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# Rebirth and Rejuvenation in a Digital Hollywood: The Challenge Computer-Simulated Celebrities Present for California's Antiquated Right of Publicity

Thomas Glenn Martin Jr.\*

*"The reality is synthetic actors are essentially the most powerful weapons in the world."\*\**

## I. INTRODUCTION

Most technological revolutions are accompanied by periods of skepticism, hostility and fear directed towards the new technology. When Thomas Edison invented the telephone in the early twentieth century, the postal service believed its own future to be dim. When Henry Ford popularized the assembly line, automobile workers raised grave concerns about their job security. Workers feared that eventually a human laborer would only be needed to turn the machines on. William E. Leuchtenburg, De Witt Clinton Professor of History at Columbia University, has written of the industrial revolution:

The word "automation" struck fear in the hearts of the American workingman. 'The workers greatest worry,' explained a writer, 'is that he

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\* B.A. Philosophy 1993, Yale University; J.D. 1997, UCLA School of Law. I would like to thank Ted Kaufman and Ingela Kling of the Artists Rights Foundation for their generosity and helpfulness. Also, but for my wonderful externship with the Directors Guild of America, I would never have enjoyed such exposure to the business of theatrical film production I find so alluring. Thank you Elliott, Beverly, Pam, and David.

\*\* Steve Williams, Casting from Forest Lawn, Address at Third Annual Artists Rights Digital Technology Symposium, (Feb. 16, 1996) (on file with the author).

will be cast upon the slag heap by a robot.' The very point of automation was to eliminate labor.<sup>1</sup>

Fritz Lang's *Metropolis*<sup>2</sup> fastened on that fear and Charlie Chaplin's *Modern Times*<sup>3</sup> satirized it. A modern day fable, James Cameron's *Terminator*,<sup>4</sup> carried that fear one step forward with the frightening message that machines will conquer man.

The digital revolution<sup>5</sup> has been no exception to this pandemonium. As was recently evidenced at the Third Annual Artists Rights<sup>6</sup> Digital Technology Symposium<sup>7</sup> entitled "The Death of Copyright and the Birth of Imaging," the digital age has struck fear into the hearts of many members of the movie business, especially actors. In the symposium's liveliest and most controversial session, "Casting from Forest Lawn,"<sup>8</sup> a panel of industry experts discussed

<sup>1</sup> William E. Leuchtenburg, *Consumer Culture and the Cold War in American Society, 1945-60*, in *THE UNFINISHED CENTURY: AMERICA SINCE 1900*, at 719 (William E. Leuchtenburg, ed., 1973).

<sup>2</sup> (UFA 1927).

<sup>3</sup> (United Artists 1936).

<sup>4</sup> (Hemdale 1984).

<sup>5</sup> A book which manages to steer clear of the hype surrounding digital technology, and provides some concrete facts and genuine insight is *BEING DIGITAL* written by M.I.T. Media Lab Professor and *WIRED* magazine columnist, Nicholas Negroponte. Negroponte observes: "The best way to appreciate the merits and consequences of *being digital* is to reflect on the difference between bits and atoms." NICHOLAS NEGROPONTE, *BEING DIGITAL* 11 (1995). Whereas an atom must be kept in inventory, packaged, and transported, "a bit has no color, size, or weight, and it can travel at the speed of light. It is the smallest atomic element in the DNA of information." *Id.* at 14. Negroponte predicts, that "[t]he change from atoms to bits is irrevocable and unstoppable." *Id.* at 4.

<sup>6</sup> The Artists Rights Foundation was established in 1991 by the Directors Guild of America, the Writers Guild of America West, the American Society of Cinematographers, the International Photographers Guild, the Screen Actors Guild, the Publicists Guild of America and the Society of Composers and Lyricists as a non-profit organization to educate the public about the importance of protecting and preserving art as an integral part of our shared cultural and historical heritage. Artists Rights Foundation, Statement of Purpose (on file with the author).

<sup>7</sup> The symposium was held at the Directors Guild of America Building on February 15 and 16, 1996.

<sup>8</sup> The title of the session was lifted from an article written by one of its panelists, Professor Joseph J. Beard of St. John's University School of Law. 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 (1993). This Article is a response to

the prospect of digital actors<sup>9</sup> and the implications of such technology for “organic” actors<sup>10</sup> living and dead. Scott Billups, a computer-effects whiz and cinematographer, predicted that “organic actors will have no place in the digital future.”<sup>11</sup> Richard Masur, actor and president of the Screen Actors Guild, remarked, “If we get to digitally created actors the way they’re being described. . . . Frankly, I hope I’m gone by then.”<sup>12</sup>

Of course, the case against digital actors has been somewhat overstated. The use of digital technology in the creation of computer-generated actors presents wonderful opportunities for filmmakers. Christian Rouet of special effects house Industrial Light + Magic believes digital animation will help free film-makers from “the physics of location.”<sup>13</sup> This new freedom will also allow more money to be spent on “new characters, new worlds, and new kinds of stories that are completely imaginary.”<sup>14</sup>

Digital actors can also be directly beneficial to their “organic” counterparts. One cannot easily dismiss the multiplication of income streams digital actors represent for the established star. An actor may choose to digitize himself and license this “digital equivalent,” including versions from different stages in the actor’s career, to the highest bidder. Further, an actor may auction off his *post-mortem* digital rights and enjoy the benefits during his lifetime. Studios could

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Professor Beard’s desire to “stimulate discussion of the legal issues involved in reanimation,” specifically those involved with the exploitation of the synthetic replica of a celebrity. *Id.* at 106.

<sup>9</sup> “Digital actor” denotes a computer-generated and computer-animated three-dimensional model, generally representing a famous celebrity. The terms “digital actor,” “virtual actor,” “cyber actor,” “artificial actor,” “computer-generated actor,” and “synthespian” can be used interchangeably.

<sup>10</sup> Some film techies already are making the distinction between the living and the digital with the use of phrases like “organic actress.” Garry Abrams, *Synthespians*, LOS ANGELES DAILY JOURNAL: CALIFORNIA LAW BUS., Mar. 4, 1996, at 20.

<sup>11</sup> Scott Billups, Casting from Forest Lawn, Address at Third Annual Artists Rights Digital Technology Symposium, (Feb. 16, 1996) (on file with the author).

<sup>12</sup> Richard Masur, Casting from Forest Lawn, Address at Third Annual Artists Rights Digital Technology Symposium, (Feb. 16, 1996) (on file with the author).

<sup>13</sup> Rupert Widdicombe, *Have We Created a Monster?*, THE TIMES OF LONDON, Mar. 17, 1996 at pp. XXX.

<sup>14</sup> *Id.*

increase their ability to ensure their opening weekend box office revenues by employing digital equivalents of deceased actors, such as Humphrey Bogart, Marilyn Monroe and James Dean, to play feature roles in new movies.<sup>15</sup> The deceased celebrity's estate could also gain from this arrangement.

Lastly, insurance companies could benefit from this new technology. Insurers could require actors to be digitally duplicated so that in the event of an actor's untimely demise, a movie's physical production could be completed in post-production.<sup>16</sup>

The purpose of this article is to suggest how right of publicity doctrine may be harmonized with the use of computer-simulated celebrities.<sup>17</sup> Part I will summarize the historical development of digital animation, as well as its present state of technology. Part II will summarize the development of the right of publicity doctrine, as well as its present incarnation in California law. Part III will discuss how the unauthorized use of a digital equivalent of a living or dead celebrity in a theatrical film might be analyzed by today's California

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<sup>15</sup> Moreover, digital equivalents of deceased actors would increase the supply of talent available, thereby driving down an actor's average price.

<sup>16</sup> Joseph J. Beard, Casting from Forest Lawn, Address at Third Annual Artists Rights Digital Technology Symposium, (Feb. 16, 1996) (on file with the author).

<sup>17</sup> The creation and commercial exploitation of a computer-generated representation of a known celebrity involves several intriguing questions of intellectual property. As of this writing, only two law review articles have been published on the right of publicity issues arising from the digital animation of celebrities. For a broad discussion of intellectual property issues pertaining to computer-generated celebrities, see Beard, *supra* note 10. For a law review note and comment on the right of publicity's effect on computer-animated celebrities, see Pamela Lynn Kunath, *Lights, Camera, Animate! The Right of Publicity's Effect on Computer-Animated Celebrities*, 29 LOY. L.A. L. REV. 863 (1996).

Let me explain briefly what this Article is not. This Article does not explore trademark issues raised by the use of the name of a living or dead celebrity, see Beard, *supra* note 10, at 170-181; nor does it touch upon copyright issues raised by the expression of a computer-generated celebrity in a tangible medium, see *id.* at 107-144. This paper does not attempt to articulate patent issues surrounding the computer process necessary to create such an expression; nor does it elaborate on issues related to unfair competition, see *id.* at 176-178. Lastly, this Article does not address the protection of trade secrets. see *id.* at 144-146. This Article concerns the right of publicity pure and simple.

courts.<sup>18</sup> Part IV will suggest ways in which the right of publicity should be reformed in order to encompass digital technology issues.

