

## ASTAIRE V. BEST FILM & VIDEO CORP.

By Ping Hin Yu

The right of publicity is the right of an individual to exploit the commercial value of her image, likeness, or persona. Emerging less than a half century ago,<sup>1</sup> the right of publicity is well established at common law<sup>2</sup> and is a vital economic right in entertainment law.<sup>3</sup>

California offers three separate rights of publicity.<sup>4</sup> Publicity rights for living personalities were codified in 1972 under section 3344 of the Civil Code. In 1985, rights for deceased personalities were recognized in permitting publicity rights to descend to heirs under section 990. Finally, broad publicity rights outside the statutes that developed historically still exist at common law.<sup>5</sup>

The scope of the publicity rights extended to living and deceased personalities differs as well.<sup>6</sup> Section 990 contains subsection (n), which exempts a whole class of media from publicity rights liability. Section 3344 does not contain parallel exemptions.

More than a decade after California enacted section 990, *Astaire v. Best Film & Video Corp.*<sup>7</sup> threatens the vitality of descendible publicity rights. In a case of first impression on the scope of subsection 990(n), the United States Court of Appeals for the Ninth Circuit circumscribed the rights of deceased personalities by resuscitating moribund doctrinal and policy rationale that section 990 had otherwise laid to rest.

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1. The United States Supreme Court first articulated the doctrine of publicity rights in 1953 in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

2. Publicity rights exist statutorily in fourteen states and at common law in eleven states. See J.T. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §§ 6.1, 6.2 (1997) (Supp. June 1997).

3. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); James L. Swanson, *Are the California Right of Publicity Statutes Unconstitutional?: A Second Look at Some First Amendment Problems*, 20 BEV. HILLS B.J. 234 (1986).

4. See Stephen M. Lobbin, *The Right(s) of Publicity in California: Is Three Really Greater than One?*, 2 UCLA ENT. L. REV. 157 (1995).

5. "The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law." CAL. CIV. CODE § 3344(g) (West Supp. 1997). The identical language appears in subsection 990(m).

6. See Swanson, *supra* note 3.

7. No. 95-56633, 1997 U.S. App. LEXIS 40083 (9th Cir. Feb. 19, 1998).

To be sure, *Astaire* is bound by the statutory text and its holding merely reflects the shortcomings of section 990. *Astaire* points out the deficiencies of a statute that attempts to protect freedom of expression merely by enumerating a class of media to be protected rather than by enunciating the First Amendment theory underlying that protection. *Astaire* also reveals the anachronism of a statute that could not anticipate the emerging technologies that would transform the entertainment and information industries.

Nonetheless, the Ninth Circuit had opportunity to bring coherence to section 990 and advance the jurisprudence of descendible publicity rights. Instead, the court interpreted section 990 by adopting a literal reading that problematically dissected the statute, was neither textually nor analytically consistent, and could disjoint any body of doctrine in this area of law. What remains of post-mortem publicity rights in the wake of *Astaire* will depend on future courts' willingness to preserve the corpus of section 990.

## I. CALIFORNIA'S PUBLICITY RIGHTS STATUTES

Under section 3344, one cannot use another living person's "name, voice, signature, photograph, or likeness" for advertising purposes without consent.<sup>8</sup> Deceased personalities are afforded similar protection under section 990, which grants heirs and transferees the control of the deceased personalities' publicity rights.<sup>9</sup>

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8. CAL. CIV. CODE § 3344(a).

9. Section 990 provides, in relevant part:

(a) 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 the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof ....

(b) The rights recognized under this section are property rights ....

...

(i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any video tape 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.

The right to control the economic use of one's personality in California is limited to commercial exploitation in products or merchandise. For both living and deceased personalities, California's publicity rights protect only against certain commercial uses.<sup>10</sup> Even when the use falls in a "commercial medium"—defined in subsection 990(k) as a material that is "commercially sponsored or contains paid advertising"—no consent is required unless the use of the persona is "directly connected with the commercial sponsorship or with the paid advertising."<sup>11</sup>

#### A. Section 990

The limitations placed on the unauthorized use of a persona for commercial purposes implicate First Amendment rights.<sup>12</sup> Under section 990, uses of a deceased personality enjoy explicit and broad First Amendment exemptions. Subsection 990(j) exempts use in "any news, public affairs, or sports broadcast or account, or any political campaign."<sup>13</sup>

(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, shall not constitute a use for which consent is required under subdivision (a).

(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 ... whether or not the use ... 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).

....  
CAL. CIV. CODE § 990 (West Supp. 1997).

10. Both sections provide in nearly identical language against the unconsented use of a personality "on or in products, merchandise, or goods" or for purposes of "advertising or selling, or soliciting purchases" of such goods or services. CAL. CIV. CODE §§ 990(a), 3344(a).

