

Digital Replicas, Performers' Livelihoods, and Sex Scenes: Likeness Rights for the 21st Century

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I would like to thank June Besek and Columbia Law School for the opportunity to participate on this panel to discuss the appropriate breadth, waivability, and term of the right of publicity. New technologies and the fact that the New York bill will not go retroactive to protect already deceased performers has made this a more pressing issue that needs legal solutions, not just one.¹

What should the right of publicity protect? The right of publicity is a property right that should protect rights to company branding, advertisements, merchandise, products, and professional performance. The right of privacy should protect against very real emotional harm caused by abusing a likeness; non-consensual sex scenes are certainly on my mind right now.

The Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) is a labor union, which means our primary mission is to ensure economic justice and fair and safe working conditions for our members. This union has pioneered protections for groups of artists and journalists once thought impossible. We fight for good union contracts, marketplace rights, child protections, general safety, and laws and regulations to prevent or stop unethical industry practices. It should come as no surprise that the union is experiencing attacks on union contracts, organizing, basic consent on the internet, and intellectual properties generally. Unfortunately, as a result, this union has to sometimes question the bounds of the First Amendment in this digital era. SAG-AFTRA represents a broad swath of creators. We represent film actors, program hosts, recording artists, singers, voiceover artists, online influencers, and other media professionals. This union also belongs to an image rights coalition made up of other unions and organizations representing entertainers.

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1. New York state is currently debating whether to update its hundred year plus old privacy law and to establish an independent, post-mortem right of publicity law. *See* N.Y. Civ. Rights Law §§ 50-51 (McKinney 2019).

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I have the honor of representing 160,000 entertainers and journalists who also happen to be public figures. These are public figures who want to protect their families and possess a degree of control over how their likeness is used in the marketplace. No SAG-AFTRA member is the same; we represent 160,000 unique individuals with different business objectives, views, and priorities when it comes to likeness rights. That being said, not one single performer we have spoken to wants their likeness to enter the public domain upon death. The right of publicity and rights to digital replicas have long been a priority for the union. SAG-AFTRA members desire autonomy over their legacy and career. If there is a value to a likeness after death, their family, close friends, or a designated charity should receive the fruits of their labors. It is also worth noting that some of our members want to be excluded from commercial exploitation altogether. For example, news broadcasters are concerned their reputations as journalists would be significantly harmed if ever associated with a company or put on a T-shirt or on a doll.

SAG-AFTRA members work hard to achieve any amount of marketplace value in the entertainment industry. Our members often self-subsidize much of their training and arts experience to be the talented individuals you see at concerts, on Broadway stages, and in the movies. Image and voice rights are essential components of a functional modern marketplace that returns value to labor. Value is not simply measured by celebrity gossip magazines or a large online following. Value may be a certain look, a certain voice, or one extraordinary performance or song that sticks with us. There is undeniable value to images and voices and so the question becomes, who should benefit from this value? A family or a corporation? Or, if there is consent, how about both? That seems like a win-win.

I. IN COMMERCIAL EXPLOITATION

In terms of a ‘traditional’ right of publicity violation, if a company places an entertainer or any American’s face on a T-shirt or advertisement, we can assume there was value to that face. Otherwise the company, in this example, would not have stolen it. Misappropriation is in no way just about famous celebrities. In this era, the line demarcating celebrity is blurry. I hear from less famous performers about theft at jazz festivals, local tourist shops, and in local ads. Each successful artist has a market. It just might not be apparent to others that these markets may be smaller. Without question, entertainers and their families benefit from merchandise. Musicians often make much of their income from these products. Merchandise is what keeps bands on the road and in the industry. Merchandise helps keep widows in a good financial situation. When musicians pass away, their families experience a massive demand by fans for merchandise as well as considerable theft and exploitation by companies.

I want to turn next to discuss traditional advertisement rights. This union is currently facing a devastating loss of commercial work. Why? Brands want more for less and the internet seems to be encouraging this. Our members are paid to appear on products and commercials or in print advertisements. This is how many performers make a living. This is how they can afford to perform in low budget films

and stage productions of *Hamlet*. Even rank and file members leverage exclusivity to a brand in exchange for ongoing compensation. Performers may re-agree every twenty-one months to exclusivity to the same brand for two to five to ten to fifteen years, thereby being paid initial or double compensation every twelve weeks a commercial is still in distribution. These agreements along with print modeling income have paid for a home and college tuition for their children.

II. DIGITAL REPLICAS—THE NOVEL ISSUE OF THE DAY

The impact of digital replicas and voice and image manipulation software on entertainers and expressive works is yet to be fully understood. I predict we will be facing problems well outside the more obvious uses that are happening right now, where a content creator digitally inserts a household name or someone who played a memorable character into a new movie or video game. For example, Gwen Stefani in the *Guitar Hero* game, Peter Cushing in *Star Wars*, or Sean Young in *Blade Runner 2049*, which were done with the consent of Peter Cushing's estate and Sean Young, just to be clear of that.² We also have today sold-out hologram concerts at \$200 a piece of dead musicians, again done with consent, which we appreciate.³

So, what is outside the right of publicity? I think people might be surprised by my views on this. There should absolutely be bounds to the right of publicity to prevent censorship and to do away with frivolous lawsuits. Most uses of an image should fall well outside the scope of the right of publicity. The right of publicity should not be used to stop murals on city streets or prevent the sale of paintings in galleries. It should not be used to halt publications of books or newspapers or to keep names out of a song lyric. It should also not be used to prevent the creation and dissemination of critical stories about real persons or events. It should not be used to chill satire, parody, comedy, or criticism. A screenwriter may decide to make things up in a biopic, as writers often do, to the displeasure of the subject. I would know: I write plays about real people and real events. The right of publicity is an economic right. It is not about hurt feelings and it should be about economics. There is nothing morally wrong with economic rights. Economic rights provide union wages, healthcare, pensions, and licensing royalties. Economic rights are human rights.

