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CG GARAGE PODCAST #268
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Can I get sued for creating a CG likeness without permission? Lawyer Duncan Crabtree-Ireland explains how copyright law applies to digidoubles and deepfakes.

With digital humans and deepfakes becoming increasingly prevalent in both traditional and social media, the law surrounding virtual humans has become more complex. Here to save the day is Duncan Crabtree-Ireland, who has served as head lawyer and second-in-command at the Screen Actors Guild - American Federation of Television and Radio Artists (SAG-AFTRA) for the past 20 years.

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Chris Nichols: First of all, Duncan, I really want to thank you guys especially SAG for inviting me out to that conference to be part of that panel at CES in Vegas, which honestly, I've been talking about that for a long time now. So it was really, really cool to be part of that.

Duncan: We really appreciated you doing it, and we've been talking about it a lot as well and I think it really struck a nerve because there's been a real lack of attention to what the impacts of technology are on workers and working people and not in a scare tactic sort of way, but in a real sort of way thinking about what the implications are and how we might do something to make sure that regular working people are part of the advances that technology is bringing to the world and not just steamrolled over by it.

Chris Nichols: Right. I think that's a good way to put it is just to sort of think about, hey, there's a new vehicle. Let's think about that technology. I think that was something that has been very refreshing, honestly speaking, especially from your point of view. So let's get into that a little bit before so I want to give some context to this. You're with SAG obviously, right?

Duncan: SAG-AFTRA.

Chris Nichols: SAG-AFTRA. So explain, some of my audience, as we were talking about during lunch may not necessarily know much about SAG or SAG-AFTRA, or sorry, so give them a little bit of an overview of what that organization is.

Duncan: Sure, absolutely. First of all, the acronym stands for Screen Actors Guild and American Federation of Television and Radio Artists. So we are basically the labor union and professional association for all types of performers. Basically, we say anybody who works in front of a camera, or behind a microphone, that's us. So we cover things such as podcasts, for example, but we also cover film, television, new media, internet.

Duncan: We cover actors, we cover broadcast journalists, we cover recording artists and within the general realm of actors and performers, we're not only big star type actors that you might immediately think of, but everybody who participates as an actor or performer in a visual production, so that includes, obviously accuracy. It also includes people like voiceover artists, stunt performers, singers, dancers, puppeteers, airplane pilots who fly on camera. Just a whole host of different people who participate.

Chris Nichols: Not theater for example?

Duncan: No, not live theater.

Chris Nichols: Okay, there you go. There's a distinction.

Duncan: We have a sister union, Actors' Equity, that handles all the live theater, although we do have contracts that cover dancers, for example, and music tours because we are also the union that covers music contracts. So we have contracts with all the major labels, a lot of indie labels, so recording artists are members of ours and when they go on tour, their dancers and their backup singers are members of ours as well. So we're involved in a lot of aspects of, we really say we're involved in four industries. So there's obviously the TV and film industry. There's the commercial advertising industry. There's the broadcast journalism industry and the music industry.

Chris Nichols: The music industry. Okay. So if you're a member of SAG, say you're a broadcast journalist of some kind. What are you bringing to that? What is that person getting from that organization?

Duncan: Sure. So our broadcast journalists, and that's a broad category. So that can include TV news anchors, that can include reporters, that includes radio as well. So not only like News Radio, but also radio DJs. It includes a whole host of people who do that type of work and for them, they have a very different work life than an actor. They typically work for the same company on a day in and day out basis. We are there to negotiate agreements with that company to help make sure that they're paid correctly, that their working conditions are fair, that their safety and security issues are addressed. There's a surprisingly large number of those with respect to broadcasters.

Chris Nichols: Oh, I bet. I can see that.

Duncan: The other thing that we do is we provide a place for people to get health and retirement benefits and that can be particularly important for people who work on a freelance basis, whether they're journalists or anything, because if you're the type of person who works for a bunch of different companies during the course of the year, you may never get insurance or retirement from any of them. If all of them are working under SAG-AFTRA contracts, then those contributions get made.

Duncan: Little by little, they all add up into your single health and pension benefits. So then you end up getting health insurance, and you end up having a retirement after, say, a 30-year career working for 20 or 30 different companies a year.

Chris Nichols: Sure. That sounds really interesting. The thing that I think is interesting also is that you guys are basically a union but it's different from other unions. If you're an automotive union, for example, that's going to have a different set of issues that they're dealing with. They're dealing with, specifically, safety and that people have good working conditions. You,

there's so much diversity, for example, an actor could be working for so many different studios and making sure that their livelihood works across all. So there are very different problems you guys are dealing with.

Duncan: Right. We're all part of the labor movement in general and there's a lot that is the same, but it is true. Every union and every industry has its own unique aspects and ours definitely does. For example, one of the things that most unions do in most industries, it's a big part of their job is dealing with employee discipline, like terminations, and people getting fired and stuff like that. Whereas in our industry that's a rare occurrence, because basically, most people are contracted and unlike in other places, if a producer wants to not use an actor that they've already contracted, they can do that, but they still have to pay them.

Duncan: So it's a bit of a different setup. Also, we deal with a lot of intellectual property issues that most unions don't have that sort of connection to, but because of our members' involvement in the creative process and the fact that they are entitled to compensation and they have certain rights that are associated with that, we're very connected to intellectual property issues, and I spend a lot of my time actually working on IP issues.

Chris Nichols: Okay, good. We are definitely going to get into that because I know that was a big part of our conversation in Vegas. In order to give that context, what is your role at SAG then?

Duncan: Sure. So I'm the Chief Operating Officer and General Counsel. So basically I have sort of a dual job. On the one hand, I'm sort of overall the second in command of the staff of the union and then I also am the head lawyer. So I oversee all of the legal activities, all of our inside counsel and all of our outside counsel and everything that's law-related that the union does. Those are sort of my two broad-based areas and within that, I have certain specific departments and things like that report to me.

Duncan: A bunch of administrative sort of stuff, and then also things such as our government affairs and public policy team, such as our equity and inclusion team, those functions report to me, international affairs reports to me. So I have a variety of things that I do on a day-in and day-out basis but it's all with one theme, which is looking out for the interests of our members and helping make sure that they're protected, whether it's from a safety perspective, or whether it's from an intellectual property rights perspective.