11. CAL. CIV. CODE §§ 990(k), 3344(e).

12. See generally Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979); Swanson, *supra* note 3; Jeff Sanders, *By Force of Persona: How the Right of Publicity Undermines the First Amendment*, 28 BEV. HILLS B.J. 13 (1994).

13. CAL. CIV. CODE § 990(j); see also CAL. CIV. CODE § 3344(d) (living personalities).

Subsection 990(n) enumerates an entire class of per se medium-based and subject-matter exemptions for media traditionally protected by the First Amendment.<sup>14</sup> Subsection 990(n) provides:

(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 play, book, magazine, newspaper, musical composition, film, 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).<sup>15</sup>

Specifically, the first prong of subsection (n)(1) exempts all uses of a deceased persona in a play, book, magazine, newspaper, musical composition, film, radio, or television program. The second prong of subsection (n)(1), when read with paragraph (4), further exempts the advertisements and commercial announcements of these plays, books, magazines, etc. However, also under this first prong of subsection (n)(1), unauthorized use in all other advertisements or commercial announcements is prohibited.

No parallel exemptions exist under the California statute for uses of living personalities. This disparity of First Amendment protections for living versus deceased personalities has not escaped commentary.<sup>16</sup> While living personalities could pursue a right of publicity claim against a book, newspaper, magazine, or film, their heirs would be barred from pursuing such a claim under subsection 990(n)(1).<sup>17</sup>

### **B. Scope of Subsection 990(n)**

Section 990 gives no guidance as to how the exemptions in subsection (n)(1) would relate to the other exemptions under section 990. While subsection (n)(1) exempts unauthorized use on the basis of the type of media, other subsections (specifically, (j), (k), and (n)(2) through (n)(4)) exempt on the basis of the content, purpose, or nature of the expression. Subsec-

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14. See Jerome E. Weinstein, *Commercial Appropriation of Name or Likeness Revisited*, 22 BEV. HILLS B.J. 192, 213-14 (1988); Swanson, *supra* note 3, at 240-41 & n.51.

15. CAL. CIV. CODE § 990(n).

16. See Swanson, *supra* note 3, at 241.

17. See *id.*

tion (n)(1), with its broad medium-based exemptions, would seem to engulf the narrow content-based exemptions.

Subsection (n)(1) has puzzled and troubled commentators.<sup>18</sup> According to Professor McCarthy, subsection (n)(1) on its face is "so broad and all-inclusive that it is difficult to conceive of forms of communication that are not included."<sup>19</sup> Subsection (n)(1) would exempt a class of media that could otherwise be liable as a "product," under subsection (a), or as a "commercial medium," under subsection (k).

What is clear, though, is that these statutory contradictions arose from and reflect the competing strands of thought on descendible publicity rights as enunciated by the California Supreme Court and Legislature.

## II. HISTORY OF SECTION 990

The codification of section 990 finds its origins in the California Supreme Court's rejection of the doctrine that publicity rights could descend to heirs. By 1972, California had codified the right of publicity for living personalities under section 3344. In 1984, the Supreme Court held in *Lugosi v. Universal Pictures*<sup>20</sup> that publicity rights were not descendible. Chief Justice Bird provided the dissent which was to become the basis of section 990. In 1985, the California legislature enacted section 990, overruling *Lugosi*.

Nevertheless, section 990 codifies specific concerns raised by the *Lugosi* majority and dissenting opinions. It parallels the language and logic of the opinions in *Lugosi* and a companion case, *Guglielmi v. Spelling-Goldberg Productions*.<sup>21</sup>

### A. Section 990 and Property/Privacy Rights

Section 990 provides that "rights recognized under this section are property rights freely transferable."<sup>22</sup> Thus section 990 rejects the notion that publicity rights are a form of privacy rights, as asserted by the *Lugosi* majority. *Lugosi* held that the right to exploit name and likeness is "personal to the artist" and must be exercised, if at all, by him during his life-

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18. "The truly troublesome provision is Subsection (n)(1). There has not been any judicial interpretation of this Subsection .... What, then, was the intent of the legislature in tacking this language onto the bill almost the very last moment?" Weinstein, *supra* note 14, at 213-14.

19. MCCARTHY, *supra* note 2, § 6.4 [F][3][b].

20. 603 P.2d 425 (Cal. 1979).

21. 603 P.2d 454 (Cal. 1979).

