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NOTE

NOT THE LAST DANCE: *ASTAIRE V. BEST FILM & VIDEO CORP.* PROVES CALIFORNIA RIGHT OF PUBLICITY STATUTES AND THE FIRST AMENDMENT CAN CO-EXIST

I. INTRODUCTION

Imagine a comprehensive American history textbook excluding all accounts of civil rights leader Dr. Martin Luther King, Jr. What about a documentary chronicling baseball with no mention of Babe Ruth? The achievements of these and other famous people have formed the contours of American culture. Famous individuals are a common point of reference for millions of Americans who never interact with one another, but share common experiences through a media-saturated culture.¹ Because of our familiarity with their achievements, we expect the opportunity to embrace, discuss, and appreciate the accomplishments of these well-known individuals, and the law affords us the opportunity to do so by allowing their stories, as well as images of their familiar characteristics, to be used in informational and entertaining works.²

Fred Astaire, known as the "American god of dance,"³ was one such famous individual. His fans remain as devoted to his work today as they were in the 1930s.⁴ Recently, film footage of the late dancer was used by a producer of instructional videotapes sold under the title *Fred Astaire Dance Studios Presents How to Dance Series*. The videotapes used the footage of Astaire to demonstrate traditional styles of dance made famous by Astaire in his numerous film performances.⁵

1. JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION* 163 (1990).

2. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) (noting that both news and entertainment enjoy First Amendment protection).

3. Irene Lacher, *Managing the Memories*, L.A. TIMES, Aug. 17, 1997, at F8.

4. *Id.*

5. *Astaire v. Best Film & Video Corp.*, 116 F.3d 1297, 1299 (9th Cir. 1997), *reh'g denied*, 98 DAILY JOURNAL D.A.R. 1679 (Feb. 19, 1998). See *infra* note 180 and accompanying text.

Fred Astaire's widow ("Mrs. Astaire") brought a lawsuit against the producer of the videotapes, Best Film & Video Corp. ("Best Film"), alleging that the film clips were not part of an informational or entertaining work, but instead were a product advertisement used to market the videotapes.⁶ Thus, she argued the use of the film footage violated her right to control the commercial use of her late husband's persona under California's right of publicity statute for deceased personalities.⁷

The right of publicity generally includes an individual's right to profit from the value of his or her name, image, likeness, and other forms of identity.⁸ This right protects an individual from the unauthorized and unremunerated appropriation of these qualities by others.⁹ California statutory law provides publicity rights for both living persons and deceased personalities.¹⁰

In *Astaire v. Best Film & Video Corp.*,¹¹ the U.S. Court of Appeals for the Ninth Circuit interpreted California's right of publicity statute concerning deceased celebrities in a way that allowed Best Film to use the film footage of Astaire under a statutory exemption for uses in film and television programs.¹² The court held that such an exemption shielding

6. *Id.* at 1298.

7. *Id.* California's right of publicity statute for deceased personalities states that

"Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purpose[s] of advertising or selling, or soliciting purchases of products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages"

CAL. CIV. CODE § 990(a) (West 1998). Under subdivision (c), the consent required by subdivision (a) is exercisable by the person to whom the right of consent has been transferred. *Id.* § 990 (c). According to the Ninth Circuit, these rights had been transferred to Mrs. Astaire. *Astaire*, 116 F.3d at 1299.

8. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-50 (1995).

9. *Id.*

10. *See* CAL. CIV. CODE § 3344 (West 1997) (providing protection for living persons); CAL. CIV. CODE § 990 (protection for deceased personalities). Section 990 defines "deceased personality" as "any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death" *Id.* § 990(h). The heirs of the deceased may enforce the deceased personality's publicity rights under section 990. *See id.* § 990(b).

Currently, a total of 25 states protect the right of publicity either by common law or by statute. *See* J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6.1[B], at 6-7 (1995). The right is recognized by statute in 14 states and by common law in the other 11. *Id.* Some jurisdictions allow the right to be assigned and inherited. *See, e.g.*, FLA. STAT. ANN. § 540.08 (West 1988); KY. REV. STAT. ANN. § 391.170 (Michie 1984).

11. 116 F.3d 1297 (9th Cir. 1997), *reh'g denied*, 98 DAILY JOURNAL D.A.R. 1679 (Feb. 19, 1998).

12. *Id.* at 1301-02.

Best Film's use comported with the purpose of California's right of publicity statutes.¹³

Prior to *Astaire*, the Ninth Circuit was notorious in its penchant for granting celebrities expansive publicity rights under California common law.¹⁴ In fact, the Ninth Circuit was dubbed the "Hollywood Circuit" for its numerous decisions favorable to celebrities.¹⁵ For example, in *White v. Samsung Electronics America, Inc.*,¹⁶ the Ninth Circuit extended the right of publicity to protect an individual from the unauthorized evocation of his or her "identity."¹⁷ Such protection is much broader than the original protection provided by California common law, which extended only to uses of an individual's name or likeness.¹⁸

Arguably, such an expansive interpretation of the right of publicity grants celebrities a much broader monopoly over the control of commercial uses of their persona than necessary to adequately safeguard their economic value.¹⁹ More importantly, such a broad view of the publicity right may conflict with the First Amendment's core values, such

13. *Id.* at 1303.

14. The California common law right of publicity may be pleaded by alleging: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's name or likeness to defendant's advantage, commercial or otherwise; (3) lack of consent; and (4) resulting harm. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983) (citing PROSSER, LAW OF TORTS § 117, at 804-07 (4th ed. 1971)). The Ninth Circuit has interpreted the second prong broadly, allowing celebrities to succeed on claims based on the appropriation of their identities beyond name and likeness. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993) (holding that the evocation of identity gives rise to a right of publicity claim at common law); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (holding that imitation of a celebrity's voice gives rise to a right of publicity claim at common law); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *cert. denied sub nom.*, *Young & Rubicam, Inc. v. Midler*, 503 U.S. 951 (1992) (holding that imitation of voice gives rise to a right of publicity claim at common law); see discussion *infra* Part IV.

15. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting). Judge Kozinski noted that the Ninth Circuit has interpreted common law broadly, protecting more than celebrities' identity. *Id.* at 1515 (citing *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988)). He argues that by protecting the evocation of Vanna White's identity, the Ninth Circuit has created a new publicity right at common law. *Id.* at 1515. The expansion of celebrities' publicity rights at common law has replaced the existing balance between the interests of the celebrity and the public with a new balance more favorable to the celebrity. *Id.*

16. 971 F.2d 1395 (9th Cir. 1992).

17. *Id.* at 1399.

18. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 455 (Cal. 1979).