## II. THE EVOLUTION OF COMPUTER-ANIMATED SPECIAL EFFECTS

It all began with Lucas. In 1976, George Lucas discovered that necessity is mother of invention when he was faced with the prodigious task of creating the special effects necessary to tell his fantastic story, *Star Wars*.<sup>19</sup> In an interview packaged with the digitally remastered video re-release of the *Star Wars* trilogy, Lucas recalled, "I went around and there were no departments at the studios, no one to do this. So I had to build up from scratch my own special effects company in the process of starting this whole thing."<sup>20</sup> That special effects company, Industrial Light + Magic, is now "the world's largest effects house with 450 people and 180 high-powered computer workstations—more than any other organization except NASA."<sup>21</sup> ILM has won fourteen academy awards for best visual effects and eight for technical achievement, dwarfing rivals such as Boss Film Studios and Digital Domain in both size and stature.<sup>22</sup>

Advances in digital technology's state of the art have been incremental in size, yet astonishing in effect. The following film-by-film history briefly describes the evolution of on-screen digital innovation:

- *Star Wars*, 1977. ILM's first breakthrough was the motion-control camera, which revolved repeatedly around stationary

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<sup>18</sup> For simplicity's sake, this Article will not address derivative digital actors, which are manipulations or distortions of the organic actor they are based upon; nor will this Article analyze the legal complexities of digital actors which are compilations of the attributes of several identifiable organic actors. Furthermore, this Article will not touch upon the legal significance of completely original digital actors not based upon anyone in particular.

<sup>19</sup> (20th Century Fox 1977).

<sup>20</sup> Interview by Leonard Maltin with George Lucas, *Star Wars: A New Hope* (Fox Video 1995).

<sup>21</sup> Martha Groves, *Digital Yoda: George Lucas at Entertainment's High Tech Edge*, L.A. TIMES, June 4, 1995, at D1.

<sup>22</sup> Both Boss Film Studios and Digital Domain were founded by former Lucas employees. *Id.*

objects while remaining in focus, creating the illusion of realistic space flight.<sup>23</sup>

- *Star Trek II: The Wrath of Khan*, 1982. ILM created the first entirely computer-generated scene with the “Genesis sequence” in which a planet’s barren surface was reconstituted into a fertile, living environment.<sup>24</sup>
- *Young Sherlock Holmes*, 1985. ILM developed its first computer-generated character: the “stained-glass man.”<sup>25</sup>
- *The Abyss*, 1989. ILM created the first computer-generated three-dimensional character, a benevolent water creature, using “morphing” technology.<sup>26</sup> This technology was used again in *Terminator 2: Judgment Day*, 1991, to create the liquid metal T-1000 Terminator.<sup>27</sup>
- *Jurassic Park*, 1993. ILM turned back the geological clock 65 million years through the use of digital imaging, yielding living, breathing dinosaurs.<sup>28</sup>
- *Forrest Gump*, 1994. ILM’s digital compositing advances wove fictional and historical footage together, allowing a character played by contemporary actor Tom Hanks to shake hands with historical figure Jack Kennedy.<sup>29</sup> Actor Gary Sinise’s legs were amputated with the aid of a digital eraser.<sup>30</sup> ILM also digitally manufactured football crowds, helicopters and ping-pong balls.<sup>31</sup>
- *Casper*, 1995. ILM created the first speaking digital lead.<sup>32</sup>
- *Jumanji*, 1995. ILM created a realistic menagerie of elephants, rhinos, lions, monkeys, zebras, pelicans, bats and mosquitoes. The major technical feat, however, rested in ILM’s realistic digital animation of animal hair and fur.<sup>33</sup>

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<sup>23</sup> See Randall Lane, *The Magician*, FORBES, Mar. 11, 1996, at 122, 126.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Groves, *supra* note 23, at D1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

- *Toy Story*, 1996. Pixar created the first feature-length computer-animated motion picture, starring animated characters voiced by contemporary actors.<sup>34</sup>
- *Twister*, 1996. ILM used proprietary 3-D animation software to conjure up 300-mph digital dust storms, occupying 25 minutes of screen time.<sup>35</sup>
- *Star Wars Twentieth Anniversary Edition*, (anticipated release, 1997). This *Star Wars* will be closer to what George Lucas originally imagined.<sup>36</sup> The original, desert village of the famous cantina will be replaced by a teeming city, bustling with aliens and robots.<sup>37</sup> Visuals and sound will be digitally enhanced. In a tribute to Lucas' vision, a scene originally filmed in 1976 with future special effects capabilities in mind will be added: a youthful Harrison Ford as Han Solo will encounter a digital Jabba the Hutt.<sup>38</sup>

Certainly, the entrance of special effects companies, such as Boss Studios, Digital Domain and Pixar, into the digital effects arena with ILM has sparked intense competition and will encourage the production of further eye-dazzling films. A testament to this competition is the number of this summer's blockbusters full of digital effects, including *Twister*,<sup>39</sup> *Mission: Impossible*,<sup>40</sup> *Dragonheart*,<sup>41</sup>

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<sup>34</sup> Pixar is a relatively new player in the motion picture special effects industry. *Id.*

<sup>35</sup> Paula Parisi, *Digital Twist*, WIRED, June 1996, at 47.

<sup>36</sup> See Lane, *supra* note 25, at 122.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> (Warner Bros. [domestic] and Universal [international] 1996). In its first weekend, *Twister* whipped up a devastating \$41.1 million worth of damage to become the biggest May opener ever, and the fifth-highest all-time opener on record. Andrew Hines, '*Twister*' shreds May B.O. record, DAILY VARIETY, May 14, 1996, at 1. In its first twelve days, *Twister* grossed \$101.5 million, making it the fifth-fastest film to reach the \$100 million mark. Andrew Hines, *New Eye of B.O. Storm: 'Mission' lights fuse for tussle with 'Twister'*, DAILY VARIETY, May 23, 1996, at 1.

<sup>40</sup> (Paramount 1996). In its opening day, Wednesday, May 22, *Mission: Impossible* grossed a record-breaking \$11.76 million in 3,012 theaters. Andrew Hines, '*Mission*' cruises to B.O. record, DAILY VARIETY, May 24, 1996, at 1. *Mission: Impossible's* cumulative six and one-third day take (the one-third coming from sneak previews) is estimated at between \$70 and \$78 million. Judy Brennan, '*Mission*' Is a Runaway on Cruise Control, L.A. TIMES, May



*The Rock*,<sup>42</sup> *Eraser*,<sup>43</sup> *Independence Day*,<sup>44</sup> and *Island of Dr. Moreau*.<sup>45</sup> Roughly fifty percent of the movies released last year used digital visuals of some sort, while ninety percent used digitally recorded sound.<sup>46</sup> That contrasts with ten percent for each category just two years ago.<sup>47</sup> This trend will persist, especially as the price of digital visual effects decreases as new innovations in imaging software are realized.

On the subject of Hollywood's future, James Cameron, director and founder of Digital Domain, noted a historical pattern, "For the past fifteen years, the most profitable films worldwide have been ones that use visual effects."<sup>48</sup> Steve Williams, ILM's Animation Supervisor, has observed, "We're completely driven by trying to duplicate ourselves synthetically."<sup>49</sup> In fact, we have already seen digital actors at work as stunt doubles in dozens of major motion pictures.<sup>50</sup> Due to the nature of the work, however, the digital actor's screen time amounts to no more than a few seconds. At the Artists Rights symposium, Richard Masur pointed out, "There's a lot of digital stunt doubling going on. It's been going on for a while. It allows you to say you do your own stunts for one thing."<sup>51</sup>

Like President Kennedy's mandate that the United States be the first to put a man on the moon, the market dynamics of today's movie industry demand the development of spectacular visual effects. For

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27, 1996, at F1. If the upper estimate is correct, *Mission Impossible* would exceed *Jurassic Park*'s six-day gross of \$74.2 million and blow past *Batman Forever*'s \$72.2 million—until now the two biggest six-day openers of all time. *Id.*

<sup>41</sup> (Universal 1996).

<sup>42</sup> (Hollywood 1996).

<sup>43</sup> (Warner Bros. 1996).

<sup>44</sup> (20th Century Fox 1996).

<sup>45</sup> (New Line 1996).

<sup>46</sup> Lane, *supra* note 25, at 122.

<sup>47</sup> *Id.*

<sup>48</sup> James Cameron, *Dreaming the Next Hollywood*, L.A..TIMES MAGAZINE, Mar. 24, 1996, at 6.

<sup>49</sup> Williams, *supra* note 2.

<sup>50</sup> Two examples of this digital stunt doubling are found in *Batman Forever* and *Jurassic Park*. In *Batman Forever*, the Batman hanging from a helicopter at the beginning of the film is a digital stuntman. *Id.* In *Jurassic Park*, the lawyer on the toilet who is eaten by T-Rex is also a digital stunt double. *Id.*

<sup>51</sup> Masur, *supra* note 14.

better or worse, digital animators have fastened upon the synthetic duplication of ourselves as the pinnacle of technical achievement. We now stand at the threshold of pure digital fantasy. Expense is the only remaining obstacle to the production of a feature film starring a believably human, but computer generated and animated cast.<sup>52</sup> The population of motion pictures with synthetic actors is inevitable.

### III. THE EVOLUTION OF THE RIGHT OF PUBLICITY

Unlike copyright, patent and trademark laws, the right of publicity does not derive its power from the Federal Constitution or congressional legislation. Rather, the right of publicity is a state common law doctrine which evolved from the right of privacy, also created by state courts. In some jurisdictions, the right of publicity has been enacted by state legislation.

