

FIRST AMENDMENT  
LAW LETTER

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FEDERAL COURT LIMITS GRAND  
JURY SUBPOENA TO PROTECT  
PRIVACY OF READING CHOICES**By Laura R. Handman and David M. Shapiro**

The United States District Court for the Western District of Wisconsin (Magistrate Judge Stephen Crocker) held, in a recently unsealed opinion, that where a grand jury subpoena seeks names and other identifying information of individuals who purchased particular books, CDs, and DVDs online, the government must make a heightened showing of need for the subpoenaed information. The subpoena in issue would have required Amazon.com, Inc. ("Amazon") to provide the names and other identifying information of individuals who, in over 24,000 online transactions, purchased expressive works through a third-party seller using Amazon's Marketplace feature. In place of the subpoena, the court devised a voluntary solution in which Amazon customers would have the option of contacting the government if they wished to participate in the grand jury investigation. The government withdrew the subpoena before this mechanism was implemented.

The decision, *In re Grand Jury Subpoena to Amazon.Com Dated August 7, 2006*, 2007 WL 4197490 (W.D. Wis. June 26, 2007) ("Amazon case"), is a significant addition to the limited jurisprudence regarding grand jury subpoenas that threaten to reveal private reading choices. In requiring the government to present a rigorous justification for the subpoena, and in crafting a creative solution designed to avoid revealing the names of Amazon customers against their will, the decision vindicates "the more commonly shared notion that living in the land of the free means that it's none of the government's business what books people are reading."<sup>1</sup>

[\(CONTINUED ON NEXT PAGE\)](#)SLAPP MOTIONS IN FEDERAL  
COURT: IS IMMEDIATE  
APPELLATE REVIEW STILL THE  
ORDER OF THE DAY?**By Andrew J. Thomas**

Since the California Legislature's enactment of the anti-SLAPP statute in 1992, SLAPP motion practice in California courts has spread like kudzu. California tribunals for the most part have turned aside attempts to limit the statute's reach, rejecting arguments that the law should apply only to suits by large companies against individuals or to suits in which the plaintiff acts with an intent to chill speech.<sup>1</sup> In 1997, the Legislature amended the statute to provide expressly that it should be construed broadly. It is not surprising, then, that the past 10 years have produced more than 275 California appellate decisions on the anti-SLAPP statute alone.<sup>2</sup>

Over that same decade, defendants have increasingly invoked the anti-SLAPP statute in federal courts, following Ninth Circuit decisions holding that some of its most attractive features—including fee-shifting and an immediate appeal from the denial of an anti-SLAPP motion—apply in federal court as well as

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## PRIVACY OF READING CHOICES

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Against the backdrop of *Branzburg v. Hayes*, 408 U.S. 665 (1972), and the D.C. Circuit's recent rejection of a reporter's privilege in the grand jury context, *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006), the decision also underscores the vitality of the First Amendment right to anonymous speech, even in the face of a grand jury's sweeping powers. This article outlines prior judicial decisions that explore the conflict between grand jury subpoena power and the right to read expressive works privately, and then analyzes the court's solution to this problem in the recent Amazon case.

### Grand jury subpoena power

The "ancient role" of the grand jury requires it both to "determin[e] if there is probable cause to believe that a crime has been committed" and to "protect [ ]citizens against unfounded criminal prosecutions."<sup>2</sup> "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'<sup>3</sup> Such inquiry requires broad power, and the grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation. ..."<sup>4</sup>

In light of this broad investigative power, "many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings."<sup>5</sup> Under Federal Rule of Civil Procedure 17(c), the burden of resisting a grand jury subpoena lies with the recipient, and the subpoena will be quashed only if "there is *no reasonable possibility* that the category of materials the Government seeks will produce information relevant to the *general subject* of the grand jury's investigation."<sup>6</sup> While a grand jury may not "engage in arbitrary fishing expeditions, nor ... select targets of investigation out of malice or an intent to harass,"<sup>7</sup> judicial review of a grand jury subpoena is quite limited.

The grand jury's subpoena power can overcome even certain First Amendment interests. The majority opinion in *Branzburg* rejected the argument that grand jury subpoenas should be subjected to more searching review where they would reveal a reporter's confidential sources. Justice Powell provided a fifth vote for the opinion but also wrote a concurrence which, in a seeming departure from the

majority opinion's wholesale rejection of the reporter's privilege in the grand jury setting, instructed courts to apply a case-by-case balancing test. The apparent contradiction between Justice Powell's stated position in his concurrence and his decision to join the majority sparked continuous debate over what exactly *Branzburg* meant, but the D.C. Circuit recently stated in categorical terms, "the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or ... otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source .... Without doubt, that is the end of the matter."<sup>8</sup> According to the D.C. Circuit, "whatever Justice Powell specifically intended, he joined the majority [in *Branzburg*]," which rejected even a qualified reporter's privilege in the face of a grand jury subpoena.<sup>9</sup> The Supreme Court declined to review the *Miller* decision, leaving until another day the question of whether a qualified reporter's privilege exists under the First Amendment or at common law. Though *In re Miller* no doubt represents a setback for First Amendment rights in the grand jury context, neither *In re Miller* nor *Branzburg* addresses the freedom to read privately. That right retains much of its force, even when it collides with a grand jury subpoena.

### Right to read privately

The Supreme Court addressed the right to read anonymously in *United States v. Rumely*, 345 U.S. 41 (1953), in which the House Select Committee on Lobbying issued a subpoena to the Committee for Constitutional Government (CCG), demanding the names of contributors who provided money for the organization to distribute books and pamphlets, either to the contributors themselves or to others. In his concurrence, Justice Douglas issued a powerful defense of the right to read free of government scrutiny:

Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. ... Fear of criticism goes with every person into the bookstall. ... Some will fear to read what is unpopular, what the powers-that-be dislike. ... [F]ear will take the place of freedom in the libraries, book stores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press.

