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Descendible Publicity Rights: California's Grateful Dead

by Peter H. Karlen*

I

Introduction

The day will come when everyone will be famous for fifteen minutes.

—Andy Warhol—

In Lugosi v. Universal Pictures,¹ the California Supreme Court struck a blow for free enterprise and freedom of speech by denying publicity rights to the heirs of actor Bela Lugosi who had claimed a post mortem monopoly on the use of Lugosi's Count Dracula character.² Publicity rights in California, including the rights to control the use of the name, likeness, and photograph of a person, once and for all were held not descendible.³

Even though the Lugosi opinion thrust a stake through the heart of the deceased celebrity, newly enacted Senate Bill 613,⁴ introduced by State Senator William Campbell,⁵ has given the deceased a new lease on life as far as publicity rights are concerned. January 1, 1985, the effective date of the new law, was the dawn of the "living dead" in California because publicity rights are now descendible by statute.⁶

This article analyzes recent legislation on publicity rights,

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2. The facts of the case are stated at 25 Cal. 3d at 816-18, 603 P.2d at 426-27, 160 Cal. Rptr. at 324-25.
3. 25 Cal. 3d at 824, 603 P.2d at 431, 160 Cal. Rptr. at 329.
5. William Campbell (R), 33rd Dist., Los Angeles.
6. However, to the date of this article, the author has not discovered any appellate cases concerning this legislation.
particularly how it relates to descendible rights. The detailed
analysis will appear in the guise of constructive criticism since
this article, including the proposed alternative draft statute on
descendible rights, presents viable alternatives to what the
Legislature has bequeathed to celebrities, their heirs, and the
public.

II
Summary of Statutes

Under existing law embodied in California Civil Code section
3344,8 any person who knowingly uses another's name, photo-
graph, or likeness for advertising purposes without the consent
of that person or his parent or his guardian is liable for dam-
ages in an amount not less than $300.9

The new legislation amends section 3344 to cover the use of
another's voice10 or signature.11 It also extends coverage to a
use on or in any products, merchandise, or goods and to a use
for purposes of selling products, merchandise, goods, or serv-
ices.12 Furthermore, the minimum award is increased from
$300 to $750,13 and, more importantly, there is a provision for
recovery of profits from the unauthorized use, attorneys' fees,
and possibly punitive damages.14

Existing case law, as found in Lugosi v. Universal Pictures,15
holds that the right to prohibit commercial exploitation of a
person's name, photograph, or likeness does not generally sur-
vive that person's death. Nonetheless, by enacting a new sec-
tion 990 of the Civil Code, the Legislature has created a
statutory right to recover damages for the unauthorized com-
mercial use of a deceased personality's name, voice, signature,
photograph, or likeness, which is similar to the right granted in
the new amended version of Civil Code section 3344. Descendi-
bale publicity rights are deemed freely transferable property

7. This summary is derived from the Legislative Counsel's analysis of the
legislation printed with Senate Bill 613, LEGISLATIVE COUNSEL'S DIGEST, 1984 Cal.
Legis. Serv. 431 (West).
9. CAL. CIV. CODE § 3344(a) (West 1982).
10. CAL. CIV. CODE §§ 990(a), 3344(a) (West Supp. 1986).
11. Id.
12. Id.
13. Id.
14. Id.
rights and, if not transferred inter vivos, are exercisable after the person's death by his or her spouse, children, or parents.

In order to fully exercise the descendible rights, the person claiming the rights must register the claim with the Secretary of State; otherwise, the unregistered owner of the rights cannot recover damages for a use that occurs before registration. Another limitation is that no action can be brought to recover damages for a use occurring more than fifty years after the death of the personality. The most important restrictions, however, are in the form of exemptions, for example, in connection with news, public affairs, and sports broadcasts or accounts of political campaigns or in connection with plays, books, magazines, newspapers, musical compositions, films, and radio and television programs.

This new legislation follows years of protracted litigation throughout the United States concerning the descendibility of publicity rights. For example, there was litigation involving the heirs of Laurel and Hardy, Marilyn Monroe, Elvis Presley, and Martin Luther King, Jr. Most of these cases involved the plaintiffs' assertion of "publicity" or property rights rather than merely personal "privacy" rights, in other words,

17. CAL. CIV. CODE § 990(c), (d) (West Supp. 1986). Additionally, the claimant(s) must possess more than half the interest in the property right. Id.
19. Id.
20. CAL. CIV. CODE § 990(g) (West Supp. 1986).
28. Of course, the right of privacy per se is usually not descendible. See W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS 815 (4th ed. 1971). At common law there could be no violation of a dead person's right of privacy. See, e.g., Ravellette v. Smith,
the plaintiffs were more concerned with money than with memories. Naturally, the heirs, or at least their assignees, were concerned with just how a name or likeness was used. They also perceived the enormous economic potential of exploiting the memory of deceased celebrities at a time when manufacturers and distributors of toys, gifts, baubles, and bric-a-brac were equipped to flood the market immediately after the death of a celebrity with products evoking memories of the deceased personality.

There were different motives for bringing these actions. Some heirs were irked by the massive exploitation of their ancestor’s personal attributes and felt that if anyone should benefit from the life and death of the celebrity it should be them. Other heirs and their assignees had already made arrangements after the celebrity's death to exploit his or her personal attributes and brought lawsuits to prevent interference with their economic plans. And, of course, there were heirs who were bothered emotionally by the commercialization of their ancestor’s attributes.

### III

**General and Theoretical Problems With the New Laws**

The principal concern of the authors of the legislation was undoubtedly protection of the economic and personal interests of public figures, celebrities, and their heirs, successors, and assigns. Because living persons should have more control over commercial use of their personal attributes, no serious objec-

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tion can be raised against extending Civil Code section 3344 to the use of voice or signature. Nonetheless, extending publicity rights beyond the death of the celebrity or other public figure is not patently justified. It could be argued that Civil Code section 990 is necessary to protect heirs from the unpleasant effects of commercial exploitation of the decedent's name, likeness, voice, photograph, and signature. However, it is unlikely that the heirs of famous people have suffered traumatically from this commercial exploitation. In fact, in almost all cases involving descendibility of publicity rights, the heirs have not placed much importance on the emotional impact of commercial exploitation. Rather, their principal concern has been to preserve licensing rights.

It appears that the main purpose of this legislation is to protect or actually create the economic interests of the heirs. One possible analogy is to section 986 of the California Civil Code which provides resale royalties for fine artists payable on sales occurring up to twenty years after the artist's death. Under this statute, the seller of an artist's work must pay to the artist's heirs five percent of the gross proceeds from post mortem sales. However, this legislation may have been based on the rights of living personalities. See also Lugosi v. Universal Pictures, 25 Cal. 3d 813, 818-19, 603 P.2d 425, 427-28, 160 Cal. Rptr. 323, 326 (1979).


33. For cases on protection of voice, see generally Lahr v. Adell Chemical Co., 300 F.2d 256, 260 (1st Cir. 1962) (imitation of comedian Bert Lahr's vocal delivery in television commercial held actionable as unfair competition); but see Sinatra v. Goodyear Tire and Rubber Co., 435 F.2d 711, 713 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971) (use of hit song, vocal mannerisms, and dress of Nancy Sinatra in tire advertisements held not actionable); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343, 349 (S.D.N.Y. 1973) (Shirley Booth, famous as television character Hazel, lost voice imitation lawsuit); Davis v. Trans World Airlines, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969) (use of popular song and vocal style of singing group "The Fifth Dimension" in airline advertisement held not actionable). Signatures of living persons are protected somewhat by section 2(c) of the Lanham Act, 15 U.S.C. § 1052(c) (1982), simply because they are not registrable as trademarks by other persons.


37. CAL. CIV. CODE § 986(a) (West Supp. 1986).
notion that many artists work hard during their lifetimes without enjoying fame or fortune; therefore, the extension of resale royalties for the posthumous period of twenty years compenses the artist's spouse and children who may have suffered deprivation during the artist's lifetime.\(^{38}\)

The same arguments are not as persuasive when applied to Civil Code section 990 on descendible publicity rights. For the most part, the decedent is already a famous person whose children have not suffered the same hardships as have those of the fine artist.\(^{39}\) In fact, the statute refers to a person "whose name, voice, signature, photograph or likeness has commercial value at the time of his or her death."\(^{40}\)

The pernicious effect of the statute is to obstruct the free market in products and services connected with the names, voices, signatures, photographs and likenesses of dead people.\(^{41}\) In other words, the statute creates a monopoly for the heirs and transferees on the use of the decedent's attributes,\(^{42}\) thus preventing competition in the sales of memorabilia connected with the dead person. Rather than being free to exploit the decedent's attributes, the entrepreneur will have to pay licensing fees, thus forcing up prices. Without descendible publicity rights, free competition would reign in the marketplace, encouraging lower prices and perhaps a greater variety of products.\(^{43}\)

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39. See, e.g., cases cited at notes 24-31 supra.

40. CAL. CIV. CODE § 990(h) (West Supp. 1986). Section 986 has a minimal requirement in that it applies only to those works with a value of $1,000 or greater. CAL. CIV. CODE § 986(b)(5) (West Supp. 1986).

41. See infra notes 42-50 and accompanying text. One commentator has argued that California Civil Code section 986 also raises this problem. See Ashley, A Critical Comment on California's Droit de Suite, Civil Code Section 986, 29 HASTINGS L.J. 249, 256-60 (1978). Furthermore, sections 986 and 990 can be distinguished on other bases; however, these differences are beyond the scope of this article.

42. See also 17 U.S.C. §§ 106, 302 (1982) (granting exclusive descendible rights to the owners of copyrights; the copyright term for authors who are natural persons is the life of the author plus fifty years).

43. On the other hand, exclusive control by the heirs may ensure the quality of products. After all, it is not unreasonable to assume that the heirs will be more concerned with having their ancestors associated with high quality products or products which will not otherwise tarnish their ancestors' reputations. See, e.g., Hicks v. Casa-
The end result is that the public suffers so that a small group of celebrities’ heirs can reap certain economic rewards. The result is unlike that of the resale royalty statute which may have no drastic effect on competition or pricing. Similarly, the statute cannot even be compared to the copyright laws which allow protection for life of the author plus fifty years. Extended copyright terms provide authors and publishers with incentives to invest time, effort, and capital to create and exploit works of authorship. The economic rights provided by Civil Code section 990 do not create the same incentives to confer any lasting benefit on the public. Not only involved heirs who expressed a desire to protect the reputations and memories of their ancestors.

44. Because of its fifty-year length, by necessity the postmortem period restricts the number of beneficiaries as does the registration requirement at section 990. CAL. CIV. CODE § 990(f) (West Supp. 1986).
46. The 5% royalty may not have very much of an effect on the art market, notwithstanding the commentary that it might have. But see Asimow, Economic Aspects of the Droit de Suite, LEGAL RIGHTS OF THE ARTIST ch. III (M. Nimmer ed. 1971) (economic analysis of the impact of resale royalties on the art market concluding that the demand for art is elastic and any increase in price would lead to a reduction in demand).
48. See M. NIMMER, NIMMER ON COPYRIGHT § 1.02-.03 (1985). The United States Constitution grants to the federal government the right “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 2.
49. Although the author and publisher are encouraged to create and publish a work of authorship by the promise of copyright protection, there is little reason to believe that celebrities will deliberately enhance their status as celebrities merely because they wish to benefit heirs having posthumous rights. Of course, it could also be argued that posthumous copyright protection is not very much of an incentive for an author, although it may amount to an incentive for many publishers.

As the court said in Memphis Development Foundation v. Factors, Etc., Inc., 616 F.2d 956-59 (6th Cir.), cert. denied, 449 U.S. 953 (1980), “[a]lthough fame and stardom may be ends in themselves, they are normally by-products of one’s activities and personal attributes, as well as luck and promotion.”

The court reasoned that a celebrity’s principal motivations in achieving fame are “the desire to achieve success or excellence in a chosen field, the desire to contribute to the happiness or improvement of one’s fellows and the desire to receive the psychic and financial rewards of achievement.” Id.

However, as noted by the court, “[t]he desire to exploit fame for the commercial advantage of one’s heirs is ... a weak principle of motivation. It seems apparent that making the right of publicity inheritable would not significantly inspire the creative endeavors of individuals in our society.” Id.

