Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity

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In July of 2023, SAG-AFTRA went on strike, joining the Writers Guild of America and bringing Hollywood to a halt. This Note centers on one of the actors' chief concerns: digital replicas. A digital replica is a computer-generated image that reproduces the likeness of a person and then can be manipulated to create a "performance" without the involvement of that person. Abuse of this technology has the potential to render actors' jobs obsolete, while also violating their right to own their likeness. This Note proposes an expansion of the right of publicity to protect actors from exploitative use of digital replicas.

A broader application of the right of publicity must grapple with First Amendment concerns, in particular, the tradition of the right applying only to commercial use of likeness and not expressive use, like the movies and television shows likely to incorporate digital replicas. However, this Note illustrates that in reality, courts and the New York state legislature have already begun to apply the right of publicity to expressive works. More, the policy behind the decision in the singular right of publicity case to come before the U.S. Supreme Court supports further expansion of the right because the Court recognized the need to protect the economic value of a performance.

The rapid development of digital replicas and other forms of artificial intelligence raises many legal questions. By addressing one narrow slice of this new territory, this Note hopes to highlight the law's potential for prioritizing and protecting human creativity.

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Introduction

Black Mirror, a Netflix show known for darkly pessimistic predictions of where society and technology are headed, is not looking too far into the future in the first episode of its newest season, "Joan Is Awful."[1] The episode features actors Annie Murphy and Salma Hayek watching a new television series starring themselves. Oddly, they never filmed the show. Rather, the "performances" are given by digital replicas of Murphy and Hayek, completely out of the actors' control. They watch in horror as the digital replicas commit embarrassing acts they never performed themselves, nor would they agree to.

Digital replicas are not just something out of *Black Mirror* fiction.[2] The technology is now capable of producing entirely new performances an actor never gave by creating a computer-generated image that replicates an actor's face, body, voice, and movements.[3] The replica is then digitally manipulated to produce the "performance," removing the need for the actor to film a

1. *Black Mirror: Joan Is Awful* (Netflix June 15, 2023).

2. *See* Stuart Heritage, *Joan Is Awful: Black Mirror Episode Is Every Striking Actor's Worst Nightmare*, GUARDIAN (July 13, 2023, 9:45 AM), https://www.theguardian.com/tv-and-radio/2023/jul/13/joan-is-awful-black-mirror-striking-actors-nightmare [https://perma.cc/T8LJ-CA94] (observing the eerie similarities between the episode and the concerns of actors on strike).

3. *See* Brian Contreras, *On the Brink of a Possible SAG-AFTRA Strike, Some Actors Are Wary of AI. Here's Why.*, L.A. TIMES (July 7, 2023, 11:53 AM), https://www.latimes.com/entertainment-arts/business/story/2023-07-07/hollywood-actors-strike-sag-aftra-artificial-intelligence [https://perma.cc/7XQH-PZD5] ("[T]hat is, using AI to re-create an actor digitally, allowing studios to create performances on screen that the actor never actually gave.").

performance live.[4] Without proactive expansion of protection for actors, this technology has the potential to render actors' careers and the art of acting obsolete.

Technology has a history of replacing human jobs[5] and does so constantly,[6] always placing a new profession on the chopping block.[7] Is acting simply the next profession to be replaced by advances in technology? Or is there reason to safeguard actors from the threat of digital replicas? Throughout history, society has universally valued art as a means of human expression. Indeed, artistic expression is found across all cultures—it is used to pass down stories, explain mythology and religion, document significant events, and make cries for social and political change.[8] More narrowly, acting has long persisted alongside the constant innovations of art, suggesting some inherent value worth preserving, or at the very least, suggesting people find enjoyment in watching actors.

The law reflects this history by protecting creativity. Recently, the Copyright Review Board refused to award registration to an image created by artificial intelligence, affirming a requirement of "human authorship."[9] This decision highlights copyright law's purpose of encouraging and protecting *human* creativity. Using the law to protect art and creativity is not

4. *See id.* ("The roll-out of this 'generative AI' could make workers' jobs easier—or put them out of work entirely."); *see also* Brian Welk, *The 3 Biggest A.I. Questions That Should Have Actors Worried*, INDIEWIRE (July 11, 2023, 10:00 AM), https://www.indiewire.com/news/analysis/actors-biggest-ai-questions-explained-1234881049/ [https://perma.cc/SZU5-VF3T] ("AI gives the director the power to quickly make [a] change [to performance], or try multiple alternatives, rather than expensive reshoots that demand the actor's presence.").

5. *See* Sean Fleming, *A Short History of Jobs and Automation*, WORLD ECON. F. (Sept. 3, 2020), https://www.weforum.org/agenda/2020/09/short-history-jobs-automation/ [https://perma.cc/LY6E-KGWH] (providing a timeline of jobs replaced by tech overtime).

6. *See* Alana Semuels, *Millions of Americans Have Lost Jobs in the Pandemic—And Robots and AI Are Replacing Them Faster Than Ever*, TIME (Aug. 6, 2020, 6:22 AM), https://time.com/5876604/machines-jobs-coronavirus/ [https://perma.cc/BS9P-JFKA] ("One study estimates that about 400,000 jobs were lost to automation in U.S. factories from 1990 to 2007. But the drive to replace humans with machinery is accelerating as companies struggle to avoid workplace infections of COVID-19 and to keep operating costs low.").

7. *See* Aaron Mok & Jacob Zinkula, *ChatGPT May Be Coming for Our Jobs. Here Are the 10 Roles that AI Is Most Likely to Replace.*, INSIDER, https://www.businessinsider.com/chatgpt-jobs-at-risk-replacement-artificial-intelligence-ai-labor-trends-2023-02 [https://perma.cc/BQF6-ANFM] (June 4, 2023, 9:09 AM) (listing jobs that may be affected by AI).

8. *See generally* BRUCE MCCONACHIE, TOBIN NELLHAUS, CAROL FISHER SORGENFREI & TAMARA UNDERINER, THEATRE HISTORIES: AN INTRODUCTION (3d ed. 2016) (discussing the cultural importance of theatre specifically and arguing that "what happens inside the theatre is deeply connected to what happens outside, not just as a matter of the topics playwrights present on stage, but also . . . what social developments produced changes in cultural ideas that were manifested in stylistic shifts").

9. Second Request for Reconsideration for Refusal to Register a Recent Entrance to Paradise, Correspondence ID 1-3ZPC6C3; SR # 1-7100387071, at 2, 3, 7 (Copyright Rev. Bd. Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf [https://perma.cc/FZ23-QHKE].

new territory but rather an area of the law facing new questions in an era of rapidly developing technology.

More, the deeply personal nature of misappropriation of likeness sets the replacement of actors by digital replicas apart from other jobs threatened by technology. Digital replicas do more than take actors' jobs: They take their face, their voice, their body, and their movements.[10] The misappropriation of those qualities by digital replicas is much more invasive to actors than other instances of technology taking over jobs, and so it should be approached with greater caution and protections. The implications of duplicating humans without their permission seem inherently violative. Assessing appropriate use of digital replicas, therefore, invokes questions of how humans expect to be treated by each other and by the law.[11]

The right of publicity has the potential to provide protection against the substantial threat digital replicas pose to actors. The right of publicity protects individuals against the misappropriation of their likeness, making it the perfect tool to combat potential exploitation of actors' likenesses by digital replicas. This Note builds an argument for using the right of publicity to protect against digital replicas in five Parts. First, Part I provides a background of the available digital replica technology and proposes the expansion of the right of publicity to protect actors from the threats of this technology. Second, Part II lays out the history of the right of publicity, up to its treatment today. Then, Part III takes a closer look at the need to balance the First Amendment with the right of publicity, which is usually accomplished by distinguishing between commercial and expressive use. Part IV examines a recently enacted New York statute that uses the right of publicity to directly address digital replicas and notably breaks out of the commercial versus expressive framework. Lastly, Part V advocates expanding the right of publicity further than the New York statute does and highlights Supreme Court precedent that supports further expansion.

10. *See* Heritage, *supra* note 2 ("It's one thing to have your work taken from you, but it's another to have your entire likeness swiped.").

11. *See* Jeremy Sheff, *Scope and Justification of the Right of Publicity*, 42 COLUM. J.L. & ARTS 333, 336 (2019) (highlighting the need to address how our connection to labor relates to how we expect to be treated as human beings).

I. Overview of Digital Replica Technology and Its Uses

A. Digital Replica Technology Can Create Actor "Performances"

Two true statements: James Dean died in a car crash in 1955, and James Dean was cast in a movie in 2019.[12] How is this possible? With the help of digital replicas.