Chris Nichols: Your background in law, as you're mentioning is mostly in the entertainment law area. That's one of the big areas that you focus on, right?

Duncan: Well, I've been at SAG and then SAG-AFTRA for, it'll be 20 years in November. So, the vast majority of my career has been in our organization. So yeah, prior to that, I was a criminal prosecutor. So that really is very different. Well, it's a very different world and in certain ways, it's the same, very similar. So I've spent the last 20 years focused on these issues at SAG and then now SAG-AFTRA.

Chris Nichols: Okay, so that was very interesting and something that became of big interest to me was, I've actually been to a number of panels, or been on panels related to stuff about digital humans because of my interest in digital humans. That was obviously going to become a big subject of what we were going to be talking about in Vegas. One of the things I found extremely refreshing, honestly speaking, is a lot of times when I go to these panels, it's a lot of like, Chicken Little, “The sky is falling, technology is going to destroy all of our jobs!”

Chris Nichols: That's a big part of what seems slightly naive in a way about what's going on. I found it extremely refreshing to hear your point of view in this situation that was not alarmist, it was much more constructive in some ways. What are your thoughts about digital humans in general? Like once you start to see this thing happening, what were some of your concerns and how do you think you're going to deal with some of those things, especially in light of intellectual property?

Are digihumans a threat?

Duncan: I appreciate what you said and I think being alarmist is not to anyone's benefit. I think there's a certain level of fear that's healthy, that helps keep us safe, that helps us focus on things that are important. Then there's just, there's a lot of people on a lot of topics in our world right now who basically want to generate buzz or who want to get people to pay attention to them by just being alarmist, by exaggerating things, or by taking things to a level that's not realistic. From my point of view, we do need to be concerned about digital humans, about AI and how it's going to affect the entertainment industry in general, and certainly actors and performers, broadcasters specifically.

Duncan: There are reasons to be concerned about that. Thankfully, we are concerned about it now and we have been. I'm looking at this for a while. So it's not like the technology is sneaking up on us. We know it's coming.

We know it's out there. The question is what kind of boundaries can we put on how it's used and what is its ultimate real trajectory?

Duncan: It's funny thinking about coming here and talking to you today, I was thinking more about this and you and I have talked about the uncanny valley, which I'm assuming a lot of your listeners already know. Basically, my shorthand version of it is how, the closer you get to reproducing humanity without actually getting there, the creepier it feels to people and the less people like it.

Duncan: That's sort of the theory and that theory has played out. We've seen that actually happen with a number of projects where people thought it was going to work out differently than it did. To me, I really believe there is something unique about human creation, that is, as of now not going to be able to be replicated even by the best AI and artificial human technology. I think it's like when you think about, you could take any person and you could hand them a script, you could hand them the script for, pick anything, *Devil Wears Prada*, let's say, for example.

Duncan: Hand them a script for that movie. That person, no matter how creative and great they are, they cannot reproduce the spark of what Meryl Streep did in that movie and that's because she's unique or if you pick any other, I'll just use her as an example, pick any one of the things that she's done. You can create her image, you can create something that looks like her, you can create something that sounds like her voice or that even uses her voice to create something that she didn't actually say, but I personally don't believe that the thing that really connects with us about truly amazing performances, I don't believe that that is something that can be just digitally generated at this point. I don't think that spark is there and that to me is-

Chris Nichols: Well, let me go one step further. A little more scientifically and tell me if you agree with this. Actually, I think they can, technically speaking, absolutely recreate Meryl Streep 100%. The problem is the only way that can do that is because Meryl Streep already did it. Meryl Streep when she first did that performance it was that came out of the spark, it's that first performance that comes out of spark.

Chris Nichols: AI by definition is only doing based on things that already have happened or it has learned from. So Meryl Streep's performance, her human spark, her inspiration comes out of that first performance, after that everything else is a copy. So the AI is going to copy what it knows. It can't create a new Meryl Streep or a new performance by Meryl Streep or someone else's interpretation. So that's I think the important part to distinguish here.

Duncan: I completely agree with that and actually, you said that in a very eloquent way. So I'm glad you did. I 100% agree with that and that's the thing is, that's what we're really looking for. No one is out there saying I really want to see Meryl Streep perform *The Devil Wears Prada* eight times a week, over and over and over again exactly the same way. Obviously, if we wanted to see that we can just rent the movie and watch it over and over and over again, which maybe some of us have done.

Chris Nichols: Yep, done that with *Star Wars*.

Duncan: Me too. Me too. We all want to know what's coming next, what is something that's new that really captures our interest. One of the biggest compliments I think projects get is, it's fresh, it's new. It's something that someone hasn't done before. It's that creative spark. *Parasite* won the Oscar for Best Picture this year, I think and won the SAG Award for Best Ensemble, because of that.

Duncan: So I say that only to say that gives me some level of comfort. I am really concerned about the technology. I'm concerned about the abuse of the technology with respect to performers, I'm concerned about what happens when performers are scanned, and have their physical data permanently stored so they can be recreated at will through digital technology. I'm concerned about all of those things in the Union as to and we're working on how to put parameters around but fundamentally, am I concerned that the need for professional actors or writers or creators is going to go away because AI can do their job in the next 50 years? I personally do not believe that will happen. It may happen at some point in the future. I mean, obviously.

Chris Nichols: Yes and no. Again, let's use the same argument. AI is only going to be basing its scripts based on scripts that it already knows. So it's going to recreate a script like, well, based on all the scripts, it's going to do this. Then everyone says, well, that's horrible. It's going to write scripts but honestly speaking, and I can be a little critical, but sometimes I go to the movies and it feels like the script was written by an AI. It doesn't feel unique. It feels very formulaic. It feels like it's delivering exactly what the audience wants to see and it doesn't necessarily do that.

Chris Nichols: Now, those films do get a lot of audiences to see it because I think people, the audience likes to see things that are predictable, but an AI is not going to write *Parasite*. An AI is not going to write some interesting new ideas out there. So I don't know, I think there are some ideas about what is going on. Because I want to go back to humans, because this is something that we were talking about, you have concerns about humans being scanned.

Chris Nichols: The fact is, we have been scanning humans in the film industry for a long time, long before the deep fake movement happened and that is usually because we need a digital double of that person or we need to recreate a different person based on that. I worked on the movie *Maleficent*. The pixies were all digital humans, so we had to make pixie versions of them. So we scanned them and then we did pixie versions of them. So all of those things happen. So once that data gets scanned, what can SAG do?