In contrast, in Commerce Union Bank v. Coors, 7 Media L. Rep. (BNA) 2204, 2206 (Tenn. Ch. Ct. 1981), one chancellor had no hesitation in upholding descendible publicity rights by saying that “[o]ften an entertainer or athlete has devoted his or her entire life to attain celebrity status, and it would be unfair to permit a commercial
is this statute ill-conceived as a matter of public policy, but, as explained below and illustrated by the proposed statutory text, it is so full of uncertainties and defects that if it is not amended, it will cause an avalanche of litigation.

enterprise to reap windfall benefits from the celebrity's labors at the expense of the celebrity's heirs or beneficiaries, usually close family members." The court also noted that "[t]he public policy served by the right of [publicity] is 'to provide an incentive for enterprise in creativity by allowing individuals to benefit from their personal efforts.'" The ability to leave a valuable property interest to one's heirs is further incentive for enterprise and creativity and deserves judicial protection. Id. at 2208.

50. What follows is the author's proposal for a new statute and should be read in conjunction with the commentary made in this article because this text embodies many of the suggestions made in the commentary.

SECTION 990. UNAUTHORIZED COMMERCIAL USE OF DECEASED PERSONALITY'S NAME, VOICE, SIGNATURE, PHOTOGRAPH, OR LIKENESS

(a) Any person(s) who knowingly use(s) a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in goods, or for purposes of advertising or selling, or soliciting purchases of, goods, services, real property, securities, or franchises without consent from the person(s) specified in subdivision (c), shall be liable for any damages sustained by those person(s) specified in subdivision (c) as a result of such use. In addition, any person(s) who violate(s) this section shall be liable to the injured party(s) in an amount equal to the greater of seven hundred fifty dollars ($750.00) or the actual damages suffered by the injured party(s) as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing these profits, the injured party(s) shall be required to present proof only of the gross revenue attributable to the use, and the person(s) who violate(s) the section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party(s). The prevailing party(s) in any action under this section shall also be entitled to attorney's fees and costs.

(b) The rights recognized under this section are property rights, freely transferable by the deceased personality or by his or her transferees, or, after the death of the deceased personality, by the person(s) in whom such rights vest under this section or the transferees of those person(s), in whole or in part, by contract or by means of trust or testamentary documents.

(c) The consent required by this section shall be exercisable by the person(s) to whom such right of consent (or portion thereof) has been transferred in accordance with subdivision (b), or if no such transfer has occurred, then by the person(s) to whom such right of consent (or portion thereof) has passed in accordance with subdivision (d), provided that only those such person(s) who have registered their claims under subdivision (f) shall be entitled to exercise a right of consent (or portion thereof).

(d) Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person(s), and may be exercised, on behalf of and for the benefit of all those persons, by those persons, who in the aggregate are entitled to more than a one-half interest in such rights, and each of them, under this section, provided that in determining which persons control more than a one-half interest in the rights, only those persons who have registered their claims under subdivision (f) shall be counted.
IV
Detailed Analysis of the Statutes

A. Consent

The very essence of a violation of publicity rights is that the commercial use is without consent. Therefore, both licensors

(1) The entire interest in those rights belong to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one-half of the entire interest in those rights belong to the surviving spouse.

(2) The entire interest in those rights belong to the surviving children of the deceased personality and to the surviving children of any dead child of the deceased personality, subject to the provisions of subparagraph (1) above.

(3) If there is no surviving spouse, and no surviving children or grandchildren, then the entire interest in those rights belong to the surviving parent(s) of the deceased personality.

(4) The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable on a per stirpes basis according to the number of the deceased personality's children represented; the share of the children of a dead child of a deceased personality can be exercised only by the action of a majority of them, provided that only the interests of those registered claimants under subdivision (f) shall be counted. For the purposes of this section, "per stirpes" is defined as it is defined in Section 240 of the Probate Code.

(e) If 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. Moreover, the rights set forth in subdivision (a) shall terminate if no person registers a claim under subdivision (f) within ten (10) years after the date of death of the deceased personality.

(f) (1) An heir, transferee, or other successor-in-interest to the rights of a deceased personality under this section may not exercise any right of consent until such heir, transferee, or other successor-in-interest registers a claim of rights under paragraph (2) of this subdivision, and an heir, transferee, or other successor-in-interest may not bring an action for damages or any other relief for a use prohibited by this section that occurs before the heir, transferee, or other successor-in-interest registers a claim to the rights under paragraph (2) of this subdivision, provided that if such registration occurs within three (3) months after the death of the deceased personality, then such registration shall be deemed to have been made as of the date of that death.

(2) Any person claiming to be an heir, transferee, or other successor-in-interest to the rights of a deceased personality under this section or licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and payment of a fee of ten dollars ($10.00). The form shall be verified and shall include the name and date of death of the deceased personality, the name and address of the claimant, the basis of the claim, and the rights claimed. According to regulations formulated by the Secretary of State, the claimant shall establish the basis of his or her claim by submission of the necessary docu-
and users should be concerned with the failure of the statutes

tements, such as marriage certificates, death certificates, contracts, court judgments and decrees, and other instruments.

(3) Upon receipt and after filing of any document under this section, the Secretary of State may microfilm or reproduce by other techniques any of the filings or documents and destroy the original filing or document. Said microfilm or other reproduction of any document shall be admissible in any court of law. The microfilm or other reproduction of any document may be destroyed by the Secretary of State fifty (50) years after the death of the personality named therein.

(4) Claims registered under this subdivision shall be public records.

(5) If the Secretary of State refuses to register the claim of any person, that person may have their claim registered if by noticed motion under Section 1088.5 of the Code of Civil Procedure they obtain a writ of mandate directed to the Secretary of State. If the writ issues, and provided that the petition is served upon the Secretary of State no later than thirty (30) days after the filing thereof with the court, the date of registration shall be the date when the petition for the writ of mandate is filed or the date of the death of the deceased personality if the petition is filed within three (3) months after the date of death.

(g) No action shall be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of fifty (50) years from the death of the deceased personality.

(h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has substantial commercial value at the time of his or her death, whether or not during the lifetime of that natural person said person used his or her name, voice, signature, photograph, or likeness on goods, or for purposes of advertising or selling, or solicitation or purchase of, goods, real property, securities, franchises, and services. A "deceased personality" shall include, without limitation, any such natural person who has died within fifty (50) years prior to January 1, 1985.

(1) As used in this section, the term "goods" has a definition set forth at Section 2105 of the Commercial Code.

(2) As used in this section, the term "securities" has the definition set forth at Section 25019 of the Corporations Code.

(3) As used in this section, the term "franchises" has the definition set forth at Section 31005 of the Corporations Code.

(i) (1) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, silent or with sound, or any videotape or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye or with a machine or device normally used to view the photograph can reasonably determine who the person depicted in the photograph is.

(2) As used in this section, "voice" means the actual or recorded voice of a deceased personality, or an imitation thereof created with the voice of another person or created with the aid of a machine or device.

(3) A voice or likeness shall be deemed that of the deceased personality if one who sees the likeness or listens to the voice can reasonably determine that the likeness is of the deceased personality and not of an-
to specify what consents are required. One possible solution to

other person and that the voice is or is meant to be the voice of the deceased personality and not that of another person.

(j) For purposes of this section, a use of a name, voice, signature, photograph or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, or any religious service, shall not constitute use for which consent is required under subdivision (a). Moreover, a use of a name, voice, signature, photograph, or likeness on or in goods shall not constitute a use for which consent is required under subdivision (a) unless the use is for commercial purposes.

(k) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the deceased personality's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(l) Nothing in this section shall apply to 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, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that the owners or employees had knowledge that the use of the deceased personality's name, voice, signature, photograph, or likeness was unauthorized, as prohibited by this section.

(m) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

(n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:

(1) A dramatic work, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

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

(3) Single and original works of fine art.

(4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).

(o) No action may be maintained to enforce any liability under this section unless brought within one (1) year of the act complained of.

(p) Within one (1) month after the filing of any action under this section, the clerk of the court shall send written notification to the Secretary of State setting forth, as far as is shown by the papers filed in the court, the names and addresses of the parties and the registration for each claim registered with the Secretary of State which is involved in the action. If any other claim is included in the action by amendment, answer, or other pleading, the clerk shall also send a similar notification concerning it to the Secretary of State within one (1) month after the pleading is filed. Within one (1) month after any final order or judgment is issued in the case, the clerk of the court shall notify the Secretary of State of said order or judgment, sending with the notification a copy of the order or judgment together with the written opinion, if any, of the court. Upon receiving the notifications specified above, the Secretary of State shall make them a part of the public records under this section.
the problem would be to require that all consents, or at least exclusive licenses, be in writing for both sections 990 and 3344.51 That is, if the user fails to obtain written consents from those persons who must give them, he acts at his own peril. The only exemption should be for employers who use the names, likenesses, or photographs of employees, and the burden of proof regarding consent should be governed by the existing provisions.52 However, once the user obtains written consent from any of the owners with apparent authority to give consent, the consent should be valid even without the signatures of a sufficient number of persons who own the necessary controlling interest in the rights.53 In many cases, with numerous heirs and transferees it would be impossible, or at the very least, quite time-consuming, to get the signatures of persons having a controlling interest. Nonetheless, in order to protect the interests of the owners who do not sign the licensing instrument, it should be up to the user to prove that the signing party was authorized or apparently authorized to execute the license on behalf of those parties who had a controlling interest in the licensed rights.54

51. Cf. Copyright Act of 1976, § 204, 17 U.S.C. § 204 (1982) (requiring written transfers, including written grants of exclusive licenses); CAL. CIV. CODE § 987(g)(3) (requiring written waivers of artists' moral rights). In states recognizing the right to privacy by statute, a written consent is often required. See, e.g., MASS. GEN. LAWS ANN. ch. 214, § 3A (West 1982); N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976); R.I. GEN. LAWS § 9-1-28 (1982); VA. CODE ANN. § 8.01-40 (1977); WIS. STAT. ANN. § 895.50(2)(b) (1982). Of course, it is under these privacy statutes that publicity rights are often recognized, for example, in New York. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976).

52. Section 3344(c), strangely enough not carried over into Civil Code section 990, provides for an exemption of sorts. Where a photograph or likeness of an employee appears in commercial materials prepared by the employer, but only incidentally, there arises a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the employee's consent was not a knowing use of the photograph. CAL. CIV. CODE § 3344(c) (West Supp. 1986). Cf. Copyright Act of 1976, § 201(b), 17 U.S.C. § 201(b) (1982) (providing that the copyright in a work of authorship created by an employee within the scope of employment belongs to the employer).

53. Although section 990(d) permits only the majority owners to license rights, nonetheless, as a practical matter, it may be impossible to track down and secure the signatures of even a majority of the owners of descendible publicity rights. CAL. CIV. CODE § 990(d) (West Supp. 1986). Under the copyright laws, joint owners can grant at least non-exclusive licenses without first procuring the consent of the other joint owners, subject only to an accounting for profits to the other joint owners. See M. Nimmer, supra note 48, § 6.01.

54. In comparison, a joint copyright owner may grant non-exclusive licenses without securing the consent of the other joint copyright owners, subject to an accounting for profits. However, all joint copyright owners must join in granting an effective exclusive license, which must be granted in writing. There is no provision for major-
Naturally, intelligent users who rely on actual or apparent authorizations should require the signing owner to warrant that he has the power to bind those owners who have a controlling interest in the licensed rights. An accompanying indemnification clause should also be included so that the user will be indemnified if the signing party is not empowered to bind the other parties.\textsuperscript{55} To make licensing easier, heirs should be able to record powers of attorney with the Secretary of State to let potential users know what persons may license the publicity rights.\textsuperscript{56}

Another problem with subdivision (a) of Civil Code section 990 is that the required consent is usually that of the heirs or transferees. However, the deceased personality may already have orally or informally consented to the exploitation of his personal attributes for an indefinite term. It would seem that if an existing business relied on the inter vivos consent, the post-mortem owners, including transferees and heirs, should not be able to revoke the rights already exercised by the prior users.\textsuperscript{57}

If postmortem rights survive inter vivos usage, the only way to allow revocation would be to mimic the effect of section 405 of the Copyright Act on innocent infringers.\textsuperscript{58} Perhaps earlier users should be considered innocent infringers, and the court should devise a reasonable royalty for the continued post-mortem use.\textsuperscript{59} Another technique would be to require prior users to obtain compulsory licenses in order to avoid actions by postmortem owners.\textsuperscript{60} The terms and conditions of compulsory

\textsuperscript{55} Such an indemnification must be in writing according to the statute of frauds. \textsc{Cal.} \textsc{Civ. Code} § 1624(b) (West Supp. 1986).

\textsuperscript{56} \textit{ Cf.} Copyright Act of 1976, § 205, 17 U.S.C. § 205 (1982) (permitting recording of certain documents relative to copyright ownership. These would include transfers, licenses, and powers of appointment).

