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80 Cal.Rptr.2d 464

49 U.S.P.Q.2d 1282, 98 Cal. Daily Op. Serv. 9134, 98 Daily Journal D.A.R. 12,735 (Cite as: 68 Cal.App.4th 744, 80 Cal.Rptr.2d 464)

COMEDY III PRODUCTIONS, INC., Plaintiff and Respondent,
v.

GARY SADERUP, INC., et al., Defendants and Appellants.
No. B120382.

Court of Appeal, Second District, Division 2, California.
Dec. 15, 1998.

Owner of statutory right of publicity for deceased personalities sought damages from, and an injunction against, maker of T-shirts and lithographic prints bearing the likenesses of the Three Stooges. The Superior Court, Los Angeles County, No. EC 020205, Carl. J. West, J., awarded damages to owner and ordered a permanent injunction. Maker appealed. The Court of Appeal, Fukuto, J., held that: (1) the T-shirts and prints were “products, merchandise, or goods,” within meaning of right of publicity statute; (2) maker did not establish right to statutory exemption for newsworthy uses; (3) maker’s use of the likenesses was not art or speech protected by federal and state Constitutions; but (4) owner was not entitled to permanent injunction.

Affirmed as modified.

[1] TORTS k8.5(6)
379k8.5(6)

“Right of publicity” involves the right to exploit one’s name and persona commercially and to restrict their commercial appropriation or exploitation by others.

See publication Words and Phrases for other judicial constructions and definitions.

[2] TORTS k8.5(6)
379k8.5(6)

T-shirts decorated with likenesses of deceased personalities were “products, merchandise, or goods,” within meaning of right of publicity statute. West’s Ann.Cal.Civ.Code s 990(a).

See publication Words and Phrases for other judicial constructions and definitions.

[3] TORTS k8.5(6)
379k8.5(6)

Lithographic prints with likenesses of deceased personalities were “products, merchandise, or goods,” within meaning of right of publicity statute. West’s Ann.Cal.Civ.Code s 990(a).

See publication Words and Phrases for other judicial constructions and definitions.

[4] TORTS k8.5(6)
379k8.5(6)

Statutory right of publicity regarding names or likenesses of deceased personalities is not limited to advertising uses. West’s Ann.Cal.Civ.Code s 990(a).

[5] TORTS k8.5(6)
379k8.5(6)

Fact that the Three Stooges may have been newsworthy after their deaths did not establish that T-shirts and lithographs bearing their likenesses were newsworthy, as basis for statutory exemption from right of publicity for deceased personalities. West’s Ann.Cal.Civ.Code s 990(n)(2).

[6] CONSTITUTIONAL LAW k90.1(1)
92k90.1(1)

Commercial use of deceased personalities' likenesses on T-shirts and lithographic prints was not art or speech protected by federal and state Constitutions, as the maker of the T-shirts and prints did not seek to convey or sell a message of any type in or on the T-shirts and prints. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, s 2; West's Ann.Cal.Civ.Code s 990.

[7] CONSTITUTIONAL LAW k90.1(1)
92k90.1(1)

Although the federal and state Constitutions protect speech that is sold, reproductions of an image, made to be sold for profit, do not per se constitute speech. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, s 2.

[8] INJUNCTION k189
212k189

In absence of proof of likelihood that maker of products bearing likenesses of deceased personalities would continue to violate the

statutory right of publicity in the future, permanent injunction against the maker could not be issued. West's Ann.Cal.Civ.Code s 990.

[9] INJUNCTION k189
212k189

Permanent injunction against maker of products bearing likenesses of deceased personalities was overbroad, as the injunction went beyond protecting statutory right of publicity and extended to matters that could involve free speech rights. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, s 2; West's Ann.Cal.Civ.Code s 990.

**465 *746 Cooper, Kardaras & Scharf, Brand Cooper, Pasadena, Victor E. Aguilera, Woodland Hills, Edward C. Wilde, Beverly Hills, and Stuart L. Brody, Sacramento, for Defendants and Appellants.