Duncan: Sure. Well, so let me just, first of all, say I think our level of concern with respect to major producers in the motion picture and television industry is moderate. Because we've had discussions with all of them, we have an understanding, and an agreement with all of them about how that data is going to be used, for example, that when you scan someone for *Maleficent* or *Maleficent 2,* as the case may be, that data isn't going to be used to make a whole new movie that hasn't been discussed with the performers.

Duncan: Performance data isn't going to be used to put them into a movie they don't agree to be in. That's sort of the fundamental concern. It's not so much concerned about it being used for the project they're in, it's what happens to the data and what use is made of it afterward. Obviously, a growing area of concern for us is, when that technology was super expensive, and could only realistically happen in the hands of people in the industry that we have relationships with, that's one thing.

Duncan: When that technology becomes something where you can do it with an iPad, and I saw someone at CES doing exactly that this year, that raises a new level of concern. It raises concern about people doing it without the person's knowledge, it raises concern about people not having appropriate boundaries around how that might be used or even worse, having unsuspecting people sign off on things that give rights to somebody to take this data and then use it forever to basically create their image and use them in other projects and things like that.

Duncan: So we do have real concerns about that happening and a large part of that is member education, making sure people know not to sign off on things from people where there's not a union contract in place to protect them or where they don't know for sure how it's going to be used or the parameters aren't in place protect them. A lot of artists aren't and don't want to be business people. They didn't become an artist because they wanted to be a business person, they became an artist because they want to be an artist.

Duncan: So they're not always first focused on things like what does that contract say that they're asking me to sign. They're relying on agents, managers, friends, their union, various people to look out for them in those areas and

so we really have to take that responsibility seriously to help make sure that there's not an expanding pattern of abuse in that area.

Chris Nichols: Okay. So there's one way to look at it. One is you have the rights of the artists that are let's say get scanned or that are well known or are well respected. We used Meryl Streep earlier. So let's pretend there's a scan of Meryl Streep. The concern is people will be able to use Meryl Streep in whatever they want, because there's a digital version of her that lives out there somewhere or something of that nature. So you're protecting Meryl Streep's intellectual property which is her likeness, should we say that?

Duncan: Sure.

Chris Nichols: SAG represents a whole lot of people, not just the Meryl Streeps in the world and some people are not necessarily as well known as her. Now, what if there's a bunch of jobs that are taken in the world that are all done by digital representations of actors instead of actual actors or broadcast people or whatever, representing different people. Is there a role that you have there?

Duncan: I think, yes. That can play in a couple of ways. I mean, obviously some people could view animation as being exactly that. Because, you can animate whether you decide to do an animated commercial, or if you decided to just do an animated project. The amount of work generated by doing voiceover for animation is an order of magnitude different in terms of the amount of time and work necessary to do a live-action project. I think, in the end, what we're really looking at is number one, if someone's actual image and likeness is being used to create anything, whether it's commercial, whether it's an entertainment project or whatever, they should be fairly compensated for it and they should consent to it.

Duncan: If that's not happening, if someone is digitally creating a human without reference to any actual existing human, then we may not like that and that does not do great things for jobs, but no one can tell them they can't do that. They can certainly do that and it does happen that non-famous people get used in these kinds of things. As an example, there was a whole series of court litigation over a coffee brand using a non-famous person's image on their labels, who was a member of SAG-AFTRA but not a household name and was put on the label for one of their brands of coffee and-

Chris Nichols: They just picked a random picture of someone?

Duncan: They took a picture. This person had sat for a different product, and then their picture was used without their consent on a coffee label right. Put out there, millions of cans of coffee and weren't even aware of it actually for a long time and then found out that they saw it or a friend saw it

somewhere and it's like, and it turned into a whole host of litigation over the proper compensation to this individual for the use of his image on these coffee containers. So, that again, that wasn't because he was famous, it was because they just liked his picture for that label and they just used it. So it does happen with people at all different levels in the industry.

Consent and compensation

Chris Nichols: Interesting. Interesting. A couple more things I want to discuss with you. One is, when I was at Digital Domain, and we were starting to really get into digital human work, there was a big question. Once we started to think about it, we made Benjamin Button younger or older but then we were working on the Tupac video, on a Tupac hologram thing. So then a lot of it came up like bringing dead actors back digitally and what does that mean?

Chris Nichols: It was a very strange ethical question. We started to ask ourselves about doing that and I'll use the Tupac example, more specifically. Dre and Snoop were very passionate about their friend and about being with their friend. They were going to go to Coachella and they wanted to bring him back as part of their trio but unfortunately, he had died and no longer there. They weren't necessarily going there to try to sell extra tickets just because Tupac was going to be there.

Chris Nichols: It was a surprise. It was part of the audience experience and it was part of their tribute to their friend. So somehow it felt okay but then it quickly felt like he was going to get abused by other people's motivations to capitalize on people that are dead already. Is that a problem or is it good that certain actors or performers can continue to make money after they've died and give that back to their families?

Duncan: It's a great question. I think it's funny how subjective and situational it is as to how it feels. As far as the actual reality of it, from our point of view, if the performer or their beneficiaries or heirs have consented to it, then it's fine. That's basically what we're looking for is for them to give consent and for them to be appropriately compensated and that's what we're looking for. I think in general, you think about example, like the one you gave, you think about examples, like since we were talking *Star Wars*, Peter Cushing, Carrie Fisher.

Duncan: I think I felt good about those, especially knowing that the families had consented to it. There was not, that I could detect, a big backlash to that then. You think about there was a famous vacuum commercial with Fred Astaire in it and there was a huge backlash to that. I think part of it is, how commercial it is versus how story-driven it is. When it's story-driven, it seems to be more acceptable. When it's like a tribute or something that's not looking like someone's just doing it for the dollars, that's great.

Duncan: Then you see things like the television commercial, there's certainly been a lot of negative feedback that I've heard about the Whitney Houston holographic concert tour. The episode of *Black Mirror* about Ashley O, for your audience who's seen that, talks a lot about the idea of taking someone, a deceased performer and recreating them as a hologram and continuing to exploit them in that way. So I really think there's a lot of feelings and emotions that are tied to this in terms of how people react to it, but from a legal point of view, and from the union perspective, I think it's really about consent. So if the person or their heirs have consented, then that's sort of the key.