\textsuperscript{57} Under copyright law, even without abandonment, the owner may be estopped from bringing an infringement action against those whose infringements he has tolerated in the past. \textit{Compare} Copyright Act of 1976, § 205(f), 17 U.S.C. § 205(f) (1982) (permitting a nonexclusive license to prevail over a conflicting transfer of copyright ownership) \textit{with} Copyright Act of 1976 § 203, 17 U.S.C. § 203 (1982) (allowing for termination of transfers and licenses).

\textsuperscript{58} Under section 405(b) of the Copyright Act of 1976, 17 U.S.C. § 405(b) (1982), an innocent infringer relying in good faith on the absence of a copyright notice may not be liable to the copyright owner for an award of damages, although the court in its discretion may award profits or reasonable royalties to the copyright owner.

\textsuperscript{59} \textit{See} id.

\textsuperscript{60} \textit{ Cf.} 17 U.S.C. § 115 (1982) (compulsory copyright license for making and dis-
licenses would be established by the Secretary of State in much the same way that copyright royalties are determined by the Copyright Royalty Tribunal. In order to preserve whatever rights they have, prior users could also be required to register their claims to the rights with the Secretary of State within a certain time period after the death of the celebrity. Obviously, a requirement for such registration would be proof of use. The registration would then serve to notify the heirs of pre-existing use which might act as a limitation on the heirs' exclusive rights.

It should be noted that, if the living celebrity fails to intervene against others who used his attributes for commercial purposes, the rights should be deemed waived or abandoned and should not be exercisable by the heirs or transferees. This proposed rule could be analogized to abandonment of a copyright, whereby an author who never enforces a copyright causes an abandonment which affects his heirs.

The doctrine of abandonment is used to encourage owners to enforce or lose their rights. Otherwise infringers, especially more recent infringers, may detrimentally rely on the inaction of the owners. After all, the law should only protect the vigilant.

B. Mens Rea

Under subdivision (a) of Civil Code section 3344, the user is liable only if he "knowingly" uses without consent. By contrast, subdivision (a) of Civil Code section 990 concerning post-mortem rights does not require knowledge; in fact, it does not...
even mention the user's state of mind. Because Civil Code section 990 is not a criminal statute, presumably the defendant can be held strictly liable for a wrongful use.\textsuperscript{65} Both extremes are unjustified.

Under section 3344 of the Civil Code, it is the use of the personal attribute, and not the lack of authorization, that should require knowledge before a user can be liable.\textsuperscript{66} To be held liable, the defendant must know that he is using a name or likeness of another person. Mere negligence or recklessness is not enough. For instance, the plaintiff should have to establish that the defendant actually knew that a photograph depicted the plaintiff. However, a media defendant should not be liable if he does not investigate the contents of his magazine or other media product.\textsuperscript{67} On the other hand, why require absolute knowledge\textsuperscript{68} concerning the consent? Anyone who is grossly negligent or reckless\textsuperscript{69} in failing to obtain a consent should be held liable. Thus, the person who definitely knows that he is using someone else's likeness should have some duty to determine whether a consent was issued.

Strict liability, which apparently could be imposed under section 990, is equally inapposite. The nonnegligent or even the merely negligent user who fails to secure a consent or fails to determine whether a personal attribute is being used should not be held liable, especially under a statute that allows awards of punitive damages and attorney's fees.\textsuperscript{70} Moreover, the harsh

\textsuperscript{65} Cf. W. Prosser, supra note 28, at 493 n.21, 539 n.26, 772-74 (4th ed. 1971) (strict liability imposed for defamation); id. at 815 (liability imposed for innocent invasions of privacy).

\textsuperscript{66} Cf. MODEL PENAL CODE § 2.02(4) (Proposed Official Draft 1962) (indicating that a prescribed culpability requirement should apply to all material elements of an offense if the criminal statute prescribes the kind of culpability sufficient for the offense without distinguishing amongst the material elements thereof). Because the word "knowingly" appears in section 3344(a) at the very beginning of the principal clause of the section which sets forth the rights, the culpability requirement may apply to the rest of that clause. See CAL. CIV. CODE § 3344(a) (West Supp. 1986)

\textsuperscript{67} Of course, most media defendants, including publishers of magazines, are immune from liability under subdivision (l) of section 990 and subdivision (f) of section 3344 unless they have full knowledge of the violation.

\textsuperscript{68} Knowledge as a mens rea, at least with respect to the circumstances of one's conduct, constitutes an awareness of the circumstances. See infra note 167, on the definition of "knowingly," as discussed in Karlen, Mens Rea: A New Analysis, 9 U. TOL. L. REV. 191, 216-18 (1978) [hereinafter, Karlen, Mens Rea].

\textsuperscript{69} See infra note 168, on the definition of "recklessly," defined in relation to conscious disregard of a substantial and unjustifiable risk of harm, as discussed in Karlen, Mens Rea, supra note 68, at 224-32, 254 (1978).

\textsuperscript{70} CAL. CIV. CODE §§ 990(a), 3344(a) (West Supp. 1986).
consequences of strict liability should be imposed under section 3344 which affects living persons rather than under section 990 which merely protects the heirs and transferees of dead persons.

C. Subject Matter

Perhaps the principal concern of anyone who analyzes the statute on descendible rights is its subject matter—the deceased personality whose name, likeness, photograph, voice, or signature had "commercial value" at the time of his death. But how much commercial value should be required? After all, the use of almost anyone's name, voice, signature, photograph, or likeness has some commercial value even if it is only nominal. Perhaps a modifier could have been used such as "substantial" or "significant." Even section 987 nearby in the Civil Code could have provided legislators with the inspiration for such a modifier. Under section 987, a work of fine art is protected from destruction, mutilation, defacement, or alteration only if it is of "recognized" quality. Also, in the realm of intellectual property, a work of authorship is not "obscene" under the guidelines in Miller v. California if it has "serious literary, artistic, political, or scientific value." Undoubtedly, without such a modifier, the courts must do what was done with the Copyright Act—devise their own minimal standards. For copy-


72. It would seem that the use of a modifier would not unduly encourage or discourage litigation and would create no peculiar problems for the trier of fact. It would seem just as difficult to determine whether the personal attribute has "commercial value" as it would be to determine whether such attribute has "serious" or "substantial" commercial value, although the threshold for the plaintiff's case would be heightened.

74. CAL. CIV. CODE § 987(c) (West Supp. 1986).
77. Id. at 24. The Miller standard is still adhered to by a majority of states; California uses a different standard. See La Follette-Deddeh Anti-Obscenity Law, ch. 51, § 2, 1986 Cal. Legis. Serv. 48 (West) (to be codified at CAL. PENAL CODE § 311).
right protection, the claimant must establish that the work embodies some minimal amount of creativity. For publicity rights, the courts should require heirs to prove that the commercial value is more than nominal and makes the licensing rights, actually or potentially, significant business assets.

One way to improve the "commercial value" clause, i.e. to protect only those who have earned protection, is to limit post-mortem protection to those families and businesses which had exploited the deceased personality's attributes during his lifetime. In that way, the investment of time, effort, and money in the exploitation of the attributes in connection with a specific business is not lost by permitting the rights to expire on death. This was the thrust of Chief Justice Bird's dissenting opinion in *Lugosi v. Universal Pictures*, in which she argued that there could be post mortem protection only for those persons whose personal attributes had been exploited during their lifetimes.

The only change needed to effectuate this result would be to require that the personal attributes not only have substantial commercial value at the time of death but also that the deceased personality used or licensed the use of his attributes during his lifetime in such a manner that the rights to these attributes were valuable business assets to the personality or his licensees. To create a licensing business for the heirs when the ancestor never used or permitted others to profit from his attributes may only amount to an unjustifiable windfall.

There may even be difficulties in establishing what the Legislature meant when it referred to specific personal attributes.

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78. M. Nimmer, *supra* note 48, § 2.01[B].
81. 25 Cal. 3d at 846-47, 603 P.2d at 445-46, 160 Cal. Rptr. at 344. On the requirement that the deceased celebrity has exercised or exploited the rights during his lifetime, see *supra* note 71.
82. In the same fashion, a trademark not yet used in commerce cannot be protected or registered until so used and cannot be transferred without being transferred in connection with the valuable business operations with which it is used. Trademark Act of 1946 (Lanham Act), §§ 1, 45, 15 U.S.C. §§ 1051, 1127 (1982).
For instance, what is meant by voice? Must it be the actual voice of the celebrity? With all of the superb voice imitators and new technical developments in artificial voice simulation, distinctive voices of celebrities can easily be mimicked and commercially exploited. Without a doubt, a living person should have the right to prevent the unauthorized use of a substantially identical voice used in place of his actual voice.

Even with the use of names there are uncertainties. Insofar as full names (but not merely surnames) can operate as protectible trademarks, the statutes are providing an additional statutory scheme for trademark protection. The perennial problem with protecting names is that for many valuable names there are other individuals who have the same name. If John Doe were the name of a famous celebrity, would his rights be violated by the use of that name in connection with products or services sold by other individuals having the same name, including other individuals who owned businesses exploiting the name? It would seem that where there are two persons with the same name, the celebrity or his heirs should be required to establish that the name is extremely well-known and that the competitor's use of the name unduly takes advantage of the celebrity's fame or notoriety, especially in an area of commerce with which the celebrity is associated. To hold

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84. CAL. CIV. CODE §§ 990(a), 3344(a) (West Supp. 1986).
86. Nonetheless, of the principal cases cited at note 85 supra, only in Lahr was the plaintiff able to prevail. 300 F.2d at 260.
89. Cf. N.Y. ARTS & CULT. AFF. LAW §§ 33.01, 33.09 (McKinney 1984) (protecting artists' names and signatures as formal trademarks).
92. In fact, under the law of trademarks, an individual's name cannot be protected unless the name has a "secondary meaning." Trademark Act of 1946 (Lanham Act), § 2(e), 15 U.S.C. § 1052(e) (1982). For names to be protected, the owners must establish that "through extensive use in advertising, such [less distinctive] terms may take on a new, or secondary meaning, becoming regarded by the public as designating the source of the products and distinguishing them from the products of others." J. GILSON, TRADEMARK PROTECTION AND PRACTICE § 2.08 (1985). Note that under the
otherwise would deprive other individuals with the same name from conducting business using their own names.

Another question concerning names is, which name is to be protected? For example, many Hollywood names are not the real names of the actors or actresses.\textsuperscript{93} Surely it was the intent of the legislators to protect stage names and well-known pseudonyms, not merely original names.\textsuperscript{94} Even where a person is known under two or more names, protection should be accorded to each name which has significant commercial value. Also, where the competitive use is unfair, protection should be extended to variations of the name, including nicknames.\textsuperscript{95} However, there would rarely be justification for extending protection where only the surname or first name were used.\textsuperscript{96}

To a lesser extent, there is a similar problem with likenesses.\textsuperscript{97} It is possible that a likeness used with a product or service may give the impression of a celebrity,\textsuperscript{98} or the likeness may simply be a drawing or cartoon of a celebrity.\textsuperscript{99} In litiga-
tion, the trier of fact will have to determine whether the likeness is that of the celebrity. Perhaps the standard is whether the likeness is substantially identical to the "true" appearance of the celebrity, which, of course, is never a constant. One would imagine that the statutes are principally concerned with the head of the celebrity, i.e., the physiognomy, hair, and miscellaneous accoutrements such as glasses and makeup. However, other attributes and characteristics should be covered by the statute. One can give the impression of a person by using certain apparel or a uniform or other furnishings. A strong argument could also be made for protecting the commercial value of a likeness by barring competitive uses of caricatures and other artistic simulations of a likeness, not only in dolls and statuettes, but also in the form of cartoon characters.

Rules in copyright cases may be applied because the defendant will be arguing that the use was a "fair use." Cf. e.g., Walt Disney Productions v. Air Pirates, 581 F.2d 751, 756-58 (9th Cir. 1977), cert. denied, 439 U.S. 1132 (1979) (caricatured and tarnished versions of Walt Disney cartoon characters employed by defendants in an extreme parody of a Disney cartoon; fair use defense overruled in copyright infringement case).

100. See, e.g., Ali v. Playboy, Inc., 447 F. Supp. 723, 726-27 (S.D.N.Y. 1978); Groucho Marx Productions, Inc. v. Playboy Enterprises, No. 77-1782, (S.D.N.Y. Dec. 30, 1977). However, one should compare copyright standards for substantial similarity. In copyright infringement cases, the trier of fact must judge substantial similarity between the protected work and the infringing work by looking at the two works as would an ordinary, reasonable observer in determining whether the aesthetic appeal is the same. See M. Nimmer supra note 48, § 13.03[E] (on substantial similarity judged by the average reasonable man); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (opinion of Learned Hand, J., in copyright case involving similar fabric designs to the effect that the aesthetic appeal must ultimately be the same).

