Year of the Living Dead: California Breathes New Life into Celebrity Publicity Rights

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by
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I

Introduction

It is ironic that in Fred Astaire's final film, *Ghost Story*, he played an elderly man haunted by a ghost from his past. The apparition, appearing lifelike and real, tormented him about a youthful indiscretion. The irony arises from the fact that Astaire's widow, Robyn, faced a similar situation only a few years later. Mrs. Astaire was also haunted by a ghost of Fred Astaire's past: a very real image of a young Fred Astaire being used to market a video on how to "dirty dance."

This image was but a glimpse of what the future holds for the film industry. Digital technology now makes it possible to resurrect actors, like Astaire, from the dead and to manipulate their images such that they can be presented to an audience as if they were alive and continuing to make films. Responding to this development, and at the urging of Mrs. Astaire, the California legislature passed SB 209, commonly referred to as the "Astaire Bill," which was signed into law by California Governor Gray Davis on October 10, 1999. Known as the "Astaire Celebrity Image Protection Act," this new law extends the period of protection for deceased celebrities' images by twenty years and, more significantly, protects the use of these images without the deceased celebrities' families' permission. While the law fails to protect against any unauthorized use of digitally altered film performances of deceased celebrities, it nonetheless significantly expands the scope of celebrity publicity rights and presents new legal issues to practitioners in the entertainment industry.

This article will provide an overview of the digital technology, which prompted the reform of California's publicity rights legislation. It will then examine the legal protections available to celebrities in both the common and statutory law, including California law as it existed prior to the recent enactment. The article will next trace the development of the Astaire Bill and compare the bill in its final

4. 1999 Cal. Legis. Serv. Ch. 998 (S.B. 209) (West) [hereinafter the Act].
version with the original proposal and its alternatives. After an introduction to the industry economic issues related to celebrity publicity rights, the article will analyze the Act and assess the desirability of a law, which extends protections to all digital film uses. This analysis will include not only a public policy evaluation of such a law, but also an assessment of how it would affect filmmakers, celebrities and their business endeavors in the future. Finally, reform recommendations will be made. Note that while there are a number of federal copyright law implications arising from the Astaire Bill's passage, the scope of this article is limited to the law's effect on celebrity publicity rights.

II
Digital Imaging Technology

Imagine the next installment in the James Bond film franchise: David Niven, as Bond, is tracking down his new nemesis, an evil high-tech international terrorist, played by Marlene Dietrich. He is distracted by the beautiful new Bond girl, played by Marilyn Monroe, and must answer to his boss, M, played by Charles Laughton. Or consider another possible scenario, a remake of the John Waters cult classic Pink Flamingos in which Marie Dressler plays Babs Johnson, vying for the title of "filthiest person alive," with James Stewart and Lillian Gish as her rivals, performing acts so disgusting they cannot be described in this article. Such casting scenarios, for better or worse, are now possible with the advent of digital imaging technology, a process that allows the creation of derivative works from existing filmed performances.

Traditionally, the manipulation of images originally captured on motion picture film did not allow precise alteration of the individual frames. Any alteration would be of a quality that would make it obvious to the viewer. Relatively recent advances in digital technology now allow existing films to be scanned and converted into a digital format. This format makes it possible to alter the images into an almost seamless new set of images, clear and practically

5. For clarity of presentation and discussion, this article will hereinafter distinguish between the proposed form of the legislation (which will be referred to as the "bill" or the "Astaire Bill") and the final version (referred to as the "law" or the "Act").

imperceptible to the viewer. These alterations include the ability to change not only colors and shapes, but also motion and expression, leading to the creation of lifelike performances by "synthespians," a special effects term used to describe synthetic characters created by means of digital technology. Synthespians can include recreations and reanimations of famous deceased performers, much like those already seen in television commercials featuring, for example, Marilyn Monroe in an advertisement for Chanel No. 5 or Fred Astaire in an ad for Dirt Devil Vacuum Cleaners.

Arguably the most publicized first usage of digital manipulation in motion pictures took place in Forrest Gump in which several public figures, including President John F. Kennedy, were shown in animation with live actors as if they were speaking and acting as part of the film. Another recent use of the technology to resurrect a dead actor is in a film which won the year's Academy Award for Best Picture. Because of the untimely death of Oliver Reed, the producers of Ridley Scott's Gladiator created a virtual version of the actor to complete his remaining scenes. This use of digital technology is similar to that made by the producers of The Crow, in which digital images of the deceased Brandon Lee were used to finish his scenes in that film when he died prior to its completion. The technology thus has both creative and practical value, enabling studios to enhance films as well as to complete films they may otherwise abandon following the death of a key actor.

Although there is debate about how soon the process will be able to create truly seamless new performances of deceased actors, the consensus is that the capability is there, and the realization is in the near future. At least one company has already been founded with

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7. See Gerald O. Sweeney, Jr. & John T. Williams, Mortal Kombat: The Impact of Digital Technology on the Rights of Studios and Actors to Images and Derivative Works, 17 Ent. & Sports Law 1 (Spring 1999). This article provides an excellent overview of the digital imaging process. In basic terms, the digitalization process involves the assignment of a series of numerical codes to each pixel, the smallest component of an image. Software allows a programmer absolute freedom to manipulate the appearance and location of any pixel within the image. Id. at 17 n. 3. For a more in-depth description of the technology and process, see Erin Giacoppo, Note, Avoiding the Tragedy of Frankenstein: The Application of the Right of Publicity to the Use of Digitally Reproduced Actors in Film, 48 Hastings L.J. 601 (1997).

8. Sweeney & Williams, supra n. 7, at 17 n. 6.


12. Id. at 607-08.
the express purpose of creating "photo-realistic" animated human versions of Hollywood film legends: Virtual Celebrity Productions unveiled an animated version of Marlene Dietrich in 1999. This company's clients include the estates of not only Dietrich, but also of Clark Gable, W.C. Fields, James Cagney, Bing Crosby, Natalie Wood, Vincent Price, Sammy Davis, Jr., and George Burns. From these estates, Virtual Celebrity Productions has secured the rights to produce digitally reconstructed film performances, a process the company calls "photo surrealism." While the company does not believe its stars will be ready for cameo roles for another two years, or for full-length feature performances until 2004, an action film starring a resurrected Bruce Lee is already in development.

Despite the hoopla, the technology is not yet as advanced as would be needed to create seamless digital acting performances by the likes of Bette Davis, for example. The process of creating such characters is highly capital and labor intensive, and the present market is small. Much of the complexity arises from the "keyframing" of the human face, especially when one must create facial expressions, which are distinctive and well-known to audiences. Inexpressive actors are the easiest to recreate digitally, while actors with more expressive faces are too complex for the existing technology. Thus, either fully computer generated synthespians or action figures like Bruce Lee and Steve McQueen are more likely to be seen in theaters in the near future. It appears that fans desiring to see Ingrid Bergman or Spencer Tracy will have to wait a few more years.

14. Logan, supra n. 10.
16. Id.
17. Logan, supra n. 10.
19. Id. Virtual Celebrity Productions' Marlene Dietrich, although it captured her essence, did not replicate her screen image. Reed, supra n. 15.
20. Logan, supra n. 10.
III

The Common Law Right of Publicity

A. Its Scope and Limits

When digital technology is used to alter the performances of deceased personalities, it comes into direct contact with their publicity rights. The right of publicity has existed in some form in this country for almost a century. The origin of this right can be traced to its close relative, the right of privacy, which has been described as the right to an inviolate personality that would protect characteristics "whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression." Many of the privacy rights cases early this century focused on whether a person's name or likeness could be protected. While these cases would today probably be considered publicity rights cases, at the time they fell under the rubric of privacy rights.

The first court-recognized publicity right did not appear until 1953. The Second Circuit, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, declared a right of publicity, based on the "common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances." This particular type of publicity right relates to the identification value of a celebrity or personality.

The Supreme Court weighed in on the right of publicity when it recognized another type of publicity right, that of performance value. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the court distinguished a performer's right to the economic value of his performance as a separate right from his identification value.

