

Proposed Amendment to California's Right of Publicity Statute Would Harm Media

Adds Insult to Injury in the Guise of Protecting Minors

By Douglas E. Mirell

Last year, California's then-Assembly Speaker Karen Bass successfully carried legislation (Assembly Bill 524) that, for the first time, exposed media outlets to potentially crushing damage awards if they initially purchase audio, video or still photos they know to have been taken in violation of the state's 10-year-old anti-paparazzi statute. See "Compounding the Felony: California's Amended Anti-Paparazzi Statute," [MLRC MediaLawLetter Oct. 2009](#) at 24.

Though no longer Assembly Speaker (and now a candidate for Congress), Bass is back this year with a dangerous new bill [A.B. 2480](#) that attempts to import only selected elements of that same anti-paparazzi law into California's 40-year-old right of publicity statute in the guise of protecting minors.

Background of California Civil Code Section 3344

On February 19, 2010, Bass introduced Assembly Bill 2480 which seeks to amend California [Civil Code Section 3344](#) – the California publicity rights statute that has been on the books since 1971. That statute permits living persons to prevent the unauthorized use of their personas (*i.e.*, name, voice, signature, photograph or likeness) "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services." Civil Code § 3344(a).

Though Section 3344 does contain an exemption for uses "in connection with any news, public affairs, or sports broadcast or account, or any political campaign" (§ 3344(d)), it does not include the more explicit and broader exemptions for expressive media found in Civil Code § 3344.1 that provides statutory protection for post-mortem publicity rights in California. *Compare* Civil Code § 3344.1(a)(2).

One further limitation upon the reach of [Section 3344](#) is that the inclusion of a living person's persona "in a

commercial medium" does not automatically constitute an unauthorized use solely because the usage "is commercial sponsored or contains paid advertising." Rather, the statute makes it "a question of fact" whether the persona usage is so "directly connected" with the commercial sponsorship or paid advertising as to constitute an unauthorized usage. Civil Code § 3344(e).

Assembly Bill 2480's Proposed Amendments

Now pending in the Assembly Judiciary Committee, [A.B. 2480](#) proposes to make two significant changes to the text of Civil Code [Section 3344](#).

First, it expands the list of activities that require authorization to include the use of "any photograph or likeness of a minor for commercial purposes." This amendment is not tied to such usages on products or for advertising. Instead, the term "commercial purposes" has an entirely different reference point – Civil Code Section [1708.8\(k\)](#), a provision of the anti-paparazzi statute. For its part, Civil Code § 1708.8(k) defines "commercial

purpose" to mean "any act done with the expectation of a sale, financial gain, or other consideration" and which results in the sale, publication or transmittal of an image or sound recording. Accordingly, any disseminated photograph or video of a minor taken by a freelancer, or by anyone regularly employed and paid by a print, broadcast or other electronic media outlet, could conceivably fall within the ambit of this vastly overbroad definition.

By selectively importing just the Section 1708.8(k) definition of "commercial purpose" into Section 3344(a), A.B. 2480 ignores the limitations that other provisions of the anti-paparazzi statute impose upon potential media liability.

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Most significantly, Section 1708.8 applies primarily to physical trespasses or technological trespasses (via telephoto lenses and parabolic microphones) undertaken with the intent to capture images or sounds of individuals engaged in “personal or familial activity” and in a manner that “is offensive to a reasonable person.” Civil Code § 1708.8(a)-(b).

Under A.B. 2480, however, *any* unauthorized use of a minor’s photograph taken by a commercial photographer can become subject to a publicity rights claim – regardless of the circumstances under which the photograph was taken. There is no requirement that the minor have been photographed as the result of a physical or technological trespass. There is no

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requirement that the minor have been photographed engaging in any type of “personal or familial activity.” See Civil Code § 1708.8(l) (defining “personal and familial activity” to include “intimate details of the plaintiff’s personal life, interactions with the plaintiff’s family or significant others, or other aspects of the plaintiff’s private affairs or concerns”). And there is no requirement that the photograph’s manner of capture be “offensive to a reasonable person.”

Perhaps the only media-positive outcome of last year’s amendments to Section 1708.8 was the rewriting of subsection (f) to create a defense that limits potential liability of a prohibited image or sound recording to the “first transaction” and requires “actual knowledge” that the image or sound was captured as the result of a physical or technological trespass or an assault undertaken to provoke same. “Actual knowledge,” in turn, was defined to mean “actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired” the image or sound recording; the plaintiff bears the burden of establishing such knowledge “by clear and convincing evidence.” Civil Code §1708.8(f)(2). Yet this defense is likewise unavailable in an action that could be brought

involving the photograph of a minor under A.B. 2480.

The second major change that would be effected by passage of A.B. 2480 is a blanket declaration that the Section 3344(e) exception discussed above “does not apply to the use of any photograph or likeness of a minor for commercial purposes.” Thus, *any* non-consensual use of a minor’s photograph “in a commercial medium” could be held impermissible if that medium was commercially sponsored or contained paid advertising – a circumstance that exists in virtually every form of print, broadcast or electronic journalism.

Potential Ramifications of A.B. 2480’s Passage

The adverse impact that A.B. 2480 could have upon the print, broadcast and other electronic media cannot be overstated. Should this legislation be enacted as initially introduced, it could effectively prevent the non-consensual use of any photograph of a minor by any news or entertainment medium. And if passed, it would be a small step indeed to extend the same legislation to photographs or likenesses of adults.

Moreover, though the “news, public affairs, or sports broadcast” exception found in Section 3344(d) seemingly remains intact, it is now at war with the “commercial purposes” definition found in Section 1708.8(k) which makes no exception for media that are commercially sponsored or that accept paid advertising. Thus, it is at least theoretically possible to argue that the only “news, public affairs or sports broadcasts” which remain immune for their use of minors’ photographs under A.B. 2480 are those that are not commercially sponsored, that do not contain any advertising and that use only photos taken by uncompensated photographers. Obviously, this would eliminate the statutory protection currently enjoyed by most all expressive visual media – including newspapers, magazines, motion pictures, television and commercial Internet websites.

While it might be appropriate to initially give Assembly Member Bass the benefit of the doubt by suggesting that she did not appreciate the massive damage that A.B. 2480 could inflict upon this nation’s mainstream media, the only appropriate response to these concerns is either a massive and immediate rewriting of this proposed legislation or, better yet, its total abandonment.

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