*Id.* at 57-58 (Douglas, J., concurring).<sup>10</sup>

A similar concern that fear of government retaliation would chill speech animated the decision in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), where the Court considered a federal statute that required the post office to hold any mail determined to be "communist political propaganda" until the intended recipient identified himself or herself by affirmatively requesting delivery. The Court held that the statute violated the First Amendment, stating "[t]his requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions."<sup>11</sup>

In addition to concerns about chilling reading choices, the right to enjoy expressive works anonymously may also be said to reflect three other First Amendment principles. First, as a corollary of the right to speak, the Supreme Court has recognized a right to know that protects the receipt of information. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[i]t is now well established that the Constitution protects the right to receive information and ideas"); *Lamont*, 381 U.S. at 306 (requirement that individuals identify themselves to receive communist mailings constitutes improper attempt to "control the flow of ideas to the public").

Second, the right to receive information "takes on an added dimension" in private contexts such as the home, for "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley*, 394 U.S. at 565 (holding that although states may prohibit public distribution of obscene material, they may not criminalize private possession).

Third, the rights of free speech and association encompass a right to engage in anonymous expressive activity. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (striking down state statute prohibiting distribution of anonymous campaign literature on First Amendment grounds); *Shelton v. Tucker*, 364 U.S. 479, 479 (1960) (invalidating Arkansas statute requiring public school teachers to disclose the organizations to which they belong).

When a grand jury subpoena demands information that would identify individuals who purchased expressive works, the stage is set for a showdown between First Amendment rights and the sweeping powers and investigatory functions of the grand jury. Confronted with

such situations, courts have reached divergent results as to whether the government must make a heightened showing of need for the information in issue. In *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 Med. L. Rptr. 1599 (D.C. 1998), the court considered a motion to quash a grand jury subpoena to an innocent third-party bookstore, which subpoena requested "all documents and things relating to any purchase by Monica Lewinsky." There, the independent counsel wished to investigate Ms. Lewinsky's reading choices to corroborate allegations of a sexual affair with the President of the United States. Finding that disclosure of a patron's choice of books would have a chilling effect on First Amendment rights, the court applied a heightened standard of scrutiny, requiring the government to show a "compelling need for the materials" sought and "a sufficient connection between the information sought and the grand jury's investigation." *Id.* at 1601.

Courts have also imposed a heightened standard where state agency subpoenas and search warrants threaten the anonymous enjoyment of expressive materials. In *Lubin v. Agora, Inc.*, 882 A.2d 833, 846 (Md. 2005), the Maryland Court of Appeals required the government to "establish a substantial relation between the information sought and an overriding and compelling State interest," where the agency subpoena in issue sought "subscriber lists, marketing lists, and other documents containing information identifying any ... subscribers" to an investment newsletter.<sup>12</sup> The Court imposed this heightened standard because "[e]nforcement of the subpoenas would intrude upon the First Amendment rights of [the publisher's] subscribers and customers."<sup>13</sup>

The Colorado Supreme Court imposed a similar heightened standard on a search warrant seeking a bookseller's records on a specific customer in *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1053 (Colo. 2002), stating, "the First Amendment embraces the individual's right to purchase and read whatever books she wishes to, without fear that the government will take steps to discover which books she buys, reads, or intends to read."

Not all courts have imposed a heightened standard on the government where a grand jury subpoena trenches on private enjoyment of expressive works. The grand jury in *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229 (4th Cir. 1992), subpoenaed records of businesses that allegedly distributed obscene material.<sup>14</sup> Although it "appear[ed] that the government may really be after ... customer

lists," the Fourth Circuit refused to subject the subpoena to a substantial relationship test that would require the government to "establish[ ] that the subpoena served a compelling governmental interest and requested evidence substantially related to the investigation."<sup>15</sup> That said, the Fourth Circuit did express concern with the First Amendment implications of the subpoena, stating "we are not prepared to rubber-stamp every subpoena of business records of a commercial enterprise that distributes material in a presumptively protected medium. There would be a serious danger of prosecutorial abuse if a grand jury could subpoena the business records of any enterprise in the country on the flimsiest of connections to the judicial district in which the prosecutor operates."<sup>16</sup> Furthermore, while the Fourth Circuit rejected a heightened standard because "*Branzburg* controls here," the court also applied Justice Powell's concurrence in *Branzburg* by "balanc[ing] the possible constitutional infringement and the government's need for documents."<sup>17</sup>

#### **Recent opinion in *In re Grand Jury Subpoena to Amazon.com* dated Aug. 7, 2006**

The Amazon case began when the government issued a subpoena to Amazon, seeking records regarding a seller account on Amazon Marketplace, a feature that connects Amazon customers with third party sellers of books, CDs and DVDs. The account belonged to Robert D'Angelo, the target of a grand jury investigation, and the government hoped to contact D'Angelo's Amazon Marketplace customers as potential witnesses against him. D'Angelo, the former director of a leading performing arts center in Madison, Wisconsin, has since been indicted on 39 counts, including mail fraud, wire fraud, and filing false income tax returns.

The subpoena would have required Amazon to produce the names and other identifying information of individuals who purchased expressive works, including potentially sensitive books such as *Mein Kampf*, *Praying with Icons*, and *The Gay Book of Lists*, in more than 24,000 online transactions. While complying with the subpoena to the extent it sought non-identifying information about D'Angelo's online sales, Amazon resisted producing information that would identify individuals who purchased particular expressive works. Amazon moved to quash the subpoena based on the First Amendment rights of its customers to enjoy expressive works anonymously.

