Date of Hearing: April 16, 2024

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Rebecca Bauer-Kahan, Chair
AB 1836 (Bauer-Kahan) – As Introduced January 16, 2024

AS PROPOSED TO BE AMENDED

SUBJECT: Intellectual property: use of likeness: digital replica

SNYOPSIS

California law grants a property right—the "right of publicity"—to the heirs of deceased celebrities, making it a tort to use the celebrity's name, voice, signature, photograph, or likeness for unauthorized commercial purposes. Excluded from the reach of this right is any "play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works" that is "fictional or nonfictional entertainment, or a dramatic, literary, or musical work."

This so-called "expressive works" exemption, which traces back to the 1980s, appears to require updating to address transformative advancements in artificial intelligence and digital technology. Digital replicas—computer-generated reproductions of an individual's likeness, voice intonations, and bodily movements—can be manipulated to create a "performance" in a creative work. Often this is done without consent of, or compensation to, the family members. In effect, this enables content creators to use as they see fit a bastardized ghost of a deceased celebrity at the expense of the celebrity's reputation and the family's financial, privacy, and dignitary interests.

This bill, sponsored by the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) and supported by a coalition of organizations representing artists as well as the California Labor Federation, seeks to provide greater protections to the heirs of deceased celebrities. Specifically, the bill narrows the scope of the expressive works exemption by establishing a specific cause of action against unauthorized uses of digital replicas in audiovisual works and sound recordings.

Opponents include Technet, Chamber of Commerce, Computer and Communications Industry Association, and Electronic Frontier Foundation. They argue the bill is overbroad and stifles creative expression protected by the First Amendment. Echoing these concerns, the Motion Picture Association and Media Coalition take an oppose-unless-amended position, arguing the bill must be narrowed to be compatible with the First Amendment.

As described below, the author has offered to amend the bill to narrow the definition of "digital replica," clarify the bill's scope, and add provisions that expressly exclude certain protected uses. The amendments should allay many of the opposition's concerns.

If the bill passes this Committee, it will next be heard by the Judiciary Committee.

SUMMARY: This bill grants a specific cause of action to beneficiaries of deceased "personalities"[1]—individuals whose likeness has commercial value at the time of their death—for unauthorized use of a digital replica of the celebrity in audiovisual works or sound recordings. Specifically, **this bill**:

1) Establishes a cause of action in an amount equal to the greater of $10,000 or the actual damages suffered by the party who controls the rights of a deceased personality against any person who produces, distributes, or makes available the digital replica of the deceased personality in an audiovisual work or sound recording, in any manner related to the work performed by the deceased personality while living.

2) Defines "digital replica" as a simulation of the voice or likeness of an individual that is readily identifiable as the individual and is created using digital technology.

EXISTING LAW:

1) Provides that any person who knowingly uses another's name, voice, signature, photograph or likeness, in any manner, on or in products, merchandise, or goods, or for the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, is liable for any damages sustained by the person or persons injured as a result thereof. Additionally provides that a violator is liable for the greater of $750 or the actual damages suffered by the injured party or parties, and any profits from the unauthorized use not taken into account in computing the actual damages. (Civ. Code § 3344(a).)

2) Excludes from 1) a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign. (Civ. Code § 3344(d).)

3) Establishes an analogous right for a "deceased personality," defined as a natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, or because of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services. (Civ. Code § 3344.1(a)(1), (h).)

4) Provides that 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 heirs or assignees is subject to liability for any damages sustained by the person or persons injured as a result thereof. Additionally provides that a violator is liable for the greater of $750 or the actual damages suffered by the injured party or parties, and any profits from the unauthorized use not attributable to the use and not taken into account in computing the actual damages. (Civ. Code § 3344.1(a)(1).)

5) Provides that these rights are property rights that are freely transferable or descendible. (Civ. Code § 3344.1(b).)

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[1] This analysis uses the terms "personality" and "celebrity" interchangeably.

6) Prohibits an action from being brought under 3) more than 70 years after the death of the deceased personality. (Civ. Code § 3344.1(g).)

7) Excludes from 3) the use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign. (Civ. Code § 3344.1(j).)

8) Additionally excludes from the right in 3) so-called "expressive works": a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works. (Civ. Code § 3344.1 (a)(2).) Further provides that this exemption does not include within it a use in connection with a product, article of merchandise, good, or service, if the claimant proves that this use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article of merchandise, good, or service by the deceased personality without prior consent. (Civ. Code § 3344.1(a)(3).)

