UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE MILTON H. GREENE ARCHIVES, INC., Plaintiff, v. CMG WORLDWIDE, INC., an Indiana Corporation, and MARILYN MONROE, LLC, a Delaware Limited Liability Company, ANNA STRASBERG, an individual, Defendants. AND CONSOLIDATED ACTIONS	CASE NO. CV 05-02200 MMM (MCx) ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff Marilyn Monroe, LLC ("MMLLC") has moved under Local Rule 7-18 for reconsideration of the court's May 14, 2007 order holding that it has no standing to enforce Marilyn Monroe's posthumous right of publicity.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 2005, The Milton H. Greene Archives, Inc. filed this action against CMG Worldwide Inc., Marilyn Monroe LLC, and Anna Strasberg. On May 3, 2005, the court

consolidated the case with two other actions filed in this district – *Shirley De Dienes et al. v. CMG Worldwide, Inc. et al.* (CV 05-2516)[1] and *Tom Kelley Studio, Inc. v. CMG Worldwide, Inc. et al.* (CV 05-2568).[2] On December 14, 2005, the court consolidated two additional actions with the pending case – *CMG Worldwide, Inc., et al. v. Tom Kelley Studios* (CV 05-5973) and *CMG Worldwide, Inc., et al. v. The Milton H. Green Archives, Inc.* (CV 05-7627).[3] These actions were originally filed by CMG Worldwide, Inc. and Marilyn Monroe, LLC (the "CMG Parties" or "plaintiffs") in the United States District Court for the Southern District of Indiana, and were transferred to this district pursuant to 28 U.S.C. § 1404(a) on August 9, 2005.[4] All of the actions seek to have the court resolve competing claims to ownership of the legal right to use, license, and distribute certain photographs of Marilyn Monroe.

In their complaints against the Milton H. Green Archives, Inc. and Tom Kelley Studios, Inc. (the "MHG Parties" or "defendants"), the CMG Parties assert that they own the "Right of Publicity and Privacy in and to the Marilyn Monroe name, image, and persona" that was created by "the Indiana Right of Publicity Act, I.C. § 32-36-1-1 et seq., and other applicable right of publicity laws." The CMG Parties contend that defendants have infringed this right by using Marilyn Monroe's name, image and likeness "in connection with the sale, solicitation, promotion, and advertising of products, merchandise, goods and services" without their consent or authorization.[5]

On October 6, 2006, the MHG Parties filed a motion for summary judgment. They argued, *inter alia*, that plaintiffs' right of publicity claims were preempted by the Copyright Act, 28 U.S.C.

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[1]The *De Dienes* action was dismissed without prejudice on February 2, 2006, pursuant to the parties' stipulation.

[2]Tom Kelley Studio, Inc. sued the same defendants as did The Milton H. Greene Archive, Inc. – CMG Worldwide Inc., Marilyn Monroe LLC, and Anna Strasberg.

[3]Anna Strasberg was not a party to the Indiana actions.

[4]On February 6, 2006, the court issued a scheduling order, which denominated the CMG Parties plaintiffs and the MHG Parties defendants for purposes of the consolidated actions. The court based this order on the fact that the CMG Parties' Indiana action was the first filed action.

[5]Plaintiffs' First Amended Complaint against Milton H. Greene Archives, Inc., ¶¶ 7, 24-26; Plaintiffs' First Amended Complaint against Tom Kelley Studios, Inc., ¶¶ 7, 28-30.

§§ 101-1332, and that, even if they were not preempted, plaintiffs had failed to adduce any evidence that they had standing to assert claims based on Marilyn Monroe's right of publicity.[6] In essence, defendants argued that, even if a posthumous right of publicity in Monroe's name, image and likeness exists, plaintiffs could not show that they were presently in possession of that right.[7]

On May 14, 2007, the court granted defendants' motion for summary judgment, concluding that plaintiffs lacked standing to assert Marilyn Monroe's right of publicity.[8] The court found that Marilyn Monroe could not have devised a non-statutory right of publicity through her will, and also could not have devised subsequently created statutory rights that did not come into existence until decades after her death. This conclusion was supported, in part, by the court's interpretation of the California right of publicity statute.[9] The court determined that under the statute, a deceased personality

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[6]Defendants' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment ("Defs.' Mem.") at 32-34.

[7]Defendants also argue that (1) Marilyn Monroe was domiciled in New York at the time of her death, such that no right of publicity could survive her passing; (2) even if Marilyn Monroe was not a New York domiciliary at the time of her death, plaintiffs are collaterally and judicially estopped from asserting otherwise; (3) Indiana's right of publicity statute does not apply to Marilyn Monroe; and (4) plaintiffs' claims are barred by laches. Defendants' motion also challenged plaintiffs' copyright infringement claims (see *id.* at 43-47); those claims have since been dismissed without prejudice pursuant to the parties' stipulation.

[8]California created a descendible, posthumous right of publicity in 1984, with the passage of its post-mortem right of publicity statute. See CAL. CIVIL CODE § 3344.1 (formerly CAL. CIVIL CODE § 990). Before passage of this act, California recognized a common law right of publicity, but that right expired on an individual's death. See *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 861 (1979).

[9]The California statute provides, in pertinent part:

> (a)(1) 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 from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. . . .
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> (b) The rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom the rights vest under this section or the transferees of that

who had died *before* the measure was enacted was deemed not to have had the capacity to transfer the subsequently created right of publicity, which was denominated a "property right[ ]" prior to death. See CAL. CIVIL CODE § 3344.1(b) (providing that a "deceased personality" may, "*before [his or her] death*," transfer the statutory publicity right "by contract or by means of trust or testamentary documents," but that "after the death of the deceased personality," the statutory publicity right "vest[ed]" directly in specified statutory beneficiaries (emphasis added)). Given the clear common law prescription that a testator cannot devise property not owned at the time of death, and the presumption that the California legislature knew of this prescription, the court found that, as respects personalities who died before its enactment, the California right of publicity statute vested the posthumous publicity right in designated heirs rather than in the "personality" himself or herself. A review of the relevant legislative history confirmed this construction of the statute. Because the California right of publicity statute did not reveal a legislative intent that was contrary to general principles of property and probate law, the court held that plaintiffs could not show that they were entitled to assert Marilyn Monroe's posthumous right of publicity.

The court, however, reached this conclusion with reluctance because some personalities who died before passage of the California and Indiana right of publicity statutes had left their residuary estates to charities. These charities had, since the California statute was enacted in 1984, assumed that they controlled the personality's right of publicity, and it appeared that they would be "divested" of the celebrities' posthumous rights of publicity as a result of the court's order. The court therefore noted that its ruling in no way prevented the California or Indiana legislature from enacting a right of publicity

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person or persons.
(c) The consent required by this section shall be exercisable by the person or persons to whom the right of consent, or portion thereof, has been transferred in accordance with subdivision (b), or if no transfer has occurred, then by the person or persons to whom the right of consent, or portion thereof, has passed in accordance with subdivision (d).
(d) Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person or persons and may be exercised, on behalf of and for the benefit of all of those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights: [the surviving spouse and surviving children or grandchildren, or the surviving parents of the deceased personality]." CAL. CIVIL CODE § 3344.1.

statute that vested the right directly in the residuary beneficiaries of a deceased personality's estate, or in the successors-in-interest of those residuary beneficiaries.

On November 21, 2007, plaintiff MMLLC filed a motion for reconsideration of the court's order. MMLLC bases its motion on the fact that, six weeks after the order was entered, California State Senator Sheila Kuehl amended Senate Bill 771 ("SB 771") to abrogate the court's ruling and clarify the meaning of California's right of publicity statute.[10] SB 771 passed both houses of the California Legislature in September 2007, and was signed by Governor Schwarzenegger on October 10, 2007.[11]

Based on this newly enacted measure, MMLLC seeks reconsideration of the court's conclusions (1) that "under either California or New York law, Marilyn Monroe had no testamentary capacity to devise, through the residual clause of her will, statutory rights of publicity that were not created until decades after her death"; (2) that alternatively, even if Marilyn Monroe's estate was open at the time the statutory rights of publicity were created, it "was not [an] entity capable of holding title to the rights"; and (3) that MMLLC and CMG have "no standing to assert the publicity rights they seek to enforce in this action."[12]

II. DISCUSSION

A. Consideration of the Motion for Reconsideration

Local Rule 7-18 limits the grounds upon which a party may seek reconsideration of the court's decision on a given motion. Under Local Rule 7-18, a motion for reconsideration is proper only where the moving party demonstrates:

> "(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of

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[10]Memorandum of Points and Authorities in Support of Marilyn Monroe, LLC's Motion for Reconsideration of the Court's May 14, 2007 Order Granting Summary Judgment ("Pl.'s Mem.") at 1.

[11] *Id.* at 4; Declaration of Laura A. Wytsma Filed in Support of Marilyn Monroe, LLC's Motion for Reconsideration ("Wytsma Decl."), Exhs. F, G, H.

[12]Pl.'s Mem. at 12.

new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." CA CD L.R. 7-18.

MMLLC does not identify the basis on which it seeks Rule 7-18 reconsideration. Presumably, however, it asserts that the legislature's attempt to clarify Civil Code § 3344.1 is "a material difference in fact or law" that could not have been presented to the court prior to its decision of the original motion, or that the passage of the bill constitutes "the emergence of new material facts or a change of law" post-dating the decision. See CA CD L.R. 7-18.