The motion to quash was heard by Magistrate Judge Stephen L. Crocker of the United States

District Court for the Western District of Wisconsin. The court stated that "the subpoena is troubling because it permits the government to peek into the reading habits of specific individuals without their prior knowledge or permission."<sup>18</sup> While acknowledging that the Supreme Court did not require a heightened showing of need by the government in *Branzburg* and *R. Enterprises*, Judge Crocker also observed that "the [Supreme] Court has implied that lower courts should be mindful of any non-speculative First Amendment concerns when determining motions to quash subpoenas."<sup>19</sup> Thus, "if the witness demonstrates a legitimate First Amendment concern raised by the subpoena, then the government must make an additional showing that the grand jury actually needs the disputed information," regardless of "[w]hether one calls this a 'substantial relationship' test, or a 'compelling interest' test."<sup>20</sup>

The court deemed it "an unsettling and un-American scenario to envision federal agents nosing through the reading lists of law-abiding citizens while hunting for evidence against somebody else." While stating that it had "no concerns about the government's good faith and intent," the court expressed serious concern over the potential chilling effects of the subpoena:

[I]f word were to spread over the Net—and it would—that the FBI and the IRS had demanded and received Amazon's list of customers and their personal purchases, the chilling effect on expressive e-commerce would frost keyboards across America. Fiery rhetoric quickly would follow and the nuances of the subpoena (as actually written and served) would be lost as the cyber-debate roiled itself to a furious boil. One might ask whether this court should concern itself with blogger outrage disproportionate to the government's actual demand of Amazon. The logical answer is yes, it should: well-founded or not, rumors of an Orwellian federal criminal investigation into the reading habits of Amazon's customers could frighten countless potential customers into canceling planned online book purchases, now and perhaps forever.<sup>21</sup>

The court then found, on the basis of an *ex parte* hearing and *ex parte* affidavit submitted by the government, that the government had shown a "bona fide investigative need" to contact at least some individuals who purchased expressive works on Amazon. While refusing to



quash the subpoena outright, the court stated, "implicitly and logically, the reviewing court should use its discretion to fashion a solution that accommodates the legitimate needs of both the grand jury and the protesting witness."<sup>22</sup> Accordingly, the court devised a "filtering mechanism," in which Amazon would send customers a packet consisting of a letter from Amazon, a letter from the United States Attorney's Office, and a copy of an order from the court. Recipients would be invited to voluntarily contact the government, but "[a]nyone who wishes *not* to participate in this exercise, by virtue of his or her silence, will be left alone, and the government will never learn that person's identity or the titles of materials he/she purchased from D'Angelo through Amazon."<sup>23</sup>

Soon after the court outlined this voluntary mechanism, but before it was implemented, the government moved to withdraw the subpoena, explaining its reasons for doing so in an *ex parte* affidavit. The court responded to the government's motion to withdraw with a second order, stating that "[t]he grand jury does not need court permission to withdraw a subpoena" but that withdrawal is "a logical and prudent decision under the circumstances."<sup>24</sup> Without revealing the reason for the withdrawal, the court stated, "if the government had been more diligent in looking for work-arounds instead of baring its teeth when Amazon balked, it's probable that this entire First Amendment showdown could have been avoided. That said, it appears nevertheless that the government has proceeded at all times in good faith."<sup>25</sup>

The court's two orders, as well as Amazon's and the government's papers, were filed under seal, although Amazon filed a motion to unseal along with its motion to quash the subpoena. The court denied this initial motion to unseal. Once the grand jury returned the indictment, however, Amazon again moved to unseal its papers and the court's orders. The court then unsealed nearly all of Amazon's filings and its orders, and then granted the government's subsequent request to unseal some of its filings.

### Conclusion

Despite the grand jury's expansive investigatory power, and decisions such as *Branzburg* and *In re Miller* that hold such power categorically trumps certain First Amendment rights, the freedom to enjoy expressive works anonymously does not necessarily wither in the face of a grand jury subpoena. The recent Amazon case adds to the growing body of decisions that prevent the government from "look[ing] over the shoulder of everyone who reads," and

"hold[ing] a club over speech and over the press." *Rumely*, 345 U.S. at 57-58 (Douglas, J., concurring).

### NOTES

1. *Id.* at \*2 n.1.
2. *Branzburg*, 408 U.S. at 686.
3. *Id.* at 701.
4. *Id.* at 688 (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)).
5. *United States v. R. Enters.*, 498 U.S. 292, 298 (1991).
6. *Id.* at 301 (emphasis added).
7. *Id.* at 299.
8. *In re Miller*, 438 F.3d at 1147.
9. *Id.* at 1149.
10. Applying the doctrine of constitutional avoidance, the majority in *Rumely* imposed a narrowing construction on the House Resolution that purportedly authorized the subpoena, and held that the subpoena did not fall within the House Committee's authority to study and investigate "lobbying activities." Thus, the Court avoided deciding whether the subpoena violated the First Amendment but did note the grave First Amendment concerns at issue.
11. *Id.* at 307.
12. *Id.* at 836.
13. *Id.* at 846.
14. The Fourth Circuit issued this opinion after the Supreme Court remanded the case in *United States v. R. Enters.*, 498 U.S. 292 (1991). The Supreme Court did not consider the First Amendment issue but ordered the Fourth Circuit to do so on remand.
15. *Id.* at 231-32.
16. *Id.* at 234.
17. *Id.*
18. 2007 WL 4197490, at \*2.
19. *Id.*
20. *Id.* Although the court did not address this issue, to the extent the subpoena sought records related to DVD purchases, the Video Privacy Protection Act of 1988 also required the government to show "probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry." 18 U.S.C. § 2710.
21. *Id.* at \*3.
22. *Id.*
23. *Id.* (emphasis in original).
24. *Id.* at \*4.
25. *Id.*

## SLAPP MOTIONS IN FEDERAL COURT

(CONTINUED FROM PAGE ONE)

state court. Even though federal courts have held that the automatic stay of discovery available in state court SLAPP litigation does not apply to the same extent in federal court, defendants in federal court nonetheless have the ability, in cases where the anti-SLAPP statute applies, to force the plaintiff to make an early evidentiary showing that it has a prima facie case, to obtain an award of attorneys' fees in the event defendants prevail, and to appeal immediately in the event they do not.

A 2006 United States Supreme Court decision may cast doubt on at least one of these boons. Recently, some plaintiffs have begun to argue that *Will v. Hallock*<sup>3</sup> has limited the collateral order doctrine in a way that should be interpreted to preclude an immediate appeal from the denial of an anti-SLAPP motion in federal court.