Chris Nichols: Right. So for example, they're going to make a new movie with James Dean in it, right? Supposedly. So how does that work from SAG's representation there?

Duncan: Well, the law has developed a lot. What we're talking about really is the right of publicity. That is the legal framework that surrounds your right to your image and likeness. That right is largely focused on commercial value. It's viewed as a property right. So when you talk about something like the Fred Astaire commercial thing, it's very clear under the laws as they exist now in the state of California, the heirs of Fred Astaire would need to consent to and would have a right to demand compensation for that.

Chris Nichols: Did they not do that when they-

Duncan: I'd have to check what the exact date was. That was not always the law. The law before was that your red publicity ended upon your death and actually, just to be clear, the right of publicity is not a federal right. It's only a state law right and it is not in all states, only about half of the states have a right of publicity. So it is a very developing area of the law. In California, it was probably, I can't remember the exact date but it was in the late 90s or early 2000s when there became a descendable right of publicity that you could leave to your heirs, either by your will or through your, just through intestate succession.

Duncan: That does not exist in all states and some states there is not a descendable right of publicity. So it really depends where you live at the

time of your death, and it depends what state would have jurisdiction over a claim. In fact, there was a big lawsuit that went back and forth over Marilyn Monroe's estate because there was a dispute over whether she was a domiciliary of California or New York when she died and where she was domiciled had an impact on the right of publicity for her estate.

Duncan: So it's a really complicated area but the bottom line is, from our point of view, there's other aspects you could think of contractually. For example, take Carrie Fisher. Set aside the right of publicity for a minute. Any of that footage that was shot of her for prior *Star Wars* projects contractually, she and her heirs have the right to have to consent to the use of that footage in another project. So regardless of her right of publicity, contractually, the producers had to get consent from her family, or whoever owns those rights now, in order to use it.

Duncan: That's from the union contract on top of her right of publicity. Publicity doesn't necessarily protect you from being used in an expressive work like a movie, like a biopic, for example. Let's say somebody decides to make a biopic of President Obama. It would be smart of them to get his consent and cooperate with him but they don't necessarily have to do that.

Chris Nichols: So it's interesting. So I did a podcast with Hal Hickel, who was one of the guys who was working on the Peter Cushing thing at ILM. So he and I had this conversation specifically, like, some people did have a problem with Peter Cushing being brought back and he says, but how is that any different than, what's his name? Who played Churchill not long ago? He's just a person in makeup. Technically you can see that digital performance because there is an underlying person that's driving the performance of Peter Cushing.

Duncan: Right. So we don't agree with that viewpoint, because to us, there is a difference between the person themselves, their actual image being used and someone else portraying them. The person portraying them may be able to have a tremendously excellent likeness of them, but it's not the same person, whereas when it's their own image, it is the same person.

Chris Nichols: So you do see a difference between Peter Cushing being digitally created, even though that performance is being driven by someone else, versus who was playing Churchill? I forgot. But anyway, he was in makeup, but he looked just like Churchill.

Duncan: Yes, I do see a difference in that and I'll even draw another distinction, which is, there's a difference in my mind between Peter Cushing's actual image and likeness being computer animated or CGed into a performance and someone without reference to actual image or likeness of Peter Cushing, recreating, animating, let's just call it, animating a Peter Cushing

character who looks a lot like Peter Cushing, but isn't actually his image or likeness that's used to create it. I see a distinction there as well.

Chris Nichols: Okay.

Duncan: Contractually, there would be a distinction because contractually if the image and if the material that was used to Peter Cushing to create the performance was taken from prior productions from *Star Wars*, then there's a contractual right that Peter Cushing and his heirs have to consent and to be compensated for any reuse of that. If they decided to do an animated version, and had an animator do a very lifelike animation of Peter Cushing without reference to any of that material right, then that contractual right would not exist.

Chris Nichols: Let's say you're doing a biopic about Marilyn Monroe and you find someone and you make that person, not using CG, but you make that person look exactly like Marilyn Monroe, using makeup and prosthetics or whatever. You're using reference of Marilyn Monroe in order to create that, right? That would not fall under the same category.

Duncan: Correct. Yes, it wouldn't, and you're right, you're using reference, but I guess the difference is, there's a human being who's independent creativity is actually creating the image. Yes, they have an image of Marilyn Monroe in their head, or they may even have it on the wall but they're not literally taking that image and converting it into a moving form. What I'm referring to is if you actually took the actual or a series of photographs of Marilyn Monroe, digitally manipulated them to turn them into a moving image then that is at least for now, that's the difference between those two scenarios and results I think in a different outcome.

Chris Nichols: Okay, so I have a friend of mine who creates CG sculptures of his friends and family et cetera and creates these fantastic complete 100% CG portraits. He uses photography as reference.

Duncan: I want those by the way. You can tell me afterwards.

Chris Nichols: He uses those as reference, but he sculpts everything by hand. He's basically side-by-side, or overlaying and stuff like that but he's not actually manipulating the actual photograph. So if that technique was used for that, it comes down to minutiae. It sounds like you're going to have to tell me like, okay, well, you have the rights to use that because you only used the reference as a visual reference, not as an actual cut. So you'd have to go down to the actual techniques and find out how that was created, even though it's CG, because someone technically could say, I didn't do all those things, even though it's all CG.

Duncan: That's right, and I think another way to think about it is, a photographer owns the copyright in the photographs that they take. Probably everybody could agree to that. So if you take the photograph that a photographer has taken, and then you use that photograph to create a moving picture of that photograph, then the photographer's copyright rights continue to exist and you need to address their copyright and making that address Derivative Work off of the copyrighted work that they created.

Duncan: If on the other hand, you were standing next to that photographer when they take the picture, and you see the same scene, with your eyes, and you draw that scene or you then later go home and animate it yourself or whatever else, you don't owe that photographer anything. You might create the same result or similar result, but it's not off of their intellectual property that you've done it and it's therefore a different scenario. Now, I do want to, again, go back to, because I didn't, this is such a fraught and complicated area of law, but there's a different thing when you're talking about something that's commercial.

