SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1836 (Bauer-Kahan)
Version: May 2, 2024
Hearing Date: July 2, 2024
Fiscal: No
Urgency: No
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SUBJECT

Use of likeness: digital replica

DIGEST

This bill prohibits a person from producing, distributing, or making available the digital replica of a deceased personality's voice or likeness in an expressive audiovisual work or sound recording without prior consent, except as provided.

EXECUTIVE SUMMARY

California has a statutory right to publicity that applies postmortem. The law prohibits a person from using 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. Exempt from this requirement are so called "expressive works," which include 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, if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

Given the transformative capabilities of generative artificial intelligence to produce realistic digital replicas of these personalities, a call has been made to update California's statute to more adequately protect these postmortem publicity rights in this new technological age. This bill does so by creating a new right of action specific for nonconsensual "digital replicas" with exemptions for various uses, such as in news broadcasts or for purposes of comment or parody, to the extent the use is protected by the First Amendment to the United States Constitution. The bill is sponsored by SAG-AFTRA. It is supported by various groups, including the California Labor Federation, AFL-CIO. It is opposed by tech and industry groups, including the California Chamber of Commerce and the Motion Picture Association.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes California's right of publicity law, which 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 purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, shall be liable for any damages sustained by the person or persons injured as a result thereof. (Civ. Code § 3344(a).)[1]

2) Provides that a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required pursuant to the above. (§ 3344(d).)

3) Subjects a person in violation to liability to the injured party for the greater of the actual damages suffered or statutory damages of $750, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. Punitive damages may also be awarded to the injured party or parties. The prevailing party shall also be entitled to attorney's fees and costs. (§ 3344(a).)

4) Establishes a right to publicity for a "deceased personality," which 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. (§ 3344.1(a)(1).)

5) Excludes from the above 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, if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work. This is referred to as the "expressive works" exemption. (§ 3344.1(a)(2).)

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[1] All further references are to the Civil Code unless otherwise specified.

6) Provides that if a work that is protected under this exemption includes within it a use in connection with a product, article of merchandise, good, or service, this use shall not be exempt, notwithstanding the unprotected use's inclusion in a work otherwise exempt, 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. (§ 3344.1(a)(3).)

7) Defines "deceased personality" as a natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of their death, or because of their death, whether or not during the lifetime of that natural person the person used their 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. (§ 3344.1(h).)

8) Provides that these rights are property rights that are freely transferable or descendible and that expire 70 years after the death of the deceased personality. (§ 3344.1(b), (g).)

9) Exempts from the requirement for consent 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. (§ 3344.1(j).)

This bill:

1) Amends Section 3344.1 to provide that 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 those specified is liable to any injured party in an amount equal to the greater of $10,000 or the actual damages suffered by a person controlling the rights to the deceased personality's likeness.

2) Permits a digital replica to be used without consent to the extent the use is protected by the First Amendment to the United States Constitution, if the use of the digital replica meets any of the following criteria:
    a) The use is in connection with any news, public affairs, or sports broadcast or account.
    b) The use is for purposes of comment, criticism, scholarship, satire, or parody.
    c) 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.
d) The use is fleeting or incidental.
e) The use is in an advertisement or commercial announcement for one of the above works.

3) Defines the following terms:
   a) "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.
   b) "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.

COMMENTS

1. History of right to publicity

In 1984, SB 613 (Campbell, Ch. 1704, Stats. 1984) enacted what is now Civil Code Section 3344.1, to address the ruling in *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813. The decision was interpreted by some as holding that a celebrity's right of publicity expired at death and thus the publicity rights that had not been used or exploited by the time of death of the celebrity defaulted to the public domain. When it was enacted, Civil Code Section 3344.1 recognized publicity rights as property rights that may be transferred, specified prohibited uses, and required the registration of those rights with the Secretary of State. An action to enforce rights protected by Section 3344.1 was then required to be brought within 50 years of the death of the celebrity.

SB 209 (Burton, Ch. 988, Stats. 1999) was later enacted to abrogate the Ninth Circuit's decision in *Astaire v. Best Film & Video* (9th Cir. 1997) 116 F. 3d 1297, which held that the unauthorized use of Fred Astaire's image in a "how to" dance video was not prohibited by the statute. The amendments to Section 3344.1 deleted certain exceptions in the statute that had been relied on by the court in the *Astaire* case and inserted language to distinguish between permissible use of the celebrity's likeness in works of art and entertainment (which the statute permitted) and use in connection with products, goods, and merchandise (which is prohibited without consent), and extended the period of protection provided by the statute from 50 years to 70 years after the death of the celebrity. The right to consent to the commercial use of a deceased personality's name, voice signature, photograph, and likeness or image is a transferable right,

exercisable by the person to whom the right devolved by trust or testamentary instrument, or to whom it was transferred by contract.

Section 3344.1 was again amended in 2007 by SB 771 (Kuehl, Ch. 439, Stats. 2007), abrogating two court decisions and following the invitation from the courts, clarifying that a deceased celebrity's right of publicity applies to individuals regardless of whether they died before or after January 1, 1985. The last substantive amendment to the statute was in 2010; AB 585 (Cook, Ch. 20, Stats. 2010) expanded the definition of "deceased personality" to any natural person whose name, voice, signature, photograph, or likeness has commercial value either at the time of the person's death, *or because of the person's death*.