Benjamin, Lugosi & Benjamin, Bela G. Lugosi, Robert N. Benjamin and Caroline H. Mankey, Glendale, for Plaintiff and Respondent.

*747 FUKUTO, J.

Civil Code section 990 provides for liability for the use of a deceased personality's likeness "on or in products, merchandise, or goods." [FN1] In this case, the trial court rendered judgment for damages under the statute, and an injunction, against an individual and a corporation that had sold lithographed copies of a sketch of the likenesses of three such personalities—the Three Stooges—as well as T-shirts bearing reproductions of the sketch. Appealing, the defendants contend that these uses were exempt from liability under section 990, either by its terms or by reason of constitutional protections of free speech. We affirm the judgment for damages, but modify it to delete the injunctive provisions.

FN1. Undesignated section references are to the Civil Code. Undesignated subdivision references are to section 990.

FACTS

Plaintiff, Comedy III Productions, Inc., brought this action against defendants, Gary Saderup (Saderup) and Gary Saderup, Inc., seeking damages and injunctive relief for violation of section 990 and related business torts. The action was also commenced by an unrelated celebrity, whose claims were settled before trial. Plaintiff's case was tried on **466 stipulated facts, and exhibits, to the following effect.

Plaintiff is the registered owner of all rights, under section 990, to the Three Stooges, who are deceased personalities within the meaning of the section. By his account, Saderup is an artist with substantial experience in doing charcoal sketches of celebrities. These sketches are used to create lithographic and silk screen "masters," which in turn are used to produce multiple reproductions of the sketches, respectively as prints and as images on T-shirts. Saderup is involved in the silk screening and lithographic processes.

Without plaintiff's consent or license, defendants sold prints and T-shirts bearing likenesses of the Three Stooges, derived from a charcoal sketch by Saderup. As exemplified by copies in evidence, the likenesses are representational and unadorned, except by Saderup's signature. Defendants profited \$75,000 from their sales of the prints and T-shirts. Finally, the prints and T-shirts did not constitute an advertisement, endorsement, or sponsorship of any particular product. It was also stipulated that each side in the case had incurred attorney fees of \$150,000.

Based upon these facts, the trial court found that defendants had violated section 990, by engaging, without plaintiff's consent, in a commercial *748 enterprise involving the sale of products using the likeness of the Three Stooges. The court held that the enterprise and sales were not protected by constitutional free speech guarantees. Accordingly, defendants were liable, under section 990, for the \$75,000 profits, and for attorney fees of \$150,000, which the

court found to be reasonable. In addition, the judgment broadly enjoined defendants from utilizing the image of the Three Stooges on lithographs, T-shirts, or other products.

DISCUSSION

1. Section 990.

[1] This case concerns the right of publicity, which involves the right to exploit one's name and persona commercially, and to restrict their commercial appropriation or exploitation by others. In *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425 (Lugosi), our Supreme Court held, to quote a companion case, "that the right of publicity protects against the unauthorized use of one's name, likeness or personality, but that the right is not descendible and expires upon the death of the person so protected." (*Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860, 861, 160 Cal.Rptr. 352, 603 P.2d 454 (Guglielmi).) In 1984, the Legislature, by section 990, extended protection of the right of publicity to the heirs and assignees of "deceased personalities," as defined. (Subd. (h).) [FN2] The same act also amended section 3344, a preexisting provision that affords a similar right of action to living persons.

FN2. Subdivision (h) defines " 'deceased personality' " to mean a person "whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death," whether or not the person used those elements on or in products or for purposes of advertising or selling while living.

Section 990's primary provision 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 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 ©, shall be liable for any damages sustained by the person or persons injured as a result thereof..." (Subd. (a).) The amounts recoverable include "any profits from the unauthorized use that are attributable to the use..." (Ibid.)

Subdivision (b) of section 990 provides that "The rights recognized under this section are property rights, freely transferable, in whole or in part," before or after the deceased personality's death, "by contract or by means of *749 trust or testamentary documents..." Consent for use must be obtained from such a transferee, or, if there is none, from certain described descendants of the decedent. (Subds. ©, (d).) If there is no such transferee or descendant, the rights terminate. (Subd. (e).) All actions

under the statute **467 must be commenced within 50 years after the deceased personality's death. (Subd. (g).) Suit must be preceded by registration with the Secretary of State of the successor in interest's claim to the rights. (Subd. (f).)