Duncan: So what I'm talking about now is really, if you're making a movie, if you're making some kind of expressive work like that, if what you're doing on the other hand, and there's a case on this is if you're making a T-shirt, and you're going to basically sell this T-shirt, so you're just taking an image of someone and putting it on a T-shirt, regardless of whether it comes from a copyrighted photograph or anything else, that's when we get back into that world of commercial use and if you draw your own likeness of Marilyn Monroe onto a T-shirt and decide to sell it, then her right of publicity implicates that because if you're selling an image of Marilyn Monroe, maybe drawn by you, but it's her likeness that's on that T-shirt and you're going to probably need to pay for the rights to do that.

Chris Nichols: Okay. So here's another thing that happens a lot. I live in the LA area as do you and I go around to, Burbank has an art festival that happens every now and then or some areas, different areas of the city have these little art festivals. People have their little booths and they sell their different arts. There is a lot of fanart that's out there. Pictures of Princess Leia to all these different characters from different famous movies. *Raiders of the Lost Ark*, whatever. What about all that? How is that protected?

Duncan: So there's what the law is — and then there's a world of reality. Generally, what the law is, is most likely there is a copyright, a trademark and right of publicity claim and possibly all three claims in many of those pieces of fan art that are created. However, none of the people involved want to generally pursue small-time fan art, like people who aren't really doing this to make a lot of money, but are doing it out of a passion for-

Chris Nichols: But they're selling their work.

Duncan: They are.

Chris Nichols: It's for a nominal fee-

Duncan: It really depends. So what I would say to you is, yes, there's probably valid causes of action against a whole lot of those people for what they're doing. Whether anyone will pursue them probably depends on how discreet they are. Whether anyone finds out about it, how much they're charging and how sympathetic they are. I'll give you an example. So it's a group that I absolutely adore. It's called Magic Wheelchair. This is a non-profit organization and they build wheelchair costumes for disabled children who want to do cosplay at like, whether it's for Halloween, or whether it's for Comic-Con or whatever.

Chris Nichols: That's awesome.

Duncan: They're an amazing nonprofit. I've tried to promote them everywhere I can. So I actually had a conversation with one of my colleagues at work about the question of, so they are in some cases creating costumes that are clearly based upon copyrighted and trademarked intellectual property. So for example, whether it's-

Chris Nichols: Captain America or Iron Man.

Duncan: Right, because with these kids, what these kids all want to do, they don't want generic costumes. They want a costume that's their personal favorite character that's their idol, whether it's Wonder Woman, whether it's Batman, whether it's whoever. So is it possibly a violation of someone's rights for them to create those costumes? Yes. Is any rights holder in their right mind going to go after a nonprofit that creates costumes for children in wheelchairs? Not in my opinion. So I think there is a certain level of common sense that does take hold in these situations.

Chris Nichols: Okay, that's fair. I'm glad, yes, the law exists and the law exists. It's not biased towards sympathy for kids in a wheelchair.

Duncan: It isn't, but the rights holders are and the public-

Chris Nichols: So they can say, do you want to go after this group. Because you do hear stories, I'm not necessarily going to name names, but you do hear stories about people that are getting attacked for wearing some kind of thing and it's like, well, that seems a little unfair. So a part of the big community that I go to all the time, there's a website called ArtStation. I don't know if you've heard of ArtStation.

Duncan: I'll check it out.

Chris Nichols: Okay. Art station is basically a site where there's a ton of ton of art that people make, mostly CG art. Well, mostly, it's all CG art. Most of it is, there's 2D and 3D art. There are a ton of digital humans that are created there that people make. Same fan idea. So I just went there yesterday, for example, someone created a very, very, very detailed model of Tupac, based on their own passion for Tupac. With all the tattoos, all the headbands and the durags and the gold chains, every hair and supposedly be able to animate him in real-time. That's a passion of that. There's a lot of Robert Downey Jr's on that site, a lot of them.

Duncan: I believe it.

Chris Nichols: So what about that? They're like, I love Robert Downey Jr. There's a ton of reference of Robert Downey Jr. on the internet. I can use that reference to sculpt Robert Downey Jr.

Fanart and non-commercial work

Duncan: Right, and generally, that's going to be fine if they're not doing it for any kind of commercial purpose. So if they are selling those sculptures, if they create a sculpture and then sell it or if they create a series of sculptures and sell them, right, honestly, that is an infringement of their right of publicity. That is, in all likelihood going to be something that could be pursued successfully, I think some potentially. If on the other hand, they're doing it for non-commercial purposes, let's say they don't sell it, let's say they just do it for their own enjoyment. They put it up on their wall at home and that's it, or they show their friends, that's it. Then there's probably not even a violation of the right of publicity there because it's non-commercial in nature.

Chris Nichols: What about did Andy Warhol pay Marilyn Monroe for using Marilyn Monroe in his art?

Duncan: I don't know, I don't know whether he did or not. Of course, at the time, the right of publicity wasn't well established, but I think his art we would, some people might debate this, but his art would not probably be viewed as a commercial product. I realize that actually in a way is the point of it being Andy Warhol and not someone else we're talking about, but for artistic works like that there is a stronger argument that you can do that.

Duncan: No one, certainly I'm not asserting that if you want to make a biopic about Obama, you have to have Obama's consent to do that. You don't have to have his consent. You might want it and it might be very helpful but you don't have to-

Chris Nichols: I don't think they got consent from Cheney when they made *Vice*, right?

Duncan: Right. I highly doubt it. So it's really clear, you don't need that but if you want to go out and you want to market a line of clothing with Obama's picture on it, then yeah, you need to get his consent. He might choose to say, no, and that's okay because, under our view of the system, someone shouldn't be used for commercial endorsement without their consent, someone should not be forced to help you sell products against their consent. That's different than you making a movie that tells the story of what happened during the Bush administration, whatever. Those are two completely different things and a different set of legal principles apply to them.

Chris Nichols: Yeah. Okay. Well, that's a fascinating thing to talk about. So I do want to get into and this is going to tie, I'm going to try to loop it into deepfakes. One of the, there's a lot of things that are going on in deepfakes right now. It's a very hot subject. I was trying to really, I was talking to both Koki and Wael who are both people who are definitely entrenched in the deepfake world to give a definition of what a deepfake is.

Chris Nichols: Because a lot of times what I've been seeing is, face-swapping seems to be what I call mostly deepfake, but they were giving a much broader idea about it. Really, the idea is that you have a representation of a certain person that's doing something that they may not necessarily have done. So that's really their definition of a deepfake and there are many different ways you can do it. You can do it like with the Obama video, that would technically be what they call a lip-sync deepfake or they would do, face-swapping is another one.