FISCAL EFFECT: As currently in print, the bill is keyed nonfiscal.

COMMENTS:

1) **Digital replicas and the entertainment industry**. Despite having been dead for 64 years, James Dean was cast in a movie in 2019 using a digital replica: a computer-generated avatar of an individual's likeness—their face, body, voice, movement; indeed, their very identity—that appears authentic and can be manipulated to move in life-like fashion. "In effect, digital replicas enable moviemakers to use existing stills, footage, and data scans of an actor to make it appear as though an actor gave a performance in a movie that the actor never actually gave."[2]

Initially, this technology was used to finish movies when an actor died before completion of filming, such as Paul Walker, who died during the production of *Furious 7*.[3] Similarly, *Star Wars: The Rise of Skywalker* repurposed unused footage of Carrie Fisher from *The Return of Jedi*, with Fisher's daughter serving as the body stand-in for the scene.[4] "As the technology has advanced, however, it has become capable of creating entirely new performances in movies that actors had no active role in making."[5]

Similar developments have occurred in the music industry. "The Lost Tapes of the 27 Club," for example, is a "project featuring songs written and mostly performed by machines in the styles of other musicians who died at 27: Jimi Hendrix, Jim Morrison, and Amy Winehouse. Each track is the result of AI programs analyzing up to 30 songs by each artist and granularly studying the tracks' vocal melodies, chord changes, guitar riffs and solos, drum patterns, and lyrics to guess

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[2] Alexandra Curren, Note, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity* (2023) 102 Tex. L. Rev. 155, 159.
[3] *Digital identity and the future of acting*, Filmmakers Academy, https://www.filmmakersacademy.com/digital-identity-and-the-future-of-acting/.
[4] Langmann, *How J.J. Abrams Pulled Off Carrie Fisher's CGI Flashback in Star Wars: The Rise of Skywalker* (Jan. 8, 2020) *Esquire*, https://www.esquire.com/entertainment/movies/a30429072/was-carrie-fisher-cgi-in-star-wars-the-rise-of-skywalker/.
[5] *Digital Replicas*, *supra,* 102 Tex. L. Rev. at 159 (fn omitted).

what their 'new' compositions would sound like."[6] The results are convincing mimicries of the unique styles of these artist in novel songs.

Whereas the above examples were authorized uses, there have also been high-profile instances of unauthorized digital necromancy. For example, George Carlin's estate recently sued a media company that used artificial intelligence to create an hour-long comedy special entitled "George Carlin: I'm Glad I'm Dead." "The faked special [was] widely condemned by Carlin's fans and family members, who believe it to be a mockery of the late comedian's work."[7] His estate claimed, among other things, a violation of his right of publicity.[8] The parties settled, with the media company agreeing to remove the comedy routine from the internet and cease using Carlin's image, voice, or likeness without permission.[9]

Concerns regarding the use of artificial intelligence in the entertainment industry played a major role in the 2023 strike by writers and performers that brought Hollywood to a standstill. After months of negotiations with the Alliance of Motion Picture and Television Producers, SAG-AFTRA ratified an agreement that, among other things, "establishes detailed informed consent and compensation guardrails for the use of AI, hair and makeup equity, meaningful protections for the casting process, sexual harassment prevention protections and more."[10] These protections apply only to the living, however.

Proponents of the bill contend protections for deceased celebrities necessitate a legislative solution. Indeed, New York and Tennessee recently passed digital replica laws. And two bills are pending in Congress—the No Fakes Act in the Senate,[11] and the No AI Fraud Act in the House[12]—that include postmortem protections against unauthorized uses in expressive works. As a coalition of organizations representing musicians and artists writes:

> Technology companies and content creators now have the tools to transform old video footage, sound recordings, life casts, body scans, still images, audio files, biometric data, and more, into realistic depictions of people performing things they have never performed or doing things they have never done. This presents a direct threat to the families of deceased performers who now face, without immediate changes to 3344.1, the nonconsensual digital replication of their loved ones into audio visual works and sound recordings.