#### A. *Right of Privacy*

In 1890, Louis Brandeis and Samuel Warren produced what is perhaps the most influential law review article ever written.<sup>53</sup> In their essay, "The Right of Privacy," Brandeis and Warren argued that a person's privacy must be protected against a press "overstepping in every direction the obvious bounds of propriety and of decency."<sup>54</sup> The right of privacy was simply the right "to be let alone."<sup>55</sup> This right extended to a person's appearance, sayings, acts and personal relations.<sup>56</sup> It was primarily due to the persuasiveness of Brandeis and Warren's article that first Georgia, and then fourteen other states came to recognize a common law right of privacy.<sup>57</sup>

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<sup>52</sup> Williams, *supra* note 2.

<sup>53</sup> Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

<sup>54</sup> *Id.* (quoting Warren and Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890)).

<sup>55</sup> Warren and Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 195 (1890).

<sup>56</sup> *Id.* at 213.

<sup>57</sup> Nimmer, *supra* note 55. The right of privacy was first recognized in the state of California in *Melvin v. Reid*, 297 P. 91, 92 (Cal. Ct. App. 1931). The court in *Melvin v. Reid* defined the right of privacy as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity." *Id.* Only Minnesota appears not to

In 1960, Dean Prosser synthesized hundreds of right of privacy cases, noting that courts recognized four distinct torts of invasion of an individual's right of privacy:<sup>58</sup>

1. Intrusion into a person's seclusion, solitude, or private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff in a false light in the public eye; and
4. Appropriation, for the defendant's advantage, of the plaintiff's name and likeness.

The first three torts are personal in nature and regard injury to an individual's feelings or reputation. Due to the personal nature of an individual's right of privacy, courts have traditionally interpreted the right of privacy to be inalienable and dissolved upon the death of the individual whose privacy right was being protected. In contrast, the fourth tort, pertaining to an individual's economic interest in one's own name or likeness, represented a definite break with common law privacy doctrine.

The tort of misappropriation grew with twentieth century technological developments, including the motion picture camera, telegraph, telephone and modernized news presses.<sup>59</sup> It was meant to protect the economic interests of another modern invention, the celebrity. Nevertheless, the tort of misappropriation is incongruent with any theory of privacy because those sought to be protected, celebrities, do not desire privacy. Their concern is rather with publicity, which may be regarded as the reverse side of the coin of privacy.<sup>60</sup> While a celebrity does not wish to bury his head in the sand, he desires to approve the use of his name or likeness and receive compensation for such use.

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recognize a cause of action for invasion of privacy. Beard, *supra* note 10 (citing *Stubbs v. North Memorial Medical Ctr.*, 448 N.W.2d 78 (Minn. Ct. App. 1990)).

<sup>58</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383-89 (1960).

<sup>59</sup> Nimmer wrote: "With the tremendous strides in communications, advertising, and entertainment techniques, the public personality has found that the use of his name, photograph, and likeness has taken on a pecuniary value undreamed of at the turn of the century." Nimmer, *supra* note 55, at 204.

<sup>60</sup> *Id.*

## B. *Right of Publicity*

In 1953, the “right of publicity” was first recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>61</sup> Judge Jerome Frank, in the opinion for the Second Circuit Court of Appeals, wrote:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be ‘in gross,’ i.e., without any accompanying transfer of a business or of anything else. Whether it be labeled a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes that fact that courts enforce a claim which has pecuniary worth.

This right might be called a “right of publicity.” For it is 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, 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.<sup>62</sup>

In 1954, Melville B. Nimmer, in his essay “The Right of Publicity,” leveled criticism at the privacy theory of the right of publicity espoused by Judge Frank. Professor Nimmer argued that the right of publicity is a property right which may be validly assigned. In keeping with this theory, Nimmer argued that privacy defenses such as celebrity waiver and non-offensive use are inappropriate for a right of publicity action.<sup>63</sup> Nimmer also took exception with the fact that the privacy theory of the right of publicity precluded the right to recover for misappropriation of publicity values inherent in animals, inanimate objects, businesses and other institutions.<sup>64</sup>

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<sup>61</sup> *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

<sup>62</sup> *Id.* at 868.

<sup>63</sup> Nimmer, *supra* note 55, at 222.

<sup>64</sup> *Id.*

Nonetheless, the right of publicity is still in search of a separate identity from the right of privacy.<sup>65</sup> Courts seem to agree that the right of publicity is the right of an individual, especially a public figure or celebrity, to control the commercial use of his or her name or likeness.<sup>66</sup> However, courts continue to waffle on the nature of the right of publicity. Is the right a personal right analogous to a right of privacy, terminating at death, as some jurisdictions have held?<sup>67</sup> Or, is the right of publicity a property right, fully assignable and devisable at death, as some other jurisdictions have concluded?<sup>68</sup> Nine states have passed *post-mortem* right of publicity statutes:<sup>69</sup> California,<sup>70</sup> Florida,<sup>71</sup> Kentucky,<sup>72</sup> Nebraska,<sup>73</sup> Nevada,<sup>74</sup> Oklahoma,<sup>75</sup> Tennessee,<sup>76</sup> Texas<sup>77</sup> and Virginia.<sup>78</sup> Four states have expressly interpreted their law, either in state or federal court,

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<sup>65</sup> Beard, *supra* note 10, at 146.

<sup>66</sup> As we shall see in part II.C.2., whether the right of publicity is construed to be a personal right or a property right does affect whether courts recognize a right of publicity which survives the death of the subject of the right. The Ninth Circuit Court of Appeals, interpreting California law, has expanded the scope of the right of publicity from an individual's specific attributes, such as name, likeness, voice, signature or photograph, to embrace an individual's identity or persona, thereby employing an "identifiability" test to prove infringement of an individual's right of publicity. *See, e.g., White v. Samsung Electronics America, Inc.*, 989 F.2d 1512 (9th Cir.), *cert. denied*, 113 S. Ct. 2443 (1993); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993); *Midler v. Young & Rubicam, Inc.*, 944 F.2d 909 (9th Cir. 1991) (unpublished opinion), *cert. denied*, 503 U.S. 951 (1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

<sup>67</sup> *See, e.g., Lugosi v. Universal Pictures*, 603 P.2d 411 (1979); *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454 (Cal. 1979); *Maritote v. Desilu Productions*, 345 F.2d 418 (7th Cir. 1965), *cert. denied*, 382 U.S. 883 (1965); *Reeves v. United Artists*, 572 F.Supp. 1231 (N.D. Ohio 1983), *aff'd*, 765 F.2d 79 (1985).

<sup>68</sup> *E.g., Martin Luther King, Jr., Center for Social Change v. American Heritage Prods.*, 296 S.E.2d 697 (Ga. 1982); *In Estate of Presley v. Russen*, 513 F.Supp. 1339 (D.N.J. 1981).

<sup>69</sup> Beard, *supra* note 10, at 147.

<sup>70</sup> CAL. CIV. CODE §990 (West Supp. 1996).

<sup>71</sup> FLA. STAT. ANN. §540.08 (West 1988).

<sup>72</sup> KY. REV. STAT. ANN. §391.170 (Michie 1984).

<sup>73</sup> NEB. REV. STAT. §§20-202, 20-208 (1983).

<sup>74</sup> NEV. REV. STAT. §598.980-988 (1989).

<sup>75</sup> OKLA. STAT. ANN. tit. XII, §1448 (West 1985).

<sup>76</sup> TENN. CODE ANN. §47-25-1101 to 1105 (1984).

<sup>77</sup> TEX. PROP. CODE ANN. §26.001-.012 (West 1987).

<sup>78</sup> VA. CODE ANN. §8.01-.40 (Michie 1984).

to include a common law *post-mortem* right of publicity.<sup>79</sup> Arizona,<sup>80</sup> Georgia,<sup>81</sup> New Jersey<sup>82</sup> and Utah.<sup>83</sup> The law of four other states appears to specifically preclude a *post-mortem* right of publicity as a matter of statute or common law:<sup>84</sup> Illinois,<sup>85</sup> New York,<sup>86</sup> Ohio<sup>87</sup> and Pennsylvania.<sup>88</sup>

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<sup>79</sup> Beard, *supra* note 10, at 147-48.

<sup>80</sup> In Arizona, a federal district court appeared to conclude that, if there were a descendible right of publicity at all in that state, the person would have to have exploited his right of publicity in his name and personality "by assigning the right to use them to another" during his time. *Id.* at 195 (quoting Sinkler v. Goldsmith, 623 F. Supp. 727, 734 (D. Ariz. 1985)).

<sup>81</sup> Martin Luther King, Jr. Ctr. for Social Change v. American Heritage Prods., 296 S.E.2d 697 (Ga. 1982).

<sup>82</sup> In Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981), the federal district court concluded that New Jersey common law provided a descendible right of publicity. Beard, *supra* note 10 at 195. However, in Gleason v. Hustler, 7 Media L. Rep. (BNA) 2183 (D.N.J. 1981), the district court narrowed its interpretation of the New Jersey *post-mortem* right of publicity by conditioning it on "the decedent's own overt exploitation of his name or likeness, usually through an *inter vivos* transfer of his rights."

<sup>83</sup> In Utah, the federal district court concluded that Utah would recognize a descendible common law right of publicity, where the right was exploited during the person's lifetime. Nature's Way Products v. Nature-Pharma, Inc., 736 F. Supp. 245 (D. Utah 1990).