Chris Nichols: So there was, what's it called face to face, was the testing was done at a university in Germany and the idea was that they would take a video, this is before deepfakes really became a thing, they'd take a video of a person, and then they would live track someone else's face and then when that person would move and move their mouth open, so they would basically digitally puppeteer the other person. What they were showing in their demos is mostly political figures. So they would show Putin and Bush and Trump et cetera, all doing things that they didn't necessarily do.

Chris Nichols: Someone else is driving their performance as a puppeteer, in essence, that's the way I call it. One of the reasons apparently, that they were using political figures is twofold, is to show that it's possible. I think that's a

responsibility to people that are doing research in this area, to show what's actually possible so that people doubt the videos that they're seeing. The second reason is they were claiming that because these are political figures, that their image is a public domain. Is that true?

Duncan: Well, yes. To a certain degree, it is true. I think the law has not caught up to the reality of the world as of today and that's true in politics and that's true outside of politics. One of the things that I think is of real concern is precisely the problem of people believing everything that they see, not really checking what their sources are and making sure it's coming from a trusted source. A lot of times people have asked me, well, how come you think it's wrong for someone to make a video of Obama or Trump saying something that they didn't say versus, Kate McKinnon pretending to be Elizabeth Warren on *Saturday Night Live*.

Duncan: People might think that's her doing the same thing, just without the technology and from my perspective, really it's the difference between parody and satire versus just fraud. Because when you're doing a parody or satire, whether you're using deepfake technology to do it, or whether you're using just acting and makeup and costume to do it, you're not trying to actually convince someone that you're really, it's really that person doing it. You are causing them to imagine the humor or the irony in them if they were doing it. No one who watches *Saturday Night Live* actually thinks that Kate McKinnon is Elizabeth Warren.

Chris Nichols: I did see a version of that video where they deepfaked her to be Elizabeth Warren.

Duncan: Again, I actually haven't seen that, but I would love to see that. It goes back though, to the whole point, which is, this is why in our modern world, the source of what you're seeing is just as important or more important than what you're seeing, because if they do that, but they release it under the *Saturday Night Live* YouTube account, then you already know what that means.

Chris Nichols: Hopefully.

Duncan: If they do that, and you release that under a news channels-

Chris Nichols: CNN.

Duncan: Yeah, or maybe some kind of online some kind of a blog or something like that, then you don't actually know what that means. So I am really concerned about it, the legal principles around it really haven't evolved. It is true that if someone's not just a public figure, but any person, forget Obama or Trump, you or me. Someone could, if they had access to the source material, they could do that and we probably don't have any

recourse against that under the current, as long as they aren't using it for commercial purposes. As long as they aren't using something that's copyrighted. Like, let's say they just capture a video of us walking down the street or-

Chris Nichols: We could use it for defamation then, couldn't we?

Duncan: They could. So that is a concern and I think part of the problem with the whole situation is that there's a movement people who want to do something about it, who want to see there be changes in the law and then there's people who are really, really afraid of allowing any kind of changes to the law because they're afraid it's the beginning of some kind of anti-free speech, slippery slope. So I think that's where we really have to ultimately find a path forward, because what can't happen is we can't allow defense of the first amendment that we're all in favor of, to prevent us from having some sort of reasonable parameters around it.

Duncan: Some of the groups that are arguing against any kind of changes to the law or any kind of legislation to address this, the way they talk, you would think they would be against saying that you can't yell fire in a crowded theater. There are times or even free speech has its limits, and rightly so. It should be expansive. It is expansive, but there are limits where that speech doesn't advance any social interest and instead just causes harm to people and that's where those boundaries need to be placed, I think.

Duncan: A great example of that is deepfake porn, because I hope most people would agree that it is really wrong to take someone and create an image of them engaged in a pornographic, sexual act that they really don't want out there and then publish that. It's an abuse of their person, it's not right and to me, that's the sort of modern deepfake equivalent of the yelling fire in a crowded theater. There's no social utility to that, it doesn't advance important ideas. It doesn't help our democracy. It doesn't do any of those things. What it does is just harm someone-

Chris Nichols: Take advantage of someone too.

Duncan: That's right.

Chris Nichols: Yeah, I agree. I agree that very much so, that that is the case. Obviously, we need to make sure that we're careful with those situations and unfortunately, we can get into the ideas of where this deepfake technology is actually could be used for interesting things or useful things. Unfortunately, like 96% of the use of deepfake just right now is literally deepfake porn, which is very, very sad. Even though it's 96%, it doesn't necessarily mean that you should basically outlaw deepfake technology, right?

Duncan: I agree with that completely. You can't outlaw the technology. A, it's not really an option because it's not viable to do that. That is way out of the gate, but beyond that, you don't ban the technology because some people misuse the technology. The deepfake technology in a way, and maybe that we need to come up with another term for it because I think the term deepfake has become so associated with the bad uses of the technology. In fact, Wael made this point on the panel, that we were both on at CES, that deepfake can be good or deepfake can be bad.

Duncan: It just depends on your use of it. I think that term is going to become more and more associated with just bad uses. So there needs to be a new name for it but in any event, the technology can be used for, before this recording, we were just discussing the fact that politicians can use the technology to help them outreach better in languages that they don't actually know. There's a whole host of legitimate uses for this technology, movie producers have been using this technology for a long time, not only to bring deceased people back into movies, but for other purposes as well. So there are legitimate and beneficial uses to the technology. So it can't just be about the technology, it has to be about the ethics and morals and rules around the use of the technology.

Chris Nichols: Okay. All right, let me go through another example. So I was on another panel with a pretty famous YouTube channel, guys from a YouTube channel. They're called Corridor Digital, but their YouTube channel is Corridor Crew and one of the things that they did is they really put the forefronts on this idea of deepfake stuff in a comedic and interesting way. So they had a friend of theirs that was a Tom Cruise impersonator.

Chris Nichols: So he did a really great Tom Cruise and they decided, oh, “We're going to have, Tom Cruise visit us at the office." He came in, but then they deepfaked Tom Cruise on top of the impersonator so he looked like Tom Cruise

Duncan: In a video. So this was all on their YouTube channel, it's not on a podcast? I see.

