

1-1-1985

Torts

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Recommended Citation

University of the Pacific; McGeorge School of Law, *Torts*, 16 PAC. L. J. 725 (1985).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol16/iss2/27>

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Torts

Torts; privacy and publicity rights

Civil Code §990 (new); §3344 (amended).
SB 613 (Campbell); 1984 STAT. Ch 1704

In 1972, the California Legislature recognized a right of privacy¹ by providing civil liability for the unauthorized use of a person's name, photograph, or likeness for commercial purposes.² Chapter 1704 amends the existing right of privacy provisions³ and, in addition, enacts new law protecting the publicity rights of deceased personalities.⁵

1. The right of privacy as initially advocated by Samuel Warren and Louis Brandeis, branched into four distinct categories with a common denominator: each represents an interference with the right of the plaintiff "to be let alone." W. PROSSER & W. KEETON, *THE LAW OF TORTS*, 851 (5th ed. 1983). See generally Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (advocating a right of privacy). The categories are the following: (1) intrusion into a person's solitude or seclusion, (2) public disclosure of private facts, (3) publicity that places a person in a false light in the public eye, and (4) appropriation of a person's name or image for another's benefit. Comment, *Commercial Appropriation of an Individual's Name, Photograph or Likeness: A New Remedy for Californians*, 3 PAC. L.J. 651, 655-56 (1972). Most statutory law in the United States relating to the right of privacy is directed to protecting the fourth interest. *Id.* at 656. The 1972 California legislation was directed to the average citizen whose name is used without consent to endorse or promote a particular product or service. *Id.* at 664. See also *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 843 n.23, 603 P.2d 425, 443 n.23, 160 Cal. Rptr. 323, 341 n.23 (1979) (Bird, C.J., dissenting).

2. CAL. CIV. CODE §3344.

3. Compare *id.* §3344(a) with 1971 Cal. Stat. c. 1595, §1, at 3426.

4. The right of publicity is a variant of the category of right of privacy that protects against appropriation of name or image for another's benefit. Comment, *supra* note 1, at 656. The development of publicity rights is largely a result of the inadequacies of the privacy theory, which is based on injury to the plaintiff's feeling, in protecting the pecuniary value of the identities of well known personalities. Comment, *Lugosi v. Universal Pictures: Descent of the Right of Publicity*, 29 HASTINGS L.J. 751, 754-55 (1978). Cf. *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867-68 (2d Cir. 1953) (coining phrase "right of publicity"; prominent persons not injured by public exposure of their likenesses, but rather injured by no exposure); *Smith v. National Broadcasting Co.*, 138 Cal. App. 2d 807, 812, 292 P.2d 600, 605 (1956) (person who intentionally places self in public eye loses protection of right of privacy doctrine).

5. CAL. CIV. CODE §990. Deceased personality is defined as any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of the person's

Right of Privacy

Existing law provides a civil penalty for the knowing use of any person's name, photograph,⁶ or likeness for advertising or soliciting purchases of products, merchandise, goods, or services without that person's prior consent.⁷ Chapter 1704 expands existing law to include the use of a person's voice or signature, uses on or in products, merchandise or goods, and uses for the purpose of selling products, merchandise, goods, or services.⁸ Liability under prior law was in an amount not less than \$300.⁹ Chapter 1704 increases the damages recoverable to \$750 or actual damages, whichever is greater, plus any profits not included in the actual amount resulting from the unauthorized use.¹⁰ In addition, Chapter 1704 allows for the award of punitive damages and entitles the prevailing party to attorney's fees and costs.¹¹

Right of Publicity

In 1979, the California Supreme Court, in *Lugosi v. Universal*

death, whether or not the right to exploit that value was exercised during the personality's lifetime. *Id.* §990(h). Many courts have attempted to limit the boundaries of the right of publicity by requiring the commercial exploitation of identity during a public figure's lifetime in order for the right to be survivable. See Comment, *An Assessment of the Commercial Exploitation Requirement as a Limitation on the Right of Publicity*, 96 HARV. L. REV. 1703, 1708-09 (1983). The *Lugosi* decision indicated that if Lugosi had used his identity in connection with a business enterprise, he would have created a tangible property interest which would have survived his death. *Id.* at 1708, n.32. See also 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts §342A (1984 Supp.); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978) (right of publicity survives death only if decedent commercially exploited name and likeness during life). But see *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975) (not necessary to exercise right of publicity during lifetime to protect it or preserve potential rights of heirs). Chapter 1704 does not require that the right be exercised during the life of the personality in order for the right to survive. See CAL. CIV. CODE §990(a), (b), (c), (h).

6. Existing law defines photograph as any photograph or photographic reproduction, still or moving, any videotape or live television transmission of any person, such that the person is readily identifiable. CAL. CIV. CODE §3344(b). A person is readily identifiable when a person viewing the photograph with the naked eye can reasonably determine who the person depicted in the photograph is. *Id.* §3344(b)(1). See *id.* §3344(b)(2) (group photographs).