<sup>84</sup> *Id.* at 149.

<sup>85</sup> In Maritote v. Desilu Productions, 345 F.2d 418 (7th Cir. 1965), *cert. denied*, 382 U.S. 883 (1965) (involving the dramatization of Al Capone's criminal activities), the Seventh Circuit concluded that there was no descendible right of publicity in Illinois.

<sup>86</sup> The New York Civil Rights Law prohibits the use of "the name, portrait or picture of any living person." N.Y. CIV. RIGHTS LAW §50 (McKinney 1976) Thus, it would appear that there is no descendible right of publicity in New York.

<sup>87</sup> In Reeves v. United Artists, 572 F. Supp. 1231 (N.D. Ohio 1983), *aff'd*, 765 F. 2d 79 (6th Cir. 1985), the federal district court held that the right of publicity is not descendible in Ohio. The court based its conclusion on the Ohio Supreme Court's language in Zacchini v. Scripps-Howard Broadcasting Co., 351 N.E.2d 454 (Ohio 1976), *rev'd on other grounds*, 433 U.S. 562 (1977), which the Reeves court interpreted as rejecting the notion of the right of publicity as a property right. Reeves, 572 F. Supp. at 1235.

<sup>88</sup> In Sharman v. C. Schmidt & Sons, 216 F. Supp. 401 (E.D. Pa. 1963), the federal district court held that Pennsylvania recognized a right of publicity, but said that the right of publicity is "a fledgling branch of the tort of invasion of privacy," which may suggest that the right of publicity is a personal right, rather than a property right, and thus not descendible. *Id.*, at 407.

### C. *California Right of Publicity*

The doctrine of the right of publicity has several manifestations in the state of California. The right of publicity exists both at common law and by legislation. Generally, the common law right of publicity is wider in scope and more generous in its remedies than its statutory counterpart. The statutory right of publicity also differs depending upon whether the individual whose name and likeness are to be protected is alive or dead. This Article proposes that the distinction between an *inter vivos* and *post-mortem* right of publicity is merely an artifact of the privacy rubric of the right of publicity.

#### 1. *Inter Vivos*

##### a. *Common Law*

In 1983, the California Court of Appeals case of *Eastwood v. Superior Court* explicitly recognized the common law tort of misappropriation. The *Eastwood* court stated that this common law tort may be pleaded in addition to the statutory cause of action under Civil Code §3344.<sup>89</sup> The court adopted a four-pronged test: (1) defendant's use of the plaintiff's identity; (2) appropriation of the plaintiff's name or likeness<sup>90</sup> to the defendant's advantage, commercial or otherwise; (3) plaintiff's lack of consent to the use; and (4) resulting injury.<sup>91</sup> Thus, a common law claim consists of a defendant's unauthorized use of a plaintiff's name or likeness which results in an advantage to the defendant and an injury to the plaintiff.

Both the common law and statutory causes of action are grounded upon a privacy rationale. Consistent with their right of privacy

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<sup>89</sup> *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 426 (1983).

<sup>90</sup> However, in *Guglielmi v. Spelling-Goldberg Productions*, the California Supreme Court held that the common law right of publicity extends to one's "name, likeness or personality." *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 861 (Cal. 1979). Chief Justice Bird, in her *Guglielmi* concurrence, reserved any construction of "personality," finding it "difficult to discern any easily applied definition for this amorphous term." *Id.* at 864 fn.5. Also, although the Ninth Circuit adopted the *Eastwood* factors, it does not strictly interpret "name" and "likeness." *See infra*.

<sup>91</sup> *Eastwood*, 149 Cal.App.3d at 416.

origins, the protection offered by both the common law tort of misappropriation and Civil Code §3344 expires upon the death of the protected subject. However, the common law tort and Civil Code §3344 differ in three significant ways. First, unlike Civil Code §3344, the common law tort does not require a "knowing" use of the plaintiff's name or likeness; mistake is no defense. Second, common law misappropriation, unlike Civil Code §3344, does not require that the use of the image be for a commercial purpose. Finally, the common law tort does not erect a wall of *per se* exemptions to recovery as does Civil Code §3344.<sup>92</sup> Rather than consider if the use falls into a specified exemption *before* addressing the question of commercial appropriation, the common law takes a more even-handed approach by balancing the an individual's asserted property interest with the defendant's purported non-commercial use.

Due to the nature of today's national media, plaintiffs and defendants in misappropriation cases are likely to be of different states. Because Hollywood is the seat of show business, one of the parties is usually connected to California in some fashion. For this reason, many recent misappropriation cases have been heard by federal Ninth Circuit courts in accordance with their diversity jurisdiction.<sup>93</sup> Generally, these federal courts simply apply state law precedent in diversity cases. However, when the California Supreme Court has not dealt with a particular issue, these federal courts must apply state law as they believe the California's highest court would have. Consequently, the Ninth Circuit has developed its own body of "California" law on the subject of an *inter vivos* right of publicity.

The Ninth Circuit's body of "California" common law has broadened the protection of the right of publicity in several significant ways. First, rather than focus on the protection on a laundry list of physical attributes<sup>94</sup>, the Ninth Circuit extends right of publicity protection to an individual's "identity," including those uses which

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<sup>92</sup> See part II.C.1.b.

<sup>93</sup> As Ninth Circuit Court of Appeals Judge Kozinski has remarked: "For better or worse, we *are* the Court of Appeals for the Hollywood Circuit." *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993).

<sup>94</sup> *E.g.*, name, likeness, photograph, voice and signature. CAL. CIV. CODE §§990, 3344 (West Supp. 1996).



evoke an individual's "identity." In 1988, the Ninth Circuit expanded the right of publicity protection to embrace voice imitation in *Midler v. Ford Motor Co.* The *Midler* court held that when a "distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."<sup>95</sup> In 1992, the Ninth Circuit, in *White v. Samsung Electronics America, Inc.*, stretched the right of publicity to include images which evoke a celebrity's likeness. The *White* court noted that "[i]t is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so."<sup>96</sup>

Second, the Ninth Circuit emphasizes the fact that an individual's right of publicity is a property interest rather than a personal right. The *Midler* court analogized the common law *inter vivos* right of publicity to the statutory *post-mortem* right of publicity created by Civil Code §990.<sup>97</sup> Civil Code §990 protects the use of a deceased person's name, voice, signature, photograph, or likeness and states that the rights it recognizes are "property rights."<sup>98</sup> The *Midler* court noted that "[b]y analogy the common law rights are also property rights."<sup>99</sup>

Finally, the Ninth Circuit provides for greater monetary damages than are available at state common law. In *Waits v. Frito-Lay, Inc.*, the Ninth Circuit rejected the notion that damages available in a right

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<sup>95</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988). The *Midler* court memorably remarked: "A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. . . . To impersonate her voice is to pirate her identity." *Id.* at 463. See also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993). The *Waits* court found his claim to be "one for invasion of a personal property right: his right of publicity to control the use of his identity as embodied in his voice." *Id.* at 1100.

<sup>96</sup> *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992). This pronouncement coincides with Professor Nimmer's belief that recovery under the right of publicity should rely on the rule of damages rather than any arbitrary limitation. See Nimmer, *supra* note 55 at 217. See part IV.C. for further discussion of the right of publicity as an equitable remedy.

<sup>97</sup> *Midler*, 849 F.2d at 463.

<sup>98</sup> CAL. CIV. CODE §990(b) (West Supp. 1996).

<sup>99</sup> *Midler*, 849 F.2d at 463.

of publicity action are limited to economic injury.<sup>100</sup> The *Waits* court held that the plaintiff could also recover for injury to his “goodwill and future publicity value” as well as injury to his “peace, happiness and feelings” experienced as a direct result of the unauthorized use.<sup>101</sup>

b. *Cal. Civ. Code §3344*

In 1972, the California legislature enacted Civil Code §3344.<sup>102</sup> The purpose of the statute was to expand the scope of an individual’s privacy rights to include the tort of misappropriation, an invasion of privacy action which had been recently excluded under common law.<sup>103</sup> Legislative history indicates that the statute was based primarily on a privacy rationale.<sup>104</sup> Moreover, nothing in the statute was intended to displace any existing common law remedies.<sup>105</sup>

The focus of the protection afforded by Civil Code §3344 is considerably narrower than that provided at common law.<sup>106</sup> Unlike the common law right of publicity, which protects a person’s identity and evocations of a person’s identity, the statute’s protection is limited to an explicit use of the person’s name, voice, signature, photograph,

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<sup>100</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993).

<sup>101</sup> *Id.*

<sup>102</sup> For complete language of Civil Code §3344, see Appendix I.

<sup>103</sup> The statute was meant to address the decision in *Stilson v. Reader’s Digest Ass’n, Inc.*, where the court held that the recipient of one of the Reader’s Digest solicitations, which listed the name and address of the recipient as well as the names and addresses of his neighbors, could not maintain an invasion of privacy class action lawsuit. J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY* §6.4[E][1]. See also *Stilson v. Reader’s Digest Ass’n, Inc.*, 28 Cal. App. 3d 270 (1972), *cert. denied*, 411 U.S. 952 (1973).

<sup>104</sup> The General Assembly bill, Chapter 1595, is prefaced: “An act to add Section 3344 to the Civil Code, relating to invasion of privacy.” 1971 Cal. Stat. 3426 (1971).