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21. See Paul C. Weiler, *Entertainment, Media, and the Law* 160-70 (1997), for a discussion of the evolution of publicity rights. Weiler defines the right of publicity as the right to control one's identity for commercial purposes, and he traces the evolution of this right to the 1903 enactment of Sections 50 and 51 of the New York Civil Rights Law, making it unlawful to use the name or picture of a living person for commercial purposes without their consent. *Id.* at 160-61.


broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purpose of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. 26

The result of these cases is a definition of the right of publicity which indicates the right of a celebrity or public figure to "control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit." 27 The scope of the right, which began as a narrow set of protections for one's name and likeness, has been expanded over time to include voice, 28 professional characteristics, 29 style of performance, 30 phrases, 31 and even the evocation of a celebrity's image. 32

Publicity rights are limited, of course, by the First Amendment and the protections of freedom of speech and of the press. Thus, celebrities and public figures may not enforce their publicity rights in news stories, 33 biographical presentations, 34 or parodies and satires 35 that use their identities. However, if the use of the identity is purely commercial in nature, fewer First Amendment protections apply, and a claim for violation of the right of publicity will prevail. 36 In the case of performance value claims, the protection is limited by the amount of originality, creativity, and newsworthiness of the performance. 37

26. Id.
28. See e.g. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
29. See e.g. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).
30. See e.g. Waits v. Frito-Lay, 978 F.2d 1093 (9th Cir. 1992).
31. See e.g. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).
32. See e.g. White v. Samsung Elec. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (holding that a robot which merely reminded the public of Vanna White violated her right of publicity).
34. See e.g. Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994).
36. See e.g. Carson, 698 F.2d at 831.
37. See Estate of Presley, 513 F. Supp. at 1356. The court indicated that if the portrayal contributes to the public debate of political or social issues or to society's cultural enrichment, as long as the portrayal is not false or defamatory, it will generally be immune from liability. If the primary function is commercial exploitation, however, the immunity disappears.
B. Rights of the Deceased

Most of the publicity rights cases thus far have involved living celebrities. The issue of the right to publicity for deceased celebrities has only recently been addressed by courts and legislatures. An early case addressing the issue is *Price v. Hal Roach Studios* in which the Southern District of New York recognized the descendibility of such rights, based on the fact that they were assignable. On the other hand, the Supreme Court of California initially declared that the right of publicity expired upon the death of the celebrity and was not descendible. In *Lugosi v. Universal Pictures*, the heirs of Bela Lugosi sued for unauthorized commercial exploitation of Lugosi's identity in the Count Dracula role. They lost the case because the court would not allow the right of publicity to descend when the celebrity did not exploit his identity for commercial purposes during his lifetime.

Even in the aftermath of the enactment of California Civil Code Section 990 (discussed infra), this decision would likely stand because Lugosi had assigned his publicity rights in the Dracula character to the studio as part of his film contract.

The *Lugosi* reasoning was later applied to the estate of Elvis Presley, a celebrity who had exploited his identity during his lifetime. In *Estate of Presley v. Russen*, the New Jersey district court held the defendant liable for copying and performing Presley's stage performances, concluding that the publicity right was descendible because it had been exploited by Presley. In addition, because the defendant's performance had neither its own creative component nor a significant independent value as entertainment, the freedom of expression claims were outweighed by the estate's right of publicity claim.

By contrast, if a deceased celebrity's performance is used as part of a biographical portrayal, courts are less likely to find a publicity right violation. In *Joplin Enterprises v. Allen*, no violation was found in a play depicting a day in the life of singer Janis Joplin, which included a concert performance. Because the concert performance

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40. *Id* at 313.
41. *Id* at 314
42. *Id* at 314 n. 2.
43. Weiler, *supra* n. 21, at 175.
45. *Id*.
was part of the protected expression in the entire play, it was likewise exempt. The Joplin court refused to analyze the use of the concert performance as separate from the context of its use within the play. Thus, if a performance is one part of a newly created artistic form of expression and is not included primarily for commercial exploitation purposes, the First Amendment limitation on the right of publicity will likely be applied.

Set against the backdrop of these holdings, the Supreme Court of Georgia addressed the issue of publicity rights for the deceased in Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc. Relying primarily on the holding in Estate of Presley v. Russen, in which the Presley court quoted from the dissent in Lugosi, the Georgia court held that the right of publicity survives the death of the owner, and is both inheritable and devisable. The Georgia court seemed to be especially concerned with those who would reap unauthorized profits from the fame of a celebrity after their death. Therefore, the court held that the owner of the right of publicity need not have commercially exploited the right in order for it to survive their death. Here, the court reasoned that a person who avoids exploitation during life is entitled to have his image protected against exploitation after death, perhaps even more so than one who exploited his image during life.

While Georgia allows the right to descend regardless of exploitation during one's life, in several other states the common law rights of publicity depend on whether the right was exploited. As these cases illustrate, the common law right of publicity is far from uniform. In the statutory arena, however, the disparity seems even

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47. Id. at 351.  
48. Id.  
49. 250 Ga. 135 (Ga. 1982).  
50. Chief Justice Bird's dissent was quoted, in part, as follows: "There is no reason why, upon a celebrity's death, advertisers should receive a windfall in the form of freedom to use with impunity the name or likeness of the deceased celebrity who may have worked his or her entire life to attain celebrity status. The financial benefits of that labor should go to the celebrity's heirs." Estate of Presley, 513 F. Supp. at 1355.  
51. King, 250 Ga. at 143.  
52. Id. at 143-44.  
53. Id. at 144.  
54. Id. at 144.  
greater.

C. Statutory Right of Publicity

Only eighteen states have enacted legislation recognizing some form of a right of publicity.56 The most recent additions to this group are Illinois and Ohio, which respectively enacted statutes in July and September of 1999.57 Other states, such as Georgia, rely mainly on case law to define and limit the right and its scope.58 As would be expected, the various states’ statutory definitions are widely disparate. The publicity right protections vary in terms of degree and length of time. For example, while all of the states protect the person’s likeness, not all of them protect the voice or signature.59 Some states limit the right to only the performer’s name and likeness, while others have expanded the right to include signature, voice, appearance, distinctive mannerisms, gestures and other identifying characteristics that make up a celebrity’s persona.60 This state expansion of protection mirrors the manner in which the common law protections developed, as described in the preceding section. The right expires upon death in many of the states.61

A post-mortem right of publicity is currently recognized in relatively few states by either statutory or common law. While eighteen states have publicity rights legislation, only twelve have legislation specifically recognizing publicity rights for deceased personalities.62 In some of these states, the right is descendible only if the person exploited the right during his lifetime, while others allow the right to pass regardless of self-exploitation.63 The terms of the post-mortem rights vary from a low of ten years to a high of one hundred years, or perhaps even in perpetuity; Tennessee has a statute that could potentially make the rights indefinite.64

56. Currently these states are California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.
58. See supra Part III(B).
60. See e.g. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
62. These states are California, Florida, Illinois, Indiana, Kentucky, Nebraska, Nevada, Ohio, Oklahoma, Tennessee, Texas, and Virginia.
63. See e.g. King, supra n. 49.
64. The “Elvis Statute” allows for the continuous protection of the right so long as the right is continuously exercised. Tenn. Code Ann. § 47-25-1104 (West 1999).
Two states explicitly deny, by statute, a post-mortem right of publicity.65 Interestingly, one of these states, New York, was the first to recognize a right of publicity for living persons.66 Nevertheless, its determination that no such right exists for deceased celebrities has been upheld by the Court of Appeals.67 California, by contrast, apparently unhappy with the Lugosi verdict, amended the California Civil Code to create descendible publicity rights for deceased persons.68 The rights were limited to commercial uses and excluded news and entertainment uses other than advertisements. Perhaps unsurprisingly, none of the states’ statutory and common law provisions address the use of reanimated or digitally manipulated images of deceased celebrities.

D. California Law

1. Section 990

In the absence of a national publicity rights statute, many courts and policy makers look to California law for guidance on this issue. California, the home to the film industry and to a large number of celebrities from all fields in the entertainment industry, has had much experience in dealing with celebrity issues. California Civil Code Section 334469 protects a celebrity’s right of publicity, but California took the further step of protecting the right for deceased personalities by enacting Section 990, which made it a tort to use a celebrity’s image for commercial purposes.70 The publicity rights were freely transferable, but if the deceased personality did not transfer his or her rights by contract or by means of either a trust or testamentary document, and there were no surviving family members, the rights terminated.71 Otherwise, the rights terminated fifty years after the death of the personality.72 The statute expressly exempted the use of the deceased personality’s likeness in a “play, book, magazine, newspaper, musical composition, film, radio or television program and material that is of political or newsworthy value.”73 Of all the

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65. These states are New York and Pennsylvania.
71. Id. §§ 990 (b), (e).
72. Id. § 990 (g).
73. Id. § 990 (n).
states which recognize such rights, California's statute was among the most comprehensive.

As broad and all-encompassing as the California statute was, it failed to address new developments such as digital imaging technology. While living celebrities would arguably be protected against unauthorized digital representation under Section 3344,74 and deceased celebrities would similarly be protected against the unauthorized digital use of their images in advertising under Section 990,75 there remained a gap when it came to the use of digital images of deceased celebrities in film. The existing statute would have allowed, immediately upon an actor's death, a digitally reconstructed performance of the actor in a new film, which a studio could have made without either obtaining permission from or paying compensation to the actor's estate.76 Into this void of protections stepped Robyn Astaire, the catalyst for reform of California Civil Code Section 990.

2. The Astaire Case

The reform story actually began over ten years ago. In 1989, Robyn Astaire, the widow of the legendary dancer and actor, was flipping through the pages of a mail order catalog when she saw an advertisement for an instructional dance video captioned "Fred Astaire Teaches You How to Dirty Dance." Distressed by this unauthorized use of her husband's name and image, Mrs. Astaire brought suit against Best Film & Video Corporation ("Best"), the company that produced and distributed the videotape.78 Mrs. Astaire


75. For these arguments to prevail, the digital manipulation and presentation of the celebrities' images must be found to fall under the definition of either a likeness or a photograph. Given the result in White, in which the court held that a robot could infringe Vanna White's right of publicity even though the robot was not an exact replica of White, it seems reasonable to presume that digital imaging would also be found to qualify as either a likeness or photograph. 971 F.2d at 1395.

76. This result would depend in part on how courts would interpret the digital performance. If, like the court in Presley, the performance is found to have little original creative or cultural enrichment value, but is primarily commercially exploitative in nature, the actor's estate would stand a better chance of prevailing on a claim for infringement of the publicity right. 513 F. Supp. at 1356. The more likely result, however, is like that in Joplin, 795 F. Supp. at 351, as the digital reproduction of an actor's performance is but a part of a new creative expression (a film), which must be viewed as a whole, and is most likely protected by the First Amendment.

77. Pyle, supra n. 2.

sued under California Civil Code Section 990, which prohibited, among other things, the use of a deceased personality's name, photograph, or likeness for commercial purposes without the prior consent of the deceased personality's heirs.79 Fred Astaire had entered into an agreement in 1965 with the operators of the Fred Astaire Dance Studios, whereby he licensed the dance studio company to use his name and photograph.80 As a result, Best's use of Astaire's name and photograph were authorized by means of an agreement Best reached with this license holder.81 Thus, Mrs. Astaire's claim was reduced on appeal to the issue of the unauthorized use of film clips from two of Astaire's films, which appeared in the video.82

Mrs. Astaire won a district court judgment in her favor, which was appealed to the Ninth Circuit U.S. Court of Appeals.83 The Ninth Circuit reversed the district court judgment, holding that Best's use of the Astaire film clips was exempt from liability under Section 990 (n).84 Subsection (n) exempted from liability the use of a deceased

79. The relevant sections of the statute read as follows:

(a) Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof . . . (h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death . . . (i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any video tape or live television transmission, of any person, such that the deceased personality is readily identifiable . . . (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 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).


80. Astaire, 116 F.3d at 1299.
81. Id.
82. Id.
83. Id. at 1300.
84. Id. at 1304.
celebrity's photograph or likeness in films and television programs. Satisfied that this meaning also comported with legislative intent, the court held that Best was not liable. Even though the court acknowledged that Best placed the film clips in the videotape for the obvious purpose of making them more salable, it found no basis for treating this use of the film clips differently from the use of the clips in a documentary about dance, a usage which would clearly be exempt from liability.

In her dissent, Justice Schroeder cautioned that under the majority's reasoning a company could, without incurring liability under Section 990, sell a videotape on fashion by introducing it with footage of Jacqueline Kennedy, an exploitation the statute was clearly intended to prevent. Nevertheless, the case ended when the United States Supreme Court refused to grant certiorari. Undaunted by the setback, Mrs. Astaire continued her ten-year battle to change the California law which allowed Best to use Astaire's film clips without either permission or remuneration.

E. Calls for Reform

Given the lack of protection afforded deceased celebrities, which the Astaire verdict illustrated, calls for the reform of Section 990 were sounded throughout the 1990's. Concerned by the court's ruling and the larger implications of digital appropriation of their images, a number of celebrities and their families became involved in the legislative reform movement. Mrs. Astaire, along with other celebrities and their relatives, called for the removal of the exemptions in the then-existing law in order to provide the same

86. Astaire, 116 F.3d at 1301-02.
87. Id. at 1304.
88. Even if the clips were considered advertisements for the rest of the videotapes, they would be considered exempt because the videotapes fell under the exemption for films. *Fred Astaire's Widow Loses Right of Publicity Suit against Producer of Instructional Dance Videos That Contain Clips from Two Movies Showing Astaire Dancing*, 19 No. 5 Ent. L. Rep., 13 (1997).
89. Astaire, 116 F.3d at 1304 (Schroeder, J., dissenting).
91. Mrs. Astaire, along with Bela Lugosi, Jr., who holds the rights to the image of his father as well as those of the Three Stooges, testified before the California Senate Judiciary Committee in March, 1999. Pyle, *supra* n. 2. Mrs. Astaire also cited support from the Directors Guild of America and several prominent actors, including Jack Lemmon, Bob Hope, and Arnold Schwarzenegger. *Prominent People Have Rights Too! PR Newswire* (July 7, 1999) (available in CIS State Capital Universe).
protection against unauthorized commercial use of deceased celebrities' images. While their concerns were motivated at least in part by monetary considerations, these individuals were also trying to protect the goodwill of their celebrity personae, images that were developed over a lifetime of work in the public. As Mrs. Astaire put it, her husband's name was comparable to the Good Housekeeping Seal of Approval. 92 This goodwill was an intangible value in need of greater protections. Living celebrities got in on the "Act," as well. Janet Leigh testified before the California senate, arguing, "[m]y image is my product, my franchise, my commodity." 93 Others supporting the bill were Tom Cruise, Michael Douglas, and Rod Steiger. 94

Joining the celebrities and their families in sounding the need for reform were academics and practitioners. 95 Citing economic as well as public policy arguments, these reformers believed the California legislature should proactively address the difficult issues posed by the capabilities of digital technology. 96 At a minimum, they sought the same protection currently provided under Section 3344 for living celebrities. 97 Still others called for a national publicity rights statute. 98 One California Assemblyman cited the need for a national statute as his reason for voting against the Astaire Bill. 99

F. Astaire Bill Development

Thanks largely to the reform movement begun by Robyn Astaire, the Astaire Bill was introduced into the California legislature in 1999. 100 The bill was originally drafted so as to delete the list of

92. Pyle, supra n. 2.
93. Quoted in Jeff Wilson, California Leads Way in Protecting Dead Celebrities from Unauthorized Resurrection, Associated Press St. & Loc. Wire (July 8, 1999).
95. For a detailed proposal for the amendment of § 990, see Giacoppo, supra n. 7.
96. The issues and arguments raised included the desire to allow the families of deceased celebrities to have some input and control over if, when, how and in what context their relative's image is presented to the public, as well the desire to provide for compensation to these families and to prevent unjust enrichment on the part of film producers who may use the celebrities' images for personal gain. Id. at 603, 608.
97. Id. at 618.
98. Beard, supra n. 6, at 106, 157. The Screen Actors Guild also called for a federal right of publicity. De Salvo, supra n. 68.
99. Paul Bond, "Astaire Bill" Moves Closer to Passage, Portland Oregonian F05 (June 25, 1999). Dick Ackerman believed the issue was better addressed at the federal level, as each state should not have a different policy.
100. Supporting Players: Sacramento Lawmakers, Cal. J. (July 1, 1999).
exemptions from Section 990 (n). It instead specified that a deceased celebrity’s name or image could not be used commercially without the heirs’ permission even if it is used in an otherwise protected medium, such as a film. However, the restrictions on the use of the images would not override any protections of such use by the constitutional guarantees of freedom of speech and freedom of the press. These constitutional protections notwithstanding, the bill met fierce resistance from the American Civil Liberties Union (“ACLU”) and the California Newspaper Publishers Association over the First Amendment issues. In an editorial, the San Francisco Chronicle called the bill “legislative overkill,” saying that it went beyond protecting assets and privacy and would hinder the freedom to think, speculate or compose. The Los Angeles Times chimed in, worried that even docu-dramas could be found in violation of the law, even if they did not damage the reputation or commercial value of the celebrity’s image.

Other opponents included major studios, film and television producers, television networks, newspaper publishers and civil libertarians. The bill was strongly supported by the Screen Actors Guild (“SAG”). SAG, along with the Consumer Federation of California, believed the proposed law would protect actors’ legacies and keep the public from being misled. With the movie studios on one side of the issue and the actors’ union on the other, it was unclear whether the measure would prove to be good or bad for the entertainment industry as a whole.

The debate over the measure was fairly heated. At one point, Mrs. Astaire issued a press release to answer the criticisms of both the

102. Pyle, supra n. 2.
103. Bill to Protect Rights of Heirs of Celebrities Clears Senate, Metropolitan News-Enterprise 8 (Apr. 6, 1999).
107. Richard Masur, then president of SAG, claimed that the bill would “significantly improve the rights of all Californians to control the commercial exploitation of their family member’s name and image, while still respecting the important freedom of expression guarantees inherent in the U.S. Constitution’s First Amendment.” Bill Sought by Astaire Widow Passed by Assembly, Associated Press St. & Loc. Wire (Sept. 3, 1999).
film studios and the First Amendment defenders.\textsuperscript{110} Dismissing the charge that the bill would limit creative choices at the studios, Mrs. Astaire pointed to the existence of the legal protections for living celebrities, which seems to be accepted as part of the Hollywood system.\textsuperscript{111} She further noted that less than 1\% of all films use descendible persona rights, and those that do use them in a way that is incidental to the story.\textsuperscript{112} Mrs. Astaire directly attacked the studios for wanting to digitally alter and to manipulate celebrity images in order to create entirely new performances, which they could commercially exploit without permission or remuneration.\textsuperscript{113} She maintained that the Astaire Bill merely sought the same protection for individual property rights that the studios have for their copyrights and trademarks.\textsuperscript{114}

In response, the Motion Picture Association of America ("MPAA") emerged as one of the most vigorous opponents of the bill. MPAA president Jack Valenti charged that the bill would open the door to claims by heirs of any celebrity used in a limited or cameo role in a film, especially if the celebrity were portrayed saying or doing something non-incidental which they did not in fact say or do.\textsuperscript{115} Valenti even went so far as to claim that filmmakers would be precluded from hiring actors to portray deceased celebrities in biographical films.\textsuperscript{116} Opponents wondered if films such as \textit{Citizen Kane} or \textit{Schindler's List} would have been made had the law been in effect at the time of their filming (reasoning that the descendants of William Randolph Hearst and Oskar Schindler would have had control over the use of their relatives' images).\textsuperscript{117}

Valenti's objections were overcome by a compromise amendment to the bill which protected the right to create fiction and nonfiction creative works, resulting in the MPAA's dropping of its

\begin{footnotes}
\footnote{110} Prominent People Have Rights Too!, supra n. 91.  
\footnote{111} Id.  
\footnote{112} Id.  
\footnote{113} Id.  
\footnote{114} Id. As an interesting aside, Mrs. Astaire was personally attacked for pushing the bill because her motives were attributed to greed. She was alleged to have denied the Kennedy Center Honors permission to use a sample of Astaire's film clips as part of a tribute to Ginger Rogers (for which she would not be paid), but allowed his image to be used in a vacuum cleaner commercial (for which she was paid). \textit{Isabella's Ear}, St. Net Capitol J. - Cal. Vol. II, No. 12 (Mar. 22, 1999).  
\footnote{116} Id.  
\footnote{117} Free Expression New Protections for Heirs of Deceased Celebrities Go Too Far, Press Democrat (Santa Rosa, Cal.) B4 (July 13, 1999).}


opposition. In a major compromise, the bill was also amended to drop the provisions which would have prevented filmmakers from digitally altering images of deceased personalities. The views of the MPAA, various news organizations, and the studios, that the bill as originally drafted would have tread on their First Amendment rights to portray deceased celebrities and historical figures, thus prevailed. Nevertheless, Mrs. Astaire has vowed to continue the fight for deceased celebrities and digital imaging technology rights in the future.

G. California's New Law

The newly enacted legislation, to be known and cited as the Astaire Celebrity Image Protection Act, serves to renumber and amend the former Section 990. The Act primarily resulted in three major revisions. First, the period of protection governing the unauthorized commercial use of the names and likenesses of deceased celebrities was extended. Second, the exceptions to this protection were revised. Third, the protections were extended to any action occurring in California. An additional noteworthy change requires the Secretary of State to post all filings of claims as successor in interest to the rights of a deceased personality, along with the entire registry of all such persons, as well as all registered licensees, directly on the Internet.

119. The original bill required filmmakers who digitally altered a celebrity's image to obtain the approval of the heirs of the celebrity, a provision that was dropped in order to secure the bill's passage. Kathy DeSalvo, California Senate Approves Dead Celebrity Legislation, Shoot, 7 (Sept. 17, 1999).
120. David Robb, Assembly OKs the Astaire Bill, Hollywood Rep. 6 (Sept. 7, 1999).
121. All references and comparisons to the old and new sections of the California Civil Code are from Cal. Civ. Code § 990 (West 1999) and 1999 Cal. Legis. Serv. Ch. 998 (S.B. 209) (West).
122. The Act also moved the right of publicity protection for deceased personalities from Civil Code Section 990 to Civil Code Section 3344.1, adjacent to the right of publicity for living celebrities. California Enacts "Astaire Celebrity Image Protection Act" Amending State's Existing Right of Publicity Statute for Deceased Personalities, 21 No. 6 Ent. L. Rep., 18 (Nov. 1999). The complete text of the Act is included in Appendix A to this article.
123. 1999 Cal. Legis. Serv. Ch. 998 (g) (S.B. 209) (West).
H. Extended Period of Protection

The period of protection for deceased celebrities was extended by the Act from fifty to seventy years,\textsuperscript{127} making California’s period of protection the longest among all states with the exceptions of Indiana and Oklahoma.\textsuperscript{128} Interestingly, because this extension applies retroactively to any person who has died within seventy years of January 1, 1985,\textsuperscript{129} a number of celebrities who died between 1930 and 1950 now have new or extended periods of protection which did not exist before enactment of the legislation. This group of newly protected deceased celebrities includes such Hollywood luminaries as Mabel Normand (died 1930),\textsuperscript{130} Lon Chaney (died 1930),\textsuperscript{131} Roscoe “Fatty” Arbuckle (died 1933),\textsuperscript{132} Will Rogers (died 1935),\textsuperscript{133} John Gilbert (died 1936),\textsuperscript{134} Jean Harlow (died 1937),\textsuperscript{135} Tom Mix (died 1940),\textsuperscript{136} Carole Lombard (died 1942),\textsuperscript{137} John Barrymore (died 1942),\textsuperscript{138} W.C. Fields (died 1946),\textsuperscript{139} Wallace Beery (died 1949),\textsuperscript{140} and Al Jolson (died 1950).\textsuperscript{141} As can be seen from this list, some important rights to several well-known Hollywood legends are now removed from the public domain. Their descendants can potentially benefit from this new law, a fact which has not yet been mentioned in any of the media coverage of the Act.

I. Revised Exemptions

The old exceptions to the protection afforded by Sections 990 were removed and revised. The revised bill provides “safe harbors” to

\begin{itemize}
  \item 127. This extension was attributed to the desire to maintain analogous protections to that of the federal copyright protection, which was extended from fifty to seventy years in 1998. California Enacts “Astaire Celebrity Image Protection Act” Amending State’s Existing Right of Publicity Statute for Deceased Personalities, supra n. 122.
  \item 128. Each of these states provides protection for one hundred years following the death of the celebrity.
  \item 129. 1999 Cal. Legis. Serv. Ch. 998 (h) (S.B. 209) (West).
  \item 131. Id. at 101.
  \item 132. Id. at 113.
  \item 133. Id. at 123.
  \item 134. Id. at 128.
  \item 135. Id. at 135.
  \item 136. Id. at 155.
  \item 137. Id. at 164.
  \item 138. Id. at 165.
  \item 139. Id. at 183.
  \item 140. Id. at 198.
  \item 141. Id. at 203.
\end{itemize}
protect journalists, filmmakers and historians from defamation charges. The new exceptions provide that:

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.¹⁴²

This clause is apparently the one drafted to satisfy the First Amendment critics of the bill. Under this provision, an instructional video using clips of Fred Astaire’s films would be in violation of the Act, while a nonfictional documentary about dance using those same clips would not be.¹⁴³

A new caveat is included, however. If a work which falls under the exceptions denoted in the preceding paragraph includes “a use in connection with a product, article of merchandise, good, or service,” such use shall not be exempt as long as the use is so directly connected with the commercial aspect as to constitute an act of advertising, selling, or soliciting purchases of that product or service by the deceased personality without prior consent from the deceased person’s heirs.¹⁴⁴ The Act thus requires the heirs’ permission if a historical figure or deceased personality is shown endorsing a commercial product in a film.¹⁴⁵ This change may have helped Robyn Astaire in her fight against Best Video.¹⁴⁶ However, one analysis suggests that it would not have helped her case because the Astaire film clips could only be viewed after the tapes were purchased, and thus could not have been considered advertisements for the tapes.¹⁴⁷

J. Nationalized Scope

The final major change brought about by the Act is the possibility of claims under the Act being brought by the families of deceased personalities who are not domiciled or residents of

¹⁴³. This conclusion assumes that an instructional dance video is not considered an entertainment, dramatic, literary, or musical work.
¹⁴⁵. DeSalvo, supra n. 119.
¹⁴⁶. Robb, supra n. 120.
California, provided the violation occurred in California. As long as the commercial use takes place in California, relatives of a deceased celebrity who resided in a state with less protection can potentially avail themselves of the greater protection afforded by California. This change makes forum shopping an increasingly likely occurrence in the filing of publicity right claims for deceased celebrities and public figures, a factor will be considered in the concluding section of this article.

IV
Industry Economics

Prior to the enactment of California's new law, the standard practice in the entertainment industry was for filmmakers to negotiate a fee and to obtain clearance before using film clips or photographs of a living actor. No such clearance was required for the use of a deceased actor’s image in a non-commercial setting. By lessening the former exemptions, the Act may impose new economic transactional costs on the film industry. However, for the most part, studios and filmmakers retain the opportunity under the Act to capitalize on the appeal of deceased actors. By carefully utilizing the images of a deceased personality in a non-commercial manner, producers can take advantage of the personality without obtaining clearance or incurring the fees and expenses associated with such a transaction.

Some critics have posited that this process could lead to the lessening of fees paid to living actors. The rationale is that if filmmakers can have free unlimited use of a “resurrected” actor in a film, they would be less willing to pay higher fees during the actor’s lifetime for something that will eventually fall into the public domain. This resistance would in turn lessen the actor’s market value while alive.

Taken to its logical extreme, however, this argument loses power when one considers that, unless the actor generated a great deal of popularity and market value while alive, the free use of his image after death would be much less appealing to filmmakers. If the actor

149. Giacoppo, supra n. 7, at 619.
150. In addition to the fees paid to the actor or his heirs, there are transactional costs, including legal and insurance expenses that increase the amount of the total clearance expenditure.
151. Giacoppo, supra n. 7, at 622.
152. Id.
153. Id.
were successful or popular enough, he would be able to demand fees at whatever amount the market would bear. Powerful box office stars can also protect themselves by contracting for control of the future use of their image after death.\textsuperscript{154} In addition, studios may fear alienating such talent and fomenting a movement for a national right of publicity law, which could eliminate the exception for usage of deceased personalities' images in film.\textsuperscript{155} Finally, if the studios were to use the images of the deceased actor to such an extent that he had a starring or featured role in the film, such usage might not qualify for the exemption provided by the Act, as it could be argued that the actor's image was being used to sell or to market the film.

Despite the lack of significant statutory protections, there already exists a market for the licensing and protection of deceased celebrities' images. The leader in this relatively new industry is CMG Worldwide, an Indiana-based company which specializes in licensing and protecting the images of both deceased and living celebrities and in representing their estates.\textsuperscript{156} The company licenses the rights to the images of celebrities such as Marilyn Monroe, James Dean, and Humphrey Bogart.\textsuperscript{157} The business is quite lucrative, generating several millions of dollars in licensing fees even before the impact of the passage of the Act.\textsuperscript{158} Because makers of commercials often must obtain both copyrighted film clips from the studios and licenses to the right of publicity from the heirs of the celebrity, CMG Worldwide believes it may be in filmmakers' best interests to coordinate with celebrity estates and thereby maximize their financial rewards from the use of the deceased personalities' images.\textsuperscript{159} Thus, it is at least possible that industry economics may lead to a system of \textit{de facto} rights for the families of deceased personalities, regardless of legislative initiatives such as the Act.

\section*{V Analysis}

The Astaire Celebrity Image Protection Act introduces an entirely new ball game to the field of celebrity publicity rights for

\begin{thebibliography}{99}
\bibitem{154} Sweeney & Williams, \textit{supra} n. 7, at 21.
\bibitem{155} Id.
\bibitem{156} Wilson, \textit{supra} n. 67.
\bibitem{158} Id.
\bibitem{159} Id.
\end{thebibliography}
deceased personalities. But is it necessarily a good thing? Should anyone have a proprietary interest in the images of deceased actors, and if so, whom? Should the original provisions of the Astaire Bill protecting the deceased against unauthorized digital appropriation of their images have been retained? If so, should these new publicity rights take priority over other social and public policy objectives? While this section will not provide the definitive answers to all of these questions, it will attempt to analyze the First Amendment, public policy, economic, and practical considerations raised by such questions.

A. First Amendment Concerns

The digital resurrection of actors brings the First Amendment freedom of expression protection, which encourages artistic creation and public commentary, into direct conflict with the right of publicity, which provides that every person can control the commercial use of their identity. To the extent that digital imaging of deceased actors is seen as a commercial use of their image, the deceased celebrity's right of publicity has been violated. But if this same use qualifies as a protected form of expression, the upholding of the publicity right results in an infringement of the constitutionally-protected freedom of expression. The final version of the Act temporarily avoided this conflict by providing safe harbors for creative uses of deceased celebrities' images. However, this inevitable conflict must soon be confronted, as reformers plan to propose amendments to include digital imaging protection in films as part of deceased celebrities' publicity rights.

Would these amendments infringe on the free speech rights of artists and writers? First Amendment critics of such provisions, including the ACLU, newspapers, authors and playwrights charge that these types of additional protections would indeed have a chilling effect on their right to write about or portray historical figures and deceased celebrities. The MPAA and large studios worry that additional restrictions would stifle creative expression if film producers, writers, and artists must guess whether a reference or depiction is protected by the First Amendment.

While the media and the studios worry about the censorship

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160. Giacoppo, supra n. 7, at 602.
162. Robb, supra n. 120.
163. Ingram, supra n. 106.
implications, the actors and their representatives are concerned about the exploitation of their economic rights. SAG believes additional protections are urgently needed because of the ability to "morph" a deceased celebrity into a live performer,\(^\text{164}\) thus depriving them of vested commercial rights.\(^\text{165}\) Ultimately the resolution of the First Amendment issues will turn on whether a particular expression is primarily commercial in nature. The more commercial an expression, the less protection afforded by the Constitution.\(^\text{166}\) The difficulty lies in the fact that in today's society, the line between commercial and non-commercial usage is increasingly blurred. In a popular culture in which, as the dissenting opinion in \textit{White v. Samsung} indicates, the line between non-commercial and commercial endeavors is disappearing, such issues are rife with complications.\(^\text{167}\)

Perhaps the most pernicious wrong at issue is the misappropriation of a deceased celebrity's image for commercial exploitation. As this harm is already addressed by California and other states, any further protections may go too far to erode free-speech protections, which benefit both the entertainment industry and society in general. Entertainment is a business of creative expression. While the expression side of the equation is holding sway at the moment, business and commerce continue to raise new concerns about the rights that must be protected. For the time being, at least, expression and the First Amendment are winning this battle.

\textbf{B. Public Policy Issues}

The public policy issues do not derive directly from the Copyright Act,\(^\text{168}\) but do relate to the policy considerations behind it: vindication of economic interests, fostering creative output, and

\begin{enumerate}
\item Pyle, \textit{supra} n. 2.
\item On an unrelated point, SAG's own rules and regulations sadly offer no protection for the names of its own deceased members: anyone who joins the union today can change their name to Fred Astaire. A deceased actor's name is unavailable for use by another actor for only three years after death. An actor who does attempt to use a famous name after the three year period has expired could face other legal obstacles other than SAG's rules, however. Robb, \textit{supra} n. 120.
\item \textit{Id.}
\item 971 F.2d at 1517. Indeed, as Justice Kozinski concluded, in the entertainment industry, \textit{fun is profit}. \textit{Id.}
\item However, it has been noted that digital technology will allow the creation of a number of derivative works, which should be copyrightable, given the lack of a significant degree of originality required for the creation of such derivative works. In this way, the technology will have a significant impact on publicity rights in the film industry. See Sweeney & Williams, \textit{supra} n. 7, at 18.
\end{enumerate}
prevention of unjust enrichment. As with copyrightable works, with celebrity there is a need to protect the economic interests of celebrities so that they can reap the rewards of the fame for which they have worked. This aim is closely related to that of redressing wrongful conduct by not allowing someone who has not earned a right to share in the profits of another's fame to be unjustly enriched through commercial exploitation.

Again, as with copyright, publicity rights are needed to encourage the creation of intellectual and socially useful works. By encouraging individual efforts through personal gain, there is a societal benefit derived from the creative output of talented artists and authors. There must, however, be a careful balancing of these interests, as society also has an interest in the free use of expression and speech. One scholar believes the extension of celebrity publicity rights protection upsets the delicate balance between the rights of the famous and the interests of the public that enabled their fame.

This balance could also be affected in the area of tort law. There is concern that expanded protections may make it possible for the heirs of dead celebrities to sue for damages to the marketability of the celebrities' image resulting from false news accounts or slanderous portrayals in films or television programs. According to the ACLU, any such amendment would be an attempt to give the deceased a defamation right, while all other states acknowledge the dead to be libel-proof. This right would indeed be unprecedented, as American common law does not provide for a tort of defamation which survives death. Defamation, after all, implies hurt feelings, which deceased persons do not have. However, the families of the deceased would argue that the knowing portrayal of false statements would harm the commercial value of their relatives' image, and should be actionable.

170. Pyle, supra n. 2. In addition, a well known authority on copyright, Professor Nimmer, has maintained that if a derivative work can be restricted by an actor's right of publicity claim, state laws would be counteracting the benefits Congress conferred by passage of the Copyright Act. Sweeney & Williams, supra n. 7, at 21 n. 20 (quoting M. Nimmer & D. Nimmer, Nimmer on Copyright §1.01 [B][3][b], at 1-65). However, at least one court has concluded that a copyright holder's digital manipulation of copyrighted material originally made with the performer's consent results in the creation of a derivative work, and the holder's exercise of that right trumps a performer's right of publicity claim. See Ahn v. Midway Mfg. Co., 965 F. Supp. 1134 (N.D. Ill 1997). For an analysis of this decision and a similar case, consult id. at 17.
171. Robb, supra n. 120.
172. Id.
for damages. As one critic puts it, "Do we want the dead to have the same right as the living?" The answer may be "Probably not," but given the valid arguments on both sides of this issue, the answer is far from clear.

One right the dead arguably should have is some measure of control over their legacy. Perhaps an actor has a moral right to determine how his image and performances are used and portrayed after his death. If he were alive, he could choose which film roles to take and which directors and writers in whose material he wished to perform. As one writer has suggested, absent this right, unscrupulous filmmakers could theoretically create an entire body of posthumous work using digitally manipulated images of a deceased actor, all in roles the actor adamantly refused to perform while alive. The actor should have the ability to control and to prevent such damaging, wholesale changes to his reputation and acting craft. This control could be exercised either through contracts the actor entered with filmmakers prior to making his films, or through licensing agreements entered into by his heirs or estate, which could specify the types of roles or films which are acceptable.

While there is certainly a risk that the estates of certain celebrities may be unwilling to allow the use of the image of their relative at any price, such a refusal is their right in a free-market economy. There will undoubtedly be many estates who will be lured by both monetary and artistic incentives to strike licensing deals and allow their relative's images to be digitally recreated. Those who choose not to do so will simply be invoking their (or more specifically, their relative's) right, like Garbo, to be let alone.

Critics maintain that Garbo-esque celebrities and any type of licensing system would cause delays which might mean that older citizens may not live long enough to see digitally resurrected actors in their lifetimes. Because these older citizens are the ones most likely to remember the actors from the era in which they were alive, such long delays would not be in the public interest. Assuming the public desires to see deceased actors performing in new films, should this desire be satisfied in their lifetimes, and should it also depend on the

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175. Giacoppo, supra n. 7, at 623.
176. Beard, supra n. 6, at 165-66.
177. Id.
178. The results of a recent poll indicate that 80% of U.S. filmgoers want to see deceased actors performing in new films. Logan, supra n. 10.
quality of the digital reanimation, in terms of both physical characteristics and acting abilities? While older citizens are most likely to remember the resurrected actors from their primes, they are also the most likely to be offended by performances contrary to the actor’s ability or reputation. It may not be appropriate for the reanimated actor to be cast in roles inconsistent with their image, especially in pornographic films. In addition, older citizens would be disappointed by a poor quality or over-used digital resurrection of their favorite actors and actresses, an overuse that is likely to occur if the celebrities’ images are available as a public good.

Critics who maintain that long delays in reanimation would not be in the public interest seem to overestimate the enthusiasm and desire of the older filmgoing public to see their favorite actors from the “golden era” of Hollywood brought back to life. The value and enjoyment of these actors is in the very performances and films from the 1930s and 1940s that made them famous. It is in these films that the nostalgic value inheres. While curiosity about what digital technology is capable of doing to these actors’ images is certainly of some import, this author does not believe that it is strong enough to constitute value as a “public interest.”

C. Economic Factors

A strong argument for extending economic rights to the families of deceased celebrities can be found in the dissenting opinion in Lugosi. Chief Justice Bird opined that granting protection after death provides incentive for further investment in one’s profession, thus enhancing the value of the publicity right. The descendibility of this right ensures the celebrity that the benefits and control of the right will be given to appropriate beneficiaries, rather than providing a windfall of cost-free commercial exploitation by advertisers. If the celebrity worked his entire life to attain his status, the financial benefit of that labor should go to his heirs.

This same logic could be applied to the usage by filmmakers and studios of a deceased actor’s digitally resurrected image. If

179. Beard, supra n. 6, at 165.
180. Giacoppo, supra n. 7, at 625.
181. Beard, supra n. 6, at 165.
182. The public good problem, also known as the “tragedy of the commons,” is discussed further in Economic Factors, infra Part V(C).
183. Lugosi, 25 Cal. 3d at 446 (Bird, J., dissenting).
184. Id.
185. Id.
filmmakers can capitalize on a deceased actor's image and popularity without paying his estate, the actor's estate is being robbed of an economic right in his identity, which the actor worked to develop during his lifetime. To the extent the use is commercially marketed and the value derives from the exploitation of the actor's image, this usage should be controlled by the actor's heirs. The actor earned the economic right to this identity, which should pass to his estate rather than provide a windfall to a studio or production company.\footnote{186}{Giacoppo, supra n. 7, at 621.}

The counter-argument is that the value of the actor's identity is not exclusively his, as film making is a creative, collaborative process.\footnote{187}{Id. at 622.} Seen in this way, a writer, director, producer, fellow actors, cinematographer, perhaps even a press agent, and others all may have contributed to the market value and reputation of the actor. Therefore, it may not be equitable to allocate all of this value to the actor and his heirs.

Allowing an actor's estate to own the economic rights to his image has also been criticized on the grounds that it will prevent filmmakers from obtaining the best digitally resurrected actors at the most affordable prices.\footnote{188}{Beard, supra n. 6, at 165.} While it is certainly true that such a licensing system would prevent a studio from using Laurence Olivier for free, it would also prevent the diminution in value of the actor's image so that both studios and the heirs could still reap economic benefits. This response is analogous to the economic analysis of the "tragedy of the commons," in which a public or common good is freely available for all to use. If the usage is free, the public will tend to overuse the good, until its value is ravaged, often to the point of becoming worthless. Circuit Judge Smith, in Matthews, recognized this concept, which he identified as the value of protecting artificial scarcity.\footnote{189}{15 F.3d at 437-38.}

Another economic argument holds that putting reanimation in the public domain will actually result in higher quality of, and healthy competition for, digital reanimation of deceased celebrities.\footnote{190}{Beard, supra n. 6, at 166.} However, this argument ignores the economic forces that will make it lucrative for low-cost operators (who would not have to negotiate or pay for licensing fees) to produce cheap versions of digitally resurrected actors in films that are made strictly for profit. One need look no further than the direct-to-video market to see that quality is
not a prerequisite to financial viability in the film industry today. By giving heirs economic benefits and rights to their relatives’ images, a certain minimum level of financial commitment will be required of filmmakers. While this minimum commitment will certainly not ensure a basic level of film quality, it will set in place two factors which will help to increase the chances of a quality production. First, the filmmaker will have invested a certain amount in the acquisition of the rights to the actor’s image. To make this investment pay off, the filmmaker will likely devote enough resources and talent to ensure that the highest quality and best use is made of the image. Second, by giving the heirs a voice in the process, they too can be selective in terms of choosing to sell the rights only to those producers whom they believe will turn out a quality project which would not be inconsistent with or harmful to the image their relative worked so hard to create.¹⁹¹

Assuming that the public wants to pay as little as possible to see resurrected actors, another analysis suggests that the exclusion of reanimation from a post-mortem right of publicity would save studios licensing fees (and certain transaction costs), which could then be passed on to the public, better serving the public interest.¹⁹² The flaw in this analysis is the assumption that any such savings would be passed on to the public. No matter how low digital technology can drive the costs, Hollywood accounting can find a way to show that these films are made at a loss, and studios will therefore point to such losses as justification that no profits are available to pass along to consumers in the form of lower ticket or DVD prices.¹⁹³

A final economic argument against publicity rights for the deceased is that “bidding wars” for famous deceased personalities in the film industry would ensue.¹⁹⁴ However, the industry knows well how to fend for itself, as it has been involved in such wars over living movie stars since the dawn of the studio era in the late 1910s and early 1920s.

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¹⁹¹ For example, Marlene Dietrich’s family struggled with the decision as to whether her digitally resurrected image should be allowed to smoke, even though she made the cigarette holder a world-famous accessory. The family ultimately decided to allow her to smoke on-screen, but not to promote cigarettes in commercials of any kind. Reed, supra n. 15.

¹⁹² Beard, supra n. 6, at 165.


¹⁹⁴ Free Expression New Protections for Heirs of Deceased Celebrities Go Too Far, supra n. 85.
D. Practical Considerations

Given the major studios’ resources and access to digital technology, one could argue that the rights of famous personalities are inadequate in the digital age. However, should post-mortem rights of publicity be extended to cover digitally altered film performances, a host of issues would arise as to the contractual and statutory limitations on these rights. These issues include the validity of inter-vivos transfers of the rights to the detriment of the actor (if done early in his career before he is established and has bargaining power); uncertainties surrounding the term of the rights (depending either on the state in which the actor and/or the infringing party was domiciled or on the state in which the infringement of the rights took place); and the moral rights concerns with the actor’s control over the integrity of his work.  

A national right of publicity statute would be a viable solution to address such issues. A national statute could serve to harmonize the existing conflicts between the various state statutes and common law rights of publicity, thus both providing for more predictable protection and also discouraging forum shopping. It could further provide the framework for a consistent approach to the moral rights and transferability issues.

Before concluding that a national law is the answer, however, one must consider whether alternative protections are already available. One protection actors have is the Screen Actors Guild Codified Basic Agreement (“SAG Agreement”). Section 22 of this contract, “Reuse of Photography or Sound Track,” could be interpreted to mean that digital manipulation of actors’ images or performances cannot be used without either a separate negotiated fee or damages of three times the amount originally paid the performer for the work covering the material used. While the studios have denied such an interpretation, the Screen Actors Guild points to the fact that the studios routinely both seek permission and negotiate for the use of existing film footage of actors.

However, at least one major studio seems to believe it can create new digital media from its existing copyrighted films without violating the SAG Reuse Provision. An executive of the studio counters that as

195. Beard, supra n. 6, at 168-70.
196. Sweeney & Williams, supra n. 7, at 20.
197. Screen Actors Guild Codified Basic Agreement § 22
198. Sweeney & Williams, supra n. 7, at 20.
199. Id. at 19.
long as the technique does not reuse photography of an actor’s performance, but merely the performer’s physical characteristics, the studio has created an entirely new work.\textsuperscript{200} The studio maintains that the digital manipulation of the performer’s image is not a use of photography or performance as specified by the SAG Agreement, and it is quite different from using a clip with identifiable actors from another film.\textsuperscript{201} While this studio executive may be confident in such an assessment, he would be wise to consider the court’s holding in \textit{White v. Samsung}, which imposed a very liberal interpretation on the definition of a celebrity’s image.\textsuperscript{202} This view notwithstanding, as long as deceased celebrity right of publicity statutes such as the Act exempt use in film, the families of such performers will not have a strong legal arsenal with which to fight studio appropriation of their images through digital manipulation.\textsuperscript{203}

A major concern over strengthening this legal arsenal is the suppression of creativity which may result. However, placing limits on the unfettered use of the images of deceased personalities does not mean that the creative process is hampered or that the actors’ images will not end up in new works of film. Rather than obfuscating the creative process, limiting the use of digitally resurrected actors will merely ensure that the use is consistent with the desires of the actor through his heirs, and that his estate will be properly compensated. The limitation may actually enhance the creative process. One studio finds the process of creating a wholly new digital actor to be even more creatively stimulating than using technology to merely copy another actor’s performance.\textsuperscript{204} Alternatively, the limitation may not even be necessary in all cases: Steven Spielberg publicly stated that he will never use digitally replicated actors in his films.\textsuperscript{205}

Of course, there is, as always, the danger of going too far. Some

\begin{itemize}
  \item \textsuperscript{200} \textit{Id.} at 20 (from an interview with a studio executive who insisted on anonymity).
  \item \textsuperscript{201} \textit{Id.} One must question, however, the value of such an image if it is unrecognizable as the original actor. Presumably, the value to the studio is in the recognition of the characteristics of a “name” actor; therefore, one must assume that this executive expects that the actor will still be recognizable in the digitally manipulated image portrayed on the screen.
  \item \textsuperscript{202} \textit{See generally White}, 971 F.2d 1395.
  \item \textsuperscript{203} There remain strong economic incentives for a film producer to be the first to produce a derivative work using a deceased celebrity, and the exemption of film in publicity statutes ensures at least a limited distribution for such films. \textit{Id.} at 21.
  \item \textsuperscript{204} Porter, supra n. 13 (in an interview with Jeff Lotman, founder of Virtual Celebrity Productions).
  \item \textsuperscript{205} As quoted from an appearance on \textit{CNN’s Larry King Live} on Dec. 8, 1999, reported by Lew Irwin, ed., Studio Briefing, (Dec. 9, 1999).
\end{itemize}
say the definition of celebrity in the California statute is so loosely defined as to allow H.R. Haldeman to halt the re-release of *All the President’s Men.*\(^{206}\) Perhaps even the descendants of Adolf Hitler could prevent future showings of *Schindler’s List.* While neither of these situations are desirable from either freedom of speech or educational/historical points of view, it seems unlikely that any such statute would give rise to legitimate claims which could result in a historical figure’s portrayal being censored.