19. See Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 227 (1994). In this Note, the term "persona" refers to any attribute protectable under the right of publicity. These attributes include name, voice, signature, photograph, or likeness. See CAL. CIV. CODE § 990(a) (West 1998).

as fostering a marketplace of ideas where knowledge and truth can be freely disseminated.²⁰ Expansion of the right may also stifle cultural discourse related to the contributions and perceptions of these famous individuals.²¹ Indeed, a finding for Mrs. Astaire would have expanded the scope of California's statutory right of publicity and, thus, hindered producers of informational or entertainment related projects from using the images of deceased celebrities out of fear of infringing their publicity rights.²²

This Note focuses on the Ninth Circuit's decision in *Astaire* denying right of publicity protection to the film footage in Best Film's instructional videotapes. It contrasts the *Astaire* decision with the Ninth Circuit's prior decisions granting broad protection to celebrities under California common law. This Note argues that, although seemingly inconsistent with the recent practice of the Ninth Circuit, the *Astaire* decision appropriately resolved the conflict between the right of publicity and the First Amendment in this decision based entirely on California statutory law.²³

Part II discusses the background, policies, and limitations of California's right of publicity statutes. The discussion primarily focuses on California Civil Code section 990, the right of publicity statute for deceased persons. Part III discusses the Ninth Circuit's decision in *Astaire*, arguing that the court properly interpreted section 990, applying it in a manner consistent with the interpretations of other courts.²⁴ Part III also argues the Ninth Circuit's decision properly balances California's statutory right of publicity with the First Amendment without displacing any First Amendment rights. Finally, Part IV explains the significance of *Astaire* in light of the Ninth Circuit's recent decisions concerning the right

20. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970) (identifying four premises upon which freedom of expression rests: individual self-fulfillment, participation in decision-making by society, advancing truth and knowledge, and maintaining stability in the community) ("An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds.").

21. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 239 (1993) (suggesting that the right of publicity constricts the "cultural commons, freely available for use in the creation of new cultural meanings and social identities . . .").

22. "Industry Won" In *Fred Astaire Decision—Best*, VIDEO WK., June 30, 1997, available in 1997 WL 7922200.

23. Although this Note argues that the case helped resolve the conflict between the right of publicity and the First Amendment, the Ninth Circuit did not explicitly base its decision on the First Amendment. In fact, the Ninth Circuit was able to resolve the case entirely on the basis of section 990 of the California Civil Code. *Astaire*, 116 F.3d at 1304. Thus, the Ninth Circuit did not have to address the First Amendment concerns the case raised. *Id.*

24. See *Joplin Enters. v. Allen*, 795 F. Supp. 349 (W.D. Wash. 1992).

of publicity at common law. Part IV concludes that the ruling will ultimately benefit the public because it provides wide latitude for the unauthorized use of a deceased celebrity's persona in various media.²⁵

II. THE RIGHT OF PUBLICITY FOR THE DECEASED PERSONALITY: CALIFORNIA CIVIL CODE SECTION 990

A. Background

The right of publicity is not a fully developed legal doctrine.²⁶ Unlike copyright, trademark, and patent law, the right of publicity is not mentioned in the United States Constitution, nor has it been federally codified.²⁷ As a result, courts have had to rely almost entirely on state common and statutory law when resolving right of publicity claims.²⁸ The United States Supreme Court gave states the ability to provide for a right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*,²⁹ holding that:

[Right of publicity] laws perhaps regard the "reward to the owner [as] secondary consideration," but they were "intended definitely to grant valuable, enforceable rights" in order to afford greater encouragement to the production of works of benefit to the public. The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work.³⁰

In 1971, the California legislature enacted Civil Code section 3344,³¹ forbidding the appropriation of an individual's name or likeness for commercial purposes without his or her consent.³² In 1984, the California

25. See Daniel Terdiman, *Instruction Video Not Infringing*, 9th Circuit Rules, RECORDER, June 23, 1997, at 1.

26. Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013, 1015 (1995).

27. *Id.*

28. *Id.*

29. 433 U.S. 562 (1977).

30. *Id.* at 577 (citations omitted) (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *Washington Publ'g Co. v. Pearson*, 306 U.S. 30, 36 (1939)).

31. See CAL. CIV. CODE § 3344 (West 1997).

32. *Id.* California adopted section 3344 in response to Dean Prosser's enunciation of the four aspects of privacy. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979). Prosser states the law of privacy is comprised of four causes of action, each consisting of a distinct invasion by the defendant and a distinct interest of the plaintiff. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). This fourth cause of action is for the

legislature enacted section 990, a companion statute to section 3344, establishing a post-mortem right of publicity.³³ The California Supreme Court recognized the need for post-mortem publicity rights in *Lugosi v. Universal Pictures*.³⁴

In *Lugosi*, Bela Lugosi's heirs claimed Universal Pictures violated Lugosi's publicity rights. Universal used Lugosi's likeness as Count Dracula, a character he portrayed in the film *Dracula*, on consumer products such as toy pencil sharpeners, beverage stirring rods, and candy dispensers.³⁵ Under California's existing right of publicity statute,³⁶ the court held that the right to exploit Lugosi's persona did not descend to his heirs because Lugosi himself did not exploit his persona for commercial gain during his lifetime.³⁷ The court viewed the right of publicity as a privacy right, referring to it as a personal right that may be exploited only by the artist during his lifetime.³⁸ Although the court was unwilling to depart from California common law and hold publicity rights descendible as property rights, it did suggest that the Legislature could amend section 3344 to recognize a "right of publicity action on behalf of the family or immediate heirs of persons such as Lugosi."³⁹ Subsequently, the California legislature enacted section 990.⁴⁰

Comparing the language of section 990 to section 3344 reveals little difference between the rights the statutes provide.⁴¹ Both statutes prohibit

"[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id.*

33. See CAL. CIV. CODE § 990 (West 1998).

34. 603 P.2d 425 (Cal. 1979).

35. *Id.* at 427-35.

36. CAL. CIV. CODE § 3344 (West 1997).

37. *Lugosi*, 603 P.2d at 428.

38. *Id.* at 429. While privacy rights are not descendible as "personal rights" that must be recognized by the artist during his or her lifetime, the *Lugosi* court stated that property rights relating to celebrity status could be inherited. For example, if Lugosi had established a business under the name of "Lugosi Horror Pictures" and then assigned the property to his heirs, such a right would be descendible. *Id.* at 428-31.

39. *Id.* at 430. Most likely, the holding in *Lugosi* would not have changed even if the California Supreme Court had held that Lugosi's publicity rights were descendible. Lugosi assigned the publicity rights surrounding his character to Universal Pictures in negotiations for the film contract. *Id.* at 426 n.2.

40. CAL. CIV. CODE § 990 (West 1998) (effective May 25, 1988). One of the main features of section 990 is that it protects the public image of the celebrity for fifty years after death. Before the enactment of section 990, any right of publicity was deemed to end with the life of the celebrity in California. *Lugosi*, 603 P.2d at 431.

41. Compare CAL. CIV. CODE § 990(a) with CAL. CIV. CODE § 3344(a). Section 3344(a) was amended at the same time to track the language of section 990(a). The only difference between section 990(a) and section 3344(a) is that the latter requires a person to "knowingly" use a person's name, voice, signature, photograph, or likeness. *Id.* § 3344(a). Section 990(a) does not have this requirement. See *id.* § 990. Perhaps, because section 990 specifically applies to the use of a deceased personality's name, voice, signature, photograph, or likeness, the

the unauthorized use of an individual's name, voice, signature, photograph, or likeness. Both statutes also exempt from liability uses of these personal attributes related to any news, public affairs or sports broadcast, or any political campaign.⁴² Similarly, both provide that uses in a commercial medium do not require consent simply because the material containing a celebrity's persona is commercially sponsored or contains paid advertising.⁴³ The use of one's persona "directly connected" to a commercial sponsorship or paid advertising does, however, require consent.⁴⁴ For example, a celebrity is "directly connected" to a commercial sponsorship when his or her persona is appropriated to endorse a particular product.⁴⁵ Ultimately, the only significant distinction between the two statutes is that section 990 contains a clause expressly permitting the use of a deceased celebrity's name, voice, signature, photograph, or likeness in a play, book, magazine, newspaper, musical composition, film, radio or television program.⁴⁶

In contrast to sections 990 and 3344, the right of publicity is not descendible under California common law.⁴⁷ However, the right of publicity at common law has been interpreted to protect a person's "identity," providing more extensive coverage than the "name, voice, signature, photograph, or likeness" protection found in section 990.⁴⁸

drafters presumed users would know when they are using a celebrity's persona.

