

Astaire v. Best Film & Video Corp. 116 F.3d 1297 (9th Cir. 1997)

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CASE SUMMARIES

ASTAIRE v. BEST FILM & VIDEO CORP.

116 F.3d 1297 (9th Cir. 1997)

INTRODUCTION

Robyn Astaire ("Mrs. Astaire"), the widow of legendary performer Fred Astaire, brought suit against Best Film & Video Corp. ("Best") alleging that Best's use of her late husband's image in dance instructional videotapes violated her statutory right to control such use under California law.¹ Mrs. Astaire claimed that when her husband died in 1987, she succeeded to all rights in his name, voice, signature, photograph, likeness and persona pursuant to California Civil Code § 990.² Though the United States District Court for the Central District of California concluded that Best did not use Astaire's image for the purpose of advertising, selling or soliciting the sale of the videotapes, summary judgment was ultimately granted for Mrs. Astaire. Both sides appealed and the Ninth Circuit reversed and remanded. The appellate court concluded that Best's use of Astaire's image was exempt from liability under Cal. Civ. Code § 990.³

FACTS

In 1965, Fred Astaire and the Ronby Corporation ("Ronby") entered into an agreement which allowed Ronby, through an exclusive license, to use Astaire's name in connection with dance

1. Astaire v. Best Film & Video Corp., 116 F.3d 1297, 1298 (9th Cir. 1997).

2. *Id.* at 1299.

3. *Id.* at 1298-9.

studios, schools and related activities.⁴ Ronby also obtained the right to use pictures, photographs and likenesses of Astaire which had been used pursuant to a previous agreement. In addition, Ronby was permitted to use any photographs and likenesses that Astaire approved in writing.⁵

In 1989, Best and Ronby entered into an agreement to make a collection of instructional dance videotapes using the Fred Astaire Dance Studios name and licenses.⁶ Thereafter, Best began manufacturing and distributing the "Fred Astaire Dance Series," consisting of five videotapes, each containing about thirty minutes of instruction in a particular type of dancing.⁷

The beginning of each videotape starts with the same introductory segment.⁸ First, Best's logo appears on the screen, followed by the title "Fred Astaire Dance Studios Presents How to Dance Series."⁹ About ninety seconds of footage from two of Astaire's movies, Second Chorus and Royal Wedding, follow. The footage shows Astaire dancing.¹⁰ Still photographs of Astaire appear next, followed by a narrator who, on a stage decorated with more Astaire photos, introduces the series and the instructional portion of the video.¹¹

In 1989, Mrs. Astaire sued Best in district court, alleging that Best's videotapes violated her § 990 rights when it used Astaire's image from the movie clips without her permission.¹² The district court's holding included the following legal determinations: (1) Best's use of the Astaire film clips was covered by the language of § 990; (2) Best's use of the Astaire film clips was not a use for "advertising, selling, or soliciting" in violation of § 990(a); (3) Best's use of the Astaire film clips was not exempt under § 990(n); (4) Mrs. Astaire's § 990 claim was not preempted by the federal

4. *Id.* at 1299.

5. *Astaire*, 116 F.3d at 1299.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Astaire*, 116 F.3d at 1299.

10. *Id.*

11. *Id.*

12. *Id.*

Copyright Act; and (5) Best's use of Astaire's likeness was not protected by the First Amendment.¹³ The sole issue on appeal was whether Mrs. Astaire had a § 990 claim against Best.

LEGAL ANALYSIS

At the outset of its analysis, the Ninth Circuit stated that, even though this case involved an issue of state law, it would review the district court's decision using the *de novo* standard for decisions of federal law.¹⁴ Furthermore, since this was a question of California law, the reviewing court was obligated to decide the case as it believed the California Supreme Court would.¹⁵ If there is no California Supreme Court decision, the Ninth Circuit must try to "predict how the California Supreme Court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises and restatements as guidance."¹⁶

Best argued that the district court erroneously concluded that its use of the Astaire film clips violated the "on or in products, merchandise or goods" prong of the statute.¹⁷ In addition, Best contended that the district court erred in concluding that subsection (n) of § 990 did not exempt its use of the Astaire film clips. Mrs. Astaire, on the other hand, contended that the lower court should have concluded that Best's use of the film clips violated the "advertising, selling, or soliciting" prong of subsection (a).¹⁸ The Ninth Circuit decided to address Best's subsection (n) argument first since a finding of complete exemption from § 990 liability would render examination of the other issues unnecessary.¹⁹

13. *Astaire*, 116 F.3d at 1300.