Other subdivisions of section 990 provide exemptions from liability or the requirement of consent for use. Under subdivision (j), use of a name, likeness, etc., "in connection with any news, public affairs, or sports broadcast or account, or any political campaign," does not require consent. [FN3] Subdivision (k) provides that use in a "commercial medium" does not require consent solely because the material is commercially sponsored or contains paid advertising. "Rather it shall be a question of fact whether or not the use ... was so directly connected" with the sponsorship or advertising as to require consent. Subdivision (l) exempts from the statute the owners and employees of media used for advertising, unless it is shown that they had knowledge of the unauthorized advertising use as prohibited. Finally, subdivision (n) provides that "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: [p] (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).[p] (2) Material that is of political or newsworthy value. [p] (3) Single and original works of art. [p] (4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3)." [FN4]

FN3. An identical provision appears in section 3344, subdivision (d).

FN4. Subdivision (i) of section 990 defines " 'photograph' " for the statute's purposes. Subdivision (m) states that "The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law."

2. The Statutory Issues.

There is no question regarding several of the elements of liability under section 990 in this case. Plaintiff is the duly registered successor to the rights of the Three Stooges, who are deceased personalities, and defendants used their likenesses on prints and T-shirts without plaintiff's consent. Defendants nevertheless assert that their conduct did not fall within the terms of the statute, for several reasons.

Defendants first contend that their T-shirts and prints were not within the reach of section 990, subdivision (a), because it restricts only the *750 use of a deceased personality's name, likeness, and so forth "on or in products, merchandise, or goods." In other words, the product must be something besides the likeness, which is all, defendants say, that they sold here. We cannot agree.

[2] Defendants' T-shirts, decorated with likenesses of the Three Stooges, unquestionably fall within section 990, subdivision (a)'s broad reference to "products, merchandise, or goods." Although, as noted below, T-shirts have been recognized as media for the display of messages, they still constitute garments, without regard to any words, insignia, or images with which they may be decorated. Use of the Three Stooges' likenesses on defendants' T-shirts therefore was a use on goods or products, just as would be embroidering those likenesses on denim jackets or weaving them into neckties.

[3] The same is true for the lithographic prints. They are tangible, marketable products, consisting of paper, ink, and the imprint of Saderup's charcoal sketch, and amenable to any use to which a buyer may wish to put them. Although the prints do contain the likenesses of the Three Stooges, it is also true that by producing and selling them defendants used those likenesses "on or in products, merchandise, or goods." (Subd. (a).) [FN5]

FN5. Although resort to legislative history is not necessary for our application of section 990, we note that a legislative staff report, generated during consideration of the bill that enacted the statute, observed that the objects of the bill included deceased celebrity " 'posters, T-shirts, porcelain plates, and other collectibles.' " (Assem. Com. on Judiciary, Staff Report on

Sen. Bill No. 613 (1983-1984 Reg. Sess.) June 18, 1984, p. 4; see *Astaire v. Best Film & Video Corp.* (9th Cir.1997) 116 F.3d 1297, 1303.)

**468 [4] Defendants' broader contention that section 990, subdivision (a) addresses only advertising uses of name or likeness is entirely unfounded. The subdivision speaks of uses both "on or in products" and "for purposes of advertising or selling ... products...." Defendants' argument that the first phrase is redundant of the second, and therefore the statute must be read as limited to advertising uses, is incorrect, both verbally and practically. There is an obvious difference between, for example, placing a celebrity's name on a "special edition" of a vehicle, and using that name in a commercial to endorse or tout the same or another vehicle. (Cf. *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 503, 134 Cal.Rptr. 668, 556 P.2d 1119.) The statute plainly covers both types of uses. [FN6]

FN6. Defendants cite *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417, 198 Cal.Rptr. 342, to the effect that the companion section, section 3344, is limited to advertising uses. But *Eastwood* was decided before the Legislature, in 1984, amended section 3344, adding to it "on or in products" language identical to that of section 990, subdivision (a). (See s 3344, subd. (a).)