42. CAL. CIV. CODE §§ 990(n), 3344(d) (West 1997).

43. *Id.* § 990(k); see also *id.* § 3344(e) (referring to a commercial medium as a medium that is commercially sponsored or contains paid advertising).

44. *Id.* §§ 990(k), 3344(e).

45. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (holding that the use of a robot evoking the identity of Vanna White in an advertisement to sell video cassette recorders was a product endorsement).

46. CAL. CIV. CODE § 990(n).

47. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 429 (Cal. 1979).

48. For example, in *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979), the California Supreme Court defined the right of publicity under common law as protecting "against the unauthorized use of one's name, likeness or *personality*." *Id.* at 455 (emphasis added). In *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), the defendant hired a voice impersonator to perform a famous Bette Midler song for a television commercial. *Id.* at 461. The Ninth Circuit held when voice is a substantial indication of an identity, it is protected from imitation for commercial purposes by the common law right of publicity. *Id.* at 463.

In *White*, the Ninth Circuit set forth the broadest pronouncement of the right of publicity yet, that California's common law right of publicity protects the evocation of one's "identity." *White*, 971 F.2d at 1398-99 ("The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice."). In *White*, Samsung Electronics had created a print advertisement featuring a robot in a gown and a blonde wig turning the letters of a game board resembling the one from the television game show, *Wheel of Fortune*. *Id.* at 1396. Although Samsung did not use the name or exact likeness of *Wheel of Fortune* hostess Vanna White, the court ruled that the totality of the circumstances raised an inference that White's personality had been appropriated

B. The Policies Behind the Right of Publicity

1. The Lockean Theory

Courts and commentators have offered three primary rationales for the right of publicity.⁴⁹ First, the Lockean labor theory justifies the grant of a property right in one's person.⁵⁰ Under the Lockean theory, the fact that celebrities have expended time and labor in developing commercially valuable identities entitles them to reap the financial rewards of their labor.⁵¹

The Lockean theory also supports a corollary policy related to the right of publicity: the curtailment of unjust enrichment.⁵² Advertisers and merchandisers who appropriate a celebrity's persona without consent and reap the resulting financial benefits for such use are unjustly enriched.⁵³ By associating a celebrity with a product without his or her permission, the advertiser or merchandiser can increase sales without paying the celebrity for the use.⁵⁴ Aside from unjust enrichment, the advertiser or merchandiser may implicate the doctrine of unfair competition.⁵⁵ When the celebrity's publicity value has been acquired at no cost, the advertiser

for commercial gain. *Id.* at 1399.

49. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 215-16 (1954). *But see* Madow, *supra* note 21, at 135, 178-238 (disputing all rationales behind the right of publicity and questioning the soundness of the existence of the right).

50. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 16-30 (Thomas P. Peardon ed., 1952).

51. Weiler, *supra* note 19, at 240; see *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977); *Lugosi v. Universal Pictures*, 603 P.2d 425, 438 (Cal. 1979).

52. The doctrine of unjust enrichment stands for the "[g]eneral principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made . . ." BLACK'S LAW DICTIONARY 1377 (5th ed. 1979).

53. See *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) ("To impersonate her voice [in this instance] is to pirate her identity."). The Ninth Circuit noted that the lower court in *Midler* compared the defendant's conduct with that of the "average thief." *Id.* at 462.

54. *Id.*

55. Unfair competition is "dishonest or fraudulent rivalry in trade and commerce, but is particularly applied to the practice of . . . substitut[ing] one's own goods or products in the markets for those of another . . . by means of imitating or counterfeiting the name, title, size, shape, or other distinctive peculiarities of the article, or . . . package. . . ." BLACK'S LAW DICTIONARY 1371 (5th ed. 1979).

or merchandiser competes unfairly with others who have paid substantial sums of money to use the celebrity's identity legally.⁵⁶

However, the Lockean labor rationale invites criticism. Celebrity status often bears no relation to talent or accomplishments.⁵⁷ It occasionally evolves out of luck, coincidental involvement in public affairs, or criminal conduct.⁵⁸

The unjust enrichment argument supporting the right of publicity may also be criticized. First, federal policy tends to favor the free use of subject matter unprotected by intellectual property law, such as copyright and trademark law.⁵⁹ Second, the celebrity may have drawn upon the labors of others in order to achieve his or her distinct persona.⁶⁰ Hence, the Lockean labor theory supporting a return on the celebrity's investment in developing a persona may be an insufficient justification for granting celebrities a right of publicity.⁶¹

2. Economic Incentives

A second rationale behind the right of publicity is that protection of the economic value in a celebrity's identity encourages the celebrity to engage in acts that enrich our culture.⁶² Under this theory, the right of publicity provides celebrities with the necessary motivation to stimulate creative work by protecting their economic interests.⁶³ Accordingly, celebrities will be less likely to perform if there is no guarantee they will be able to reap the benefits.⁶⁴ Critics point out, however, that individuals are likely to seek celebrity status even without a right of publicity.⁶⁵ Thus,

56. Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 118-19 (1981).

57. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 341 n.220 (1988).

58. *Id.*

59. Weiler, *supra* note 19, at 242 (citing *Compco Corp. v. Day-Bright Lighting, Inc.*, 376 U.S. 234 (1964)); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964)).

60. *Id.* at 243 (citing *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting)).

61. Madow, *supra* note 21, at 179-81.

62. *Id.* at 178.

63. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32-35 (4th ed. 1992). *But see* Madow, *supra* note 21, at 209 (suggesting that even without the right of publicity, people would pursue fame).

64. POSNER, *supra* note 63, at 32-35.

65. See Madow, *supra* note 21, at 209 (arguing that the right of publicity is not necessary to assure an adequate supply of creative effort and achievement).

like the Lockean labor rationale, the economic incentive rationale may be an insufficient foundation upon which to base the right of publicity.⁶⁶

3. Unfair Business Practices and Consumer Protection

A third rationale for the right of publicity relates to unfair business practices and consumer protection.⁶⁷ Under this theory, the right of publicity promotes the influx of accurate information about goods and services to consumers protecting them from deception and related marketplace harms.⁶⁸ Unauthorized use of a celebrity's likeness may create a false impression that the celebrity actually endorses a particular good or service, impairing the goodwill value to consumers of attaching a celebrity's identity with a particular product.⁶⁹ By requiring authorization of the celebrity, consumers are not deceived into thinking that a product is endorsed by a celebrity when it actually is not.

In addition to consumer harm, this theory also recognizes that an unauthorized use may disadvantage celebrities because it may inhibit their ability to obtain other sponsorship opportunities, especially those with competitors.⁷⁰ Unauthorized endorsements may also undermine a celebrity's credibility and marketability, especially if the celebrity becomes overexposed or if the product advertised is controversial.⁷¹ Finally, this theory acknowledges that unauthorized appropriation penalizes the sponsors who pay substantial sums for the use of a celebrity's persona.⁷² For example, if *Company A* uses the persona of a celebrity without authorization and the celebrity has already authorized *Company B* to use his image, *Company B* may be associated with *Company A* because of the common use of the celebrity. If *Company A* is controversial or has a bad reputation, *Company B* may, like the celebrity, lose credibility.