"Digital replica," in the context of entertainment and performers, refers to a computer-generated image that recreates the likeness of a person—their face, body, voice, and movement.[13] A digital replica is completely manipulatable; it can be made to do anything. 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.[14] In the past, the technology has been used to finish movies when an actor dies before filming is complete.[15] 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.[16]

Currently, digital replicas are created in several ways. In the case of a deceased actor, like the casting of James Dean in *Finding Jack*, a digital replica is created by superimposing on a stand-in actor computer-generated imagery made from existing footage and photos of the deceased actor.[17] In

12. Alex Ritman, *James Dean Reborn in CGI for Vietnam War Action-Drama*, HOLLYWOOD REP. (Nov. 6, 2019, 6:10 AM), https://www.hollywoodreporter.com/movies/movie-news/afm-james-dean-reborn-cgi-vietnam-war-action-drama-1252703/ [https://perma.cc/P5LQ-4XMK].

13. *See* Rob Balin, Jesse Feitel, Jim Rosenfeld & Lance Koonce, *Dead Celebrities and Digital Doppelgangers: New York Expands Its Right of Publicity Statute and Tackles Sexually Explicit Deepfakes*, 41 LICENSING J., April 2021, at 8, 9–10 (citing a New York statute defining "digital replica" as a performance generated by computer that is "so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual").

14. *See* Erin Winick, *Actors Are Digitally Preserving Themselves to Continue Their Careers Beyond the Grave*, MIT TECH. REV. (Oct. 16, 2018), https://www.technologyreview.com/2018/10/16/139747/actors-are-digitally-preserving-themselves-to-continue-their-careers-beyond-the-grave/ [https://perma.cc/ML9B-FUYP] (discussing how "dead and magically 'de-aged' actors" are appearing on screen via digital replica technology); *Digital Identity and the Future of Acting*, FILMMAKERS ACAD. (Jan. 24, 2022), https://www.filmmakersacademy.com/digital-identity-and-the-future-of-acting/ [https://perma.cc/AF62-XNUZ] (explaining that filmmakers have used advanced digital replication technology to superimpose deceased actors' faces onto stunt doubles rather than recast the film).

15. *Digital Identity and the Future of Acting*, *supra* note 14.

16. *See* Welk, *supra* note 4 (quoting Tom Hanks as stating that it is "a 'bona-fide possibility right now'" to pitch a series that would star a younger version of him without his involvement).

17. *See* Ritman, *supra* note 12 (highlighting that James Dean's performance will be constructed via CGI "using actual footage and photos" while another actor provides the voice); Joey Nolfi, *Chris Evans and More Actors Criticize James Dean's Posthumous CGI Movie Role*, ENT. WKLY. (Nov. 7, 2019, 12:21 PM), https://ew.com/movies/2019/11/07/celebrities-criticize-james-dean-new-movie/ [https://perma.cc/3L49-L8H7] (explaining that the film will "incorporat[e] Dean's likeness in pre-existing photos and footage along with new digital creations projected over stand-ins and body doubles").

the case of living actors, more recent advancements in 3D-scan technology can capture an incredibly detailed likeness of a person that can then be digitally manipulated.[18] But at the end of any digital replica process, the actor ultimately appearing in the film did not give the performance for the camera.

For example, Digital Domain, the visual effects and digital production company behind movies like *Avengers: Endgame* and *Terminator: Dark Fate*, boasts on its website that its "Digital Humans Lab" technology can trace a person's every hair, subdermal blood flow, pore structures, and fine wrinkles, reproducing those characteristics in under 20 milliseconds a frame.[19] The scanning process records these images in a matter of seconds.[20] The imagined uses of this technology are nearly endless. Scanned deceased actors could continue to star in series and sequels long after their deaths.[21] Or, younger scans of living actors could star in roles the actor is now too old to play.[22] One scan of an actor could play all the roles in one film without the actor themself performing any of the roles. All these scenarios could be accomplished with the digital replica without needing a new performance from the actor.

B. Digital Replicas Pose a Threat to Actors' Careers

This quickly advancing technology calls into question actors' job stability. If a production company can use a digital replica of an actor, it has no need to hire the actor themself. The digital replica provides the production company full creative control over the performance. Further, the digital replica does not need days off, does not complain, does not catch COVID-19, and does not need a stunt double. In short, digital replicas have the potential to put actors out of jobs.[23]

Recently, actors' concerns over the threat of digital replicas have made headlines.[24] Screen Actors Guild-American Federation of Television and

18. *E.g.*, *Realtime Digital Human Rendering*, DIGIT. DOMAIN, https://digitaldomain.com/technology/real-time-digital-human-rendering/ [https://perma.cc/MPD9-KZ5K].

19. *See Feature Films*, DIGIT. DOMAIN, https://digitaldomain.com/feature-films/work/ [https://perma.cc/C98N-2WCJ] (showing *Avengers: Endgame* and *Terminator: Dark Fate* as two recent films that the company worked on); *Realtime Digital Human Rendering*, *supra* note 18 (explaining that the latest recreations "are fully ray-traced down to each and every . . . hair[] and include dynamic sub-dermal blood flow, pore structures and fine wrinkles all rendered in under 20 milliseconds a frame").

20. *Digital Identity and the Future of Acting*, *supra* note 14.

21. Winick, *supra* note 14.

22. *See* Welk, *supra* note 4 (quoting Tom Hanks as stating that "it is a 'bona-fide possibility right now' to 'pitch a series of seven movies that would star me in them, in which I would be 32 years old from now until kingdom come'").

23. *Digital Identity and the Future of Acting*, *supra* note 14.

24. *See, e.g.*, Kevin Collier, *Actors vs. AI: Strike Brings Focus to Emerging Use of Advanced Tech*, NBC NEWS (July 14, 2023, 4:14 PM), https://www.nbcnews.com/tech/tech-news/hollywood-actor-sag-aftra-ai-artificial-intelligence-strike-rcna94191 [https://perma.cc/S9BP-29WL] ("The

Radio Arts (SAG-AFTRA), the union that represents screen actors, went on strike on July 14, 2023, over concerns of how technology such as streaming and artificial intelligence affects actors' legal rights and compensation.[25] The union, joining the Writers Guild of America in a strike that brought Hollywood to a "standstill,"[26] voted by an overwhelming 98% to strike at the same time as screenwriters for the first time in sixty-three years after negotiations with production studios failed.[27] The actors' demands include protections against digital replicas, pushing back against indications that production companies do not take their concerns seriously.[28] They worry that their current contracts, as well as the larger legal landscape, are insufficient to protect actors against abuse of digital replicas.[29] Artists are also concerned with the bigger picture; they worry that rapid implementation of artificial intelligence without thoughtful safeguards will not only harm actors but also kill the intangible thing that makes art art.[30]

These concerns are not unfounded—the technology exists, and it's being developed and used. Netflix and Disney are hiring AI engineers and

actors' concerns highlight a broader anxiety . . . . Many fear that, without strict regulation, their work will be replicated and remixed by artificial intelligence tools, and that such a transformation will both cut their control over their work and hurt their ability to earn a living.").

25. *See What to Know About the SAG-AFTRA Actors' Strike*, L.A. TIMES (Sept. 5, 2023, 1:26 PM), https://www.latimes.com/entertainment-arts/business/story/2023-06-29/what-to-know-sag-aftra-strike-actors-hollywood [https://perma.cc/3WEZ-55MH] (explaining that key causes of the strike, approved July 13th, included actors' demands for residual payments, contributions to SAG-AFTRA's health and pension plan, and a pay increase, as well as concerns about artificial intelligence).

26. Brooks Barnes, John Koblin & Nicole Sperling, *Hollywood Actors Strike*, N.Y. TIMES (July 13, 2023, 6:55 PM), https://www.nytimes.com/live/2023/07/13/business/actors-strike-sag [https://perma.cc/Q7FB-N8SF].

27. *What to Know About the SAG-AFTRA Actors' Strike*, *supra* note 25.

28. *See SAG-AFTRA Strike Authorization Vote*, SAG-AFTRA, https://www.sagaftra.org/sag-aftra-strike-authorization-vote [https://perma.cc/B8ME-6A3U] (informing union members that, regarding AI, "[i]n their public statements and policy work, the companies have not shown a desire to take our members' basic rights to our own voices and likenesses seriously"); *see also* Duncan Crabtree-Ireland, *SAG-AFTRA Fights for AI Regulation to Protect the Soul of Entertainment*, VARIETY (June 6, 2023, 7:29 AM), https://variety.com/2023/biz/news/sag-aftra-contract-writers-strike-duncan-crabtree-ireland-1235634077/ [https://perma.cc/KL64-F6PQ] (detailing SAG-AFTRA's efforts to prevent misuse of AI).

29. *See* Crabtree-Ireland, *supra* note 28 (advocating for greater protection in state and federal laws safeguarding an actor's likeness, voice, and right of publicity as well as seeking to reserve for the union the exclusive ability to bargain over the right to "us[e] an AI system to create new performances using a performer's voice and likeness"); *see also* Welk, *supra* note 4 (raising the "tricky" questions about ownership of likeness, scans, and IP under existing law).

