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CIVIL CODE

DIVISION 4. General Provisions

PART 1. Relief

TITLE 2. Compensatory Relief CHAPTER 2. Measure of Damages

ARTICLE 2. Damages for Wrongs

Cal Civ Code § 3344 (1995)

§ 3344. Unauthorized commercial use of name, voice, signature, photograph or likeness

(a) Any 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 such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, 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 him or her 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 such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this 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 in any action under this section shall also be entitled to attorney's fees and costs.

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

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

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

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

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

(d) 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).

(e) 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 it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness 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) .

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

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

**HISTORY:**

Added Stats 1971 ch 1595 § 1.  
Amended Stats 1984 ch 1704 ~ 2.

**NOTES:**

was enacted 1872 and

**FORMER SECTIONS:**

Former § 3344, similar in part to present CCP § 1161, repealed by Stats 1961 ch 792 § 2 p 2045. Prior Law:  
Field's Draft NY CC § 1868.

**AMENDMENTS:**

1984 Amendment: (1) Amended subd (a) by (a) substituting "voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or

selling, or soliciting for

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"photograph, or likeness, in any manner, for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of" in the first sentence; (b) substituting "equal to the greater of seven hundred fifty dollars (\$ 750) or the actual damages suffered by him or her 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*" for "no less than three hundred dollars (\$ 300)" in the second sentence; and (c) adding the third, fourth, and fifth sentences; (2) added "voice, signature," after "use of a name," in subds (d) and (e) and after "the person's name," in subd (f); (3) substituted "which consent is required under subdivision (a)" for "purposes of advertising or solicitation" wherever it appears in subds (d) and (e); (4) substituted "person's name, voice, signature, photograph," for "complainant's name, photograph" in the second sentence of subd (e); and (5) *substituted "networks and stations, cable television systems" for "stations" in subd (f).*

**CROSS REFERENCES:**

Unauthorized commercial use as to deceased personality: CC § 990. Detriment defined: CC § 3282.

Recovery for injuries subsequent to or during suit: CC § 3283. Interest as damages: CC §§ 3287 et seq. Exemplary damages: C~ ~ 3z~ et seq.

Damages for breach of obligation other than contract: CC § 3333. Estimations of value: CC §§ 3353 et seq. Exclusiveness of damages: CC § 3357.

Limitation on recovery of damages: CC ~ 3358, 3359.

Nominal damages: CC ~ 3360.

Preventive relief: CC 3§ 3368, 3369, 3420 et seq.

Restrictions *on* actions and recovery for invasion of privacy: CC § 3425.3. Invasion of privacy: Pen C §§ 630 et seq.

**COLLATERAL REFERENCES:**

130.

Witkin Procedure (3d ed) Pleading § 696.

Witkin Summary (9th ed) Contracts ~ 856, Torts §§ 589 et seq. Witkin Summary {8th ed) pp 2203, 2603--2605. cal Jur 3d (Rev) Assault and Other Wilful Torts § 112, 118, 121, 124, Cal Jur 3d Damages ~ 47.

Cal Digest of Official Reports 3d Series, Privacy § 4.

Cal Practice §§ 236:1 et seq.

**FORMS:**

Am Jur Pl & Pr Forms (Rev ed) Privacy Forms 31 et seq.

**LAW REVIEW ARTICLES:**

Traps for the *Unwary*: Avoiding Some Common *Mistakes in Intellectual Property Law*. 27 Bev Hills B J 89 (Spring, 1993).

Are the California right of publicity statutes unconstitutional?: A second look at some First Amendment problems. 20 Bev Hills BJ 234.

Commercial appropriation of name or likeness in California revisited.  
Hills BJ 192.

22 Bev

Look what they've done to my song (suits by celebrities against those

imitating their voices or images in California). 9 Cal Law No. 7 p 43.

Interactive multimedia: What is it, why is it important and what do I *need to* know about it?: *11*  
*Computer LJ 585.*

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A comparative analysis of name and likeness rights in the United States and England. 18 *Golden Gate LR 301*.

White v. Samsung Electronics America, Inc.: The wheels of justice take an unfortunate turn. 23 *Golden Gate LR 299*.

waits v. Frito-Lay, Inc.: Ninth Circuit reaffirms viability of voice misappropriation as a California tort. 23 *Golden Gate LR 299*.

§ Shopping for the California right of publicity. 16 *Hast Com Ent LJ 151*.