[5] Defendants also contend that their uses of the Three Stooges' likenesses did not violate section 990 by reason of subdivision (n)(2), which *751 provides that the statute shall not apply to use of a deceased personality's name, likeness, etc., in "Material that is of political or newsworthy value." Defendants argue that this exemption applies because the Three Stooges presently remain newsworthy. We find this argument unsupported by the statutory text and its manifest purpose.

The exemption declared by section 990, subdivision (n)(2) does not hinge simply on whether a deceased personality is "newsworthy."

If it did, the successors of any celebrity who could so be deemed would have no rights at all under section 990. Rather, subdivision (n)(2) speaks of "Material that is ... newsworthy...." Read in conjunction with the rest of the subdivision, subdivision (n)(2) contemplates an exemption for uses of name and likeness in or in connection with newsworthy material, not an open-ended right to use the likenesses of newsworthy individuals.

Defendants' principal case authorities confirm this. In *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 18 Cal.Rptr.2d 790 (*Dora*), this court considered a suit for commercial appropriation of name, voice, and likeness, under common law and section 3344, brought by a retired expert surfer against the producers of a video documentary about the early days of surfing at Malibu. We affirmed a judgment for the defendant, because the film and its content qualified for established public interest and public affairs (s 3344, subd. (d)) exemptions from liability, which we also analyzed under the rubric of "newsworthy." (*Dora*, supra, at pp. 542-546, 18 Cal.Rptr.2d 790.) It was the public interest of the subject matter, and its presentation using the plaintiff's voice and likeness, that provided the basis for exemption of those uses from liability.

Similarly, in *Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 40 Cal.Rptr.2d 639 (*Montana*), the quarterback for the San Francisco 49'ers sued under section 3344 on account of posters which reproduced his likeness as shown on newspaper pages that reported and celebrated a string of Super Bowl victories. The court affirmed summary judgment for the newspaper, on grounds that "The Posters Reported on Newsworthy Events." (*Montana*, supra, at p. 794, 40 Cal.Rptr.2d 639.) Applying both the common law doctrine relied on in *Dora*, supra, 15 Cal.App.4th 536, 18 Cal.Rptr.2d 790 and parallel First Amendment considerations, the court focused on the newsworthiness of the events in which the plaintiff was involved, not his own popularity, as precluding liability. (*Montana*, supra, at pp. 794-796, 40 Cal.Rptr.2d 639; see *id* at p. 797, 40 Cal.Rptr.2d 639 ["the First Amendment protects the posters ... because the posters themselves report newsworthy items of public interest...."].)

The exemption by section 990, subdivision (n)(2) of uses in newsworthy material reflects the same concerns—with allowing commercial breathing *752 space for dissemination of knowledge—that the foregoing cases applied to remedies for commercial use of living personalities' likenesses. Here too, the subject of the exemption is newsworthy material, not **469 just newsworthy individuals. Although the one may engender the other, it is far too simple, and defies the statutory language and purpose, to say that defendants' prints and T-shirts were "newsworthy material" simply because the Three Stooges may yet be "newsworthy." We therefore reject defendants' contention of exemption under subdivision (n)(2). [FN7]

FN7. Citing *Welton v. City of Los Angeles*, supra, 18 Cal.3d at p. 504, 134 Cal.Rptr. 668, 556 P.2d 1119, defendants qualify their own argument by asserting that section 990, subdivision (n)(2)'s exemption for "newsworthy" material cannot constitutionally be applied, because that would be a "content-based" regulation of speech. (See *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 244-247, 74 Cal.Rptr.2d 843, 955 P.2d 469 (conc. opn. of Kennard, J.)) But this assertion begs the question discussed in the next section of this opinion: whether defendants' uses of the Three Stooges' likenesses constitute constitutionally protected speech.