Chris Nichols: Right, and I basically, the whole joke is like, isn't it funny? Tom Cruise came here. Clearly, some of the things he's saying is, he's an impersonator. Not really Tom Cruise, and then they showed people how they did it. I thought that was like, okay, because Tom Cruise is a pretty famous person and his likeness is very important and probably has a lot of intellectual property, a lot of collateral. So there's a line there, that's kind of interesting. So how does that fall into what you guys are talking about?

Duncan: Well, let me just start by saying the fact that they then at the end showed people what they were doing and how they did it, I think is great. If I were

analyzing this as a lawyer, that's a great fact for them because that takes this out of the world of we're trying to trick people into thinking that Tom Cruise came to our YouTube channel, for whatever reason, whether that be to drive views and increase their ad revenue or whatever.

Chris Nichols: It did get a whole lot of views though.

Duncan: That's what's interesting about it is, whether something's commercial or not, that's a bit subjective, I mean, sometimes it's clear. Sometimes it's obvious. You're marketing a product, it's commercial. When you're talking about something like we're going to show you how this combination of a person who can do a really good impression of someone combined with deepfake technology for the visual part of it can really do something. That's a legitimate topic of interest. I would think it's a very strong argument that's not commercial in nature, even though they're making money off of doing it just like you make a biopic about someone.

Duncan: You're making money off of it, they're not making the biopic for free. Their goal is to make money, but it's different than, say, making a commercial for a vacuum cleaner. So, I do think that something like that is probably in a fairly safe zone, again I should say, although I am a lawyer, I'm not giving anyone legal advice to say any of this. If you have any legal issues around this, please go hire a lawyer to represent you. Don't quote me or certainly write me a letter or an email saying, “Hey, you said this and now something different has happened.” But I do think that it is an area that's developing so people should keep an eye on it. There's a real significant difference between clear commercial use and something that has a different sort of focus.

Chris Nichols: Yeah. Well, I think it's interesting to think about that. So, as you said, we're clearly in an area where we need to reconsider some legal implications that are going on. There are some laws that need to be brought through so that those abuses don't necessarily happen. At the same time, what is really refreshing is like, you're not trying to actually ban the technology. I think some people are trying to ban the technology and that's a little bit, that's-

Duncan: I can understand why they want to, but I don't understand why they think that's feasible or in the end, why that's the right balance.

Chris Nichols: What's also interesting is that people who are developing the technology are suddenly feeling the pressure as well, to protect it because of abuse of technology. So there's a lot of people out there saying, hey, you know what? We're never going to release the source code because that's going to make it really hard for people to do things. It comes down to like, 3D printing guns. That's another thing that's the same idea really.

Policing new technology

Duncan: It is and we haven't, as far as I know, found a way to stop that from happening. I admire people who say things like, we're going to hold on to the source code and make sure that, we'll do what we can to make sure that users are using this responsibly. I think we also have to recognize that like, any form of technology that only holds things back for so long.

Chris Nichols: Yeah, people can reverse-engineer things.

Duncan: They can and they will, or people can come up with their own way of doing it. It's really I think, setting standards for how we manage it is a really important part of it, and sure some people will violate those standards, some people will break the law just like break the law in every area. That doesn't mean we shouldn't have them and it doesn't mean that they won't be largely effective. There's great technology that can do great things and cause great harm.

Duncan: This isn't the first time we've had technology that can be used for good or used for ill and usually how we address that situation is, we put appropriate parameters around it, make sure that it's used responsibly. Take cars, cars are an example of a technology that can be used for great good and for great ill and what do we do? We license drivers and we have rules of the road and we have laws and do people sometimes break them? Sure. By and large, that gives us at least a framework in which to know, “It's okay to do this and it's not okay to do that.” Most people will follow that and the ones who don't, then we can focus our attention on them.

Chris Nichols: So what do you think, I don't know if, I'm sure you've thought about this some way, but what do you think are some sensible laws or rights that we could start to focus on or consider, considering the emergence of this new technology?

Duncan: I certainly think that consent should be an important part of whatever framework is set up around this and sort of a general sense.

Chris Nichols: How do you achieve consent?

Duncan: Well, for example, you can ask the person themselves. The use of deepfake technology that happens in a motion picture and television

production, that's an example of it being used with consent because generally, in those examples, people have actually usually consented in writing, in contract, to doing it and if you look out there, no one's really complaining about that. That's not a problem. Where consent has been given and parameters are there, people are pretty much okay with that.

Duncan: Certainly, I think in general consent should be a principle that's there, especially for anything that's going to involve something that's highly personal or exposure. Obviously, anything that's sexually explicit, anything like that, really there should be consent in particular in those areas because just like we have laws that provide for consent in terms of your personal integrity, your control over your body and use of your image, we have laws against revenge porn, for example. That should be sort of a general principle which is that when something is going to be as personal and intimate as that there ought to be consent of the person involved.

Chris Nichols: So it really could, the laws against revenge porn have actually been somewhat successful.

Duncan: I think so and they've been used.

Chris Nichols: They've been used. So, using a very similar concept, that could be done for protecting people in deepfake porn, for example really.

Duncan: Correct, absolutely. I do think that there is also room for appropriate use of technology for things like biopics and other uses to tell stories and to share information. I do believe one of the key elements there also needs to be is that if someone's willing to use this technology to create a scene or to illustrate something, even if that's something is based on historical fact, but it's not an actual recording of the real events, that ought to be disclosed to anyone who is observing, who's watching that.

Duncan: Deepfake technology should not be used to trick people into thinking something happened that may not have exactly happened that way because it appears that the real people are there, you know what I mean? So I think those are some of the examples, I'm sure there are others. In general, if it's going to be part of a performance, there should probably be compensation. There's an international treaty that's just now entering into force called the Beijing Treaty on the Protection of Audiovisual Performances. It's a WIPO Treaty.

Duncan: The US has signed but not yet ratified this treaty but one of the things that the treaty provides for is the right of people whose image and likeness were used for performances to receive an equitable remuneration for the use of their image and likeness in projects, whether that's a biopic or whether that's a fictional work or whether that's any other type of thing. So I do think the principle that when people's image and likeness is used,

they ought to be fairly compensated for it, is also something we should have out there.

Chris Nichols: Yeah. Well, that's great and I think that finding a way to define what is, finding a way because I still think it's a slippery slope, when we were talking about, this is makeup versus this is digital representation, and that one is protected, and that one isn't, that seems, there's a lot of Elvis impersonators out there, right? You know what I mean? So it's very hard to think about like, does that mean that they're infringing on Elvis because they're pretending to be Elvis?