### SLAPP motions in federal court: An *Erie* tale

In 1992, the California Legislature enacted Code of Civil Procedure § 425.16 "to nip ... in the bud" meritless claims that target a defendant's exercise of free-speech rights.<sup>4</sup> Under the statute, any "cause of action against a person arising from any act of that person in furtherance of that person's right of ... free speech ... in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that [he] will prevail on the claim."<sup>5</sup>

Five years later, responding to a handful of court decisions that interpreted the statute narrowly, the Legislature amended Section 425.16(a) to ensure that it "shall be construed broadly." The California Supreme Court later declared that this "broad construction ... is desirable from the standpoint of judicial efficiency," and "that [a narrow construction] would serve Californians poorly."<sup>6</sup>

The anti-SLAPP statute authorizes defendants to file a special motion to strike at the outset of the case. If the defendant does so, all discovery proceedings are stayed automatically. A court, however, may permit "specified discovery" on noticed motion and for "good

cause shown."<sup>7</sup> In order to prevail on an anti-SLAPP motion, the defendant is required to make a prima facie showing that the plaintiff's suit arises from an act by the defendant made in connection with a public issue in furtherance of the defendant's right to free speech under the United States or California Constitution.<sup>8</sup> The burden then shifts to the plaintiff to establish a reasonable "probability" that the plaintiff will prevail on his or her claim.<sup>9</sup> If the plaintiff fails to meet this burden, the claim at issue is dismissed and the defendant is entitled to recover its reasonable attorneys' fees.<sup>10</sup>

In 1999, the Ninth Circuit affirmed that at least certain aspects of California's anti-SLAPP statute may be invoked against state law claims asserted in federal court. In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*,<sup>11</sup> the court undertook an *Erie* analysis and held that subsections (b) and (c) of the anti-SLAPP statute—providing for the special motion to strike and the recovery of attorneys' fees by a prevailing defendant—would operate in federal court without any "direct collision" with the Federal Rules of Civil Procedure.<sup>12</sup> The Ninth Circuit further held that application of the anti-SLAPP statute to state law claims in federal court would serve the "twin purposes of the *Erie* rule—discouragement of forum shopping and avoidance of inequitable administration of the law."<sup>13</sup>

Later decisions have held that other aspects of the anti-SLAPP statute do not apply in federal court, most notably the stay of discovery under subsection 425.16(g).<sup>14</sup> In *Rogers v. Home Shopping Network*,<sup>15</sup> the district court held that the statute's discovery stay provision collides with Rule 56 of the Federal Rules, at least where a special motion to strike is used to test the plaintiff's evidence and is not premised entirely on legal arguments.<sup>16</sup> As Judge Pregerson explained:

If a defendant makes a special motion to strike based on alleged *deficiencies in the plaintiff's complaint*, the motion must be treated in the same manner as a motion under Rule 12(b)(6) except that the attorney's fees provision of 425.16(c) applies. If a defendant makes a special motion to strike based on the plaintiff's alleged *failure of proof*, the motion must be treated in the same manner as a motion under Rule 56 except that again the attorney's fees provision of 425.16(c) applies.<sup>17</sup>

Presumably, this means that the court should grant plaintiffs' requests for additional discovery in the same manner that it would grant requests for additional discovery made pursuant to Rule 56(f).<sup>18</sup> The Ninth Circuit adopted this view in *Metabolife Int'l v. Wornick*,<sup>19</sup> holding that the district court should have allowed discovery before granting the defendant's anti-SLAPP motion on the basis of the plaintiff's lack of evidence, at least where the relevant evidence was in the defendant's "exclusive control."<sup>20</sup>

In *Batzel v. Smith*,<sup>21</sup> the Ninth Circuit held that another important procedural protection of the anti-SLAPP statute, the right of a defendant to appeal immediately from the denial of an anti-SLAPP motion, also applies in federal court by virtue of the collateral order doctrine.<sup>22</sup> Specifically, the *Batzel* court considered whether the denial of an anti-SLAPP motion was an appealable "final decision" under 28 U.S.C. § 1291 that could be considered immediately by the court of appeals.

Relying on *Digital Equipment Corp. v. Desktop Direct, Inc.*,<sup>23</sup> the *Batzel* court held that all three factors necessary for inclusion in the "narrow class of immediately appealable orders" were met. First, it was a "conclusive" order: the denial of an anti-SLAPP motion was "conclusive as to whether the anti-SLAPP statute required dismissal of [plaintiff's] suit." Second, the order resolved "important questions completely separate from the merits," in that the order decided whether the defendant would be "forced to defend against a meritless claim." Third, a denial of the anti-SLAPP motion would "render such questions effectively unreviewable on appeal from a final judgment in the underlying action." Specifically, an eventual reversal after entry of a final judgment "would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression."<sup>24</sup>

The *Batzel* court also looked to the legislative history of Section 425.16, as well as the fact that the statute provided for an immediate right of appeal in California actions, to conclude that the anti-SLAPP motion is "designed to protect the defendant from having to litigate meritless cases aimed at chilling first amendment expression."<sup>25</sup>

### ***Will v. Hallock*: Collateral damage to federal court SLAPP practice?**

In *Will*, the Supreme Court considered whether the collateral order doctrine permitted an immediate appeal of a district court's refusal to apply the judgment bar of the Federal Tort Claims Act (FTCA).<sup>26</sup> The dispute arose after a husband and wife sued the United States under the FTCA, alleging that federal agents had damaged computer disk drives in the course of a search of the plaintiffs' residence, destroying trade secrets and account files and ruining the couple's software business.<sup>27</sup> The district court dismissed the claim, holding that the agents' activities occurred in the course of detaining goods and thus fell within an exception to the Act's waiver of sovereign immunity.<sup>28</sup> While that action was still pending, the wife filed a *Bivens* action against the individual Customs agents, alleging that the agents had damaged her computers and deprived her of property in violation of the Fifth Amendment's due process clause.<sup>29</sup>

After the district court dismissed the first suit against the government, the agents moved for judgment in the *Bivens* action, citing the judgment bar of the FTCA. The district court denied the motion, holding that the dismissal of the FTCA action had been solely on procedural grounds, and the agents filed an immediate appeal. The Second Circuit affirmed, after first finding that it had jurisdiction to hear the appeal under the collateral order doctrine.<sup>30</sup>