<sup>105</sup> “The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.” CAL. CIV. CODE §3344(g) (West Supp. 1996).

<sup>106</sup> The statute’s protection is limited to an explicit use of the person’s name, voice, signature, photograph, or likeness. CAL. CIV. CODE §3344(a) (West Supp. 1996). In 1984, the legislature amended section 3344 to also protect against the unpermitted use of another’s voice or signature.

or likeness.<sup>107</sup> According to Civil Code §3344, an infringement of a person's right of publicity includes a knowing use of the aforementioned attributes "in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling . . . without such person's prior consent."<sup>108</sup> Thus, in a Civil Code §3344 right of publicity action, a defendant's unpermitted use of a plaintiff's name, voice, signature, photograph, or likeness must be coupled with a commercial purpose and knowledge that the use was without the plaintiff's permission.

Several limitations of Civil Code §3344 further weaken its protection. First, if the use of a person's name, voice, signature, photograph, or likeness "is only incidental, and not essential," to the commercial purpose, then a rebuttable presumption arises that the use was not a knowing use.<sup>109</sup> Second, the mere fact that a person's name, voice, signature, photograph, or likeness is used in a commercial medium "shall not constitute a use for which consent is required . . . solely because the material is . . . commercially sponsored or contains paid advertising."<sup>110</sup> Whether or not the use was an infringement "shall be a question of fact."<sup>111</sup> Third, if the use is "in connection with any news, public affairs, or sports broadcast or account, or any political campaign," consent is not required.<sup>112</sup> Finally, in applying Civil Code §3344, courts have

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<sup>107</sup> For example, in the case of *White v. Samsung Electronics America, Inc.*, Ms. White's claim would fail under Cal. Civ. Code §3344. The ad which prompted the dispute was for Samsung VCRs. *White*, 971 F.2d at 1396. "The ad depicted a robot, dressed in a wig, gown, and jewelry which [the defendant] consciously selected to resemble White's hair and dress." *Id.* "The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous." *Id.* White could not recover because a reasonable person could not mistake a robot adorned in a dress, wig and jewelry for the real thing. Under Cal. Civ. Code §3344, "likeness" refers to a fairly exact duplication rather than a caricature or resemblance. *Id.* at 1397.

<sup>108</sup> CAL. CIV. CODE §3344(a) (West Supp. 1996).

<sup>109</sup> CAL. CIV. CODE §3344(c) (West Supp. 1996).

<sup>110</sup> CAL. CIV. CODE §3344(e) (West Supp. 1996).

<sup>111</sup> *Id.*

<sup>112</sup> CAL. CIV. CODE §3344(d) (West Supp. 1996). See *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536 (1993) (finding surfing documentary which made use of an interview and film of plaintiff, a noted surfer, involved "public affairs" within the meaning of Cal. Civ. Code §3344). The "news" and "public affairs" exemption can be undercut by a showing that the publishers knew their statements were false or published them in reckless disregard of the

used these limitations as a baseline to create a new more difficult standard of liability.<sup>113</sup> In two of the most recent cases applying the statute, courts refused to consider the issue of commercial appropriation unless the plaintiff first disproved the applicability of the “news” and “public affairs” exemptions.<sup>114</sup>

## 2. Post-Mortem

### a. *Common Law*

In the 1979 case of *Lugosi v. Universal Pictures*, the California Supreme Court held that while the right of publicity protects against the unauthorized use of one’s name, likeness or personality, this right is not descendible and expires upon the death of the person so protected.<sup>115</sup> Therefore, because the California Supreme Court has at least tacitly accepted the privacy theory of the right of publicity, no cause of action currently exists for the infringement of a *post-mortem* right of publicity under California common law.

### b. *California Civil Code §990*

In 1984, the California legislature enacted Civil Code §990.<sup>116</sup> The purpose of the statute was to expand the scope of the right of

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truth. *Cher v. Forum Intern., Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1982).

<sup>113</sup> Stephen M. Lobbin, *The Right(s) of Publicity in California: Is Three Really Greater Than One?*, 2 UCLA ENT. L. REV. 157, 165 (1995).

<sup>114</sup> *See, e.g.*, *New Kids on the Block v. News America Publ'g, Inc.*, 745 F.Supp. 1540 (C.D. Cal. 1990), *aff'd*, 971 F.2d 302 (9th Cir. 1992) (finding “newsworthiness” because the defendant intended to later publish an article indicating the calls it had received due to its “900” number ad, which made use of the plaintiff’s name); *see also*, *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536 (finding that an interview with a noted surfer in a video documentary was within the purview of the “public affairs” exemption).

<sup>115</sup> *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 823 (1979); *see also*, *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454, 455 (Cal. 1979).

<sup>116</sup> For complete language of Civil Code §990. The legislature originally attempted to amend Civil Code §3344 to include deceased individuals. Lobbin, *supra* note 116, at 165 (citing California Assembly Journal at 7785 (Aug. 15, 1983)).

publicity to include *post-mortem* protection,<sup>117</sup> a cause of action excluded under common law and by Civil Code §3344.<sup>118</sup> Because of the right of publicity's generally accepted privacy rationale, individuals were traditionally denied *post-mortem* protection.<sup>119</sup> However, the drafters of Civil Code §990 made explicit that "[t]he rights recognized under this section are property rights, freely transferable."<sup>120</sup> Thus, because the rights conferred by Civil Code §990 are property rights, rather than personal rights, they can survive the death of the subject of their protection.

The protection of Civil Code §990, as in Civil Code §3344, narrowly extends to a "deceased personality's name, voice, signature, photograph, or likeness."<sup>121</sup> The statute defines a deceased person as "any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death."<sup>122</sup> According to Civil Code §990, an infringement of a person's right of publicity includes a use of the aforementioned attributes "in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling . . . without such person's prior consent."<sup>123</sup>

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<sup>117</sup> Nothing in the statute indicates an intent to displace any right of publicity existing at common law. In fact, the statute expressly states that the "remedies provided for in this section are cumulative and shall be in addition to any others provided for by law." CAL. CIV. CODE §990(m) (West Supp. 1996).

<sup>118</sup> See parts II.C.2.a, II.C.1.b.

<sup>119</sup> Chief Justice Bird's dissent to the *Lugosi* decision noted that the "appropriation of an individual's likeness for another's commercial advantage often intrudes on interests distinctly different than those protected by the right of privacy." *Lugosi*, 603 P.2d at 437. Because the right of privacy protects feelings, Bird emphasized that "conforming a claim for the misappropriation of the commercial value in one's identity to the requirements of the right of privacy requires a procrustean jurisprudence." *Id.* at 444. Given that there is a clear distinction between the personal interests of the right of privacy and the proprietary interests of the right of publicity, Bird could find no good reason why the right of publicity "should not descend at death like any other intangible property right." *Id.* at 445-446 (quoting *Factors, Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 284 (S.D.N.Y. 1977)).

<sup>120</sup> CAL. CIV. CODE §990(b) (West Supp. 1996).

<sup>121</sup> CAL. CIV. CODE § 990(a) (West Supp. 1996). As in Civil Code §3344, Civil Code §990's protection is limited to an explicit use of the aforementioned attributes. For example, "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." CAL. CIV. CODE §990(i) (West Supp. 1996).

<sup>122</sup> CAL. CIV. CODE §990(h) (West Supp. 1996).

<sup>123</sup> CAL. CIV. CODE §990(a) (West Supp. 1996).

Thus, in a Civil Code §990 right of publicity action, a defendant's unpermitted use of a plaintiff's name, voice, signature, photograph, or likeness must be coupled with a commercial purpose. Finally, the protection offered by Civil Code §990 endures fifty years after the person's death, a period of protection analogous to that provided by copyright law.<sup>124</sup>

Although Civil Code §990 extended the right of publicity beyond the grave, because of its broader exemptions, it was considerably weaker than Civil Code §3344. Both statutes exempt the use of a person's name, voice, signature, photograph, or likeness "in connection with any news, public affairs, or sports broadcast or account, or any political campaign."<sup>125</sup> In addition, both statutes acknowledge that the mere fact that a person's name, voice, signature, photograph, or likeness is used in a commercial medium "shall not constitute a use for which consent is required . . . solely because the material is . . . commercially sponsored or contains paid advertising." However, Civil Code §990(n) takes a dramatic step further by exempting the use of a person's name, voice, signature, photograph, or likeness in a "play, book, magazine, newspaper, musical composition, film, radio or television program."<sup>126</sup> In fact, the exemptions under subsection (n) are so broad that it is difficult to imagine what might possibly still qualify as an infringing use.

#### IV. RIGHT OF PUBLICITY ANALYSIS OF AN UNAUTHORIZED COMPUTER-SIMULATION OF A CELEBRITY

The following two hypothetical fact patterns are constructed to represent the type of unauthorized exploitation actors fear will result from a technology which can realistically simulate human beings. The right of publicity analysis following each hypothetical is intended to provide a cursory answer as to how the unpermitted exploitation of a celebrity's identity, by means of a computer-generated and computer-

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<sup>124</sup> CAL. CIV. CODE §990(g) (West Supp. 1996).

<sup>125</sup> CAL. CIV. CODE §3344(d) (West Supp. 1996); CAL. CIV. CODE §990(j) (West Supp. 1996).