7. *Id.* §3344(a). Privacy statutes in other states commonly require that consent must be in writing to be valid, but in California the consent only needs to be prior to the use, and may be implied in some cases. Comment, *supra* note 1, at 668.

8. Compare CAL. CIV. CODE §3344(a) with 1971 Cal. Stat. c. 1595, §1, at 3426 (enacting CAL. CIV. CODE §3344(a)).

9. 1971 Cal. Stat. c. 1595, §1, at 3426 (enacting CAL. CIV. CODE §3344(a)).

10. Compare CAL. CIV. CODE §3344(a) with 1971 Cal. Stat. c. 1595, §1, at 3426 (enacting CAL. CIV. CODE §3344(a)). In order to establish profits, the complainant is required only to prove gross revenue attributable to the use, and the defendant then must prove deductible expenses. CAL. CIV. CODE §3344(a).

11. CAL. CIV. CODE §3344(a). Punitive damages previously have been allowed in privacy cases upon a finding that the defendant acted with fraud, express or implied malice, or oppression. Comment, *supra* note 1, at 662.

Pictures,¹² held that the right of an artist or entertainer to exploit name and likeness was a right of privacy, personal to the artist, and not capable of descent or transfer to others after death.¹³ Chapter 1704, in contrast, creates civil liability¹⁴ for the unauthorized use¹⁵ of a deceased personality's name, voice, signature, photograph,¹⁶ or likeness (hereinafter referred to collectively as identity) on or in products, merchandise, or goods, or for advertising, selling, or soliciting the purchase of products, goods, merchandise, or services.¹⁷ The rights created by Chapter 1704 are specifically designated as property rights, freely transferrable by contract, trust, or testamentary document, and are capable of being exercised or transferred before death by the personality or transferees of the right, or after death by persons named by Chapter 1704 as intestate successors or their transferees.¹⁸ Furthermore, Chapter 1704 specifies that the publicity rights expire fifty years after the death of the personality.¹⁹

12. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

13. *Id.* at 821, 603 P.2d at 431, 160 Cal. Rptr. at 327. The court stated that the "right of value" that Lugosi had in the exploitation of his name was embraced in the law of privacy, and referred to the statutory privacy rights found in CAL. CIV. CODE §3344. 25 Cal. 3d at 818 & n.6, 603 P.2d at 428 & n.6, 160 Cal. Rptr. at 326 & n.6. Chief Justice Bird, in a dissenting opinion, stated that the majority erred in basing the decision on the existing law, which was not intended to apply to the right of a public figure to control and profit from the exploitation of name and likeness. *Id.* at 843, 603 P.2d at 444, 160 Cal. Rptr. at 341. *Lugosi* was closely followed by *Guglielmi v. Spelling Goldberg Productions*, in which the California Supreme Court specifically addressed the right of publicity, but relied on *Lugosi* in holding that the right of publicity is not descendible. 25 Cal. 3d 860, 861, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 353 (1979).

14. Liability is in the amount of \$750 or actual damages, whichever is greater, plus any profits not computed as actual damages. *Id.* §990(a). See *supra* note 10 and accompanying text.

15. The right of publicity action does not require a knowing use, as the right of privacy action does. Compare CAL. CIV. CODE §990(a) with *id.* §3344(a). Although the first amendment of the United States Constitution requires knowledge in many forms of publication, the knowledge requirement may not be necessary in a purely commercial appropriation statute. Comment, *supra* note 1, at 659. The United States Supreme Court, in *Time, Inc. v. Hill*, however, was equivocal on the subject of commercial appropriation: "[A]pplication of that limited scope would present different questions of violation of the constitutional protections for speech and press." 385 U.S. 374, 381 (1964).

16. The definition of photograph found in CAL. CIV. CODE §3344(b) is applied by Chapter 1704 to the publicity action. CAL. CIV. CODE §990(i), (j). See *supra* note 6 and accompanying text.

17. CAL. CIV. CODE §990(a). This civil action is separate from the existing right of privacy action and instead is found under Part 3, Title 2, Chapter 1704, "Products of the Mind," previously covering only compositions in letters or art, inventions, or designs. See CAL. CIV. CODE §§980-990.

18. *Id.* §990(b),(c). Courts and commentators have differed as to whether the publicity right is a property right or a personal right, and whether as a property right it is survivable or transferrable. See Comment, *The Right of Privacy vs. the First Amendment: Reconciling the Conflict Between a Proprietary Interest of the Plaintiff and the Constitutional Guarantee of Free Speech*, 27 VILL. L. REV. 1205, 1207 n.8, 1214-1221 (1982); Comment, *supra* note 4, at 757-58.