B. SB 771's Purported Clarification of the Right of Publicity Statute

1. The Legislative History of SB 771

The legislative history[13] of SB 771 indicates that the measure was intended to respond to the court's May 14, 2007 summary judgment order, as well as a recent decision by a court in the Southern District of New York,[14] and to clarify existing law with respect to protection of a deceased personality's publicity rights. See SENATE JUDICIARY COMMITTEE BILL ANALYSIS at 1 (S.B. 771 Sept. 6, 2007). The bill states that all celebrities who died within seventy years of January 1, 1985 (the effective date of § 3344.1) have a posthumous right of publicity that is deemed to have existed at the time of their death. It explains that, in the absence of an express provision in a will or other testamentary instrument that

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[13]Under Rule 201 of the Federal Rules of Evidence, the court may take judicial notice of the legislative history of state statutes. See, e.g., *Chaker v. Crogan*, 428 F.3d 1215, 1223 n. 8 (9th Cir. 2005) (granting plaintiff's request to take judicial notice of the legislative history of a state statute); see also *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (explaining that a court may judicially notice undisputed matters of public record but not disputed facts stated therein).

[14]*Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F.Supp.2d 309 (S.D.N.Y. 2007), is an action similar to this one that CMG and MMLLC filed in Indiana against the family archives of a photographer of Marilyn Monroe. *Id.* at 312-13. The case was transferred to the Southern District of New York by a court in the Southern District of Indiana after the Shaw Family Archives filed suit in New York seeking a declaratory judgment regarding Marilyn Monroe's post-mortem right of privacy or publicity. *Id.* at 310-11. On May 7, 2007, the New York court granted summary judgment in favor of plaintiff on MMLLC's claim that plaintiff had violated Marilyn Monroe's right of publicity. *Id.* at 320. Like this court in its May 14, 2007 order, the *Shaw* court determined that Marilyn Monroe could not devise a right of publicity she did not possess at that time of her death, and also that California's right of publicity statute did not allow for transfer of the right of publicity through the will of a personality who had died prior to the statute's enactment. *Id.* at 319-20.

transfers the publicity right of a deceased personality, "disposition of the publicity right[ ] would be in accordance with the disposition of the residue of the deceased personality's assets." *Id.* Finally, the bill clarifies that publicity rights recognized in § 3344.1 are "freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's publicity rights." *Id.*

Committee reports on the bill indicate that Senator Kuehl, the bill's sponsor, believed that the court erred in ruling that Marilyn Monroe did not possess a statutory right of publicity when she died and thus that the right could not pass to the residuary beneficiary under her will. *Id.* at 4. Senator Kuehl asserted that passage of SB 771 was necessary to clarify that in enacting § 3344.1, the legislature intended "to create post-mortem publicity rights for celebrities, to extend those rights back to 50 years from the date the statute became effective[15] and to enable the transfer of such publicity rights to the deceased personality's designated beneficiaries."[16] *Id.*

2. Amended Text of § 3344.1

In relevant part, SB 771 amends § 3344.1(b) to provide:

> "The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument, executed before or after January 1, 1985. The rights recognized

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[15]A 1999 amendment to the statute extends publicity rights back seventy years from the date of the law's enactment. See 1999 Cal. Stat. ch. 998 (S.B. 209).

[16]The Senate Judiciary Committee analysis indicates that SB 771 was intended to clarify § 3344.1 in the following ways:

> "a) It would provide that the 3344.1 rights of publicity are property rights that are deemed to have existed at the time of death of any deceased personality who died prior to or after January 1, 1985.
> b) It would provide that these rights are therefore transferable or descendible by contract, trust, or other testamentary instrument.
> c) If the rights were not expressly transferred under a provision of the deceased personality's will or other testamentary instrument, the rights are to be disposed under the residue provision of the testamentary instrument.
> d) The rights established by this statute are freely transferable and descendible by contract, trust, or other testamentary instrument by any subsequent owner of these rights." See SENATE JUDICIARY COMMITTEE BILL ANALYSIS at 5.

under this section shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and, except as provided in subdivision (o), shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights in his or her name, voice, signature, photograph, or likeness, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights recognized under this section in accordance with the terms of that provision. The rights established by this section shall also be freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights as recognized by this section. Nothing in this section shall be construed to render invalid or unenforceable any contract entered into by a deceased personality during his or her lifetime by which the deceased personality assigned the rights, in whole or in part, to use his or her name, voice, signature, photograph or likeness, regardless of whether the contract was entered into before or after January 1, 1985." 2007 Cal. Stat. ch. 439 (S.B. 771).

Newly added subsection (o) provides an exception to subsection (b) for parties who exercised posthumous rights of publicity under the pre-amendment version of § 3344.1. Subsection (o) provides:

"(o) Notwithstanding any provision of this section to the contrary, if an action was taken prior to May 1, 2007, to exercise rights recognized under this section relating to a deceased personality who died prior to January 1, 1985, by a person described in subdivision (d), other than a person who was disinherited by the deceased personality in a testamentary instrument, and the exercise of those rights was not challenged successfully in a court action by a person described in subdivision (b), that exercise shall not be affected by subdivision (b). In such a case, the rights that would otherwise vest in one or more persons described in subdivision (b) shall vest solely in the person or persons described in subdivision (d), other than a person disinherited by the deceased

personality in a testamentary instrument, for all future purposes." *Id.*

Finally, a new subsection (p) provides:

"(p) The rights recognized by this section are expressly made retroactive, including to those deceased personalities who died before January 1, 1985." *Id.*

SB 771 expressly states that "[i]t is the intent of the Legislature to abrogate the summary judgment orders entered in The Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., United States District Court, Central District of California, Case No. CV 05-2200 MMM (Mcx), filed May 14, 2007, and in Shaw Family Archives Ltd. v. CMG Worldwide, Inc., United States District Court, Southern District of New York, Case No. 05 Civ. 3939 (CM), dated May 2, 2007." *Id.*

C. Whether the Court Should Reconsider its Order in Light of SB 771

1. Standard for Determining When a Statute is a Legislative Clarification of an Existing Law

As a first step, the court must determine the effect on this case of the legislature's enactment of SB 771. It is a basic canon of statutory construction that "statutes do not operate retrospectively unless the Legislature plainly intended them to do so." *Western Security Bank, N.A. v. Superior Court*, 15 Cal.4th 232, 243 (1997) (citing *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1207-1208 (1988), and *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, 30 Cal.2d 388, 393 (1947)); see also *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 316 (2001) ("Despite the dangers inherent in retroactive legislation, it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect").

"A statute has retrospective effect when it substantially changes the legal consequences of past events." *Western Security Bank*, 44 Cal.3d at 243 (citing *Kizer v. Hanna*, 48 Cal.3d 1, 7 (1989)). "A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment." *Id.* When the legislature clearly intends a statute to operate retrospectively, the court is obligated to carry out that intent unless due process considerations prevent it from doing so. *Id.* (citing *In re Marriage of Bouquet*, 16 Cal.3d 583, 587, 592 (1976)).

"A corollary to these rules is that a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment." *Id.* (emphasis

original). A clarifying statute "'may be applied to transactions predating its enactment without being considered retroactive' because it 'is merely a statement of what the law has always been.'" *In re Marriage of Fellows*, 39 Cal.4th 179, 183 (2006) (quoting *Riley v. Hilton Hotels Corp.*, 100 Cal.App.4th 599, 603 (2002)); *Western Security Bank*, 44 Cal.3d at 243 ("Such a legislative act has no retrospective effect because the true meaning of the statute remains the same" (citations omitted)); *Re-Open Rambla, Inc. v. Bd. of Supervisors*, 39 Cal.App.4th 1499, 1511 (1995) ("[W]e honor the well-established precept that '. . . the enactment of a statute or an amendment to a statute for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; . . . it simply states the law as it was all the time, and no question of retroactive application is involved,'" quoting *City of Redlands v. Sorensen*, 176 Cal.App.3d 202, 211 (1985)); see also *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1079 (9th Cir. 2005).

In determining whether a statute seeks to clarify existing law or constitutes a new measure, the court considers the circumstances surrounding the legislature's change to the statute to ascertain whether its sole intent is to clarify existing law. *Western Security Bank*, 44 Cal.3d at 243 (citations omitted); *Kern v. County of Imperial*, 226 Cal.App.3d 391, 400 (1990) ("The legislative history of a statute and the wider historical circumstances of its enactment are legitimate and valuable aids in divining statutory purpose" (citation omitted)). One circumstance that may be relevant to the court's analysis is whether the legislature's changes are a prompt reaction "to the emergence of a novel question of statutory interpretation." *Id.* ("'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. . . . [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act – a formal change – rebutting the presumption of substantial change,'" quoting *RN Review for Nurses, Inc. v. State of California*, 23 Cal.App.4th 120, 125 (1994) (quoting 1A Singer, SUTHERLAND STATUTORY CONSTRUCTION (5th ed. 1993) § 22.31))).

The California Supreme Court has recognized, however, that even where a statute purports to clarify the original meaning of the act, "a legislative declaration of an existing statute's meaning is

neither binding nor conclusive in construing the statute." *Id.* at 244. While such a declaration is given due consideration, "[u]ltimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." *Id.* (citing *California Emp. etc. Com. v. Payne*, 31 Cal.2d 210, 213 (1947), *Bodinson Mfg. Co. v. California E. Com.*, 17 Cal.2d 321, 326 (1941), and *Del Costello v. State of California*, 135 Cal.App.3d 887, 893 n. 8 (1982)); see *Alch v. Superior Court*, 122 Cal.App.4th 339, 398 (2004). Thus, "[w]hen [the state's highest court] 'finally and definitively' interprets a statute, the Legislature does not have the power to then state that a later amendment merely declared existing law." *Carter v. California Dep't of Veterans Affairs*, 38 Cal.4th 914, 922 (2006). Indeed, "there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies." *Western Security Bank*, 15 Cal.4th at 244; see also *Peralta Community College Dist. v. Fair Employment & Housing Com.*, 52 Cal.3d 40, 52 (1990) ("The declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law" (citation omitted)).