22. CAL. CIV. CODE § 990(b).

time.<sup>23</sup> While the court endorsed the notion that one could create economic worth in one's name or likeness, the "very decision to exploit name and likeness is a personal one."<sup>24</sup> As a right of choice, the court reasoned, the right to the economic value of one's persona is "embraced in the law of privacy."<sup>25</sup>

Instead, section 990 adopts the *Lugosi* dissent's theory of publicity rights. Chief Justice Bird dissented from *Lugosi*, arguing that the majority conflated the rights of publicity and privacy. The dissent asserted that the appropriation of an individual's likeness for another's commercial advantage "often intrudes on interests distinctly different than those protected by the right of privacy."<sup>26</sup> The dissent argued that the "fundamental objection is not that the commercial use is offensive, but that the individual has not been compensated."<sup>27</sup>

Thus, to the extent that section 990 protects noneconomic harm, it does so within the context of unauthorized use in commercial products. The *Lugosi* dissent recognized certain "noneconomic injuries" related to commercial misappropriation.<sup>28</sup> The legislative history of section 990 reflects this concern as well, protecting against commercial exploitation of persona "subjected to abuse or ridicule in the form of a marketed product."<sup>29</sup>

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23. *Lugosi*, 603 P.2d at 431.

24. *Id.* at 430.

25. *Id.* at 428. "The so-called right of publicity means in essence that the reaction of the public to name and likeness ... endows the name and likeness of the person involved with commercially exploitable opportunities. The protection of name and likeness from unwarranted intrusion or exploitation is the heart of the law of privacy." *Id.* at 431.

26. *Id.* at 437 (Bird, C.J., dissenting). Chief Justice Bird continued, the "gravamen of the harm flowing from an unauthorized commercial use of a prominent individual's likeness in most cases is the loss of potential financial gain, not mental anguish." *Id.* at 438-39 (Bird, C.J., dissenting).

27. *Id.* at 439 (Bird, C.J., dissenting).

28. *Id.* Noneconomic harm ranges from commercial use that is undesirable or offensive to unauthorized use that inhibits one's efforts to control the public projection of one's identity. *Id.* at 439 n.11 (Bird, C.J., dissenting).

29. "The bill is intended to address circumstances in which (a) commercial gain is had through the exploitation of the name ... or likeness of a celebrity ... or (b) ... subjected to abuse or ridicule in the form of a marketed product. Such goods or services typically involved ... on posters, T-shirts, porcelain plates, and other collectibles; in toys, gadgets, and other merchandise." Staff of Assembly Comm. on Judiciary, 1983-84 Reg. Sess., Report on S.B. 613 at 3-4 (Campbell) (as amended Aug. 15, 1983) (Cal. 1984) [hereinafter STAFF REPORT].

## B. Section 990 and First Amendment Rights

Section 990 also addresses the First Amendment concerns that the *Lugosi* majority and dissent raised. The *Lugosi* majority was concerned whether “society’s interest in the free dissemination of ideas ... would be served” if publicity rights automatically descended.<sup>30</sup> In her dissent, Chief Justice Bird wrote that she was “sensitive to the fact that enforcement of the right of publicity may conflict with freedom of expression in some cases.”<sup>31</sup>

The legislative history of section 990 re-enacts the First Amendment dialogue between the majority and the dissent in *Lugosi*. The earliest manifestation of the subsection (n)(1) language in Senate Bill 613, which enacted section 990, provided:

Nothing in this section shall be construed to derogate from any rights protected by constitutional guarantees of freedom of speech or freedom of the press, such as the right to use a deceased personality’s name, voice, signature, photograph, or likeness in a play, book, magazine, newspaper, film, television program, or similar medium of expression, to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press.<sup>32</sup>

Eventually, subsection 990(n)(1) was amended to its current version, which does not contain the language explicitly defining the scope of its exemption to constitutionally protected uses, nor to the class of “medium of expression.”<sup>33</sup>

## III. THE CASE: *ASTAIRE V. BEST FILM & VIDEO CORP.*

It was in this context of the doctrinal tension and statutory ambiguity of subsection (n)(1) that the Ninth Circuit established a bright-line rule in *Astaire v. Best Film & Video Corp.* Subsection (n)(1) provides per se exemptions for the enumerated media (“play, book, magazine, newspaper, musical composition, film, radio or television program”) irrespective of their content or a commercial motive in their use. Furthermore, all advertisements of the exempted media are likewise exempt.

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30. *Lugosi*, 603 P.2d at 431.

31. *Id.* at 449 (Bird, C.J., dissenting).

32. S.B. 613, 1983-84 Reg. Sess. (as amended Aug. 15, 1983). (Cal. 1984).

33. *See id.* (as amended July 3, 1984).