3. The Free Speech Issue.

[6] Defendants contend that their uses of the Three Stooges' likenesses constitute a form of speech, protected by the First

Amendment to the United States Constitution and article I, section 2 of the California Constitution (collectively First Amendment), and hence that as applied to these uses section 990 constitutes a presumptively impermissible, content-based restriction. For the reasons that follow, we conclude that defendants' uses are not so protected, and therefore the First Amendment does not preclude liability for them under section 990.

With reference first to the T-shirts, defendants note that contemporary federal cases have recognized that T-shirts may serve as "a medium of expression prima facie protected by the free-speech clause of the First Amendment." (*Ayres v. City of Chicago* (7th Cir.1997) 125 F.3d 1010, 1014; see also *Gaudiya Vaishnava Soc. v. City of San Francisco* (9th Cir.1990) 952 F.2d 1059, 1063-1065.) But the T-shirts in those cases carried "messages," and it was the presence of these "political, religious, philosophical or ideological message[s]" (*id.* at p. 1063) that rendered the shirts a First Amendment medium and invoked constitutional and judicial protection. [FN8] The same holds true with respect to the vulgar protest of the draft that was held protected when displayed on a jacket in *Cohen v. California* (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284.

In the present case, however, there is neither contention nor demonstration that defendants sought to convey or sell a message of any type in or on their T-shirts, or for that matter their prints. With respect to both, defendants have expressly averred that what *753 they sold was no more or less than the Three Stooges' likenesses. (Cf. Brockum Co., A Div. of Krimson Corp. v. Blaylock (E.D.Pa.1990) 729 F.Supp. 438, 446 ["The unauthorized printing on defendant's T-shirts of the name 'The Rolling Stones' is a violation of the right of publicity of that musical performing group."].)

FN8. It goes without saying that this list does not exhaust the types of communication subject to First Amendment protection.

The distinction, for First Amendment purposes, between using a celebrity's image to convey an informational or other type of message and merely selling a representation of the image, has been drawn and observed in cases involving claims that posters bearing celebrity likenesses or photographs infringed the right of publicity. As previously discussed, in *Montana*, supra, 34 Cal.App.4th 790, 40 Cal.Rptr.2d 639, the court held nonactionable the use of Joe Montana's likeness on posters that reported newsworthy events. The court cited *Paulsen v. Personality Posters, Inc.* (1968) 59 Misc.2d 444, 299 N.Y.S.2d 501, in which a comedian who had conducted a mock presidential campaign was denied an injunction against the selling of posters bearing his photograph and the legend, "FOR PRESIDENT." Those posters were held to be "sufficiently relevant to a matter of public interest to be a form of expression which is constitutionally protected...." (Id. at p. 450, 299 N.Y.S.2d at p. 508; cf. *Cardtoons v. Major League Baseball Players* (10th Cir.1996) 95 F.3d 959 [use of players' likenesses on trading cards which parodied the players not actionable].) On the other hand, in *Factors etc., Inc. v. Pro Arts, Inc.* (2d Cir.1978) 579 F.2d 215, 222, the court distinguished *Paulsen* and upheld a preliminary injunction **470 against a poster of Elvis Presley, bearing the words, " 'IN MEMORY' " and the singer's years of birth and death, ruling that it was a mere use of likeness and "not privileged as celebrating a newsworthy event."

Chief Justice Bird drew the same distinction in her separate opinions in *Lugosi*, supra, 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425, and *Guglielmi*, supra, 25 Cal.3d 860, 160 Cal.Rptr. 352, 603 P.2d 454, which were joined respectively by two and (on the First Amendment issues) three other justices. (See id. at p. 876, 160 Cal.Rptr. 352, 603 P.2d 454.) The Chief Justice espoused a broad First Amendment exemption from right of publicity liability for the use of deceased celebrity names and likenesses in expressive

communication. (Guglielmi, supra, at pp. 865-870, 160 Cal.Rptr. 352, 603 P.2d 454 (conc. opn. of Bird, C.J.)) However, the opinions distinguished non- informational, commercial uses such as on T-shirts, as “hardly implicat[ing] the First Amendment.” (Lugosi, supra, at p. 851, 160 Cal.Rptr. 323, 603 P.2d 425 (dis. opn. of Bird, C.J.); see Guglielmi, supra, at p. 874, 160 Cal.Rptr. 352, 603 P.2d 454 (conc. opn. of Bird., C.J.))