Preventing the misappropriation of identity: Beyond the "right of publicity." 13 *Hast Comm/Ent LJ 489*.

Commercial appropriation of name or likeness: Section 3344 and the common law. 52 *LA BJ 430*.

"Do you want to dance" around the law? Learn the latest steps (about the right of publicity) from the Ninth Circuit in *Midler v. Ford Motor Company*. 23 *Loyola of LA LR 601*.

Commercial appropriation of an individual's name, photograph or likeness. 3

*Pacific LJ 651*.

Review of Selected 1984 Legislation. 16 *Pacific LJ 725*.

Restricting the use of "sound-alikes" in commercial speech by amending the right of publicity statute in California. 26 *San Diego LR 911*.

Posthumous right of publicity: jurisdictional conflict and a proposal for solution. 24 *Santa Clara L Rev 111*.

*Apple Corp. v. Leber*: Did Beatlemania infringe the Beatles' right of publicity? 17 *Southwestern U LR 756*.

Transfer of the right of publicity: Dracula's progeny and privacy's stepchild. 22 *UCLA LR 1103*.

**ANNOTATIONS:**

Invasion of privacy by sale or rental of list of customers, subscribers, or the like, to one who will use it for advertising purposes. 82 *ALR3d 772*.

Publication of address as well as name of person as invasion of privacy. 84 *ALR3d 1159*.

Right to publicize or commercially exploit deceased person's name or likeness as inheritable. 10 *ALR4-h 1193*.

Liability for injuries inflicted by dog on public officer or employee. 74 *ALR4th 1120*.

**NOTES OF DECISIONS**

An action for damages for invasion of the right of privacy brought by a family on the basis of defendants' reprinting, in a college English textbook, of a magazine article concerning the finding by the father of the family of nearly a quarter of a million dollars and his return of the money to its owner, could not be said to fall within the purview of Civ. Code, § 3344, subd. (a), relating to liability for appropriation of a person's name or likeness for commercial purposes. The article was used only as an educational tool, and it obviously was not a primary reason for the textbook, or a substantial factor in students' purchases of the book. *Johnson v Harcour[, Brace, Jovanovich, Inc. (1974) 43 CA3d 880, 118 Cal Rpr 370*.

The common law protection against an invasion of privacy by the appropriation of one's name or likeness has been complemented, not codified, by Civ. code, § 3344. One difference between a common law action and an action under the statute is that the statute requires a knowing use, whereas mistake and inadvertence are not a defense against commercial appropriation under case law. In

addition, the

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statute expressly provides that its remedies are cumulative and in addition to any provided for by law. *Eastwood v Superior Court (1983, 2d Dist) 149 Cal App 3d 409, 198 Cal Rptr 342.*

A common law cause of action for appropriation of one's name or likeness may be pleaded by alleging the defendant's use of the plaintiff's identity; the appropriation of the plaintiff's name or likeness to the defendant's advantage, commercially or otherwise; lack of consent; and resulting injury. In order to plead the statutory remedy provided in Civ. Code, § 3344, there must also be an allegation of a knowing use of the plaintiff's name, photograph, or likeness for purposes of advertising or the solicitation of purchases. Furthermore, a direct

connection must be alleged between the use and the commercial purpose.

*Eastwood*

*v Superior Court (1983, 2d Dist) 149 Cal App 3d 409, 198 Cal Rptr 342.*

In an action by an entertainer against a publication based on its unauthorized use of plaintiff's name, photograph, and likeness on its cover and in related telecast advertisements in connection with a nondefamatory article false but presented as true, the trial court erred in sustaining, without leave to amend, a demurrer to a cause of action alleging commercial appropriation of the right of publicity, where the alleged use constituted commercial exploitation, and where it was not exempt from liability as a news account (Civ. Code, § 3344, subd. (d)), and was not privileged or protected by constitutional considerations. Civ. Code, § 3344, subd. (d), as it pertains to news, does not provide an exemption from liability for infringement of the right of publicity for a knowing or reckless falsehood. Nor does the First Amendment immunize a publisher when an entire article is allegedly false. Although the requisite scienter allegations had not been incorporated by reference into the cause of action at issue, such defect was capable of being cured by amendment. *Easgwood v Superior Court (1983, 2d Dist) 149 Cal App 3d 409, 198 Cal Rptr 342.*

In a photographer's action against a magazine for unauthorized publication of a photograph, the photographer's claims for violation of his right of privacy and for commercial appropriation under Civil Code ~ 3344 were properly dismissed, where the photographer had previously published the photograph himself. *Brewer v Wusler Magazine, Inc. (1984, CA9 Cal) 749 F2d 527.*