### A. Facts of *Astaire*

Robyn Astaire, widow of dancer and actor Fred Astaire, pursued nine years of litigation, against Best Film & Video Corporation. In 1965, Fred Astaire granted Ronby Corporation an exclusive license to use his name in connection with dance studios and related activities.<sup>34</sup> Fred Astaire died in 1987 and Robyn succeeded to all rights under section 990.<sup>35</sup> In 1989, Best, a New York corporation that manufactures, markets, and distributes prerecorded videotapes, entered into an agreement with Ronby to produce a series of dance instructional videotapes using the Fred Astaire Dance Studios name and licenses.<sup>36</sup>

Since October 1989, Best has been manufacturing and distributing a series of videotapes known as the "Fred Astaire Dance Series." Each videotape is packaged in a box labeled "Fred Astaire Franchised Dance Studios."<sup>37</sup> The videotapes, each about thirty minutes long, begin with the Best logo and the title "Fred Astaire Dance Studios Presents How to Dance Series." The videotape is prefaced by an introductory segment containing ninety seconds of footage, taken from clips in the public domain, specifically, from two of Astaire's films in which he is dancing. Some still photographs of Astaire follow, then the narrator introduces the series, and the instructional portion of the video begins.<sup>38</sup>

In 1989, Mrs. Astaire sued Best in the United States District Court for the Central District of California, alleging that Best's use of Fred Astaire's image in the clips violated her section 990 rights.<sup>39</sup> She conceded that Best's use of Astaire's name and still photographs were authorized under Astaire's agreement with Ronby. But she argued that Best's use of the Astaire clips in the videotapes: (1) was "on or in products, merchandise, or goods" within the meaning of subsection 990(a); (2) violated the "for purposes of advertising or selling, or soliciting purchases" prong of subsection (a); (3) violated subsection (k) which prohibits use when the "material containing the use is commercially sponsored or contains paid advertising;" (4) was not exempt under subsection (n)(1) because videotapes are not covered; (5) and, even if a videotape is a "film" within the meaning of subsection (n)(1), was prohibited because subsection (n)(1), according to

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34. *See Astaire*, 1997 U.S. App. LEXIS 40083, at \*2.

35. *See id.* at \*4.

36. *See id.* at \*3.

37. *See id.*

38. *See id.* at \*3-4.

39. *See id.* at \*4.

its legislative history, exempts only legitimate historical, fictional, and biographical accounts of deceased celebrities.<sup>40</sup>

Best challenged every claim and also defended on the grounds that Mrs. Astaire's section 990 claims were preempted by the federal Copyright Act and that Best's use was protected by the First Amendment.

### B. District Court Ruling

In an unpublished order arising out of cross motions for summary judgment, the district court granted Mrs. Astaire's motion, holding that Best's use violated section 990. The district court found that Best's use in the videotapes: (1) was "on or in products, merchandise or goods" within the meaning of subsection (a); (2) was not an "advertising or selling, or soliciting" in violation of subsection (a); (3) thus was not a medium that contains commercially sponsored material or paid advertising under subsection (k); and (4) most importantly, was not exempt under subsection 990(n) because the court would not include videotapes in the definition of "film."<sup>41</sup> The court did not discuss the question of the legislative aims of the subsection (n)(1) exemptions.

The court ruled that Mrs. Astaire's section 990 claim was not preempted by the federal Copyright Act.<sup>42</sup> Moreover, the court held that the First Amendment did not protect Best's use of Astaire's likeness.<sup>43</sup>

Both sides appealed. Mrs. Astaire argued that the district court erred when it concluded that Best's use of the Astaire film clips did not violate the "advertising, selling, or soliciting" prong of subsection (a).<sup>44</sup> Mrs. Astaire further contended that the legislative history of Senate Bill 613, the legislation that enacted section 990 in 1984, supported the district court's conclusion that subsection (n)(1) creates a limited exception for "legitimate historical, fictional, and biographical accounts of deceased celebrities."<sup>45</sup> Best argued in turn that the district court erred when it concluded that its use of the Astaire film clips violated the "on or in products, merchandise, or goods" prong of the section 990(a).<sup>46</sup> Best urged that the district court erred when it concluded that its use of the Astaire film clips was not exempt under subsection (n).<sup>47</sup>

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40. *See id.* at \*17.

41. *See id.* at \*6.

42. *See id.*

43. *See id.*

44. *See id.* at \*7.

45. *See id.* at \*17.

46. *See id.* at \*7.

47. *See id.*

### C. Ninth Circuit Holding

The Ninth Circuit reversed the district court's decision. Judge Wiggins wrote for the panel, holding that Best's use of Astaire's image was exempt from liability pursuant to subsection (n). The Court did not reach the other issues, reasoning that once it ruled on the subsection (n) exemption issue, it needed to go no further.<sup>48</sup>

Mrs. Astaire petitioned for rehearing and suggested rehearing en banc. Judge Wiggins, again writing for the same three-judge panel, amended his opinion on February 19, 1998, affirming its holding in its entirety but specifying that the "holding in this case is narrow and driven by the unusual facts" presented.<sup>49</sup>

The Ninth Circuit found that the use of Fred Astaire film clips in a commercial dance instructional videotape was exempt from liability under subsection (n) because the clips were used to advertise the video itself, rather than another product. The court based its decision on statutory interpretation, which it conducted de novo.