14. *Id.* See also, *Mastro v. Witt*, 39 F.3d 328, 241, (9th Cir. 1994).

15. *Id.* See also, *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1556 (9th Cir. 1991).

16. *Id.* See also, *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996).

17. *Astaire*. 116 F.3d at 1300.

18. *Id.*

In consulting California law on statutory interpretation, the Ninth Circuit found that the initial object is to ascertain the legislature's intent in order to effectuate the purpose of the law.²⁰ This procedure requires a court to first examine the words of the statute and give them their ordinary meaning. In doing this, a court must not only interpret the language in context, but also remain mindful of the statutory purpose.²¹ Any statutory sections containing language on the same subject must be harmonized both internally and with each other to the fullest possible extent.

Having stated these principles, the Ninth Circuit turned its attention to the language of this particular statute to begin its application. Section 990(n) provides:

(n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:

- (1) A play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).
- (2) Material that is of a political or newsworthy value.
- (3) Single and original works of fine art.
- (4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3).²²

Giving the language in this provision its ordinary meaning would seem to yield clear examples of what uses are exempt from § 990 liability. When taking § 990 as a whole, however, exempted use becomes much less clear. Subsection (n)(1) specifically limits the exemption to the uses listed therein, but also states that "such uses are not exempt if they are advertisements or commercial announcements."²³ This limitation is further qualified, however,

20. *Id. See*, Quintaro v. Mercury Cas. Co., 906 P.2d 1057, 1060 (1995)..

21. *Astaire*, 116 F.3d at 1300.

22. Cal.Civ.Code § 990(n) (West 1997).

23. *Astaire*, 116 F.3d at 1301.

because such advertisements or commercial announcements may still be exempt under subsection (n)(4). This is possible because subsection (n)(4) exempts advertisements and commercial announcements for the uses described in subsections (n)(1), (n)(2) and (n)(3).²⁴ Therefore, in order to determine whether a use is exempt under subsection (n)(1), one must refer to subsection (n)(4), which in turn refers back to subsections (n)(1), (n)(2) and (n)(3).²⁵

The Ninth Circuit, recognizing this "convoluted statutory scheme,"²⁶ offer three examples to help clarify what these provisions mean.²⁷ In the first example, the court hypothesized about a person who uses a deceased personality's name without authorization when writing a magazine article about the history of television.²⁸ Both the writer and the publisher would be exempt from § 990 liability because of subsection (n)(1).²⁹ The second example supposed an automobile manufacturer who wanted to advertise its newest model in a magazine with a colorful design which included a picture of a deceased personality.³⁰ Though the use involved is in a magazine like in example one, it would not be exempt under subsection (n)(1) because the deceased personality's photo appears in the advertisement.³¹ Since this use would not be permitted under subsections (n)(1), (n)(2) or (n)(3), it cannot be exempt under subsection (n)(4).³² The final example used the publisher from example one who now wants to advertise the magazine by referring to articles that had appeared in its pages, including the article about the history of cinema.³³ If this particular advertisement used a deceased personality's name, the use would

24. *Id.*

25. *Id.*

26. *Id.*

27. *Astaire*, 116 F.3d at 1301.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Astaire*, 116 F.3d at 1301.

32. *Id.*

be exempt under subsection (n)(4) because the advertisement was for a magazine, which is permitted under subsection (n)(1).³⁴

Best used the *Astaire* film clips on pre-recorded videotapes, which is not specifically listed in subsection (n)(1), although films and television programs are mentioned.³⁵ Normally, when statutory language is clear, examining the legislative history is unnecessary. On the other hand, the court stated that "[i]t is a settled rule of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."³⁶ To interpret subsection (n)(1) as exempting a film or television program but not a videotape is indeed an absurd result. It would be nonsensical to think that the legislature intended a motion picture to be exempt from § 990 liability when it is shown in a theater or on cable television but not when someone rents or purchases it from a store and plays it on his VCR.³⁷ Furthermore, the court felt that this absurd result would be inconsistent with § 990(i) because it contains a broad definition of "photograph" which includes photographic reproductions, whether still or moving, of videotapes or television transmissions where the deceased personality can be easily identified. Because it would have been anomalous to conclude that the definition of the word "photograph" included a videotape recording of a film but the word "film" did not, the Ninth Circuit believed that the California Supreme Court would not have followed the literal language of subsection (n)(1). Therefore, the court held that the term "film" in subsection (n)(1) included Best' pre-recorded videotapes.