<sup>126</sup> CAL. CIV. CODE §990(n) (West Supp. 1996).

animated replica, would be analyzed by today's courts under California law.

A. *Hypothetical: Inter Vivos Animation*

A production executive for XYZ Pictures, a New York corporation, receives a memo from his twenty-something assistant, informing him that F/X Company, a California corporation, has just overcome the final barrier to cost-effective digital actors. The executive is informed that now "A" list stars can be be digitally recreated for half of the organic actor's asking price and with no appreciable difference in likeness, voice, or acting quality. The executive quickly develops an idea for the first completely digital action flick. He negotiates a deal with F/X Company and decides that the film should star no other than a synthetic version of popular actor Arnold Schwarzenegger. For this film, Schwarzenegger, a California resident, would be digitally rejuvenated to resemble the world champion body-builder physique of his early career, yet would retain his present accent and acting range.

XYZ Pictures' movie, *Take No Prisoners*, is a sci-fi thriller featuring a virtual Arnold partaking of staple Schwarzenegger fare including hand-to-hand combat, machine gun fire, explosives, and deadpan witticisms. The film is advertised nationally as starring "the world's most beloved action hero," but makes no use of Mr. Schwarzenegger's name or likeness. Moreover, the trailers, print ads, and television ads do not portray the digital Arnold. The ads simply employ spectacular action sequences, beautiful women, and fancy cars with a voice-over, declaring, "Coming this Summer, the world's favorite action hero invades virtual reality and brings it to its knees!" *Take No Prisoners* has its world premiere at the Mann Village Theater in Westwood, California, to rave reviews. *Daily Variety* exclaims: "*Take No Prisoners* holds America hostage, captures greatest opening weekend B.O. ever!"

After receiving numerous phone calls from friends and family congratulating him on his new role, Arnold Schwarzenegger sees the film for himself. Having remarked in an interview with the *Hollywood Reporter* that he would never allow his image or voice to

be digitized, Mr. Schwarzenegger is shocked and angered at XYZ Pictures' film. The next day, Mr. Schwarzenegger, (in his corporate capacity as an officer of his California loanout corporation, I'LL BE BACK Productions, Inc., the owner of his right of publicity), files a lawsuit against XYZ Pictures in the district court for the Central District of California. The suit pleads infringement of Schwarzenegger's California common law and statutory right of publicity.<sup>127</sup> What result?

### 1. California Common Law

Under California common law, XYZ Pictures' use of Mr. Schwarzenegger's identity will likely constitute an infringement of the plaintiff's right of publicity. Misappropriation of a plaintiff's right of publicity may be pleaded by alleging: (1) defendant's use of the plaintiff's identity; (2) appropriation of the plaintiff's name or likeness to the defendant's advantage, commercial or otherwise; (3) lack of the plaintiff's consent; and (4) a resulting injury.

First, the defendant used the plaintiff's identity by mimicking the plaintiff's likeness and speech. Although the likeness and voice of the virtual Arnold is not the same as the real Arnold's likeness and voice, they are almost identical imitations. In *White v. Samsung Electronics America, Inc.*, the court stretched the right of publicity to include images which evoke a celebrity's likeness. If a robot dressed in a gown, wig and jewelry posed in front of the Wheel of Fortune game board qualifies as a use of Vanna White's identity, then surely a computer-animated simulation of a gun-toting Arnold Schwarzenegger

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<sup>127</sup> Let us assume that the federal district court's jurisdiction is based upon the plaintiff and defendant's diversity of state citizenship. Further, let us assume that the federal district court applies California law. Although this Article does not address questions of jurisdiction, two Second Circuit cases used the following factors to determine jurisdiction: 1) the public figure's place of domicile; 2) the plaintiff's place of incorporation; 3) place of forum; 4) place where right of publicity was assigned; and 5) place of infringement. See *Groucho Marx Prods. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). For a discussion of jurisdictional problems inherent to right of publicity actions, see Richard C. Cray, *Choice of Law in Right of Publicity*, 31 U.C.L.A. L. REV. 640 (1984).



that is nearly indistinguishable from the real Arnold would be a use of Schwarzenegger's identity.

Furthermore, in *Midler v. Ford Motor Co.*, the court expanded the right of publicity to include voice impersonations. If the close imitation of Midler's voice by one of her back-up singers amounts to a use of Midler's identity, then certainly an exacting digital simulation of Arnold's Austrian-accented voice, in conjunction with Arnold's image, would be a use of his identity.

Second, the use of Schwarzenegger's identity provided the defendant with a commercial advantage over other production companies marketing similarly budgeted sci-fi thrillers. Whereas the defendant's competitors may have attempted to obtain Mr. Schwarzenegger for their films and failed, the defendant circumvented the marketplace by digitally simulating the plaintiff's identity. What the defendant knew that it could not obtain by ordinary means, it took.

Third, neither I'LL BE BACK Productions, Inc., nor any of its agents, approved the use of Schwarzenegger's identity in XYZ Pictures' film. Moreover, Mr. Schwarzenegger's interview with the *Hollywood Reporter* only serves to reinforce lack of consent to the digitization of his likeness and voice.

Lastly, Mr. Schwarzenegger suffered damages as a result of the defendant's appropriation of his identity. The plaintiff's compensatory damages include the fair market value of his services, currently valued at \$20 million, and injury to his "goodwill and future publicity value," which may be reasonably estimated.<sup>128</sup> The plaintiff may also seek attorney fees and punitive damages.

As a defense, XYZ Pictures will likely claim that its use of Schwarzenegger's identity, far from being a commercial use, is artistic expression given broad protection by the First Amendment. In weighing the plaintiff's property interest against the defendant's First Amendment interest, a court will consider the nature of the defendant's use. If XYZ Pictures' use of Schwarzenegger's identity is predominantly exploitative and adds little to the overall creative

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<sup>128</sup> *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102-03 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993). It is unlikely that a corporate owner of an individual's right of publicity could successfully plead injury to its "peace, happiness and feelings" as did Tom Waits in his suit against Frito-Lay. *Id.*

contribution, then a court will likely find the use is not protected. However, if XYZ Pictures' use is part of a larger work that includes a significant contribution of the defendant's own creativity, then a court will likely protect the use. In short, whether XYZ Pictures' use of Schwarzenegger's identity is commercial or artistic expression is arguable.

Computer-simulation of an actor's identity is a unique new situation, and as such, demands a unique answer to XYZ Pictures' First Amendment defense. In a similarly unique case of *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>129</sup> the Supreme Court addressed a First Amendment defense to a misappropriation tort action. In *Zacchin*, the plaintiff had performed his "human cannonball" act at the county fair.<sup>130</sup> A television station filmed the entire fifteen-second act and broadcast it on a local news program.<sup>131</sup> In its only ruling on the right of publicity, the Supreme Court held that the First Amendment did not immunize the television station when it broadcast the "human cannonball" performer's entire act without his consent.<sup>132</sup> Writing for the majority, Justice White stated that the broadcasting of the plaintiff's entire act posed a "substantial" threat to the pecuniary value of the act, unjustly enriched the broadcaster; and as a policy matter, undermined the incentive to create such performances.<sup>133</sup>

Appropriation of an actor's entire identity by means of a computer-simulation should be analyzed in the same way that the Supreme Court analyzed the appropriation of the human cannonball's act. First, theatrical film exhibition, television broadcasting and videocassette sales of a movie featuring a computer-simulation of an actor's identity similarly poses a "substantial" threat to the economic value of the "organic" actor's performance. If the actor's entire identity can be duplicated digitally at a cheaper price, then the "organic" actor's market will be effectively eliminated. Furthermore, digital mimicry not only destroys the "organic" actor's market, it allows the defendant

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<sup>129</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 563 (1977).

<sup>130</sup> *Id.* at 563.

<sup>131</sup> *Id.* at 564.

<sup>132</sup> *Id.* at 578-79.

<sup>133</sup> *Id.* at 575-76.

to reap the spoils of producing a "Schwarzenegger" movie without compensating Schwarzenegger for the use of his identity. As a policy matter, computer-simulation of actors' identities, if allowed to proliferate unchecked, will undermine the incentive for established actors to act, and for new actors to pursue careers in the industry. In sum, unauthorized computer-simulation of an actor's identity is a clear-cut case of infringement of the actor's right of publicity.

## 2. California Civil Code §3344

Under California statutory law, XYZ Pictures' use of Mr. Schwarzenegger's identity would also likely constitute an infringement of the plaintiff's right of publicity. A right of publicity action<sup>134</sup> under Civil Code §3344 requires that a use of a plaintiff's name, voice, signature, photograph, or likeness be coupled with both a commercial purpose and knowledge that the use was without the plaintiff's permission.

First, we must ascertain whether the defendant's use of Arnold Schwarzenegger's likeness and voice in the film falls under the purview of one of Civil Code §3344's exemptions. Because of recent court decisions,<sup>135</sup> I'LL BE BACK Productions would have to disprove the applicability of the "news" and "public affairs" exemptions set forth in Civil Code §3344(d). Because *Take No Prisoners* is a work of fiction, does not relate current events or news, and is not a documentary in the service of public affairs, it is unlikely that a court would find XYZ Pictures' use of Schwarzenegger's identity to fall within the "news" and "public affairs" exemptions of the statute.