101. The likeness of a celebrity is always changing as he grows older or alters his appearance to suit changing fashions. Moreover, there may be no such thing as one definite "likeness" of a person since the person can be depicted from various angles with a wide variety of facial expressions.

102. For example, the commercial exploitation of Charlie Chaplin, Napoleon, and other characters would largely rest on the similarity of costume or wardrobe. See Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974) (plaintiff was only identifiable because of furnishings, namely, a racing car); Lone Ranger, Inc. v. Cox, 124 F.2d 650, 651, 654 (4th Cir. 1942) (action to restrain use of Lone Ranger character using similar garb); Chaplin v. Amador, 93 Cal. App. 359, 360, 269 P. 544, 545 (1928) ("Charles Aplin" character in movie enjoined by Chaplin who alleged use of similar makeup, garb, and mannerisms).


Even the term “photograph” is not as well-defined as it could be. A “photograph” is:

Any photograph or photographic reproduction, still or moving, or any videotape or live television transmission of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.

Presumably the “photograph” is different from the “likeness” because a photograph is a likeness achieved by chemical and mechanical means which has a degree of precision not otherwise associated with artistic likenesses achieved in drawings, paintings, and sculptures. But what about the hologram or the transparency? The hologram and holographic plate are not exactly photographs and cannot be seen without the use of a projection device, and with many transparencies the personality may not be readily identifiable when viewed by the naked eye.

The question is, which version of the “photograph” must be viewed by the naked eye? If we have a transparency, hologram, or motion picture film, is it the holographic plate, transparency, or film itself, or is it their projections? Most likely, the intent was to ensure that the projected or enlarged version was at issue rather than the original photographic template. Perhaps the personality not readily identifiable on the frame of film or the piece of videotape would otherwise be identifiable when the film or videotape were projected or transmuted onto a screen. However, in technical parlance the showing of a film or videotape does not necessarily amount to a “photograph or photo-

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105. See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-59 (1884) (defining photography for copyright purposes).
106. CAL. CIV. CODE § 990(i) (West Supp. 1986). Compare the slightly different wording in section 3344(b), CAL. CIV. CODE § 3344(b) (West Supp. 1986).
108. A hologram is a photographic negative made on a plate without the use of a lens by means of interference between two parts of a split laser beam, the picture appearing as a meaningless pattern until suitably illuminated, when it shows as a 3-D image (a number of pictures can be stored on the same plate). CHAMBER'S TWENTIETH CENTURY DICTIONARY 622 (A. Macdonald ed. 1977).
109. In other words, a small transparency is usually viewed with the aid of a machine or a device before the personality will be readily identifiable. In fact, there may be certain photographic materials, such as the microdots, which need special types of equipment, not ordinarily available to the public, before they can be viewed.
graphic reproduction, still or moving, or any videotape or live television transmission." The drafter of the statute should have made use of language in the Copyright Act by referring not only to photographs themselves but also to displays and performances from which the personality is readily identifiable; otherwise, the term "reproduction" refers only to physical copies. Another alternative, drawn from the Copyright Act, is to determine whether the personality is identifiable "with the aid of a machine or device" if the "photograph" in the particular medium is normally viewed with the aid of a machine or device.

D. Rights Conferred

Almost as important as the subject matter are the rights conferred by the statutes. Unlike the Copyright Act which affirmatively sets forth the exclusive rights of the copyright owner,

110. CAL. CIV. CODE §§ 990(i), 3344(b) (West Supp. 1986). The exhibition of a film or videotape does not amount to a reproduction, rather it is a "performance," nor is the exhibition of a videotape equivalent to "any videotape or live television transmission." Of course, it is unclear whether the words "any videotape or live television transmission" refer to "videotapes" and "live television transmissions" as separate items or together in terms of "videotape and live television" transmissions. In any case, it would seem that the exhibition of a motion picture film does not constitute "any videotape or live television transmission" no matter how that wording is construed.

111. Section 106 of the Copyright Act, 17 U.S.C. § 106 (1982) grants five exclusive rights to the copyright owner, namely the exclusive rights to reproduce, adapt, publicly distribute, publicly perform, and publicly display the protected work and copies thereof.

112. Section 106(1) of the Copyright Act states that reproduction is "to reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1) (1982). Nonphysical reproductions are categorized either as displays or performances. To display a work, according to section 101 of the Copyright Act, means "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." 17 U.S.C. § 101 (1982). Moreover, to perform a work means "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101 (1982).

113. Cf. section 102(a) of the Copyright Act which extends copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (1982).

114. Section 106 of the Copyright Act states that the owner of a copyright has the exclusive rights to do and to authorize reproduction of the work in copies or phonorecords; preparation of derivative works based upon the copyrighted works; public distribution of copies or phonorecords of the work; in the case of certain works, public
the publicity rights granted by the statutes are stated in negative form.

Any person who [knowingly]\textsuperscript{115} uses . . . [a deceased personality's]\textsuperscript{116} 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 [such person's]\textsuperscript{117} prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.\textsuperscript{118}

The bar against uses in connection with advertising, selling, and soliciting purchases is drawn from the older version of section 3344 of the Civil Code\textsuperscript{119} which represented the statutory enactment of the right to privacy insofar as such right will protect the individual from commercial use of personal attributes.\textsuperscript{120} However, one addition in these statutes will create some problems, namely, the prohibition against uses “on or in products, merchandise, or goods.”\textsuperscript{121}

First, this prohibition falls short of the statutes’ objectives because “products, merchandise, or goods” do not comprise all tangible things which may be commercially exploited in connection with personal attributes. For example, land and other forms of real property\textsuperscript{122} are not usually considered products of the work; and, in the case of other works, public displays of the works.


\textsuperscript{115}. The term “knowingly” appears in section 3344(a) but does not appear in section 990(a). See supra notes 65-68 and accompanying text.

\textsuperscript{116}. Section 990 relates to the personal attributes of deceased personalities only.

\textsuperscript{117}. The term “such persons” appears in section 3344(a) but not in section 990(a).

\textsuperscript{118}. \textsc{cal. civ. code} §§ 990(a), 3344(a) (West Supp. 1986).

\textsuperscript{119}. Ch. 409, § 1, 1971 Cal. Stat. 1595.

\textsuperscript{120}. W. Prosser, supra note 28, at 804-07. According to Professor Prosser:

To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff “to be let alone.” \textit{Id.} at 804. These four kinds of invasion are (1) commercial appropriation of the plaintiff’s name or likeness, (2) intrusion on the plaintiff’s physical solitude or seclusion, (3) public disclosure of private facts concerning the plaintiff, and (4) placing the plaintiff in a false light in the public eye. \textit{Id.} at 804-14.

\textsuperscript{121}. \textsc{cal. civ. code} §§ 990(a), 3344(a) (West Supp. 1986).

\textsuperscript{122}. The term “real property” is defined as follows:

Real or immovable property consists of:

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;
4. That which is immovable by law;
except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be
ucts, merchandise, or goods; nonetheless, celebrities' names should not be used without consent in sales programs for real estate developments. Why not impose similar prohibitions in connection with sales of securities, franchises, and seller assisted marketing plans? Nevertheless, it might seem that, apart from real estate, the terms "products, merchandise, or goods" would at least subsume all tangible items subject to commercial exploitation. But is this really true? Does a work of fine art fall within such categories? What about membership in a recreational or health club, contract rights, or other intangibles?

The "on or in" terminology presents its own problems. Of course, plays, books, paintings, and other artistic works are exempt under Civil Code section 990, as are uses connected with news, public affairs, sports broadcasts and accounts, and political campaigns. But imagine the following example: A

severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods.

CAL. CIV. CODE § 658 (West 1982).

123. Compare definition of "goods" set forth at CAL. CIV. CODE § 1689.5 (West Supp. 1986) ("tangible chattels bought for use primarily for personal, family, or household purposes") with CAL. COM. CODE § 2105 (West 1964) ("all things (including specially manufactured goods) which are movable at time of identification . . . other than . . . money . . . investment securities . . . and things in action").

124. See CAL. CORP. CODE § 25019 (West Supp. 1986) (defining "security").

125. See CAL. CORP. CODE § 31005 (West Supp. 1986) (defining "franchise").

126. See CAL. CIV. CODE § 1812.201 (West 1985) (defining "seller assisted marketing plan").

127. The answer is probably yes. For example, a good art lawyer will try to apply section 536(a) of the California Penal Code on consignment sales to sales of works of art made by art dealers. That section requires, among other things, that the consignee, on request, give the consignor the name and address of the purchaser of goods sold on consignment. CAL. PENAL CODE § 536(a) (West 1970). Because section 990(n) of the Civil Code exempts single and original works of fine art, by implication other works of fine art are goods which are not exempt.

128. There is no indication that club memberships could possibly be classified as merchandise, goods, or products even though these memberships conceivably may be securities. The same is true of franchises, licenses, leases, and other rights which relate to tangible properties. On the other hand, perhaps a membership in a club, which entitles the member to certain services, could be covered by subdivision (a) of sections 990 and 3344 in relation to marketing activities for services.

129. Clearly copyrights, trademarks, patents, and contract rights are not products, merchandise, or goods and are technically not subject to the statutes even though they may ultimately relate to products, merchandise, and goods.

130. Section 990(n) only affects the rights owned by the heirs and transferees of deceased personalities. CAL. CIV. CODE § 990(n) (West Supp. 1986). See infra notes 172-96 and accompanying text for detailed discussion of subdivision (n) exemptions.

131. See CAL. CIV. CODE §§ 990(j), 3344(d) (West Supp. 1986).
producer makes a tape recording of a celebrity's voice. If the recording is not connected with news or public affairs, or is not otherwise exempt, then copies cannot be sold since the voice is "on or in" a product. Furthermore, the tape recording cannot be sold with the celebrity's name which, for all practical purposes, must be used in connection with the product. Thus, it would be impossible for the producer to describe the tape recording accurately since he could not name the person whose voice had been recorded.

To eliminate this problem, perhaps the list of exempt art, literary, and entertainment works should be expanded. The terms "products," "goods," and "merchandise" could be limited to consumer goods, memorabilia, bric-a-brac, baubles, and the like.

The example of the tape recording also demonstrates possible conflicts with the rights of copyright owners. Section 301 of the Copyright Revision Act of 1978 explicitly preempts all state laws which govern the subject matter of copyright protection, which otherwise provide for or affect some or all of the exclusive rights granted by the Copyright Act, namely, the exclusive rights to reproduce, adapt, distribute, perform, and display. If the copyright owner of a sound recording were prevented from selling the tapes because a celebrity's voice was used "on or in" the product, this bar may directly conflict with the copyright owner's exclusive right to distribute copies of the sound recording. Although the California legislation would not be preempted because it does not grants rights which are equivalent to the copyright owner's rights, it does interfere

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132. However, in privacy cases it has been held that the mere use of the plaintiff's name in a novel or other literary work is not actionable. See, e.g., Nebb v. Bell Syndicate, 41 F. Supp. 929, 929-30 (S.D.N.Y. 1941); People on Complaint of Maggio v. Charles Scribner's Sons, 205 Misc. 818, 822, 130 N.Y.S.2d 514, 516 (1954); Swacker v. Wright, 154 Misc. 822, 823, 277 N.Y.S. 296, 297 (1935).

133. For most audiotapes it is necessary to attribute the sound recorded voice to a particular individual in order to make the copies of the sound recording marketable. Imagine, for example, a sound recording of a celebrity which must be sold in connection with the celebrity's name before it will have any market value. In any case, the user should have the right to attribute authorship or co-authorship. See infra notes 139-43 and accompanying text.

134. See supra note 123 (defining "goods").


with the exercise of the copyright owner's rights and in some cases may even destroy the value of the copyright.

The problems with the "on or in products" clause can be solved in a couple of ways. First, if the personality is the author or co-author of a work of authorship, as that term is used in the Copyright Revision Act of 1978, or if the personality is the inventor or co-inventor of an "invention," as that term is used in the Patent Act of 1952, then the use of the personality's name only to indicate authorship or inventorship should not require consent. And the same rule should apply to "workmanship." In other words, truthful attribution should be permitted where not otherwise restricted by law. Moreover, if the personality's name, signature, photograph, or likeness appears only within the body or text of a literary work, the use should be exempt, which was apparently the intent of the legislators in exempting certain works of authorship at subdivision (n) of section 990.