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[6] Grow, *In Computero: Hear How AI Software Wrote a 'New' Nirvana Song* (Apr. 2, 2021) https://www.rollingstone.com/music/music-features/nirvana-kurt-cobain-ai-song-1146444/.
[7] Weatherbed, *George Carlin's estate is suing the creator of fake AI comedy special* (Jan. 26, 2024) *The Verge*, https://www.theverge.com/2024/1/26/24051476/dudesy-ai-generated-george-carlin-special-sued-by-late-comedians-estate.
[8] *Estate of George Carlin v. Dudesy, LLC et al* (Dist. Court Central Cal., Case No. 2:24-cv-00711), gov.uscourts.cacd.912662.1.0.pdf (courtlistener.com).
[9] Brittain, *George Carlin's estate settles lawsuit over AI-generated comedy routine* (Apr. 3, 2024) Reuters, https://www.reuters.com/legal/transactional/george-carlins-estate-settles-lawsuit-over-ai-generated-comedy-routine-2024-04-03/#:~:text=The%20estate%20of%20Carlin%2C%20who%20died%20in%202008%2C,April%201%2C%20according%20to%20court%20filings%20from%20Tuesday.
[10] Lawler, *Hollywood's actors vote to make their new deal official—the strikes are really over* (Dec. 5, 2023) *The Verge*, https://www.theverge.com/2023/12/5/23990186/hollywoods-actors-vote-to-make-their-new-deal-official-the-strikes-are-really-over.
[11] *Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act*, https://www.coons.senate.gov/imo/media/doc/no_fakes_act_one_pager.pdf.
[12] *Hundreds of artists, actors, and creators back Salazar's No AI Act* (Feb. 2, 2024) https://salazar.house.gov/media/press-releases/hundreds-artists-actors-and-creators-back-salazars-no-ai-fraud-act.

2) **Author's statement.** The author writes:

> Performers deserve protection from exploitation by AI. California has strong protections for a living artist's voice, image, and likeness that are not then mirrored for deceased performers. Technology has progressed to the point to allow a generation of new films, shows, and songs from deceased performers without due consent. Without similar protections to living performers, the intellectual property of deceased artists is at risk. When California's laws protecting artist's rights were written, no one anticipated the ability to re-animate the dead with AI. AB 1836 prevents the endless recycling of deceased artist's work by protecting deceased performers from exploitation by digital replicas.

3) **Postmortem Right of Publicity.** The use of a person's name or image without consent for commercial purposes has long been recognized as an actionable invasion of privacy at common law. In 1974, California Civil Code section 3344 codified the right to publicity for living personalities, imposing liability on any person who knowingly uses 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 prior consent.[13]

In *Zacchini v. Scripps-Howard Broad, Co*. (1977) 433 U.S. 562, the United States Supreme Court framed the right in terms of economic rather than privacy interests:

> The State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. The State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation? "The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay. [Citation.]"[14]

After two California Supreme Court cases, *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813 and *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860, found that California's statutory right to publicity was not transferable upon death, the Legislature extended the right to the heirs of deceased "personalities"—that is, individuals' whose likeness had commercial value at the time of their death.[15]

4) **Expressive Works Exemption.** As originally enacted, the posthumous right of publicity contained a broad exemption for expressive works not contained in its counterpart statute applicable to living individuals.[16] Following a case in which the Ninth Circuit, applying the expressive works exemption, rejected a lawsuit against the producers of video dance lessons

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[13] Ch. 1595, Stats. 1971.
[14] *Id.* at p. 573.
[15] Ch. 1704, Stats. 1984.
[16] As originally enacted, section 3344.1(n) provided that "[a] play, book, magazine, newspaper, musical composition, film, radio or television program," work of "political or newsworthy value," "[s]ingle and original works of fine art," or "[a]n advertisement or commercial announcement" for the above works were all exempt from the provisions of the statute.

featuring movie clips of Fred Astaire,[17] his widow, Robyn Astaire, along with the Screen Actors Guild, sponsored SB 209 (Burton, 1999). Initially, the bill proposed to remove the expressive works exemption altogether. The Assembly Judiciary Committee analysis of the bill stated that it "effectively seeks to bring these two statutes into conformity, eliminating the list of exemptions for deceased celebrities, and thereby substantially expanding the types of uses for which consent of the celebrity's heirs is required."[18]

Shortly after the bill passed out of Assembly Judiciary, it was amended to further exclude "works of expression . . . that alter[] or manipulate[] the deceased personality's name, voice, signature, photograph, or likeness using *digital technology* now known or hereafter developed."[19] The Assembly Appropriations analysis of the bill stated that "Mrs. Astaire and the president of the Screen Actors Guild argue that companies should not be able to digitally alter a celebrity's image and create entirely new performances without first seeking permission from their heirs."[20] The analysis stated that the Motion Picture Association of America (MPAA), which opposed the bill, "contends the prohibition on manipulation of images using digital technology is too broad and will create barriers to the use of new technology and limit creative expression in books, television, movies, etc. The MPAA believes more study and discussion is warranted on this issue."[21]

The bill was then amended to strike the provision regarding digital technology (as well as another extending defamation protections to deceased individuals). Language similar to the original expressive works exemption was restored to the bill. That language read then as it does now: "For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work."