Having reached this conclusion, the Ninth Circuit cautioned that its analysis was not complete because, as example two above illustrated, a particular use may not be exempt even though it is listed in the first part of subsection (n)(1). A use that is listed in the first part of subsection (n)(1) will not be exempt if it is an advertisement or commercial announcement that is not exempt

34. *Id.*

35. *Astaire*, 116 F.3d at 1301.

36. *Id.* (quoting *Younger v. Superior Court*, 577 P.2d 1014, 1021-2 (1978)).

37. *Astaire*, 116 F.3d at 1301.

under subsection (n)(4).³⁸ The court, however, found it unnecessary to resolve the parties' dispute over whether the use of the film clips was an advertisement or commercial announcement because Best would be exempt from liability in either case.³⁹

The court reasoned that if Best's use of the film clips was not an advertisement or commercial announcement, then the second part of subsection (n)(1) would not apply and the use would be exempt under that subsection.⁴⁰ Even assuming *arguendo*, that Best's use of the clips is considered an advertisement or commercial announcement, that use is still exempt.⁴¹ This is because it would be an ad or announcement for the purpose of the videotapes as opposed to some other product.⁴² The court referenced the third example above, which illustrates how subsection (n)(4) exempts ads and commercial announcements for uses allowed under subsections (n)(1), (n)(2) and (n)(3).⁴³ Since the court held that the videos were exempt under the first part of subsection (n)(1), subsection (n)(4) provides that "even if Best's use of the Astaire film clips is an advertisement or commercial announcement, such a use is exempt from liability."⁴⁴

Mrs. Astaire's erroneous argument ignored the last five words of subsection (n)(1) (referencing subsection (n)(4)) and focused on the fact that because the use was an ad or commercial announcement it could not be exempt even if the tapes were included under subsection (n)(1).⁴⁵ The court, noting that each part of a statute must be given significance, could not disregard this language. Hence, it held that the only logical reading of subsection (n)(4) is that it exempts ads and announcements "for the uses permitted by the preceding three subsections."⁴⁶

38. *Id.* at 1302.

39. *Id.*

40. *Id.*

41. *Astaire*, 116 F.3d at 1302.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Astaire*, 116 F.3d at 1302.

The court concluded that, when read as a whole, subsection (n)'s proper and only meaning leads to the conclusion that Best's use of the Astaire film clips is exempt.⁴⁷ However, the court's inquiry did not end here because it was obligated under California law to decide if the meaning of the plain language could be reconciled with the legislature's intent.

Senate Bill 613 (:SB 613") is the legislation which enacted § 990. Mrs. Astaire claimed that the legislative history of SB 613 supported the district court's holding that subsection (n)(1) created a limited exception for "legitimate historical, fictional, and biographical accounts of deceased celebrities."⁴⁸ Mrs. Astaire argued that Best's use of the film clips was aimed at making the videos more attractive and salable and, therefore, could not be exempt under subsection (n)(1).⁴⁹

In making this argument, Mrs. Astaire relied on several letters written by the author of SB 613. The Ninth Circuit, however, could not examine these letters because California law contains a general prohibition against considering the motives of individual legislators even if that person wrote the statute.

The court is permitted to make an evaluation of things such as the legislative history of the statute, committee reports, and staff bill reports in order to determine the intent of the legislature. In addition, courts may follow a statute's evolution through the California State Senate or Assembly because this process may contain significant information regarding legislative intent.

In its original form, SB 613 did not contain § 990. The Senate passed the bill in this form, but the Assembly amended it many times.⁵⁰ When § 990(n) first appeared in the amended legislation on June 12, 1984, it read:

Nothing in this section shall be construed to derogate from any rights protected by constitutional guarantees of freedom of speech or freedom of the press, such as the right to use a deceased

47. *Id.*

48. *Id.*

49. *Astaire*, 116 F.3d at 1302.

