

# Right-of-Publicity Statutes: Some Historical Reflections and Recent Developments

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For nearly four decades, the state of California has recognized a statutory right of publicity for living people. And for the past quarter of a century, California has extended that statutory right to the heirs and other representatives of deceased individuals. This article explores the extent to which the hopes of this legislation's proponents have been achieved and, conversely, whether the concerns expressed by its opponents have come to fruition. It also briefly addresses the reasons for 2008 clarifying amendments to California's postmortem publicity rights statute, as well as the status of various other states' recent attempts to enact or amend right-of-publicity legislation.

## Thanks to *Reader's Digest*, an Acorn Becomes a Tree

Contrary to popular myth, California's original publicity rights statute<sup>1</sup> did not result from lobbying by celebrities or by their unions, agents, managers, or lawyers. Rather, it arose from a complaint made by a constituent of then-Assemblyman John Vasconcellos. That constituent took offense at computerized solicitation letters he received stating that the addressee and some of his neighbors had been selected to participate in a *Reader's Digest* sweepstakes. The constituent argued that these computerized letters were an unauthorized form of advertising that improperly associated the names with this contest. In authoring this legislation, Vasconcellos found it anomalous that existing California law prevented the unauthorized commercial use of a corporation's name<sup>2</sup> but that no similar protection existed for the commercial expropriation

of an individual's name or likeness.

Concerned that a lawsuit to recover anything more than nominal damages (i.e., one cent to one dollar) would require proof of emotional distress or direct financial injury, Vasconcellos set out to create a statutory remedy, California Civil Code § 3344,<sup>3</sup> that would allow for the recovery of greater amounts. As initially introduced, Vasconcellos's Assembly Bill (A.B.) 826 would have permitted the recovery of "penal damages of \$1,000" provided that the use had been "knowing" (as opposed to simply mistaken or inadvertent).<sup>4</sup> Though potential criminal liability was deleted from the bill before its final passage, the "knowing" requirement was retained, and statutory civil damages were reduced to \$300<sup>5</sup> without any need to prove actual damages. Vasconcellos hoped that these statutory damages, along with the threat of possible class action litigation,<sup>6</sup> would deter such advertising schemes in the future.

A.B. 826 was initially supported by two unions, the United Auto Workers in Los Angeles and the Ship Clerks Local of the International Longshore and Warehouse Union in San Francisco, as well as the Consumer Action League. Its only initial opponent was the California Broadcasters Association (CBA).

Though the bill's legislative history fails to disclose the specific bases for these groups' support and opposition, it is reasonable to assume that the unions were anxious to ensure that their members' names and likenesses were not used to the commercial advantage of their employers without their permission. Inferential support for this understanding is found in correspondence to Vasconcellos from Bethlehem Steel Corporation thanking him for including an amendment it sponsored that created an exception for the "incidental" use of an employee's photograph or likeness in an employer's advertising or other publications.<sup>7</sup> Likewise, the consumer group that supported A.B. 826 was doubtless concerned with the types of advertising usages that had prompted the bill's

original introduction. Indeed, Vasconcellos himself apparently regarded California's common law right of publicity as fully sufficient to protect the interests "of a celebrity or sports star" who would easily be able to prove actual damages because "the person's name has a commercial value on the open market."<sup>8</sup> Instead, his A.B. 826 aimed to establish "a concrete remedy for the little man" with its \$300 statutory damage provision.<sup>9</sup>

The early opposition voiced by CBA was doubtless premised upon the fact that, as originally drafted, A.B. 826 sought to amend California's version of the Uniform Single Publication Act<sup>10</sup> both to permit class actions and to allow the recovery of attorney fees in cases seeking "damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance."<sup>11</sup> It is not clear from the legislative history that CBA objected to any of the provisions of A.B. 826 that ultimately became California Civil Code § 3344, though that is certainly possible given CBA's subsequent opposition to the postmortem publicity rights legislation discussed below.