#### 1. *Scope of Subsection (n)(1)*

The court first found that videotapes were included within the meaning of "film" under subsection (n)(1), which expressly exempts use in a "film" or "television program," but not a "videotape." The court reasoned that to interpret subsection (n)(1) to exempt a film or television program but not a videotape would create an "absurd result" where a motion picture would be exempt from section 990 liability when it is shown in a theater or on cable television but not when someone rents it at a video store and plays it on a VCR. In addition, it found subsection (n)(1) appeared to be inconsistent with subsection (i), which defines "photograph" broadly to include "any photographic reproduction, still or moving, of any video tape or live television transmission" for purposes of identifying the deceased personality. The court concluded that it would be "anomalous if the definition of photograph included a videotape recording of a film but 'film' did not."<sup>50</sup>

#### 2. *Advertising Exemptions Under Subsection (n)*

Next, the court considered the advertisement exemptions under subsections (n)(1) and (n)(4). The court read subsection (n)(4) on its face to exempt advertisements and commercial announcements for uses permitted under subsection (n)(1). The court reasoned that, because Best's video-

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48. *See id.*

49. *See id.* at \*16.

50. *See id.* at \*12-13.

tapes were among the uses exempted by the first prong of subsection (n)(1), subsection (n)(4) applied, even if Best's use of the Astaire film clips were an advertisement or a commercial announcement. Without deciding the issue, the court assumed that Best's use was an advertisement or commercial announcement, in which case the use was only "an advertisement for the videotapes themselves rather than some other product."<sup>51</sup>

### 3. *Legislative Intent*

In support of its interpretation, the court concluded that the Legislature's removal of the broad constitutional protection language from amended versions of Senate Bill 613 demonstrated an intent "to adopt a broader exemption that was not limited to constitutionally protected uses."<sup>52</sup> Thus the legislative history would not support Mrs. Astaire's contentions that the (n)(1) exemptions were limited to "legitimate historical, fictional, and biographical accounts of deceased celebrities."<sup>53</sup>

### D. *Dissenting Opinion*

The dissent by Judge Schroeder assailed both the majority's reading of the statute as well as the commercial implications of the holding. The dissent assumed without deciding that subsection (n)(1) includes videotapes within the meaning of "film." However, the dissent argued that subsection (n)(4) exempts only those advertisements or commercial announcements for which there was a separate use of the persona.

The dissent focused on the notion of when a name or likeness is used "in" something. Subsection (n) provides that liability does not attach to use "in any" play, film, etc.<sup>54</sup> The footage of Astaire, the dissent urged, was not used "in" the dance instruction body of the video; rather, it was merely "prefatory" to promote the "accompanying" videotape which did not otherwise use Astaire's image. The dissent reasoned that had the clip been "physically separated" from the underlying medium, it would be clear that the clip was a commercial announcement of something unrelated to any exempted use.<sup>55</sup>

Furthermore, the dissent criticized the result that would arise from the majority's reasoning. One could with impunity "hawk a videotape on fashion for the next century by introducing it with footage of Jacqueline

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51. *See id.* at \*14.

52. *See id.* at \*20.

53. *Id.* at \*17.

54. CAL. CIV. CODE § 990(n) (emphasis added).

55. *Astaire*, 1997 U.S. App. LEXIS 40083, at \*28 (Schroeder, J., dissenting).

Kennedy.”<sup>56</sup> The dissent urged that the policy underlying the statute was intended to “prevent such exploitation, not immunize it.”<sup>57</sup>

#### IV. DISCUSSION

*Astaire* was anomalous in its result and erroneous in its reasoning. In this informational age of electronic and digital commerce, the dichotomy between commercial products and expressive/informational media is less and less tenable. Applying the logic of *Astaire* would eviscerate section 990.

##### A. Scope of Subsection (n)(1)

The court misconstrued statutory text and intent to include videotapes within the meaning of “film” under subsection (n)(1). In considering whether “videotape” is encompassed by “film,” the court argued that it would be “anomalous if the definition of photograph included a videotape recording of a film but ‘film’ did not.” But the court failed to grasp how the nature of videotapes could logically be treated differently under section 990.