30. *See* Crabtree-Ireland, *supra* note 28 (urging that precautions around AI use are "about the soul of entertainment"); *see also* Lois Beckett & Kari Paul, *'Bargaining for Our Very Existence': Why the Battle over AI Is Being Fought in Hollywood*, GUARDIAN (July 22, 2023, 7:00 AM), https://www.theguardian.com/technology/2023/jul/22/sag-aftra-wga-strike-artificial-intelligence [https://perma.cc/5CJ4-SM98] (suggesting that the AI issue is contentious because it is about "something so fundamentally human, which is creativity").

project managers.[31] Lucasfilm, the production company that created *Star Wars*, has implemented a policy of scanning all lead actors.[32] These scans provide the production company security.[33] Regardless of what happens to the actors themselves, the production company can continue to make movies with their characters and with the faces audiences recognize and love.[34] Recently, moviegoers saw this technology in action in the shape of a de-aged Harrison Ford in *Indiana Jones and the Dial of Destiny*.[35] Ford himself explained that, albeit with his permission in this instance, his younger face was constructed using artificial intelligence and the decades-old footage the studio had from previous *Star Wars* and *Indiana Jones* movies.[36] Further, production studios are not only scanning stars. Background actors, more vulnerable due to their lack of celebrity prowess, have reported being faced with the choice of being scanned or sent home without pay.[37] Duncan Crabtree-Ireland, SAG-AFTRA's chief negotiator during the failed negotiations, reported that production studios proposed that "background performers should be able to be scanned, get paid for one day's pay, and their company should own that scan, their image, their likeness, and to be able to use it for rest of eternity, on any project they want, with no consent and no compensation."[38]

Hopefully, scans and digital replica use are subject to negotiations and agreements between the production company and the actors. Ideally, contracts could provide answers for questions like who owns the data from the scans, how the scans may be used in the future, and how the actors will

31. Wilson Chapman, *Studios Double Down on A.I. Use: Netflix Offers up to $900K for One A.I. Product Manager Role*, INDIEWIRE (July 25, 2023, 8:31 PM), https://www.indiewire.com/news/general-news/netflix-lists-ai-job-900k-1234888399 [https://perma.cc/Y658-4WFL].

32. Ryan Britt, *Lucasfilm Has Digital Clones of Your Favorite 'Star Wars' Characters*, INVERSE (Apr. 6, 2018), https://www.inverse.com/article/43342-star-wars-digital-leia-flying-last-jedi-vfx-episode-ix [https://perma.cc/UM8L-ULAK].

33. *See id.* (quoting the visual effects supervisor for *Last Jedi* as explaining that Lucasfilm scans all lead actors because the company "do[es]n't know if [it's] going to need them").

34. Winick, *supra* note 14.

35. Zack Sharf, *'Indiana Jones 5' De-Aged Harrison Ford with A.I. and Old Film Footage of Him That Lucasfilm Never Printed: 'That's My Actual Face'*, VARIETY (Feb. 6, 2023, 8:15 AM), https://variety.com/2023/film/news/indiana-jones-5-artificial-intelligence-de-age-harrison-ford-unreleased-footage-1235514222/ [https://perma.cc/LD9Y-8TKQ] ("The artificial intelligence program even had access to rolls of film featuring Ford that never made it to theaters.").

36. *See id.* (quoting Harrison Ford as calling it "fantastic" that the studio could use old footage to make a de-aged version of him for the film).

37. *See* Gene Maddaus, *SAG-AFTRA Strike: AI Fears Mount for Background Actors*, VARIETY (July 25, 2023, 9:44 AM), https://variety.com/2023/biz/news/sag-aftra-background-actors-artificial-intelligence-1235673432/ [https://perma.cc/37RC-6HJQ] (revealing process background actors go through on set and describing releases they sign).

38. Beckett & Paul, *supra* note 30.

be compensated for those future uses.[39] However, SAG-AFTRA's strike suggests these negotiations are not taking place or at least are not fruitful.[40] More, the novelty of the technology and the speed of advancement makes it likely that the content of existing agreements may not be able to keep up.[41] And, considering the difference in bargaining power between a company like Lucasfilm and perhaps a relatively unknown actor that just got a career-altering offer to be in a *Star Wars* film, it seems likely any agreement will favor the production company. Questions, like the ones actors and other industry professionals are asking,[42] arise: To what degree can a live performance be manipulated using this technology? Can the offer of a role be conditional on agreeing to be scanned? Who owns the data from the scan, and how will it be protected? Is the performance of a digital replica more or less valuable than a performance from an actor themself?

C. The Right of Publicity Can Protect Actors from Abuse of Digital Replicas

Most concerningly, what should happen if a digital replica is used without an actor's consent? Hopefully, negotiations between production companies and actors will be done in good faith, providing mutually agreeable terms for the use of digital replicas. However, in the event a digital replica is used without an actor's consent, the law should provide a cause of action for the actor. This Note proposes a possible solution: arming actors against digital replicas with the right of publicity.

The right of publicity provides a legal path to protecting actors against the unauthorized use of digital replicas. The right of publicity protects individuals from the unauthorized use of their likeness.[43] Recognizing that

39. *See* Vejay Lalla, Adine Mitrani & Zach Harned, *Artificial Intelligence: Deepfakes in the Entertainment Industry*, WIPO MAG., June 2022, at 12, 13, 17 (arguing that individuals and businesses who plan to use deepfake technology "will have to preemptively think through their existing contractual arrangements and navigate applicable law on this topic," while "individuals who enter into talent agreements should carefully review the terms regarding their rights of publicity to ensure that they have sufficient control in how those rights might be used in conjunction with AI-based technologies").

40. *See What to Know About the SAG-AFTRA Actors' Strike*, *supra* note 25 (explaining that the strike was instigated after a failure to reach an agreement); *see also* Maddaus, *supra* note 37 (describing the stark differences in the studios' and the union's understanding of potentially legitimate uses for scans of background actors).

41. *See* Sheera Frenkel, *The Writers' Revolt Against A.I. Companies*, N.Y. TIMES: THE DAILY (July 18, 2023), https://www.nytimes.com/2023/07/18/podcasts/the-daily/ai-scraping.html [https://perma.cc/TQL5-2Q6J] (discussing similar concerns writers have over growing use of A.I., including how A.I. is advancing faster than laws and contracts can change).

42. *See* Welk, *supra* note 4 (listing the three main concerns about A.I. that experts believe SAG-AFTRA should seek to address).

43. Jonathan L. Faber, *Recent Right of Publicity Revelations: Perspective from the Trenches*, 3 SAVANNAH L. REV. 37, 40 (2016).

there is economic value in likeness, especially in celebrity likeness, the right aims to keep ownership of that economic value with each individual.[44]

The functions of the right of publicity align with the goal of protecting actors against unauthorized digital replicas. The right of publicity concerns use of likeness; digital replicas recreate an actor's likeness. The right of publicity protects the economic value of one's likeness; when unauthorized, digital replicas misappropriate the economic value of an actor's likeness. Ultimately, the production company profits off using the digital replica by gaining the benefits of having a certain actor in its film while cutting the cost of hiring the actor themself.[45] Giving actors a right of publicity claim against unauthorized digital replicas returns control of their likeness, and ultimately of their careers, to actors.

To build this argument for using the right of publicity to protect actors, the rest of this Note proceeds in four additional Parts. The next Part provides an overview of the development of the right of publicity before addressing how the right is applied in two specific contexts, commercial and expressive use. It then assesses where digital replicas may fall between those two categories.

II. Overview of the Right of Publicity

J. Thomas McCarthy and Roger E. Schechter, in the only treatise on the right of publicity, define the right of publicity as "the inherent right of every human being to control the commercial use of his or her identity."[46] The most straightforward examples of right of publicity claims come in the context of advertising.[47] When an advertisement features an individual's identity, or likeness, it leads consumers to believe that the individual endorses the product. Individuals often consent to this kind of participation in advertisements, lending their face to commercials or their voice to radio ads, in exchange for compensation. But if an individual's likeness is used without consent, then that use violates their right of publicity.[48] The right of publicity ensures that one's identity is not used to promote products or services without consent.

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44. *Id.* at 40 & nn.14–15.

45. *See* Sheff, *supra* note 11, at 336 (questioning where to draw the line between exploitation of value from the actor's labor and value from the labor of the exploiter).

46. J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d. ed. 2023).

47. *See* Welk, *supra* note 4 (explaining that existing publicity laws already prevent unauthorized use of likeness to endorse a product).

48. *See, e.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802, 811 (Cal. 2001) (interpreting California's right of publicity statute to find liable anyone who uses a deceased's likeness in a product without consent and holding that the right-of-publicity holder's consent is required for such commercial use).