As the Supreme Court explained in *Will*, the collateral order doctrine "is best understood not as an exception to the 'final decision' rule laid down by Congress in 28 U.S.C. § 1291, but as a 'practical construction' of it."<sup>31</sup> The doctrine "accommodates a small class of rulings, not concluding the litigation, but conclusively resolving claims of right separable from, and collateral to, rights asserted in the action."<sup>32</sup> For the doctrine to apply, three "stringent" conditions must be met: the order to be appealed from must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.<sup>33</sup>

In *Will*, Justice Souter, writing for a unanimous Court, stressed the "modest scope" of the doctrine, noting that it had been applied to permit immediate appeals of orders rejecting claims of absolute or qualified immunity, orders denying State claims of Eleventh Amendment immunity, and adverse rulings on double jeopardy defenses in criminal cases.<sup>34</sup> Reciting the principles it had articulated a few years earlier in *Digital Equipment*, the Court cautioned that the doctrine should not be generalized to apply to any order denying a claim of a right to prevail without trial, lest the doctrine leave the final judgment rule in "tatters."<sup>35</sup> Beyond implicating an asserted right to avoid the burdens of trial, orders subject to immediate appeal under the collateral order doctrine also must "imperil a substantial public interest."<sup>36</sup>

In *Will*, the Supreme Court described the interests at stake in the immunity cases as "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, and respecting a State's dignitary interests." It then characterized the interests of the Customs agents in prevailing on the FTCA's judgment bar as akin to the interest in avoiding duplicative litigation present in any run-of-the-mill assertion of a res judicata defense.<sup>37</sup>

In thus reminding litigants of the narrow scope of the collateral order doctrine, has the Supreme Court altered the law in a way that undermines the Ninth Circuit's holding in *Batzel* that a federal court's denial of an anti-SLAPP motion is subject to an immediate appeal under the collateral order doctrine? No published decision within the Circuit has yet addressed the question. At least one district court, however, rejected such an argument in an unpublished order last year.<sup>38</sup> This result seems correct. *Will* did not purport to create a new rule or change the contours of the collateral order doctrine. Consistent with Supreme Court precedent, the *Batzel* court recognized that California's anti-SLAPP statute conferred rights on defendants "in the nature of immunity"—to protect defendants who might otherwise be "compelled to defend against a meritless claim brought to chill rights of free expression."<sup>39</sup>

*Batzel* described this immunity as a protection from the "burdens of trial"—a consideration

that alone would not satisfy the "stringent" requirements set forth in *Will*. But the free speech rights protected by the anti-SLAPP statute do constitute a "substantial public interest." Like the separation of powers, Eleventh Amendment, and double jeopardy considerations found sufficient by the Supreme Court to justify an immediate right to appeal under the collateral order doctrine, these First Amendment speech rights are of constitutional dimension. Accordingly, denials of anti-SLAPP motions in federal court would seem to remain well within even the narrow confines of the collateral order doctrine.

## NOTES

1. See, e.g., *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002) (rejecting an "intent to chill" requirement); *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 815 (1994) (SLAPP defendants need not be "local organizations with limited resources").
2. SLAPP is an acronym for "strategic lawsuit against public participation."
3. 546 U.S. 345 (2006).
4. *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1042 (1997).
5. C.C.P. § 425.16(b)(1).
6. *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1121 (1999).
7. C.C.P. § 425.16(g).
8. C.C.P. § 425.16(e) (defining "act in furtherance of a person's right of ... free speech"). See generally *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002).
9. C.C.P. § 425.16(b).
10. C.C.P. § 425.16(c).
11. 190 F.3d 963 (9th Cir. 1999).
12. *Id.* at 971. See generally *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980); *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
13. 190 F.3d at 971-73. The anti-SLAPP statute thus applies to state law claims in diversity cases, as well as to pendent claims in federal question cases. It does not apply to federal claims. See *Globetrotter Software, Inc. v. Elan Computer Group*, 63 F. Supp. 2d 1127, 1129-30 (N.D. Cal. 1999); *In re Bah*, 321 B.R. 41, 46 (Bankr. 9th Cir. 2005). A number of subsequent decisions confirm that prevailing defendants on anti-SLAPP motions in federal court are entitled to recover attorneys' fees and costs, even in situations where the plaintiff has dismissed the complaint before the court can issue a ruling on the anti-SLAPP motion. See, e.g., *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110-11 (9th Cir. 2003); *Thomas v. Los Angeles Times Communs., LLC*, 189 F. Supp. 2d 1005, 1017 (C.D. Cal. 2002).
14. In a subsequent decision, the Ninth Circuit also has held that granting a defendant's special motion to strike under the anti-SLAPP statute without leave to amend would directly collide with Federal Rule of Civil Procedure 15(a)'s policy of liberal amendment. *Verizon Delaware, Inc. v. Covad Communs. Co.*, 377 F.3d 1018, 1091 (9th Cir. 2004).
15. 57 F. Supp. 2d 973 (C.D. Cal. 1999).
16. *Id.* at 980-82.
17. *Id.* at 983 (emphasis added).
18. See *id.* at 985.
19. 264 F.3d 832 (9th Cir. 2001).
20. *Id.* at 846-47. Some federal judges have questioned whether there really is any significant conflict between Section 425.16(g)



and Rule 56(f). In practice, courts require a plaintiff seeking leave under Rule 56(f) to conduct discovery in response to a summary judgment motion to identify the specific discovery needed to oppose the motion and to explain how such discovery will create a triable issue of fact—a standard that is not much different from the "good cause" requirement for "specified discovery" set forth in subsection (g) of the anti-SLAPP statute. See, e.g., *Metabolife Int'l v. Wornick*, 264 F.3d at 859-60 (Rymer, J., dissenting) (observing that Section 426.16(g) and Rule 56(f) are not inconsistent because both "allow for discovery that is needed to rule on the respective motions"); *New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1101-02 (C.D. Cal. 2004) (Feess, J.) (noting that a plaintiff seeking discovery under Rule 56(f) "must explain with particularity why it is unable to oppose the motion, state with specificity what facts it intends to seek through discovery, and show how its discovery efforts are reasonably expected to create a triable issue").

21. 333 F.3d 1018 (9th Cir. 2003).