19. CAL. CIV. CODE §990(g). Many objections to the descendibility of publicity rights concerned the need for durational limits. See Comment, *supra* note 4, at 772; Note, *Torts—Right of Publicity—Famous Persons Right of Publicity is Descendible—The Need for a Durational*

A. Descendibility

Chapter 1704 stipulates that upon the death of the personality, publicity rights not transferred during the life of the personality pass to the following persons: (1) the entire interest to the surviving spouse, if no children or grandchildren survive;²⁰ (2) if no surviving spouse, the entire interest to the surviving children and to the surviving children of any deceased child of the personality,²¹ divided on a per stirpes basis;²² (3) if the decedent is survived by a spouse *and* children or grandchildren, a one-half interest to the surviving spouse and a one-half interest divided among surviving children²³ on a per stirpes basis;²⁴ or (4) if no surviving spouse, children or grandchildren, the entire interest to the surviving parents of the decedent.²⁵ The rights passing intestate under Chapter 1704 can be exercised only by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights.²⁶ If the rights have not been transferred during the deceased personality's lifetime, and no successors-in-interest survive, the rights terminate upon the death of the personality.²⁷

B. Registration

In order to recover damages for the unauthorized use of a deceased personality's identity, any licensee or successor to the rights is required by Chapter 1704 to have registered a claim of the rights with the Secretary of State prior to the unauthorized use.²⁸ The registration consists of a verified form stating the deceased personality's name and date of death, the basis of the claim, and the rights claimed.²⁹

Limit on the Right of Publicity, 14 SETON HALL 190, 207 (1983). Chapter 1704 parallels federal copyright law in providing a 50-year limit. See 17 U.S.C. §302(a) (duration of copyright). Included within the protection of Chapter 1704 are persons who die within 50 years prior to January 1, 1985. CAL. CIV. CODE §990(h).

20. CAL. CIV. CODE §990(d)(1).

21. *Id.* §990(d)(2).

22. *Id.* §990(d)(4); see CAL. PROB. CODE §240 (definition of per stirpes).

23. CAL. CIV. CODE §990(d)(1), (2).

24. *Id.* §990(d)(4). See *supra* note 22 and accompanying text.

25. *Id.* §990(d)(3).

26. *Id.* §990(d). Those persons may exercise the rights on behalf of and for the benefit of all the successors-in-interest named in section 990(d)(1)-(4). *Id.*

27. *Id.* §990(e).

28. *Id.* §990(f)(1), (2). The registration fee is \$10. *Id.* §990(f)(2). Previous opposition to the survivability of publicity rights raised the question of the undue burden of seeking out all possible successors-in-interest before using the identity with impunity. Comment, *supra* note 4, at 772. The requirement of registration for publicity rights parallels federal copyright law. Compare CAL. CIV. CODE §990(f) with 17 U.S.C. §302(d).

29. CAL. CIV. CODE §990(f)(2). Chapter 1704 allows microfilming or other reproduction of the original document and subsequent destruction of the original document by the Secretary of State, and provides that the reproduction of the document is admissible in a court of law. *Id.* §990(f)(3). All reproductions may be destroyed by the Secretary of State 50 years after

C. Exemptions

Chapter 1704 provides a number of exemptions from liability for the unauthorized use of a deceased personality's identity.³⁰ Consent is not required for use of an identity in connection with news, public affairs or sports broadcasts, or political campaigns.³¹ Chapter 1704 also specifies that use of a personality's identity in a commercially sponsored medium presents a question of fact as to whether the use of the identity is so closely connected with the commercial aspects of the medium as to require consent.³² Moreover, owners or employers of a medium through which the advertising reaches the public³³ are not subject to liability unless they had knowledge of the unauthorized use.³⁴ Finally, Chapter 1704 specifically exempts any use of a deceased personality's identity in (1) books, plays, magazines, newspapers, musical compositions, films, and radio or television programs that are not advertisements or commercial announcements;³⁵ (2) material that is of political or newsworthy value;³⁶ (3) single and original works of fine art;³⁷ and (4) advertisements or commercial announcements

the death of the personality. *Id.* In addition, the claims registered under Chapter 1704 are deemed public records, allowing their disclosure to the general public. *Id.*, §990(f)(4). See generally *id.* §1798 (Information Practices Act of 1977).

30. See *id.* §990(j),(k),(l),(n).

31. *Id.* §990(j). Political uses would include the unauthorized use of a person's name for endorsing a particular candidate. Comment, *supra* note 1, at 667.

32. CAL. CIV. CODE §990(k). One commentator notes that commercial appropriations of name or likeness are rarely for the sole purpose of advancing sales, but often are mixed with a biographical or informational function, a mixture that raises problems of the violation of first amendment rights. Comment, *supra* note 18, at 1234. The latitude given to the jury in regard to the question of fact provided by Chapter 1704 may hinder the development of concrete standards of what is and is not "directly connected" to advertising or commercial sponsorship. Comment, *supra* note 1, at 666.