Chris Nichols: Or they're definitely capitalizing on Elvis. So it's very hard to think about what that means and defining that and that's, I think going to be tricky especially now with all this deepfake technology and everything else that's going on out there.

Duncan: It is, it is really interesting. When you think about going to Hollywood Boulevard or go to Times Square in New York, and you'll see all of these licensed characters out there taking photographs for tips and things like that. You have to know that some of the rights holders don't love that, especially some of them, let's just say are not in the ideal state of cleanliness or whatever and I'm sure it's not the image-

Chris Nichols: Not necessarily the best representation.

Duncan: Exactly. Yet, there's certain realistic limitations on what even rights holders are going to do to enforce those rights. I do think when we talk about mass media and we talk about the use of deepfakes to take someone's image and push that out to a very broad audience in something that they haven't consented to, aren't a part of. There are a lot of scenarios where that really calls for consent and compensation, I would say,

Chris Nichols: Okay, we've been running a little long if that's okay. So that comes down to distribution of this media and how that happens right now. So the big thing that's starting to happen, especially with videos or "fake videos" or whatever we're going to talk about, we can just go beyond deepfakes. There is an idea that we should make the distributors, social media platforms, for example, responsible for checking everything that's on their platforms. All the YouTubes and the Facebooks, and Twitter, whoever else is distributing this data. How can we make them responsible for that? Do they need to be responsible for that or is it up to the viewer to filter things themselves?

Duncan: Well, I guess from my perspective, as the law stands right now, we really can't, we don't make them responsible for that. Section 230 of the Communications Decency Act makes it pretty clear that so long as they

abide by certain types of rules and principles, that online platforms are not responsible for the content that is posted by their users. So legally liable as it stands right now, no, there is a desire to make some changes to that.

Duncan: I think there are some that are proposed that are quite reasonable and should be enacted. There are others that go too far but set aside the legal for a minute, do we as just human beings have a right to expect, say big platforms like Facebook, or YouTube or others, Instagram even, to somehow police this? I think we have a right to expect them to do what they can, to make some kind of effort to do that. I think Facebook, just earlier this year announced that it was going to have a policy about deepfakes.

Duncan: I personally don't think that policy goes far enough. It was a good headline, but it's a very limited policy to actually read the actual words of the policy. At least they're taking a step in the right direction and that's a voluntary step. One of the things I've never really understood is why the industry doesn't do more, on a voluntary basis, to help take some of the pressure off of the desire to go out and regulate and legislate. If they did more on their own, there'd probably be a lot less demand for that.

Duncan: So maybe this first step by Facebook is a step in the right direction. If they can do things like you use the technology that Wael has talked about to help flag things that might be suspicious, or likely to be deepfake, or just to say to you, hey, check the source on this because this is flagging some algorithm that we've got that says it might be a deepfake, I think that would be a huge step forward if we're looking at the political aspects of that.

Duncan: As far as the deepfake porn goes, I do think there's a lot that can be done there. I think you see less of that on mainstream platforms. You see that more in the wild west of the internet. It's harder to see how that's going to get constrained through those channels but certainly what you do sometimes see is you see ad networks attached to platforms where this type of stuff is distributed. Those kind of ad networks should really, when those are reported to them, they should pull their support for those networks. Things like that, ISPs-

Chris Nichols: Again, that's a voluntary thing, right?

Duncan: Yeah. As of now, that's a voluntary thing, but could that end up being legislated? I think it could be-

Chris Nichols: It's like, if you're doing this kind of behavior, then we are not going to give you money for that. They do that on networks all the time. There's certain networks that show a newscaster that says something very controversial,

for example, not necessarily a commentator, and then a bunch of ads get removed from that platform, and that's done as a reaction to, “We don't want to support that.”

Duncan: Right. So that could end up being a legislative proposal or something, but I think it's just as likely that what will happen is those ad networks will mess up, they'll put an ad for some very mainstream advertiser or product on one of those pages, it's going to get caught, and it's going to blow up. Then most likely, they'll just yank their ad network from those pages completely so that they don't have to deal with that in the future and actions like that are actually very helpful, because, without the funding to support it, a lot of the distribution would be a lot less.

Chris Nichols: Sure. Sure.

Duncan: So I hope something like that does take place, but what I really hope is that people will just try to be a little more responsible about that. Will there always be deepfake porn? Probably. I'm not aware of any legislative proposal or anything else that's going to completely end the problem but I do think it's really important, along with what you said earlier, that we recognize that the fact that we can't 100% fix a problem doesn't mean we shouldn't make some kind of effort and that making it better isn't really worthwhile. Making it better would be really worthwhile, even if we can't solve it completely.

Chris Nichols: Yeah. Well, I think that's a perfect place to end it, Duncan. This has been a really great conversation. I really appreciate your input and I think that this is the kind of conversation that we all need to be having with each other on a regular basis. I think that the people making this technology should be like, oh, I should really think about how what I'm creating is going to affect the world, in terms of the rights of people or whatever else is going on. So I think it's really important.

Duncan: Well, thank you so much for having me. It's been really fun to have this conversation with you even if you really tested my, I didn't know I was going to have to do so much law talk. So you really tested my qualifications there. I hope it worked out right.

Chris Nichols: I think it's important because I think there's a lot of our users and a lot of people that listen to the show that are making stuff and they're like, hey, think about what you're making. Just think about that idea and think about the world and the implications that it has around you.

Duncan: Very true, but I also think creators should not be scared to make projects that they're really passionate about. I think it's funny because I sit on panels all the time about the right of publicity. I've got one coming up next month and one of the things I always hear is I hear producers talking

about how they have to have the life rights to this person or they can't make their project, things like that. It's really not the case.

Duncan: There's a lot that you can do and a lot of lawyers have scared people about this, and they think I should be the scariest one, because I'm here, just representing the people whose rights we're talking about, in actuality there's a lot you can do and creators don't need to be so scared about it. Get some competent legal advice and you can probably make your project. If you want to make biopics, make biopics. Oh my god, yes. Absolutely.

Chris Nichols: Great. Thank you. Thank you for not being so scary. All right, Duncan, thanks so much.

Duncan: All right. Thanks.