A.B. 826 was passed by the legislature with only one negative vote. In his November 1971 letter to then-Governor Ronald Reagan urging signature of this legislation, Vasconcellos argued, "With the increasing sophistication of the advertising industry and its never-ending search for new ways to promote products, it becomes imperative that the law be equipped to provide some sort of protection to the individual citizen from an invasion of his privacy."<sup>12</sup>

Governor Reagan signed A.B. 826 into law, and California Civil Code § 3344 became effective on March 4, 1972. Nearly forty years later, in a world transformed by advertising-infused e-mails and websites, Vasconcellos's characterization of the advertising industry appears truer than ever.

Yet, although A.B. 826 may well have remedied the problem that Vasconcellos's *Reader's Digest*-subscribing

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constituent identified, the absence of any categorical exemptions for expressive works in California Civil Code § 3344 created a vacuum that ultimately led the California Supreme Court to create and apply a “transformative use” test in an effort to ensure that this statute would comport with the dictates of the First Amendment.<sup>13</sup> This transformative use test, however, has been subjected to intense criticism on the grounds that it does not sufficiently protect First Amendment interests, particularly with respect to plays, books, newspapers, magazines, motion pictures, television, video games, and various other “new media” usages.<sup>14</sup> Given the subsequent inclusion in California’s postmortem publicity rights statute (California Civil Code § 3344.1(a)(2), formerly California Civil Code § 990(n))<sup>15</sup> of categorical exemptions for traditionally protected expressive works, their continued absence from California Civil Code § 3344 is all the more anomalous.

## There were objections to extending rights to heirs that were never exercised by the person “in his lifetime.”

Thus, from a purely commercial use perspective, California’s publicity rights statute appears to have served the function it was intended to perform, i.e., protecting living Californians against the unauthorized misappropriation of their identities in pure commercial advertising as well as in connection with the sale of goods or services. However, the judicial invention and application of the transformative use test has done little to resolve the question of whether California Civil Code § 3344 is sufficient to protect the use of various indicia of personae in expressive works.

### The Thirteen-Year Itch: Resurrecting the Dead

It took thirteen years from the 1972 enactment of California’s publicity rights statute protecting the living for similar protection to be accorded to the heirs and other representatives of deceased

individuals. During that intervening period, the California Supreme Court ruled in *Lugosi v. Universal Pictures*<sup>16</sup> that the common law right to exploit one’s persona was a personal one that must be exercised, if at all, during an individual’s lifetime. Failure to do so would, upon death, result in that individual’s persona falling into the public domain.

To prevent this result, and thereby effectively overturn *Lugosi*, then–State Senator William Campbell authored Senate Bill (S.B.) 613.<sup>17</sup> This bill created a new California Civil Code § 990 to protect the rights of the deceased for a period of fifty years from their date of death<sup>18</sup> and, as originally formulated, would have permitted this postmortem right to be “exercised or enforced by the heirs of that person to the same extent that it could have been exercised by that person during that person’s lifetime.”<sup>19</sup> S.B. 613 also made a number of other substantive changes to existing California Civil Code § 3344.<sup>20</sup>

Unlike A.B. 826, the principal proponents of S.B. 613 were the heirs and other representatives of deceased celebrities; the Screen Actors Guild was the bill’s prime sponsor. At S.B. 613’s first committee hearing, Ginger Rogers (Fred Astaire’s longtime dancing partner) and Priscilla Presley (ex-wife of Elvis Presley, the late rock and roll icon) appeared to testify in support of the measure. Also supporting this legislation were relatives of the late John Wayne, Bela Lugosi, Lou Costello, W.C. Fields, and many other prominent deceased celebrities.

Formidable opposition was voiced by, among others, ABC, CBS, NBC, CBA, the Motion Picture Association of America (MPAA), the Alliance of Motion Picture and Television Producers (AMPTP), the Writers Guild of America West, Inc. (WGA), Walt Disney Productions, the American Civil Liberties Union (ACLU), and even Ron Smith’s Celebrity Look-Alikes. Prominent entertainment attorney Fred Leopold asserted that the bill was “confusing and unnecessary” and that it would “inevitably conflict with the First Amendment and rights of freedom of speech.”<sup>21</sup> Leopold also objected vigorously to the fact that Campbell’s proposed postmortem legislation would grant “a right of publicity to heirs of a person who never exercised the same during his lifetime.”<sup>22</sup>