33. Advertising media includes, but is not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit advertisements. CAL. CIV. CODE §§990(1), 3344(f).

34. *Id.* §990(1).

35. *Id.* §990(n)(1). "Books and movies are vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain Constitutional protections not generally accorded 'merchandise.'" *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978). See also Comment, *supra* note 18, at 1225 n.107 (entertainment materials having first amendment protection include fiction, biography, history, mimicry, parody, and stage, motion picture and television productions); *id.* at 1229-32 (entertainment materials and free speech doctrines in general).

36. CAL. CIV. CODE §990(n)(2). Newsworthy or political uses receive constitutional protection, but case law varies widely as to the line between those uses and purely commercial use. See Comment, *supra* note 18, at 1226-29.

37. CAL. CIV. CODE §990(n)(3). First amendment protection may apply to any nondefamatory communication which expands the cultural experience of society by producing entertaining, creative, or even whimsical expression. Comment, *supra* note 18, at 1224. In addition, California law provides considerable protection to the "moral rights" of artists, in the form of the California Art Preservation Act, CAL. CIV. CODE §987. See Karlen, *Moral Rights in California*, 19 SAN DIEGO L. REV. 675, 679 (1980).

for a use in any of these exempted materials.³⁸

Conclusion

With the enactment of Chapter 1704, the California Legislature changes prior case law that denied recognized personalities a descendible and transferrable property right in their valuable identities.³⁹ In recognizing a protectable property right and providing for descendibility regardless of prior exercise of the right, Chapter 1704 reflects the rationale and policy considerations of Chief Justice Rose Bird's dissent in *Lugosi v. Universal Pictures*.⁴⁰ Chapter 1704 also addresses specific concerns about the creation of a descendible publicity right by mandating termination of the right after fifty years and requiring registration of publicity right claims with the Secretary of State.⁴¹

Although Chief Justice Bird noted in *Lugosi* that the sale of "plastic toy pencil sharpeners, soap products, target games, candy dispensers and beverage stirring rods...hardly implicates the First Amendment,"⁴² many commercial products subject to the provisions of Chapter 1704 may more closely resemble protected forms of expression.⁴³ Chapter 1704 removes much of the potential for constitutional conflict by the exemption of material with political, entertainment, or news value.⁴⁴ Differentiation between purely commercial appropriations and the exempted materials, however, may prove difficult, as illustrated by cases finding news or "informational" value in such items as satirical posters, phonograph records, games, and T-shirts.⁴⁵ Moreover, many celebrities may be associated so closely with a political cause or ideology that any use of their identities will represent symbolic speech protected by the first amendment.⁴⁶ While the language of Chapter 1704 would preclude a constitutional challenge in most of these examples, they represent potential difficulties in the application of the law.

38. CAL. CIV. CODE §990(n)(4).

39. See *supra* notes 12-17 and accompanying text.

40. *Lugosi*, 25 Cal. 3d at 828-58, 603 P.2d at 434-454, 160 Cal. Rptr. at 332-52. The policy expressed by Chief Justice Bird in favor of the creation of a proprietary right was to provide reward and incentive for the expenditure of time and labor needed to produce skills or achievements leading to public recognition, and to discourage the impairment or destruction of the value of the identity through unauthorized appropriation. *Id.* at 834, 603 P.2d at 438 160 Cal. Rptr. at 336.

41. See *supra* notes 19 and 28 and accompanying text.

42. *Lugosi*, 25 Cal. 3d at 852, 603 P.2d at 449 160 Cal. Rptr. at 347.

43. See Comment, *supra* note 18, at 1234.

44. See *supra* notes 34-37 and accompanying text.

45. Comment, *supra* note 18, at 1226, 1227 n.112, 1234 nn.161-62.

46. *Id.* at 1235 nn.163-64.

Torts; trade secret misappropriation

Civil Code §§3426, 3426.1, 3426.2, 3426.3, 3426.4, 3426.5, 3426.6, 3426.7, 3426.8, 3426.9, 3426.10 (new); Code of Civil Procedure §2036.2 (new).

AB 501 (Harris); 1984 STAT. Ch 1724

Chapter 1724 enacts the Uniform Trade Secrets Act¹ in California, establishing a civil cause of action for misappropriation of trade secrets.² Trade secrets historically have been protected according to common law property or contract principles under the rules of equity or under existing statutes relating to fair trade or labor practices.³ Existing law also provides criminal penalties for the theft of a trade secret.⁴ Chapter 1724 provides a uniform definition of terms relating to trade secrets,⁵ authorizes relief for misappropriation in the form of injunctions,⁶ money damages,⁷ or other types of relief,⁸ mandates protection of the trade secret during litigation,⁹ and establishes a single statute of limitation for trade secret misappropriation.¹⁰

1. CAL. CIV. CODE §§3426-3426.10. The Uniform Trade Secrets Act (hereinafter referred to as the Act) was promulgated in response to perceived confusion and uneven development in trade secret law among the states. Uniform Trade Secrets Act, Commissioners' Prefatory Note, 14 U.L.A. 537 (1980). The Act stipulates that application and construction of the provisions of the Act should further the general purpose of making trade secret law uniform among the states. CAL. CIV. CODE §3426.8.