The elements of a common law cause of action for invasion of privacy for misappropriation of name may be pleaded by alleging the defendant's use of the plaintiff's identity, the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise, lack of consent, and resulting injury. In addition, to plead the statutory remedy provided in Civ. Code, § 3344, there must also be an allegation of a knowing use of the plaintiff's name for purposes of advertising or solicitation of purchases. Furthermore, an additional judicially construed requirement of § 3344 is that a direct connection be alleged between the use and the commercial purpose. *Slivinsky v Welkins-Johnson Co. (1990, 6th Dist) 221 Cal App 3d 799, 270 Cal Rptr 585.*

In an action against the producer of a surfing documentary for the unauthorized use of plaintiff's name, voice, and likeness, the trial court properly granted summary judgment as to plaintiff's statutory cause of action for appropriation (Civ. Code, § 3344), since the use of plaintiff's name and likeness was among the uses exempt from consent under Civ. Code, § 3344, subd. (d). Specifically, the surfing documentary fell under the category of "public affairs" referred to in Civ. code, § 3344, subd. (d), which do not constitute a use for which consent is required. Surfing has created a lifestyle that influences speech, behavior, dress, and entertainment, among other things. A phenomenon of such scope has an economic impact, since it affects purchases, travel, and the housing market. Surfing has also had a significant influence on the popular culture, and in that way touches many people. *Dora v Frontline*



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*Video, Inc. (1993, 2nd DisT) 15 Cal App 4th 536, 18 Cal Rptr 2d 790.*

Civ. Code, § 3344, subd. (d) (exceptions to requirement of consent for commercial use of name, voice, signature, photograph, or likeness), distinguishes Between news and public affairs. It may be presumed that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, thereby resulting in a reading that courts are not entitled to give to the statute. It may also be presumed that the term "public affairs" was intended to mean something less important than news. Public affairs must be related to real life occurrences. The public is interested in and constitutionally entitled to know about things, people, and events that affect it. For that reason, courts cannot limit the term "public affairs" to topics that might be covered on public television or public radio. To do so would be to jeopardize society's right to know, since publishers and broadcasters could then be sued for use of name and likeness in documentaries on subjects that do not relate to politics or public policy, and may not even be important, but are of interest. *Dora v Frontline Video, Inc. (1993, 2nd Dist) 15 Cal App 4th 536, 18 Cal Rptr 2d 790.*

A cause of action for common law misappropriation of a plaintiff's name or likeness may be pleaded by alleging: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's name or likeness to the defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. However, no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it. Furthermore, a matter in the public interest is not restricted to current events, but may extend to the reproduction of past events. In addition to the common law cause of action, California also has a statutory cause of action for misappropriation (Civ. Code, § 3344). The statutory cause of action complements rather than codifies common law misappropriation. Like the common law cause of action, the statutory cause of action specifically exempts from liability the use of a name or likeness in connection with the reporting of a matter in the public interest. *Montana v San Jose Mercury News, Inc. (1995, 6th Disr) 34 Cal App 4th 790, 40 Cal Rptr 2d 639.*

In an action by a professional football player against a newspaper for common law and statutory (Civ. Code, § 3344) commercial misappropriation of his name, photograph, and likeness, after the newspaper reproduced in poster form certain previously published pages for sale to the general public, the trial court properly granted summary judgment for the newspaper. The newspaper accounts of two Super Bowls and four championships in a single decade by plaintiff's team constituted publication of matters in the public interest entitled to U.S. Const., 1st Amend., protection. The relatively contemporaneous reproduction of the pages, in poster form, for resale, was similarly entitled to First Amendment protection. This was because plaintiff's name and likeness appeared in the posters for the same reason they appeared on the original newspaper pages: plaintiff was a major player in contemporaneous newsworthy sports events. Also, the newspaper had a right to republish its stories to show the quality of its work product. A person's photograph originally published in one issue of a periodical as a newsworthy subject (and therefore exempt from the statutory prohibitions) may be republished in another medium as an advertisement for the periodical itself, without the person's written consent. The posters were exact reproductions of pages from the paper, and they did not state or imply that plaintiff endorsed the newspaper. The newspaper also submitted evidence showing it set the price of the posters with the intent simply to recover its costs. *Montana v San Jose Mercury News, Inc. (1995, 6th Dist) 34 Cal App 4th 790, 40*