"[E]ven [in cases where] the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a 'clarification,' the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change." *Western Security Bank*, 15 Cal.4th at 244 (citing *California Emp. etc. Com.*, 31 Cal.2d at 214). "Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute." *Id.* (citing *Evangelatos*, 44 Cal.3d at 1206). Ordinarily, "[t]he presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance." *Evangelatos*, 44 Cal.3d at 1214; see also CAL. CIVIL CODE § 3 ("No part of [the civil code] is retroactive, unless expressly so declared"). "Thus, where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto.'" *Western Security Bank*, 15 Cal.4th at 244 (quoting *California Emp. etc. Com.*, 31 Cal.2d at 214, and citing *City of Sacramento v. Public Employees' Ret. Sys.*, 22 Cal.App.4th 786, 798 (1994); *City of Redlands v.*

Sorensen, 176 Cal.App.3d 202, 211 (1985)).

2. MMLLC's Arguments in Favor of Reconsideration

Applying these principles, MMLLC argues that SB 771 clarifies the law in two ways that warrant reconsideration of the court's order granting summary judgment. First, it notes that SB 771 clarifies that "post-mortem publicity rights in California 'shall be deemed to have existed at the time of death of any person who died prior to January 1, 1985.'"[17] MMLLC contends this provision makes clear that, in enacting § 3344.1, the legislature intended that a celebrity who died prior to the bill's passage would be deemed to have held the right of publicity at the time of death, such that the right could pass through the residuary clause of his or her will. Such an intent may be gleaned, MMLLC asserts, from the fact that § 3344.1 "always" defined a "deceased personality" as any person who died within 70 years of January 1, 1985.[18] MMLLC also cites Senator Kuehl's remark that "[t]here is nothing in the statute that indicates the Legislature intended to treat people differently depending on whether they died before or after 1985."[19] It contends that this statement of intent by the bill's sponsor should be given "due consideration by the court."[20] See *Kern*, 226 Cal.App.3d at 401 ("The statements of the sponsor of legislation are entitled to be considered in determining the import of the legislation" (citations omitted)).

MMLLC next asserts that SB 771 clarifies that "'the property right to use a deceased personality's name, voice, signature, photograph or likeness in a commercial product is freely descendible by means of trust or any other testamentary instrument executed before or after January 1, 1985.'"[21] The legislative history of SB 771 indicates that "in the absence of an express [t]ransfer of these rights, a provision in the will or other testamentary instrument that provides for the disposition of

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[17]Pl.'s Mem. at 6 (citing SB 771).

[18]*Id.*

[19]*Id.* (citing SENATE JUDICIARY COMMITTEE BILL ANALYSIS at 5).

[20]*Id.* at 8.

[21]*Id.* at 7; Wytsma Decl., Exh. K (Analysis of SB 771 by Office of Senate Floor Analyses, Senate Rules Committee (prepared for Sept. 7, 2007 Senate floor vote) at 2).

the residue of the deceased personality's assets is effective to transfer them."[22] The stated legislative purpose of this amendment is not to " change[ ] existing law, but, rather . . . [to] clarif[y] it in order to prevent needless litigation."[23]

MMLLC notes that the legislature acted swiftly to address a perceived judicial error in statutory interpretation.[24] It argues that because SB 771 was introduced, passed, and signed into law within five months of the court's order, the court should honor the legislature's statement that it was acting to clarify existing law.[25] See *Western Security Bank*, 15 Cal.4th at 246 ("If the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect"). This is particularly true, MMLLC asserts, because the legislature expressly stated, both in the legislative history of SB 771 and in the text of the bill, that it intended to abrogate the court's May 14, 2007 order.[26] See 2007 Cal. Stat. ch. 439 (SB 771); SENATE JUDICIARY COMMITTEE BILL ANALYSIS at 6.

That there is a direct link between the court's May 14, 2007 decision and SB 771 is highlighted by the fact that the Senate Judiciary Committee's analysis specifically describes how *Marilyn Monroe's* right of publicity would be transferred under the clarified scheme, i.e., that Monroe's posthumous right of publicity would be deemed to have passed to Lee Strasberg as part of her residuary estate, that Lee Strasberg would be deemed to have transferred the right by will to his wife, Anna Strasberg, thus entitling Anna Strasberg to transfer the right to MMLLC. The bill analysis also references the CMG Parties, observing that, after receiving the rights from Anna Strasberg, MMLLC "licensed CMG to use the images and likenesses of Marilyn Monroe." See SENATE JUDICIARY COMMITTEE BILL ANALYSIS at 6. As this aspect of the legislative history underscores, the legislature not only attempted to abrogate

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[22]Wytsma Decl., Exh. K (Analysis of SB 771 by Office of Senate Floor Analyses, Senate Rules Committee (prepared for Sept. 7, 2007 Senate floor vote) at 5).

[23]*Id.*

[24]Pl.'s Mem. at 8.

[25]*Id.* at 8-9.

[26]*Id.* at 9.

the court's interpretation of § 3344.1, but to delineate how the statute should be applied in this case.

3. SB 771 is a Clarification of Existing Law

While recognizing the legislature's clearly expressed intent to abrogate the court's summary judgment order and vest Marilyn Monroe's right of publicity in MMLLC, the court is cognizant that interpretation of statutes is a judicial function. See *People v. Cruz*, 13 Cal.4th 764, 780 (1996) ("[T]he interpretation of law is a judicial function"). Even when the legislature declares that an amendment merely clarifies the meaning of a preexisting statute, its declaration is not dispositive. *Id.* at 781. Rather, "[b]ecause the determination of the meaning of statutes is a judicial function, a court, faced with the question of determining the scope of the earlier version, still must ascertain from all the pertinent circumstances and considerations whether the subsequent amendment actually constitutes a modification or instead a clarification of the preexisting provision." *Id.* (citing *Peralta Community College Dist.*, 52 Cal.3d at 52; *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 1158 (1991) (noting that subsequent legislative declarations are not binding as to the intent of the Legislature that enacted the statute, and observing that the Legislature has no authority to interpret a statute)).

Applying the guidelines for statutory construction established by the California Supreme Court, however, the court is persuaded that SB 771 is a clarification of existing law. First, it is significant that the meaning of § 3344.1 has never been "finally and definitively" interpreted by the state's highest court. See *Carter*, 38 Cal.4th at 922. "'[I]f the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration.'" *Id.* (quoting *McClung v. Employment Development Dept.*, 34 Cal.4th 467, 473 (2004)). As noted in the May 14, 2007 order, in construing § 3344.1, the court lacked guidance from a higher court. As a result, it looked to the language of the statute itself, the common law background against which it was enacted, and the measure's legislative history. Under these circumstances, the legislature's attempted clarification of the statute is entitled to due consideration.

It is also significant that the legislature explicitly stated that it was clarifying existing law. In interpreting a statute, a California court must determine legislative intent so as to effectuate the

purpose of the law. See, e.g., *Cruz*, 13 Cal.4th at 775. "'In order to determine this intent, [the court] begin[s] by examining the language of the statute.'" *Id.* (quoting *People v. Pieters*, 52 Cal.3d 894, 898 (1991)). Generally, if the statute's language is "'without ambiguity, doubt, or uncertainty, then the language controls.'" *Herman v. Los Angeles County Metropolitan Transportation Authority*, 71 Cal.App.4th 819, 825 (1999) (quoting *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal.App.4th 1233, 1239 (1992)). The California Supreme Court has held, however, that even if the plain meaning of a statute is clear, a court may nonetheless inquire whether the "literal meaning of [the] statute comports with its purpose." *Lungren v. Deukmejian*, 45 Cal.3d 727, 729 (1988) ("[T]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. . . . Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act"). To ascertain legislative intent, the court looks to "the history of the statute, committee reports, and staff bill reports." *DeCastro West Chodorow & Burns, Inc. v. Superior Court*, 47 Cal.App.4th 410, 411 (1996).

As MMLLC notes, the legislative history of SB 771 contains numerous statements that "[t]he bill would clarify" the meaning of the existing law protecting a deceased personality's right of publicity.[27] See, e.g., SENATE JUDICIARY COMMITTEE BILL ANALYSIS at 3 ("SB 771 intends to clarify the Legislature's intent to make the protections under 3344.1 of the Civil Code applicable to deceased personalities who died between January 1, 1915 and January 1, 1985, the 70 year period of protection under the statute"); *id.* at 4 ("The author states this bill is necessary to clarify the Legislature's intent, when it enacted Civil Code 3344.1 (then 990 of the Civil Code) in 1984 to create post-mortem publicity rights for celebrities, to extend those rights back to 50 years from the date the statute became effective and to enable the transfer of such publicity rights to the deceased personality's designated beneficiaries"); *id.* at 5 ("SB 771 would indeed clarify 3344.1 in several ways").

These expressions of intent are indicative of the legislature's purpose in enacting SB 771. See

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[27]Pl.'s Mem. at 5-7.

Valles, 410 F.3d at 1080 ("In this case, the California legislature made clear that in its view the amendment constituted a clarification and not a substantive change"); *Western Security Bank*, 15 Cal.4th at 238 ("The Legislature soon acted to express a clear, contrary intent. It passed Senate Bill No. 1612 (1993-1994 Reg. Sess.) . . . as an urgency measure specifically meant to abrogate the Court of Appeal's holding"); *Salazar*, 117 Cal.App.4th at 324 (noting that "AB 76 also includes the following declaration of legislative intent: 'It is the intent of the Legislature in enacting this act to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in [the court's prior decision]"); *Kern*, 226 Cal.App.3d at 401 (noting that "it is clear the intent of the sponsor of the bill was to clarify existing law and remove any ambiguity to specific fact situations, one of which was the type of transfer which is the subject of this lawsuit"). Compare *Fonseca v. City of Gilroy*, 148 Cal.App.4th 1174, 1197 (2007) ("[P]articularly when there is no definitive 'clarifying' expression by the Legislature in the amendments themselves, we will presume that a substantial or material statutory change, as occurred here by the addition of section 65583 alone, bespeaks legislative intention to change, and not just clarify, the law," citing *Reidy v. City and County of San Francisco*, 123 Cal.App.4th 580, 592 (2004), and *Garrett v. Young*, 109 Cal.App.4th 1393, 1404-05 (2003)).

