the protection period during which permission is required for the use of a deceased celebrity's persona from fifty to seventy years.<sup>114</sup> This move comports with the recent extension of the copyright,<sup>115</sup> but some question the justification behind that change because of the difference between the copyright, which protects intellectual property rights, and persona rights, which protect rights to images of celebrities.<sup>116</sup> The two are admittedly different, with the copyright applying to "things"—books and images, for example—while persona rights declare property rights in persons.<sup>117</sup> The time extension also raises another controversy. Another twenty years, an entire generation, has been placed between the public and its idols.<sup>118</sup> As Columbia Pictures stated in opposition to the new law, "Extension of the right of publicity from 50 to 70 years further perpetuates the

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107. Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1020 (C.D. Cal. 1998).

108. *Supra* text accompanying notes 50-60.

109. *Id.* at 1029.

110. *Id.*

111. See CAL. CIV. CODE § 3344.1(n) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

112. *Id.*

113. Cf. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 15-16 (Sept. 7, 1999) (discussing opposition concerns that a low standard would allow parties with little or no connection to California to sue in this jurisdiction).

114. CAL. CIV. CODE § 3344.1(g) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998).

115. See *supra* note 49 and accompanying text (detailing changes in the copyright law).

116. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 14 (Sept. 7, 1999)

117. See CAL. CIV. CODE § 3344.1(a)(1) (incorporating 1988 Cal. Stat. ch. 113, sec. 2, at 464-67) (enacted by Chapter 998) (listing protected property interests—also known as persona rights—in a deceased celebrity's name, voice, signature, photograph, or likeness).

118. CAL. CIV. CODE § 3344.1(g).

chilling effect of [this law] by reaching back into history and removing from public view or subjecting to private control another 20 years['] worth of historical figures."<sup>119</sup> Some may question that this move denies History access to great figures, but it remains to be seen that this is true. History can always comment on individuals, and Chapter 998 expressly grants the public the right to use deceased celebrity personae in a broad range of expressive art.<sup>120</sup>

## V. CONCLUSION

Chapter 998 brings change to California law,<sup>121</sup> and the future associated with this change is not entirely clear, like all predictions of the future, it has some dark clouds. The courts will undoubtedly struggle to bring meaning to the words of Chapter 998, particularly the term "direct[]," which the law uses to describe unauthorized uses that give rise to deceased celebrity persona rights.<sup>122</sup> Constitutional privileges raised by those without authorization to use deceased celebrity persona rights may also cause lengthy litigation.<sup>123</sup> Some will ask if the defense of long-dead celebrities is worth this effort.<sup>124</sup> The answer, from the nostalgic minds of the fans, is, of course, yes.

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119. *Id.*

120. *See id.* § 3344.1(a)(2) (incorporating 1984 Cal. Stat. ch. 1704, sec. 1, at 6169-72) (enacted by Chapter 998) (allowing unrestricted use of a celebrity persona in "works of expression, including, but not limited to, fictional or nonfictional entertainment, [as well as] dramatic, literary, and musical works," as long as such works are not for commercial uses).

121. *See supra* Part III (discussing the revisions of California's laws regarding deceased celebrity persona rights).

122. *See supra* text and accompanying notes 54-60 (discussing the ambiguity of the term "direct" as used by the Legislature to describe the threshold showing that plaintiffs must meet when they seek the protection of California's persona laws for deceased celebrities).

123. *See supra* Part IV.A (outlining the freedom of expression and other constitutional privilege arguments that may be raised as a defense by those using the personae of deceased celebrities without authorization).

124. *See, e.g.,* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 209, at 13, 15 (Sept. 7, 1999) (citing opposition claims that the new law will cause increased litigation and forum shopping that will crowd California courts).