22. *Id.* at 1024-26. See generally *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

23. 511 U.S. 863, 868 (1994).

24. 333 F.3d at 1024-26.

25. *Id.* at 1025.

26. 28 U.S.C. § 2676. The FTCA judgment bar provides that judgment in an action under the Act's waiver of sovereign immunity "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." *Id.*

27. See 546 U.S. at 348. The complaint alleged that the husband's credit card was stolen and used to subscribe to a child pornography web site. Customs agents traced the payment to the husband's stolen card, got a warrant to search the couple's residence, and seized computer equipment, software and disk drives. No criminal charges were filed. *Id.*

28. *Id.* at 348-49.

29. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

30. 546 U.S. at 349.

31. *Id.* (citation omitted).

32. *Id.*

33. *Id.*

34. *Id.* at 350. See generally *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (rejection of absolute presidential immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (rejection of qualified immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993) (denial of claim of Eleventh Amendment immunity); *Abney v. United States*, 431 U.S. 651, 660 (1977) (adverse ruling against defendant on double jeopardy defense).

35. 546 U.S. at 351-52 (discussing *Digital Equip.*, 511 U.S. at 869, 872 and 873).

36. *Id.* at 352-53.

37. *Id.* at 354-55.

38. *Schering Corp. v. First Databank, Inc.*, No. C 07-01142 WHA, 2007 WL 1747115 (N.D. Cal. June 18, 2007) (Alsup, J.).

39. *Batzel*, 333 F.3d at 1025. California courts likewise have likened the protections of the anti-SLAPP statute to a form of limited immunity. See, e.g., *Physicians Comm. For Responsible Medicine v. Tyson Foods, Inc.*, 119 Cal. App. 4th 120, 129 (2004). Indeed, even post-*Will*, and without specifically addressing *Will*, the Ninth Circuit has cited *Batzel* for the proposition that denials of anti-SLAPP motions are immediately appealable under the collateral order doctrine. *Zamani v. Carnes*, 491 F.3d 990, 994 (9th Cir. 2007).

## CALIFORNIA'S "DEAD CELEBRITIES" BILL: OR, HOW THE TERMINATOR HAS PROTECTED AMERICA FROM THE SPECTER OF UNAUTHORIZED MARILYN MONROE T-SHIRTS

**By Robyn Aronson**

Marilyn Monroe's platinum locks, arched eyebrows, and ruby lips are not just the stuff that dreams are made of—they're also the stuff that legislation is made of. For on October 10, 2007, Gov. Arnold Schwarzenegger (owner of a rather famous face himself) signed into law a bill that granted expanded post-mortem publicity rights for dead public figures, expressly abrogating a pair of district court decisions that had limited the scope of those rights.

### **A new age in advertising**

The origins of this amended statute—often referred to as the "Dead Celebrities" bill—can be traced back to 1991, when Humphrey Bogart, Louis Armstrong, and Jimmy Cagney were digitally inserted into a Diet Coke commercial. It was the dawn of a new age in advertising, in which modern products could trade on the goodwill of long-departed cinematic legends. The products would benefit from their association with the glamour and prestige of an icon—and, conveniently, the icon would never show up late on set or request a bigger trailer.

The Diet Coke ad was the start of a trend: in 1996, John Wayne's image was added into a Coors beer commercial (which co-starred then-unknown Johnny Knoxville); in 1997, a television commercial aired featuring a dance sequence from the classic movie *Royal Wedding*, in which the broom Fred Astaire had partnered with in the original film was digitally replaced by a Dirt Devil vacuum cleaner; and in 2001, Lou Gehrig's touching farewell speech was incorporated into advertisements for French telecommunications company Alcatel. All told, by now there has been a decade of memorable commercials featuring the renowned deceased—and a decade's worth of fodder for legal controversy.

The fact is, ads using dead celebrities work. If you have seen any of the commercials listed above, you probably remember them—even if what you remember was your outrage at the perceived desecration of an icon. However, these particular ads do not represent the shameless theft of a celebrity's goodwill; instead, they were actually made with the cooperation of the celebrities' heirs. Contrary to popular belief, the infamous Dirt Devil spot did *not* make unauthorized use of Astaire's image; instead, the ad had the explicit (remunerated) blessing of Astaire's widow. But the Astaire ad seems now to represent a watershed moment in the commercial use of dead celebrities, and is often the image invoked by opponents of the practice. If the rights of dead celebrities are not aggressively protected by statute, the theory goes, then Gene Kelly will soon be dancing with a Swiffer, Frank Sinatra will be singing into a Motorola phone, and Steve McQueen will be using a Cadillac Escalade to make *The Great Escape*.

### **The original "Dead Celebrities" bill**

California has long recognized the existence of a common-law right of publicity, but it expired upon an individual's death.<sup>1</sup> A posthumous right of publicity was created in 1984, when the California Legislature first enacted Civil Code § 990 (which was later amended slightly and renumbered as Section 3344.1).<sup>2</sup> The post-mortem publicity right recognized in Section 3344.1 protected against unauthorized use of a dead celebrity's image "in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services."<sup>3</sup> Creative, expressive works (and promotional material for such works) were exempted from this prohibition.<sup>4</sup> Section 3344.1 also stated, under subsection (c), that "[t]he rights recognized under this section are property rights, freely transferable, in whole or in part, by contract or by means of trust or testamentary documents, whether the transfer occurs before the death of the deceased personality, by the deceased personality or his or her transferees, or, after the death of the deceased personality, by the person or persons in whom the rights vest under this section or the transferees of that person or persons."

### The Marilyn Monroe estate cases

While the statute seems to indicate the Legislature's intent to cover all the bases necessary for the creation and protection of robust posthumous publicity rights, the judiciary has had a different view. In 2007, the courts handed down a pair of decisions involving Marilyn Monroe's estate: *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007) and *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, Case No. CV05-2200 MMM (C.D. Cal. May 15, 2007). These cases involved use of Monroe's image in merchandise, not advertising campaigns, but they concerned interpretation of the California statute that purports to control any commercial use of dead celebrity likenesses. In both actions, Marilyn Monroe LLC—the company that was created to license Monroe's images and oversee her legacy—and affiliated parties sought to halt the distribution of merchandise which bore Monroe's likeness.<sup>5</sup> In both actions, the opposing parties were the estates of photographers who owned the copyrights to various Monroe photos. And in both actions, the district courts found that the Monroe estate did not have standing to enforce Monroe's rights of publicity, a finding that the 2007 amendment to Section 3344.1 was meant to remedy.