Furthermore, SB 771 was enacted shortly after the court entered an order interpreting § 3344.1. Senator Kuehl amended SB 771 to address § 3344.1 in June 2007, after the court entered its May 14, 2007 order construing the statute.[28] As amended, the measure passed in the Assembly without a single negative vote on September 4, 2007; on September 7, 2007, the Senate also approved the bill, again without a negative vote.[29] On October 10, 2007, just five months after the court entered a final order, Governor Schwarzenegger signed the bill into law.[30] "'[W]here [an] amendment [is] adopted soon after [a] controversy arose concerning the proper interpretation of the statute,'" the court should generally construe it as a "'legislative declaration of the meaning of the original act.'" *Western Security Bank*,

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[28]Wytsma Decl., Exh. F.

[29]*Id.*, Exh. G.

[30]*Id.*, Exh. H.

15 Cal.4th at 243 (quoting *RN Review for Nurses, Inc.*, 23 Cal.App.4th at 125).[31] That this was the legislature's intent in the present case is also evident from statements by the bill's author that the bill was intended to abrogate the court's order. See 2007 Cal. Stat. ch. 439 (SB 771), § 2. Given the legislature's clear statement that SB 771 was meant to clarify existing law, the court must give it "due consideration," *Western Security Bank*, 15 Cal.4th at 244, and examine whether "all the pertinent circumstances and considerations" support the legislature's declaration, see *Cruz*, 13 Cal.4th at 781; see also *Fonseca*, 148 Cal.App.4th at 1197.

One relevant factor in assessing whether a bill is a clarification rather than a modification of existing law is whether the measure as originally enacted was clear or contained some ambiguity. See *In re Marriage of McClellan*, 130 Cal.App.4th 247, 257 (2005) (noting that the legislature "indicates an intent to merely clarify existing law where . . . it amends a statute to resolve ambiguity in the existing law"); *Kern*, 226 Cal.App.3d at 401 (holding that an amendment clarified existing law, *inter alia*, because the sponsor intended to "remove any ambiguity to specific fact situations"); see also *Tyler v. State of California*, 134 Cal.App.3d 973, 977 (1982) (concluding that a statute clarified existing law where it was enacted in response to "confusion" created by a court decision).

Subsection (h) of § 3344.1 states that the term "'deceased personality' . . . include[s], without limitation, any . . . natural person who . . . died within 70 years prior to January 1, 1985." CAL. CIVIL CODE § 3344.1(h). Because the statute was passed in 1984 and took effect on January 1, 1985, at the time it became law the only individuals whose rights it impacted were celebrities who were already deceased. The legislative history of the statute shows, in fact, that it was enacted to protect the names,

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[31]Defendants argue it is incongruous for the 2007 legislature to declare the intent of the 1984 legislature. (See Defs.' Opp. at 9-11). As noted earlier, courts have recognized that "there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies." See *Western Security Bank*, 15 Cal.4th at 244; see also *Salazar*, 117 Cal.App.4th at 333 (Kitching, J., dissenting) ("The length of time between the 1984 amendment and the 2003 amendment suggests that the Legislature's declaration of its earlier intent should be disregarded"). Although acknowledging this, the California Supreme Court has nonetheless instructed that "the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them." *Western Security Bank*, 15 Cal.4th at 244; see *Salazar*, 117 Cal.App.4th at 328 (holding that the 2003 legislature properly clarified a 1984 law); *Carter*, 38 Cal.4th at 930 (affirming *Salazar*'s determination that a law was a clarification of a prior statute despite the fact that nearly twenty years had elapsed).

images and likenesses of deceased celebrities such as Elvis Presley, John Wayne, and W.C. Fields.

Subsection (b) provides that "[t]he rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom the rights vest under this section or the transferees of that person or persons." *Id.*, § 3344.1(b). Subsection (e) provides that "[i]f any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary document, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate." *Id.*, § 3344.1(e).

The court earlier concluded that, because a deceased person cannot transfer a property right that she does not own at the time of death, subsection (b) meant that the publicity right of a predeceased celebrity automatically vested in the statutorily designated heirs. This interpretation flowed directly from the language of subsection (b), which distinguished between transfers that occurred "before the death of the deceased personality" and transfers that occurred "after the death of the deceased personality." The statute provided that transfers occurring "before the death of the deceased personality" were to be made "by the deceased personality or his or her transferees," while transfers occurring "after the death of the deceased personality" were to be made by "the person or persons in whom the rights vest under this section or the transferees of that person or persons."

MMLLC now argues that the definition of "deceased personality" found in subsection (h) injects ambiguity into the language of subsection (b), which states that a "deceased personality" can transfer the right before his or her death. Since subsection (h) defines "deceased personality" as an individual who died within 70 years of January 1, 1985, and since the bill did not take effect until that date, MMLLC contends that the legislature must have contemplated that celebrities who predeceased the enactment would be deemed to have held the right before their death and to have had the ability to transfer it via a residual clause in their will. It is to this possible ambiguity that SB 771 speaks. The bill makes explicit what was at best implicit, and at worst ambiguous, in the original version of § 3344.1 – i.e., that "[t]he rights recognized under this section shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985. . . ."

The need for clarification is also supported by the fact that there was confusion in the marketplace as to the operation of the statute. As the court acknowledged in the May 14, 2007 order, some celebrities who died before § 3344.1 was passed in 1985 left their residuary estates to specified charities. Albert Einstein's statutory right of publicity, for instance, is registered to the Hebrew University of Jerusalem, a university co-founded by Einstein, who died in 1955. Similarly, the legislative history of SB 771 indicates that Wayne Enterprises, of which John Wayne's son is the president, is able to support the John Wayne Cancer Foundation and the John Wayne Cancer Institute through use of John Wayne's name and likeness. See SENATE JUDICIARY COMMITTEE BILL ANALYSIS at 9. The legislative history reports that many other "worthwhile causes and charitable institutions" are supported by exploitation of the publicity rights of deceased personalities such as Joan Crawford, Mae West, Edith Head, Janis Joplin, Alfred Hitchcock, Glenn Miller, Ozzie Nelson, Groucho Marx, and Bela Lugosi. *Id.* These charities evidently perceive that although the celebrity whose right of publicity they hold died before 1985, he or she was deemed to have transferred the right pursuant to § 3344.1. The charities and organizations have apparently relied on this and acted accordingly.

It is appropriate for the legislature to clarify the law to protect such expectations. See *Western Security Bank*, 15 Cal.4th at 245-46 ("The Legislature's unmistakable focus was the disruptive effect of the Court of Appeal's decision on the expectations of parties to transactions where a letter of credit was issued in connection with a loan secured by real property. By abrogating the Court of Appeal's decision, the Legislature intended to protect those parties' expectations and restore certainty and stability to those transactions. If the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect," citing *Escalante v. City of Hermosa Beach*, 195 Cal.App.3d 1009, 1020 (1987), *City of Redlands v. Sorensen*, 176 Cal.App.3d 202, 211-12 (1985), and *Tyler v. State of California*, 134 Cal.App.3d 973, 976-977 (1982)).

Defendants argue that SB 771 is not a clarification because it substantially changes prior law.[32] As noted, SB 771 rewords subsection (b) of § 3344.1 to provide that a deceased personality's right of

[32]Defs.' Opp. at 8.

publicity is deemed to have been in existence at the time of the celebrity's death, and to have been transferrable either through an express testamentary disposition or through the residual clause of the celebrity's will. 2007 Cal. Stat. ch. 439 (S.B. 771), § 3344.1(b). Recognizing that this intent was not necessarily apparent in § 3344.1 as originally drafted, and that the statute has potentially been misinterpreted by the public, SB 771 includes a savings provision as subsection (o). This subsection states that statutory heirs who, prior to May 1, 2007, "took action" to exercise a deceased celebrity's right of publicity, and whose "action" was not successfully challenged by a residuary beneficiary in court, continue to hold the right of publicity unless they were expressly disinherited by the deceased celebrity in a testamentary instrument. *Id.*, § 3344.1(o). The legislature also provided that "[t]he rights recognized [in the statute] are expressly made retroactive . . . to . . . deceased personalities who died before January 1, 1985." *Id.*, § 3344.1(p).

While it is true that SB 771 makes material changes to the right of publicity statute, the court need not view the changes as modifications given the potential ambiguity in the original version of § 3344.1. Under certain circumstances, "the Legislature may make material changes in language in an effort to clarify existing law." *Carter*, 38 Cal.4th at 929 (citing *Western Security Bank*, 15 Cal.4th at 243 (holding that a change was a clarification of existing law despite the addition of two sections by amendment); *Plotkin v. Sajahtera, Inc.*, 106 Cal.App.4th 953, 961 n. 3 (2003) ("The amendment's substantial narrowing of the definition of 'vehicle parking facility' does not necessarily preclude a finding that it merely clarifies, rather than changes, existing law"); see also *In re Angelique C.*, 113 Cal.App.4th 509, 518 (2003) (addressing the legislature's action to clarify law in response to *Renee v. Superior Court*, 26 Cal.4th 735 (2001)).

Additionally, "'the Legislature may choose to state all applicable legal principles in a statute rather than leave some to even a predictable judicial decision.'" *Id.* (quoting *Reno v. Baird*, 18 Cal.4th 640, 658 (1998)). Thus, SB 771 does not contain surplusage or create new law simply because it confirms that the right of publicity created by § 3344.1 is deemed to have existed at the time a predeceased celebrity died; sets forth the manner in which the right of publicity can be transferred; and declares that the rights recognized by § 3344.1 are retroactive to celebrities who died before January 1, 1985. "'Rather, [the provisions are statements that] may eliminate potential confusion and avoid the

need to research extraneous legal sources to understand the statute's full meaning. Legislatures are free to state legal principles in statutes, even if they repeat preexisting law, without fear the courts will find them unnecessary and, for that reason, imbued with broader meaning.'" *Id.* (quoting *Reno*, 18 Cal.4th at 658)).