The right of publicity belongs to everyone regardless of their status as a "celebrity."[49] The right of publicity is categorized as an intellectual property right and shares some characteristics with trademark, copyright, and false advertising laws.[50] However, the right stands on its own, is recognized by the Supreme Court, and is backed by its own justifications.[51]

The right of publicity was first conceived under the right of privacy, then eventually separated as a distinct right.[52] Originally, use of likeness without consent was seen as an invasion of privacy because it thrust someone's image into the public eye without their consent.[53] A disconnect developed, however, as plaintiffs bringing right of publicity suits were increasingly well-known individuals, often celebrities.[54] Courts began to struggle with placing a right of publicity under the right to privacy umbrella when these public figures were complaining not that their privacy had been invaded but that they were robbed of monetary opportunities by not being compensated for the use of their likeness.[55]

Then, in 1953, the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[56] distinguished a right of publicity as separate from a right to privacy.[57] In *Haelan Laboratories*, a professional baseball player's image was used by a chewing gum company without his permission.[58] The court observed that the player's harm was not an invasion of privacy but rather economic harm in the form of lost income that should have been paid to him for the use of his image.[59] This case is regarded as the first time the right of publicity was recognized as separate from the right to privacy, and moving forward, courts began to view it as a distinct right.[60]

The separation of the right of publicity from the right to privacy was paralleled by a change in justification for the right of publicity: from an indignity justification to a property justification. When under the privacy umbrella, the right of publicity was justified by the indignity of having

49. MCCARTHY & SCHECHTER, *supra* note 46, § 1:3.

50. *Id.*

51. *See id.* ("[T]he right of publicity has its own unique legal dimensions and reasons for being."); Faber, *supra* note 43, at 39 (stating that the Supreme Court of the United States has "strongly" affirmed the right of publicity).

52. MCCARTHY & SCHECHTER, *supra* note 46, § 1:2–3.

53. *Id.* § 1:7.

54. *Id.*

55. *Id.*

56. 202 F.2d 866 (2d Cir. 1953).

57. *Id.* at 868.

58. *Id.* The dispute arose first as an interference with contract question, but the court took up the issue of the unconsented use, as well. *Id.* at 867–68; *see also* MCCARTHY & SCHECHTER, *supra* note 46, § 1:26 (explaining that "[t]he critical issue in Haelan arose almost by accident" because "[t]he case was primarily brought as one for intentional interference with contractual relations").

59. *Haelan Labs., Inc.*, 202 F.2d at 868.

60. MCCARTHY & SCHECHTER, *supra* note 46, § 1:7.

information spread widely about oneself in a manner that one did not consent to.[61] Then, the separation of the right of publicity from the right to privacy indicated the two rights were driven by different injuries and justifications. The 1995 *Restatement (Third) of Unfair Competition* documents this distinction, relating injury to dignity to the right to privacy, while relating economic injury to the right of publicity.[62] The property justification recognizes that each individual owns their likeness, and that misappropriation of likeness can result in economic injury.[63] This justification suggests that if anyone is going to benefit monetarily from the use of likeness, it should be the likeness owner themselves.[64] Essentially, each individual should be in control of their property and be compensated for its use.

Today, the right of publicity has made a clear break from the right of privacy. The right of publicity is entirely a matter of state law, spread across both statutes and common law.[65] Approximately twenty-five states have right of publicity statutes.[66] The various statutes are substantially similar in how they regulate the right.[67] The largest difference is some states' statutes distinguish between a right of publicity for living persons and for deceased persons. Over thirty states recognize a right of publicity for living persons, while around twenty states recognize a post-mortem right of publicity.[68]

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61. *Id.*

62. *Id.* § 1:35; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (AM. L. INST. 1995) (explaining that both the right to publicity and the right to privacy protect a plaintiff's "personal dignity and autonomy" while the right of publicity "also secures for plaintiffs the commercial value of their fame and prevents the unjust enrichment of others seeking to appropriate that value for themselves").

63. *See* MCCARTHY & SCHECHTER, *supra* note 46, § 2.2 ("The right of publicity recognizes legal injury because such unpermitted use causes loss of the financial rewards flowing from the economic value of a human identity."); *see also* Faber, *supra* note 43, at 41 (explaining that the most basic rationale behind the right of publicity is rooted in "the notion that my property is *mine*").

64. *See* Faber, *supra* note 43, at 55–56 (stating that the right of publicity "serves the critical function" of allowing a person or their heirs "the right to determine the terms upon which that person is commercialized, if at all").

65. *See* J. Faber, *An Abridged History of the Right of Publicity*, RIGHT OF PUBLICITY (Feb. 24, 2023), https://rightofpublicity.com/brief-history-of-rop#:~:text=The%20Supreme%20Court%20of%20the,televised%20on%20the%20local%20news [https://perma.cc/L9LU-X4S7] (describing the "state-based regime" that governs the right of publicity through statutes and case law as well as the failed efforts to federalize the right).

66. *Right of Publicity Statutes and Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes [https://perma.cc/6HC5-3V3N].

67. *Compare, e.g.*, FLA. STAT. ANN. § 540.08 (West 2022) (prohibiting the use of a person's likeness for commercial or advertising purposes without express written or oral consent) *with* MASS. GEN. L. ANN. ch. 214, § 3A (West 2023) (same).

68. MCCARTHY & SCHECHTER, *supra* note 46, § 1:2.

When recognizing a post-mortem right of publicity, the statutes also vary in how long after death the right is retained.[69]

In most states, the right of publicity applies in commercial settings, with a distinction made between commercial use and expressive use. Under this structuring of the right, one has a right of publicity claim against unauthorized commercial use of one's likeness, but no claim against unauthorized expressive use of likeness. The next Part examines this distinction, then questions if the distinction is consistently applied.

III. Commercial Use Versus Expressive Use

A. The Right of Publicity Traditionally Only Provides a Claim in Cases of Commercial Use

Traditionally, the right of publicity only protects against unauthorized *commercial* use of likeness.[70] As previously illustrated, commercial use is seen in advertising: an individual lends an element of their likeness, such as their face or voice, to endorse a product.[71] Usually, individuals are compensated for this use of their likeness. Especially for celebrity endorsements, this compensation often comes in large sums[72] because of the value it adds to advertisements by increasing visibility and strengthening brand image.[73] The right of publicity protects against one's identity being used in this way without compensation. This protection aligns with the property justification of the right of publicity. If everyone owns their likeness and the creator of an advertisement wishes to enhance the advertisement with use of someone's likeness, that individual should be compensated for use of their property.

Midler v. Ford Motor Co.[74] illustrates how the right of publicity prevails against commercial use. After Bette Midler, an award-winning singer, turned

69. *Compare, e.g.*, ARK. CODE ANN. § 4-75-1107 (West 2023) (stating that the right of publicity expires fifty years after the individual's death) *with* CAL. CIV. CODE § 3344.1(g) (West 2023) (stating that the right of publicity expires seventy years after the individual's death).

70. MCCARTHY & SCHECHTER, *supra* note 46, § 1:3.

71. *See supra* notes 47–48 and accompanying text.

72. *See, e.g.*, Daniel Rugunya, *How Much Did Jonathan Goldsmith Get Paid for the Dos Equis Commercials and Where Is He Now?*, THETHINGS (Sept. 20, 2022), https://www.thethings.com/how-much-did-jonathan-goldsmith-get-paid-for-the-dos-equis-commercials-and-where-is-he-now/ [https://perma.cc/JGL8-YLJX] (reporting that Goldsmith was at one point compensated as much as one million dollars yearly for use of his likeness by Dos Equis).

73. *See* Lu Zhang, *Influencer Marketing: A Comparison of Traditional Celebrity, Social Media Influencer, and AI Influencer*, BOS. HOSP. REV. (Oct. 4, 2021), https://www.bu.edu/bhr/2021/10/04/influencer-marketing-a-comparison-of-traditional-celebrity-social-media-influencer-and-ai-influencer/ [https://perma.cc/XX3H-9AGD] ("The ROI (return on investment) of celebrity endorsement is salient. On average, businesses see an increase of 4% in stock price and sales after they announce signing a celebrity endorser." (citation omitted)).

74. 849 F.2d 460 (9th Cir. 1988).

down the opportunity to sing for a Ford commercial, Ford hired a "sound alike" to imitate Midler in the commercial.[75] The Ninth Circuit held that unauthorized use of a singer's voice to sell a product, even through imitation, was appropriation of property and a tort in California.[76] The court recognized that Midler's voice, as an element of her identity, had value in the marketplace, and Ford desired to capitalize on that value to enhance its commercial.[77] This case is a classic application of the right of publicity against unauthorized commercial use.