In her will, Marilyn Monroe had left the residue of her estate to her acting coach, Lee Strasberg; on Lee Strasberg's death, his own estate (including any post-mortem publicity rights inherited from Monroe) went to his widow, Anna. Anna Strasberg now manages the company that controls the "official" licensing of Monroe's image; and, under her stewardship, the Monroe LLC has been extremely active in exploiting the value of the Monroe image and name. There is a host of Monroe LLC-licensed material now, including posters, magnets, Absolut vodka advertisements, cookie jars, and t-shirts. As a result of the Monroe LLC's activities, Marilyn Monroe now has the curious distinction of being one of the world's highest-earning dead celebrities. (Elvis Presley and John Lennon are among the other members of this macabre elect.)

But not every Monroe product on store shelves was created under the aegis of the Monroe LLC. Among this allegedly "unauthorized" merchandise were t-shirts sold in Target stores,

which bore a photograph of Monroe that had been taken by the late photographer Sam Shaw. The t-shirts bore the name of the Shaw Family Archives, and had been created with an image duly licensed from the Shaw family, but neither the Shaw family nor the t-shirt company had received a license from the Monroe estate. Additionally, the Shaw family's use of the Monroe image went beyond this single t-shirt venture; they also maintained a website through which various Shaw photographs of Monroe could be licensed for commercial purposes.

Based on the Shaw family's use of Monroe's image, the Monroe LLC sued under Indiana's right of publicity statute, which recognizes expansive post-mortem publicity rights. The U.S. District Court for the Southern District of New York (to which the action was transferred from Indiana) first noted that neither Monroe nor Shaw had any connection to the state of Indiana; Indiana had simply provided the most useful publicity statute.

But this attempt to cherry-pick favorable law proved useless, since under generally recognized principles of probate law—which applied in Indiana as well as California and New York—Monroe did not have the capacity to transfer post-mortem publicity rights in her will, because no such rights existed at the time of her death. And because Monroe could not have disposed of her rights in her will, Strasberg's estate could not claim those rights by virtue of being the beneficiary of the will's residuary clause. As the court put it, "[a]ny argument that the residuary clause of Ms. Monroe's will could devise a postmortem right of publicity is thus doubly doomed because the law in effect at the time of Ms. Monroe's death did not recognize descendible post-mortem publicity rights and did not allow for distribution under a will of property not owned by the testator at the time of her death."<sup>6</sup>

This conclusion was not affected by looking to either California's or Indiana's right of publicity statutes for support. While section (b) of the California statute provided that Monroe could have transferred her publicity rights via testamentary instrument, such a transfer could only have been realized if she had any such rights to give. However, at the time of her death, no such rights were recognized under the

law. Section 3344.1 also provided that if post-mortem publicity rights have not otherwise been effectively transferred during the celebrity's life, or by will, then the rights would automatically vest in certain specific heirs (generally, close family members).<sup>7</sup> Here, since those rights could not have been effectively transferred by will, for the reasons described above, then only statutorily-defined heirs could benefit from the statute's purview. Lee Strasberg, Monroe's mentor, was not among those categories of heirs, so he could not have passed on any post-mortem publicity rights to Anna Strasberg; and Anna Strasberg thus had no rights to transfer to the Monroe LLC.<sup>8</sup> Since neither general probate law nor any specific right of publicity statute recognized the assumption of post-mortem publicity rights by the Strasberg estate, the Monroe LLC's claims were dismissed.

Shortly after the *Shaw* decision, the Central District of California issued a similar ruling. This matter, too, had been transferred from Indiana, where it had been brought to take advantage of the generous right of publicity statute there. Again, the Monroe LLC was in opposition to the archives of a photographer who had taken well-known images of the movie star, and which was actively licensing those images—in this case, the Milton Greene Archives, which possessed the iconic shot of Monroe in a white dress on the set of the *Seven Year Itch*. And, again, the district court found that Monroe could not have bequeathed to her heirs a posthumous publicity right that did not exist at the time of her death, and neither California's nor Indiana's right of publicity statute remedied this problem. The district court's reasoning thus followed that of its New York counterpart closely.<sup>9</sup>

In its discussion of Section 3344.1, the court noted that the only individuals with any potential claim to Monroe's post-mortem publicity rights would have been her statutorily-designated heirs, not the Monroe LLC. As the Central District observed, in this regard, the statute was designed to mirror Section 304(c) of the Copyright Act, which also provides that only specified heirs, not the beneficiaries of the residual estate, could inherit copyright interests created pursuant to the Copyright Act of 1976.

Additionally, the court reiterated a point also made briefly by the Southern District of New York: Section 3344.1 states that a "deceased personality" could transfer his or her statutory publicity rights "by contract or by means of trust or testamentary documents," but only "before [his or her] death." After the celebrity's death, those rights would vest only in statutorily-designated heirs. The court interpreted this to mean that Section 3344.1 "expressly contemplates that a deceased personality who died before enactment of the statute would not have had the capacity to transfer the subsequently created right of publicity ... before her death."<sup>10</sup>

In its order denying any post-mortem publicity rights to the Monroe LLC, the Central District indicated that it "reache[d] this conclusion with some reluctance," because many charitable organizations rely on post-mortem publicity rights as a source of income (such as Hebrew University, which benefits from exploitation of the image of Albert Einstein, one of its founders).<sup>11</sup> The court understood that its ruling would effectively "divest[]" such institutions of a significant revenue stream. However, the court encouraged legislatures to correct this result, stating that "nothing in this order prevents legislatures from enacting right of publicity statutes so as to vest the right of publicity directly in the residuary beneficiaries of deceased personalities' estates or their successors-in-interest."<sup>12</sup>

#### **California's Legislature reacts quickly**

The California Legislature responded to the court's invitation quickly. State senator Sheila Kuehl—former star of the television series *Dobie Gillis*—introduced SB 771. The bill was supported by Wayne Enterprises (the gatekeepers of John Wayne's image, not the company run by Batman), the Jimi Hendrix and Alfred Hitchcock estates, the Screen Actors Guild, and others. The legislative history of the amended statute explains that it was motivated by the two Monroe decisions, as the Legislature deemed it "necessary to reaffirm 'California's protection of post-mortem publicity rights for deceased California celebrities and artists and to ensure the charitable works by foundations funded by post-mortem publicity rights can continue."



