

ASSEMBLY BILL

No. 585

Introduced by Assembly Member Duvall

February 25, 2009

An act to amend Section 3344.1 of the Civil Code, relating to deceased personalities.

LEGISLATIVE COUNSEL'S DIGEST

AB 585, as introduced, Duvall. Deceased personalities.

Existing law establishes a cause of action for damages on behalf of specified injured parties for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness for commercial purposes within 70 years of the personality's death, except as specified. Existing law defines "deceased personality" for purposes of these provisions as any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services.

This bill would expand that definition of "deceased personality" for purposes of these provisions to include any natural person whose name, voice, signature, photograph, or likeness has commercial value either at the time of his or her death, or because of his or her death.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 3344.1 of the Civil Code is amended to read:

3344.1. (a) (1) 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 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. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use and the person who violated the section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party or parties in any action under this section shall also be entitled to attorney's fees and costs.

(2) For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

(3) If a work that is protected under paragraph (2) includes within it a use in connection with a product, article of merchandise, good, or service, this use shall not be exempt under this subdivision, notwithstanding the unprotected use's inclusion in a work otherwise exempt under this subdivision, if the claimant proves that this use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of

1 advertising, selling, or soliciting purchases of that product, article
2 of merchandise, good, or service by the deceased personality
3 without prior consent from the person or persons specified in
4 subdivision (c).

5 (b) The rights recognized under this section are property rights,
6 freely transferable or descendible, in whole or in part, by contract
7 or by means of any trust or any other testamentary instrument,
8 executed before or after January 1, 1985. The rights recognized
9 under this section shall be deemed to have existed at the time of
10 death of any deceased personality who died prior to January 1,
11 1985, and, except as provided in subdivision (o), shall vest in the
12 persons entitled to these property rights under the testamentary
13 instrument of the deceased personality effective as of the date of
14 his or her death. In the absence of an express transfer in a
15 testamentary instrument of the deceased personality's rights in his
16 or her name, voice, signature, photograph, or likeness, a provision
17 in the testamentary instrument that provides for the disposition of
18 the residue of the deceased personality's assets shall be effective
19 to transfer the rights recognized under this section in accordance
20 with the terms of that provision. The rights established by this
21 section shall also be freely transferable or descendible by contract,
22 trust, or any other testamentary instrument by any subsequent
23 owner of the deceased personality's rights as recognized by this
24 section. Nothing in this section shall be construed to render invalid
25 or unenforceable any contract entered into by a deceased
26 personality during his or her lifetime by which the deceased
27 personality assigned the rights, in whole or in part, to use his or
28 her name, voice, signature, photograph, or likeness, regardless of
29 whether the contract was entered into before or after January 1,
30 1985.

31 (c) The consent required by this section shall be exercisable by
32 the person or persons to whom the right of consent, or portion
33 thereof, has been transferred in accordance with subdivision (b),
34 or if no transfer has occurred, then by the person or persons to
35 whom the right of consent, or portion thereof, has passed in
36 accordance with subdivision (d).

37 (d) Subject to subdivisions (b) and (c), after the death of any
38 person, the rights under this section shall belong to the following
39 person or persons and may be exercised, on behalf of and for the

benefit of all of those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights:

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

(2) The entire interest in those rights belong to the surviving children of the deceased personality and to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren.

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

(4) The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable in the manner provided in Section 240 of the Probate Code according to the number of the deceased personality's children represented. The share of the children of a dead child of a deceased personality can be exercised only by the action of a majority of them.

(e) If any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary instrument, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate.

(f) (1) A successor in interest to the rights of a deceased personality under this section or a licensee thereof may not recover damages for a use prohibited by this section that occurs before the successor in interest or licensee registers a claim of the rights under paragraph (2).

(2) Any person claiming to be a successor in interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and upon payment of a fee as set forth in subdivision (d) of Section 12195 of the Government Code. The form shall be verified and shall include the name and

1 date of death of the deceased personality, the name and address
2 of the claimant, the basis of the claim, and the rights claimed.