In sum, in passing SB 771, the 2007 California legislature clearly expressed an intent to clarify § 3344.1 as originally enacted. The bill was passed promptly after, and in response to, the court's May 14, 2007 order, and the May 7, 2007 *Shaw* opinion in the Southern District of New York. It was intended to clarify potential ambiguities in the existing statute that had caused confusion among beneficiaries and heirs of deceased celebrities, and that had resulted in court decisions that were at odds with what this legislature believed an earlier legislature intended. In combination, these circumstances are sufficient to support a finding that in amending § 3344.1, the legislature clarified existing law by stating that the right of publicity of a personality who died before January 1, 1985 is deemed to have existed at the time that personality died.[33]

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[33]Defendants argue that although SB 771 states that the posthumous right of publicity is deemed to have existed at the time a deceased personality died, it does not vest that right in the deceased personality directly. (Defs.' Opp. at 2, 9, 12). Therefore, they maintain, the personality does not have the power to pass the right by will. (*Id.*) The court finds this argument unpersuasive. While SB 771 does not expressly state that the right of publicity was "vested" in the deceased personality, it clearly expressed the legislature's intent that the personality be deemed to have owned the right at the time of her death, since this is the only way that she could transfer the right through a testamentary instrument. 2007 Cal. Stat. ch. 439 (S.B. 771), § 3344.1(b) (stating that the posthumous right of publicity "shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985," and recognizing that the deceased personality could transfer the right by express provision in a testamentary instrument or through the residual clause in her will). This language is consistent with general probate law, which looks solely to what a decedent *owned at the time of death*. See, e.g., *In re Buzza's Estate*, 194 Cal.App.2d 598, 601 (1961) ("It is settled law that a will is construed as applying to and disposing of the estate in its condition at the time of death"); *Conlee v. Conlee*, 269 N.W. 259, 263 (Iowa 1936) ("No matter what the provisions of the will are when probated, it confers no rights in property not owned by the testator at the time of her death, and in no event could it be made to avoid contractual obligations assumed during her life," quoting *Steward v. Todd*, 173 N.W. 619, 624 (Iowa 1919)); *In re Van Winkle's Will*, 86 N.Y.S.2d 597, 600 (Sur. Ct. 1949) ("[U]nder no circumstances, in the absence of a valid power, can any amount of testamentary intent produce the effect of subjecting property not owned by a testator at the date of his death to any disposition whatever"); 80 AM.JUR.2D WILLS § 1168 ("A person cannot make a postmortem distribution of property which he or she did not own, at the time of his or her death, or in which such a person had [no] legal or equitable right. Thus, property acquired by a testator's estate after his or her death may not pass under the residuary clause of the will"); 96 C.J.S. WILLS § 1088 (same); see also CAL. PROB. CODE § 21105 ("[A] will passes all

Because the court determines that SB 771 clarifies existing law, the amendment does not change § 3344.1's substantive legal effect. See *Carter*, 38 Cal.4th at 923 ("If we conclude the amendment did more than clarify existing law, we would then address whether the amendment should apply retroactively to the conduct present here, and whether a retroactive application would implicate due process concerns. If, however, the amendment merely clarified existing law, then employers were potentially liable for sexual harassment of employees by nonemployees at the time of the conduct we address, and the amendment would not change the statute's substantive legal effect or require us to address the validity of the statute's application" (citations omitted)); *Western Security Bank*, 38 Cal.4th at 243 ("Such a [clarifying] legislative act has no retrospective effect because the true meaning of the statute remains the same").

Defendants' argument that SB 771 unconstitutionally takes property from the statutorily designated heirs of a predeceased celebrity, and that it interferes with contracts, are thus unavailing.[34] Because SB 771 clarifies that § 3344.1 always provided that a deceased personality's right of publicity existed at the time of his or her death and could be transferred either by a specific bequest or as part of the residue of his or her estate, the right of publicity never vested in the deceased personality's statutory

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property the testator owns at death, including property acquired after execution of the will").

The fact that the bill states that the posthumous right of publicity "shall vest" in the persons entitled to it under the deceased personality's testamentary instrument does not change this conclusion. As plaintiffs note, "[s]ince a testamentary instrument is effective at death, the words 'shall vest' mean just that – i.e., the rights, which are deemed to exist at death, "shall vest" in the beneficiaries at the time of death." (Reply in Support of Marilyn Monroe, LLC's Motion for Reconsideration of the Court's May 14, 2007 Order Granting Summary Judgment ("Pl.'s Reply") at 14). Stated differently, as a matter of property and probate law, the right could not "vest" in the beneficiaries named in a personality's testamentary instrument unless it first vested in the personality herself.

Accordingly, because the court concludes that SB 771 was a clarification rather than a modification of existing law, and because it states expressly that the right of publicity of a predeceased celebrity is deemed to have been in existence on the date of the individual's death, the bill responds to the concern expressed in the May 14, 2007 order that Marilyn Monroe could not transfer a property right she did not possess at the time of her death. Moreover, it also makes clear that § 3344.1 is consistent with the principle that the "law attempts to avoid an intestacy and any construction which favors a residuary disposition should be upheld and sustained whenever possible." *In re Estate of O'Brien*, 627 N.Y.S.2d 544, 546 (Sur. Ct. 1995); see also *In re Estate of Goyette*, 123 Cal.App.4th 67, 74 (2004) ("It is the strongly favored policy of the law that wills be construed in a manner that avoids intestacy").

[34] *Id.* at 16.

heirs as defendants argue.[35] As a result, the court need not address defendants' due process concerns. It notes, however, that if a statutory heir exercised a predeceased celebrity's right of publicity prior to May 1, 2007 and no legal challenge was successfully mounted, subsection (o) vests the right of publicity in the heirs. This ameliorates any potential due process concerns.[36]

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[35]SB 771's legislative history indicates that the legislature considered and apparently found unpersuasive defendants' takings arguments. See SENATE RULES COMMITTEE SENATE FLOOR ANALYSIS (S.B. 771 Sept. 4, 2007) (noting that opponents of the bill "also argue that, depending to whom a celebrity left the bulk of his/her estate through the residuary clause, this bill could strip statutory heirs of the rights of publicity of their deceased relatives").

[36]Although the court need not address of the constitutionality of California's posthumous right of publicity statute to decide the pending motion, it recognizes that, as clarified, the law created a retroactive property right when it was enacted in 1985. "Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute." *Western Security Bank*, 15 Cal.4th at 244 (citing *Evangelatos*, 44 Cal.3d at 1206). "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976).

Neither party has identified any due process concerns that arise from the fact that § 3344.1 applies retroactively to celebrities who died prior to January 1, 1985. "'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.'" *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 902-03 (9th Cir. 2007) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972)). A property interest is more than a "unilateral expectation"; it is "a legitimate claim of entitlement." *Roth*, 408 U.S. at 577. "Entitlements are not created by the constitution, but are defined by independent sources such as state law, statutes, ordinances, regulations or express and implied contracts." *Saunders v. Knight*, CV 04-5924 LJO WMW, 2007 WL 3482047, *21 (E.D. Cal. Nov. 13, 2007) (citing *Lucero v. Hart*, 915 F.2d 1367, 1370 (9th Cir. 1990), *Brenizer v. Roy*, 915 F.Supp. 176, 182 (C.D. Cal. 1996), and *Coleman v. Dep't of Personnel Admin.*, 52 Cal.3d 1102, 1112 (1991) ("Property interests that are subject to due process protections are not created by the federal Constitution. Rather, they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law")). "'If a right has not vested, it is not a property interest protected by the due process or takings clause.'" *Id.* (quoting *Brenizer*, 915 F.Supp. at 182).

Before passage of the posthumous right of publicity law in 1985, California recognized a common law right of publicity, which expired on an individual's death. See *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 861 (1979) ("In *Lugosi v. Universal Pictures*, [25 Cal.3d 813 (1979)], we hold that the right of publicity protects against the unauthorized use of one's name, likeness or personality, but that the right is not descendible and expires upon the death of the person so protected"). After an individual died, his name, image and likeness were in the public domain and anyone could use them for a legitimate commercial purpose. See *Lugosi*, 25 Cal.3d at 823 ("After Lugosi's death, his name was in the public domain. Anyone, including [plaintiffs], or either of them, or Universal, could use it for a legitimate commercial purpose"). In Marilyn Monroe's case, before the

D. Reconsideration of the Court's Order

Because SB 771 is a new law that clarifies California's posthumous right of publicity statute, the court concludes that it must reconsider its ruling that MMLLC lacks standing to assert claims for infringement of Marilyn Monroe's statutory right of publicity. Under clarified § 3344.1(b), Marilyn Monroe's right of publicity is deemed to have existed at the time of her death in 1962. 2007 Cal. Stat. ch. 439 (S.B. 771), § 3344.1(b). Because Monroe's will did not expressly bequeath this right of publicity, under the statute as clarified, the court must examine the residual clause of her will. *Id.* That provision stated:

> "SIXTH: All the rest, residue and remainder of my estate, both real and personal, of whatsoever nature and wheresoever situate, of which I shall die seized or possessed or to which I shall be in any way entitled, or over which I shall possess any power of appointment by Will at the time of my death, including any lapsed legacies, I give, devise and bequeath as follows:

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statutory right of publicity was created in 1985, her name, likeness, and image were in the public domain. It is possible that individual members of the public made use of her name and likeness for commercial purposes. It is not clear, however, that state law or any other source gave those individuals an *entitlement* to use her name and likeness – i.e., a vested property interest protected by Fourteenth Amendment – such as would preclude retroactive application of the posthumous right of publicity law.