5) **What this bill does.** This bill gives beneficiaries of deceased "personalities"—individuals whose likeness had commercial value when they passed—greater control over the deceased's likeness when the means of appropriating it is through a digital replica. The bill does so by creating a carveout, specific to digital replicas, in the expressive works exemption. Specifically, the bill establishes a cause of action in an amount equal to the greater of $10,000 or the actual damages suffered by the party who controls the rights of a deceased personality against any person who produces, distributes, or makes available the digital replica of the deceased personality in an audiovisual work or sound recording, in any manner related to the work performed by the deceased personality while living. "Digital replica," for these purposes, is defined as a simulation of the voice or likeness of an individual that is readily identifiable as the individual and is created using digital technology.

6) **First Amendment considerations**. The United States and California Constitutions prohibit abridging, among other fundamental rights, freedom of speech.[22] The California Supreme Court

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[17] *Astaire v. Best Film & Video Corp.* (9th Cir. 1997) 116 F.3d 1297.
[18] Assem. Jud. Analysis of SB 209 (1999-2000 Reg. Sess.), as amended March 3, 1999, p. 9.
[19] SB 209, as amended June 29, 1999 (emphasis added).
[20] *Id.* at p. 2.
[21] *Id.* at p. 3.
[22] U.S. Const., 1st and 14th Amends; Cal. Const. art. I, § 2.

in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387 (*Comedy III*), recognized the "tension between the right of publicity and the First Amendment."[23] "When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist."[24]

Drawing on the "fair use" doctrine in copyright law, the Court adopted "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere . . . likeness or imitation."[25] The test asks "whether the new work merely 'supersedes the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[26] "Another way of stating the inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."[27] This is based not on "the quality of the artistic contribution," but rather "whether the literal and imitative or the creative elements predominate in the work."[28] A "subsidiary inquiry" is whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted[.]"[29] "When the value of the work comes principally from some source other than the [plaintiff]—from the creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment Protection."[30] "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame."[31]

Using this test, the Court rejected a First Amendment defense to a right-of-publicity lawsuit because, although not bereft of creativity, the depictions at issue—lithographs and silkscreened Three Stooges T-shirts—were, at bottom, "literal, conventional depictions of The Three Stooges" intended to "exploit their fame."[32] Such "depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment."[33] "Indeed, were we to decide that [the defendant's] depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements."[34]

Two years later, the California Supreme Court in *Winter v. DC Comics* (2003) 30 Cal.4th 881, 890 (*Winter*) upheld a First Amendment defense against the right of publicity, finding

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[23] *Id.* at p. 396.
[24] *Id.* at p. 405, footnote and citation omitted.
[25] *Comedy III, supra,* 25 Cal.4th at p. 391.
[26] *Id.* at p. 404.
[27] *Id.* at p. 406.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Comedy III, supra,* 25 Cal.4th at p. 409.
[33] *Id.* at p. 400.
[34] *Id.* at p. 409.

transformative a comic book's depictions of two musicians that "contain[ed] significant expressive content other than plaintiffs' mere likeness" because they were "distorted for purposes of lampoon, parody, or caricature," drawn as "half-human and half worm" in the context of "a larger story, which is itself quite expressive."[35] Unlike the replications of the Three Stooges, the comic book depicted "fanciful, creative characters, not pictures" of the musicians.[36]

Similarly, in *Kirby v. Sega of Am., Inc.* (2006) 144 Cal.App.4th 47 (*Kirby*), the California Court of Appeal found sufficiently transformative an anime video game character, Ulala, who resembled a 1990s singer, Kirby, in terms of facial features, style, and catchphrases.[37] The court found that Ulala differed from Kirby in physique, hairstyle, costumes, and dance moves.[38] Moreover, the fact that Ulala was "a space-age reporter in the 25th century"[39] led the court to conclude that Ulala was not an "imitative character."[40] Rather, the court concluded—quoting *Winter*—Ulala was a "fanciful, creative character" who "exists in the context of a unique and expressive video game," and thus the portrayal was protected by the First Amendment.[41]