In addition to case law, statutes also identify commercial use as the primary battleground for the right of publicity. For example, Florida's right of publicity statute provides that no person shall "publicly use *for purposes of trade or for any commercial or advertising purpose* the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent" of that person.[78] Similarly, Massachusetts's right of publicity law states: "Any person whose name, portrait or picture is used within the commonwealth *for advertising purposes or for the purposes of trade* without his written consent may bring a civil action . . ."[79] Going into more detail, Illinois's right of publicity statute defines "[c]ommercial purpose" as:

> (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services;
> (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or
> (iii) for the purpose of fundraising.[80]

This type of language, contained in many right of publicity statutes,[81] makes the application of the right of publicity against commercial use clear. Advertisers cannot use one's identity to promote a product sans consent without risking a right of publicity suit.

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75. *Id.* at 461.

76. *Id.* at 463.

77. *Id.*

78. FLA. STAT. ANN. § 540.08 (West 2022) (emphasis added).

79. MASS. GEN. L. ANN. ch. 214, § 3A (West 2023) (emphasis added).

80. 765 ILL. COMP. STAT. 1075/5 (2023).

81. *See, e.g.*, IND. CODE ANN. § 32-36-1-8 (West 2023) (forbidding the use of another's right of publicity "for a commercial purpose" during their lifetime or for one hundred years after their death without written consent); OHIO REV. CODE ANN. § 2741.02 (West 2023) (forbidding the use of "any aspect of an individual's persona for a commercial purpose" without written consent); VA. CODE ANN. § 8.01-40 (West 2023) (forbidding the use of another's "name, portrait, or picture . . . for advertising purposes or for the purposes of trade" without their written consent).

B. The Right of Publicity Traditionally Does Not Provide a Claim in Cases of Expressive Use

In contrast, there is typically no right of publicity claim against unauthorized use of identity in an expressive work.[82] Expressive works are creative works made for entertainment.[83] Many right of publicity statutes explicitly create a "carve-out" for expressive works.[84] Effectively, this carve-out means creative works like movies, television shows, documentaries, plays, and books can be made about someone and feature that person's likeness without that person's consent and not violate their right of publicity.

The policy behind this carve-out is to keep artistic expression free from the burden of right of publicity restrictions. For example, this carve-out enables the multitude of movies and television series depicting fictionalized versions of real people and real events. If everyone had a right of publicity claim against expressive works, popular shows like *The Crown*,[85] *Dahmer-Monster: The Jeffrey Dahmer Story*,[86] and *Inventing Anna*,[87] all depicting fictionalized versions of real people's lives, would be subject to right of publicity suits. The carve-out allows creative works like these television shows to use individuals' names and have actors imitate appearances, voices, and mannerisms without risking a right of publicity suit.

Importantly, the carve-out serves another purpose: balancing the right of publicity with the First Amendment. Courts recognize that the right of publicity stands in tension with free speech.[88] If the right of publicity prevented all unauthorized use of likeness, without exception, the right becomes a censorship power.[89] That censorship would frustrate two aims of the First Amendment: one, facilitating a free market of ideas and two, protecting self-expression from restraint.[90] With regard to celebrities and other figures in the public eye, prioritizing the First Amendment over the

82. *See* MCCARTHY & SCHECHTER, *supra* note 46, § 1:35 (explaining that infringement "does not include use of identity in news reporting, commentary, entertainment or works of fiction and nonfiction").

83. *See id.*, § 3:10 (using motion pictures and video games as examples of expressive works).

84. *See, e.g.*, IND. CODE ANN. § 32-36-1-1 (West 2023) (excluding from liability the use of another's name or likeness in literary works, film, and other forms of art); CAL. CIV. CODE § 3344.1(a)(2) (West 2023) (exempting from liability the use of a deceased person's name or likeness in "fictional or nonfictional entertainment, or a dramatic, literary, or musical work"); WASH. REV. CODE ANN. § 63.60.070 (West 2023) (exempting from liability the use of another's name or likeness in works of fine art, literary works, musical compositions, films, and other expressive works).

85. *The Crown* (Netflix 2016).

86. *Dahmer-Monster: The Jeffrey Dahmer Story* (Netflix 2022).

87. *Inventing Anna* (Netflix 2022).

88. *E.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 803 (Cal. 2001).

89. *See id.* (voicing concerns about the right of publicity's "potential of censoring significant expression").

90. *Id.*

right of publicity in expressive works serves these aims by allowing free flowing commentary, criticism, and parody.[91] Commercial speech, on the other hand, does not serve these purposes as directly, and therefore, has historically been subject to more First Amendment limitations.[92] These limitations allow the right of publicity to prevail in the context of commercial speech, while the right of publicity and free speech are more at odds in cases of expressive speech.[93] The right of publicity carve-out for expressive works attempts to balance this tension by allowing the unencumbered use of likeness in art.

In *Hicks v. Casablanca Records*,[94] a New York federal court applied the carve-out in its traditional form. Casablanca Records produced the movie *Agatha*, a fictionalized version of the real-life event of Agatha Christie going missing, without the involvement of Christie's estate.[95] Christie's estate claimed this was a violation of Christie's right of publicity.[96] The court held that First Amendment protections afforded to fictional works outweighed any right of publicity interest.[97] Specifically, the court stated, the right of publicity does not prevail "where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and in such novel or movie it is evident to the public that the events so depicted are fictitious."[98] This case exemplifies how the carve-out for expressive works applies.

The carve-out for expressive works stands in contrast to commercial use, providing a delineation of where the right of publicity does and does not apply. In the same way states' right of publicity statutes spell out prohibitions on unauthorized commercial use, the same statutes explicitly identify the carve-out for expressive works. For example, Indiana's right of publicity statute provides that the right of publicity does not create a claim for unauthorized use of likeness in "[l]iterary works, theatrical works, musical

91. *See id.* ("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.") (quoting Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 460 (Cal. 1979) (Bird, C.J., concurring)).

92. *See* Christina Smedley, *Commercial Speech and the Transformative Use Test: The Necessary Limits of a First Amendment Defense in Right of Publicity Cases*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 451, 458–59 (2014) (acknowledging justifications for not providing commercial speech with full First Amendment protections); *Comedy III Prods., Inc.*, 21 P.3d at 802 (noting that "the right of publicity may often trump" advertisers' right to use celebrity likenesses because of the lesser First Amendment protections that commercial speech receives).

93. *See Comedy III Prods., Inc.*, 21 P.3d at 802 (acknowledging the limits to First Amendment protections for commercial speech but noting that expressive works receive more First Amendment protection even when "undertaken for profit").

94. 464 F. Supp. 426 (S.D.N.Y. 1978).

95. *Id.* at 428–29.

96. *Id.* at 429.

97. *Id.* at 433.

98. *Id.*

compositions, film, radio, or television programs."[99] This type of statutory language draws a sharp divide between expressive use and commercial use, applying the right of publicity only to the latter.

The carve-out for expressive works is a hurdle to the argument that the right of publicity can and should be applied against digital replicas. Digital replicas are likely to be used in expressive works—fictional stories or retellings of events in movies and television shows. Under the traditional application of the right of publicity, there would be no right of publicity claim against works like movies since a movie containing a digital replica is an expressive work rather than a commercial work. Allowing a right of publicity claim against movies and television requires expanding the right beyond the commercial-versus-expressive framework. And, as the next Parts detail, both courts and New York's legislature have begun to do so.

C. In Practice, the Theoretical Opposite Treatment of Commercial Use and Expressive Use Is Inconsistently Applied

Upon closer inspection, the line between commercial use and expressive use is not so clear. The simplest formation would be: if a likeness is used without consent in a commercial setting, then the right of publicity wins; if a likeness is used without consent in an expressive setting, then free speech wins. Indeed, secondary sources on the right of publicity suggest this is the most accurate delineation of the right.[100] However, the law recognizes the social utility in both the right of publicity and protections for free speech,[101] and in grappling with this tension, courts have attempted to formulate an appropriate balancing test for the right of publicity and expressive works.[102] But, the very existence of a test to balance right of publicity interests with free speech interests suggests one interest is not always stronger than the other. If expressive use always prevails over the right of publicity, then no balancing would be necessary.

The predominant test courts use to balance the right of publicity and free speech is the "transformative use test."[103] The principles underlying the transformative use test in the right of publicity context find their roots in copyright law. "Fair use" is an affirmative defense to copyright infringement;

99. IND. CODE ANN. § 32-36-1-1 (West 2023).

100. *See, e.g.*, MCCARTHY & SCHECHTER, *supra* note 46, § 1:3 (defining the right of publicity as "the inherent right of every human being to control the commercial use of his or her identity" but cautioning that this right is not absolute).

101. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805–06 (Cal. 2001) (balancing the state's interest in preventing the misappropriation of likeness against the constitutional interest in free expression).

102. *See* Smedley, *supra* note 92, at 452 (noting the existence of several different tests used by various jurisdictions to balance publicity rights against First Amendment rights).