Even the language prohibiting use "for purposes of advertis-

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139. The definition of "joint work" at section 101 of the Copyright Act by implication defines a "joint author." A "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (1982).

140. The term "works of authorship" is used at subsection 102(a) of the Copyright Act. See supra note 113.


142. In the first place, the signature on a painting or the use of a name in connection with a patent application amounts to consent to use the names. In cases involving the right to privacy, it has been held that a defendant may indicate authorship of a literary or other work which is in the public domain without invading the privacy rights of the plaintiff. See Shostakovich v. Twentieth-Century Fox Film Corp., 196 Misc. 67, 71, 80 N.Y.S.2d 575, 579 (1948), aff'd, 275 A.D. 692, 87 N.Y.S.2d 430 (1949); Ellis v. Hurst, 70 Misc. 122, 125, 128 N.Y.S. 144, 147 (1910), aff'd, 145 A.D. 918, 130 N.Y.S. 1110 (1911).

143. Of course, it should be noted that subdivision (d) of Civil Code section 987, California's droit moral, permits an artist to disclaim credit for his or her work of fine art for a "just and valid reason." CAL. CIV. CODE § 987(d) (West Supp. 1986). An artist might avail himself of such a statute successfully, for example, when an unfinished, poor quality work is attributed to him against his wishes. In the absence of California appellate cases, compare Carco c. Camoin [1931] D.P. II 88 (Cour d'appel, Paris) (plaintiff artist had cut up and discarded painted canvases; defendant found the pieces, reconstructed the works, and sold them at auction in violation of plaintiff's moral rights); Anatole France c. Lemerre [1911] Pataille 1912.1.98 (plaintiff writer sold to defendant plaintiff's historical manuscript; defendant delayed publication for twenty-five years, and plaintiff was allowed to rescind the contract and withdraw the manuscript from publication because the work no longer reflected plaintiff's creative abilities).
ing or selling, or soliciting purchases of products, merchandise, goods, or services\textsuperscript{144} may not express what was intended. Harmful uses may not always be directly "for purposes of" commercial exploitation.\textsuperscript{145} Broader language should be used. For instance, use could be "in connection with" advertising, selling, or soliciting purchases of products.\textsuperscript{146} After all, the use of a name or signature in promotional materials may not necessarily be "for purposes of" advertising, selling, or soliciting purchases, or at least not for any direct purpose.\textsuperscript{147}

The statutes declare that the use of personal attributes shall not necessarily constitute a use for which consent is required solely because the material containing the use is commercially sponsored or contains paid advertising.\textsuperscript{148} Rather, it is a question of fact whether or not the use of the personal attribute is so directly connected with commercial sponsorship or with paid advertising that it constitutes a use for which consent is required.\textsuperscript{149} However, although this rule may affect some cases involving advertising, selling, or soliciting, it is hard to imagine how it will affect cases involving the "on or in products" clause because almost all products are going to be sold by profit as well as nonprofit entities. Therefore, a commercial purpose will exist.

\textsuperscript{144} \textsc{Cal. CIV. Code} §§ 990(a) (West Supp. 1986).

\textsuperscript{145} "For purposes of" implies an intention to achieve a specific result and requires proof of a subjective state of mind. \textit{See} Karlen, \textit{Mens Rea}, supra note 68, at 235-39 (1978) (discussing the definition of "intention"). The Model Penal Code states that:

A person acts purposely with respect to a material element of an offense when:

(i) If the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) If the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

\textsc{Model Penal Code} § 2.02(2)(a) (Proposed Official Draft 1982).

\textsuperscript{146} However, "in connection with" implies an objective standard. Note that sections 990(k) and 3344(e) of the Civil Code refer to uses "directly connected" with commercial sponsorship or paid advertising, reflecting that the drafters of the statutes were prepared to use objective standards even though they had used subjective standards in other parts of this legislation.

\textsuperscript{147} Imagine, for example, that the name or signature is only being used almost as a trademark, for purposes of identification rather than for purposes of indicating sponsorship or endorsement. Perhaps the name is used as part of a trade name for a business. Would this amount to a use for purposes of advertising or selling or soliciting?

\textsuperscript{148} \textsc{Cal. CIV. Code} §§ 990(k), 3344(e) (West Supp. 1986).

\textsuperscript{149} \textit{Id.}
E. Exemptions

The rights conferred seem quite extensive, but actually they are restricted on all sides by exemptions. First of all, both statutes specifically exempt uses "in connection with any news, public affairs, or sports broadcast or account, or any political campaign." Again, the intent was proper, but the language does not provide all of the necessary exemptions. For example, the term "political campaign" has specific meanings in other areas of the law. Perhaps it refers to a campaign on behalf of a candidate, or even to a voter-initiated referendum. But what happens when the use is connected merely with "political activities?" For instance, what if a name or likeness is used in connection with anti-war or anti-abortion political activities which are not necessarily "political campaigns?" Moreover, it is surprising that religious activities were not mentioned in the subdivisions which establish these exemptions. Imagine the repercussions of enforcing publicity rights against churches and other religious organizations. And what happens when owners bring actions against other types of nonprofit organizations, including educational institutions and charities? If the Copyright Act can provide exemptions for religious and educational
institutions, perhaps, with lesser interests at stake, the legislators could have allowed similar exemptions in the case of publicity rights.

The wording is vague in other respects. The definition of "broadcast" is clear from reviewing copyright and media law. However, by using the term "broadcast," the legislators may have inadvertently omitted an exemption for cable transmission. Moreover, what is an "account?" Does this mean that written articles and nonbroadcast transmissions are also covered? What does the term "public affairs" mean? Does this refer only to politics, international affairs, and contemporary social problems, or does it refer also to society page items and public gossip? Perhaps the law of defamation and the rules concerning "public figures" and "public affairs" will pro-

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157. In distinguishing broadcasting from cable transmitting, the Supreme Court said in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 397-400 (1968):

The broadcaster selects and procures the program to be viewed. He may produce it himself, whether "live" or with film or tape, or he may obtain it from a network or some other source. He then converts the visual images and audible sounds of the program into electronic signals, and broadcasts the signals at radio frequency for public reception. Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visible images and audible sounds of the program.

Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers.

158. Compare the definition of "public affairs" and "public figures" in invasion of privacy and defamation cases. "Public figures" as discussed in Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, 345 (1974) are celebrities and public officials who by their occupations are in the public eye, as well as individuals who by virtue of their involvement in a particular public issue or controversy have thrust themselves into the limelight.

vide some point of reference. In addition, section 107 of the Copyright Act on "fair use" also offers some guidance.\textsuperscript{161}

Subdivision (l) of section 990 and subdivision (f) of section 3344 appear to be well-drafted. These subdivisions exempt owners and employees of any medium used for advertising, such as newspapers, magazines, and radio and television networks and stations, unless it is established that the owners or employees had knowledge of the unauthorized use.\textsuperscript{162} Of course, if the statute were amended to require written permissions,\textsuperscript{163} then requiring knowledge would not be absolutely necessary since it would be incumbent on the owners and employees to determine whether the users had acquired written permission. Naturally, even where written permissions were presented by advertisers to the advertising medium, they might be no longer valid. For example, they may have been rescinded or signed by improper parties. In such cases, the advertising medium should be liable only if it unreasonably relied on the written permission.

The effect of these subdivisions on advertising is to grant immunity to owners and employees unless they have been given notice of a violation. But what happens if the advertising medium is already committed to a wrongful use and is given notice of the owner's claims only at the very last minute? For example, what happens if it is too late to withdraw the advertising materials without stopping circulation of a particular issue of an advertising medium? Certainly no court would grant an im-


\textsuperscript{161} For purposes of judging copyright infringement and fair use, a use is deemed "fair" if it is for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. Factors to be considered include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (1982).

\textsuperscript{162} Compare the trademark infringement exemptions for printers and publishers under section 32(2) of the Lanham Act, 15 U.S.C. § 1114(2) (1982).

\textsuperscript{163} See supra note 51 on other statutes requiring written consent for waiver of privacy rights and other rights.
junction,\textsuperscript{164} nor should it award damages.\textsuperscript{165} These remarks concerning advertising media are based on the assumption that liability depends on absolute "knowledge" of the unauthorized use.\textsuperscript{166} It would seem that the \textit{mens rea} for liability should be knowledge\textsuperscript{167} and not "recklessness"\textsuperscript{168} or "negligence."\textsuperscript{169} In other words, with all the complexities of

\begin{itemize}
\item \textsuperscript{164} In copyright cases a preliminary injunction will be denied "if such an injunction might work an injury to the defendant out of proportion to the damages which might result to the plaintiff by failure to issue the injunction." M. Nimmer, \textit{supra} note 48, § 14.06[A]. \textit{See, e.g.,} McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415, 422 (S.D.N.Y. 1971) (plaintiff sought injunction to bar publication of defendant's textbook when only 1.74\% of defendant's textbook could have been copied from plaintiff's textbook); Life Music, Inc. v. Wonderland Music Co., 241 F. Supp. 653, 654 (S.D.N.Y. 1965) (plaintiff sought injunction to block use of Mary Poppins song in the film "Mary Poppins").
\item \textsuperscript{165} \textit{Cf.} 17 U.S.C. § 405(b) (1982) (innocent copyright infringers misled by the omission of a copyright notice incur no liability for actual or statutory damages, but are subject, in the court's discretion, to awards of profits, injunctions, or payment of reasonable license fees).
\item \textsuperscript{167} \textit{Cf.} Karlen, \textit{Mens Rea supra} note 68, at 216-18 (1978) on definition of knowledge; The Model Penal Code states:
\begin{itemize}
\item (i) If the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
\item (ii) If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
\end{itemize}
\textbf{Model Penal Code § 2.02(2)(b)} (Proposed Official Draft 1962)
\item \textsuperscript{168} Karlen, \textit{Mens Rea, supra} note 68, at 224-32 (1978). The Model Penal Code states:
\begin{itemize}
\item A person acts recklessly with respect to a material element of an offense when:
\begin{itemize}
\item (i) If the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
\item (ii) If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
\end{itemize}
\item \textsuperscript{169} Karlen, \textit{Mens Rea, supra} note 68 at 218-24 (1978). The Model Penal Code states:
\begin{itemize}
\item A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
\end{itemize}
the statutory scheme, the owner or employee of an advertising agency should not be liable if he unreasonably determines that a use has been authorized. Without "knowledge" there should be no liability even if the judgment is grossly negligent or in reckless disregard of the facts.\(^{170}\) To impose liability would otherwise destroy publishing as we know it today, especially magazine publishing. This is the same policy behind the Trademark Act exemption for printers and publishers who are liable for reproducing a trademark only if they have knowledge of the infringement.\(^{171}\)

Subdivision (n) of section 990, which is not replicated in section 3344, further extends immunity for uses in certain media and for certain purposes. Uses in plays, books, magazines, newspapers, musical compositions, films, and radio and television programs, other than advertisements or commercial announcements not otherwise exempt, are permitted, as are uses in connection with single and original works of fine art. Moreover, if the material has political or newsworthy value, the user is immune. Finally, an advertisement or commercial announcement for these permitted uses will also be exempt.\(^{172}\)

Again, the problem is that the list of immune media is incomplete. Although the term "film" is mentioned, technically speaking, "film" does not include videotape.\(^{173}\) And why no mention of audiotapes? Moreover, it is apparent that there are other media in which literary works are fixed, apart from books and magazines,\(^{174}\) and it is also clear that there are other dramatic works apart from plays, such as operas, musical plays, mime, and dance. Perhaps the Legislature should have re-

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170. A good definition of gross negligence appears at section 987(c)(2) of the California Civil Code which relates to care exercised in framing, conserving, or restoring a work of fine art. Under this statute the term "gross negligence" means "the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art." CAL. CIV. CODE § 986(c)(2) (West Supp. 1986).


173. Compare the definition of "photograph" found at Civil Code sections 990(i) and 3344(b).

174. Literary works are now being published in the form of audiotapes and microfiche. The audiotape versions are used not only by blind persons but by the general public as well. For example, in Kelly v. William Morrow & Co., Inc., No. 529948 (San Diego Sup. Ct. 1985), the 'publishing' of Joseph Wambaugh's LINES & SHADOWS in audiotape form gave rise to a potential liability which may not have been present had the book been confined to printed form because a personal depiction waiver ostensibly was limited to audiovisual works and printed materials.
ferred to section 102(a) of the Copyright Revision Act of 1978 which describes works of authorship in terms of broader categories such as literary works, audiovisual works, and dramatic works. 175

At least the exemption for materials “of political or newsworthy value” will swallow up most of the owner’s rights under section 990 since many uses involve materials having such values. But again, what about materials having scientific, religious, charitable, educational, or literary value? 176 The Legislature should have referred to Miller v. California, which allowed exemptions from criminal liability for obscenity. 177

Moreover, what is a “single and original work of fine art”? 178 Undoubtedly, the purpose here was to let the owner of the work publicize it using the artist’s name in order to resell it. 179 But what do the terms “original” and “fine art” mean?

