The Ethical Dilemma of Digital Necromancy: The Elis Regina Case and a Partial Solution by Brazilian Legislators

El dilema ético de la necromancia digital: el caso de Elis Regina y una solución parcial por parte de los legisladores brasileños

Autor

Pedro Khauaja
Universidade Federal Fluminense
Email: pkhauaja@hotmail.com
https://orcid.org/0000-0002-8038-3616

Abstract

The combination of death and technology is a tricky topic, especially with Artificial Intelligence (AI) thrown into the mix, as seen in the Elis Regina Case in Brazil. Volkswagen used AI to bring back the late singer's image for a commercial, which sparked debates nationwide and globally about the ethical and legal implications of AI resurrecting deceased individuals' images, dubbed "digital necromancy". Efforts such as Bill No. 3592/23 aim to regulate *postmortem* image use, requiring explicit consent or presuming its prohibition. This paper explores the bioethical dimensions raised by the case, diving into the ethical dilemmas and legal responses while shedding light on the evolving landscape of bioethics and law in the age of advancing technology. Using a case study, this paper concludes that Bill No. 3592/23 offers a partial solution to a complex ethical dilemma, opening a possible pathway for future regulators.

Resumen

La combinación de la muerte y la tecnología es un tema delicado, especialmente cuando se incluye la inteligencia artificial (IA), como se vio en el Caso Elis Regina en Brasil. Volkswagen utilizó IA para revivir la imagen de la cantante, ya fallecida, en un anuncio publicitario, lo que generó un amplio debate a nivel nacional y global sobre las implicaciones éticas y legales de que la IA cree nuevas imágenes de personas fallecidas, fenómeno conocido como "necromancia digital". Iniciativas como el Proyecto de Ley N.º 3592/23 buscan regular el uso de la imagen postmortem, exigiendo consentimiento explícito o, en su defecto, presumiendo su prohibición. Este artículo explora las dimensiones bioéticas que plantea el caso, profundizando en los dilemas éticos y las respuestas legales, a la vez que arroja luz sobre el panorama en evolución de la bioética y el derecho en la era del avance tecnológico. Mediante el estudio del caso, el artículo concluye que el Proyecto de Ley N.º 3592/23 ofrece una solución parcial a un dilema ético complejo, abriendo una posible vía para futuros reguladores.

1. Introduction

The complex mix between death and technology is always a very delicate topic. When you add to this equation the variable "Artificial Intelligence," a technology with immense imaginative potential, the topic becomes even more sensitive. If the use of artificial intelligence in the health area has already mobilized the WHO to create ethical and practical guidelines, it is nothing less expected that the technology will reach the moment of death — and, more importantly, the afterlife.

In 2023, Volkswagen Brasil aired a commercial advertisement for a new Kombi model that will reach the Brazilian market. In this advertisement, the company used cutting-edge Artificial Intelligence technology to recreate, in the form of a three-dimensional avatar, the image of the late singer Elis Regina. From a series of videos and videos, this AI was able to perfectly emulate the singer, and Volkswagen placed her next to her daughter, Maria Rita, in the commercial.

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The practice has raised, in Brazil, a series of debates that have been going on in other countries for some time about the technical, ethical and legal dimensions of these technologies for recreating the image of deceased people. This is the so-called "Elis Regina Case," which has moved regulatory actors in the advertising sector, jurists and lawyers, and even fan clubs of the singer. Although it is not the first manifestation of this technology in Brazil, which has already hosted hologram concerts and other similar events, it was the first major mobilization around the theme, especially in legal circles.

These technologies for "resurrecting" the dead have been given the nickname, overseas, "digital necromancy," in reference to the magical art of bringing the dead back to life. These technologies are now undergoing a process of metamorphosis, creating new dilemmas due to the change of *who* can be "revived." With the advancement of AI, what used to require a colossal amount of videos and photos — and, therefore, was practically exclusive to celebrities linked to the film and music industry — now requires less and less amount of base material, becoming more public and more accessible.

With this change in mind, and considering the Elis Regina Case, came the legislative will to regulate the permissions for the use of the image in the afterlife, in the form of Bill No. 3592/23. In it, Brazilian legislators propose a first regulatory step in this field, betting on linking these technologies to the current technical framework that Private Law already offers. Amongst the articles of the Bill are Articles 2, 3 and 5, in which legislators build the notion that permission to use the image of a deceased person must be expressed, and that, in the absence of express permission during life, a negative is presumed: the image cannot be used. This is, in part, what I call the "negative presumption."