Defendants contend, however, that reproductions of their likenesses of the Three Stooges, based on Saderup’s charcoal sketch of the trio, must command full First Amendment protection, as art. Defendants rely principally on *754 Bery v. City of New York (2d Cir.1996) 97 F.3d 689 (Bery), in which a municipal law requiring permits for street vending of goods was held unconstitutional in its application to a group of painters, sculptors, and photographers. Rejecting the trial court’s view that the plaintiffs’ artwork merited only a secondary level of constitutional protection, the Court of Appeals opined that “Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.” (Id. at p. 695, fn. omitted.) The court observed that the communicative power of art may occasionally surpass that of the written word, both in directness of expression and in the number of persons who may be reached. (Ibid.) Having so ruled, the court found the ordinance invalid as applied to the plaintiffs, because it discriminated by content (written matter having been exempted), effectively prohibited the plaintiffs from selling, and was not narrowly drawn.

[7] Defendants’ effort to apply Bery, supra, 97 F.3d 689, and its protection of art to their multiple reproductions for sale of the Three Stooges’ likenesses is unpersuasive, because it essentially proves too much. First, that the original image from which those reproductions were made may have been individually drawn does not, necessarily or demonstrably, render them expressive of any message, idea, emotion—or anything, other than the likenesses of the Three Stooges. Second, to say that defendants’ T-shirts and prints must be constitutionally considered art, because they reproduce a sketch, would in essence mean that the First Amendment would shield virtually any representation of likeness from coverage by section 990. A recent decision applying section 3344 noted that “a likeness is a visual image of a person other than a photograph....” (Newcombe v. Adolf Coors Company (9th Cir.1998) 157 F.3d 686, 693.) Moreover, the uses of likeness on target games, pencil sharpeners and swizzle sticks, which were dismissed by three justices in Lugosi, supra, as “hardly implica[ting] the First Amendment” (25 Cal.3d at p. 851, 160 Cal.Rptr. 323, 603 P.2d 425 (dis. opn. of Bird., C.J.); see also Guglielmi, supra, 25 Cal.3d at p. 874, 160 Cal.Rptr. 352, 603 P.2d 454 (conc. opn. of Bird, C.J.)), could well have been derived from hand-drawn or otherwise personally rendered originals. Simply put, although the First Amendment protects speech that is sold (e.g., Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal.3d 501, 509, 217 Cal.Rptr. 225, 703 P.2d 1119), reproductions of an image, made to be sold for profit, do not per se constitute speech.

Defendants make a correlative argument, with respect to subdivision (n)(3) of section 990, which exempts uses of deceased personalities’ likenesses in “Single and original works of fine art.” Defendants note that section 982, subdivision © provides that upon an artist’s sale of a work of *755 fine art, as broadly defined in section 982, subdivision (d)(1), the “right of reproduction” (as defined **471 in section 982, subdivision (d)(3)) remains with the artist, unless otherwise transferred. Defendants therefore argue that section 990, subdivision (n)(3)’s “single and original” exemption constitutes a conflicting and unconstitutional quantitative limitation of artists’ rights to reproduce and sell their work.

This argument begs the question. First, section 982, subdivision © does not purport to confer an omnibus right to reproduce and sell. It provides who shall have the right of reproduction, and it must be read in harmony with the subsequently enacted section 990. Second, assuming arguendo that Saderup’s charcoal sketch falls within the broad definition of “fine art” in section 982, subdivision (d)(1), that does not necessarily render sale of reproductions of it subject to First Amendment protection. The Civil Code also contains other definitions of “fine art” that are limited to original works. (ss 986, subd. ©(2), 987, subd. (b)(2), 989, subd. (b)(1).) Defendants have still

failed to establish that their commercial reproductions of Saderup's sketch constitute art or speech as a constitutional matter.