The term “original” can have at least two meanings. In the parlance of the Copyright Act it can refer to a work which is original with the author, that is, a work which is not the result of copying or plagiarism. 180 Perhaps it may also refer to origi-

176. These are the purposes given for tax-exempt treatment under Internal Revenue Code section 501(c)(3), I.R.C. § 501(c)(3) (1986), and are oftentimes accorded “fair use” status under section 107 of the Copyright Act which provides for a fair use defense to copyright infringement actions.
177. 413 U.S. 15, 24 (1973) (the Supreme Court refused to extend criminal obscenity prosecutions to works which, when taken as a whole, had serious literary, artistic, political, or scientific values).
178. The term “fine art” is defined as any work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, a work of graphic art (including an etching, lithograph, offset print, silk screen, or work of graphic art of like nature), crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials), or mixed media (including a collage, assemblage, or any combination of the foregoing art media).
179. Most unique works of fine art will have value only if sold in connection with the artist’s name. Many art collectors primarily are not concerned with aesthetic value but with other value attendant on name attribution. This is why moral rights under section 987(d) of the Civil Code do not entitle the artist to disclaim credit for his or her work of fine art except for “just and valid reason.” CAL. CIV. CODE § 987(d) (West Supp. 1986).
180. 17 U.S.C. § 102(a) (1982); M. NIMMER supra note 48, § 2.01[A].
nal artwork which acts as the template for an edition of copies or reproductions.\textsuperscript{181} However, the former meaning is the probable one, especially in light of its association with copyright and patent law.\textsuperscript{182}

"Fine art" presents more problems. The California Civil Code, for example, is already littered with various definitions of "fine art." Section 982(d) has one definition which includes virtually any type of artistic work,\textsuperscript{183} whereas sections 986 and 987 have a definition which is restricted to "paintings, drawings, sculptures, and original works of art in glass."\textsuperscript{184} Section 997 adds porcelain works and stained glass artistry, perhaps to all of the other sections.\textsuperscript{185} The question is, do we accept one of these definitions or do we devise a unique definition for this legislation?\textsuperscript{186}

There may even be difficulties with what is meant by a "single" work of fine art. What happens if the artist produces a series of works each employing a name, likeness, or photograph of the decedent, but each piece is slightly different?\textsuperscript{187} Each work might be described as a single and original work and may be sold as such in the trade.\textsuperscript{188} Nevertheless, should the exemption be allowed?\textsuperscript{189}

One interesting aspect of this statute is that it might be used

\textsuperscript{181} Cf. CAL. CIV. CODE § 1740(c) (definition of "master" which is the original template for fine art multiples, defined in terms of "printing plate, stone, block, screen, photographic negative, or mold or other process as to a sculpture, which contains an image used to produce fine art objects in multiples").


\textsuperscript{183} See supra note 179.

\textsuperscript{184} CAL. CIV. CODE §§ 986(c)(2), 987(b)(2) (West Supp. 1986).

\textsuperscript{185} It is not absolutely clear that section 997, CAL. CIV. CODE § 997 (West Supp. 1986), provides protection for porcelain works and stained glass artistry under all of the other Civil Code statutes which protect artists. Although this seems to be the logical interpretation since section 986 of the Civil Code was recently amended at subdivision (b)(7) to mention stained glass artistry, this type of work is not expressly mentioned at subdivision (c)(2) of section 986. CAL. CIV. CODE § 986 (West Supp. 1986).

\textsuperscript{186} This is the proposal in Karlen, Moral Rights in California, 19 SAN DIEGO L. REV. 675, 700-02 (1982).

\textsuperscript{187} For example, the Andy Warhol portraits of Mao, Marilyn Monroe, and others use the same basic photographic images painted in different colors.

\textsuperscript{188} Each work sold separately might be considered an individual work and might "pass without objection in the trade." See, e.g. CAL. COM. CODE § 2314(2)(a) (West 1964), (implied warranties of merchantability in the sale of goods).

\textsuperscript{189} Multiples may be excluded in the same way that they may be excluded under sections 986(c)(2) and 987(b)(2) of the Civil Code. See CAL. CIV. CODE §§ 986(c), 987(b)(2) (West Supp. 1986), delimiting protected works as to respectively, resale royalties and moral rights. See Karlen, Moral Rights in California, 19 SAN DIEGO L. REV.
DESCENDIBLE PUBLICITY RIGHTS

to prevent forgeries. Since a forgery is not an "original" work of art, the artist or his heirs or transferees, who own the publicity rights, could object to the use of the artist's name in connection with the forgery.\textsuperscript{190} This new right would complement section 987(d) of the Civil Code which permits an artist to claim credit or to disclaim credit for his or her work of fine art for "just and valid reason."\textsuperscript{191}

The statute clearly applies to works created in multiples, so what happens to the owner of a limited edition fine print or sculpture casting which is not signed by the artist?\textsuperscript{192} To establish its value, the owner must attribute the work to the deceased artist and thus use a deceased personality's name in connection with the sale or other disposition of the piece. However, such attribution technically would be forbidden by the statute, effectively destroying the value of the piece to the owner. The suggestion, as made above, is that any time an owner of property needs to attribute authorship, inventorship, or workmanship to a deceased personality, he should be permitted to do so notwithstanding the right of consent owned by the heirs or transferees.\textsuperscript{193} This exemption should constitute part of a "fair use" defense.\textsuperscript{194} Of course, if the attribution is false, the artist might have an action for invasion of privacy,\textsuperscript{195} while the heirs or other owners of the publicity rights might have an action for unfair competition based on an injurious falsehood.\textsuperscript{196}

\begin{footnotes}


192. There seems to be a conflict with section 1744 of the Civil Code which in certain circumstances may require a disclosure of the artist's name in connection with the sale or offering for sale of a fine art multiple. See CAL. CIV. CODE § 1744 (West 1985).

193. See supra notes 139-43 and accompanying text.

194. Cf. Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983) (suggesting that in a copyright infringement case the giving of credit for a work of authorship is a factor in determining whether the use is a "fair use").

195. See W. Prosser, supra note 28, at 812.

\end{footnotes}
Sections 990(j) and 3344(d) of the California Civil Code relating to news, public affairs, and sports broadcasts and accounts, and political campaigns, as well as section 990(n), enumerating many works of authorship also exempt, compare favorably with the fair use provisions at section 107 of the Copyright Act. However, the copyright legislation is superior in the sense that section 107, based on decades of prior case law under the 1909 Copyright Act, does not delimit fair use in relation to the type of use or media of expression. Although section 107 mentions specific uses, such as news reporting, classroom teaching, criticism and commentary, and sets forth specific factors for the court to consider, a court may still find fair use outside of the stated categories of uses even without a strong showing under the statutory factors that are to be considered. Certainly this approach is recommended for the California legislation, especially because the statutes ignore many types of uses; for example, uses in connection with certain educational and religious activities are omitted.

A catch-all fair use provision, in addition to the provisions of subdivisions (j) and (n) of section 990 and subdivision (d) of section 3344, could provide for certain factors to be considered, almost like the statutory factors considered in a copyright

197. Not only does the California legislation specify the types of uses which are exempt, but Civil Code section 990(n) also exempts a broad range of specific media of expression without requiring the user to prove that the use was non-commercial. Copyright legislation, however, does not confer such carte blanche protection to uses in certain media of expression.
199. See M. Nimmer, supra note 48, at § 13.05.
200. According to section 107 of the Copyright Act:
   In determining whether the use made of a work in any particular case is a
   fair use the factors to be considered shall include—
   (1) the purpose and character of the use, including whether such use is of a
   commercial nature or is for nonprofit educational purposes;
   (2) the nature of the copyrighted work;
   (3) the amount and substantiality of the portion used in relation to the
   copyrighted work as a whole; and
   (4) the effect of the use upon the potential market for or value of the copy-
   righted work.
Because section 101 of the Copyright Act says that "the terms 'including' and 'such as' are illustrative and not limiting," the statutory factors are not exclusive, and the court can consider other factors in ruling on a fair use defense. 17 U.S.C. § 101 (1982). For example, in Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983), the court overruled a fair use defense partly because the defendants failed to give credit to the plaintiff for her work of authorship. Id. at 1176.
201. See supra notes 154-55 and accompanying text.
infringement case. One factor considered under section 107(4) of the Copyright Act is whether the use substantially impairs the market for uses that have been exploited or licensed by the owners of the rights. Another factor, found in section 107(1), is whether the use is by a profit or a nonprofit entity. Section 107(3) adds an additional factor, whether the use be a substantial one. It is one thing to use the name and photograph of a personality prominently on the cover of an advertising publication; it is quite another to bury the name in the middle of the text.

F. Ownership

As with the Copyright Act, ownership first vests in the source from whom all rights emanate, the celebrity himself. Under these new and amended statutes, the "property" rights may be transferred inter vivos and enforced by other persons, and, if not transferred while the celebrity is alive, are subject to testamentary transfers. If there is no inter vivos or testamentary transfer, then the rights pass intestate.

202. The rights first exist under section 3344 while the celebrity is alive. Under section 201(a) of the Copyright Act, 17 U.S.C. § 201(a) (1982), "title vests initially in the author or authors of the work." Of course, under the definition of "work made for hire" in section 101 of the Copyright Act, the "author" may be the employer for hire. 17 U.S.C. § 101 (1982). It should be noted that under copyright law there is some question as to community property ownership of the copyright. See M. Nimmer, supra note 48, at § 6.13. It would also seem that publicity rights, as property rights, should be subject to community property laws since they stem from the activities of the celebrity in his or her chosen profession.

203. CAL. CIV. CODE § 990(b) (West Supp. 1986).

204. Id.

205. According to the Civil Code, section 990(d) the rights first pass to the spouse, who will be the sole owner unless there are children or grandchildren, or both, in which case the spouse and the issue share the rights equally. If there is no spouse but only children or grandchildren, or both, the rights devolve on issue with per stirpes representation for the grandchildren. If there is no surviving spouse, children or grandchildren, then the parents of the decedent become the owners. Finally, with none of these persons alive to take title, the rights expire automatically. CAL. CIV. CODE § 990(d) (West Supp. 1986).

Although not identical, these rules appear to mimic the law of intestate succession. CAL. PROB. CODE §§ 6400-14 (West Supp. 1986). Basically, the terms "children," "grandchildren," and "parents," have the same meaning in both codes and include, for example, adopted children, but not necessarily stepparents.

However, there are some differences in the scheme of succession between section 990 of the Civil Code and sections 6400-14 of the Probate Code. Assuming that publicity rights constitute the deceased personality's separate property, the rules are completely different. Under section 6401 of the Probate Code, when the decedent leaves only one child and a spouse, both heirs share equally. However, where the decedent leaves a spouse and more than one child, or a child and children of another child, the
Under section 990 of the Civil Code, the rights can be exercised only by heirs, legatees, and transferees who, in the aggregate, are entitled to more than a one-half interest in the rights.\(^{206}\) This scheme is reminiscent of the enforcement of copyrights and moral rights in Europe.\(^{207}\) Take, for example, the Spanish copyright law which provides for family councils that meet at family reunions in the author’s home village in order to make decisions concerning the copyrights of the deceased author.\(^{208}\)

If only family members are involved, perhaps problems will be minimized, although this is doubtful if there are numerous heirs in different generations. However, if heirs own some rights and transferees and legatees own other rights, there may be problems not only because of personal conflicts but also because of the difficulty in determining who actually owns more than a one-half interest in particular rights. Once again, copyright rules should be invoked.\(^{209}\) In determining whether someone has an interest in a separate right, all nonexclusive licenses should be excluded from the determination.\(^{210}\) The

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spouse receives one-third of the estate and the children or grandchildren, or both, share the remaining two-thirds. Moreover, the spouse is required to share the intestate estate equally with respect to separate property when there are living parents of the deceased personality. Furthermore, in case of intestacy, under Probate Code section 6401, the surviving spouse gains title to all of the community property and does not have to share with the children, grandchildren, or parents. It is clear that the legislators did not perceive the descendent property rights as community property. Perhaps the most that can be said is that with regard to publicity rights, the legislators compromised by giving the surviving spouse less than he or she would have received if there were surviving children and the rights were deemed community property but more than the surviving spouse would have received in the same situation if the rights were deemed separate property.