2. Updating the law to address "digital replicas"

This bill seeks to address the use of "digital replicas" of deceased personalities, which it defines as 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.

Digital replicas, in some form, have been around for a while but the technology has been rapidly advancing:

> Such scenarios can sound like science fiction, but "performances" by the past selves of aged or even deceased actors have helped carry movies like 2016's "Rogue One: A Star Wars Story." Aided by motion capture recorded on a different actor, Peter Cushing, who died in 1994, reprised his role as Grand Moff Tarkin from the original 1977 "Star Wars" film. (His estate gave permission.)
>
> "Digital humans have been part of the visual effects process for quite a while now — about 20 years," said Paul Franklin, a visual effects supervisor at DNEG.[2]

The concern from the artistic community is that the terms of using such digital replicas need to be fairly negotiated:

> Innovations in digital technology and artificial intelligence have transformed the increasingly sophisticated world of visual effects, which can ever more convincingly draw from, replicate and morph flesh-and-blood performers into virtual avatars. Those advancements have thrust

[2] Marc Tracy, *Digital Replicas, a Fear of Striking Actors, Already Fill Screens* (August 4, 2023) The New York Times, https://www.nytimes.com/2023/08/04/arts/television/actors-strike-digital-replicas.html.

> the issue toward the top of the grievances cited in the weekslong strike by the actors' union.
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> SAG-AFTRA, the union representing more than 150,000 television and movie actors, fears that a proposal from Hollywood studios calling for performers to consent to use of their digital replicas at "initial employment" could result in its members' voice intonations, likenesses and bodily movements being scanned and used in different contexts without extra compensation.[3]

This bill prohibits a person from producing, distributing, or making available the digital replica of a deceased personality's voice or likeness in an expressive audiovisual work or sound recording without prior consent from specified persons, essentially the personality's heirs or their assignees. Violations subject the person to liability to any injured party in an amount equal to the greater of $10,000 or the actual damages suffered by a person controlling the rights to the deceased personality's likeness.

According to the author:

> Performers deserve protection from exploitation by AI. California has strong protections for a living artist's voice, image, and likeness that are not the mirrored for deceased performers. Technology has progressed to the point to allow 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. Rights to publicity and the First Amendment

A coalition in opposition, including TechNet, argues the bill "represents a significant departure from California's long-established right of publicity statute under §3344.1, which could likely infringe upon First Amendment protected expressive uses." The case law on the First Amendment implications of rights to publicity is, at best, uncertain.

The United States Supreme Court seminal case on the subject is *Zacchini v. Scripps-Howard Broad. Co.* (1977) 433 U.S. 562. Zacchini was an entertainer that performed a "human cannonball" act in which he would be shot out of a cannon into a net hundreds of feet away. A local reporter filmed his entire act, and it was broadcast on the local news. Zacchini brought suit alleging violation of his state-law "right to publicity." The

[3] *Ibid.*

broadcaster countered on First Amendment grounds. The Supreme Court found the right to publicity claim was not violative of the First Amendment:

> There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. Time, Inc. v. Hill. But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it.[4]

However, the Court did not give much guidance on the First Amendment standard to be applied, but instead framed the case as more of an issue akin to copyright law:

> [T]he 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. As we later note, 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.[5]

The California Supreme Court has provided some more guidance on the issue and detailed the complex interaction of the First Amendment and the right to publicity:

> The tension between the right of publicity and the First Amendment is highlighted by recalling the two distinct, commonly acknowledged purposes of the latter. First, to preserve an uninhibited marketplace of ideas and to repel efforts to limit the uninhibited, robust and wide-open debate on public issues. Second, to foster a fundamental respect for individual development and self-realization. The right to self-expression is inherent in any political system which respects individual dignity. Each speaker must be free of government restraint regardless of the nature or manner of the views expressed unless there is a compelling reason to the contrary.
>
> The right of publicity has a potential for frustrating the fulfillment of both these purposes. Because celebrities take on public meaning, the appropriation of their likenesses may have important uses in uninhibited debate on public issues, particularly debates about culture and values. And because celebrities take on personal meanings to many individuals in the society, the creative appropriation of celebrity images can be an

[4] *Zacchini v. Scripps-Howard Broad. Co.* (1977) 433 U.S. 562, 578.
[5] *Id.* at 573.

> important avenue of individual expression. . . . The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment.[6]

However, the court then proceeded to state the important role that right to publicity laws play in this space:

> But having recognized the high degree of First Amendment protection for noncommercial speech about celebrities, we need not conclude that all expression that trenches on the right of publicity receives such protection. The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility. Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one's identity.[7]

The Court concluded that the Legislature has the authority to provide "that a celebrity's heirs and assigns have a legitimate protectable [sic] interest in exploiting the value to be obtained from merchandising the celebrity's image, whether that interest be conceived as a kind of natural property right or as an incentive for encouraging creative work." The Court asserted: "Although critics have questioned whether the right of publicity truly serves any social purpose, there is no question that the Legislature has a rational basis for permitting celebrities and their heirs to control the commercial exploitation of the celebrity's likeness." Ultimately, the Court established what is known as the "transformative use test," derived from copyright law, that required a work to be "sufficiently transformative" to receive protection and differentiated it from works that merely siphoned the economic value of a person:

> Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment.[8]

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[6] *Comedy III Prods., Inc. v. Gary Saderup, Inc.* (2001) 25 Cal. 4th 387, 396-397 (internal citations and quotations omitted.)
[7] *Id.* at 399.
[8] *Id.* at 400.