In a lengthy letter to Campbell opposing S.B. 613, Roselyn Brassell, the

then–assistant general attorney for CBS, identified a number of specific concerns.<sup>23</sup> These included the following:

- The distortion of the common law and the opening up of “a new frontier of liability” by transmuting what had been “a purely personal right” into “an inheritable property right” exercisable by all rather than only by celebrities who had merchandised their personae during their lifetimes.
- The absence of any distinction between the protection accorded to the use of a commercially valuable persona and one that had no such value at the time of death.<sup>24</sup>
- The difficulty of identifying heirs from whom consent would need to be sought.<sup>25</sup>
- Concern that postmortem protection might be expanded from the right-of-publicity realm to the three other historic “privacy” torts, i.e., intrusion, public disclosure of private facts, and false light.
- The potentially substantial financial burden imposed on advertisers, producers, publishers, and broadcasters resulting from new restrictions on previously public domain material as well as “the cost of legal review, errors and omissions insurance, and defense of lawsuits.”<sup>26</sup>

WGA was equally vociferous in its opposition to S.B. 613, claiming that “[t]he statute will cast grave doubt on the right of motion pictures and television programs to use the events of history as the basis for fiction.”<sup>27</sup> It proposed adding language that would exempt all usages “in any work of fiction or in any motion pictures or radio or television program produced for entertainment and not primarily for advertising purposes.”<sup>28</sup> WGA also warned that the proposed bill would “lead to further clogging of our courts with new claimants and cases multiplied as the years accrete from the historical events, because the number of potential heirs of deceased persons will multiply.”<sup>29</sup> Finally, in light of the bill’s provision permitting an award of punitive damages, WGA expressed fear that it would “encourage litigation, including strike suits. This is particularly probable in the entertainment industry because of [*sic*] the creators and producers of motion pictures and television films are highly visible targets of litigation. The

provision providing entitlement to attorneys' fees also increases the unfortunate effect of encouraging litigation."<sup>30</sup>

In their joint opposition to S.B. 613, MPAA and AMPTP cited several additional concerns:<sup>31</sup>

- Ambiguous language in an early version of the legislation that would have prohibited the use of a deceased personality's persona for "any other commercial purpose for which consent is required under the common law."<sup>32</sup>
- The difficulty of drawing reliable distinctions between "news and public affairs" (protected) and "entertainment" (unprotected) programming.<sup>33</sup>
- Concerns that classic movie posters could not be sold absent permission from the heirs of all people depicted on those posters.
- Inequities that may arise among celebrities from choice-of-law issues since S.B. 613 cannot "give an estate the right of survivability if the decedent's state of residence did not recognize such a right."<sup>34</sup>
- A generalized "chilling effect on the creative community in California" while failing to provide any "offsetting benefit to heirs of deceased celebrities."<sup>35</sup>

For its part, ACLU's opposition was premised upon the assertion that "S.B. 613 permits heirs of the public figure to prevent information regardless of whether the public figure would have prevented it and regardless of whether the public figure desired to pass on this right. The ACLU strongly feels that there is no legitimate interest in allowing suppression of speech under those circumstances."<sup>36</sup>

As a consequence of numerous amendments made during the course of legislative deliberations, it took eighteen months for S.B. 613 to pass both the Senate and Assembly. In his August 1984 letter to then-Governor George Deukmejian urging signature of this legislation, Campbell claimed "that all opposition to SB 613 has been removed, and that the American Civil Liberties Union has confirmed that there are no infringements in SB 613 upon the First Amendment guarantee of free speech."<sup>37</sup>

Whether or not Campbell's assertion was fully accurate,<sup>38</sup> it is certainly true that as it progressed through the legislature, S.B. 613 underwent a series of significant changes that made it relatively

more palatable (or, perhaps, simply less unpalatable) to the broad array of news and entertainment media organizations that had originally lined up in opposition to this proposed legislation. Key among those changes was halving the duration of the postmortem right from one hundred to fifty years, thus bringing S.B. 613 into line with a then-basic term of copyright protection. Also key was the establishment of a claim registry to be used by successors-in-interest and licensees, and a provision that no damages could be recovered for any usage occurring prior to the registration of such a claim. In addition, valid consent did not require 100 percent unanimity; rather, it could be procured from those people who, in the aggregate, claimed to be entitled to more than a 50 percent interest in those rights. In those instances where celebrities died intestate without any surviving spouse, children, or grandchildren and without having transferred their postmortem rights by contract or trust, the postmortem right would be extinguished.