103. *Id.*

fair use developed in common law but is codified in the Copyright Act of 1976.[104] The statute does not define "fair use" but rather provides four flexible factors for courts to apply.[105] The fair use factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[106]

"Transformative use" developed out of the first factor when the Supreme Court interpreted that factor as seeing if the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"[107] To answer this question, courts often ask if the original work is only a "raw material" used to create the new work.[108] The more creative additions, the more transformative the new work is, and the less the other factors are weighed.[109] Recently, as part of a fair use analysis, the United States Supreme Court applied transformative use in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.[110] The Court clarified that the factor should not be interpreted to mean that any added expression makes a work transformative.[111] Rather, the important determination is if the new work has a purpose distinct from the original.[112]

Borrowing from this area of copyright law, the California Supreme Court, in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,[113] formulated a similar, yet separate, transformative use test to apply to the right of publicity.[114] The court recognized, similar to fair use in copyright law, that applying the right of publicity required balancing parties' interests of protecting ownership of their likeness and protecting creative expression.[115]

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104. TCA Television Corp. v. McCollum, 839 F.3d 168, 178 (2d Cir. 2016).

105. *Id.*

106. 17 U.S.C. § 107.

107. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994).

108. *See, e.g.*, Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176 (9th Cir. 2013) (applying an understanding of transformative use that asks if the original work is merely "raw material" added to additional elements).

109. *Id.* at 1175–76.

110. 143 S. Ct. 1258, 1273, 1274–75 (2023).

111. *Id.* at 1283.

112. *Id.* at 1282–83.

113. 21 P.3d 797 (Cal. 2001).

114. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 810–11 (Cal. 2001). This case occurred before *Goldsmith*, and therefore, in formulating a transformative use test for the right of publicity, does not reference or incorporate the guidance of the Court regarding transformative use for copyright in *Goldsmith*.

115. *Comedy III Prods., Inc.*, 21 P.3d at 806.

The court formulated a similar inquiry to the fair use factors, and even more similarly, focused its inquiry on whether the use of likeness is a literal depiction or if the work is "transformative."[116] The court described the tipping point as "[w]hen 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."[117] At this point, "the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist."[118]

Further, the court elaborated in ways that continue to mirror the fair use inquiries. The transformative use test can be rephrased to ask if the likeness is just one of the "raw materials" used to create the work or if the likeness is the sum of the work.[119] If the likeness is just a raw material, the work is more likely to be transformative, which means that it is likely protected by free speech and not in violation of the right of publicity. More, imitating the fourth fair use factor, courts should ask: "[D]oes the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted?"[120] For celebrities, the right of publicity protects the labor expended to create economic value in their likeness.[121] By asking from where the value of the work derives, the court endeavors to balance protection of that economic value with stifling of creative expression. If the answer is yes, that an expressive work's value derives mainly from the fame of the celebrity depicted, then that value belongs to the celebrity, so the right of publicity should prevail.

The court in *Comedy III* applied its new transformative use test to the facts of the case. An artist created a charcoal drawing of the Three Stooges and then used that drawing to print t-shirts featuring the image of the Three Stooges.[122] The actors asserted their right of publicity under California's right of publicity statute, while the artist asserted his right to free speech.[123] The court found that the t-shirts depicting the Three Stooges were not sufficiently transformative since the artist's skill was used to create literal depictions of the actors rather than adding a creative contribution to the raw material of the actors' image.[124] Further, the sale of the t-shirts exploited the actors' image for economic gain, reducing the actors' ability to capitalize on the economic

116. *Id.* at 807–08.
117. *Id.* at 808.
118. *Id.*
119. *Id.* at 809.
120. *Id.* at 810.
121. *Id.* at 804–05.
122. *Id.* at 800–01.
123. *Id.* at 800–02.
124. *Id.* at 811.

value of their image themselves.[125] The court held the right of publicity prevailed over the artist's free speech.[126]

Two years later in *Winter v. DC Comics*,[127] the California Supreme Court applied its transformative use test but illustrated the opposite outcome: when an expressive work is sufficiently transformative to prevail over a right of publicity claim.[128] Here, a comic book artist depicted two well-known musicians in his comic book.[129] However, they were drawn as half-worm, half-human offspring of a supernatural worm.[130] The court contrasted this fanciful drawing to the literal drawing of the Three Stooges in *Comedy III* and found the musicians' identities had been sufficiently transformed.[131] Additionally, the musicians' ability to derive economic value from their likeness, largely via live performances and related merchandise, was unaffected by the sale of the comic books.[132] Therefore, the comic books were entitled to robust First Amendment protection against the musicians' right of publicity.[133]

Overall, the transformative use test does not fit nicely into the commercial versus expressive framework. The test erodes the framework by separating expressive works into sufficiently transformative and not transformative, opening up the possibility for a case where the right of publicity prevails over an expressive work. This stands in contrast to the traditional formulation of the right of publicity where free speech *always* protects expressive works. The result in *Comedy III* itself departs from this tradition. The artist in *Comedy III* was not using the image of the Three Stooges in an advertisement to imply that the actors were endorsing a product,[134] like Ford was in *Midler*.[135] The court in *Comedy III* explicitly stated that the case did not concern commercial speech because the portraits of the Three Stooges were expressive works.[136] If the line between commercial and expressive use was as clear as some commentators suggest,

125. *See id.* ("[W]e are concerned not with whether conventional celebrity images should be produced but with who produces them and, more pertinently, who appropriates the value from their production.").

126. *Id.*

127. 69 P.3d 473 (Cal. 2003).

128. *Id.* at 480.

129. *Id.* at 476.

130. *Id.*

131. *Id.* at 480.

132. *See id.* at 479 ("The characters and their portrayals do not greatly threaten plaintiffs' right of publicity. Plaintiffs' fans who want to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for conventional depictions.").

133. *Id.* at 479–80.

134. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802 (Cal. 2001).

135. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

136. *Comedy III Prods., Inc.*, 21 P.3d at 802.

then that would be the end of the inquiry. The artist would win because the work is expressive, and therefore, it is protected by the First Amendment. Yet, in *Comedy III*, the artist loses to the actors' right of publicity.[137]

The mismatch between the transformative use test and the commercial versus expressive framework highlights the need for updated right of publicity law. In its application of the transformative use test, the California Supreme Court indicated a willingness to let the right of publicity push into the carve-out for expressive works. By asking from where the economic value of the challenged work derives, the court recognized that expressive works can, in the same way commercial works do, misappropriate the economic value of likeness.[138] Therefore, expressive works can also infringe on an individual's right of publicity, despite their categorization as expressive works. This recognition expands the world of works that can infringe on the right of publicity. If the world of works that can infringe on the right of publicity is expanding, the law needs to expand accordingly.

D. The Transformative Use Test, When Applied to Digital Replicas, Favors Actors' Rights

Further, if applied to digital replicas in expressive works, the transformative use test comes out in favor of the right of publicity over free speech. The chief concern of the transformative use test is whether the likeness is a literal reproduction, or whether the likeness has been transformed with creative elements. Digital replicas are a reproduction of an actor's likeness, analogous to the drawings of the Three Stooges in *Comedy III*.[139] In both instances, the creator is producing a literal depiction of an actor. In fact, the producers of the most innovative digital replica technology boast how literal the depiction can be.[140] The actor's likeness is not just a "raw material" used in a larger creation,[141] but rather, the literal depiction is the end game of the digital replica. Per the transformative use test, when the reproduction of likeness is a mere literal depiction, the right of publicity interest is stronger than the free speech interest.[142]

To the contrary, there may be room for argument if a digital replica builds on an actor's likeness in a significantly creative way. For example, a

137. *Id.* at 811.

138. *See id.* at 804–05 (acknowledging the labor that the Three Stooges and other celebrities put into creating economic value out of their likeness).

139. *See id.* at 811 (calling the defendant's drawing of the Three Stooges "literal, conventional depictions of the Three Stooges" made to "exploit their fame").

140. *See Realtime Digital Human Rendering*, *supra* note 18 (describing Digital Domain's realistic rendering of humans).

141. *See Comedy III Prods., Inc.*, 21 P.3d at 809 (explaining the test for determining whether a celebrity's likeness is merely a "raw material[]" in a creative project or "is the very sum and substance of the work in question").

142. *Id.* at 808.

digital replica may render the likeness of an actor as a member of an alien species. In that case, it could be argued that the digital replica has "transformed" the actor's likeness significantly, and therefore, it should be afforded First Amendment protection, as the comic books in *Winter* were.[143] Thus, producers of digital replicas are likely to argue that there is creativity in the process of programming a digital replica, especially when it recreates an actor in an imaginative form.