Additionally, while the statute as clarified may raise constitutional concerns if it is enforced against individuals who used a deceased celebrity's image *prior to* the law's passage in 1985, it is not apparent that those concerns are implicated in this case. CMG and MMLLC's complaint against the Milton Greene Archives indicates that for many years, CMG and MHG had a business relationship pursuant to which a party seeking to use a Monroe/Greene photograph for commercial purposes secured a license from CMG covering Monroe's intellectual property rights, and a license from MHG covering MHG's interest in the photographs. (Plaintiffs' First Amended Complaint against Milton H. Greene Archives, Inc., ¶ 10). MHG ended this relationship in 2004 when it informed MMLLC and CMG that it would no longer seek permission to use Monroe's intellectual property rights and would not recognize plaintiffs' rights in Monroe's name, image, etc. (*Id.*, ¶ 11). It appears that MMLLC's claim for damages is limited to Greene's use of Monroe's image after 2004 – well after the statute's passage in 1985. As for the complaint against Tom Kelley Studios, plaintiffs' claim for damages is not limited as to time. (Plaintiffs' First Amended Complaint against Tom Kelley Studios, Inc., ¶¶ 12-16). Given that the court is obligated to interpret laws so as to avoid constitutional problems, however, see *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001), the court will not construe plaintiffs' complaint as seeking damages against Kelley for use of Monroe's image prior to 1985.

(a) To MAY REIS the sum of $40,000.00 or 25% of the total remainder of my estate, whichever shall be the lesser.

(b) To DR. MARIANNE KRIS 25% of the balance thereof, to be used by her as set forth in ARTICLE FIFTH (d) of this my Last Will and Testament.

(c) To LEE STRASBERG the entire remaining balance."

Because the right of publicity was deemed to have existed at the time of Marilyn Monroe's death, and because it was not expressly bequeathed in her will, it was transferred under the residual clause of the will to Lee Strasberg and other residuary beneficiaries.[37]

SB 771 makes clear that the posthumous right of publicity is "freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights as recognized by this section." *Id.* MMLLC argued previously that when Lee Strasberg died, his property, which under SB 771 is deemed to have included Monroe's publicity rights, passed by will to his wife, Anna Strasberg.[38] In 2001, Ms. Strasberg formed MMLLC, and she and the

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[37]Defendants argue that Marilyn Monroe's right of publicity could not have been transferred to Lee Strasberg under either SB 771 or § 3344.1 as enacted in 1985 because Strasberg died before the law's passage, and, as the court noted in its May 14 order, "a dead man or woman may not take property." (Defs.' Opp. at 13-14, citing *In re Matthew's Estate*, 176 Cal. 576, 580 (1917)). This ignores the fact that the original statute – as clarified – deemed the right to have existed at the time of Monroe's death. It is a longstanding principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). While the legislature's creation of a retroactive statutory right perhaps conflicts with the common law property and probate principles on which the court relied in its prior holding, the legislature has clearly stated its intention to vest such a right in predeceased personalities at the time of their deaths. The statutory purpose is thus evident. As a result, even though both Monroe and Lee Strasberg had died by 1985, the right is deemed to have passed to Strasberg as Monroe's residuary beneficiary at the time of her death, and from Strasberg to Anna Strasberg at the time of his death.

[38]Defendants argue that Anna Strasberg cannot be deemed to have received Marilyn Monroe's posthumous right of publicity because Monroe's will did not provide for the *successors-in-interest* of her residuary beneficiaries to take the residue directly. (Defs.' Opp. at 14). They also argue that the right could not have passed through Lee Strasberg's will because he died before the effective date of § 3344.1. (*Id.* at 14-15). These arguments overlook the fact that the statute created a retroactive right deemed to have existed at the time of Monroe's death, and provided that it was transferred to Monroe's residuary beneficiary as of the date of her death. At that time, Lee Strasberg was alive and took possession of the right as a residuary beneficiary. Consequently, the fact that Strasberg died prior to the

holder of a 25% interest in the residue of Monroe's estate transferred their rights and interest in Monroe's estate, including, without limitation, the right of publicity, to MMLLC. This series of transfers by subsequent holders of the right is expressly permitted by § 3344.1 as clarified by SB 771. Therefore, under § 3344.1, MMLLC is deemed to possess Monroe's posthumous right of publicity, and the court vacates its prior ruling that MMLLC lacks standing to assert Monroe's posthumous right of publicity.

1. Domicile

Because the court finds that under § 3344.1 as clarified, MMLLC has standing to assert right of publicity claims under California law, and because it is clear that at the time of Marilyn Monroe's death, there was no posthumous right of publicity in New York, the court must conduct a choice of law analysis to determine whether Marilyn Monroe had testamentary power to bequeath a posthumous right of publicity through her will. Typically, such questions are decided by reference to the law of the testator's domicile, see, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(b)(2) (formerly DECEDENT EST. LAW § 47) ("The intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death"); *In re Moore's Estate*, 190 Cal.App.2d 833, 841-42 (1961) (recognizing that, under California Civil Code § 946, a decedent's personal property should be distributed according to the law of his or her domicile); see *Shaw Family Archives*, 434 F.Supp.2d at 210-11 ("[Under the Indiana choice of law rule,] its courts apply the substantive law of the place of the tort. . . . In property cases, Indiana seems to adhere to the majority view that the law of the situs of the property governs. The situs of intangible personal property, such the Marilyn Monroe publicity right, is the legal domicile of its owner," citing *Van Dusen v. Barrack*, 376 U.S. 612, 638-39 (1964)).

No party argues that Marilyn Monroe was domiciled in a state other than California or New York

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enactment of § 3344.1, and the fact that Monroe's will did not provide that the residue would pass directly to successors-in-interest if a residuary beneficiary predeceased Monroe, do not change the outcome or demonstrate that MMLLC lacks standing to enforce Marilyn Monroe's right of publicity under California law.

at the time of her death. Neither New York statutory nor common law recognizes a descendible, posthumous right of publicity. See, e.g., *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585-86 (2d Cir. 1990) (observing that, under New York law, the right of publicity is exclusively statutory, is personal to the individual, and is extinguished upon his death (citations omitted)). California law, by contrast, deems Monroe to have owned a statutory right of publicity at the time of her death and thus affords her the ability to transfer that right. 2007 Cal. Stat. ch. 439, § 3344.1(b). As a result, the parties' factual dispute regarding Marilyn Monroe's domicile at the time of her death becomes relevant. See *Gaudin v. Remis*, 379 F.3d 631, 636 (9th Cir. 2004) ("'Domicile' is, of course, a concept widely used in both federal and state courts for jurisdiction and conflict-of-law purposes,'" quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989)).

MMLLC argues that the issue of Monroe's domicile is not yet ripe for adjudication.[39] It asserts that discovery is ongoing and that it recently came into possession of thousands of documents that potentially bear on whether Monroe was domiciled in California or in New York. Plaintiffs' discovery of these materials, in fact, recently prompted the court to continue the fact discovery cut-off date to January 25, 2008.[40] Citing the facts set forth in MMLLC's opposition to the motion for summary judgment, defendants counter that MMLLC has failed to raise triable issues respecting the fact that Monroe was domiciled in California at the time of her death. Consequently, they argue, summary judgment must be entered in their favor.[41]

"'A person's domicile is her permanent home, where she resides with the intention to remain or to which she intends to return.'" *Gaudin*, 379 F.3d at 636 (quoting *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001)). "'A person residing in a given state is not necessarily domiciled there.'" *Id.* (quoting *Kanter*, 265 F.3d at 857); see also *Weible v. United States*, 244 F.2d 158, 163 (9th Cir. 1957) ("Residence is physical, whereas domicile is generally a compound of physical presence plus an intention to make a certain definite place one's permanent abode, though, to be sure, domicile often

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[39]Pl.'s Mem. at 13.

[40]*Id.*; see November 1, 2007 Minute Order.

[41]Defs.' Opp. at 18.

hangs on the slender thread of intent alone, as for instance where one is a wanderer over the earth. Residence is not an immutable condition of domicile").

Because a person may only have one domicile at a time, "a person's old domicile is not lost until a new one is acquired." *Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986) (citing *Barber v. Varleta*, 199 F.2d 419, 423 (9th Cir. 1952), and RESTATEMENT (SECOND) OF CONFLICTS §§ 18-20 (1971)). "A change in domicile requires the confluence of (a) physical presence at the new location with (b) an intention to remain there indefinitely." *Id.* (citing *Owens v. Huntling*, 115 F.2d 160, 162 (9th Cir. 1940); 13B C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3613, at 544-45 (1984 & Supp. 1986)). Among the factors courts consider in determining domicile are an individual's "current residence, voting registration and voting practices, location of personal and real property, location of brokerage and bank accounts, location of spouse and family, membership in unions and other organizations, place of employment or business, driver's license and automobile registration, and payment of taxes." *Id.* (citations omitted). "[C]ourts have also stated that domicile is evaluated in terms of 'objective facts.'" *Id.* (citations omitted). Thus, the determination of a party's domicile is a mixed question of law and fact. *Id.*

Given the variety of factors that must be considered in determining where a person is domiciled, the court concludes that defendants' motion for summary judgment on the issue of domicile is premature. As noted in the court's prior order, defendants filed the motion less than two months after the parties first served written discovery. Neither party has adduced sufficient evidence to permit the court to determine whether Monroe was domiciled in New York or California at the time of her death. Defendants' argument that Monroe was domiciled in New York is based primarily on representations allegedly made by plaintiffs and their predecessors-in- interest in various public documents; it is not evidence bearing on the factors that are generally used to determine domicile.[42] Plaintiffs, for their part,

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[42]Defendants' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment ("Defs.' Mem.") at 41-43; Defendants' Opposition to Plaintiffs' Objections to and Request to Strike Evidence Submitted in Reply by Defendants on Their Motion for Summary Judgment ("Defs.' Reply Opp.") at 4 ("Plaintiffs' interrogatory sought all facts regarding Defendants['] contention that Marilyn Monroe was a domiciliary of New York at the time of her death. Defendants identified all facts they had at that time, namely the representations by plaintiffs and their predecessors in interest made

adduce evidence showing that Monroe purchased a home in California in 1962; that she licensed her dog in the state; that she attended psychotherapy sessions in Los Angeles; and that she maintained a Connecticut driver's license with a California address.[43]

Since the time of the court's May 14 ruling, discovery has continued and MMLLC asserts that it has recently obtained an extensive collection of documents that purportedly bear on the issue of domicile.[44] Because discovery is ongoing and the record contains only limited evidence regarding Monroe's domicile, the court declines to decide the issue on the basis of a premature and incomplete record. Defendants' request for a ruling on question of domicile is thus denied. See, e.g., *First Chicago Intern. v. United Exchange Co., Ltd.*, 836 F.2d 1375 (D.C. Cir. 1988)

("Petra and PIBC contend, however, that FCI cannot challenge the summary judgment order, because FCI failed to file a Rule 56(f) affidavit specifying the 'facts it hoped to adduce by further discovery, and how any facts so adduced would be material.' ... We disagree. Under Rule 56(f), the district court may defer ruling on a summary judgment motion and permit further discovery so that the nonmoving party

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from public documents Defendants were able to locate through their independent investigations").