Yet another vitally important concession to media interests was the provision that expressly exempted "[a] play, book, magazine, musical composition, film, radio or television program[,] . . . [m]aterial that is of political or newsworthy value[,] . . . [s]ingle and original works of fine art[,] . . . [and a]n advertisement or commercial announcement" for such works.<sup>39</sup> Also separately exempted from liability were "the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads" unless those conduits had knowledge of any unauthorized usage of a deceased personality's persona.<sup>40</sup>

In an attempt to address the media's "spillover" concerns and to confirm the distinction between privacy and publicity rights, S.B. 613 confirmed that the postmortem right of publicity was a "property right" and not a "personal right,"<sup>41</sup> thus eliminating the possibility that it could be used to challenge the existing law of nonsurvivability for claims of defamation, intrusion, public disclosure of private facts, and false light invasion of privacy.

Finally, the enacted version of S.B. 613 limited the category of individuals who could claim a postmortem publicity

right to bona fide celebrities whose identities had "commercial value at the time of his or her death."<sup>42</sup>

Nevertheless, it is certainly true that the enacted version of this legislation failed to obviate the media's most consistently expressed concern, i.e., that S.B. 613 would statutorily overturn the *Lugosi* Court's holding that only those who had commercially exploited their identities during their lifetimes were entitled to claim a postmortem publicity right. One of the reasons this objection appeared to fall on deaf ears is that there were then, and remain today, a number of celebrities (such as Robert Redford, Dustin Hoffman, and Woody Allen) who deliberately refuse to endorse commercial products. Though a postmortem right of publicity is frequently, and perhaps cynically, characterized as a vehicle by which the heirs of deceased celebrities can continue to financially profit from the legacies of their ancestors, it also serves the equally important function of preventing anyone from engaging in the unauthorized exploitation of these decedents' identities. Thus, if the postmortem right were limited only to those celebrities who had commercially exploited their identities during their lifetimes, the heirs of those who had deliberately refused to allow such inter vivos exploitation would be stripped of the ability to prevent any third parties from engaging in that very kind of exploitation immediately upon those celebrities' deaths.

The media's concern that choice-of-law principles could create inequities among celebrities depending upon their domicile at the time of death proved correct. However, the upshot of those concerns was a judicially affirmed, media-beneficial rule that, under California law, the only celebrities with an enforceable postmortem right of publicity were those who died domiciled in jurisdictions that recognized a descendible publicity right.<sup>43</sup>

In the more than a quarter of a century that has ensued since S.B. 613 became effective on January 1, 1985, and in stark contrast to California Civil Code § 3344, there have been fewer than a handful of cases that addressed issues arising under California's postmortem publicity rights statute. In each of these cases, subsequent legislative amendments served to modify<sup>44</sup> or abrogate<sup>45</sup> those judicial decisions.

Largely because of the originally

enacted and subsequently amended categorical exemptions for expressive works, the transformative use test that has been so controversial in disputes involving California Civil Code § 3344 has been absent from litigation implicating California Civil Code § 3344.1 (and its predecessor, California Civil Code § 990).<sup>46</sup> This disparity may well speak to the need to engraft onto § 3344 the kinds of categorical exceptions for expressive works that have worked so well in the postmortem statute, thus diminishing judicial reliance upon the problematic transformative use test.