However, even when creative changes are made to the actor's likeness in a digital replica, the secondary economic factor distinguishes digital replicas from the cartoons in *Winter*. The court in *Comedy III* posed a crucial question in its transformative analysis: from where does the economic value of the work derive?[144] In *Winter*, the court determined that the comic books' depiction of the musicians as worms did not threaten the musicians' right of publicity because fans would not substitute reading the comic book for purchasing conventional depictions of them.[145] In contrast, a digital replica is a direct substitute for the actor's performance. Moviegoers are likely to unwittingly equate a digital replica with a live performance, since the result is the same: the actor appears in the movie. When a digital replica is used in a movie, the economic value derives from the actor's likeness; well-known actors, even if reproduced as aliens, are likely to positively influence audience numbers and ticket sales for the movie.[146] A digital replica is likely used precisely *because* including the actor increases the likelihood of economic success for the movie.[147] When viewed through this economic lens, digital replicas are not sufficiently transformative to receive full First Amendment protection against right of publicity claims.

Next, the proposal to expand the right of publicity to protect actors from digital replicas is not unprecedented. A recently enacted New York right of publicity statute explicitly applies the right of publicity to protect against select uses of digital replicas.[148] This statute is examined closely in the next Part.

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143. *See* Winter v. DC Comics, 69 P.3d 473, 480 (Cal. 2003) ("Here, as we have explained, the comic books are transformative and entitled to First Amendment protection.").

144. *Comedy III Prods., Inc.*, 21 P.3d at 810.

145. *Winter*, 69 P.3d at 479.

146. *See Top 100 Stars in Leading Roles at the Domestic Box Office*, THE NUMBERS, https://www.the-numbers.com/box-office-star-records/domestic/lifetime-acting/top-grossing-leading-stars [https://perma.cc/R8YY-5ATN] (listing actors in order of their movies' box office success and showing, for example, that Samuel L. Jackson has contributed to a domestic box office total of over $5.7 billion across his films).

147. *See* Winick, *supra* note 14 (asserting that using digital replicas to fill in for deceased movie stars allows movie studios to "continue to rake in the dough").

148. N.Y. CIV. RIGHTS LAW § 50-f (McKinney 2023).

IV. New York's Right of Publicity Statute

In 2021, New York passed a right of publicity statute that specifically addresses digital replicas.[149] In fact, it explicitly grants a right of publicity claim against unauthorized use of digital replicas.[150] The statute provides that anyone who uses a "deceased performer's digital replica in a scripted audiovisual work as a fictional character or for the live performance of a musical work shall be liable for any damages sustained by the person or persons injured as a result thereof if the use occurs without prior consent from the person."[151] A "digital replica" is defined as

> a newly created, original, computer-generated, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual.[152]

Notably, the statute breaks entirely from the traditional right of publicity framework of commercial versus expressive works by providing protection against "scripted audiovisual work[s]" with "fictional character[s]," which are expressive works such as movies and television.[153] The enactment of this statute represents a legislative recognition of the ability of the right of publicity to protect actors against digital replicas, as well as the need to extend such protection.

The statute is the result of extensive efforts of, and negotiations between, SAG-AFTRA and the Motion Picture Association.[154] SAG-AFTRA sought protections from potential exploitative uses of likeness with new technologies. The union's website warned performers that "the current status of the law is antiquated in light of new technologies that enable unprecedented exploitation of your likeness—both during and after your lifetime."[155] On the other side of the debate, the MPA sought to maintain the

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149. Andrea L. Calvaruso & Taraneh J. Marciano, *New Year Brings Expanded Protections for Publicity and Privacy Rights Under New York Law*, INTELL. PROP. & TECH. L.J., Feb. 2021, at 12, 12.

150. N.Y. CIV. RIGHTS LAW § 50-f(2)(b) (McKinney 2023).

151. *Id.*

152. *Id.* § 50-f(1)(c).

153. *See* Balin et al., *supra* note 13, at 9–10 (theorizing that a cause of action under New York's statute would likely arise from an unauthorized use "as part of a movie or television show") (quoting N.Y. CIV. RIGHTS LAW § 50-f(2)(b) (McKinney 2022)).

154. Judith B. Bass, *New York's New Right of Publicity Law: Protecting Performers and Producers*, N.Y. ST. BAR ASS'N J., May/June 2021, at 33, 34.

155. *Id.* at 35 (quoting *Digital Image Rights & Right of Publicity: #ProtectMyImage*, SAG-AFTRA, https://www.sagaftra.org/get-involved/government-affairs-public-policy/digital-image-rights-right-publicity#:~:text=Union%20contracts%20and%20state%20and,specific%20uses%20of%20a%20likeness [https://perma.cc/U44C-DVLT]).

freedom to use celebrities' likeness to engage in constitutionally protected speech.[156] The MPA was concerned about the effects of a right of publicity statute of this kind on its members' ability to report celebrity news and otherwise use celebrities' names and likenesses to tell stories.[157] The new statute, which passed with only one dissenting vote in New York's State Assembly, represents a compromise between these interests.[158] The statute affords significant protection against digital replicas while maintaining a balance with First Amendment concerns.

However, the balancing elements of the statute create a loophole for parties using digital replicas without consent. The statute allows the unauthorized use of a digital replica if a "conspicuous disclaimer in the credits" is provided and states "the use of the digital replica has not been authorized by the person" depicted.[159] Essentially, this disclaimer loophole guts the protection supposedly provided by the statute. Placing a disclaimer in the credits is a relatively easy task, especially to avoid liability to the replicated person. Further, use of a digital replica with a disclaimer still deprives the actor of the job and the ability to control their performance.

Additionally, the New York statute only provides this protection to "*deceased* performer[s]," leaving living performers still vulnerable to exploitation.[160] This distinction seems counterintuitive. Why protect deceased performers from economic loss, but not those still alive and in need of career opportunities and income? While estates and families of deceased performers benefit financially from controlling the rights to the likeness of a deceased performer, living performers are actively making a living off the economic value of their likeness to support themselves during their lifetime.[161] Prioritizing the right of publicity for deceased performers over living ones overlooks the threat digital replicas pose to actors still in the midst of active careers. Overall, the New York statute takes a significant step by directly addressing digital replicas in expressive works but falls short of providing robust protection for actors.

The next Part advocates for expanding the right of publicity further than the New York statute and examines Supreme Court precedent that supports protecting actors' ability to control their performances and careers.

156. *Id.* at 34.
157. *Id.* at 36–37.
158. *Id.* at 34.
159. N.Y. CIV. RIGHTS LAW § 50-f(2)(b) (McKinney 2023).
160. *Id.* (emphasis added).
161. *See supra* note 22 and accompanying text.

V. The Case for Expanding the Right of Publicity

The law should continue to push in the direction of the New York statute, expanding the right of publicity into the carve-out for expressive works, but should go further to protect the economic value of a living actor's likeness against digital replicas. Other states, particularly those like California with extensive entertainment industries, should consider legislation similar to New York's but with more robust protection against digital replicas. If movie and television works using digital replicas are given full First Amendment protection against right of publicity claims, or statutes leave gaps in protection like those left by New York's, living actors lose the ability to use the right of publicity to protect the economic value of their likeness. Further, without new statutes to address digital replicas specifically, courts will have to construe how outdated right of publicity statutes should apply to digital replicas.

Unauthorized use of digital replicas is exploitation. Actors provide economic value that they have built through performance and reputation.[162] Unauthorized use of digital replicas capitalizes on the value of an actor's likeness to the benefit of creators like producers and directors[163] but to the detriment of the actor. The digital replica deprives the actor of an employment opportunity[164] and waters down ownership of likeness. Without the threat of a lawsuit, a producer has little incentive to pay Tom Cruise to star in his next movie when the producer could instead use a digital replica.[165] The digital replica gives the director creative control of Cruise's performance, while still drawing box office numbers that come with a marquee star.[166] Further, while multimillionaire Tom Cruise may not be the most sympathetic plaintiff, digital replicas also significantly threaten the developing careers of "unknown" actors. An unknown actor could be hired once, scanned, and then never hired again.[167] The usefulness of digital

162. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804–05 (Cal. 2001) (acknowledging that the social utility in the right to publicity coupled with the time and energy needed to develop prominence that would bring economic returns mean that the identifiable presence the comedians in the case toiled to form created a recognized value).

163. *See* Brian Contreras, *AI Is Here, and It's Making Movies. Is Hollywood Ready?*, L.A. TIMES (Dec. 19, 2022, 5:00 AM), https://www.latimes.com/entertainment-arts/business/story/2022-12-19/the-next-frontier-in-moviemaking-ai-edits [https://perma.cc/2L8L-G68M] (giving an example of AI helping a director and movie studio alter performances in a film so that it received a PG-13 rating).

164. *Digital Identity and the Future of Acting*, *supra* note 14.

165. *See id.* (pointing out the potential for productions to use "digital resurrections" to take advantage of celebrity draw normally out of their production budget).

166. *See Top 100 Stars in Leading Roles at the Domestic Box Office*, *supra* note 146 (listing actors in order of their domestic box office totals and noting that Tom Cruise's films have generated over $4.8 billion at the domestic box office).