The court’s facile analogy was flawed because section 990 provides cogent reasons for the distinctions. Subsection (i) is concerned with cataloging a genus of reproductive media (of which photographs, films, videotapes are species) in which the identification of a person could be an issue. As such, photographs, films, and videotapes are all qualitatively alike in that they could reproduce and contain infringing images. On the other hand, subsection (n) is normative in scope; it seeks to exempt specific media in which the infringing use of a persona would be irrelevant. As such, it is logically consistent for the legislature to deem some media (such as film) deserving of protection, while others (photographs and videotapes) not, even though all these media could reproduce the identical content. Films are exempt under subsection (n)(1) as film per se, not as a reproductive medium. There is no logical contradiction in the fact that section 990 could analytically group films, videotapes, and photographs in one subsection but not in another.

The court’s error permeated the rest of its reasoning. For example, the court argued that it would be absurd that a television program shown at home would be exempt whereas a videotape of that same program played at home would not. That argument rested on dubious grounds: (1) there is

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56. *Id.*

57. *Id.*

no other motivating basis for differentiating videotapes from broadcast works aside from their content; and (2) an anachronistic reading of legislative intent.

The identical content in videotaping and broadcasting belies an enormous commercial difference. The content of a videotape that is being broadcast could be duplicated for free by the public. Demand for the actual product may diminish because the public has either taken the information or deemed the information not worthy of the price. The content of a videotape being broadcast is like the content of a television program or film similarly disseminated. A decision to disseminate the content of the videotape would depend on commercial rather than technical feasibility. It is not obvious that merchandisers would choose to broadcast a videotape. Thus it is logical that the legislature should exempt a medium based on some commercial factor rather than the medium's content.

Section 990's disparate treatment of videotapes is not only logically consistent, it is historically consistent as well. S.B. 613 was introduced in 1983, before the United States Supreme Court's decision in *Sony Corp. v. Universal City Studios, Inc.*<sup>58</sup> At the time section 990 was drafted, the issue was not settled over the First Amendment and commercial implications of home videotaping. It was until almost a year after S.B. 613 was introduced before the United States Supreme Court found that home use recording of material broadcast over the airwaves "served the public interest in increasing access to television programming, an interest that is consistent with the First Amendment policy."<sup>59</sup> *Sony* also held that in-home videotaping, or "time-shifting for private home use must be characterized as a noncommercial, nonprofit activity ... that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work." Given the historical context, the California Legislature could have reasonably excluded videotapes from subsection (n)(1). If there are convincing textual, logical, or commercial reasons to include videotapes among the (n)(1) exemptions, the *Astaire* court did not provide them.

#### **B. Advertising Exemptions under Subsection (n)**

The *Astaire* court did not seem to appreciate the full reach and import of its holding. On the one hand, the court averred that its holding was "narrow and driven by the unusual facts,"<sup>60</sup> implicitly acknowledging that the result it reached was anomalous. At the same time, the court stressed that its holding was based on de novo interpretation of the statute, aimed at

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58. 464 U.S. 417 (1984).

59. *Id.* at 425 (citation omitted).

60. *Astaire*, 1997 U.S. App. LEXIS 40083, at \*16.

being "reasonable" and "conform[ing] to the spirit of the act."<sup>61</sup> The court would have its holding to be both narrow and generally applicable.

First of all, the court maintained that its holding was limited to the unusual facts that: (1) Astaire had licensed the use of his name to the dance studios; (2) the film clips that Best used were in the public domain; and (3) the videotapes were related to the licensed use.<sup>62</sup> The first factor is irrelevant because the statutory exemptions presume unauthorized use. The second factor is insubstantial because the use of computer-generated images of celebrities based solely on the animator's artistic skills would evade copyright claims. The third factor would contradict the core of the holding, which is, that the plain meaning of subsection (n)(1) does not require any relatedness between the use and the celebrity. Finally, the court protested that to hold otherwise would unwisely require courts to "make a content-based decision every time."<sup>63</sup> Yet the court engaged in precisely this kind of content-based judgment in holding for Best.

At the same time, the court insisted that its holding was based on the "ordinary and usual meaning"<sup>64</sup> of the statute. If the court is right that all it had done was determine the meaning of the "plain language" of the statute,<sup>65</sup> then the apparently clear intent and logic of the statute should always apply no matter what the facts are. Thus the same statutory reading that compelled the results in *Astaire* should equally compel the results in a different case.

Nonetheless, the court wrote assuredly that no "absurdity ... will arise from our interpretation."<sup>66</sup> But it is far from obvious that *Astaire's* interpretation of section 990, taken to its logical conclusions, could foreclose incongruous consequences. One logical result, the dissent suggested, is that a celebrity's name and photograph could now be used freely to advertise any film, however unconnected to the celebrity.<sup>67</sup> Among other implications of *Astaire* is that the extent of the use of the persona becomes irrelevant. One could splice a two second shot of a celebrity into a film and then use the persona extensively for later advertising. One could merely mention the name of a celebrity in passing in the exempted medium and then use extensively other aspects of that persona to advertise that exempted medium. For example, Best could have said in the narrated por-

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61. *Id.* at \*12 (citations omitted).