### The “Marilyn Monroe” Amendments

In two lawsuits involving the posthumous publicity rights of the late Marilyn Monroe,<sup>47</sup> federal district courts in Los Angeles and New York found that Marilyn Monroe, LLC (MMLLC), the successor-in-interest to the publicity rights conveyed by Monroe to Lee Strasberg (her longtime friend and acting coach) in the residuary clause of her 1961 will, had no standing to enforce these rights under California’s postmortem publicity rights law. These opinions concluded that: (a) all people who died before enactment of the 1985 statute (including Monroe, who died in 1962) would not have had the capacity to transfer these later-created rights by will; and (b) California Civil Code § 3344.1 vests the posthumous rights of such pre-1985 decedents only in statutorily designated heirs rather than in any residuary beneficiaries whom the will may have identified.<sup>48</sup>

Both courts entered summary judgment against MMLLC, thereby placing Monroe’s publicity rights in the public domain because she had no statutory heirs. However, in the California case, U.S. District Judge Margaret M. Morrow expressed reluctance about her ruling. She invited the California legislature to clarify whether the posthumous right of publicity applies equally to all celebrities regardless of whether they died before or after 1985 and to confirm whether that right can vest “directly in the residuary beneficiaries of deceased personalities’ estates or their successors in interest.”<sup>49</sup>

Within six weeks of Judge Morrow’s summary judgment order, then-State Senator Sheila Kuehl amended and repurposed her existing S.B. 771. Sponsored by the Screen Actors Guild and

supported by the estates of numerous prominent celebrities who died before 1985 (including many of those who had supported Senator Campbell’s S.B. 613), S.B. 771 was expressly crafted to abrogate these two court decisions. Two months later, S.B. 771 passed both houses of the California legislature without a single dissenting vote; on October 10, 2007, Governor Arnold Schwarzenegger signed this bill into law.<sup>50</sup>

Effective January 1, 2008, S.B. 771 clarified and confirmed that the rights established by the 1985 legislation to prevent the unauthorized exploitation of decedents’ personae are deemed to have existed at the time of death regardless of whether the person died before 1985. This amended legislation also clarified that in the absence of an express provision in a testamentary instrument, these rights can be transferred by means of the residuary clause of a will. S.B. 771 also confirmed that the recognized rights “are expressly made retroactive, including to those deceased personalities who died before January 1, 1985.”<sup>51</sup>

Opponents of this legislation claimed that it would obliterate the settled expectations of “prior users who acted in reliance on their pre-SB 771 rights and are harmed as a result of this retroactive bill.”<sup>52</sup> Those critics, however, ignored the fact that S.B. 771 merely reaffirmed the understanding of this statute that had prevailed prior to the time of the two Monroe court decisions.<sup>53</sup> Indeed, in a July 2007 letter to the legislature, Campbell wrote that S.B. 613 was always intended to protect the rights of celebrities who had previously died. “In point of fact,” Campbell noted,

the overwhelming testimony on my bill throughout the legislative process came from heirs or representatives of celebrities who had already passed, such as, the widow of Elvis Presley, the son of John Wayne, and the grandson of W.C. Fields. There was even written testimony from the widow of the great American General, Omar Bradley.<sup>54</sup>

Thus, prior users—and all would-be infringers—uniformly understood that California’s postmortem right of publicity was possessed by the heirs and representatives of those who had predeceased the original postmortem law’s 1985 effective date. In the two decades

preceding the Monroe decisions, this understanding had never been challenged. Indeed, this same form of retroactivity has never been contested in any of the similar postmortem publicity rights statutes that currently exist.

Finally, the opponents of S.B. 771 attempted to argue that this legislation was, in and of itself, impermissibly retroactive. However, any statute that clarifies preexisting law or otherwise affirms an original legislative intent does not effect any change in the law; rather, it states the law as it always was. In such cases, no question of retroactive application is involved.<sup>55</sup> Moreover, the Senate Judiciary Committee, which considered S.B. 771, concluded that it “would not create a new ‘retroactive’ effect of 3344.1,” and the Legislative Counsel of California similarly confirmed to Governor Schwarzenegger that S.B. 771 was constitutional. In the more than two years since S.B. 771’s amendments to California Civil Code § 3344.1 were enacted, there have been no successful challenges to any of its provisions.