Privacy rights should be about hurt feelings. I would argue a privacy right should be narrow since its purpose is to address the kinds of commercial misappropriation that cause harm to a person's mind as defined by society at that time. I am sure we would all be disturbed by what minor offenses courts felt were emotionally harmful and legally actionable for much of the twentieth century.

2. Peter Allen, *A Genuinely Believable CGI Actor? It Won't Be Long*, ABC NEWS (Jan. 19, 2017, 3:10 AM), <https://perma.cc/JD58-4DY3> (Cushing's estate consenting to use of Cushing's image); Movienewz.com, *Sean Young Talks Blade Runner 2049 and VFX*, YOUTUBE (Oct. 20, 2017), <https://perma.cc/YCE2-AE3M>.

3. See, e.g., Wendy Lee, *Roy Orbison Hologram Concert in L.A. Invites Awe and Debate*, WASH. POST (Oct. 6, 2018, 5:00 AM), <https://perma.cc/M7D2-K884>.

There is one use of a persona that I feel strongly should be protected by privacy laws: non-consensual sex-scenes, deep-fakes porn, and non-consensual nude performances. SAG-AFTRA members are deeply concerned and troubled by digital doubling violations in sex scenes and the rise of nonconsensual deepfakes pornography. The latter are disturbing internet video produced with artificial intelligence software that uses a neural network of publicly available images to depict an individual as performing pornographic works without consent. The problem is more complex than right of privacy or right of publicity alone, and the problem goes beyond pornography or this specific deepfakes technology. As it pertains to non-consensual pornography, this union has engaged with tech platforms and experts to understand what could be done voluntarily and what requires legal interference. With tailored legislation, individuals can receive modernized digitized sex scene rights that respond to this abhorrent new form of image-based sexual abuse.

Unfortunately, as the #MeToo movement has revealed, many workers in the entertainment industries are victims of sexual harassment, assault, or even rape. These videos trigger post-traumatic stress syndrome and have further made the internet unsafe for Americans. SAG-AFTRA has always fought for the strongest protections to guarantee performers the right to not appear nude in any kind of video content. We take this abuse seriously and will not allow technology to provide an unethical director or producer a loophole to avoid union contract protections on nudity and sex scenes.

III. RESTRICTIONS ON THE FREEDOM TO CONTRACT

Now to restrictions on the freedom to contract. There are valid reasons to limit how these likenesses can be transferred. However, the union approaches such potential restrictions with care and advice. The ability to waive a privacy right or transfer a likeness has been a hot topic and I fear its focus misdirected. The more practical real-world problems with likeness agreements are bad licensing deals, and potentially bad management deals. Not involuntary transfers by governments that give ex-spouses or creditors absolute control over an identity. It is true that judges have reviewed licensing clauses in personal services agreements too literally,⁴ which could theoretically manifest into a problem. But the sky is not falling. The problem of losing one's identity can easily be remedied with legislation, if the problem manifests, to ensure property assignments have certain limits and to ensure such serious decisions are duly considered by the individual. But to be clear, it is extraordinarily rare for someone to actually sell their likeness outright to a third-party. Image management companies are by and large personal representatives. SAG-AFTRA members hire a number of personal representatives to manage their various personal and business affairs so they can focus their time on their artistic craft and their families.

4. See, e.g., *Prince v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 839-42 (S.D.N.Y. 1975), *abrogation recognized by Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc.* (S.D.N.Y. 1994).

The more practical problems are bad right of publicity licensing deals and privacy right waivers. Our members unfortunately agree to terms they should not and now regret. I hear from performers who agreed to less than satisfactory band merchandise deals or who pose for \$500 test shoots and find out that they have just signed away rights to an image—not their identities—for all of time. The performer then sees T-shirts being sold for \$15 a piece or themselves promoting upwards of dozens of brands online. These are lost licensing deals that could have produced hundreds or thousands—maybe tens-of-thousands—of dollars for the performer. It is particularly heartbreaking to me when the actor telling me one of these stories is someone who lives with three roommates in a Brooklyn apartment.

But it is far too complicated or impossible to try and legislate many, but not all, of these licensing problems through right of publicity legislation. Digital replicas, either when it comes to non-consensual nudity or artistic performance, are places where I would like to see limitations placed on what can be waived or transferred in a licensing agreement. Furthermore, it should go without saying but unread social media terms of services agreements that run twenty pages long should never constitute meaningful consent.

IV. CONCLUSION

In conclusion, this union supports legislation that gives our members strong rights, but in a way that does not interfere with legitimate business transactions, and that does not unduly restrain estate planning, tax decisions, or charitable giving. This union cannot and does not make personal decisions for 160,000 unique humans and their families, but we can fight for them to have the requisite underlying rights.