The Ninth Circuit applied this test in concluding that a Hallmark card featuring Paris Hilton's head on a cartoon waitress's body was not transformative because, despite some differences, the card drew directly from an episode of Hilton's television show in which she was depicted as "born to privilege, working as a waitress."[42] The court stated, "[w]hile a work need not be phantasmagoric as in *Winter* or fanciful as in *Kirby* in order to be transformative, there is enough doubt as to whether Hallmark's card is transformative under our case law that we cannot say Hallmark is entitled to the defense as a matter of law."[43]

A trio of video game cases is informative as to how a court might address a First Amendment defense to an action brought under this bill. In *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018 (*No Doubt*), the California Court of Appeal addressed a videogame's use of "avatars of No Doubt" that were "computer-generated recreations of the real band members, painstakingly designed to mimic their likenesses."[44] Based on "motion-capture photography" that enabled the videogame maker "to reproduce their likenesses, movements, and sounds with precision," these avatars of "real celebrity musicians" stood in "in stark contrast to the 'fanciful, creative characters' in *Winter* and *Kirby*."[45] Citing *Comedy III*, the court noted that life-like reproductions of celebrities may qualify for First Amendment protection if "the context into which a literal celebrity depiction is placed creates 'something new, with a further purpose or different character, altering the first [likeness] with new expression, meaning, or message.'"[46] In this case, however, the fact "[t]hat the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a video game that contains many other creative elements, does not

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[35] *Winter v. DC Comics* (2003) 30 Cal.4th 881, 890.
[36] *Id.* at p. 892.
[37] *Id.* at p. 59.
[38] *Ibid.*
[39] *Ibid.*
[40] *Id.* at p. 61.
[41] *Ibid*, internal quotation marks omitted.
[42] *Hilton v. Hallmark Cards* (9th Cir. 2009) 599 F.3d 894, 911.
[43] *Ibid.*
[44] *Id.* at 1033.
[45] *Ibid.*
[46] *Id.* at 1034, internal quotation marks omitted.

transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities."[47]

In *Keller v. Electronic Arts Inc.* (9th Cir. 2013) 724 F.3d 1268, 1276-1277 and *Davis v. Elec. Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172, 1178, the Ninth Circuit relied heavily on *No Doubt* in rejecting First Amendment defenses asserted for video games containing life-like reproductions of collegiate and professional athletes, respectively, playing the very sports in which the athletes had achieved renown. In addition to considering the verisimilitude of the depictions of the players themselves, the court expressly stated in *Keller* that, like the Third Circuit in *Hart v. Electronic Arts, Inc.* (3d Cir. 2013) 717 F.3d 141, it "considered the potentially transformative nature of the game as a whole."[48] Collectively, these cases suggest that a postmortem publicity suit involving a digital replica in an audiovisual work—a life-like avatar, likely depicting the deceased doing what they did as celebrities—would survive a First Amendment challenge.

Largely ignoring these cases, the Media Coalition and the Motion Picture Association (MPA) assert that the bill is unconstitutional as drafted. Most helpful to their argument is *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, in which a Ninth Circuit panel concluded that the above-described line of cases did not apply to a publicity suit brought by the army sergeant who was the subject of the movie *Hurt Locker*. Like the cases above, the speech at issue was expressive rather than commercial speech.[49] Unlike those cases, however, the subject was "a private person" who had not labored to develop "the economic value of any performance of persona" that warranted protection from exploitation.[50] Instead of applying the "transformative" test, then, the court treated the application of the right of publicity in this context as a "content-based" speech restriction, which is subject to "strict scrutiny" and thus is presumptively unconstitutional absent a compelling state interest in restricting the speech. The court found no such interest and thus held that "applying California's right of publicity in this case would violate the First Amendment."[51]

MPA argues the bill in print "would unconstitutionally restrict wide swaths of First Amendment-protected speech, chilling the use of new and existing digital filmmaking techniques and censoring the depiction of real individuals in biopics, docudramas, and similar works." In particular, MPA and Media Coalition assert that the bill would fail the "strict scrutiny" test applied in *Sarver* for lack of a compelling state interest. MPA writes:

> [T]he government has no compelling interest in restricting creative depictions of real people (including performers) in stories about them or the world they inhabit. Nor is there a compelling government interest in protecting against the use of digital replicas of deceased individuals in expressive works. The employment-based interest does not exist for deceased individuals. And other purported justifications for protecting deceased performers are unavailing. Any interest in a performer's reputation or dignity is already governed by defamation and privacy law, which is personal to the individual at issue. And recognizing dignitary interests of deceased individuals, and giving heirs or corporate successors the ability to sue over them, would represent a radical change in longstanding American law

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[47] *Ibid.*
[48] *Keller, supra,* 724 F.3d at p. 1278.
[49] *Id.* at p. 905.
[50] *Ibid.*
[51] *Id.* at p. 906.

> (including over a century of California law), under which "there can be no defamation of the dead." (Footnote omitted.)

But the fact that such rights have not been conferred does not show the government lacks a sufficient interest in protecting the privacy, reputational, and dignitary interests of the deceased and their families from the potential harms of digital disinterment. As SAG-AFTRA, the bill's sponsor, writes:

> Families and beneficiaries of deceased California performers should have the absolute right to prohibit, or to permit with consent, the use of voice and likeness property rights in expressive works. These performers forged careers using their voices and likeness and left a legacy of creative expression we all enjoy. They are now at risk of being reanimated for performances without consent or payment to their loved ones, or without their loved ones able to say, "No, they did not want this, please stop." (Emphasis in original.)

More to the point, *Sarver* is readily distinguishable from the circumstances this bill targets, as *Sarver* did not involve the misappropriation of a celebrity persona. The "transformative" test has been criticized by some courts and academics,[52] but it remains controlling doctrine in California.[53]

The cases discussed above suggest that, as a general matter, publicity challenges against unauthorized digital replicas under the bill are compatible with the First Amendment. But the application of old doctrines to a rapidly evolving technology is, at best, uncertain. The author and sponsors recognize this challenge but contend that the blanket exemption for expressive works goes well beyond the protections of the First Amendment. In their view, the families of deceased celebrities should not be barred from asserting claims as a matter of law; rather, courts should be empowered to do as they've always done and grapple with a novel issue on a case-by-case basis.

7) **Amendments respond to opposition concerns.** Opponents of the bill urge that it be amended to narrow the definition of "digital replica." MPA requests that it "include only highly realistic representations of an individual." The author's amendments set forth below narrow the definition along these lines.

Opponents also request narrowing the bill to address First Amendment concerns, with Media Coalition asserting the bill must be limited to commercial uses and other opponents arguing the bill must be limited to deceptive uses of digital replicas. Neither assertion finds solid footing in the case law discussed above, which involved expressive speech that was not deceptive. Taking a different approach, Technet, Chamber of Commerce, and Computer & Communications Industry Associates (CCIA) request clarifying that the bill does not override the First Amendment. CCIA

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[52] "Lower courts have struggled mightily[] . . . to figure out how to apply [the test] to expressive works such as films, plays, and television programs." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 863.) "[O]nce we realize that the larger purpose of any such test is to determine the constitutional value of particular communicative acts, we can also see that the doctrine is woefully inadequate." (Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity* (2020) 130 Yale L.J. 86, 158.)

[53] Courts continue to apply the "transformative" test. (See e.g., *De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 863 [First amendment protected movie actor's portrayal of a fictitious interview, which was "a far cry from T-shirts depicting a representational, pedestrian, uncreative drawing of The Three Stooges"]; *Woloszynska v. Netflix, Inc.* (N.D.Cal. 2023) U.S.Dist.LEXIS 194648 [use of photo in TV show protected by First Amendment].)

specifically argues that the bill should exclude specified protected uses of a digital replica. In response, the author's amendments include certain protected uses.

The amendments are as follows:

SEC. 2. Section 3344.1 of the Civil Code is amended to read:

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

~~(2) (A) For purposes of this subdivision,~~

(B) (i) Except as provided in clause (ii), a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

~~(B) Notwithstanding subparagraph (A), any person who produces, distributes, or makes available the digital replica of a deceased personality in an audiovisual work or sound recording, in any manner related to the work performed by the deceased personality while living, shall be liable to the injured party or parties in an amount equal to the greater of ten thousand dollars ($10,000) or the actual damages suffered by the person or persons controlling the rights. For purposes of this clause, "digital replica" means a simulation of the voice or likeness of an individual that is readily identifiable as the individual and is created using digital technology.~~

~~(3)~~

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

(2) (A) (i) Notwithstanding paragraph (1) and subject to clause (ii), a person who produces, distributes, or makes available the digital replica of a deceased personality's voice or likeness in an expressive audiovisual work or sound recording without prior consent from a person specified in subdivision (c) shall be liable to any injured party in an amount equal to the greater of ten thousand dollars ($10,000) or the actual damages suffered by a person controlling the rights to the deceased personality's likeness.