[43]Plaintiffs' Statement of Genuine Issues of Material Fact ["MF"] and Additional Material Facts ["AMF"] in Response to Defendants' Statement of Uncontroverted Facts in Support of Defendants' Motion for Summary Judgment ("Pls.' Facts"), AMF ¶¶ 7-9, 12.

[44]Wytsma Decl., ¶ 17, Exh. M (letter dated March 26, 1962 from Monroe's secretary to The Actors Studio in New York requesting that they update their records to reflect her California address). At the time it opposed the motion, MMLLC did not request a continuance under Rule 56(f) of the Federal Rules of Civil Procedure so that it could conduct discovery and "present facts essential to justify its opposition." FED.R.CIV.PROC. 56(f) ("If a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order"). Parties seeking a continuance must show: "(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *State of Cal., on Behalf of Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). Although MMLLC did not seek a continuance under Rule 56(f), the court accepts its representation that it has recently obtained evidence supporting its claim that Monroe was domiciled in California; this evidence includes newly discovered documents acquired from the nephew of Monroe's business manager at the time of her death. (Pl.'s Reply at 21). Given the discovery of this new evidence, and the limited information presented by the parties in October 2006 in support of and opposition to defendants' motion for summary judgment, the court believes it is appropriate to defer ruling on the domicile issue.

may obtain the information necessary to show an issue of material fact in dispute. . . . . The purpose of the affidavit is to ensure that the nonmoving party is invoking the protections of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition. . . . Although several courts have held that filing an affidavit is necessary for the preservation of a Rule 56(f) contention, other circuits have excused the absence of a Rule 56(f) filing on the ground that other documents filed by the plaintiff – such as opposing motions and outstanding discovery requests – sufficed to alert the district court of the need for further discovery and thus served as the functional equivalent of an affidavit. . . . Given the particular facts before us, this latter, more flexible approach was the appropriate response"); *Sames v. Gable*, 732 F.2d 49, 51-52 & n. 3 (3d Cir. 1984) (where there were outstanding document requests, plaintiff's failure to file a Rule 56(f) affidavit was "not sufficiently egregious to warrant a non-merits resolution of the case"); see also *Cowan v. J.C. Penney Co.*, 790 F.2d 1529, 1532 (11th Cir. 1986) (holding that a Rule 56 affidavit was unnecessary where plaintiff brought to the court's attention the fact that discovery remained outstanding); *Investors Title Ins. Co. v. Bair*, 232 F.R.D. 254, 256 (D.S.C. 2005) (noting that "in some cases courts have held that summary judgment was premature even when the opposing party failed to file a Rule 56(f) affidavit. . . . When the nonmoving party, through no fault of its own, has had little or no opportunity to conduct discovery, and when fact-intensive issues, such as intent, are involved, courts have not always insisted on a Rule 56(f) affidavit if the nonmoving party has adequately informed the district court that the motion is premature and that more discovery is necessary").

2. Collateral Estoppel

Alternatively, defendants contend that the court should enter summary judgment in their favor on the basis of collateral and/or judicial estoppel.[45] Defendants argue that MMLLC is collaterally estopped from asserting that Marilyn Monroe was domiciled in California at the time of her death, citing (1) *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828 (N.Y. App. Div. 1980); (2) the Report of Appraiser filed December 30, 1969 in Monroe's probate proceedings; and (3) a 1975 opinion of the

[45]Defs.' Opp. at 17.

California State Board of Equalization ("BOE").[46] The court is not persuaded that MMLLC is estopped from contending that Monroe was domiciled in California at the time of her death.

The Full Faith and Credit Act requires that federal courts give judgments issued by the courts of a state the same preclusive effect they would have in state proceedings. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988); see 28 U.S.C. § 1738. Because the *Frosch* case and Surrogate's Court proceedings took place in New York state courts, New York's law of collateral estoppel applies; because the BOE proceeding took place in California, California collateral estoppel law applies in assessing its preclusive effect. See *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) ("... under the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give"); *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1095 (9th Cir. 1990) ("Title 28 U.S.C. § 1738 requires federal courts to apply the preclusory rules of a particular state to judgments issued by courts of that state"); *Robi*, 838 F.2d at 322 ("[F]ederal courts must give state judicial proceedings 'the same full faith and credit ... as they have by law or usage in the courts of [the] State ... from which they are taken.' ... This Act requires the federal courts to apply the res judicata rules of a particular state to judgments issued by courts of that state").

Collateral estoppel, or issue preclusion, "prevents relitigation of all 'issues of fact or law that were actually litigated and necessarily decided' in a prior proceeding." *Robi*, 838 F.2d at 322 (quoting *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979)); see also *Branson v. Sun-Diamond Growers*, 24 Cal.App.4th 327, 339-40 (1994) (noting that in California, the doctrine of collateral estoppel governs issue preclusion). Under New York law, "[t]wo requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling." *Buechel v. Bain*, 97 N.Y.2d 295, 303-04 (2001) (citing *Gilberg v Barbieri*, 53 N.Y.2d 285, 291 (1981)). "The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action

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[46]Defs.' Mem. at 38-43.

against a party, or one in privity with a party." *Id.* at 304 (citing *Gilberg*, 53 N.Y.2d at 291); see also *M.J. Woods, Inc. v. Conopco, Inc.*, 271 F.Supp.2d 576, 581 (S.D.N.Y. 2003) ("The issue must have been identical to the issue decided in the prior proceeding, see *Green v. Montgomery*, 219 F.3d 52, 55 (2d Cir. 2000), and 'the decision of the issue [must have been] necessary to support a valid and final judgment on the merits,'" quoting *Metromedia Co. v. Fugazy*, 983 F.2d 350, 365 (2d Cir. 1992)). Similarly, under California law, certain threshold requirements must be met before collateral estoppel applies: (1) the issue whose relitigation a party seeks to preclude must be identical to that decided in the former proceeding; (2) the issue must have been actually litigated and necessarily decided in the earlier proceeding; and (3) the decision in the former proceeding must be final and on the merits. *Branson*, 24 Cal.App.4th at 346; see also *In re Executive Life Ins. Co.*, 32 Cal.App.4th 344, 373 (1995) ("Issue preclusion requires both an identity of issue in the later and earlier cases and that the issue be entirely necessary to the decision in the earlier case.")

Frosch examined whether the Estate of Marilyn Monroe possessed a right of publicity that it could protect from infringement by publication of a book titled "Marilyn." *Frosch*, 427 N.Y.S.2d at 828. The Appellate Division of the New York Supreme Court determined that "[t]he statutory right of privacy applies to the name, portrait or picture of 'any living person' (Civil Rights Law, § 50); and it is thus on its face not applicable to the present book." *Id.* The court noted, however, that "[p]laintiff claim[ed] that there [was] an additional property right, a right of publicity which survive[d] the death of Miss Monroe and belong[ed] to the estate." *Id.* At to this right, it held that "[n]o such nonstatutory right ha[d] yet been recognized by the New York State courts." *Id.* (citing *Wojtowicz v Delacorte Press*, 43 N.Y.2d 858 (1978)). The court went on to state that even if such a right existed, defendant's book was a "literary work[,] . . . not simply a disguised commercial advertisement for the sale of goods or services," and that "protection of the right of free expression [was] so important that [it] should not extend any right of publicity, *if such exists*, to give rise to a cause of action against the publication of a literary work about a deceased person." *Id.* (emphasis added).

Defendants argue that "where Marilyn Monroe was domiciled at the time of her death was

foundational to whether the Estate of Marilyn Monroe had a right to publicity."[47] As can be seen, however, the court's decision turned on the fact that the allegedly infringing book was a literary work, and that, as respects such a work, freedom of speech considerations outweighed any right of publicity that might exist. The opinion gives no indication that the issue of domicile was raised by the parties or necessarily decided by the court.[48] The court's observation that New York did not recognize a posthumous right of publicity does not demonstrate that it decided the question of Monroe's domicile;[49] instead, the court affirmed the trial court's conclusion that publication of a literary work could not give rise to a violation of a right of publicity.

Because defendants have not met their burden of showing "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action," they are not entitled to have summary judgment entered in their favor on the basis that the *Frosch* decision collaterally estops plaintiffs from arguing that Marilyn Monroe was domiciled in California. See *Buechel*, 97 N.Y.2d at 304. In any event, as discussed below, defendants have not shown that Frosch, as the executor of Monroe's estate, was in privity with plaintiffs.

Defendants have also failed to show that domicile was definitively decided by the California BOE or the New York Surrogate's Court. The BOE's opinion states that "[a]t the time of her death in 1962, Marilyn Monroe was a resident of the state of New York."[50] Defendants extrapolate from this that the BOE necessarily determined that Monroe was a New York domiciliary at the time of her death.[51] As noted, however, residence and domicile are distinct concepts; domicile involves the party's intention

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[47] *Id.* at 39.

[48] Frosch did not address the issue of domicile in his brief to the Appellate Division. (See Defendants' Compendium of Exhibits in Support of Defendant's Reply in Support of Motion for Summary Judgment ("Defs.' Reply Exhs."), Exh. 29).