### Recent Activity on Publicity Rights Legislation Outside California

In the absence of a federally recognized right of publicity, states outside of California likewise continue to grapple with the question of whether to enact or amend statutes governing publicity rights for the living and/or the dead. At present, nineteen states recognize a statutory right of publicity for the living.<sup>56</sup> Fourteen of those states also have postmortem publicity rights laws on their books.<sup>57</sup>

Though Hawaii has yet to enact a statute that formally protects publicity rights for living or deceased people, Governor Linda Lingle signed S.B. 2775 into law on April 25, 2010 (Act 062).<sup>58</sup> Perhaps a precursor to more formal protection, this legislation directs the state’s Department of Commerce and Consumer Affairs to establish a publicity rights name registry for both living and deceased individuals. Maintenance of a current registration gives the registrant the presumptive right to license the individual’s publicity rights and provides a “complete defense to any infringement action” that might be brought against a person who had obtained “a valid license from the registered holder of the publicity rights name registration.”<sup>59</sup>

On February 2, 2010, the Indiana


House of Representatives passed House Bill 1335, which amends that state's existing publicity rights statute to provide that it applies retroactively "to a cause of action commenced after June 30, 1994, regardless of when the cause of action arose."<sup>60</sup> It also includes various amendments to address the Monroe issue by clarifying that the rights recognized by the statute apply to "deceased personalities who died before July 2, 1994."<sup>61</sup> As of the time of this writing, House Bill 1335 had been referred to and was pending before the Indiana Senate Committee on Rules and Legislative Procedure.

In Massachusetts, Senator Stanley Rosenberg introduced legislation<sup>62</sup> that would establish an action for infringing the publicity rights of living people and institute a seventy-five-year period of protection for deceased people. As of this writing, that legislation had yet to pass its house of origin.

On March 18, 2010, Michigan Representative Pam Byrnes introduced legislation<sup>63</sup> that would create that state's first statutory publicity right for both the living and the dead. As of this writing, however, that measure had yet to be heard in its first committee.

This year, an effort was made to pass a postmortem right of publicity law in New York, a state that, ironically, was the first in the nation to enact a publicity rights statute for the living in 1903. That bill<sup>64</sup> would have created rights similar to those that exist under current California law, though the exemptions for various categories of expressive works would have been far more expansive. However, due largely to opposition from the state's influential print and electronic news media outlets, S. 8373-A never made it beyond its house of origin.

Finally, on March 19, 2008, Governor Christine Gregoire signed Substitute House Bill 2727, which had passed both houses of the Washington State legislature without opposition. This legislation, effective June 12, 2008, amended that state's right of publicity statute (WASH. REV. CODE §§ 63.60.010–63.60.080) to clarify that the right of publicity not only continues after a person's death but also without regard to where the person died and whether the jurisdiction where that death occurred recognized a descendible right of publicity at the time of his or her death. This amendment would appear to give any person anywhere (living or dead) a cause of action in Washington

for violating his or her right of publicity. The legislation also resolves the Monroe issue by clarifying that the right to protect deceased people's personae exists regardless of whether they died before or after June 11, 1998, the effective date of Washington's original postmortem publicity rights statute. 

### Endnotes

1. As early as 1939, California attempted to enact a publicity rights statute (Assembly Bill (A.B.) 2004) that would have been similar to New York's 1903 law (N.Y. Laws 1903, ch. 132, §§1–2, now codified at N.Y. CIV. RIGHTS LAW §§ 50–51)). Though A.B. 2004 received unanimous approval in the legislature, it was vetoed by then-Governor Culbert Olson.

2. See CAL. BUS. & PROF. CODE §§ 14493–94 (1955 Cal. Stat. ch. 1931, § 1).

3. 1971 Cal. Stat. ch. 1595.

4. See A.B. 286, introduced March 8, 1971, § 1 and accompanying Legislative Counsel's Digest.

5. Subsequent amendments to CAL. CIV. CODE § 3344 increased these statutory damages to \$750, as well as restored a provision permitting the recovery of reasonable attorney fees that was included in the original version of A.B. 286 but deleted when it was finally enacted. See 1984 Cal. Stat. ch. 1704, § 2.