Second, turning to the question of appropriation of Schwarzenegger's likeness and voice, the defendant used the plaintiff's identity by mimicking the plaintiff's likeness and speech. Although the terms "likeness" and "voice," as used in Civil Code §3344, have traditionally been given a narrow construction, the Ninth Circuit

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<sup>134</sup> The statutory cause of action for misappropriation of name and likeness compliments rather than codifies common law misappropriation. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995).

<sup>135</sup> See *supra* note 123, and accompanying text.

indicated that these terms may be stretched where appropriate. In *White v. Samsung Electronics America, Inc.*, the Ninth Circuit rejected White's Civil Code §3344 argument that Samsung's ad used her "likeness," stating that "[i]n this case, Samsung and Deutsch used a robot with mechanical features, and not, for example, a manikin [*sic*] molded to White's precise features." Although the *White* court reserved its judgment concerning at what point a caricature becomes a "likeness," one may reasonably infer from the court's example that a mannequin molded to Vanna White's precise features comes fairly close. Under this logic, a computer simulation, which is much more faithful to the original than a papier-maché sculpture, would qualify as a "likeness."

As for XYZ Pictures' computer simulation of Arnold Schwarzenegger's voice, the use will likely be permitted under Civil Code §3344. In *Midler v. Ford Motor Co.*, the Ninth Circuit rejected Midler's Civil Code §3344 argument that Ford's ad used her "voice," stating, "The defendants did not use Midler's name or anything else whose use is prohibited by the statute. The voice they used was [someone else's], not hers."<sup>136</sup> Whereas the term "likeness," indicating a person's visual appearance, is inherently malleable,<sup>137</sup> the term "voice," on the other hand, is quite exact. A "voice" is either someone's voice, or it isn't. A computer simulation of Schwarzenegger's voice is not Schwarzenegger's voice, however closely it may sound like the real thing. Consequently, a computer-simulated voice will not likely qualify as Schwarzenegger's "voice" within the meaning of Civil Code §3344.

Third, we must determine whether XYZ Pictures' use of Arnold Schwarzenegger's identity was for a "commercial purpose." Civil Code §3344 restricts the unauthorized use of a person'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."<sup>138</sup> XYZ Pictures made a conscious effort not to include

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<sup>136</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

<sup>137</sup> Although, as indicated *supra*, the term "likeness" is malleable to a very limited degree.

<sup>138</sup> CAL. CIV. CODE §3344(a) (West Supp. 1996).

virtual Arnold's image or likeness in advertising for the film. Thus, XYZ Pictures could not be accused of using Schwarzenegger's likeness or voice "for purposes of advertising or selling." The crux of the matter turns on whether a motion picture is considered "a product, merchandise, or goods" for purposes of Civil Code §3344.

We may resolve this question by analogy to Civil Code §3344's companion statute, Civil Code §990. Both Civil Code §990 and Civil Code §3344 prohibit unauthorized use of a person'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."<sup>139</sup> However, Civil Code §990(n)(1) specifically exempts uses in a "play, book, magazine, newspaper, musical composition, film, radio or television program." If film were not considered a "product, merchandise, or goods" for purposes of Civil Code §990, then it would not be necessary to include film in Civil Code §990(n)(1)'s list of exemptions. Therefore, film must be a "product, merchandise, or goods" for purposes of Civil Code §990. By analogy, a film is also a "product, merchandise, or goods" for purposes of Civil Code §3344 as well. Thus, XYZ Pictures' use of Arnold Schwarzenegger's identity was for a "commercial purpose."

Finally, neither Mr. Schwarzenegger, nor any of his agents, approved the use of his likeness or voice in XYZ Pictures' film. XYZ Pictures never requested permission to use Mr. Schwarzenegger's likeness or voice. Moreover, Mr. Schwarzenegger's interview with the *Hollywood Reporter* reinforces I'LL BE BACK Productions' lack of consent to the digitization of Mr. Schwarzenegger's likeness and voice. Therefore, one could reasonably conclude that XYZ Pictures knowingly used Mr. Schwarzenegger's likeness and voice without his permission.

In sum, XYZ Pictures' use of Mr. Schwarzenegger's likeness will probably constitute an infringement of I'LL BE BACK Productions' right of publicity. However, XYZ's use of Mr. Schwarzenegger's digitized "voice" will most likely be permissible.

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<sup>139</sup> CAL. CIV. CODE §990(a) (West Supp. 1996); CAL. CIV. CODE §3344(a) (West Supp. 1996).

### B. *Hypothetical: Post-Mortem Animation*

A production executive for ABC Pictures, a California corporation, receives a letter from his movie-buff daughter, informing him that F/X Company, a California corporation, has just overcome the final barrier to cost-effective digital reanimation.<sup>140</sup> He is informed that F/X Company can now not only digitally recreate live actors with no appreciable difference in likeness, voice, or acting quality, it can digitally resurrect deceased celebrities as well. The executive develops an idea for the first feature film starring a deceased celebrity and negotiates a deal with F/X Company. The executive decides that the film should star a digitally reborn Marilyn Monroe.

ABC Pictures' movie, *Digital Is a Girl's Best Friend*, is a love story that features a virtual Marilyn as a love goddess brought to life by a computer whiz. The movie is advertised nationally as starring "Marilyn Monroe, the sexiest woman to grace the silver screen." Moreover, the trailers, print ads, and television ads feature the virtual Marilyn in several popular poses, including her famous shot where she is caught in a flowing white dress over an air vent. A voice-over declares: "Coming to a theater near you, Marilyn Monroe, the world's favorite blonde bombshell returns. She'll take your breath away." Television, radio, and print advertisements flood the airwaves and city streets. *Digital Is a Girl's Best Friend* premieres at the Mann Village Theater in Westwood, California, to ebullient reviews.

After seeing advertisements for the movie on television, then the movie itself, the trustee of Ms. Monroe's estate sues ABC Pictures. What result?

#### 1. California Common Law

Under the California Supreme Court's decision in *Lugosi v. Universal Pictures*, no common law cause of action exists for the infringement of a deceased individual's *post-mortem* right of publicity.

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<sup>140</sup> "Reanimation technology promises to put fresh dialogue into the mouth of the deceased performer and to bring new physical activity to the actor; the images of the late actor will no longer be frozen in time." Beard, *supra* note 10, at 104.

Therefore, Ms. Monroe's estate's only alternative would be to seek a remedy under California Civil Code §990.

## 2. California Civil Code §990

Under California statutory law, ABC Pictures' use of Marilyn Monroe's name, likeness and voice will likely fall under an exemption for film set forth in Civil Code §990(n). In a Civil Code §990 right of publicity action, a defendant's use of a plaintiff's name, voice, signature, photograph, or likeness must be coupled with both a commercial purpose and the plaintiff's lack of consent.

First, we must determine whether Ms. Monroe's statutory term of protection has expired. The protection of Civil Code §990 exists for an individual's life plus fifty years. Because Ms. Monroe died in 1962, she is covered by the statute and will continue to enjoy protection for an additional 16 years.

Second, we must ascertain whether the defendant's use of Ms. Monroe's name, likeness and voice, in both the film and in advertisements for the film, falls within one of Civil Code §990's exemptions. According to Civil Code §990(n)(1), the use of a person's name, voice, signature, photograph, or likeness in a "play, book, magazine, newspaper, musical composition, *film*, radio or television program" is an exempt use.<sup>141</sup> Consequently, the answer would appear straightforward. The use of Ms. Monroe's name, likeness and voice in the film is not actionable by Monroe's estate.

Monroe's estate does not fare any better if it challenge's ABC's use of Monroe's image in the film's advertisements and publicity. Under Civil Code §990(n)(4), "an advertisement or commercial announcement for a use permitted by paragraph (1)" is also exempt. Consequently, all of the advertisements and commercial announcements for the film may make use of Monroe's name, likeness and voice as well. It would appear that Monroe's estate would have no legal recourse under either the common law or statutory right of publicity. Under the present right of publicity regime, the casting of

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<sup>141</sup> CAL. CIV. CODE §990(n)(1) (West Supp. 1996) (emphasis added).

deceased celebrities seemingly could proceed unfettered by legal entanglements.

#### V. REFORM OF CALIFORNIA'S RIGHT OF PUBLICITY TO ACCORD WITH INNOVATIONS IN COMPUTER-ANIMATED SPECIAL EFFECTS

Certainly, the ability to digitally recreate a human being for the big screen was not a possibility contemplated by the drafters of the California right of publicity statutes. Computer-animation of celebrities will allow living celebrities to gain the ability to license their digital personas, thereby increasing and diversifying their income. Deceased celebrities may continue to have prosperous *post-mortem* careers. In effect, celebrities will live as long as their fans continue to pay to see their movies, watch their television shows, and buy the products with which they associate their names. Fans will no longer need to content themselves with original photographs, films and tapes of their beloved star. Instead, they can watch the virtual "real thing" star in new roles in new movies and new television shows. Furthermore, studio executives will no longer have to watch helplessly as valuable commodities are extinguished by the inconvenience of death.

While the advent of digital actors presents the entertainment industry with many intriguing possibilities, it also encumbers the right of publicity with several new challenges. Although California's common law and Civil Code §3344 provide adequate protection for the living celebrity, the California Supreme Court's ruling in *Lugosi v. Universal Pictures*, coupled with Civil Code §990, extends scant protection to the deceased celebrity's assignees.<sup>142</sup> The following sections will briefly explore the areas of California's right of publicity most affected by the computer-simulation of deceased celebrities and suggest how these areas may be harmonized with the new technology.