3 (3) Upon receipt and after filing of any document under this
4 section, the Secretary of State shall post the document along with
5 the entire registry of persons claiming to be a successor in interest
6 to the rights of a deceased personality or a registered licensee under
7 this section upon the ~~World Wide Web, also known as the~~
8 *Secretary of State's Internet Web site*. The Secretary of State may
9 microfilm or reproduce by other techniques any of the filings or
10 documents and destroy the original filing or document. The
11 microfilm or other reproduction of any document under the
12 provisions of this section shall be admissible in any court of law.
13 The microfilm or other reproduction of any document may be
14 destroyed by the Secretary of State 70 years after the death of the
15 personality named therein.

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

18 (g) ~~No~~ *An* action shall *not* be brought under this section by
19 reason of any use of a deceased personality's name, voice,
20 signature, photograph, or likeness occurring after the expiration
21 of 70 years after the death of the deceased personality.

22 (h) As used in this section, "deceased personality" means any
23 natural person whose name, voice, signature, photograph, or
24 likeness has commercial value at the time of his or her death, *or*
25 *because of his or her death*, whether or not during the lifetime of
26 that natural person the person used his or her name, voice,
27 signature, photograph, or likeness on or in products, merchandise,
28 or goods, or for purposes of advertising or selling, or solicitation
29 of purchase of, products, merchandise, goods, or services. A
30 "deceased personality" shall include, without limitation, any such
31 natural person who has died within 70 years prior to January 1,
32 1985.

33 (i) As used in this section, "photograph" means any photograph
34 or photographic reproduction, still or moving, or any video tape
35 or live television transmission, of any person, such that the
36 deceased personality is readily identifiable. A deceased personality
37 shall be deemed to be readily identifiable from a photograph ~~when~~
38 *if* one who views the photograph with the naked eye can reasonably
39 determine who the person depicted in the photograph is.

1 (j) For purposes of this section, ~~a~~ *the* use of a name, voice,
2 signature, photograph, or likeness in connection with any news,
3 public affairs, or sports broadcast or account, or any political
4 campaign, shall not constitute a use for which consent is required
5 under subdivision (a).

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

15 (l) Nothing in this section shall apply to the owners or employees
16 of any medium used for advertising, including, but not limited to,
17 newspapers, magazines, radio and television networks and stations,
18 cable television systems, billboards, and transit ads, by whom any
19 advertisement or solicitation in violation of this section is published
20 or disseminated, unless it is established that the owners or
21 employees had knowledge of the unauthorized use of the deceased
22 personality's name, voice, signature, photograph, or likeness as
23 prohibited by this section.

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

26 (n) This section shall apply to the adjudication of liability and
27 the imposition of any damages or other remedies in cases in which
28 the liability, damages, and other remedies arise from acts occurring
29 directly in this state. For purposes of this section, acts giving rise
30 to liability shall be limited to the use, on or in products,
31 merchandise, goods, or services, or the advertising or selling, or
32 soliciting purchases of, products, merchandise, goods, or services
33 prohibited by this section.

34 (o) Notwithstanding any provision of this section to the contrary,
35 if an action was taken prior to May 1, 2007, to exercise rights
36 recognized under this section relating to a deceased personality
37 who died prior to January 1, 1985, by a person described in
38 subdivision (d), other than a person who was disinherited by the
39 deceased personality in a testamentary instrument, and the exercise
40 of those rights was not challenged successfully in a court action

1 by a person described in subdivision (b), that exercise shall not be
2 affected by subdivision (b). In ~~such a~~ *that* case, the rights that
3 would otherwise vest in one or more persons described in
4 subdivision (b) shall vest solely in the person or persons described
5 in subdivision (d), other than a person disinherited by the deceased
6 personality in a testamentary instrument, for all future purposes.

7 (p) The rights recognized by this section are expressly made
8 retroactive, including to those deceased personalities who died
9 before January 1, 1985.