Specifically, there were three enumerated goals for the legislation: (1) to clarify that post-mortem publicity rights are freely descendible by will or other means, that these rights were deemed to have existed at the time of the celebrity's death, and that, unless there is an explicit provision to the contrary, these rights will be considered part of the residuary estate; (2) to specify that recognition of post-mortem publicity rights is retroactive; and (3) to make clear the Legislature's intent to abrogate the holdings of the two Monroe actions described above.

To this end, the "Dead Celebrities" bill inserts new language in subsection (3)(b). Where the statute states that a celebrity's post-mortem publicity rights are freely transferable and descendible, the following terms have been added:

The rights recognized under this section shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and, except as provided in subsection (o), shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights in his or her name, voice, signature, photograph, or likeness, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights recognized under this section in accordance with the terms of that provision. The rights established by this section shall also be freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights as recognized by this section.

Subsection (o), referred to above, protects some of those who may have acted in reliance on the previous version of the law, and reads:

Notwithstanding any provision of this section to the contrary, if an action was taken prior to May 1, 2007, to exercise

rights recognized under this section relating to a deceased personality who died prior to January 1, 1985, by a person described in subdivision (b),<sup>13</sup> other than a person who was disinherited by the deceased personality in a testamentary instrument, and the exercise of those rights was not challenged successfully in a court action by a person described in subdivision (b),<sup>14</sup> that exercise shall not be affected by subdivision (b). In such a case, the rights that would otherwise vest in one or more persons described in subdivision (b) shall vest solely in the person or persons described in subdivision (d),<sup>15</sup> other than a person disinherited by the deceased personality in a testamentary instrument, for all future purposes.

This language seems to be crafted specifically to exclude the Milton Greene and Shaw Archives—and similarly situated photographic archives—from its purview. That is, the statute only protects statutorily-defined heirs who had exercised post-mortem publicity rights prior to May 1, 2007—not entities like the archives who may have exercised such rights.

#### **Where are we now?**

What practical effect does the new statute have? Any photographers or other licensors who concluded that the two Monroe decisions amounted to *carte blanche* for the exploitation of celebrity images may find themselves disappointed. However, neither the Shaw nor Milton Greene Archives are necessarily barred at this point from making commercial use of Monroe's image. That is because neither the New York nor the California court determined whether Monroe was actually domiciled in California at the time of her death, which would control the applicability of the newly-revised California Code; if Monroe is found to have been a resident of New York when she died, then Section 3344.1's amendment may not affect her estate at all. Instead, the descendibility of her post-mortem publicity rights would be defined by New York law, and as of yet New York has not enacted an equivalent of California's "Dead Celebrities" act. However, that may change. A similar bill was introduced in the New York State Legislature in 2007, and is being supported by,

among others, Al Pacino—who had studied (and co-starred) with Lee Strasberg, and who happens to be a friend of Lee’s widow Anna, the individual who controls the Monroe LLC.

What, then, is the ultimate effect of passage of the "Dead Celebrities" act? Civil Code § 3344.1 already recognized that spouses and blood relations of dead celebrities possessed post-mortem publicity rights. The revised statute is thus relevant only where an entity other than one of the celebrity’s statutorily-defined heirs claims to control the celebrity’s image. Consequently, the statute’s critics contend that it was essentially custom-designed to benefit the Monroe LLC, and the Monroe LLC alone. While it is true that the Monroe LLC lobbied for the bill’s passage, and is one of the statute’s clearest beneficiaries, other entities conceivably benefit as well—such as Hebrew University, the John Wayne Cancer Institute, and other charitable institutions that rely on revenue from posthumous publicity rights.

Will this change how people do business? Most commercial entities have tended to act conservatively when it comes to the exploitation of celebrity images; as mentioned above, Fred Astaire’s Dirt Devil ad, John Wayne’s Coors ad, and Lou Gehrig’s Alcatel ad were all made with the cooperation of the celebrities’ estates. And there is no evidence that the market has been flooded with commercial products making unauthorized use of, say, Albert Einstein’s image. In other words, there does not seem to have been an enormous market for, say, Einstein toilet-bowl cleaners that would now be threatened by the revised statute. In short, the "Dead Celebrities" act does not necessarily represent a significant new limitation on the use of celebrity images—at least, not in comparison to the original iteration of the statute, which broke new ground by recognizing the existence of post-mortem publicity rights in the first place.

## NOTES

1. See, e.g., *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 861 (1979).
2. The section went into effect on January 1, 1985.
3. Civil Code § 3344.1(a)(1).
4. "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." Civil Code § 3344.1(a)(2).
5. The plaintiffs in the California action were Marilyn Monroe LLC, CMG Worldwide, Inc. (the Monroe LLC’s licensing agent), and Anna Strasberg; the plaintiffs in the New York action were Marilyn Monroe LLC and CMG Worldwide, Inc. For readability, these parties are collectively referred to as the Monroe LLC in this article.
6. *Shaw Family Archives*, 486 F. Supp. 2d at 317.
7. Namely, a surviving spouse, children, grandchildren, or grandparents. Civil Code § 3344.1(d).
8. Indiana’s law is phrased slightly differently, but has the same effect.
9. *Milton H. Greene Archives*, Docket 269.
10. *Id.* at 29-30 (emphasis in original).
11. *Id.* at 36.
12. *Id.*
13. *I.e.*, the deceased celebrity.
14. *I.e.*, those who claim post-mortem publicity rights pursuant to subsection (b)(2).
15. *I.e.*, statutorily-defined heirs.

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