2. See CAL. CIV. CODE §§3426.1-3426.10.

3. Trade secret action initiated under California Labor Code section 2860, providing that every thing an employee acquires by virtue of his employment except compensation due belongs to the employer, treated the trade secret as property. See *California Intelligence Bureau v. Cunningham*, 83 Cal. App. 2d 197, 203, 188 P.2d 303, 306-07 (1948) (trade secrets and confidential information are the employer's property and cannot be used by an employee for his own benefit); *Reid v. Mass Co.*, 155 Cal. App. 2d 293, 300, 318 P.2d 54, 59 (1957) (customer list is employer's property and use by former employee will be enjoined). Actions relying on the provisions of the Restatement of Torts section 757, (Liability for Disclosure or Use of Another's Trade Secret) were actions in equity to provide a remedy when there was no protected property right. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §83 (8th ed. 1974). In addition, trade secret misappropriation often involved a breach of confidence, which led to liability under the rules of contract law. RESTATEMENT OF TORTS §757, comment j (1939). A violation of trade secret law also could be enjoined under provisions relating to unfair competition or unfair business practices. *Chicago Lock v. Fanberg*, 676 F.2d 400, 404 (9th Cir. 1982). See CAL. BUS. & PROF. CODE §17200 (law governing unfair competition). The provisions relating to trade secrets were omitted from the Second Restatement; the resulting gap in the law was filled by the Uniform Trade Secrets Act in 1979. 7 B. WITKIN, Summary of California Law, *Equity* §82 (8th ed. 1984 Supp.).

4. See CAL. PENAL CODE §499c.

5. CAL. CIV. CODE §3426.1.

6. *Id.* §3426.2(a),(b).

7. *Id.* §3426.3(a).

8. *Id.* §§3426.2(c) (affirmative acts to protect trade secret), 3426.3(b) (payment of reasonable royalty).

9. *Id.* §3426.5.

10. *Id.* §3426.6.

Misappropriation

Chapter 1724 defines a trade secret as information that gains independent economic value from being generally unknown to the public or to others in the trade, and has been the subject of reasonable efforts to maintain the secrecy of the information.¹¹ Under Chapter 1724, misappropriation includes both the acquisition of a trade secret by a person¹² who knows or should know that the trade secret was acquired by improper means,¹³ and the disclosure or use of a trade secret without consent by a person who (1) used improper means to acquire it,¹⁴ (2) knew or should have known that it was acquired by another through improper means¹⁵ or under circumstances indicating a duty to maintain secrecy,¹⁶ or (3) knew or should have known that it was a trade secret acquired by accident or mistake.¹⁷

11. *Id.* §3426.1(d). Prior to the enactment of Chapter 1724, California courts generally used the definition of trade secret that appears in section 757, comment b of the Restatement of Torts. *See, e.g.*, *Rigging Int'l Maintenance Co. v. Gwin*, 128 Cal. App. 3d 594, 606, 180 Cal. Rptr. 451, 458 (1982); *Sinclair v. Aquarius*, 42 Cal. App. 3d 216, 221, 116 Cal. Rptr. 654, 658 (1974); *Uribe v. Howie*, 19 Cal. App. 3d 194, 208, 96 Cal. Rptr. 493, 501 (1971). The Restatement required that a trade secret be continually in use in one's business, whereas Chapter 1724 protects a plaintiff who has not yet had an opportunity or the means to put the trade secret to use. Uniform Trade Secrets Act, §1, commissioners comment, 14 U.L.A. 537, 543 (1980). Unlike patent law, which provides a legal monopoly for 17 years while allowing public disclosure, trade secret law protects commercially valuable information only as long as it retains the element of secrecy. Comment, *Trade Secrets: How Long Should an Injunction Last?*, 26 UCLA L. REV. 203, 203 (1978). The information need not be known to the general public for trade secret rights to be lost. If the information is known within the industry or to the principal person who can benefit from it, there is no trade secret. Uniform Trade Secrets Act, §1, commissioners comment, 14 U.L.A. 537, 543 (1980). Similarly, information readily available in trade journals, reference books or published materials cannot be protected as trade secrets. *Id.*