Like the other policy justifications behind the right of publicity, the unfair business practices and consumer protection rationale is subject to

66. *Id.* at 205.

67. *See, e.g.*, 15 U.S.C. § 1125(a) (1994) (prohibiting "false designations of origin" within the commercial context).

68. Madow, *supra* note 21, at 235 (citing Douglas G. Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1186 n.7 (1978)).

69. *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970).

70. Spahn, *supra* note 26, at 1016.

71. *Id.*

72. *Id.* at 1017.

criticism.⁷³ Recent surveys suggest that the majority of adult television viewers believe that celebrities appear in advertisements for monetary gain rather than to show that they truly endorse a particular product.⁷⁴ In addition, protecting consumers via the right of publicity is superfluous because the federal Lanham Act⁷⁵ and equivalent state laws already exist to prevent consumer confusion and deception.⁷⁶ Accordingly, the justifications offered for the right of publicity and the criticisms of those justifications reveal the inherent conflict within right of publicity law.⁷⁷

C. *Limitations on the Right of Publicity*

There are constitutional limitations on the right of publicity.⁷⁸ The First Amendment strives to protect free speech and creative expression in order to promote the democratic exchange of ideas and to encourage artistic contributions to society.⁷⁹ However, different types of speech are afforded different levels of protection. The Supreme Court has held that while entertainment, news, and political works are subject to full First Amendment protection,⁸⁰ purely commercial speech receives less First Amendment protection.⁸¹ Advertisers, or others who exploit a celebrity's name or likeness for commercial gain, are entitled to less First Amendment protection than someone who uses a celebrity's name or likeness for

73. Madow, *supra* note 21, at 229 n.478.

74. *Id.*

75. Pub. L. No. 79-489, 60 Stat. 427, 444 (codified as amended at 15 U.S.C. § 1125(a) (1994)). Section 43(a) of the Lanham Act prohibits the false designation of the origin, false descriptions, and false representations in the advertising and sale of goods and services. 15 U.S.C. § 1125(a).

76. Madow, *supra* note 21, at 233-35.

77. Compare MCCARTHY, *supra* note 10, § 1.11 (stating that the right of publicity protects the value of the celebrity's persona and prevents unwanted association with products) with Madow, *supra* note 21, at 239 (suggesting that the right of publicity conflicts with our "cultural commons," which are freely available for the use of new cultural meanings and identities). Professor Madow contends that the criticisms of the rationales for a right of publicity suggest that no right should exist at all. See Madow, *supra* note 21, at 239.

78. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."). The First Amendment has been incorporated to apply to the States through the Due Process Clause of Fourteenth Amendment. See *Duncan v. Louisiana*, 392 U.S. 947 (1968).

79. See EMERSON, *supra* note 20, at 6; see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977); *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 458-59 (Cal. 1979) (Bird, C.J., concurring).

80. See *Zacchini*, 433 U.S. at 578.

81. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) ("The Constitution affords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

political or expressive speech.⁸² Consequently, courts must weigh a plaintiff's publicity rights against the First Amendment protection afforded to a defendant's creative work. Thus, courts must carefully draw a distinction between commercial, political, and expressive uses of a celebrity's image.

This constitutional distinction is implied within California Civil Code section 990, which states that any person who uses a deceased personality's name, voice, signature, photograph, or likeness "*for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods, or services, without prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.*"⁸³ Furthermore, an express exemption within section 990 precludes liability for the use of a deceased celebrity's persona in: (1) a play, book, magazine, newspaper, musical composition, film, or radio or television program, other than an advertisement or commercial announcement for a non-permitted use; (2) material that has political or newsworthy value; (3) a single and original work of fine art; or (4) an advertisement or commercial announcement for a permitted use indicated in (1)-(3).⁸⁴ Thus, use of a celebrity's persona in a work that is not an advertisement, or is an advertisement of a permitted use, does not give rise to a violation of the right of publicity under the statute.

III. *ASTAIRE V. BEST FILM & VIDEO CORP.*

A. *Background*

In 1965, Fred Astaire granted the Ronby Corporation ("Ronby") an exclusive license to use his name to promote the dance studios Ronby operated.⁸⁵ Astaire also granted Ronby the right to use certain pictures, photographs, and other likenesses of himself that were the subject of a previous agreement between the two.⁸⁶ Astaire agreed that Ronby could use new photos and likenesses upon approval as well.⁸⁷ Twenty-four years later, Best Film entered into an agreement with Ronby to produce a series of instructional dance videotapes called the *Fred Astaire Dance Studios*

82. *Central Hudson*, 447 U.S. at 563.

83. CAL. CIV. CODE § 990(a) (West 1998) (emphasis added).

84. *Id.* § 990(n).

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

86. *Id.*

87. *Id.*

*Presents How to Dance Series.*⁸⁸ The agreement permitted Best Film to use the likenesses Astaire granted Ronby.⁸⁹

The series features different styles of dance instruction, such as swing, Latin, and ballroom dancing.⁹⁰ The videos, which are each about thirty minutes long, contain approximately ninety-three seconds of Fred Astaire film footage demonstrating the dance styles, as well as still photos of Astaire.⁹¹ The actual dance instruction, however, is narrated and conducted by someone other than Astaire.⁹²

In 1989, Mrs. Astaire sued Best Film in federal court.⁹³ She alleged Best Film violated her sole proprietor rights under section 990 because the videotapes incorporated Fred Astaire's image without authorization.⁹⁴ The District Court ruled in favor of Mrs. Astaire, finding that section 990 did not exempt uses of a deceased celebrities' persona within videotape.⁹⁵ Best Film appealed the ruling, contending that the District Court erred in finding that videotapes were not exempt under section 990.⁹⁶ Mrs. Astaire appealed the portion of the court's holding declining to find the film footage actionable under section 990 as an advertisement.⁹⁷

88. *Id.*

89. *Id.*

90. *Id.*

91. *Astaire*, 116 F.3d at 1299. The film clips were taken from two films in which Astaire performed, *Second Chorus* and *Royal Wedding*. *Id.*

92. *Id.*

93. *Id.*; see CAL. CIV. CODE §§ 990(b), (d) (West 1998).

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

95. *Id.* at 1300. In addition, the court found Mrs. Astaire's section 990 claim was not preempted by the federal Copyright Act, and Best Film's use of Astaire's persona was not protected by the First Amendment. *Id.*

96. *Id.*

97. *Id.* Rather than holding Best Film liable because uses within videotape fall outside the statutory exemption, the court could have held that Best Film's use was a product advertisement violative of section 990. See CAL. CIV. CODE § 990(a). Section 990(a) states that uses of a deceased personality's persona for "the purposes of advertising or selling" a product are not permitted unless the statutory exemption applies. Under the exemption, uses in various media other than advertisements of the media in which the use is contained are exempt. See *id.* §§ 990(a), (n). Mrs. Astaire did not appeal the holding, but rather the rationale, arguing that the District Court should have found the use of the film clips within the videotapes was an unpermitted advertisement. *Astaire*, 116 F.3d at 1300.