\(^{206}\) CAL. CIV. CODE § 990(d) (West Supp. 1986).

\(^{207}\) See, e.g., Spanish copyright laws embodied in the Act of January 10, 1879.

\(^{208}\) Id.; attendant Copyright Regulations, ch. VIII, “The Family Council.”

\(^{209}\) See M. NIMMER, supra note 48, § 10.02 (discussing divisibility and ownership of copyrights). Section 201(d)(2) of the Copyright Act on ownership of copyright states:

Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by Section 106 [exclusive rights to reproduce, adapt, distribute, perform, and display], may be transferred as provided by clause (1) [i.e., by conveyance or by operation of law or bequeathed by will or passed by intestate succession] and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.


\(^{210}\) Cf. Copyright Act of 1976 § 204, 17 U.S.C. § 204 (1982) (requiring that all “transfers of copyright ownership” be in writing and signed by the grantor). Addi-
majority rule probably should be applied to each individual right rather than to all of the rights in the aggregate, otherwise there would be a complete paralysis in the exercise of the rights. For example, someone who owned the exclusive right to exploit a name would otherwise be stymied by other persons who own more than a one-half interest in all the publicity rights. On the other hand, how does one begin to determine who owns more than a one-half interest in the right to use a name? One person may own an exclusive right to exploit a name in the Western Hemisphere while another person may own the right to use the same name in the Eastern Hemisphere. Is this to be like Spain and Portugal owning the entire world? Who owns more than the one-half interest? Obviously, this whole scheme to exercise rights through voting may not always work.

It will be difficult to apportion the rights according to the respective percentage interests of the holders. For example, during his lifetime, the deceased personality may have conveyed to one transferee the right to use his name, but only in connection with one type of merchandise or business. By testamentary disposition, a legatee may have the right to use the name in connection with another type of merchandise or business. Finally, different generations of heirs may have inherited remainder interests in the rights to exploit the name. If there is a proposal to license the name for a third type of merchandise or business, who participates in giving the consent: the transferee, the legatee, the heirs, or all of them? According to Civil Code section 990(d), it would seem that the legatee and

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211. This is the rule for copyright licensing. The owners of a specific right do not have to appeal to owners of the rest of the rights comprising the copyright in order to license the right which they own. 17 U.S.C. § 101 (1982) (defining "copyright owner" and referring to owners having separate rights in particular exclusive rights comprised within the copyright). See N. Boorstin, Copyright Law § 4.1 (1981) (the separate constituent rights may be owned and enforced separately).

the transferee, given very special rights, will not be entitled to vote on another use of the name, so the heirs who receive the remainder interest in the name will do all of the voting.

Another problem with voting is that some of the voting parties may be minors. If the minors themselves were to vote to approve the contract or were to sign the contract itself, their assent might be revocable under the terms of section 35 of the Civil Code, which governs the contracts of minors.213

It should be noted that if the deceased celebrity himself were a minor, and he conveyed certain publicity rights while alive, this conveyance may be disaffirmed under section 35 of the Civil Code, which also permits the heirs or personal representatives to disaffirm within a reasonable time after death.214

Just as copyrights are infinitely severable,215 publicity rights may be separately owned and conveyed.216 For instance, while alive, the celebrity might convey certain rights to exploit name and signature, while reserving to himself and his heirs the rights to exploit voice, likeness, and photograph. As with copyrights, it seems that exclusive and nonexclusive licenses can be granted for different durations in different territories.217

G. Registration

As with the Copyright Revision Act of 1978, registration under section 990 on descendible rights enhances the substantive rights of the owner. Because of the precedent of the Copyright Act, one would assume that the registration of claims to publicity rights would be easily comprehended. In the same way that copyright registration is a prerequisite to bringing an action218 and that early copyright registration preceding the infringement is a prerequisite for certain remedies,219 registration of one's claim to descendible publicity rights must precede the unauthorized use

213. "In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor ... may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives." CAL. CIV. CODE § 35 (West 1982).
214. Id.
215. See M. NIMMER, supra note 48, § 10.02[A].
216. See CAL. CIV. CODE § 990(c) (West Supp. 1986).
before the owner may recover damages. However, it is unclear whether the restriction on the recovery of "damages" explicitly precludes other remedies. Read literally, Civil Code section 990(f)(1) says only that the collection of damages is restricted, and it appears that profits, attorney's fees, and costs may still be collected. However, it is not easy to accept that this was the intent of the Legislature; rather, the Legislature's intent may have been to prevent all actions for monetary relief by persons who had not registered. But even if this view is not correct and the restriction is only on damages (as is the approach of section 405 of the Copyright Act which restricts the awards made against innocent infringers), there is no meaningful penalty for failure to register because damages, rather than profits and attorney's fees, will not often be the key element of a good case since they will usually be impossible to prove.

It also appears that a licensee may never be sure of acquiring the rights to exploit personal attributes when he relies on the consent of the registered owners. In other words, there could always be unregistered children or grandchildren who together own a one-half interest in the rights, the necessary ownership

221. CAL. CIV. CODE § 990(a) (West Supp. 1986).
222. Section 405(b) of the Copyright Act reads as follows:

Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court. 17 U.S.C. § 405(b) (1982).

223. Because inheritable and transferable property rights are involved, and because there is no invasion of the personal rights of someone already deceased, the injuries suffered by owners of post-mortem rights arguably will be limited to lost sales, lost licensing proceeds, and, in some cases, the destruction of the value of the property rights. These are the same types of injuries for which damages are recovered by a copyright proprietor under section 504(b) of the Copyright Act, 17 U.S.C. § 504(b) (1982). See M. Nimmer, supra note 48, § 14.02. And, as any copyright attorney knows, proving lost sales and lost licensing proceeds, and, in extreme cases, the destruction of the value of the copyright itself, is not an easy task in comparison to proving profits since these lost advantages can be evaluated only in relation to prior sales, prior licensing proceeds, and prior value of the copyright, if any.
interest to prevent other persons from granting a proper consent. There may be enough unregistered owners to give a distorted picture about who actually owns a majority interest, so that genealogical research may be needed.

Another problem with the registration system is that anyone can register, ostensibly even without proving a relationship to the decedent, either as a transferee, legatee, ancestor, or descendant. 224 This means that the prospective user has to research the claims of the registrant. It would seem that registrants should be asked to deposit documentation with the Secretary of State to prove their claims. In the case of transferees, the written conveyances should be deposited. 225 (It should be noted that the statute does not explicitly require written contracts, as does section 204 of the Copyright Act.) 226 For spouses, copies of marriage certificates should be deposited, and children should merely need their birth certificates or, for adopted children, court-approved adoption papers. Naturally, the filed statements should be made under oath, 227 and penalties should be imposed for filing false statements. 228 Perhaps even remedies should be provided to those who have detrimentally relied on false statements. 229

224. Admittedly, the current registration form must be verified. CAL. CIV. CODE § 990(f)(2) (West Supp. 1986). However, as with copyright law, the registration certificate only reflects a claimed ownership, unlike a letters patent which is actually an ownership document. Section 410(c) of the Copyright Act provides that the certificate of registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. Nonetheless, as made clear by sections 410(a) and 408(a), the registration is only for a copyright claim and does not represent certification of ownership. On the other hand, as set forth in section 154 of the Patent Act of 1952, 35 U.S.C. § 154 (1982), the patent constitutes a "grant to the patentee" which is secured after an extensive examination of the application according to section 131 of the Patent Act, 35 U.S.C. § 131 (1982).


226. The rights in question are "personal property" as defined by section 663 of the Civil Code, CAL. CIV. CODE § 663 (West 1982), and no written contract is required, unless the transfer is to take place after death or unless the transfer is to take effect as the result of an agreement to devise or bequeath the rights. See CAL. CIV. CODE § 1052 (West 1982) providing for oral transfers of personal property.


228. CAL. CIV. PROC. § 2015.5 (West 1983).

229. Cf. Trademark Act of 1946 § 14 (Lanham Act), 15 U.S.C. § 1064 (1982), (cancellation of federal trademark registrations). Under this statute, which specifies numerous grounds for cancellation, a user of a mark who is damaged by a registration may have the registration cancelled. Id. There appears to be no reason why a user of personal attributes should not be able to cancel a registration of a claim to publicity rights.
As with real property titles, the prospective licensee should be able to rely completely on the registration system, so that if he has the consent of those registrants holding the rights he intends to license, then the consent should bind all the unregistered owners.230

And, of course, the prospective licensee is not the only person depending on the registration system. In the same way that section 205 of the Copyright Act provides a system of recording title to copyright interests,231 the recording system here should be adapted so that it, too, will protect bona fide purchasers without notice of prior conveyances.232 To match the Copyright Act, the statute should provide for a grace period to register a transfer in order to cut off the interests of bona fide purchasers without notice.233 The goal should be a registration system that enables any licensee to determine who the owners really are.234

With these comments in mind, it is suggested that the Secretary of State act not so much like the Copyright Office, receiving claims without full examination of their merit, but rather like the Patent and Trademark Office with complete determination of merit.235 Realistically, prospective licensees cannot and should not have to expend time, effort, and money to determine the validity of proposed licenses which are facially valid. Therefore, if the Secretary of State could issue preliminary certifications that state that certain persons are or appear to be owners of the rights, then licensees and other users could act without fear of liability. Moreover, any user or licensee who relied on the Secretary of State’s opinion should be exempt


232. Under section 205 of the Copyright Act a recording system is established similar to county recording systems for real property transfers. 17 U.S.C. § 205 (1982). The purpose of the copyright registration system is to protect the respective interests of the general public, bona fide purchasers without notice of earlier transfers, and earlier transferees. As with real property recording systems, under the copyright law the interests of a transferee can be curtailed in favor of a later bona fide purchaser if the transferee fails to timely record an assignment. Id.


234. Presumably the public records established at the office of the Secretary of State will be governed by the Information Practices Act of 1977 CAL. CIV. CODE §§ 1798-1798.7 (West 1985 & Supp. 1986) and therefore open for inspection.

from liability, at least for punitive damages and attorney's fees and perhaps even for actual damages. To effect this *modus operandi*, the statute should be amended so that the one-half interest rule applies only to registered owners.

These proposals for an effective registration system are also compatible with market conditions for exploiting the personal attributes of celebrities. Certain celebrities come in and out of fashion, and both users and owners benefit from licensing that can be effectuated immediately when the opportunity for successful exploitation arises. Waiting for the results of a tedious title search does not make good business sense.

In determining the validity of claims, the Secretary of State should establish the date of death of the deceased personality, certify which persons own the rights, and indicate what rights are actually owned by those persons.

If the Secretary of State denies any claim in whole or in part, the claimant should have a short period of time, commencing with the denial, to bring a mandamus action against the Secretary of State to reinstate the claim. This is almost the same type of action as that brought against the Register of Copyrights when he refuses to register a copyright.

While the claim is being litigated, the user should not have to act at his peril. Either the Secretary of State's determination should be given effect until overturned by court order, or the owner whose claim is in dispute should be required to give a compulsory license to the potential user, with the proceeds held in trust by the Secretary of State pending a final determination. The latter alternative seems difficult to implement but avoids depriving a claimant of the rewards of ownership because of an adverse determination by the Secretary of State. In any event, if a claim remains unregistered but subject to a pending lawsuit, a lis pendens should be recorded by the Secretary of State to inform users that a claim that has been de-


238. When the Register of Copyrights refuses to issue a certificate of registration under section 410(b) of the Copyright Act, a mandamus action may be brought to test the refusal. *See*, *e.g.*, Bouvé v. Twentieth Century-Fox Film Corp., 122 F.2d 51, 52 (D.C. Cir. 1941).

239. *See supra* note 60 (discussing compulsory copyright licenses).

240. *Cf.* 17 U.S.C. § 411(a) (1982) (providing that even when a registration has been refused, the applicant is entitled to institute an infringement action. Notice of the
DESCENDIBLE PUBLICITY RIGHTS

The same recording should be made if there is ongoing litigation between competing heirs or transferees, or both. Just as with copyrights, the clerk of the court should be required to inform the Secretary of State about the pending litigation so that the information will become part of the Secretary of State’s records. This will enable the Secretary of State to intervene in the litigation.241 Again, if rights are in doubt, there is the alternative of granting a compulsory license unless the two claimants are the only possible owners and both claimants do not wish to license the rights in any fashion.