50. *Id.* at 1303.

personality's name, voice, signature, photograph, or likeness in a play, book, magazine, newspaper, film, television program, or similar medium of expression, to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press.⁵¹

After a staff report criticized this version of the bill, § 990 was put in its existing form containing no explicit language "limiting the scope of its exemption to constitutionally protected uses."⁵²

The court put significant emphasis on the Legislature's deletion of the language "to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press" from SB 613. The court felt that this omission was crucial because it "demonstrated an intent to adopt a broader exemption that was not limited to constitutionally protected uses."⁵³ Based on this evolution of subsection (n), the court held that its view of the statute, as required by its plain language, was consistent with the Legislature's intent.⁵⁴

A group of several staff reports, including the one mentioned above, described SB 613 as being created with the intention of addressing situations where exploitation of a celebrities name, voice, signature, photograph or likeness leads to commercial gain, or the celebrity is abused or ridiculed through a marketed product.⁵⁵ Examples of such uses given in the reports were posters, T-shirts, porcelain plates, and other collectibles, toys, gadgets, merchandise and look-alike services.⁵⁶ The court stated that Best's use neither

51. S.B. 613, 1983-4 Reg. Sess. (Cal.1984)(hereinafter "S.B. 613") (as amended June 12, 1984).

52. *Astaire*, 116 F.3d at 1303. *See also*, Staff of Assembly Comm. on Judiciary, 1983-4 Reg. Sess., Report on SB 613 (Campbell) As amended 6/12/84 at 6 (Cal. 1984).

53. *Astaire*, 116 F.3d at 1303.

54. *Id.*

55. *Id.* *See* Staff of Assembly Comm. on Judiciary, *supra*, at 3-4; *See also*, Assembly Office of Research, 1983-84 Reg. Sess., Report on S.B. 613 (Campbell) As Amended 8/9/84 at 3 (Cal.1984).

abused or ridiculed Fred Astaire, nor did it resemble the exploitative marketing uses listed in the staff reports.⁵⁷

The court was well aware that Best's motives for placing the Astaire clips in the videos was increased marketability.⁵⁸ However, there was no support in the statute or the legislative history that would permit the court to make a legal distinction between Best's use of the clips and their use in a documentary about dance in film. Even Mrs. Astaire conceded that use in such a documentary would be exempt from liability. Hence, the court concluded that Mrs. Astaire's claim for a limited exception to be drawn from subsection (n) was not born out by the legislative history.⁵⁹

DISSENTING OPINION

The dissent focused its attack on the fact that Best did not use the Astaire film clips in the actual dance instruction videos.⁶⁰ Although the dissent agreed that subsection (n)(1) exempts videotapes even though the statute does not expressly refer to them, it felt that the majority went too far in holding the clips exempt as an ad or announcement of an exempt use.⁶¹

The dissent argued that the majority focused improper attention on subsection (n)(4) when holding the use exempt, while the actual source for the exemption should have come from subsection (n)(1), which allows use of an image or likeness in a videotape and the like.⁶² However, the dissent found it impossible to give an exemption here because the Astaire footage was never used in the dance instruction videos.⁶³ While the clips of Astaire were used to promote the dance video, Astaire's image never appeared during the instructional part of the tape.⁶⁴ The dissent argued that if Best

57. *Astaire*, 116 F.3d at 1303.

58. *Id.*

59. *Id.* at 1304.

60. *Id.*

61. *Astaire*, 116 F.3d at 1304.

62. *Id.*

63. *Id.*

64. *Id.*

had used the clips in an advertisement appearing anywhere other than on the same tape with the instructional video, the use would clearly not have been exempt.⁶⁵ The mere fact that Best decided to append the clips to the instructional video under the guise of a prefatory statement did not alter its basic form as a commercial announcement of something unrelated to any exempted use of a photograph or likeness. Under the reasoning of the dissent, since the clips were not advertising or announcing a use permitted by subsection (n)(1), then they could not be exempt under subsection (n)(4).⁶⁶

CONCLUSION

In reversing the district court's holding granting summary judgment for Mrs. Astaire, the Ninth Circuit reviewed California law of statutory interpretation, analyzing the legislative history and intent behind § 990. After giving the language of the statute its plain and ordinary meaning, as required under California law, and finding nothing in the legislative history to the contrary, the Ninth Circuit held that Best's use of the Astaire film clips to advertise a series of instructional dance videos was exempt under § 990(n).

T. Sean Hall

65. *Astaire*, 116 F.3d at 1304.