Courts have continued to hone the law in a series of cases in the wake of *Comedy III Products*.[9]

This bill attempts to create room for these protected expressions by providing a series of exemptions, where the digital replica can be used without consent. Those include:

- The use is in connection with any news, public affairs, or sports broadcast or account.
- The use is for purposes of comment, criticism, scholarship, satire, or parody.
- 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.
- The use is fleeting or incidental.
- The use is in an advertisement or commercial announcement for one of these works.

However, the prefatory clause to these exemptions states that they apply "to the extent the use is protected by the First Amendment to the United States Constitution." Opposition raises concerns with this language. The Motion Picture Association (MPA) writes:

> The Bill as amended in the Assembly does include a list of statutory exemptions in proposed § 3344.1(a)(2)(A)(ii), a positive step that MPA appreciates. Regrettably, however, those exemptions as drafted are not adequate to protect filmmakers from the chilling effect that the broad new right would create, including through legal actions brought to muzzle filmmakers seeking to tell fact-based stories about the world around us and the people in it, warts-and-all. **Specifically, inclusion of the phrase "to the extent the use is protected by the First Amendment to the United States Constitution" negates the benefit of the statutory exemptions, and MPA strongly urges that it be deleted.**

MPA argues this language "effectively imports the need to perform First Amendment analysis" into the determination of whether those exemptions apply and thus severely undermines the effectiveness of the statutory exemptions.

In response to concerns, the author has agreed to amendments that remove the controversial clause and that rework the third exemption to read:

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[9] *See No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018; *Kirby v. Sega of Am., Inc.* (2006) 144 Cal.App.4th 47; *Keller v. Electronic Arts Inc.* (9th Cir. 2013) 724 F.3d 1268, 1276-1277; *but see Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891.

(III) The use is a representation of the individual as the individual's self in a documentary or in a historical or biographical manner, including some degree of fictionalization, unless the use is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated.

Writing in support, SAG-AFTRA, the sponsor of the bill, explains the need for it:

> Recent amendments also make it clear that the rights established in this bill are narrow and that those rights will be balanced with the 1st Amendment.
>
> 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. The latest in digital replication technology, courtesy of exponential advancements in AI, allows for the ability to transform still images into live action audiovisual content and the ability to easily clone human voices.
>
> This presents an obvious and direct threat to the families of deceased performers who now face, without immediate changes to the law, the nonconsensual digital replication of their loved ones into audio visual works and sound recordings. At present, this nonconsensual use is arguably permitted in California. Civil Code Section 3344.1 includes express, specific exemptions against liability for the unauthorized use of voice and likeness in "musical compositions, audiovisual works, or television programs."
>
> If we don't pass AB 1836, California should prepare to be a new home for unscrupulous individuals and companies looking to commercialize the talents of deceased California performers.
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> There is no recourse in California for the families and/or beneficiaries if others wish to use their loved ones for profit. There is also no recourse for current artists who now must compete in a marketplace saturated with the digital clones of the deceased.

SUPPORT

SAG-AFTRA (sponsor)
California Labor Federation, AFL-CIO
Concept Art Association

Los Angeles County Democratic Party

OPPOSITION

California Chamber of Commerce
Computer & Communications Industry Association
Electronic Frontier Foundation
Media Coalition
Motion Picture Association
Technet

RELATED LEGISLATION

Pending Legislation:

SB 970 (Ashby, 2024) ensures, among other things, that media manipulated or generated by artificial intelligence technology is incorporated into the right of publicity law and criminal false impersonation statutes. SB 970 was held in the Senate Appropriations Committee.

AB 2602 (Kalra, 2024) provides that a provision in an agreement for the performance of personal or professional services that contains a provision allowing for the use of a digital replica of an individual's voice or likeness is unenforceable if it does not include a reasonably specific description of the intended uses and is not negotiated with legal representation or by a labor union, as specified. AB 2602 is currently in this Committee.

Prior Legislation:

SB 613 (Campbell, Ch. 1704, Stats. 1984) *See* Comment 1.

SB 209 (Burton, Ch. 988, Stats. 1999) *See* Comment 1.

SB 771 (Kuehl, Ch. 439, Stats. 2007) *See* Comment 1.

AB 585 (Cook, Ch. 20, Stats. 2010) *See* Comment 1.

PRIOR VOTES:

Assembly Floor (Ayes 59, Noes 0)
Assembly Appropriations Committee (Ayes 11, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 0)
Assembly Privacy and Consumer Protection Committee (Ayes 8, Noes 0)
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