12. Person is defined as a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity. CAL. CIV. CODE §3426.1(c).

13. *Id.* §3426.1(b)(1). Chapter 1724 defines improper means to include theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means. *Id.* §3426.1(a). *Compare id. with* RESTATEMENT OF TORTS §757, comment f, at 10 (1939) (defining improper means as means which fall below the generally accepted standards of commercial morality and reasonable conduct). Improper means may include lawful conduct that is improper under the circumstances. Uniform Trade Secrets Act, §1, commissioners comment, 14 U.L.A. 537, 542 (1980). Improper means *do not* include independent derivation or reverse engineering, a process of starting with the known product and working backward to derive the process that aided in its development or manufacture. CAL. CIV. CODE §3426.1(a). *See* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §83 (8th ed. 1974) (independent invention, accidental disclosure, or reverse engineering are not improper means). Improper means is the basis of trade secret liability, not mere copying or use. *Chicago Lock v. Fanberg*, 676 F.2d 400, 404 (9th Cir.1982).

14. CAL. CIV. CODE §3426.1(b)(2)(A).

15. *Id.* §3426.1(b)(2)(B)(i).

16. *Id.* §3426.1(b)(2)(B)(ii),(iii).

17. *Id.* §3426.1(b)(2)(C). The type of accident or mistake constituting misappropriation under Chapter 1724 requires that the person seeking relief has made reasonable efforts to maintain secrecy. Uniform Trade Secrets Act, §1, commissioners comment, 14 U.L.A. 537, 542-43 (1980).

Injunctive Relief

With the enactment of Chapter 1724, a complainant proving actual or threatened misappropriation of a trade secret may obtain an injunction,¹⁸ terminable when the trade secret no longer exists, or continued for an additional period of time to nullify any commercial advantage gained by the misappropriation.¹⁹ If an injunction against future use appears unreasonable,²⁰ Chapter 1724 allows the court to order the payment of a reasonable royalty for as long as the use could be prohibited.²¹ In some circumstances, a court order may be issued compelling affirmative acts to protect a trade secret.²²

Damages

Chapter 1724 also permits an award of damages for actual loss caused by the misappropriation,²³ plus recovery for unjust enrichment

18. For an injunction against threatened misappropriation, plaintiff must show a probability of improper disclosure. S. OPPENHEIM, G. WESTON, P. MAGGS & R. SCHECHTER, *UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION, CASES AND COMMENTS*, at 316-17 (4th ed. 1983). The circumstances surrounding the hiring or leaving of an employee have been found to indicate a sufficient threat of disclosure or use. *Id.* at 317. *See also* B.F. Goodrich v. Wohlgemuth, 192 N.E. 2d 99, 104-05 (Ohio Ct. App. 1963) (injunction granted on basis of attitude displayed in termination interview); E.I. DuPont de Nemours v. American Potash and Chemical Corp., 200 A.2d 428, 436 (Del. Ch. 1964) (disclosure of trade secret by 12-year employee inevitable if allowed to work for only competitor using the same process).

19. CAL. CIV. CODE §3426.2(a). Trade secrets, unlike other forms of intellectual property, which possess statutorily fixed terms, are of unpredictable duration, because the law protects them only as long as they remain secret. Comment, *supra* note 11, at 203. When a trade secret has been disclosed before trial, a split of authority has existed as to whether an injunction should be perpetual or should issue at all. *Id.* at 206-07. *Compare* Shellmar Products Co. v. Allen-Qualley Co., 87 F.2d 104, 108 (7th Cir. 1936) (majority view that appropriate remedy for trade secret theft is perpetual injunction) *with* Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 150, 156 (2d Cir. 1949) (injunction must end when secrecy ends). The modern trend is to issue a limited injunction for the approximate period a competitor would require to legitimately produce a copy after public disclosure of the secret. Comment, *supra* note 11, at 215-16. *See* Winston Research Corp. v. Minnesota Mining and Manufacturing Co., 350 F.2d 134, 142 (9th Cir. 1965).

20. Prohibition of future use may be deemed unreasonable in light of an overriding public interest in the denial of an injunction, or in the case of reasonable reliance in good faith upon the acquisition of a misappropriated trade secret. Uniform Trade Secrets Act, §2, commissioners comment, 14 U.L.A. 537, 545 (1980).

21. CAL. CIV. CODE §3426.2(b). *See also supra* note 20 and accompanying text (duration of prohibition).

22. CAL. CIV. CODE §3426.2(c). Affirmative acts may include a return of the fruits of the misappropriation to the plaintiff. Uniform Trade Secrets Act, §2, commissioners comment, 14 U.L.A. 537, 546 (1980).