(ii) To the extent a use is protected by the First Amendment to the United States Constitution, it is deemed a fair use and not a violation of an individual right, for purposes of this section, if the use of the digital replica meets any of the following criteria:

(I) The use is in connection with any news, public affairs, or sports broadcast or account.

(II) The use is for purposes of comment, criticism, scholarship, satire, or parody.

(III) The use is a representation of the individual as the individual's self in an audiovisual work, unless the audiovisual work containing the use is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated.

(IV) The use is fleeting or incidental.

(V) The use is in an advertisement or commercial announcement for a work described in subclauses (I) to (III), inclusive.

(B) For purposes of this paragraph:

(i) "Audiovisual work" means a work that consists of a series of related images that are intrinsically intended to be shown by the use of machines, or devices, including projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, including films or tapes, in which the works are embodied.

(ii) "Digital replica" means a digital simulation of the voice or likeness of an individual that so closely resembles the individual's voice or likeness that a layperson would not be able to readily distinguish the digital simulation from the individual's authentic voice or likeness.

[. . .]

8) **Related legislation.**

AB 2602 (Kalra, 2024) provides that a provision in an agreement for the performance of personal or professional services is unenforceable if it: 1) contains a provision allowing for the use of a digital replica of an individual's voice or likeness; 2) does not clearly define and detail all of the proposed uses; and 3) is not negotiated with legal representation or by a labor union, as specified. The bill will be heard in this committee on April 23rd.

AB 3050 (Low, 2024) would provide that an AI-generating entity or individual that creates a deepfake using a person's name, voice, signature, photograph, or likeness, in any manner,

without permission from the person being depicted in the deepfake, is liable for the actual damages suffered by the person or persons as a result of the unauthorized use. The bill is pending in this Committee.

SB 970 (Ashby, 2024) would provide that, for purposes of Civil Code Section 3344, a synthetic voice or likeness that a reasonable person would believe to be a genuine voice or likeness, is deemed to be the voice or likeness of the person depicted.

ARGUMENTS IN SUPPORT: A coalition of supporters from the music industry writes:

> The latest in digital replication technology, courtesy of the exponential advancements in artificial intelligence (AI), allows for the ability to transform still images into live action audiovisual content and the ability to easily clone human voices. Technology companies and content creators now have the tools to transform old video footage, sound recordings, life casts, body scans, still images, audio files, biometric data, and more, into realistic depictions of people performing things they have never performed or doing things they have never done. This presents a direct threat to the families of deceased performers who now face, without immediate changes to 3344.1, the nonconsensual digital replication of their loved ones into audio visual works and sound recordings.

ARGUMENTS IN OPPOSITION:

Electronic Frontier Foundation writes:

> A.B. 1836 would dramatically expand the reach of publicity rights in California – already among the broadest in the nation – to encompass uses that are not tied to commercial products or advertising.
>
> Under A.B. 1836, a deceased personality's estate could extract statutory damages of $10,000 for the use of the dead person's image or voice "in any manner related to the work performed by the deceased personality while living" – an incredibly unclear standard that will invite years of litigation. What is worse, it eliminates existing exemptions for important uses such as in plays, films, and news commentary. And it does all of this not to protect any *living* person, but only those who hope to grow rich exploiting others' identities long after they are long gone. (Emphasis in original.)

REGISTERED SUPPORT / OPPOSITION:

Support

Artists Rights Alliance (ARA)
Black Music Action Coalition
California Labor Federation, Afl-cio
Music Artists Coalition (MAC)
Recording Academy
Sag-aftra (sponsor)
Songwriters of North America

Opposition

1 Individual
California Chamber of Commerce
Computer and Communications Industry Association
Electronic Frontier Foundation
Individual (Law Professor, Pennsylvania Carey Law School)
Technet

Oppose Unless Amended

The Media Coalition

Analysis Prepared by: Josh Tosney / P. & C.P. / (916) 319-2200