62. *Id.* at \*16.

63. *Id.*

64. *Id.* at \*22.

65. *Id.* at \*16.

66. *Id.*

67. *Id.* at \*28.

tion of the videotape, "Fred Astaire was a legendary dancer," with nothing more, and presumably, that would be enough to trigger the exemption to use the images of Astaire in subsequent advertising. Second, since the advertisement does not have to be separated from the product under *Astaire*, every self-advertising (n)(1) product would be exempt (for example, every how-to magazine, self-help book, instructional videotape that co-opted a deceased celebrity's persona). Similarly, pure advertisements would be exempt (for example, an infomercial for Best's videotapes). Because a large quantity of advertising takes place in a (n)(1) medium, subsection (n) would, in effect, exempt most uses.<sup>68</sup>

The court summarily dismissed any possibility of absurdity; but it could only do so by insisting that the holding be limited to the particular facts of *Astaire*.<sup>69</sup> To be sure, later courts can always limit the holding of *Astaire*, but not if they remain faithful to the reasoning of the holding, which is presumably mandated by the "plain meaning" of section 990.

The court adhered to the tenet that statutory interpretation should not "result in absurd consequences which the Legislature did not intend."<sup>70</sup> By explicitly limiting its holding, the court implicitly recognized the absurdity that could result from its reading of subsection (n)(1). The court wished to back away from its holding at the very moment that the logical consequence of its "plain meaning" interpretation of subsection (n)(1) threatened to undermine the intent of section 990.

### C. Legislative Intent

The court argued that because the Legislature removed the broad constitutional protection language from amended versions of Senate Bill 613, it demonstrated an intent to adopt a broader exemption that was not limited to constitutionally protected uses. The court argued that "the evolution of subsection (n) demonstrates that the interpretation of the statute we conclude is required by the plain language is consistent with the Legislature's intent."<sup>71</sup>

But the court construed legislative history as casually as it did statutory text. The crux of the criticism coming from the staff reports to S.B. 613 questioned the relevancy of the constitutional language not the legitimacy of the constitutional intent. The staff report argued that as a matter of litigation practicality and jurisprudential reality, "irrespective of this stated intent [of S.B. 613], a defendant who has used a person's name,

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68. See Weinstein, *supra* note 14, at 213.

69. *Astaire*, 1997 U.S. App. LEXIS 40083, at \*16.

70. *Id.* at \*12 (citation omitted).

71. *Id.* at \*20.

voice, etc. without authorization may assert a First Amendment privilege. Is not this section of the bill superfluous?"<sup>72</sup> Also, a staff report criticized the vagueness of the phrase "similar medium of expression."<sup>73</sup> Thus, far from demonstrating an intent to broaden the scope of exemption, the legislative evolution of the text of subsection (n)(1) instead reveals the stripping away of supposedly irrelevant language from a list of core First Amendment media. Still, even if the scope of exemptions could be broadened, logically, it would be the species of each of the enumerated media, not the genus of all media that could be analogized to the enumerated media. So while "film" would be broadened to include all films, irrespective of content or purpose, "film" would not be broadened to include videotapes.

The court paid scant attention to the very structure of section 990, which is permeated by the legislature's attempt to reconcile the tension between proprietary rights and First Amendment protection. It is a tension that arises out of the California Supreme Court's jurisprudence on descendible publicity rights. Section 990 as a whole distinguishes between commercial products and expressive media.<sup>74</sup> Accordingly, subsection 990(a) only protects against unauthorized use in "products, merchandise, or goods." Thus subsection (n)(1) can be read to codify *Lugosi's* concerns over informational media.<sup>75</sup> It follows that subsection (n)(4) should codify the *Guglielmi* concern about advertising in connection with commercial products and expressive media.<sup>76</sup> Thus subsection (n)(1) distinguishes between advertisements for the enumerated exempted media and all other advertisements, the former of which is then exempted by subsection

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72. STAFF REPORT, *supra* note 29, at 2.

73. *Id.* (as amended June 18, 1984), at 6.

74. In her *Lugosi* dissent, Chief Justice Bird drew the First Amendment boundary for use "in connection with the sale of such objects as plastic toy pencil sharpeners .... Such conduct hardly implicates the First Amendment." *Lugosi v. Universal Pictures*, 603 P.2d 425, 449 (Cal. 1979) (Bird, C.J., dissenting). This "unauthorized exploitation of plaintiffs' proprietary interest in these commercial merchandising products is no[t] ... insulated from suit by the constitutional guarantees of freedom of expression." *Id.* (Bird, C.J., dissenting).