167. *See* Maddaus, *supra* note 37 (revealing the process that background actors go through on set and the releases they sign).

replicas must be countered to ensure that actors retain ownership of the value of their likeness and are not rendered relics of the past.

Notably, the U.S. Supreme Court recognizes the importance of performers' ability to protect their likeness. In *Zacchini v. Scripps-Howard Broadcasting Co.*,[168] the single right of publicity case to come before the Supreme Court,[169] a news station broadcasted a carnival performer's entire act on its network without the performer's consent.[170] The Supreme Court held that the First Amendment did not require finding in favor of the news station.[171] Instead, the performer's right of publicity prevailed over the broadcast station's First Amendment claim.[172] The policy reasoning the Court provided to support this result is particularly applicable to protecting living actors against exploitative uses of digital replicas.

To support finding in favor of the performer, the Court highlighted that the unauthorized duplication of Zacchini's performance posed "a substantial threat to the economic value" of his performance.[173] Specifically, it went "to the heart of [Zacchini's] ability to earn a living as an entertainer."[174] In the exact same way, use of digital replicas goes to the heart of actors' ability to earn a living as entertainers. Digital replicas eliminate the need to hire the actor themself by duplicating their performance.[175] When the actor themself is not the only source of a performance, much like how the broadcast in *Zacchini* meant Zacchini was no longer the sole source of his act,[176] the economic value of the actor's performance is reduced.

Further, the Court went as far as to say that the "*strongest case*" for a right of publicity is *not* when an entertainer's reputation is being used to sell a commercial product but "may be" when the case presents "the appropriation of the very activity by which the entertainer acquired his reputation in the first place."[177] Digital replicas do just that: they appropriate an actor's performance—the very activity by which actors make their reputation. Since, in the eyes of the Supreme Court, this type of appropriation makes the strongest case for enforcing a right of publicity, the application of

168. 433 U.S. 562 (1977).

169. Faber, *supra* note 65.

170. *Zacchini*, 433 U.S. at 563–64.

171. *Id.* at 578–79.

172. *Id.* at 576, 578–79.

173. *Id.* at 575.

174. *Id.* at 576.

175. *See Digital Identity and the Future of Acting*, *supra* note 14 ("Well, one could hardly deny that [AI] technology does certainly take roles away from living performers.").

176. *See Zacchini*, 433 U.S. at 575–76 (observing that "if the public can see [Zacchini's] act free on television, it will be less willing to pay to see it at the fair" and noting that such a result represents "the appropriation of the very activity by which the entertainer acquired his reputation in the first place").

177. *Id.* at 576 (emphasis added).

the right of publicity against unfettered use of digital replicas is consistent with the Court's decision in *Zacchini*.

Likely, using the right of publicity to control digital replicas will be met with concerns over stifling creative expression and First Amendment protection. However, providing actors a right of publicity claim against unauthorized digital replicas does not open a floodgate to eliminating all First Amendment protection for expressive works. Like in *Zacchini*, when the focus is on appropriating the very activity that makes an actor's likeness valuable[178]—acting—there is a ready distinction between digital replicas and other uses of likeness in expressive works. The distinction lies in making an expressive work *about* someone versus using a digital replica to put an actor, playing a character, *in* an expressive work.

In the first instance, the expressive work might be a creative retelling of Meryl Streep's life, where the character of Meryl Streep is played by another actor. The work is *about* Streep. Here, there is no misappropriation of the value of Streep's acting since the performance is being given by another actor. Under this Note's proposal, this expressive work remains fully protected by the First Amendment against a right of publicity claim by Streep. SAG-AFTRA, despite their efforts toward expanding the right of publicity, agree that the right of publicity should not chill these kinds of expressive works.[179] Works of this kind serve the First Amendment's purpose of allowing freedom to creatively discuss, criticize, and parody public figures.[180]

In the latter hypothetical situation, a digital replica of Meryl Streep is used to portray her character of Miranda Priestly in a new sequel to *The Devil Wears Prada*.[181] Now, Streep herself is *in* the work, playing a character. By using the digital replica instead of hiring Streep to perform herself, the work appropriates Streep's acting, the very activity that makes Streep's likeness valuable in the first place. This Note proposes that this is the instance where Streep should have a right of publicity claim against the unauthorized use of her likeness. The digital replica of Streep undermines the need to hire Streep to perform herself, in the same way the duplication of Zacchini's act in

178. *Id.*

179. *See* Sarah "Alex" Howes, *Digital Replicas, Performers' Livelihoods, and Sex Scenes: Likeness Rights for the 21st Century*, 42 COLUM. J.L. & ARTS 345, 345, 347 (2019) (stating, as the Director and Counsel of Government Affairs and Public Policy at SAG-AFTRA, that the right of publicity should "not be used to prevent the creation and dissemination of critical stories about real persons or events").

180. *See* Winter v. DC Comics, 69 P.3d 473, 478 (Cal. 2003) ("Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope.").

181. THE DEVIL WEARS PRADA (20th Century Fox 2006).

Zacchini undermined the need to hire Zacchini himself.[182] In this case, the aims of the First Amendment are not as squarely served by protecting the digital replica with free speech. Providing Streep with a right of publicity claim against the producers of this film is not giving her censorship power over a work about her,[183] but rather preventing the film from infringing on her right to control her own likeness and from benefiting economically from her performance to her detriment.

Now, a more complicated hypothetical involves a combination of the two previous examples: a fictionalized biographical movie about Meryl Streep where the character of Meryl Streep is played by a digital replica of Meryl Streep. Here, the First Amendment concerns of protecting the freedom of the public to criticize, comment, and parody are strongly in play and weigh in favor of protecting this use of a digital replica from a right of publicity claim. On the other hand, the digital replica is misappropriating Streep's acting, so the policy underlying *Zacchini* suggests protecting Streep with a right of publicity claim. Under New York's statute, this case would likely come out in favor of the First Amendment, and Streep would be denied a right of publicity claim.[184] New York's statute provides a cause of action only when a digital replica is used as a "fictional character" and not when the digital replica is a representation of the "performer as himself or herself."[185] Even if other states implemented similar exceptions, the market would likely render the economic harm to actors from this type of work minimal. Audiences will be interested in only so many fictionalized biographies about each actor. Thus, digital replicas used to depict actors playing themselves do not pose nearly as large of a threat to actors' careers as repeated lost opportunities to play fictional characters.

Additionally, the economic value of actors' performances can be protected without a total ban on digital replicas. If a producer wishes to use a digital replica, the producer is free to contract with an actor for their consent.[186] Applying the right of publicity to use of digital replicas does not put a complete stop to the technological and artistic possibilities that digital

182. *See Zacchini*, 433 U.S. at 576 (stating that "the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer").

183. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 807 (Cal. 2001) ("What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the 'name, voice, signature, photograph, or likeness' of the celebrity.").

184. This point momentarily ignores the inapplicability of New York's statute to living performers for the sake of analysis.

185. N.Y. CIV. RIGHTS LAW § 50-f(2)(b), (2)(d)(ii) (McKinney 2023).

186. *See* Crabtree-Ireland, *supra* note 28 (expressing SAG-AFTRA's desire to work with employers to discuss acceptable uses of AI in storytelling).

replicas create; rather, it only ensures actors are compensated for the use of their likeness and talents.[187]

Further, digital replicas may create positive possibilities for actors. An actor could scan himself at age twenty, and then when he is sixty, his twenty-year-old scan could play roles that he no longer could be cast in. Or the actor could contract with production companies for his scan to star in a movie while he films another movie live, expanding the amount of work the actor could accomplish. However, to capitalize on these advantages, actors need control of digital replicas. Providing actors a right of publicity claim against unauthorized digital replicas enables them to control the reproduction of their likeness, and ultimately, control how digital replicas will affect their careers.

Conclusion

Expanding the right of publicity provides a viable path to protect actors from the tangible threat posed by digital replicas. The right of publicity has firmly broken out of its original commercial use box and found new bite against unauthorized use of likeness in expressive works. New York's right of publicity statute marks the beginning of how the right of publicity can combat exploitative use of digital replicas. But states—backed by U.S. Supreme Court precedent recognizing the importance of performers' ability to protect the economic value of their performances—should consider taking further proactive steps to empower actors to retain control over their likeness.[188] By bolstering protections, lawmakers can set the tone for how the law will treat extremely personal exploitation and the value of human creativity as technology advances.

187. *See Zacchini*, 433 U.S. at 578 (explaining that Zacchini "does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it"); *see also* Crabtree-Ireland, *supra* note 28 (assuring that SAG-AFTRA is not seeking to ban creative AI use but rather merely wants to ensure that the "new creative possibilities" do not "come at the expense of people").

188. *See Zacchini*, 433 U.S. at 575–76, 578–79 (acknowledging that broadcasting Zacchini's whole act "poses a substantial threat to the economic value" of his performance and thus approving of Ohio's choice to protect Zacchini's right of publicity from that injury).