23. California courts have disagreed as to the proper circumstances for an award of damages and the proper measure of damages. *See, e.g.,* Gordon v. Landau, 49 Cal. 2d 690, 695, 321 P.2d 456, 459 (1958) (damages awarded only when expiration of agreement precluded injunction); Reid v. Mass Co., 155 Cal. App. 2d 293, 307, 318 P.2d 54, 68 (1957) (damages may be properly measured by plaintiff's lost profits); American Loan Corp. v. California Commercial Corp., 211 Cal. App. 2d 515, 524, 27 Cal. Rptr. 243, 248 (1963) (damages measured by profits gained by defendant). The amount of damages often is highly speculative due to the difficulty of

not computed into the actual loss.²⁴ If neither actual loss nor unjust enrichment can be proved, the court may order payment of a reasonable royalty for no longer than the use could have been prohibited.²⁵ If the misappropriation is willful and malicious, the court may award punitive damages up to twice the amount of actual damages awarded.²⁶ In addition, Chapter 1724 allows for an award of reasonable attorney's fees if willful and malicious misappropriation exists, if a claim of misappropriation is made in bad faith, or if a motion to terminate an injunction is made or resisted in bad faith.²⁷

Protection During Litigation

Chapter 1724 requires a court to use reasonable means to preserve the secrecy of a trade secret during the course of the action, including protective orders during discovery, *in camera* hearings, sealing of records, and ordering persons involved in the litigation not to reveal the secret without prior court approval.²⁸ The party alleging a misappropriation, however, is required by Chapter 1724 to identify the trade secret with reasonable particularity before initiating discovery.²⁹

Statute of Limitation

Prior to the enactment of Chapter 1724, the statute of limitation for trade secret litigation varied depending on the legal basis of the action.³⁰ Chapter 1724 specifies that the statute of limitation for any action for misappropriation is three years from the time the misappropriation is discovered or should have been discovered by reasonable diligence.³¹ The provisions of Chapter 1724 do not supersede any statute relating to the misappropriation or regulation of trade

estimating either lost profits or wrongful gains. Comment, *supra* note 11, at 203.

24. CAL. CIV. CODE §3426.3(a).

25. *Id.* §3426.3(b).

26. *Id.* §3426.3(c).

27. *Id.* §3426.4.

28. *Id.* §3426.5. See S. OPPENHEIM, G. WESTON, P. MAGGS & R. SCHECHTER, UNFAIR TRADE PRACTICES AND CONSUMER PRACTICES, CASES AND COMMENTS, at 317 (4th ed. 1983) (protection of trade secret in court).

29. CAL. CIV. PROC. CODE §2036.2.

30. See *supra* note 3 and accompanying text.

31. CAL. CIV. CODE §3426.6. Under Chapter 1724, a continuing misappropriation constitutes a single claim. *Id.* Although prior to the Uniform Trade Secrets Act, a conflict existed among other states as to whether a misappropriation constituted a continuous wrong, California regarded a misappropriation as a single wrong, with the statute of limitation running from the initial misappropriation. Uniform Trade Secrets Act, §6, commissioners comment, 14 U.L.A. 537, 549 (1980).

secrets.³² Moreover, the title has no effect on any contractual or criminal remedies,³³ on other civil remedies not based on trade secret misappropriation,³⁴ or on the disclosure of a public record by a state or local agency under the California Public Records Act.³⁵

32. CAL. CIV. CODE §3426.7(a). See CAL. BUS. & PROF. CODE §§16606 (customer list of telephone answering service is a trade secret), 16607 (customer list of employment agency is a trade secret). Federal patent law does not preempt state action to protect trade secrets even if they are patentable. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §82 (8th ed. 1974) (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478 (1974)).

33. A duty of secrecy that is voluntarily assumed through express or implied-in-fact contract is governed by contract law. Uniform Trade Secrets Act, §7, commissioner's comment, 14 U.L.A. 537, 550 (1980). A trade secret agreement, or confidential disclosure of a secret in return for royalties, is effective only between the contracting parties and is not a bar to free copying by others who discover the idea independently. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §84A (8th ed. 1984 supp.) (citing *Kewanee Oil*, 416 U.S. at 482). Criminal penalties for trade secret misappropriation are imposed by California Penal Code section 499c.

34. CAL. CIV. CODE §3426.7(b).

35. *Id.* §3426.7(c). The California Public Records Act, sections 6250-6265 of the Government Code, permits public access to public records. Exemption of particular records from the disclosure requirements are found in section 6254 of the Government Code, which may operate to exempt records containing trade secrets when it will not tend to conceal fraud or otherwise work injustice. *Uribe v. Howie*, 19 Cal. App. 3d, 194, 206-07, 96 Cal. Rptr. 493, 499-500 (1971). See generally, *id.* (pesticide spray reports did not constitute trade secret and could not be deemed privileged under exemptions of the California Governmental Code); *California School Empl. Ass'n v. Sunnyvale Elementary School Dist. of Santa Clara County*, 36 Cal. App. 3d 46, 66, 111 Cal. Rptr. 433, 445 (1973) (Government Code exception in favor of privileged material is broad enough to cover trade secrets). The provisions of Chapter 1724 are severable in order to ensure that if any provision is held invalid, the remaining provisions that can be given effect without the invalid provisions will remain in effect. CAL. CIV. CODE §3426.10.