H. Remedies

The remedies for a violation include actual damages, punitive damages, profits, and attorney’s fees.242 The award of attorney’s fees is mandatory,243 but the award of punitive damages is discretionary.244 Actual damages start at a minimum amount of $750.245 Profits are determined in almost the same manner as those in a copyright infringement case.246 Such profits include amounts attributable to the unauthorized use but exclude all profits taken into account in computing the actual damages.247 This eliminates the possibility of double recovery. If the owners lose sales and the same sales are picked up by the violator, the lost sales are awarded as actual damages and may not be

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242. CAL. CIV. CODE §§ 990(a), 3344(a) (West Supp. 1986).

243. “The prevailing party or parties in any action under this Section shall also be entitled to attorney’s fees and costs.” CAL. CIV. CODE § 990(a) (West Supp. 1986). The language of section 3344(a) in this regard is almost identical.

244. Both sections 990(a) and 3344(a) say that “punitive damages may also be awarded to the injured party or parties.”

245. CAL. CIV. CODE §§ 990(a), 3344(a) (West Supp. 1985). The damages awarded are $750 or actual damages, whichever is greater, plus any profits not taken into account in computing actual damages. Id.

246. The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work. 17 U.S.C. § 504(b) (1982).

247. Id.
recovered again as profits, and vice versa. In establishing profits, the injured party must present proof of the violator’s gross revenues attributable to the use, and the violator must prove any deductible expenses.248

Presumably, the rules governing calculation of profits and damages in copyright cases will be applied as much as possible.249 For example, it is presumed that the violator will be allowed the same deductions as would the owner for the costs of production,250 distribution,251 and even an allocable proportion of overhead.252 However, there may be no apportionment as there is in copyright cases.253 In a copyright case, if the infringer’s work is partly composed of materials created by the infringer and partly composed of materials owned by the copyright proprietor, then the copyright proprietor can only recover that portion of the profits attributable to the copyrighted materials.254 Nonetheless, how does one make an apportionment when a name, likeness, voice, signature, or photograph is used on or in a product or in connection with sales, advertising, or solicitations?

In copyright infringement cases where the infringer’s contribution is really inseparable from the copyright owner’s contribution, the court will make an apportionment in its best judgment.255 But in copyright cases, the court usually can rationally decide whether a work is one-third originated by the copyright owner and two-thirds created by the infringer; in other words, rough but substantially accurate estimates are possible. With publicity rights, these approximations cannot be made with such certainty. Imagine that a celebrity’s name or signature is used in connection with advertising a product. Naturally, there are no proceeds directly from the advertisements; the proceeds stem from the sales of the product. But what proportion of the product is the name or signature? How much did the name or signature help to sell the product? One can never

249. See M. NIMMER, supra note 48, §§ 14.02, 14.03 (calculation of profits and damages in copyright infringement actions).
250. Id. § 14.03[B].
251. Id.
252. Id.
253. Id. § 14.03[C].
254. Id; see also Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399-405 (1940).
255. M. NIMMER, supra note 48, § 14.03[c].
really know. The only way to avoid this difficulty is to award all of the proceeds derived from the product. However, this would be unfair if the use of the name or signature were only a minor ingredient in the marketing program. Perhaps a rule could be articulated for uses which substantially contribute to sales.

As with copyright litigation, actual damages will be difficult to establish. To show lost sales or lost licensing proceeds in connection with publicity rights is almost impossible.

One puzzle is why these statutes lack any provision for injunctive relief. In copyright, trademark, and patent cases there are distinct provisions for injunctive relief. Moreover, even in section 987 of the Civil Code, there is a provision expressly providing for injunctive relief. Certainly the courts should be empowered to grant injunctions because, in some cases, an award of damages after years of litigation may not adequately compensate the owner.

I. Duration

One aspect of this legislation is immune from criticism. The provisions on duration are clear. Apparently, the Legislature adopted the suggestion of Chief Justice Bird in her dissenting opinion in *Lugosi v. Universal Pictures*, namely, that publicity rights should subsist for the full copyright or economic term for intellectual property rights. Thus, the term of protection is the life of the celebrity plus fifty years, the same as that in section 302(b) of the Copyright Act. The extra fifty-year period allows one, two, or perhaps three generations of heirs to benefit, after which time the multiplication of heirs would make it impractical to apportion and enforce the rights. Insofar as these descendible rights were developed to enable heirs to preserve the memories and reputations of their ancestors, as well as their economic interests, the fifty-year period protects

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256. *Id.* § 14.02.
260. *Id.* at 847, 603 P.2d at 446, 160 Cal. Rptr. at 344-45.
262. *Cf.* Family Councils under Spanish copyright law, *supra* note 208 (control by different generations of heirs over postmortem copyrights).
those heirs who need the personal protection, namely, the children, grandchildren, and parents. Usually, the great-grandchildren and later heirs do not need to be similarly shielded. Unlike the post-mortem twenty-year period for the collection of resale royalties under Civil Code section 986,263 which is intended to benefit primarily the spouse and children of the artist, the fifty-year term under this legislation makes the economic rights more viable. In some cases, the true fame of a celebrity is not fully realized until many years, or even decades, after his death, so that the entire fifty-year term is required to make these rights valuable. Some licensees may not even consider licensing unless a fifty-year term is available because ten or twenty years may be too short a term for the investment in certain products.

It should be noted that section 990 of the Civil Code provides protection to the heirs of any deceased person who died within fifty years prior to January 1, 1985.264 Not only will this "retroactive" protection undo prior court determinations, as for example, in the Lugosi case,265 but it may enable heirs of persons who have died after January 1, 1935 to control the personal attributes of their ancestors which heretofore have been commercially exploited on a widespread basis.

One can imagine that where a user has already invested time and money in developing products in connection with a name, likeness, or photograph, the creation and enforcement of these new rights will seem like an unlawful taking of property without just compensation.

Neither of the statutes specify limitations for bringing actions apart from the duration of the rights themselves. Therefore, the limitations will be drawn from the general statutes of limitations set forth in the Code of Civil Procedure, the term being one or two years from the time the cause of action accrued, namely, the time of the first impermissible use.266 An

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266. Because actions for defamation and other torts come under section 340 of the Code of Civil Procedure, CAL. CIV. PROC. § 340 (West Supp. 1986), which is a one-year statute of limitations, publicity rights actions may also have a one-year statute. See 43 CAL. JUR. 3d, Limitation of Actions § 72 (1978). In the same way that some defamation actions accrue from the time of the wrongful conduct rather than from discovery, it would make little sense to have publicity rights actions accrue from the date of discovery. After all, if the offending products are placed in commerce, the vigilant owner of the rights should have almost immediate notice of the infringement. See
alternative would be to limit the action to one or two years from the date of violation, or one year from the date of discovery, whichever occurred last.267

J. Constitutional Problems and Statutory Conflicts

As indicated above, the statutes may face conflicts with the supremacy clause268 and with federal statutes specifically providing for preemption, particularly section 301 of the Copyright Act.269 However, owners of publicity rights can argue, at least with respect to copyright legislation, that they are not exercising any of the exclusive rights granted by the Copyright Act. In other words, the copyright owner of a photograph which depicts a deceased personality still has the exclusive right to exploit the photograph commercially;270 however, the copyright owner simply cannot use the photograph commercially without the consent of the deceased personality’s successors-in-interest. It should be mentioned that if a photograph contains defamatory material, the copyright owner of the photograph cannot necessarily publish it without becoming liable for defama-

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267. E.g., CAL. CIV. CODE § 987(i) (West Supp. 1986) (relating to artists’ moral rights and providing that no action may be maintained after three years of the act complained of or one year after discovery, whichever period is longer).

268. U.S. CONST art. VI. This clause states that laws made pursuant to the Constitution and all treaties made under the authority of the United States are the “supreme law of the land” and enjoy legal superiority over any conflicting provision of a state law or constitution. See also BLACK’S LAW DICTIONARY 1292 (5th ed. 1979).


270. The copyright owner’s exclusive right to reproduce, adapt, publicly distribute, publicly display, and publicly perform works of authorship still controls and preempts all state laws on the same subject matter, according to section 301 of the Copyright Act, 17 U.S.C. § 301 (1982).
tion. The copyright owner's rights are not absolute and can be restricted if use of the copyrighted material otherwise infringes upon the personal or proprietary rights of other persons.

There may be more direct conflicts with trademark rights. For instance, a third party may acquire trademark rights in a person's name, likeness, or signature during the life of that person, because the person either consented or failed to object to the use. However, if the deceased personality transfers or bequeaths the statutory rights, or these rights pass intestate to the heirs, what happens to the pre-existing rights of the trademark owner? What if the trademark owner already owns a federally registered trademark which has become incontestable under the Lanham Act? Won't the federal legislation control?

There are even potential conflicts with other California statutes. For example, Civil Code section 987 entitles an artist's heirs to control the crediting for certain works of fine art created by the artist. Under this statute it is not clear whether the rights pertain only to unique works of art; they may, by implication, also cover small limited editions. If this is so, what happens when the heirs seek to claim credit for a work of art under section 987(d) while the owners of publicity rights other than the heirs seek to disclaim credit for the identical work of art?

Another difficulty with section 990 is that it does not contain the same provisions as section 3344 which seemingly restricts the rights of persons who are only incidentally depicted, for example, in photographs of crowds and audiences. It would appear that if the use of a crowd photograph were permitted under section 3344 notwithstanding the objections of the living

271. See W. Prosser, supra note 28, at 752-54.
272. Id. at 752-54, 806, 811.
273. Note, however, that section 2(c) of the Lanham Act, 15 U.S.C. § 1052(c), bars federal registration of trademarks consisting of the names, portraits, or signatures of living persons without their written consent.
274. Trademark Act of 1946 (Lanham Act) § 15, 15 U.S.C. § 1065 (1982) (providing that registered marks which have been in continuous use for five consecutive years subsequent to registration and remain in use shall become incontestable, with certain exceptions).
277. CAL. CIV. CODE § 3344(b) (West Supp. 1986).
person, the owners of postmortem rights also should not be able to object under section 990.

A further problem with section 990 is that it does not have the beneficial provisions for employers contained in section 3344.\(^{278}\) Under section 3344(c), where the photograph or likeness of an employee of the user appears in an advertisement or other publication prepared on behalf of the employer, and where the photograph or likeness is only incidental and not essential to the purpose of the publication in which it appears, there arises a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness. Certainly this presumption should survive the death of the employee and should restrict the rights of the postmortem owners.

\section*{V Conclusion}

By enacting California Civil Code section 990, the Legislature attempted to extend publicity rights to heirs and transferees of deceased persons using some of the techniques employed by Congress in devising the Copyright Revision Act of 1978, including provisions for registration of claims, collection of damages and profits, and exemptions for certain fair uses. However, the failure to employ all of the technical language used in the Copyright Act as well as the failure to include a comparable section on definitions,\(^ {279}\) make the statutes unworkable. Furthermore, the exemptions are far too limited, and the statutes will be open to many constitutional challenges.

Once the statutes are amended to eliminate some of the technical defects, it is likely that most of the litigation will center on which uses are exempt. For example, the courts will have to decide whether certain commercial items are exempt because they are newsworthy and whether certain works of authorship, not otherwise protected, are exempt because they have political value. Perhaps the courts will refer to section 107 of the Copyright Act which permits the fair use of copyrighted materials in connection with news reporting, criticism, commentary, and classroom teaching. Reference can also be made

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    \item CAL. CIV. CODE § 3344(c) (West Supp. 1986).
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to other laws which protect and encourage certain activities. One example might be Internal Revenue Code section 501(c)(3) which grants tax exemptions to nonprofit charitable, literary, religious, scientific, and educational organizations.

In a very real sense, the personal attributes of celebrities which are likely to be exploited after the celebrities' deaths really belong to the public as much as to their families. During his lifetime, the celebrity, usually with the support of family, has voluntarily thrust himself into the limelight. His name or image can become a symbol used in public discourse, and this symbol should not be removed from products, merchandise, and goods, even though there may be a strong argument for banning the unauthorized use of personal attributes for purposes of advertising, selling, or soliciting purchasers of products, especially if the celebrity never endorsed the products or allowed any association with the products.

In other words, these statutes offer grist for the litigation mill and are a great burden on the public at large. It is difficult to imagine the day when the heirs of a reasonable number of us will benefit from Civil Code section 990 and similar statutes in other states; thus, very few people, most of them well-off, will benefit at the expense of millions of consumers.

The trend in the law has been to create more property rights, not merely to encourage a proper distribution of scarce resources but also to encourage productivity with the rewards of exclusivity. However, unlike patent and copyright laws which encourage progress in the sciences and arts, descen-dible publicity rights do not necessarily promote anything of great and lasting public benefit.


281. See supra note 48 (regarding art. I, § 8, cl. 8 of the United States Constitution on the constitutional authority for patent and copyright laws).