[49] In fact, as of the date of the decision, California too did not recognize a posthumous right of publicity. Section 990 (which later became section 3344.1) did not take effect until January 1, 1985.

[50] See Declaration of Greg T. Hill Submitted in Support of Defendants' Motions for Summary Judgment ("Hill Decl."), Exh. 8.

[51] Defs.' Mem. at 40.

to make a particular location her home. See *Gaudin*, 379 F.3d at 636 ("'A person residing in a given state is not necessarily domiciled there'" (citation omitted)). There is no indication that the issue of domicile was litigated in the BOE proceeding or decided by the board.

Defendants' claim of collateral estoppel based on the New York probate proceedings fails for the same reason. Defendants cite a statement in the report of the estate appraiser that Monroe "died a resident of the State of New York on the 5th day of August 1962."[52] Because residence is not the same as domicile, this does not demonstrate that the court considered or weighed any of the usual factors that are used to determine domicile, or that it decided the question.

3. Judicial Estoppel

The court is further unpersuaded that MMLLC is judicially estopped, as defendants claim, from contending that Monroe was not domiciled in New York at the time of her death.[53] Judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citations omitted). Courts uniformly recognize that the purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from changing positions as circumstances warrant. *Id.* (citations omitted). Judicial estoppel can be invoked whether a party takes inconsistent positions in the same action or in two different actions. See *Rissetto v. Plumbers and Steamfitters Loca 343*, 94 F.3d 597, 605 (9th Cir. 1996) ("We now make it explicit that the doctrine of judicial estoppel is not confined to inconsistent positions taken in the same litigation").

Factors courts consider in determining whether to apply the doctrine include: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) whether the party has successfully advanced the earlier position, such that judicial acceptance of an inconsistent position in the later proceeding would create the perception that either the first or the second court was misled; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 751

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[52]Hill Decl., Exh. 11.

[53]Defs.' Mem. at 41-43.

(citations omitted).

Defendants cite several purportedly inconsistent positions that they contend judicially estop MMLLC from asserting that Monroe was domiciled in California. Defendants argue that plaintiffs are estopped by various statements made to the Surrogate's Court by Aaron Frosch, the executor of Monroe's estate, and Anna Strasberg, administratrix of Monroe's will, that Monroe was a resident of New York at the time of her death.[54] As noted, residence is distinct from domicile, and none of the statements addressed Monroe's domicile at the time of her death. A person may have more than one residence, but only one domicile, and may reside somewhere other than her domicile. See, e.g., *United States v. Venturella*, 391 F.3d 120, 125 (2d Cir. 2004) ("'Residency means an established abode, for personal or business reasons, permanent for a time. A resident is so determined from the physical fact of that person's living in a particular place. One may have more than one residence in different parts of this country or the world, but a person may have only one domicile. A person may be a resident of one locality, but be domiciled in another,'" quoting *Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992)). As a result, assertions that Monroe was a resident of New York are not "clearly inconsistent" with a contention that she was a domiciliary of California. See *New Hampshire*, 532 U.S. at 751; *Pegram v. Herdrich*, 530 U.S. 211, 228 n. 8 (2000) ("Herdrich argues that Carle is judicially estopped from denying its fiduciary status as to the relevant decisions, because it sought and successfully defended removal of Herdrich's state action to the Federal District Court on the ground that it was a fiduciary with respect to Herdrich's fraud claims. . . . [But] [b]ecause fiduciary duty to disclose is not necessarily coextensive with fiduciary responsibility for the subject matter of the disclosure, Carle is not estopped from contesting its fiduciary status with respect to the allegations of the amended complaint"); *Holder v. Holder*, 305 F.3d 854, 872 (9th Cir. 2002) (declining to apply judicial estoppel and noting that "Jeremiah's position that California had jurisdiction over his custody claim is not necessarily inconsistent with his position that Washington, not California, has jurisdiction over his [International Child Abduction Remedies Act ("ICARA"] claim, because the concept of 'home state' under California state law differs from the concept of 'habitual residence' under ICARA").

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[54] *Id.* at 41-42; Hill Decl., Exhs. 12, 17, 18.

Defendants also argue that a statement by Frosch that the estate did not have an exclusive right to Monroe's image judicially estops plaintiffs from claiming otherwise.[55] This statement was made by Frosch in a 1972 affidavit to the Surrogate's Court. The affidavit concerned a dispute regarding transparencies of photographs taken of Monroe by Tom Kelley; the photographs were in Monroe's possession at the time of her death.[56] When Kelley sought to have the photographs returned, Lee Strasberg, the beneficiary of Monroe's personal effects, argued that he was entitled them.[57] Frosch distinguished between the transparencies themselves, and the right to reproduce the photographs. As to the latter, he opined that Monroe's "Estate [had] no exclusive right to her image" and could not "retain the photographs."[58] In a subsequent affidavit, Frosch stated that a "question remained [regarding the identity of] . . . the owner of rights" to the photographs,[59] and suggested that "*if* they were owned by [Monroe] at the time of her death, the Estate would be [the] Owner."[60] As can be seen, Frosch did not take a firm position regarding the Estate's ownership of reproduction or other rights in the photographs; moreover, the issue before the Surrogate's Court appears to have been ownership of the physical transparencies, not ownership of rights to Monroe's image and likeness. Finally, there is no evidence that the Surrogate's Court ever ruled on the Estate's ownership of reproduction or other rights in Monroe's image. Consequently, to the extent Frosch advanced a position, the record does not support a finding that he did so successfully.[61]

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[55]Defs.' Mem. at 41.

[56]Hill Decl., Exh. 19.

[57]*Id.*

[58]*Id.*; Hill Decl., Exh. 20.

[59]Hill Decl., Exh. 21.

[60]*Id.*

[61]There is an additional reason for declining to estop plaintiffs judicially based on Frosch's statement. Frosch submitted his affidavits in 1973; he was correct that at that time, the estate had no right to Monroe's image, as neither California nor New York then recognized a posthumous right of publicity. The subsequent change in California law was not something Frosch could have anticipated; to the extent he took a position, and was in privity with Strasberg and his successors, therefore, his statement cannot be considered to be inconsistent with positions being taken now based on a subsequent

Finally, defendants contend that plaintiffs are judicially estopped to assert that Monroe was domiciled in California at the time of her death based on statements Frosch made to the BOE.[62] The issue in the BOE appeal was whether Monroe's estate should pay California income tax on her percentage payments, i.e., earnings she made from films in which she appeared.[63] Frosch asserted the percentage payments were not taxable in California, but was denied a tax clearance certificate. The BOE classified the earnings as "personal services income," whose source is the place where the services were performed.[64] California taxes "the entire taxable income of every nonresident which is derived from sources within [the] state."[65]

The Estate made several unsuccessful arguments to the BOE in an effort to avoid imposition of the tax. Among these was an assertion that the percentage payments were not taxable in California because they did not derive from California sources.[66] The Estate argued that the income was earned in New York because it derived from *the Estate's* ownership of "an intangible contract right whose situs, under the doctrine of *mobilia sequunter personam*, was the state" of *the Estate's* domicile or residence,[67] and that, "under the *mobilia* rule the source of the income was in appellant's domiciliary state, New York."[68] The BOE rejected this argument because no authority suggested that a contract right to receive

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change in the law.

[62]Defs.' Mem. at 41-42; Hill Decl., Exh. 8.

[63]Hill Decl., Exh. 8 at 179.

[64]*Id.*, Exh. 8 at 180.

[65]*Id.*

[66]*Id.*, Exh. 8 at 185.

[67]*Id.* As the BOE explained, this doctrine distinguishes between the "immediate" source of income from intangibles such as dividend income from corporate stock or interest income from promissory notes "(which is the intangibles themselves) and the "ultimate" source of the same income (which . . . would be the activities of the corporations or the sale of property)." (*Id.*). It noted that, applying this principle, the Estate argued that "the immediate source of the income in question was *its* intangible contract right to receive the percentage payments, and that Miss Monroe's services were merely the ultimate source of that income." (*Id.*) (emphasis added).

[68]*Id.*

percentage payments for personal services was an intangible subject to this doctrine.[69] Rather, the Board concluded, the estate stood in the shoes of the decedent. Because Monroe performed the services in California, it stated, income from them was taxable in California.[70]

As with defendants' other arguments, the Estate's argument to the BOE does not judicially estop plaintiffs from asserting that Monroe was a domiciliary of California at the time of her death. First, the Estate's position that *it* was a New York domiciliary is not inconsistent with plaintiffs' present position that Monroe was domiciled in California when she died. There is no evidence, moreover, that the Estate made any argument respecting Monroe's domicile at the time of her death. Indeed, as the BOE noted, "[d]uring her lifetime Miss Monroe owned the same contract right [to receive the percentage payments], and [the Estate] does not contend that the *mobilia* rule would have applied to her receipt of the income."[71]

Additionally, the BOE rejected the Estate's argument. Consequently, defendants cannot show that the Estate prevailed on its argument in the BOE proceeding, while its purported privy relies on a contradictory argument in this action. See *New Hampshire* , 532 U.S. at 749. There is, therefore, no risk that judicial acceptance of plaintiffs' present position that Monroe was domiciled in California would create the perception that either the BOE or this court was misled. See *id.* at 751.[72] As a result, defendants have failed to show that plaintiffs are judicially estopped from arguing that Monroe was not a domiciliary of New York at the time of her death

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[69] *Id.*, Exh. 186.

[70] *Id.*

[71] *Id.*

[72] Since the BOE determined that California could properly tax the percentage payments, the Estate sought a credit for the taxes it had paid to New York on that income. This argument too was unsuccessful; the BOE found that Monroe was a resident of New York at her death, and that only California residents are entitled to a credit for taxes paid in another state. (*Id.*, Exh. 8 at 186-87.)

III. CONCLUSION

For the reasons stated, plaintiff MMLLC's motion for reconsideration is granted.

DATED: January 7, 2008

Margaret M. Morrow

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE