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Avoiding the Tragedy of Frankenstein: The Application of the Right of Publicity to the Use of Digitally Reproduced Actors in Film

by Erin Giacoppo*

We're about to unfold the story of Frankenstein. A man of science who sought to create a man after his own image, without reckoning upon God. It is one of the strangest tales ever told. It deals with the two great mysteries of creation: Life and Death. I think it will thrill you. It may shock you. It might even horrify you.

—Opening Narration, "Frankenstein"1

Introduction

The 1931 movie "Frankenstein" depicts a man who is obsessed by the desire to create life. The scientist fashioned a body from the remains of corpses not long dead.2 His laboratory consisted of an operating table, surgical instruments and electrical gadgetry that summoned the power of an electrical storm.3 His goal to create life succeeded, but the result was a Pandora's box of unexpected disasters.4

Today there are modern scientists who can be analogized to the well-meaning Dr. Frankenstein. They seek to create, not life, but the illusion of life, by digitally replicating living actors and digitally resurrecting deceased personalities.5 In their laboratories lie powerful

** J.D. Candidate, Hastings College of the Law, 1997; B.A., Arizona State University, 1987. I am grateful to my husband Paul, whose career as a motion picture special effects artist inspired me to write about digital actors and the right of publicity. Paul's love and constant support bring meaning to all of my endeavors.

1. FRANKENSTEIN (Universal Pictures 1931).
2. See id.
3. See id.
4. Although intended for good, Dr. Frankenstein's creation of life ironically resulted in the loss of life and damaged reputations. See id.
5. For the purposes of this Note, a "replicated actor" is a computer-generated version of a living actor; a "resurrected actor" is a computer-generated version of a deceased actor.

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Silicon Graphics computers, fully equipped with the latest modeling and animation software, three-dimensional scanners, and motion-capture technology. Photos and film footage of the deceased person, sample hair and clothing textures, and voice tracks of the late actor fill the lab. Although it may sound far-fetched, this scenario is already underway at various special effects companies and research laboratories around the world. Visual Effects Supervisor Steve Williams, of the special effects company Industrial Light & Magic, predicts that in the near future "[l]ong dead Presidents will be on TV, computer-generated, giving speeches. Actors who died 50 years ago will be starring next to contemporary actors. We could even create actors who have never been born—guys you don’t have to pay points or give trailers to. It will happen."

Computer technology presents exciting and innovative possibilities. Digital magic could bring endless opportunities for scientific research and creative expression. While these are worthy pursuits, these endeavors raise questions. Should filmmakers be allowed to replicate living actors without the actor’s permission? Should deceased celebrities be digitally resurrected without compensating their estates? Such futuristic potential presents ethical, moral, and legal dilemmas.

The process of digitally replicating and resurrecting actors brings First Amendment freedom of expression into conflict with the right of publicity. The First Amendment encourages artistic expression and public comment while the right of publicity establishes that "every person [can] control the commercial use of his or her iden-

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6. Interview with Paul Giacoppo, Senior Model Supervisor, Industrial Light & Magic, in San Rafael, Cal. (Feb. 25, 1996) (describing the office of a typical computer artist at Industrial Light & Magic, one of the nation’s leading special effects companies) [hereinafter Giacoppo Interview]. For a discussion of digital techniques such as “motion capture” see Parts I.A & I.B of this note.

7. Giacoppo Interview, supra note 6.

8. See Part I.C of this Note for a discussion of some recent attempts to digitally reproduce human characters.

9. Richard Corliss, They Put the ILM in Film: At George Lucas’ Oscar-hoarding Industrial Light & Magic, computer wizards are re-forming the face of movies, TIME, Apr. 13, 1992, at 68.

10. The First Amendment to the U.S. Constitution states: “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. CONST. amend. I.

11. See Parts III and IV of this Note for a discussion of the right of publicity and how it conflicts with freedom of speech.

12. See Cardtoons v. Major League Baseball Players Ass’n, 95 F.3d 959, 969 (10th Cir. 1996) (holding that parody baseball trading cards did not infringe on baseball players’ right of publicity because the First Amendment protects “[s]peech that entertains, like speech that informs . . . because ‘the line between the informing and the entertaining is too elusive for the protection of that basic right.’” (quoting Winters v. New York, 333 U.S. 507, 510 (1948))).
tity." When an artist utilizes a celebrity's identity for commercial purposes without permission, he violates the celebrity's right of publicity.

The right of publicity originated at common law and is codified in several states. For example, in California the statutory right of publicity protects a celebrity's "name, voice, signature, photograph, or likeness" from commercial use without the celebrity's permission. Because Hollywood is the hotbed of the entertainment industry, California's right of publicity statute is pivotal to the development of publicity rights throughout the nation. Other states will look to California for guidance in developing right of publicity statutes that protect celebrities in light of new technology.

The digital creation of actors will likely spark right of publicity claims from living actors who are replicated and used in commercials or movies without their consent. Moreover, the resurrection of deceased actors is sure to bring claims from heirs, some of whom may not approve of the use of their deceased family member in a modern movie. Others may want control of the context in which the actor is presented to the modern public. All heirs will likely want to be compensated for the use of the late actor's likeness. Although the process of digitally creating actors is not yet seamless, the technology is just a few years off. Therefore, the California Legislature should be proactive in developing legislation, anticipating this soon-to-be reality and providing guidance to special effects companies, actors, and deceased actors' families.

Part I of this Note discusses recent developments in special effects for film and explains the various processes for creating digital characters. It also predicts the likelihood of digitally replicating living actors and digitally resurrecting deceased personalities. Part II points out the potential areas of exploitation regarding the use of the digital actor and suggests that the right of publicity provide protection to the

14. See id.
15. See CAL. CIV. CODE § 3344 (West Supp. 1997) (prohibiting the appropriation of a person's identity without his or her consent for use in a commercial context); see also Part II.B of this note.
16. See Part III.B.
17. See Part III.C for a discussion of the reasons an estate may want control over the use of a deceased relative in film.
18. See Part III.C for a treatment of the economic impact free digital resurrection may have on the acting profession.
19. See infra Part I.C.
actor. This section also explains the evolution of the right of publicity at common law and discusses California’s statutory provisions. To illustrate the growing recognition and protection of the right of publicity, Part II explores current case law. Part III analyzes the impact of California law on the creation and use of replicated and resurrected actors. It advocates the application of the right of publicity to the use of resurrected actors in film. Part IV proposes an exception to California Civil Code section 990(n) that exempts the use of a deceased person’s likeness from the right of publicity when used in film and television programs.

I. Digital Technology

A. Recent Developments in Special Effects for Film

To appreciate digital technological advances, a review of some recent developments in the special effects industry is helpful. The Oscar-winning special effects company Industrial Light & Magic (ILM) has made numerous advances in the area of digital characters. One of the first memorable appearances of a digital character was in “The Abyss,” where a “pseudopod,” made entirely of seawater, believably mimicked actor Mary Elizabeth Mastrantonio’s facial expressions. In “Terminator 2,” the shape-shifting “T-1000” character digitally assumed various humanoid forms.

The technology took another leap forward with ILM’s creation of the 3-D dinosaurs in “Jurassic Park.” For the first time, computer artists played a dominant part in creating living, breathing, life-like movie characters. The creation of computer-generated hair and skin textures on the animals in “Jumanji” brought computer artists one step closer to realism. The movie “Dragonheart” featured the first realistic computer-generated character to perform in a starring role. The dragon demonstrates a full range of emotional expression inspired by actor Sean Connery, who provides the dragon’s voice.

20. See Bill Rodriguez, Approaching Pixel Perfect: They’ve done it with dinosaurs and toys, but can computers now simulate a human being?, VANCOUVER SUN, Dec. 8, 1995, at C1.
22. See Rodriguez, supra note 20, at C1.
25. See id.
Finally, producer/director George Lucas used computer graphics imaging to digitally resurrect a fictional character. In his 1983 film “Return of the Jedi,” Lucas relied on animatronic puppetry to create the character “Jabba the Hutt,” a slug-like alien gangster. When Lucas decided to release an enhanced version of his well-known film “Star Wars” in 1997, he wanted to include Jabba, who was not part of the original film when it was released in 1977. Although the Jabba puppet had been destroyed after “Return of the Jedi,” ILM’s computer animators digitally resurrected Jabba for the release of “Star Wars-Special Edition.”

B. Digital Character Creation

The creation of digital characters currently falls into two categories: two-dimensional (“2-D”) and three-dimensional (“3-D”). The 2-D technique commonly involves the digital manipulation of existing photographs or film footage. These images are first scanned into a computer, then altered through the use of image-warping or “morphing” technologies. While this technique has limitations, it was used effectively in the popular film “Forrest Gump” to manipulate footage of John F. Kennedy, making him appear to say and do things he never did.

By contrast, the 3-D process entails creating an entire three-dimensional replica of a celebrity that exists only inside the computer. The computer artist begins by scanning either a sculpted model of the actor or the actual actor’s face and body. This process converts the physical form of the actor into a 3-D digital representation inside the computer.

After the digital model is complete, a computer animator creates a virtual skeleton inside the model that is used to animate the body.

27. See id.
28. See id.
29. See id.
30. See Valerie Hall, Morphing in 2-D and 3-D, Dr. Dobb’s J. Of Software Tools, July 1993, at 18 (discussing the process of morphing using a 2-D image or a 3-D model).
32. See Hall, supra note 30, at 18.
33. See Einstein, supra note 21, at B1.
34. Giacoppo Interview, supra note 6.
35. See Stephen Porter, Made for the stage: synthetic actors are getting better; three-dimensional computer animation of human or human-like images, Computer Graphics World, Aug. 1990, at 60.
36. See id.
positions of the character. Facial expressions can be animated by blending sculpted facial poses over time to create the appearance that the character is speaking or emoting. Piece by piece, the character is made to move until it develops realistic expressions and mannerisms. Animation can also be accomplished through a process called motion capture, which involves placing sensors on a performer. As the performer moves, the generated motion is transferred to the computer-modeled human, giving the digital character extremely life-like and subtle movements.

The final touches are then added in the rendering phase. First, color and texture are "painted" onto the character by computer artists. Fine details such as complexion, pores, eye coloration, and even skin imperfections are added. Advances in technology allow the creation of realistic hair and clothing, which until recently proved problematic in digital imagery. Finally, the artist places the character into the scene, lit by virtual lights, and the computer painstakingly "renders" frame after frame. A technical director then outputs the images to traditional film stock.

To provide a voice for the character, several techniques are available. Creating an entirely computer-generated voice is difficult but offers the most versatile performance. A more limited approach involves editing recordings of the original actor's voice and restringing words and phonemes together to create new phrases and sentences. The most traditional method is simply to hire a "soundalike" or impressionist to provide the necessary dialogue.

37. Giacoppo Interview, supra note 6.
38. See Porter, supra note 35, at 60 (“[A]n animator starts with a source expression and a target expression (acquired from a facial expression library or by digitizing a series of clay models) and then uses the computer to create the in-between frames that take the face from one expression to the next.”).
39. See Porter, supra note 35, at 60.
40. See id.
41. See id. (discussing the use of motion-capture to animate a character in the movie "RoboCop").
42. See Steve Upstill, The Renderman Companion 435 (1990) (defining “rendering” as “[t]he process of generating a synthetic image of a scene given a precise description of the geometry and other characteristics of the scene”).
43. Interview with James R. Tooley, Senior Technical Director and Animator, Industrial Light & Magic, in San Rafael, Cal. (Feb. 23, 1996).
44. See id.
45. See id.
46. See id.
47. See id.
48. See id.
49. See id.
50. See id.
C. Computer-Generated Actors

How close are computer scientists and artists to actually replicating human actors? Presently, time and money pose difficulties.\textsuperscript{51} As computer technology continues to develop, however, the time and costs of creating human actors will decrease.\textsuperscript{52} "[M]ost experts agree that someday (be it five years from now or 20 years from now) it probably will be possible to create a truly realistic-looking animated human."\textsuperscript{53}

Although computer artists have not yet been able to realistically replicate a human actor to seamless perfection, they have made significant progress. For instance, "[a] silicon actor named Ray Tracy, created by Digital Vision Entertainment in Los Angeles, w[as] the cohost of Computer Visions, a PBS documentary special."\textsuperscript{54} Producers of "The Crow" completed the movie despite the death of actor Brandon Lee during the filming, "because digital glimpses of Brandon Lee . . . could be inserted in scenes yet to be shot."\textsuperscript{55} Digital artists altered archival footage of personalities Humphrey Bogart, James Cagney and Louis Armstrong to interact with modern celebrities such as Elton John in a series of Diet Coke commercials.\textsuperscript{56}

Moreover, at the 1995 SIGGRAPH computer graphics tradeshow, a Montreal computer-graphics designer unveiled his film "The Boxer," which starred computer-generated characters complete with realistic skin, hair, draped clothing, and sweat.\textsuperscript{57} In 1987, Swiss scientists Daniel and Nadia M. Thalmann created a "seven-minute film, 'Rendezvous à Montreal,' featuring Humphrey Bogart and Marilyn Monroe—the first computer-synthesized performances by dead actors."\textsuperscript{58} Although the actors were noticeably computer-generated, the scientists captured the essence of the actors' unique mannerisms.\textsuperscript{59} These scientists believe that, although "[i]t will be difficult to do a film with a lot of action," they will soon be able to successfully

\textsuperscript{51} See Saunders, supra note 23, at Cl.
\textsuperscript{52} See Bruce Weber, Why Marilyn and Bogie Still Need a Lawyer, N.Y. TIMES, Mar. 11, 1994, at B18 (quoting Jim Morris, President of Lucas Digital Ltd., who explains that costs will decrease over time and comments that it is possible to replicate human actors right now, but that it is very expensive).
\textsuperscript{53} Porter, supra note 35, at 60.
\textsuperscript{54} Kathleen K. Wiegner & Julie Schlax, But can she act?, FORBES, Dec. 10, 1990, at 274.
\textsuperscript{55} Rodriguez, supra note 20, at Cl.
\textsuperscript{56} See Hubbard, supra note 31, at 82.
\textsuperscript{57} See Rodriguez, supra note 20, at Cl (noting that the character's "movements in just those few seconds—micro-motions of the lips, arms swinging down naturally—are an achievement").
\textsuperscript{58} Weber, supra note 52, at B18.
\textsuperscript{59} See id.
produce "a film within a limited environment." The scientists are currently digitally resurrecting James Dean.

James Lima, director of imaging for Steven Spielberg's Amblin Entertainment, envisions "Christian Slater and Kevin Costner in a western, being approached by John Wayne. What an amazing scene that would be!" While deceased actors are attractive targets for resurrection through computer animation, living actors will likely be replicated as well. In anticipation of convincing replication technology, Marlon Brando and several other celebrities have had their faces digitally scanned and stored for future use. With such capabilities at the entertainment industry's doorstep, now is the time to address the legal issues that actor replication and resurrection raise. Therefore, the California Legislature should enact legislation that will anticipate the right of publicity questions that digital replication and resurrection pose.

II. Exploitation Issues Regarding the Creation and Use of Digital Actors and the Right of Publicity

As digital actors become indistinguishable from footage of real persons, film producers and advertisers will likely want to use replicated and resurrected actors in their work. Right-of-publicity laws may provide some guidance. However, it is unclear how the right, as it stands today, will apply to the actor who is reproduced digitally. This uncertainty may leave an open door for producers or advertisers to use the digital actor for personal financial gain without compensating or obtaining permission from the real actor or his estate.

While the thought of long-dead actors such as Humphrey Bogart and Greta Garbo "performing" on the screen again is exciting, this excitement fades when one considers the potential for abuse. Garbo, for example, could be cast in a "Fatal Attraction"-type movie, complete with nude love scenes. Bogart's timeless face could be used to implore us to buy used autos. Thus, with the power to resurrect an actor's image comes the potential to lessen or cheapen his reputation.

60. Id.
61. See id.
62. Id.
64. See Part III.C.
65. See Part III.C.
This potential raises questions of defamation and invasion of privacy, which are distinct causes of action from the right of publicity.\textsuperscript{66} Defamation, which consists of libel and slander, gives a plaintiff recourse if he is falsely defamed in a broadcast, performance or publication.\textsuperscript{67} The right of privacy also protects a person's reputation. Dean Prosser divides the right of privacy into four distinct claims: false light invasion of privacy, public disclosure of private facts, unreasonable intrusion, and appropriation.\textsuperscript{68} The first three privacy claims, like defamation, protect a person from presentation to the public in an offensive and/or false context.\textsuperscript{69} Only appropriation protects a person's name or likeness from unauthorized use for commercial gain.\textsuperscript{70}

What Prosser called the appropriation claim has evolved into the distinct right of publicity.\textsuperscript{71} Thus, while defamation and right of privacy claims may protect the reputation of a digitally created actor, these rights do not protect a celebrity's identity from unauthorized use for economic gain.

Moreover, although defamation and right of privacy claims may aid the living actor who is replicated and cast in a defaming context,\textsuperscript{72} these claims will not help the estate of the deceased. The personal rights that defamation and privacy are designed to protect terminate upon death.\textsuperscript{73} This leaves the heirs of a defamed actor without recourse, unless they can prove that the portrayal caused them personal harm.\textsuperscript{74} The right of publicity, on the other hand, is descendible in several states,\textsuperscript{75} and it is the best legal right to protect deceased actors.
from exploitation. To illustrate the scope of this unique right, this section will review the common law right of publicity, California publicity statutes and current right of publicity cases.

A. The Common Law Right of Publicity

The right of publicity finds its origin in the common law right to privacy. It was first discussed in an 1890 Harvard Law Review article entitled The Right to Privacy, where Samuel Warren and Louis D. Brandeis advocated the “right to an ‘inviolate personality’ that would protect ‘thoughts, emotions, and sensations ... whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.’”

There are two types of right of publicity cases: those involving the plaintiff’s identification value and those involving performance value. Courts first recognized identification value as a celebrity’s right of publicity. In Haelan Laboratories, Inc. v. Topps Chewing Gum, the Second Circuit stated:

This right might be called “a right of publicity.” For it is common knowledge that many prominent persons (especially actors and ballplayers), 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, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Thus, Haelan Laboratories recognized the right of publicity as distinct and separate from the right of privacy. The common law right of publicity makes it illegal for an advertising agency, company or individual to use a person’s identity—name, photo, or voice—to sell a product without that person’s permission. California followed this common law jurisprudence when it adopted its current right of public-

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77. Id. (quoting Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890)).
79. 202 F.2d 866 (2d Cir. 1953), cert. denied, 346 U.S. 816 (1953) (recognizing a celebrity’s right of publicity in the Second Circuit).
80. Id. at 868.
81. See McCarthy, supra note 78, at 130.
ity statutes in the 1970s and 1980s, which encompass protection for a celebrity's identity.

The United States Supreme Court first recognized a person's right of publicity for performance value in Zacchini v. Scripps-Howard Broadcasting Co. In Zacchini, where the defendant broadcasting company filmed the plaintiff's human cannonball performance and aired the event on the news, the Court held that the broadcasting company infringed the plaintiff's right of publicity. The Court reasoned that "if the public can see the act free on television, it will be less willing to pay to see it at the fair." "The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance." The court distinguished performance value cases from those of identification value, noting that performance value cases address a plaintiff's ability to make a living from his performances while identification value cases deal with unauthorized use of a plaintiff's identity to sell a product. "[T]he broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes 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."

Thus, in both identification and performance value cases, "[t]he term 'right of publicity' has . . . come to signify the right of an individual, especially a public figure or celebrity, 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."

Moreover, to prove an identification value claim the plaintiff must show that his name, likeness, or voice was used without his consent to sell a product. A successful claim proves that the plaintiff is readily identifiable as himself, and therefore the value of his identity was appropriated by another. In performance value cases a plaintiff

84. Id. at 563-64, 576.
85. Id. at 575.
86. Id.
87. Id. at 576.
88. Id.
90. See McCarthy, supra note 78, at 134-35.
91. Id.
must show that the defendant exploited his performance for financial gain.92

The right of publicity is not, however, without limitations. The First Amendment to the U.S. Constitution protects freedom of speech and creative expression in order to limit censorship, to provide an uninhibited outlet for news reporting, and to encourage artistic contributions to society.93 Therefore, a person may not use the right of publicity to claim identification value in a news story, a biography novel or film, a parody or a satire using his identity.94 On the other hand, a person may successfully invoke the right of publicity for identification value in an advertisement because purely commercial uses of a person's identity to sell products are consistently given less First Amendment protection than news reporting or artistic expression.95 "[T]he rule seems to be that the more commercial the form, the less it is apt to be considered as protectable 'speech.'"96 Thus, the right of publicity protects the identification value of a celebrity's persona against unauthorized commercial use.

Performance value cases, on the other hand, demonstrate that the more original, creative, and newsworthy the performance using the plaintiff's identity, the more likely it is to be exempt from the right of publicity.97 The court stated in *Estate of Presley v. Russen*:

The purpose of the portrayal in question must be examined to determine if it predominately serves a social function valued by the protection of free speech. If the portrayal mainly serves the purpose of contributing information, which is not false or defamatory, to the public debate of political or social issues or of providing the free expression of creative talent which contributes to society's cultural enrichment, then the portrayal generally will be immune from liability. If, however, the portrayal functions primarily as a means of commercial exploitation, then such immunity will not be granted.98 Thus, the First Amendment protects performances copied for the purpose of contributing valuable newsworthy information or artistic

95. *See discussion infra* Part II.C.1.
98. Id. at 1356. The court also commented that "[t]he right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire." Id. at 1358 (quoting concurring opinion of Bird, C.J., in Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 869 (1979)). *See also supra* text accompanying notes 140-43.
achievement to society, and the performances are immune from the right of publicity.\footnote{99}

Although the right of publicity began at common law, today fourteen states have statutes that codify this right.\footnote{100} Eleven other states recognize a common law right, while the remaining states have not acknowledged the right in any form.\footnote{101} In addition, thirteen states recognize a post mortem right of publicity through either common law or statutory provisions.\footnote{102}

While the common law recognizes both performance and identification value publicity rights for living persons, courts differ in the treatment of the descendibility of this right to the deceased celebrity's estate. Courts and commentators have expressed three views regarding this issue: (1) The right is not descendible to the person's estate, and therefore the identity of the person reverts to public domain status immediately upon the person's death; (2) The right descends only if the person exploited the right during his lifetime; and (3) The right descends regardless of whether the person exploited the right while alive.\footnote{103} At the same time, some states have enacted statutes that specifically provide for a post mortem right of publicity.\footnote{104}

\section*{B. California Right of Publicity Statutes}

While the common law protects a person's performance value in California, California Civil Code section 3344 recognizes a person's identification value and protects a celebrity's right of publicity. Section 3344 makes it illegal to "knowingly use another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent."\footnote{105} Consistent with the First Amendment, the statute exempts the use in "connection with any news, public affairs, or sports broadcast or account, or any political campaign."\footnote{106}

\footnote{99. This immunity is similar to the fair use defense in copyright law which provides an exception to the prohibition on the reproduction of copyrighted works "for purposes such as criticism, comment, news reporting, teaching, scholarship or research . . . ." The Copyright Act of 1976, 17 U.S.C. § 107.}
\footnote{100. McCarthy, supra note 78, at 132.}
\footnote{101. Id.}
\footnote{102. Id.}
\footnote{103. CARTER ET AL., supra note 73, at 203.}
\footnote{104. McCarthy, supra note 78, at 132. See, e.g., CAL. CIV. CODE § 990 (West Supp. 1997).}
\footnote{105. CAL. CIV. CODE § 3344(a) (West Supp. 1997).}
\footnote{106. Id. § 3344(d).}
California also codifies the post mortem right of publicity in section 990, which makes it a tort to use "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 purchase of products, merchandise, goods, or services, without prior consent from the person or [the estate]." The statute provides that the rights are "freely transferable" and sets forth the manner in which the interest in a deceased personality shall be divided among the deceased personality's heirs if the person dies intestate. Additionally, "[i]f the deceased personality does not transfer his or her rights [under the statute] by contract, or by means of a trust or testamentary document, and there are no surviving family members, the right terminates."

This post mortem right terminates fifty years after the death of the personality. Moreover, the provision expressly exempts 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." Indeed, California's right of publicity statutes are among the most comprehensive in the nation, protecting a celebrity's image against unauthorized commercial use while maintaining an outlet for news reporting and artistic expression.

C. Current Right of Publicity Cases

(I) Identification Value

Recent right of publicity cases illustrate the courts' increasing sensitivity to celebrities' publicity rights. Today courts are taking a hard line against unauthorized use of a person's identity for commercial gain. For example, in Midler v. Ford Motor Co., the court held that Ford committed a tort when it used singer Bette Midler's voice
identity to sell its cars without her permission.115 After Midler refused Ford's advertising offer, Ford hired a former back-up singer from Midler's band to sing the 1973 Midler hit "Do You Want to Dance?"116 as part of an advertising campaign. Ford instructed the singer to sound as much like Midler as possible.117 The court determined that Ford misappropriated Midler's identity and reasoned that a "voice is one of the most palpable ways identity is manifested."118

Similarly, in Onassis v. Christian Dior, the Supreme Court of New York County held that the use of a Jacqueline Kennedy Onassis "lookalike" in an advertisement violated the former first lady's right of publicity.119 The Dior Sportswear ad featured a posh wedding with such celebrities in attendance as movie critic Gene Shalit, model Shari Belafonte, and a secretary who looked strikingly like Onassis.120 Although the face used in the ad did not belong to Onassis, the court nevertheless found that Dior violated Onassis' right of publicity because the face was identifiable as Onassis.121 Although the New York privacy statute covered only use of the plaintiff's own identity, the court reasoned that the statute "is intended to protect the essence of the person, his or her identity or persona from being unwillingly or unknowingly misappropriated for the profit of another."122 The court concluded that Dior intended to create the illusion that Onassis endorsed its products.123

The Ninth Circuit demonstrated a commitment to protecting the right of publicity in White v. Samsung Electronics America, Inc.124 As part of a humorous advertising campaign, Samsung depicted a robot, adorned in a gown and hairstyle resembling game show hostess Vanna White.125 While the robot turned letters on a game board, the ad prominently displayed Samsung VCRs and a caption reading, "Longest-running game show. 2012 A.D."126

115. Id. at 463. The court also noted that California Civil Code § 3344 did not apply since Midler's own voice was not used; it found a separate tort for the appropriation of Midler's identity. Id.
116. Id. at 461.
117. Id.
118. Id. at 463.
120. Id. at 257.
121. Id. at 263.
122. Id. at 260 (emphasis in original).
123. Id. at 261, 263.
125. Id. at 1396.
126. Id.
Although Samsung did not use White's name or exact likeness in creating the robot, the court found that the totality of the circumstances—the blonde wig, style of dress, and "Wheel-of-Fortune" type game board—raised an inference that White's persona had been appropriated for commercial gain. Viewed separately, the individual aspects of the advertisement . . . say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict. Moreover, the court rejected Samsung's parody defense, reasoning that the satirical format was outweighed by the main message: "[B]uy Samsung VCRs." Because the robot was identifiable as White, the court determined that there was a triable issue of fact as to whether Samsung violated White's right of publicity.

The commercial use of the likeness of a character played by a deceased actor surfaced in *Lugosi v. Universal Pictures*. The heirs of actor Bela Lugosi sued the defendants for unauthorized commercial exploitation of Lugosi's identity in the role of Count Dracula. The California Supreme Court held that the right to exploit Lugosi's name and likeness in that context did not descend to the heirs because Lugosi did not exploit his identity for commercial gain during his lifetime. Although this case was decided prior to the enactment of California Civil Code section 990 (establishing a post mortem right of publicity), the holding would likely stand under the modern statute since Lugosi assigned his publicity rights surrounding the character "Dracula" to Universal as part of the movie deal. Judge Mosk, in his concurring opinion, distinguished between appropriating an actor's likeness and appropriating the likeness of a character played by the actor. He reasoned that since Lugosi portrayed a classic character from a novel, he did not own property rights to that character. Therefore, he concluded that Lugosi's identity as Dracula did not descend to his heirs. As illustrated by *Midler* and *White*, courts are expanding the right of publicity to find misappropriation in look- and sound-alike situations as well as in circumstances in which the celebrity's exact voice or photograph is exploited. These identification value cases reflect an

127. *Id.* at 1399.
128. *Id.*
129. *Id.* at 1401.
130. *Id.*
132. *Id.* at 427.
133. *Id.* at 431. This case was decided before the California legislature established a post mortem right of publicity in section 990.
134. *Id.* at 426 n.2.
135. *Id.* at 432 (Mosk, J., concurring).
136. *Id.*
137. *Id.*
increased awareness by the courts of the importance of a celebrity's interest in his or her identity. The right of publicity is evolving into an effective method to protect celebrities from unauthorized exploitation for commercial gain.

(2) Performance Value

Performance value cases are less common than identification value claims because advertisers are more likely to use a celebrity's name, voice or likeness without capitalizing upon an entire performance. Nevertheless, courts continue to recognize a celebrity's right to the economic value of his performance. Courts have been unsympathetic to producers who copy a celebrity's performance without parody or creative additions that alter the performance. In *Estate of Presley v. Russen*, the United States District Court for New Jersey enjoined the defendant from performing a stage show designed to imitate Elvis because the performance would likely infringe upon the Presley estate's right of publicity. The court found that since Elvis had exploited his name during his lifetime the right was descendible. In balancing freedom of expression against the plaintiff's claim, the court found that the defendant's use of Presley's performance was "merely a copy" and did "not really have its own creative component and [did] not have a significant value as pure entertainment."

Similarly, in *Apple Corps Ltd. v. Leber*, defendants presented eight shows a week for over three years performing Beatles songs against a multimedia background. Applying Zacchini, the court reasoned that the unauthorized imitation constituted commercial appropriation of the Beatles' identity. Moreover, because the main objective of the performance was to exploit the Beatles' identity, the court determined that the appropriation outweighed any First Amendment fair use defense, such as newsworthy content.

138. See McCarthy, supra note 78, at 133.
139. See Estate of Presley, 513 F. Supp. at 1339 (enjoining defendant's stage show because it would likely infringe Presley's estate's right of publicity).
140. See id.
141. Id.
142. Id. at 1361.
143. Id. at 1355. See also Lugosi, 603 P.2d at 445 (Byrd, C.J., dissenting) (arguing that the right of publicity should descend to the celebrity's heirs).
144. Estate of Presley, 513 F. Supp. at 1359.
146. Id. at 1017.
148. Id.
Courts, however, are less likely to find a violation of the right of publicity when a defendant uses a celebrity's performance as part of a biographical portrayal of the celebrity. For example, in Joplin Enterprises v. Allen, the court held that the defendant's two-act play depicting a day in the life of deceased singer Janis Joplin, including a concert, did not violate the plaintiff's right of publicity. The court found that the defendant's use of Joplin's identity in a play was exempt under California Civil Code section 990(n), which extends the right of publicity to deceased celebrities, since the performance of the concert in Act II was part of the protected expression of the entire play. Noting that cases such as Apple Corps and Estate of Presley imply that a performance must be analyzed as a whole, the court stated: "To analyze Act II of Janis out of context would destroy the statutory exemption." Thus, Joplin suggests that if the performance is one aspect of a new artistic work and does not merely cash in on the original performer's labor, courts will apply the First Amendment and find the right of publicity inapplicable.

III. Analysis

Although no case law expressly addresses digital replication, California Civil Code section 3344 arguably protects a living actor from digital replication in a commercial or a film without his consent. Similarly, California's post mortem right of publicity statute, California Civil Code section 990, prohibits the use of a digitally resurrected actor in an advertisement without his estate's permission. This statute, however, is inadequate to protect a deceased actor from unauthorized use in a movie or television program because film and television are expressly excluded by the statute. The statute should provide the same level of protection for deceased actors as section 3344 provides for living actors. To this end, the California Legislature should amend section 990 in anticipation of digital resurrection of deceased celebrities.

A. California Law as Applied to the Digital Replication of Living Actors

In California, before an actor's "name, voice, . . . photograph or likeness" can be used to sell a commercial product, California Civil Code section 3344 and case law dictate that the actor's permission must be gained. For the actor who has been digitally replicated to enjoy the protection of the statute, the digital replication must fall

150. Id.
152. CAL. CIV. CODE § 3344 (West Supp. 1997).
under the definition of either a likeness or a photograph. Although the statute does not define the term “likeness,” the replicated actor is arguably a likeness in that the digital replication is made to exactly match the physical appearance of the living actor so as to be indistinguishable. Moreover, *White v. Samsung Products* supports this position because the Ninth Circuit implied that a robot could infringe Vanna White’s right of publicity even though the robot was not an exact replica of White.153

The statute does, however, define the term photograph as “any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.”154 The process of rendering the computer-generated actor mimics a “photographic reproduction.”155 The computer traces virtual “light rays” from its computer camera to the digital character.156 These rays reflect off the digital surfaces to light sources.157 The resulting image is photographic in every way, including highlights, shadows, reflections, motion blur, focus and zoom.158 Therefore, whether considered a likeness or a photograph, a computer-generated actor would almost certainly be covered by the statute as long as he was readily identifiable. Furthermore, even if a court classified the replicant as a “lookalike” and not as a photographic reproduction or likeness, cases such as *Onassis v. Christian Dior*159 and *White v. Samsung Products*160 illustrate that a court would likely find the use of a replicant to sell a product a violation of that person’s right of publicity.

It is standard practice in the entertainment industry that a producer must negotiate a fee and obtain clearance before using a photo or film clip that bears a living actor’s likeness.161 Since section 3344 does not exempt books, plays, film or magazines, a producer would need to obtain the actor’s permission prior to casting a replicated actor in a film.162 Because a court would likely classify a replicated actor as a likeness or a photographic reproduction under section 3344, California’s right of publicity statute arguably protects living celebrities from unauthorized digital replication. Nevertheless, the California

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154. CAL. CIV. CODE § 3344(b) (West Supp. 1997).
155. See Upstill, *supra* note 42, at 1-16 (describing the process of rendering an image in the computer).
156. Id.
157. Id.
158. Id.
159. See *Onassis*, 472 N.Y.S. at 254.
160. See *White*, 971 F.2d at 1395.
Legislature should strengthen section 3344 by expressly including 2-D and 3-D digital replication in its definition of photograph. The Legislature should also define the term likeness to include digital replication.

B. California Law as Applied to the Digital Resurrection of Deceased Actors

The digital resurrection of deceased actors will likely spark concern among the heirs of celebrities. After the completion of "Rendezvous à 'Montreal," the estate of Humphrey Bogart notified the scientists, imploring them not to use the deceased actor's likeness for advertising purposes. Based on California Civil Code section 990, which prohibits the unauthorized use of a deceased person's identity in advertising, it is illegal to use a resurrected actor to advertise a product without the estate's permission. Section 990 defines "photograph" in the same manner as section 3344. As previously mentioned, the computer process used to digitally produce an actor's image mimics photographic reproduction. Therefore, a court would likely apply section 990's definition of "photograph" to a resurrected actor so long as the resurrected figure was identifiable as the actor.

Overall, however, section 990 provides less protection for deceased actors than section 3344 provides for living actors. While section 990 provides the same protection from unauthorized commercial use as section 3344, section 990 does not protect use of a deceased actor's identity in a film or television program. The exemption of film and television from the right of publicity in section 990 may illustrate the California Legislature's First Amendment concerns surrounding the right of publicity. The Legislature likely wanted to insure that images of deceased celebrities remained available for news, fictional novels, and drama. Because the potential capabilities of digital technology have only recently surfaced, it is doubtful that the Legislature had resurrected actors in mind when it ratified the statute. Nevertheless, since section 990(n) expressly allows the use of the deceased celebrity's likeness in film and television, it appears that, immediately

163. Weigner & Schlax, supra note 54, at 274.
165. Id. §§ 990(i), 3344(b).
166. But see Joseph J. Beard, Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law, 8 HIGH TECH. L.J. 101, 154 (1993) (stating that a computer-generated actor is likely to be considered a "likeness" under post mortem right of publicity statutes). This article does not advocate the application of the right of publicity to deceased actors. Id. at 146-47. Instead, it proposes that the digital actor be protected via moral rights. Id. at 192.
167. Gaines, supra note 96, at 201.
168. Id.
upon the actor's death, a resurrected version of the actor could be cast in a role by any studio without permission from the estate.

However, the common law may exclude a pure performance value use as in violation of the right of publicity. Cases such as *Estate of Presley*\(^{169}\) and *Apple Corps*\(^{170}\) arguably prohibit a studio from using a resurrected actor in a recreation of his original performance. If a court determined that, like the concert in *Estate of Presley*, such a portrayal contributed little to the cultural value of society and was more commercial in nature, it would probably find that the exploitation infringed upon the estate's right of publicity. On the other hand, if the reproduced performance was merely one element in a film, *Joplin*\(^{171}\) would likely control. In that case, the court held that it was impossible to separate the performance from the protected expression, and therefore the right of publicity did not apply.\(^{172}\)

Thus, California's right of publicity statutes provide some protection against unauthorized digital replication and resurrection of actors. The language of section 3344 protects living celebrities from unauthorized digital replication in commercials and arguably in movies. California's post mortem right of publicity statute, section 990, recognizes the need for protection against unauthorized use of a deceased actor's image in a commercial context but does not protect a deceased actor from digital resurrection in film or television. Section 990's exclusion of film and television weakens the statute because of the potential for abuse that exists with the ability to digitally resurrect deceased actors.

**C. Public Policy Reasons for Applying the Right of Publicity to the Use of Digitally Resurrected Actors in Film**

Several economic arguments favor application of section 990, which protects a deceased celebrity's right of publicity, to the use of a resurrected actor in film. First, if the resurrected actor falls immediately into public domain, the studio will be able to capitalize upon the actor's reputation and audience appeal without paying the actor's estate. When the actor was alive, his work and talent built his reputation and appeal. Therefore, he has an economic right in his identity and this right should pass to the actor's estate rather than provide a windfall to a multimillion dollar studio.\(^{173}\)

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\(^{169}\) *Estate of Presley*, 513 F. Supp. at 1339.

\(^{170}\) *Apple Corps*, 229 U.S.P.Q. at 1015.


\(^{172}\) *Id.*

\(^{173}\) See Beard, supra note 166, at 166 (acknowledging that an argument in favor of the right of publicity is "that the financial benefits of the actor's labors in life should, in death, go to his heirs").
Some may argue that, since filmmaking is a collaborative process between the actor, producer, director, and production crew, the actor's performance value and reputation are not exclusively the product of the actor's ability. Proponents of this view believe that, because the entertainment industry played a role in creating the actor's appeal, the industry should have some control over the actor's image. It is often difficult, however, to separate the actor as a person from the actor the public perceives through the roles the actor has played. This argument is akin to stating that a student's intellect can somehow be separated from the student because his teachers and parents helped to develop that intellect.

In addition, allowing a studio to have free use of a resurrected actor could diminish the actor's worth while alive. Studios may be unwilling to pay as much for something that will eventually fall into public domain. Furthermore, as digital technology improves, it will inevitably decrease in cost. In time it could become less expensive for studios to make movies using replicated actors than to pay living actors' salaries. This could result in loss of employment or wages for actors, and could stifle acting as an art form.

Studios commonly market movies by licensing the rights to create dolls of the characters, posters, t-shirts, and countless other tie-in products. Although merchandising is not a form of artistic expression, a standard movie contract includes the right to use the actor's identity in marketing the film and in associated merchandise. This dichotomy in the structure of film deals reveals a glaring flaw in section 990. While the statute allows the likeness of a deceased actor to be used in film without permission from the estate, the statute prohibits the unauthorized use of the actor's likeness for commercial gain. The use of the actor's image for merchandising is purely commercial, and it is arguably prohibited by the statute unless the studio obtains permission from the actor's estate. Because it is difficult to distinguish between the part of the film deal that is artistic and that which is commercial, the unauthorized appropriation of a digitally resurrected actor in film should be limited.

174. Cf. Gaines, supra note 96, at 85 (discussing the conflict between photographer and subject of proprietorship over the photographic likeness of a person).
175. Id.
177. See supra note 52 and accompanying text.
179. See discussion supra Part III.B.
Moreover, the protection of a deceased actor's reputation supports the application of the right of publicity to the use of a resurrected actor in a film. If the actor were still alive, he would be able to choose which roles to play. As the law now stands, immediately upon death the deceased actor falls into public domain. This creates an opportunity for much abuse. Consider the following scenario: a popular actor, to preserve his reputation, turns down a leading role in a violent, erotic thriller. If the next day he is killed in an unfortunate accident, the studio would be able to use a digitally resurrected version of the actor to star in the film immediately. The studio nullifies the actor's wishes by casting him in a role he refused to perform while alive. Furthermore, it is possible for the studio to cast the resurrected actor in other film roles that are inconsistent with his personality, creating an entire body of work that the actor did not authorize. As a result, future generations will form an opinion about the actor based on the studio's portrayal and not on the actor's real personality or ability.

Many will argue that the First Amendment should allow the film producer to use the resurrected actor in whatever way he desires. The California Legislature, however, can impose limits on digital resurrection without abridging the Constitution. The Legislature can limit the manner in which an idea is expressed without restraining the idea itself. For example, the Legislature could prevent a movie studio from digitally resurrecting Marilyn Monroe without permission, but the law would still allow the studio to hire a "lookalike" actor to portray her.

There is a marked distinction between a digitally resurrected actor and a living "lookalike" actor playing the deceased in a film. Because of the exacting detail that is possible with computer graphics, the resurrected actor will be indistinguishable from the deceased. In contrast, a "lookalike" does not match the deceased as perfectly. Additionally, the "lookalike" is a real person who will be credited and judged on his own acting merits. Finally, freedom of expression still allows the deceased actor to be written about in books and commented on in the news.

Some may argue that a limitation on the use of resurrected actors will frustrate the creative filmmaking process. However, limiting the use of resurrected actors does not prevent a producer from creating

180. Cf. Beard, supra note 166, at 162 (noting that there is no constitutional impediment to involuntary servitude regarding the use of a digital actor).
181. Since the use of a lookalike is not for advertising purposes, the holding of Onassis would not prohibit its use.
182. For example, actor Martin Landau won an Academy Award for his portrayal of the late Bela Lugosi in the film "Ed Wood." Roxanne Roberts, 'Forrest Gump,' Good as Gold; Few Surprises as Blockbuster Takes Top Honors, WASH. POST, Mar. 28, 1995, at E1.
unique computer-generated characters with personalities of their own and casting them in movies. This process is arguably more creative than replicating a deceased person's personality. Finally, limitations on the use of resurrected actors does not imply that they will not be used. It will, however, require that they be used in a manner consistent with the actor's wishes or those of his estate and that the estate be compensated.

D. A Licensing System in the Hands of the Estate

These public policy arguments support putting the decision to create the resurrected actor in the hands of the actor himself or his estate. If the right of publicity applied to the use of digitally resurrected actors, a studio that desired to use the actor in a movie or television program would have to gain permission from the estate. This permission could be set up through a licensing system whereby a studio would purchase the right to use the actor's identity from the actor while alive, or from his estate after death. Actors could specify the terms of the license in their wills. If an actor did not provide for digital resurrection in his will, the responsibility would pass to his estate. The license could stipulate the types of roles the actor would be willing to play and/or the compensation due. The estate's involvement through such a system could help to create a resurrected actor that contributes to artistic expression, while simultaneously preserving the actor's reputation and final wishes.

(1) Arguments Against a Licensing System

Professor Joseph Beard, in his article, Casting Call at Forest Lawn,\(^\text{183}\) raises several arguments against granting the estate the right to license a deceased actor's identity. First, he contends that the licensing approach may frustrate the ability of producers to obtain the best quality resurrected actors at the most affordable price.\(^\text{184}\) However, if the actor's identity falls immediately into public domain, studios will likely produce a few high quality resurrections and a myriad of low quality performances. If the identity of a deceased celebrity is freely available, many studios will attempt resurrection with inferior technology in order to profit. A licensing structure would foster high quality performances because the studio will have to protect its monetary investment by striving for a high-quality product; the studio will have to come to an agreement with the estate regarding such details as the type of film roles the resurrected actor will play.

\(^{183}\) Beard, supra note 166, at 165.

\(^{184}\) Id.
Beard further contends that licensing could make the process so
lengthy that many older people may not be able to see resurrected
actors in their lifetime, and these people would be the people most
likely to remember the actor when he was alive. However, these
would also be the people most disappointed by a poor resurrection
and most offended by a performance inconsistent with the actor’s rep-
utation. A licensing system provides the best mechanism for a studio
to produce a performance that is consistent with the actor’s reputation
and acting ability.

Next, Beard argues that a licensing system may result in a refusal
by the estate to license any rights to use the actor, “or demand such
unrealistic fees that no producer would be willing to buy;” as a result,
few deceased celebrities would be digitally resurrected. However,
the free market system operates in such a manner that living actors
who are in high demand can charge higher prices than those in lower
demand. There is no reason to assume that this principle should not
hold for resurrected actors. Estates asking more than producers are
willing to pay will likely lower their fees in order to negotiate a deal.
Finally, Beard implies that licensing may impede competition by al-
lowing an estate to negotiate an exclusive deal with one producer or
studio. However, competition would be no more stifled than it is
with living actors who are currently able to negotiate similar exclusive
licenses. Moreover, an exclusive deal might be desirable. The studio
would have a vested long-term interest in casting the resurrected actor
in roles consistent with the late actor’s reputation.

Thus, a statutory extension of the post mortem right of publicity
would foster a licensing system in the hands of the estate. This system
would allow the actor or his estate to decide whether the actor should
be digitally resurrected. Studios would be required to purchase a li-
cense from the actor or his estate. The license would set forth the
digital actor’s film roles and compensation due. This system would
result in high quality digital resurrection that is consistent with the
actor’s reputation.

(2) An Alternative to the Proposed Licensing System

Those who oppose a licensing system controlled by the actor’s
estate suggest a compromise between actors and the entertainment
industry. For example, Pamela Kunath recommends a compulsory

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185. Id.
186. Id. at 165-66.
187. Id. at 166.
188. See Pamela L. Kunath, Note, Lights, Camera, Animate! The Right of Publicity’s
against the application of the right of publicity and advocating a compulsory licensing
scheme).
licensing system for the use of digitally resurrected actors in film in her Note, *Lights, Camera, Animate!* The Right of Publicity’s Effect on Computer-Animated Celebrities.*189* Kunath’s proposal would require both living and deceased celebrities to license their likenesses on a per use basis to some of those who request it in exchange for a “statutorily determined” compensation figure.*190* Kunath also suggests that celebrities be required by statute to accept a minimum number of requests.*191*

While this compulsory licensing system does compensate a celebrity’s estate, it does not address the potential for a filmmaker to damage a deceased personality’s reputation. Although Kunath’s suggestion of a “statutory minimum requirement of acceptances”*192* implies that a celebrity would not need to accept every request, it would not prevent exploitation of a deceased celebrity. In fact, studios could use a compulsory licensing system to manipulate an actor’s estate into licensing the image of the actor for use in an undesirable role. For example, if a celebrity’s estate was required to accept twenty requests per year, a studio could submit an undesirable request at the end of the year. If the estate had not already accepted twenty requests, it would be forced to license the likeness regardless of the filmmaker’s intended use.

Moreover, the likenesses of less popular personalities would be especially vulnerable. The statutory minimum requirement may leave these estates without recourse against numerous exploitative requests if they receive no favorable requests during the statutory period. Thus, neither Professor Beard’s anti-licensing approach nor Kunath’s compulsory licensing system protects a deceased celebrity’s reputation. By contrast, a statutory revision to the right of publicity would compensate the estate while simultaneously protecting celebrities’ reputations.

**IV. An Exception to California Civil Code Section 990(n)**

Although section 990 prevents the unauthorized use of a deceased actor’s identity to sell commercial products, it fails to recognize the potential problems digital resurrection presents. Digital resurrection creates unlimited potential for filmmakers to damage an actor’s reputation and uncontroverted possibilities for a studio to gain a financial windfall from unauthorized exploitation of a deceased actor’s

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189. Unlike a licensing system in the hands of the actor or his estate, a compulsory licensing system would require the actor or his estate to license his identity for use in a movie or television program. See *id.* at 904.
190. *Id.* at 904.
191. *Id.*
192. *Id.*
labor. Moreover, the structure of a film deal reveals a weakness in section 990. While section 990(n) exempts film from the right of publicity, section 990(a) applies the right of publicity to commercial uses. A typical film deal dictates that the actor's likeness may be used to create tie-in products relating to the movie. Because tie-in products that use an actor's likeness are commercial, they are arguably prohibited without permission from the estate. Thus, the film deal circumvents the statute's general prohibition on unauthorized use of the deceased personality's identity for commercial gain.

Based on these policy reasons, the right of publicity should exist for the use of a resurrected actor in a film or television program. The California Legislature should, therefore, redraft Civil Code section 990 to include this protection. 193 To create a version of the statute that would protect the resurrected actor, the Legislature should begin by defining the term "likeness" to include digitally recreated actors. Although the Legislature defines the term photograph in section 990(i), it fails to define "likeness" in either section 990 or 3344. 194 As noted earlier, a resurrected actor arguably falls under the definition of photograph. However, the Legislature can fashion a more effective version of the statute by defining likeness to include 2-D and or 3-D computer-generated versions of a person that are readily identifiable as that person.

In addition, the Legislature should amend the exemption of film and television in section 990(n). It should extend the right of publicity to the use of 2-D and 3-D digitally reproduced actors in film and television programs. It should specify that digital replication requires permission from the estate. 195 Furthermore, the Legislature should set a specified time limit on this exclusion to allow the deceased personal-

193. Some commentators argue that because of the disparity among states in the treatment of the right of publicity a federal statute should be enacted. See J. Eugene Salomon, Jr., Note, The Right of Publicity Run Riot: The Case for a Federal Statute, 60 S. CAL. L. REV. 1179, 1204 (1987) (proposing a federal right of publicity statute which provides for survivability); McCarthy, supra note 78, at 141 (noting that the International Trademark Association has inquired into sponsoring the legislation of a federal right of publicity statute). Without a federal statute in place, the best solution is to provide for protection at the state level. California is the most appropriate place to begin since it is the entertainment capital. Moreover, if California leads the way in protecting the publicity rights of actors who are digitally resurrected and used in film, a federal statute may be more likely to incorporate such protection.

194. Although section 3344 likely protects living celebrities from unauthorized digital replication in commercials and in film, the California legislature should expressly include 2-D and 3-D digital replication in its definition of photograph in section 3344. Moreover, the legislature should define likeness in section 3344 to include digital replication. To strengthen section 3344, the legislature could adopt the definitions of photograph and likeness in this Note's proposed amended section 990. See supra Part IV.A of this Note.

195. This permission could be established through a licensing system in the hands of the actor's estate. See supra Part III.D of this Note.
ity's identity to eventually fall into public domain. Fifty years after the death of the actor would be appropriate, since it would bring the time limit in line with the statute's prohibition on the use of a deceased person's likeness for advertising purposes.\textsuperscript{196}

Additionally, to provide for freedom of expression, the exception should include a fair use provision, similar to the Copyright Act,\textsuperscript{197} to allow digital resurrection without the estate's permission under certain circumstances.\textsuperscript{198} For example, this provision should allow a producer to create a computer-generated version of a classic character such as Dracula or Frankenstein for use in film, without permission from the estate of an actor who played the character during his lifetime.\textsuperscript{199} The statute should also allow a producer to create an obviously exaggerated digital caricature of a deceased actor for use in parody or satire.\textsuperscript{200} This would encourage political commentary and creative expression that the First Amendment so rightly protects.

Since it is not possible to effectively provide for every situation that may arise in a statute, the Legislature should include factors in the fair use provision that courts may consider when evaluating a particular case. The fair use provision should direct courts to take a balancing approach, similar to that stated in Estate of Presley,\textsuperscript{201} which weighs freedom of expression and the right of publicity when deciding cases. For example, a studio might be allowed to digitally resurrect an actor who dies during the filming process, as in the movie "The Crow."\textsuperscript{202} The studio, however, may be limited to using the resurrected actor to finish the movie that he was under contract to complete. The role the actor plays should not deviate from the original script and character role the actor agreed to play, and the actor's salary could be paid to his estate. Thus, amended section 990 would define the terms "likeness" and "photograph" to include digital actors, extend the right of publicity to digitally resurrected actors used in film and television programs, and provide a fair use provision that allows digital resurrection without permission under certain circumstances.

\textsuperscript{196} The legislature will need to determine the exact length of time based on arguments made by special interest groups.

\textsuperscript{197} See supra note 99 and accompanying text.

\textsuperscript{198} The concept of fair use allows courts to protect culturally contributive performances while excluding economically exploitative performances. See Apple Corps Ltd., 229 U.S.P.Q. at 1017. See also supra note 99 and accompanying text.

\textsuperscript{199} See supra text accompanying notes 131-37.

\textsuperscript{200} See supra note 94 and accompanying text.

\textsuperscript{201} See Estate of Presley, 513 F. Supp. at 1356.

\textsuperscript{202} See supra note 55 and accompanying text.
A. A Proposal for Amending Section 990

As noted, California Civil Code section 990 provides in pertinent part:

(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 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.

(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).\(^203\)

The California Legislature could amend section 990 to encompass digital personality reproduction as follows:

Section 990(a)'s general prohibition would remain without change.

(a)(1) As used in this section, "likeness" means any reproduction of a personality in which the deceased personality is readily identifiable from a visual image or audio simulation. Audio simulation includes any audio performance which is indistinguishable from the personality's voice by a reasonable person. Visual image includes, but is not limited to, 2-D, 3-D and photographic reproductions. A deceased personality shall be deemed readily identifiable from the likeness when one who views the likeness with the naked eye can reasonably determine who the person depicted in the likeness is.\(^204\)

(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, radio program, film or television program not exempt under paragraph (i), other than an advertisement or commercial announcement not exempt under paragraph (4).

(i) The exemption in paragraph (n)(1) shall not apply to the use of a deceased personality as a 2-D or 3-D digitally reproduced personality for use in film or television programs without the consent of the person prior to death or the consent of the person's estate. No action shall be brought under this section by reason of any use of a digitally reproduced personal-

\(^203\) CAL. CIV. CODE § 990.

\(^204\) See id. § 990(i) (defining "readily identifiable" in the context of a photograph).
ity occurring after the expiration of 50 years from the death of the deceased personality.  

(ii) As used in this section, “2-D” digital reproduction means alteration of a photograph or film image of the deceased personality by computer or similar means, so as to create a new performance.

(iii) As used in this section, “3-D” digital reproduction means the creation of an exact or near-exact, three dimensional replica of the personality by computer or similar means, so as to create a new performance.

(iv) Fair Use of Digitally Reproduced Personalities

Notwithstanding the provisions of subsection (i), the fair use of a 2-D or 3-D digitally reproduced personality for purposes such as parody, satire, historical or biographical portrayal is not an infringement of the right of publicity. In determining whether the use of a 2-D or 3-D digitally reproduced personality in a particular case is a fair use the following factors should be considered:

1. Whether the digital reproduction is of a personality or of a well-known fictional character the deceased personality portrayed while alive.

2. Whether the digital reproduction is made in order to complete a film or television program in which the deceased personality contracted to perform prior to death. Such use shall be limited to the express terms of the contract and the personality's estate shall be compensated for the use.

3. The extent to which the digital personality is used in relation to the work as a whole, including whether a famous performance or scene of a classic film is inserted into an otherwise original work.

4. The extent to which the digital portrayal communicates newsworthy occurrences, including reenactment of historical events as documented.

5. The extent to which a personality's likeness is used to create a new, unique digital character that is not an exact replica of the personality at any age during his lifetime.

Conclusion

Digital artists are on the brink of creating exact replicas of living and deceased actors. This capability presents new possibilities for
creative expression, but it is not without dangers.\textsuperscript{208} A studio could exploit a living actor's talent for commercial gain. A producer could diminish a deceased personality's reputation by creating an inaccurate portrayal of the actor. As we are warned in the tale of "Frankenstein," the capacity to create life, even the illusion of life, is so powerful that it has the potential to cause damage and injury if left ungoverned.\textsuperscript{209}

The California Legislature should respond proactively before fully believable digital actors become a reality. The right of publicity is widely recognized through the common law and statutory provisions\textsuperscript{210} and should be used to protect the identity of actors from exploitation. Today, California law prohibits the exploitation of a likeness of a living or deceased actor for advertising purposes, and arguably protects living actors from digital replication.\textsuperscript{211} To round out the protections, the deceased actor must be insured against unauthorized digital resurrection. To this end, the Legislature should re-draft California Civil Code section 990 to include right of publicity protection for deceased actors who are digitally resurrected and used in film and television programs.\textsuperscript{212}

\textsuperscript{208} See supra Part III.C.
\textsuperscript{209} See supra note 1.
\textsuperscript{210} See supra Part II.
\textsuperscript{211} See supra Part III.A-B.
\textsuperscript{212} See supra Part IV, which outlines the suggested provisions for a version of California Civil Code section 990 which would prohibit the use of digitally resurrected actors in film without permission from the actor or his estate.