The statute at issue in this case, section 990, does not seek to regulate protected speech, but rather to secure and protect a declared interest in property. (Subd. (b).) In so doing, section 990 resembles the nation's copyright, patent, trademark and tradename laws. That resemblance was noted by the United States Supreme Court, in its one decision that considered, and rejected, a First Amendment defense to liability for infringement of the right of publicity. (*Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, 576-577, 97 S.Ct. 2849, 53 L.Ed.2d 965.) Section 990 nonetheless makes plentiful allowance for uses of deceased personalities' likenesses that could summon First Amendment protection. The statute exempts newsworthy material, as well as a host of other expressive materials and media. (Subds.(j), (k), (l), (n).) These exemptions have been perceived as intended in some respects to exceed the requirements of the First Amendment. (*Astaire v. Best Film & Video Corp.*, supra, 116 F.3d at p. 1303.) Defendants' products, however, do not fall within any of them. Instead, defendants seek protection for nothing more than the general sale of likenesses of the Three Stooges—that is, plaintiff's property. Defendants have not shown, and we cannot conclude, that this commercial appropriation constitutes protected speech.

4. The Injunction.

Defendants' final contention is that plaintiff did not establish entitlement to injunctive relief, and that the injunctive portions of the judgment are overbroad. With this contention we agree.

*756 The complaint in this case alleged that defendants had refused plaintiff's demands to cease using the Three Stooges' likenesses, and that plaintiff was undergoing irreparable injury from those uses. Plaintiff prayed generally for temporary and permanent injunctive relief, as well as damages. No motion for temporary restraining order or preliminary injunction appears to have followed. At trial, the stipulated evidence, previously summarized, did not reflect a threat of continuing or expanded use by plaintiff. Nevertheless, the court in its oral decision announced that it would issue a permanent injunction, enjoining defendants from violating section 990 "through the use of the likeness of the Three Stooges, either in lithographs, T-shirts or any other medium by which the defendant, Gary Saderup's art work may be sold or marketed."

The final judgment, prepared by plaintiff, went further. In addition to the court's language, the judgment in paragraph 2(A)(ii) enjoined defendants from "Creating, producing, reproducing, copying, distributing, selling or exhibiting any lithographs, prints, posters, t-shirts, buttons, or other goods, products or merchandise of any kind, bearing the photograph, image, face, symbols, trademarks, likeness, name, voice or signature of The Three Stooges or any of the individual members of The Three Stooges." [FN9]

FN9. Specifically excepted was Saderup's single charcoal sketch from which the reproductions in this case were derived.

[8][9] For several reasons, we agree with defendants that the permanent injunction was inappropriately imposed. First, plaintiff **472 did not prove a likelihood that defendants would continue to violate section 990 in the future. Such a probability of recurrence is generally a prerequisite for permanent injunctive relief. (*Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1658, 39 Cal.Rptr.2d 189; *Donald v. Cafe Royale, Inc.* (1990) 218 Cal.App.3d 168, 184, 266 Cal.Rptr. 804.) Second, the language of paragraph 2(A)(ii) extends beyond the terms and subject matter of section 990, and the issues in this case, to "symbols" and trademarks. It also addresses all "goods, products, or merchandise," without regard to the exceptions of section 990, subdivision (n). Third, by covering all such items, their creation, exhibition, and sale, and "any other medium by which [Saderup's] art work may be sold," the injunction could extend to matters and conduct protected by the First Amendment, along with unprotected activity. Accordingly, we shall modify the judgment to eliminate its injunctive provisions. [FN10]

FN10. Notwithstanding this disposition, plaintiff remains the prevailing party in the action, with respect to attorney fees on appeal. (See s 990, subd. (a).)

*757 DISPOSITION

The judgment is modified by deleting paragraph 2, and as modified is affirmed. Plaintiff shall recover costs.

BOREN, P.J., and ZEBROWSKI, J., concur.

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Citation: 80 Cal.Rptr.2d 464

Print Command: Current document,
Complete result

Number of Lines Delivered: 542

Number of Lines Charged: 542

Number of Documents Delivered: 1

Number of Documents Charged: 0