Torts; discrimination-sexual orientation

Civil Code §51.7 (amended).

AB 848 (Bates); 1984 STAT. Ch 1437

The Ralph Civil Rights Act of 1976¹ provides that all persons within California have the right to be free from violence or intimidation by threat of violence against their person or property based upon race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute.² In an apparent attempt to protect those individuals who are victimized due to a presumed infirmity,³

1. CAL. CIV. CODE §51.7. See 1976 Cal. Stat. c. 1293, §1, at 5778 (short title).

2. CAL. CIV. CODE §51.7; see also *id.* §52. Any person who denies another individual the right to freedom from violence will be liable to the injured person for the actual damages of each and every offense, and \$10,000 in addition thereto. *Id.*

3. See *San Francisco Chronicle*, Aug. 29, 1984, at 1, col. 5.

incompetence,⁴ or inability to obtain civil protection, Chapter 1437 expands the protected classifications to include sexual orientation, age, and disability.⁵ Sexual orientation is defined by Chapter 1437 as heterosexuality, homosexuality, or bisexuality.⁶

4. See Note, *Derivative Deviance . . . The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men*, 19 CRIMINOLOGY 546, 547 (Feb. 1982).

5. Compare CAL. CIV. CODE §51.7(a) with 1976 Cal. Stat. c. 1293, §2, at 5778 (enacting CAL. CIV. CODE §51.7).

6. CAL. CIV. CODE §51.7(b).

Torts; dog bites

Penal Code §399.5 (new); Civil Code §3342.5 (amended).
AB 2208 (Tucker); 1984 STAT. Ch 655
(Effective August 15, 1984)

Existing law provides that after a dog has bitten a human being on two separate occasions, a civil action may be brought against the owner of the animal by any individual, the district attorney, or the city attorney to determine whether conditions or circumstances existing at the time of the bites have changed so as to remove the danger to other persons.¹ Chapter 655 provides that a civil action may be brought against the owner after *one* bite if the dog is trained to fight, attack, or kill, and the attack causes substantial physical injury.²

In addition to providing a civil remedy, Chapter 655 provides misdemeanor penalties for an owner or person having custody or control³ of a dog trained to fight, attack, or kill if, as a result of the owner's failure to exercise ordinary care, the dog bites a human being on two occasions or on one occasion causing substantial physical injury.⁴ The owner or custodian will not be criminally liable under

1. CAL. CIV. CODE §3342.5(b). See also *id.* §3344.5(a) (imposing legal duty on the owner of any dog that has bitten a human being to take reasonable precautions necessary to remove any danger presented to other persons from bites by the animal). The action may be brought in the municipal court in the county where the bite occurred. *Id.* §3342.5(b).

2. *Id.* §3342.5(c). The court, after a hearing, may make any order it deems appropriate to prevent the recurrence of such an incident, including, but not limited to, removal from the area or destruction of the animal. *Id.*

3. Compare CAL. PENAL CODE §399.5(a) with CAL. CIV. CODE §3342.5 (civil action applicable only to dog owners).

4. CAL. PENAL CODE §399.5(a). A violation of this section is punishable by up to six months in county jail, a \$1,000 fine, or both. *Id.* Chapter 655 has no effect on the liability of a dog owner under CAL. PENAL CODE §399, which imposes felony penalties upon the owner of a mischievous animal that kills a person. *Id.* §399.5(d).

Chapter 655, however, unless the owner or custodian knew or should have known of the vicious or dangerous character of the dog, or if the victim failed to take all precautions that a reasonable person would ordinarily take in the same situation.⁵ Following an individual's conviction of violating Chapter 655, a court hearing is required to determine if the dog continues to present a danger to other persons, and to authorize appropriate action, including removal or destruction of the dog.⁶

Chapter 655 does not authorize either a civil or criminal action based on a bite or bites inflicted upon a trespasser or inflicted by a military or police dog while the dog is actually performing in that capacity.⁷ Moreover, a misdemeanor action is not authorized by Chapter 655 when the victim has provoked⁸ the dog or contributed to the injury.⁹

5. *Id.* §399.5(a). See generally *Gomes v. Byrne*, 51 Cal. 2d 418, 333 P.2d 754 (1959); *Smythe v. Schacht*, 93 Cal. App. 2d 315, 209 P.2d 114 (1949) (cases illustrating reasonable precaution and assumption of the risk with regard to dog bites).

6. CAL. PENAL CODE §399.5(b).

7. CAL. CIV. CODE §3342.5(d); CAL. PENAL CODE §399.5(c).

8. Provocation includes, but is not limited to, approaching the owner or custodian in a threatening manner, thereby causing a dog held on a leash to react in a protective manner. CAL. PENAL CODE §399.5(c).

9. *Id.*