75. The California Supreme Court noted, in connection with its concerns about the "free dissemination of ideas," that "there is no common law right of action for a publication concerning one who is already dead." *Id.* at 429 (quoting PROSSER, LAW OF TORTS 815 (4th ed. 1971)).

76. Chief Justice Bird, in her concurring opinion in *Guglielmi* exempted a use "to advertise [a] particular film ... not a case in which a celebrity's name is used to promote or endorse a collateral commercial product or is otherwise associated with a product or service in an advertisement." *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454, 457 n.6 (Cal. 1979) (Bird, C.J., concurring).

(n)(4). Similarly, subsection (k) forbids advertising use in a "commercial medium."

#### D. Property and Privacy Rights

Offering policy justifications, the Court echoed the same dispute that animated the *Lugosi* majority and dissent: property rights versus privacy rights. The Ninth Circuit was not troubled by Best's profit motives, recognizing that Best placed these film clips in its videotapes to make the videotapes more salable.<sup>77</sup> In short, the court held that whether the use was included "to increase the marketability of a product cannot be the test" of whether it is exempt from section 990 liability.<sup>78</sup> Rather, the court was satisfied by the fact that Best's use "did not subject Fred Astaire to abuse or ridicule ... like the exploitative marketing" uses proscribed by legislative intent.<sup>79</sup> It is remarkable that *Astaire* should reclaim the doctrine of privacy rights in the service of interpreting section 990 in order to deny Mrs. Astaire's post-mortem property rights claim. The property doctrine of publicity rights was to have been firmly established with the enactment of section 990.

#### V. CONCLUSION

There is little disagreement that subsection (n) is poorly drafted, if not incorrectly drafted, in light of its manifest First Amendment goals. But whether the language of subsection (n) compels the *Astaire* interpretation is far from self-evident given the court's flawed rationale. The court's reading fails its own self-directed test of avoiding absurd consequences, and thus does not make the case for a decisive interpretation of subsection (n).

It is an ongoing question whether subsection (n) achieves its First Amendment purposes or overprotects. *Astaire* shows that when the medium/product does not fall into traditional categories and significant financial interests are at stake, even a clear rule like (n)(1) will do nothing to dissuade the persistent plaintiff or deter the profit-oriented defendant. As Internet technology blurs the line between commerce, entertainment, and information, the boundaries of subsection (n)(1) will continue to be tested for First Amendment use as well as for descensible publicity rights.

It remains to be seen whether other courts will follow *Astaire* in expansively reading the (n)(1) exemptions to go beyond videotapes. By *As-*

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77. *Astaire*, 1997 U.S. App. LEXIS 40083, at \*2.

78. *Id.*

79. *Id.*

*taire's* reasoning, Internet web sites, CD-ROMS, and other multi-media products could all be analogized to "film," "videotape," or "television program." Internet web sites and tied-in off-line multi-media products are particularly compatible to the kind of self-referential uses of advertising permitted in *Astaire*. The World Wide Web is a medium that tends to collapse the differences among the advertising function, expressive content, and commercial purpose of a product. Indeed, cyberspace transactions involve less the commerce of products than the sale of entertainment and information. The demarcation that section 990 attempts to make, between commercial and informational media, becomes increasingly untenable in the Internet age.

To be sure, courts will have to steer between the Scylla of subsection (a) and the Charybdis of subsection (n) to safeguard the competing interests of publicity and First Amendment rights. On the one hand, if courts strictly read the (n)(1) exemptions to exclude any new media, then the First Amendment protection will become increasingly irrelevant, because what could otherwise be classified as a First Amendment media would be subsumed under the category of "product" or "merchandise" under subsection (a). On the other hand, if courts continue to expansively construe the (n)(1) exemptions, then the publicity rights protection will also become increasingly diluted, because what could otherwise be classified as a merchandise or product would be subsumed under the category of (n)(1) media.

The Legislature should amend subsection (n) to recuperate the excised language of First Amendment protection. The legislative report criticizing the original language assumed too much. Defendants have indeed availed themselves to the First Amendment defense regardless of the constitutional language; but the court has been equally disinclined to find such legislative intent without that language. Subsection (n) should be a rule of construction, rather than a per se exemption to section 990. Subsection (n) would then be a savings clause to assure that section 990 is not construed to reach constitutionally protected speech.

Absent such an amendment, courts will have to continue to balance First Amendment rights against rights of heirs to control the publicity rights of their ancestors. Every decision may well rehearse the debate over descendible publicity rights that section 990 was supposed to have resolved more than a decade ago.

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