Finally, there are also those celebrities who do not wish to commercially exploit their images after death. One would expect Greta Garbo to be such a celebrity. As the court in *King v. American Heritage Products* succinctly concluded, these wishes should be honored.

VI

Conclusion

Considering the panoply of First Amendment, public policy, economic and practical concerns in the existing framework of publicity rights, a national right of publicity statute is needed. A national law would provide order to the current chaotic patchwork of state laws, and would resolve the choice of law problem by eliminating forum shopping. In addition, a national law could be used to balance the economic and practical issues, which favor greater protections on the one hand, with the public interest and creativity concerns favoring less protections on the other.

While California’s new law is instructive, an appropriate analogy to an existing area of law may be more useful in guiding the development of a national publicity rights law. Although much of the analysis of the right of publicity focuses on analogies to either personal rights or property rights, the most appropriate analogy would be to copyright.\(^{207}\) The descendibility of copyright is believed to provide significant motivational effects in the advancement of enterprise and creative efforts.\(^{208}\) These are benefits important in the application of the right of publicity, which, as the United States Supreme Court puts it, has a purpose of encouraging enterprise and creativity by allowing individuals to profit from their efforts.\(^ {209}\) A

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206. *Free Expression New Protections for Heirs of Deceased Celebrities Go Too Far,* *supra* n. 85.
207. This is also the analogy used by Felcher and Rubin, *supra* n. 134, at 1129-30.
208. *Id.*
delicate balance must be struck between encouraging creative endeavors and protecting the constitutional interest in the free use of information. Copyright law achieves this balance in its fair use provisions, which allow for certain, limited uses of a creator's work, which do not constitute an infringement of the copyright. \[210\]

Fair use provisions in a publicity rights statute would arguably protect both the public and private interests in creative endeavors by carving out a common area in which the results of those endeavors could be freely used and exchanged. In advocating a national publicity rights law which takes a fair use approach to the digital resurrection of deceased celebrities, this author believes that the interests of both the individual actors and their families, as well as society and the public at large, can be served and enriched.

As one lawyer put it, "the moment of death should not be the end of an actor's career." \[211\] This sentiment is certainly shared by Robyn Astaire, who continues to fight for the rights of deceased actors. A national publicity rights law, which addresses the issue of digital reanimation technology will enable her goals to be realized. So let the public see whether Scarlett gets Rhett back—and let them see it happen with Vivien Leigh and Clark Gable on the screen.


\[211\] Edward Rosenthal, lawyer for the grandson of Marlene Dietrich, as quoted in Reed, supra n. 15.
APPENDIX A

CALIFORNIA 1999 LEGISLATIVE SERVICE
1999 Portion of 1999-2000 Regular Session
CHAPTER 998
S.B. No. 209
DECEASED PERSONALITIES — UNAUTHORIZED USE FOR COMMERCIAL PURPOSES — PROTECTION PERIOD

AN ACT to amend and renumber Section 990 of the Civil Code, relating to deceased personalities.

[Filed with Secretary of State October 10, 1999.]

LEGISLATIVE COUNSEL'S DIGEST
SB 209, Burton. Deceased personalities.

Existing law establishes a cause of action for damages on behalf of specified injured parties for the unauthorized use of a deceased personality’s name, voice, signature, photograph, or likeness for commercial purposes within 50 years of the personality’s death, except as specified.

This bill would revise that provision to extend the period of protection from 50 years to 70 years after the personality’s death. The bill would also revise the exceptions applicable to this protection, as specified, and would state that its provisions apply if any of the acts giving rise to the action occurred directly in this state. In addition, the bill would require the Secretary of State, upon the filing of a claim as successor in interest to the rights of a deceased personality, as provided pursuant to existing law, to post the document along with the entire registry of persons filing such claims on the World Wide Web.

This bill would provide that these provisions may be known and cited as the Astaire Celebrity Image Protection Act.

The people of the State of California do enact as follows:

SECTION 1. Section 990 of the Civil Code is amended and renumbered to read:

3344.1. (a) (1) Any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any
action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use and the person who violated the section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party or parties in any action under this section shall also be entitled to attorneys’ fees and costs.

(2) 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.

(3) If a work that is protected under paragraph (2) includes within it a use in connection with a product, article of merchandise, good, or service, this use shall not be exempt under this subdivision, notwithstanding the unprotected use’s inclusion in a work otherwise exempt under this subdivision, if the claimant proves that this use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article of merchandise, good, or service by the deceased personality without prior consent from the person or persons specified in subdivision (c).

(b) The 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.

(c) The consent required by this section shall be exercisable by the person or persons to whom the right of consent (or portion thereof) has been transferred in accordance with subdivision (b), or if no transfer has occurred, then by the person or persons to whom the right of consent (or portion thereof) has passed in accordance with
(d) Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person or persons and may be exercised, on behalf of and for the benefit of all of those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights:

(1) The entire interest in those rights belong to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one-half of the entire interest in those rights belong to the surviving spouse.

(2) The entire interest in those rights belong to the surviving children of the deceased personality and to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren.

(3) If there is no surviving spouse, and no surviving children or grandchildren, then the entire interest in those rights belong to the surviving parent or parents of the deceased personality.

(4) The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable in the manner provided in Section 240 of the Probate Code according to the number of the deceased personality's children represented; the share of the children of a dead child of a deceased personality can be exercised only by the action of a majority of them.

(e) If any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary document, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate.

(f)(1) A successor in interest to the rights of a deceased personality under this section or a licensee thereof may not recover damages for a use prohibited by this section that occurs before the successor-in-interest or licensee registers a claim of the rights under paragraph (2).

(2) Any person claiming to be a successor-in-interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and upon payment of a fee of ten dollars ($10). The form shall be verified and shall include the name and date of death of the deceased personality, the name and address of the
claiant, the basis of the claim, and the rights claimed.

(3) Upon receipt and after filing of any document under this section, the Secretary of State shall post the document along with the entire registry of persons claiming to be a successor in interest to the rights of a deceased personality or a registered licensee under this section upon the World Wide Web, also known as the Internet. The Secretary of State may microfilm or reproduce by other techniques any of the filings or documents and destroy the original filing or document. The microfilm or other reproduction of any document under the provisions of this section shall be admissible in any court of law. The microfilm or other reproduction of any document may be destroyed by the Secretary of State 70 years after the death of the personality named therein.

(4) Claims registered under this subdivision shall be public records.

(g) No action shall be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality.

(h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services. A "deceased personality" shall include, without limitation, any such natural person who has died within 70 years prior to January 1, 1985.

(i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any video tape or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.

(j) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(k) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material
containing the use is commercially sponsored or contains paid advertising. Rather, it shall be a question of fact whether or not the use of the deceased personality's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

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

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

(n) This section shall apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in this state. For purposes of this section, acts giving rise to liability shall be limited to the use, on or in products, merchandise, goods, or services, or the advertising or selling, or soliciting purchases of, products, merchandise, goods, or services prohibited by this section.

(o) This section shall be known, and may be cited, as the Astaire Celebrity Image Protection Act.

1999 Cal. Legis. Serv. Ch. 998 (S.B. 209) (West)
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