6. As originally introduced, A.B. 826 not only sought to create a statutory right of publicity (CAL. CIV. CODE § 3344), but it also sought to amend California's version of the Uniform Single Publication Act, *infra* note 10, to allow for class actions. That latter provision, however, was subsequently deleted from the bill.

7. See Letter from Edward H. Frank to Robert Leidigh, dated June 4, 1971.

8. See Letter from Vasconcellos to Governor Ronald Reagan, dated November 10, 1971.

9. *Id.*

10. CAL. CIV. CODE § 3425.3 (1955 Cal. Stat. ch. 867).

11. A.B. 826, introduced March 8, 1971, § 2.

12. See *supra* note 8.

13. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 391 (2001); *Winter v. DC Comics*, 30 Cal. 4th 881, 887–91 (2003); see also *Hilton v. Hallmark Cards*, 599 F.3d 874, 909–12 (9th Cir. 2010).

14. See, e.g., F. Jay Dougherty, *All the World's Not a Stoooge: The "Transformative-ness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27

COLUM. J.L. & ARTS 1, 35–77 (2003).

15. CAL. CIV. CODE § 3344.1(a)(2) (1999 Cal. Stat. chs. 998 & 1000), formerly CAL. CIV. CODE § 990(n) (1984 Cal. Stat. ch. 1704).  
16. 25 Cal. 3d 813 (1979).

17. S.B. 613, introduced February 28, 1983.

18. See *supra* note 17. By the time S.B. 613 reached the Assembly, the duration of this postmortem protection had doubled from fifty to one hundred years. Prior to the bill's final passage and enactment, further amendments had returned the duration of protection to fifty years. See S.B. 613, as amended on May 17, 1983. Fifteen years later, however, the duration of postmortem protection was extended to seventy years by virtue of the so-called Astaire amendments of 1999 that also renumbered CAL. CIV. CODE § 990 as § 3344.1. See 1999 Cal. Stat. ch. 998, § 1.

19. See *supra* note 17.

20. Those changes included adding "voice or signature" to the list of protected aspects of one's persona; increasing the minimum statutory damages from \$300 to \$750; providing for the recovery of profits from unauthorized use; and allowing for the recovery of punitive damages, attorney fees, and costs. See S.B. 613, as amended on May 9, 1983.

21. Letter from A. Fredric Leopold to Campbell, dated April 15, 1983.

22. *Id.*

23. Letter from Brassell to Campbell, dated July 13, 1983.

24. This particular concern was addressed through subsequent amendments to S.B. 613 in which *deceased personality* was defined as a "natural person" whose persona had "commercial value at the time of his or her death, whether or not during the lifetime of that natural person" any commercial use of the individual's persona was ever made. See CAL. CIV. CODE § 990(h) (1984 Cal. Stat. ch. 1704). Effective January 1, 2011, this provision will be amended to include individuals whose identities acquired commercial value "because of" their death. See 2010 Cal. Stat. ch. 20.

25. This concern was likewise partially addressed in amendments to S.B. 613 that prohibited the recovery of any damages unless a successor-in-interest or licensee registered a claim of rights. See CAL. CIV. CODE § 990(f) (1984 Cal. Stat. ch. 1704). That registry is a public record and is currently available on the California Secretary of State's Web site ([www.sos.ca.gov/business/sf/sf\\_siisearch.htm](http://www.sos.ca.gov/business/sf/sf_siisearch.htm)).

26. See *supra* note 23. In partial response to these "financial" issues, Campbell wrote a letter to Brassell in which he noted that "by

expressly recognizing the transferability and descendibility of the right of publicity, exclusive contractual grants made to CBS of such rights will be clearly enforceable as against unauthorized third parties for 50 years after the death of the person. As you know, such rights can be extremely valuable.” Letter from Campbell to Brassell, dated March 5, 1984.

27. Letter from WGA Executive Director Naomi Gurian to Campbell, dated July 29, 1983.

28. See WGA opposition statement, dated July 29, 1983. This criticism was addressed both in S.B. 613 (via categorical exemptions embodied in then-CAL. CIV. CODE § 990(n)) and again later as part of the Astaire amendments, see *supra* note 18, which contained the following provision: “For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.” CAL. CIV. CODE § 3344.1(a)(2).