B. The Ninth Circuit Ruling

The court first considered whether Best Film's use of the Astaire film clips was free from liability pursuant to the section 990 exemption.⁹⁸ Applying California rules of law on statutory interpretation,⁹⁹ the court found that the use was exempt from section 990 liability for two principal reasons.¹⁰⁰

First, the court held that the language of section 990 implies that videotapes are encompassed within the exemption for film and television programs.¹⁰¹ Although there is ordinarily "no need to resort to the indicia of the intent of the legislature" when the language is clear, the court held that it was not prohibited from determining whether a literal reading of the statute complies with its purpose.¹⁰² The court held that "[i]t is a settled rule of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."¹⁰³ Accordingly, the court stated that exempting a film or television program without exempting a videotape leads to an illogical result.¹⁰⁴ It does not make sense for a film to be exempt when projected in the theater, but not a videotape of the same film when rented from a video store.

Furthermore, the court argued that it would be inconsistent to maintain a narrow definition of "film" and "television program," as described in one part of section 990, when a "photograph" is defined broadly as "any photograph or photographic reproduction, still or moving, or any *video tape* or *live television transmission*, of any person, such that

98. *Astaire*, 116 F.3d at 1300 (referring to section 990). If exempt, the other issues raised—the First Amendment and federal preemption—would not have to be resolved. *Id.* at 1304.

99. Under California law, a statute is to be construed on the basis of the legislative intent behind it. *Id.* (quoting *Quintano v. Mercury Cas. Co.*, 906 P.2d 1057, 1060 (Cal. 1995)). In determining such intent, courts must first look to the language of the statute and give each word "its usual, ordinary import." *Id.* Courts must also consider whether the plain language of the statute comports with the legislature's purpose for adopting the law. *Id.* at 1302. Legislative purpose may be gleaned from the history of the statute, committee reports, and staff bill reports. *Id.*

100. *Id.* at 1301-02.

101. *Id.*

102. *Id.* at 1301 (citing *Lungren v. Deukmejian*, 755 P.2d 299, 303-04 (Cal. 1988)).

103. *Id.* (quoting *Younger v. Superior Court*, 577 P.2d 1014, 1021-22 (Cal. 1978)). The Ninth Circuit emphasized that "intent prevails over the letter, and the letter will, if possible, be read so to conform to the spirit of the act." *Id.* (quoting *Lungren*, 755 P.2d at 304).

104. *Astaire*, 116 F.3d at 1301. Inclusion of a deceased celebrity's persona in a film or television program is an exempted use. CAL. CIV. CODE § 990(n) (West 1998).

the deceased personality is readily identifiable.”¹⁰⁵ If the statutory definition of “photograph” encompasses a videotape recording of a film, the statutory definition of “film” should certainly encompass a videotape.¹⁰⁶ In light of the legislative purpose and the broad scope of defined terms, the court reversed the District Court’s decision, concluding the term “film” extended to videotape.¹⁰⁷

Second, the court held that the legislative intent behind section 990 supports the court’s holding. Based on relevant legislative reports, the court concluded that the exemption was meant to extend to uses beyond “legitimate historical, fictional, and biographical accounts of deceased celebrities.”¹⁰⁸ An earlier version of the statute stated that a defendant’s First Amendment rights would not be derogated by right of publicity claims.¹⁰⁹ The court believed that the omission of this language demonstrated the Legislature’s intent to adopt a broader exemption not limited solely to constitutionally protected uses in the adopted version of the law.¹¹⁰

Notwithstanding Mrs. Astaire’s assertion that the use of the films clips made the videos more marketable, the court held that “neither the statute nor legislative history provides any support for treating Best Film’s

105. CAL. CIV. CODE § 990(i) (emphasis added).

106. *Astaire*, 116 F.3d at 1301.

107. *Id.* at 1301–02.

108. *Astaire*, 116 F.3d. at 1304. The court quoted the original version of California Civil Code section 990(n) which stated that nothing in section 990 “shall be construed to derogate any rights protected by constitutional guarantees of freedom of speech or freedom of the press” *Id.* at 1303. The court stated, however, that this language was later dropped to extend the exemption beyond “constitutionally protected uses.” *Id.* Next, the court discussed the real legislative intent behind the statute: to address commercial gain through exploitation of a deceased celebrity’s right to publicity and to curtail abuse or ridicule to the celebrity in the form of a marketed product. *Id.*

109. *Id.* at 1303 (citing S.B. 613, 1983–84 Reg. Sess. (Cal. 1984) (as amended June 12, 1984)).

110. *Id.* In addition to the legislative intent extrapolated from the revised statutory language, the Ninth Circuit cited two purposes behind the bill that proposed section 990. *Id.* First, the bill was created to apply to situations where a celebrity’s persona is exploited for commercial gain in the marketing of goods or services. *Id.* Second, the bill was designed to address circumstances where a celebrity is subject to abuse or ridicule in the form of a marketed product. *Id.* Examples of such goods or products include the use of a celebrity’s name or likeness on T-shirts, collectibles, or other items. *Id.* Arguably, a videotape could be considered such a good or product. When a celebrity’s persona is incorporated into a videotape unrelated to the celebrity, the videotape is more like a product than an expressive work with respect to the celebrity’s persona. Although the Ninth Circuit did not make such a distinction, it reached the same result as if it had. *Id.* The Ninth Circuit found that Best Film’s use of Astaire’s persona in the dance instructional videotapes were not the kind of goods the drafters of section 990 contemplated and they did not offend the purposes behind section 990 because the videotapes did not subject Astaire to abuse or ridicule. *Id.*

use of the Astaire film clips any differently from the use of the same clips in a documentary about dance in film, a use that Mrs. Astaire concedes would be exempt from liability."¹¹¹ The court held that the media in which most uses are embodied is of a commercial nature and that whether a use increases the marketability of a product does not alone determine the liability of a user.¹¹²

Once the court determined that videotapes were encompassed by section 990, it considered whether the film footage itself constituted an advertisement. The court held that it did not.¹¹³ Only advertisements or works (e.g., films, television programs, etc.) incorporating the persona of a deceased celebrity are permitted under section 990.¹¹⁴ Despite its conclusion, the court believed that it was irrelevant whether the Astaire film clips were considered an advertisement.¹¹⁵ Even if the Astaire film clips were an advertisement, the court rationalized, the clips would be an advertisement of the videotape as a whole, including the film clips themselves, rather than an advertisement for some other product.¹¹⁶ Thus, even as an advertisement, the film footage would be exempt under the provision in section 990 shielding advertisements of works containing permitted uses.¹¹⁷

C. Discussion of the Ninth Circuit's Analysis

Aside from the court's interpretation of California law, this case implicates more significant First Amendment issues. On a number of occasions the Ninth Circuit has refused to recognize the First Amendment as a limit on the right of publicity.¹¹⁸ The line of pre-*Astaire* cases

111. *Id.*

112. *Id.*; see CAL. CIV. CODE § 990(k) (West 1998) (stating that the use of a celebrity's persona in a commercial medium shall not constitute a use that requires authorization solely because the material containing the use is of a commercial nature); see also *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 459 (Cal. 1979) (stating that the First Amendment is not limited to those who publish without charge). A work does not lose constitutional protection if it is undertaken for profit. *Id.* at 460.

113. *Astaire*, 116 F.3d. at 1302.

114. See CAL. CIV. CODE § 990(n)(4).

115. *Astaire*, 116 F.3d. at 1302.

116. *Id.* The dissent disagreed with the majority's contention that the Astaire film clips would be exempt even as an advertisement. *Id.* at 1304 (Schroeder, J., dissenting). Judge Schroeder argued that use of the Astaire film clips was not permitted under section 990 because it was not related to the expressive dance instructional portion of the videotape. *Id.* As such, he argued that the section 990 exemption for advertisements of permitted uses did not apply. *Id.*

117. *Id.* at 1302; see CAL. CIV. CODE § 990(n)(4).

118. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir.

revealed the Ninth Circuit's willingness to expand the protection afforded to a celebrity's identity by the right of publicity under California common law.

In *Midler v. Ford Motor Co.*,¹¹⁹ the defendant hired a voice impersonator to sing a famous Bette Midler song for a television commercial.¹²⁰ The court found that when a voice is a substantial indication of a celebrity's identity, the common law right of publicity protects it from imitation for commercial purposes.¹²¹ Similarly, in *Waits v. Frito-Lay, Inc.*,¹²² use of Tom Waits' voice by an impersonator to sell Frito-Lay products in a radio spot was considered a violation of his publicity rights.¹²³

In *White v. Samsung Electronics America, Inc.*,¹²⁴ the Ninth Circuit declared for the first time that the right of publicity includes "appropriations of identity," forbidding the unauthorized use of a celebrity's attributes to the extent the celebrity may be identified. In this decision, the Ninth Circuit's holding went further than it or any other court ever had in protecting the right of publicity.¹²⁵

White has been heavily criticized as "subjective, expansive, and unpredictable."¹²⁶ Arguably, the decision covers all personal attributes that may evoke the identity of a celebrity.¹²⁷ Unlike the statutes that specify which uses may violate a person or deceased celebrity's publicity rights, the practical scope of the *White* decision is limitless.¹²⁸ Not only does the protection of personal attributes provide courts with excessive discretion,¹²⁹ it also deters the creation of new cultural meaning and identity.¹³⁰ In addition, *White* has been criticized for granting the celebrity

1988).

119. 849 F.2d 460 (9th Cir. 1988).

120. *Id.* at 463.

121. *Id.*

122. 978 F.2d 1093 (9th Cir. 1992).

123. *Id.* at 1096.

124. 971 F.2d 1395 (9th Cir. 1992).

125. Lisa M. Gigliotti, *Beyond Name and Likeness: Should California's Expansion of the Right of Publicity Protect Non-Human Identity?*, 83 TRADEMARK REP. 64, 64 (1993).

126. See Paul Cirino, *Advertisers, Celebrities, and Publicity Rights in New York and California*, 39 N.Y.L. SCH. L. REV. 763, 790 (1994).

127. *White*, 971 F.2d 1395, *reh'g denied*, 989 F.2d at 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting).

128. Christopher Pesce, Note, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. REV. 782, 799 (1990) ("Any distinctive attribute, habit, phrase, or object associated with a celebrity could be eligible for protection against commercial exploitation.").

129. *Id.*

130. See Madow, *supra* note 21, at 239. The right of publicity gives a celebrity the power

a common law monopoly much broader than is necessary to sufficiently protect the economic value of a celebrity's identity,¹³¹ one of the very policies the right of publicity attempts to achieve.¹³²

In the only Supreme Court case to address the right of publicity, it too gave states wide latitude in providing for this type of economic incentive.¹³³ The First Amendment, however, protects uses of an individual's persona, whether in books, magazines, or film. When the use of a famous person's protected attributes are sanctionable under state right of publicity claims, the motivation to create such expressions is chilled. California's right of publicity laws accommodate the broad goals of the First Amendment by exempting expressive uses of persons, otherwise protected attributes.¹³⁴ In *Astaire*, the court furthered this goal by extending the exemption to cover videotapes, a medium that is at least as expressive as its film or print counterparts. Yet there are still many types of uses not deserving of First Amendment protection.¹³⁵

1. Works Related to Entertainment

In *Guglielmi*, Rudolph Valentino's legal heir claimed a right of publicity violation for the defendant's use of Valentino's name, likeness, and personality in a fictionalized television production based on the actor's life. The court held that such a use did not raise a right of publicity claim because the film is subject to the constitutional protections of the First Amendment.¹³⁶ The court distinguished the facts of this case from those in *Lugosi v. Universal Pictures*,¹³⁷ where the defendant used Lugosi's image

to suppress appropriations of his or her persona that depart from the meaning he or she prefers. *Id.* at 145. It also gives the celebrity power to deny the use of his or her persona in the construction of alternative identities, thus limiting the expressive opportunities of the public. *Id.* at 146. The result is a narrowing of the channels of alternative cultural dialog. *Id.*

131. Weiler, *supra* note 19, at 227.

132. See discussion *supra* note 15.

133. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

134. In *Zacchini*, the Supreme Court declared the First Amendment protects both information and entertainment. *Zacchini*, 433 U.S. at 578; see also *Winters v. New York*, 333 U.S. 507, 510 (1948) (deeming informative and entertaining expression worthy of equal free-speech protection because the "line between the informing and the entertaining is too elusive for the protection of the basic right"). The language in section 990(n) parallels this notion, specifically stating that there is no liability when the use of a deceased celebrity's persona is included in "[a] play, book, magazine, newspaper, musical composition, film, radio, or television program." CAL. CIV. CODE § 990 (n) (West 1998). Section 990 does not, however, exempt uses that exploit a celebrity's persona for commercial gain or subject a celebrity to abuse or ridicule in the form of a marketed product. *Id.* at 990(a).

135. See discussion *infra* Part III.C.1.c.

136. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 463-64 (Cal. 1979).

137. 603 P.2d 425 (Cal. 1979).

as "Dracula" on commercial products, including candy dispensers and beverage stirring rods.¹³⁸ The *Guglielmi* court called these products "objects" that, unlike motion pictures, "are not vehicles through which ideas and opinions are regularly disseminated."¹³⁹ Thus, the court reasoned, such uses should not receive the same First Amendment protection.¹⁴⁰

Similarly, in *Joplin Enterprises v. Allen*,¹⁴¹ the court held that the defendant's two-act play about singer Janis Joplin did not violate her right of publicity under section 990.¹⁴² Unlike the videotapes at issue in *Astaire*, the play at issue in *Joplin* was expressly encompassed within the section 990's exemption.¹⁴³ Therefore, incorporation of Joplin's likeness into the play was not actionable.¹⁴⁴

Arguably, the *Astaire* film clips are not a part of the expressive nature of the videotapes because they were not used as a part of the actual dance lesson.¹⁴⁵ Justice Schroeder stated in his dissent that the *Astaire* film clips should not be exempt under section 990 because they were attached "to the dance instruction video in the form of a prefatory announcement" rather than included as a part of the dance lesson. This rationale, however, is illogical. Had Best Film inserted the clips into the middle of the lesson, that use of the clips would likely have been exempt.

Moreover, calling the *Astaire* film clips an advertisement to begin with seems unfounded. The viewer would not see the *Astaire* film clips until after the videotape was purchased. Thus, there is really no need for Best Film to use the clips as an advertisement once the sale has been made. The fact that *Astaire's* name was on the packaging of the box may have advertised or endorsed the videotapes, but this use of his name was authorized.¹⁴⁶

The videotapes in *Astaire* are more comparable to the protected forms of expression in *Guglielmi* and *Joplin* than to the candy dispensers and beverage stirrers in *Lugosi* because the videotapes are more than consumer goods. Similar to a fictionalized film or play, the material on

138. *Id.* at 435.

139. *Guglielmi*, 603 P.2d at 463.

140. *Id.* at 464.

141. 795 F. Supp. 349 (W.D. Wash. 1992).

142. *Id.* at 351.

143. CAL. CIV. CODE § 990(n)(1) (West 1998).

144. *Joplin*, 795 F. Supp. at 351.

