

ASSEMBLY BILL

No. 2480

Introduced by Assembly Member Bass

February 19, 2010

An act to amend Section 3344 of the Civil Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 2480, as introduced, Bass. Privacy: commercial use of minor's photograph.

Under existing law, a person who knowingly uses another'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 that person's prior consent, or, in the case of a minor, the prior consent of his or her parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof and for the payment to the injured party of any profits attributable to that unauthorized use.

Existing law provides that a person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, or knowingly trespasses or commits assault with the intent to capture, as specified, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, as specified. Existing law also provides that a person is liable for constructive invasion of privacy for the first sale, offer for sale, transmission, publication, broadcast, or other use of any visual image, sound recording, or other physical

impression, if the person sold, transmitted, published, broadcast, or used any image or recording of the type described in the provision above with actual knowledge that the images or recordings were obtained in violation of that provision and provided compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression. If the plaintiff proves the invasion of privacy was committed for a commercial purpose, the defendant is subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of these provisions.

This bill would provide that any person who knowingly uses any photograph or likeness of a minor for commercial purposes, as defined, without consent, shall be liable for any damages sustained by the person or persons injured as a result thereof and for the payment to the injured party of any profits attributable to that unauthorized use.

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

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

1 SECTION 1. Section 3344 of the Civil Code is amended to
2 read:
3 3344. (a) ~~Any~~A person who knowingly uses another’s name,
4 voice, signature, photograph, or likeness, in any manner, on or in
5 products, merchandise, or goods, or for purposes of advertising or
6 selling, or soliciting purchases of, products, merchandise, goods,
7 or services, *or uses any photograph or likeness of a minor for*
8 *commercial purposes, as defined in subdivision (k) of Section*
9 *1708.8, without such that* person’s prior consent, or, in the case
10 of a minor, the prior consent of his *or her* parent or legal guardian,
11 shall be liable for any damages sustained by the person or persons
12 injured as a result thereof. In addition, in ~~any~~ *an* action brought
13 under this section, the person who violated the section shall be
14 liable to the injured party or parties in an amount equal to the
15 greater of seven hundred fifty dollars (\$750) or the actual damages
16 suffered by him or her as a result of the unauthorized use, and any
17 profits from the unauthorized use that are attributable to the use
18 and are not taken into account in computing the actual damages.
19 In establishing ~~such~~ *those* profits, the injured party or parties are
20 required to present proof only of the gross revenue attributable to

1 ~~such~~ *the* use, and the person who violated this section is required
2 to prove his or her deductible expenses. Punitive damages may
3 also be awarded to the injured party or parties. The prevailing party
4 in any action under this section shall also be entitled to attorney's
5 fees and costs.

6 (b) As used in this section, "photograph" means—~~any a~~
7 photograph or photographic reproduction, still or moving, or—~~any~~
8 videotape or live television transmission, of—~~any a~~ person, such
9 that the person is readily identifiable.

10 (1) A person shall be deemed to be readily identifiable from a
11 photograph when one who views the photograph with the naked
12 eye can reasonably determine that the person depicted in the
13 photograph is the same person who is complaining of its
14 unauthorized use.

15 (2) If the photograph includes more than one person so
16 identifiable, then the person or persons complaining of the use
17 shall be represented as individuals rather than solely as members
18 of a definable group represented in the photograph. A definable
19 group includes, but is not limited to, the following examples: a
20 crowd at—~~any a~~ sporting event, a crowd in—~~any a~~ street or public
21 building, the audience at—~~any a~~ theatrical or stage production, a
22 glee club, or a baseball team.

23 (3) A person or persons shall be considered to be represented
24 as members of a definable group if they are represented in the
25 photograph solely as a result of being present at the time the
26 photograph was taken and have not been singled out as individuals
27 in any manner.

28 (c) ~~Where~~—~~If~~ a photograph or likeness of an employee of the
29 person using the photograph or likeness appearing in the
30 advertisement or other publication prepared by or in behalf of the
31 user is only incidental, and not essential, to the purpose of the
32 publication in which it appears, there shall arise a rebuttable
33 presumption affecting the burden of producing evidence that the
34 failure to obtain the consent of the employee was not a knowing
35 use of the employee's photograph or likeness.

36 (d) For purposes of this section, ~~a~~ *the* use of a name, voice,
37 signature, photograph, or likeness in connection with any news,
38 public affairs, or sports broadcast or account, or—~~any a~~ political
39 campaign, shall not constitute a use for which consent is required
40 under subdivision (a).

1 (e) The use of a name, voice, signature, photograph, or likeness
2 in a commercial medium shall not constitute a use for which
3 consent is required under subdivision (a) solely because the
4 material containing ~~such~~ *the* use is commercially sponsored or
5 contains paid advertising. Rather it shall be a question of fact
6 whether or not the use of the person's name, voice, signature,
7 photograph, or likeness was so directly connected with the
8 commercial sponsorship, or with the paid advertising, as to
9 constitute a use for which consent is required under subdivision
10 (a). *This subdivision does not apply to the use of any photograph*
11 *or likeness of a minor for commercial purposes, as defined in*
12 *subdivision (k) of Section 1708.8, and for which consent is required*
13 *pursuant to subdivision (a).*

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

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