29. See *supra* note 27.

30. Letter from Gurian to Campbell, dated March 19, 1984.

31. Statement from MPAA and AMPTP, dated July 22, 1983.

32. This provision was deleted from S.B. 613 prior to its final passage and enactment.

33. See *supra* note 31.

34. *Id.*

35. *Id.*

36. Letter from legislative advocates Marjorie C. Swartz and Daphne L. Macklin to Campbell, dated August 8, 1983.

37. Letter from Campbell to Deukmejian, dated August 31, 1984.

38. It is doubtful that the enacted version of S.B. 613 was unopposed by companies

with a vested interest in the exploitation of celebrity personae on commercial products. For example, Hackett American Collectors Company, a self-described “producer of limited edition collectibles, plates, figurines, lithographs and character mugs,” sent a letter of opposition to S.B. 613 in which it objected to the absence of any “grandfather clause” as well as to the bill’s failure to “assign liability to manufacturers only.” See Letter from James R. Hackett, company president, to State Assemblyman Larry Sterling [*sic*], dated March 7, 1984.

39. See CAL. CIV. CODE § 990(n)(1); see also CAL. CIV. CODE § 3344.1(a)(2).

40. See CAL. CIV. CODE § 990(l).

41. See CAL. CIV. CODE § 990(b).

42. See CAL. CIV. CODE § 990(h).

43. See Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1023–29 (C.D. Cal. 1998), *aff’d*, 292 F.3d 1139, 1146–49 (9th Cir. 2002) (holding that the late Princess Diana had no enforceable postmortem right of publicity).

44. Compare Astaire v. Best Film & Video Corp., 116 F.3d 1297 (9th Cir. 1997), amended by 136 F.3d 1208 (9th Cir. 1998), cert. denied, 525 U.S. 868 (1998), with 1999 Cal. Stat. ch. 998 (modifying the Astaire case’s rule regarding embedded commercials).

45. Compare summary judgment orders entered in Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., Case No. CV 05-2200 MMM (MCx) (C.D. Cal. filed May 14, 2007), and in Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309 (S.D.N.Y. 2007), with 2007 Cal. Stat. ch. 439 (abrogating the Greene and Shaw courts’ holdings that the postmortem right of publicity belongs only to those people who died after January 1, 1985, the effective date of S.B. 613). These rulings and the legislative clarifications that they prompted are discussed in greater detail, *infra*.

46. See *supra* notes 14 and 15.

47. See *supra* note 45.

48. *Id.*

49. Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., Case No. CV 05-2200 MMM (MCx) (C.D. Cal. filed May 14, 2007). See generally Douglas E. Mirell, *California Clarifies Its Posthumous Right of Publicity Statute*, J. OF INTELL. PROP. LAW & PRAC. 224-225 (April 2008).

50. 2007 Cal. Stat. ch. 439.

51. *Id.*; CAL. CIV. CODE § 3344.1(p).

52. Thomas F. Zuber, *Everlasting Fame*, LOS ANGELES LAWYER 33 (MAY 2009).

53. See, e.g., Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923 (C.D. Cal. 2004); Joplin Enters. v. Allen, 795 F. Supp. 349 (W.D. Wash. 1992).

54. Letter from Campbell to Kuehl, dated July 23, 2007.

55. See, e.g., Western Security Bank v. Superior Court, 15 Cal. 4th 232, 243 (1997); *In re Marriage of Fellows*, 39 Cal. 4th 179, 183 (2006).

56. Those states are California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. See J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, § 6:8, at 842–843 (2d ed. 2010) (“MCCARTHY”).

57. Those states are California, Florida, Illinois, Indiana, Kentucky, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, and Washington. MCCARTHY, § 9.18, at 445.

58. Haw. Rev. Stat. 482P.

59. *Id.* at § 482P–8(d).

60. Proposed amended IND. CODE § 32-36-1-1(a)(1).

61. Proposed amended IND. CODE § 32-36-1-16.

62. S. 1800, introduced January 13, 2009.

63. House Bill 5964 (2010).

64. S. 8373-A, introduced June 25, 2010.