145. *Astaire*, 116 F.3d at 1299. The film clips preceded the dance instructional portion of the videotape.

146. *Id.* Mrs. *Astaire* and Best Film agree that Best Film's use of *Astaire's* name is authorized under *Astaire's* agreement with Ronby. *Id.*

the videotapes is the expression of an idea that possesses both entertainment and educational value.¹⁴⁷

As set forth in *Guglielmi*, entertaining works, such as the fictionalized film about Valentino's life, are entitled to the same constitutional protection as the exposition of information for two reasons.¹⁴⁸ First, the line between information and entertainment is too elusive to separate: what one person finds amusing may be educational to another.¹⁴⁹ Second, entertainment, as a mode of self-expression, warrants constitutional protection regardless of its contribution to the market-place of ideas.¹⁵⁰ Self-expression is necessary for the development of ideas.¹⁵¹ Works of fiction express "commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future."¹⁵² In addition, what may be difficult to communicate when factually reported may be conveyed powerfully if offered in parody or science fiction.¹⁵³

2. Works Related to Education and Information

In addition to being a creative and entertaining work under section 990, the instructional videotapes are a source of educational information warranting First Amendment protection as well.¹⁵⁴ The First Amendment protects use of a celebrity's persona within an educational work if the use is reasonably related to the content of the expression.¹⁵⁵ Using a name or photograph in a textbook to convey an idea associated with a particular celebrity is an effective educational method because the celebrity can be identified with easily.¹⁵⁶ Known people active in the fields of "politics, economics, sciences, and the arts" should expect their personas to be used

147. In order to receive copyright protection, the dance instruction videotape would have to be considered an original work of authorship fixed in a tangible medium of expression. 17 U.S.C. § 102 (1994). While illustration of specific dance steps may be considered a non-copyrightable idea, the selection, arrangement, or coordination of the film clips, still photographs, narrator's introduction, and instructional portion of the video may be considered a copyrightable compilation. *Feist Publications, Inc. v. Rural Tel. Serv.*, 499 U.S. 340 (1991).

148. *Guglielmi*, 603 P.2d at 459 (1979).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* (citing *EMERSON*, *supra* note 20, at 879).

153. *Id.*

154. *See MCCARTHY*, *supra* note 10, § 8.8[B][3], at 8-49 ("If information on 'public issues' is within the core of strong first amendment protection and immune from appropriation privacy and Right of Publicity liability, then educational and scholarly uses of a person's identity clearly must also be immune.").

155. *See id.*

156. *See id.*

“without payment to illustrate the content of books, articles, and films which teach or comment upon those fields.”¹⁵⁷

Because Fred Astaire is so well known for his dancing, film clips of his performances are reasonably related to a dance instruction videotape featuring traditional styles of dance.¹⁵⁸ Use of his image serves as an inspiration to viewers eager to follow the instruction and as a reminder of the history of popular dance. Furthermore, Astaire and his estate should have anticipated that his persona would be used without payment in media that teaches or comments upon dancing because Astaire was such a well-known performer.¹⁵⁹ In fact, Astaire did desire his image to be associated with the dance world, evidenced by the exclusive license he granted to Ronby to use his name in association with the operation of their dance studios.¹⁶⁰

Moreover, a holding that the dance instruction video fell outside statutory protection would stifle education and information. A producer who wanted to create a made-for-video documentary would be required to “buy” permission to include a clip of a well-known individual. Moreover, such a ruling would not be limited to entertainers. Every newspaper and textbook publisher would have to acquire permission from any historical or political figure, such as past presidents, about whom the publisher desired to write.

The court’s second rationale for including videotapes within the section 990 exemption was based purely on logic: it would be illogical to protect uses within a film, but not a videotaped reproduction of the film.¹⁶¹ However, rather than focusing on the media in which a work exists, determining whether the use of a celebrity’s persona is contained within a purely commercial¹⁶² or an expressive work seems to be the more relevant inquiry for determining if there is a section 990 violation. In spite of the ambiguity, the court most likely intended the section 990 exemption to extend to uses within *any expressive work* rather than to videotape simply

157. *See id.* In *Guglielmi*, concurring Chief Justice Rose Bird stated, “[P]rominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction.” *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 460 (Cal. 1979).

158. *See MCCARTHY*, *supra* note 10, § 8.8[B][3], at 8-48.

159. *See id.*

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

161. *Id.*

162. For purposes of this Note, a “purely commercial work” is one that lacks any expression protected by the First Amendment. Although an expressive work may be of a commercial nature, it may be entitled to First Amendment protection. *See discussion supra* note 112.

because film can be transferred to it.¹⁶³ Section 990's exemption was meant to illustrate examples of media that embody expressive works and, thus, be exempt from right of publicity claims when such works incorporate the image of a deceased personality.¹⁶⁴ The statute is concerned with the way a deceased personality's image is used, not the medium.¹⁶⁵ Extending coverage of section 990 to creative works in media, other than those specifically listed, is consistent with the purpose of the bill and allows the right of publicity and the First Amendment to co-exist.¹⁶⁶

Under this approach, the relation between the use of the deceased personality's persona and the expressive nature of the work must also be considered. If the use of the persona is completely unrelated to the rest of the work, then it is likely that a right of publicity claim exists.¹⁶⁷ In such a case, an expressive work is analogous to a "product" for purposes of section 990 because use of the deceased personality's persona does not aid in the expression of an idea.¹⁶⁸

Nevertheless, exempting uses in educational and entertaining works based on the First Amendment provides the strongest, most well-grounded argument for excluding use of the Astaire film clips from a right of publicity claim. The court, however, never discussed the First

163. The dissenting opinion states that the majority intended section 990's exemption to apply to all "expressive works." *Astaire*, 116 F.3d at 1304.

164. Because the purpose of section 990 was to prevent unauthorized commercial exploitation of a deceased celebrity's persona, 116 F.3d at 1303, it hardly seems that the media in which this takes place is of any importance.

165. *Id.*

166. Such an approach to distinguishing between protected and unprotected uses is consistent with the First Amendment, which protects educational and entertaining works. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) Because the drafters of section 990 deleted language in the original version of the statute, stating that First Amendment rights would be protected, the Ninth Circuit found that section 990 protected more than the First Amendment. *Astaire*, 116 F.3d at 1303. Otherwise, there would be no need for the statute at all. Mrs. Astaire, however, believed that section 990 only applied to "legitimate historical, biographical, and fictional works." *Id.* at 1302. It should be noted that the protection provided by the First Amendment and section 990 end in roughly the same place. Like section 990, which does not protect uses incorporated into advertisements and commercial endorsements unrelated to a permitted use, the First Amendment provides less protection to commercial speech. Compare CAL. CIV. CODE § 990(n) (West 1998) with *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 771 n.24 (1976).

167. If the use of a celebrity's persona is not related to the content of the expression it is likely that the celebrity's persona has been used solely to endorse the product. Such a use is not permitted by section 990. See CAL. CIV. CODE § 990(a).

168. Section 990 protects the celebrity from uses of their persona in or on products, in addition to uses in advertisements and for commercial purposes. *Id.*

Amendment, resolving the case on section 990's language alone.¹⁶⁹ Grounding the decision on the First Amendment would have resulted in the same just outcome in favor of Best Film.