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<sup>142</sup> For convenience, "assignees" is used in this paper to refer to anyone to whom the celebrity may convey the rights to his image. This includes assignees, descendees and beneficiaries.



### A. *Scope of Protection*

The area of the most fundamental concern is the broad *per se* exemptions spelled out in California Civil Code §990, subsection (n). These exemptions narrow the statute's scope of protection to cover only those uses which flagrantly violate the deceased personality's right of publicity or commercial advertisements, e.g., the unauthorized use of a celebrity's name and likeness on T-shirts and coffee mugs.

When Civil Code §990 was first proposed, the American Civil Liberties Union and other interested parties voiced concerns about the chilling effect the law might have on First Amendment rights.<sup>143</sup> Their concerns were reflected in Civil Code §990(n)(1), which exempts the use of a person's name, voice, signature, photograph, or likeness in a "play, book, magazine, newspaper, musical composition, film, radio or television program."<sup>144</sup> Likely, the drafters of these exemptions feared that a *post-mortem* right of publicity would prevent the production of biographies, or stories in which the individual was involved during his lifetime.

The *per se* exemptions pertaining to film and television programs are too broad, and must be rolled back. Civil Code §990, as presently drafted, would permit the unauthorized computer-simulation of a deceased celebrity. Rather than grant film and television programs *per se* exemptions, a court should make an inquiry into the nature of the defendant's use of the deceased personality's identity in that program. If the defendant's use of the deceased personality's identity is simply exploitative and adds little to the defendant's overall creative contribution, then a court should find that such use is unprotected. However, if the defendant's use is an integral part of a work that includes a significant contribution of the defendant's own creativity, then a court should protect the use.

Civil Code §990's exemptions for film and television programs may have made sense when the statute was drafted, because the presumed uses of the deceased's persona in film and on television

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<sup>143</sup> Beard, *supra* note 10, at 157.

<sup>144</sup> CAL. CIV. CODE §990(n)(1) (West Supp. 1996) (emphasis added).

programs were for biographical purposes. However, the development of reanimation technology undermines that presumption. To allow the computer-simulation of deceased personalities to go unregulated would unjustly enrich celebrity simulators, deprive the deceased personality's assignees of their property rights, and open the doors to immoral exploitation of the deceased celebrity's persona. Elimination of Civil Code §990's *per se* exemptions for film and television would allow courts to inquire into the nature of the use and render judgment on a case-by-case basis.

### B. *Duration*

Presently, the protection offered by California Civil Codes §990 and §3344 in combination runs for the term of an individual's life plus an additional fifty years. This term length, modeled after that of federal copyright law,<sup>145</sup> was meant to ensure an individual's limited monopoly over the commercial exploitation of his name, voice, signature, photograph, and likeness. However, modern digital technology prompts us to question the assumptions underlying any limit on the duration of the right of publicity's protection.

The duration of the right of publicity's statutory protection may be said to reflect the waning natural cycle of a celebrity's fame. For example, in the case of most actors, fifty years after their deaths, you are likely to get blank stares, and the question, "Harlow who?" This fifty year time period reflects the perceived extent of the popular memory. Under this assumption, fifty years after the celebrity's death, the celebrity's name recognition and commercial value have dwindled to zero. However, modern digital technology renders this fifty year term limit completely arbitrary. With reanimation

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<sup>145</sup> The Senate Judiciary Committee voted 14-2 on Thursday, May 23, 1996, to expand the term of copyright protection an extra twenty years for musical works, books and films. Dennis Wharton, *Copyright Bill Clears Panel: Law would extend royalties for 20 years; bar amendment nixed*, DAILY VARIETY, May 24, 1996, at 5. Despite the victory in the committee, the bill faces an uncertain future given the short legislative calendar left in an election year. *Id.* at 61. The bill is designed to "harmonize" U.S. copyright law with that of the European Union countries. *Id.* Last July, an EU provision took effect establishing the term of copyright at life of the author plus seventy years. *Id.*

technology, it is possible to break this waning natural cycle of popularity by casting deceased actors in new roles, thus keeping the deceased actor's name and face in the popular consciousness. Theoretically, there would be no reason not to extend the celebrity's right of publicity protection indefinitely.

The right of publicity serves a fundamental purpose in maintaining the commercial value of celebrity. Judge Green of the Fifth Circuit wrote, "We can ration the use of highways by imposing tolls. We grant celebrities a property right to ration the use of their names in order to maximize their value over time."<sup>146</sup> Of course, this rationing of the celebrity's publicity right benefits the celebrity, but it also benefits the celebrity's licensees. By preventing an unauthorized licensee from quickly diluting celebrities' commercial values through overuse and misuse, the right of publicity serves to ensure that a large pool of recognizable celebrities exists from which licensees can choose for use on their boxes of corn flakes, in their latest films, or in promoting their exercise equipment.

The possibility of a celebrity's perpetual, digital existence requires that we reevaluate the conventional wisdom of placing time limits upon right of publicity protection. If digital technology can extend a celebrity's commercial value indefinitely, and the purpose of the right of publicity is to protect that commercial value, then setting an arbitrary time limit on the right of publicity's protection would be completely irrational. Rather than set an arbitrary time limit upon right of publicity protection, a far better solution would be to let the market decide when it has had enough Elvis. In other words, when a celebrity's commercial value diminishes to a point where the transactional cost of protection exceeds its worth, then such protection would become economically unreasonable.

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<sup>146</sup> Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 U.C.L.A. ENT. L. REV. 97, 112 (1994) (quoting No. 93-4434, 1994 U.S. App. LEXIS 3855 (5th Cir., Mar. 3, 1994) at \*10 n.2.).

### C. Federal Legislation

Presently, the right of publicity is a patchwork quilt of various state laws, both common law and statutory. Some states employ a *post-mortem* as well as an *inter vivos* right of publicity, while other states limit their residents to *inter vivos* protection. Still other states do not recognize the right of publicity at all. These state laws protect a range of physical attributes, from a person's name and likeness to anything that evokes the person's "identity." Moreover, the term of protection, where it does exist, may vary from as little as twenty years after a celebrity's death,<sup>147</sup> to as long as forever.<sup>148</sup> This division must end.

Just as the industrial revolution left the country unified by a railway infrastructure, the information revolution has forged an electronic community. As a nation, we generally listen to the same music, watch the same movies and television broadcasts. We are privy to the same celebrities' lives, same fashion styles, same news and entertainment. We are also thereby exposed to the same radio and television commercials; national commercials on which national celebrities' names, faces, and voices urge us to consume. Although a trivial degree of regionalism persists, the most popular and powerful forms of entertainment are those produced by national networks, such as NBC, CBS, ABC and Fox, and major studios, like Disney, Universal, Fox, Paramount, Warner Bros., and Sony.

Because celebrities' personas are exploited on a national media, it would seem only natural that a national right of publicity law should regulate such exploitation. However, even a natural conclusion must have its reasons. National regulation of celebrities' publicity rights would make sense only if it either enhanced the efficacy of the law or enhanced the cost efficiency of compliance to a greater degree than state regulation has.

National regulation accomplishes both. First, a national right of publicity would prevent forum shopping, eliminate jurisdictional problems and difficulties related to extrastate enforcement of state law.

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<sup>147</sup> See *supra* note 80.

<sup>148</sup> See *supra* note 79.

National regulation would also increase predictability of the law and thus its observance, and provide nationwide protection. Second, a national right of publicity would decrease the transaction costs inherent in negotiating licenses, tracking state legislation, and pursuing infringers. Advertisers who want to run an ad nationally must comply with the laws of all fifty states under the present regime, not just the law of the state where their corporate headquarters is located. A national right of publicity would slice through this red tape, making the entire process less costly and more efficient.

## VI. CONCLUSION

Nothing is real in a digital Hollywood. With the advent of digital actors, the last barrier to complete fantasy has been removed. For some, this revolution is a horrible loss and demoralization of the human spirit. For others, it is a great leap forward in the art and science of storytelling. As one animator has remarked, "The best reason to achieve reality is so that we can expand it."<sup>149</sup> In any case, the fear that digital actors will replace "organic" actors wholesale will, more likely than not, turn out to be unjustified. Certainly, digital actors will find their way onto the big screen, but in limited numbers and for limited purposes, such as body-doubling, stunt scenes, and physically impossible shots.

Years ago, a student of the industrial revolution noted that "[a]utomation is today the same kind of menace to the unskilled—that is, the poor—that the enclosure movement was to the British agricultural population centuries ago. However, employers countered that automation, while making some jobs obsolete, would create new opportunities, as indeed it did."<sup>150</sup>

Digital actors, while rendering stunt persons, body-doubles, and look-alikes obsolete, will spark new opportunities in computer animation and special effects. Digital actors can create new markets in video games, simulator rides, and serve as hosts on the world wide

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<sup>149</sup> Philippe Berjeron, Casting from Forest Lawn, Address at Third Annual Artists Rights Digital Technology Symposium, (Feb. 16, 1996) (on file with the author).

<sup>150</sup> Leuchtenburg, *supra* note 3, at 719.

web. However, without the right of publicity to protect the interests of celebrities and their assignees, the digital frontier will be a wild frontier, indeed.