3. Distinguishing Between a Protected and Unprotected Use

California case law pertaining to the right of publicity distinguishes between uses of a celebrity's persona in a medium of expression protected by the First Amendment and uses in a consumer product which are not.¹⁷⁰ Unauthorized uses of a celebrity's persona on consumer products, such as a plastic bust of Martin Luther King, Jr.¹⁷¹ or pencil sharpeners reflecting the image of Bela Lugosi as "Dracula,"¹⁷² are subject to right of publicity claims.

While the court determined that Best Film's instructional videotapes were not exploitative, it did not articulate a rule defining when a use is part of a commercial product or when it is part of an expressive work.¹⁷³ If forced to create a rule, perhaps the court would have said that such a decision should be based upon the facilitation of public discourse.¹⁷⁴ One might argue that uses within works that benefit society should be protected because access to information and ideas strengthens cultural dialogue.¹⁷⁵

The continuing privatization of the celebrity image exhibited by the Ninth Circuit's pre-*Astaire* decisions diminishes the public's opportunity to construct and circulate views on what the celebrity represents in society.¹⁷⁶ Such a trend may have influenced the Ninth Circuit's decision in *Astaire* and prompted it to treat section 990 differently when it could have simply upheld the judgment of the District Court.

169. *Astaire*, 116 F.3d at 1304 n.2.

170. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 463-64 (Cal. 1979). For the purpose of this Note, the term "consumer products" refers to commercial products which are not capable of disseminating ideas and opinions.

171. *Martin Luther King, Jr., Cntr. for Soc. Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982).

172. *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979).

173. *Astaire*, 116 F.3d. at 1303.

174. See Sudakshina Sen, Comment, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 753 (1995).

175. See Madow, *supra* note 21, at 239 ("[T]he law ought to align itself with cultural pluralism and popular cultural production. It ought to expand, not contract, the space in which 'local' discourses and alternative cultural practices can develop."). The result would be a "decentralized, open, 'democratic' culture practice" rather than a "centralized, top-down management of popular culture" that exists with expansive protection of an individual's publicity rights. *Id.*

176. See Sen, *supra* note 174, at 753 (citing JOHN FISKE, TELEVISION CULTURE 236-39 (1987)).

Alternatively, maybe the line between a protected and an unprotected use with respect to section 990 depends on the context of the use, rather than merely whether the use is contained within an expressive or purely commercial work. In her *Guglielmi* concurrence, Chief Justice Bird noted that a cause of action might have existed had the defendant, instead of producing a fictionalized movie about Rudolph Valentino, published a "Rudolph Valentino Cookbook" containing recipes and menus completely unrelated to Valentino.¹⁷⁷ Bird noted that as long as the use of a celebrity's name is not wholly unrelated to a trait or activity for which the celebrity is noted, the right of publicity does not apply.¹⁷⁸ Perhaps the Ninth Circuit would have come to this same conclusion in *Astaire* if it had considered the First Amendment argument.

In fact, if the *Astaire* film clips were used in a "how-to" video unrelated to dancing, such as a "how-to" video about gardening, the court might have found a right of publicity violation by deeming such a use analogous to use in a commercial product lacking the requisite expressive qualities.¹⁷⁹ Even a "how-to" video about break-dancing might be considered unrelated to Fred Astaire because break-dancing is not a style of dancing for which Astaire is known.¹⁸⁰ Thus, in deciding future section 990 cases, perhaps the Ninth Circuit will subjectively consider the intent of the alleged infringer and query whether the defendant intended to sell an expressive product or a product bearing no relation to the individual whose image was used.

IV. CONCLUSION: SIGNIFICANCE OF THE *ASTAIRE* DECISION

The expansion of the right of publicity has raised concerns that First Amendment values, such as "[the] free flow of ideas essential to energetic public discourse and the exchange of cultural dialogue," are in jeopardy.¹⁸¹

177. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 457 n.6 (Cal. 1979) (Bird, C.J., concurring).

178. *Id.*

179. One criticism of this argument is that "how-to" type videos are not expressive works to begin with, but are more like products. This argument, though, is countered by the fact that educational and informational works, such as books, designed to teach, receive First Amendment protection. See discussion *supra* Part II.C.

180. The types of dance instruction videos produced by Best Film included *Swing, Latin, and Ballroom Dancing*. *Id.* Astaire was known for each of these styles of dancing. See *FLYING DOWN TO RIO* (RKO Pictures, Inc. 1933) (Astaire engaged in Latin dancing); *SWING TIME* (RKO Pictures, Inc. 1936) (Astaire engaged in swing dancing); *TOP HAT* (RKO Pictures, Inc. 1935) (Astaire engaged in ballroom dancing).

181. See Sen, *supra* note 174, at 752; see also JOHN FISKE, *TELEVISION CULTURE* 236-39 (1987) (defining "semiotic democracy" as a society in which all persons are able to participate in the generation and circulation of cultural meanings) ("[T]he continuing privatization of the

The Ninth Circuit has certainly done its part in expanding this right. *Astaire*, however, reveals the Ninth Circuit's willingness to put a limit on the boundaries of celebrities' publicity rights.

Just as the court expanded the qualities of the individual subject to right of publicity claims in *White*, *Waits*, and *Midler*, it easily could have found for Mrs. Astaire and ruled that Best Film's use of the Astaire film clips was an advertisement for the videotapes in violation of section 990.¹⁸² Instead, the court defined the contours of the right of publicity under California statutory law,¹⁸³ illustrating why the instructional dance videotapes did not constitute a right of publicity violation.¹⁸⁴

The facts of *Astaire* provided the Ninth Circuit with an appropriate place to draw such a line. Use of the film clips in *Astaire* is distinguishable from the voice and identity appropriations at issue in *White*, *Waits*, and *Midler*. Not only did the use of Astaire's persona consist of actual images of the performer, the use was not directly associated with the sales of a consumer product. Rather, the film footage represented the creator's expressive attempt to honor and remember the talents of Fred Astaire. That such expression occurred in the form of an educational, or even entertaining, videotape only adds to its First Amendment value.

The existence of a First Amendment limitation on right of publicity claims is necessary to restrict the monopolies celebrities and their heirs possess over the images of cultural icons, as well as to maintain and encourage the democratic exchange of ideas. Like Mrs. Astaire, the public feels that Fred Astaire "belongs" to it. Fred Astaire is a cultural icon because of his contributions to American film and dance. Fortunately for the public, the court defined the boundaries of the right of publicity when presented with the opportunity. Such a ruling affirms the well established notion that celebrities are entitled to publicity rights for commercial uses and product endorsements, but allows the public to use images of and references to the personas of celebrities within informational works and

celebrity by protecting all incidents of identity diminishes the public's opportunity to construct and to circulate diverse views of what the celebrity means to society.").

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

183. *Id.* at 1301-04. The term "film" includes pre-recorded videotapes. *Id.* at 1301-02. Section 990's statutory exemption is not "limited to 'legitimate historical, fictional, and biographical accounts of deceased celebrities.'" *Id.* at 1304.

184. *Id.* at 1302-03.

entertainment.¹⁸⁵ The Ninth Circuit has proven that the right of publicity and the First Amendment can co-exist.

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185. See Madow, *supra* note 21, at 130:

Our legal order . . . has divvied up the economic values associated with modern celebrity, enabling celebrities to capture (and monopolize) some, but not all, of them. Thus, on the one hand, celebrity personas may be freely appropriated for what are deemed to be primarily “informational” and “entertainment” purposes. Except in unusual circumstances, permission need not be obtained, nor payment made, for use of a celebrity’s name or likeness in a news report, novel, play, film, or biography.

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