The objective of this research is to investigate the bioethical aspects that the Elis Regina case raises, especially the relationship between these aspects and the legal

environment. To this end, I divided the work into four parts: first, an explanation of the Elis Regina case, focusing on the ethical dilemma posed by the use of her image after death; then, an in-depth look at the so-called digital necromancy and the current regulations on the subject; then, a literature review of the field of Law and Bioethics, which found scarce material on ethical implications of this kind; and, finally, a case study on the legal reactions to Volkswagen's advertising.

2. The "Elis Regina Case"

On July 20, 2023, Volkswagen launched a commercial celebrating the brand's 70th anniversary in Brazil, created by AlmapBBDO. The advertisement prominently featured the late singer Elis Regina, who passed away in 1982, driving an old Kombi alongside her daughter, Maria Rita. Together, they performed "Como Nosso Pais," one of Elis's iconic songs. Despite its immediate success, reaching an audience of over 10 million within 24 hours, the commercial sparked controversy. Some questioned the ethics of using artificial intelligence to resurrect a deceased individual, a concern that has garnered attention in the wake of advancements in technology.

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Volkswagen swiftly defended the campaign, emphasizing that Regina's family had granted authorization for her image's use. The automaker maintained that the commercial served as a tribute to the singer and disavowed any profit-driven motives. Consequently, the National Council for Advertising Self-Regulation (Conar) commenced an ethical inquiry into the commercial. Ultimately, Conar opted to archive the investigation, citing no substantial issues given the family's consent for image usage.

While the commercial received public approval in some quarters, dissenting voices, particularly within specialized media (Figueira, 2023), raised significant ethical concerns. Central to these concerns was the utilization of Regina's likeness without her explicit consent, compounded by the fact that she had long passed away before the advent of such artificial intelligence technologies. This confluence of ethical dilemmas has sparked considerable debate regarding the boundaries of technological innovation and ethical responsibility in advertising.

The Elis Regina Case, as outlined by Figueira (2023), underscored three primary concerns. Firstly, it raised questions regarding privacy and the ethical use of individual images associated with Elis Regina, particularly concerning her inability to provide consent and the preservation of her post-mortem rights, which are distinct from those of her heirs. Secondly, it brought to light issues concerning her public image and the impact of such usage on public perception. This includes exploitation of the artist-fan relationship for commercial gain, disregarding the historical significance of the artist. Lastly, the case highlighted concerns regarding the potential misuse of these images for unauthorized purposes beyond the scope permitted by her heirs.

There are many possible legal consequences of this type of practice, especially considering that it was the first major use in the national territory. To begin with, we have a clear application of the principles of non-waivability and non-transferability of personality rights, except in cases defined law. In other words, there is a general presumption for the maintenance of the very personal character of these rights, which applies to the image and its derivatives. The very establishment of personality rights makes it possible for heirs to act for the maintenance of the honour of the deceased, for example.

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This type of legal approach is what legitimizes the idea that the heirs have a position of legitimacy to deal with this use of image, which will partially lead to the proposal of the Bill. Figueira (2023) approaches, on the other hand, the perspective of inheritance as a legal possibility to analyze the subject, based on Family Law, which also offers a conclusion for the legitimacy of the heirs to act as representatives. In general, there is a tension between the perspective that finds in the heirs someone who must authorize, and another that finds in them someone to curb this use.

The case sparked institutional repercussions in both the actions of CONAR and in the subsequent proposal of the Bill of Rights. Firstly, it's important to outline the role of CONAR. The National Council for Advertising Self-Regulation (CONAR) is a non-profit private entity tasked with overseeing advertising practices in Brazil. Established in 1980 by a consortium of companies and entities within the advertising sector, its primary objective is to uphold ethical standards and responsibility in advertising.

CONAR operates under the legal framework of a non-profit private entity and is governed by an Ethics Council comprised of representatives from advertising companies, consumer groups, public agencies, and other relevant stakeholders. Employing a system of self-regulation, CONAR evaluates advertising campaigns submitted by companies, offering approval, disapproval, or recommendations for modifications. In the case of the Elis Regina advertisement, CONAR received a complaint alleging infringement upon the late singer's image rights. Upon review, CONAR deemed the advertisement lawful as it had been authorized by the singer's heirs.

Typically, CONAR serves an internal regulatory function within the advertising industry, operating in cooperation with companies. However, it also holds significant judicial recognition as an effective mechanism for safeguarding certain rights, endorsed by numerous judges. In this specific instance, CONAR's concerns oscillated between ethical considerations regarding the use of public image and societal impact, and the consent of the heirs. Ultimately, the case was closed upon verifying the authorization from the heirs, reflecting CONAR's prioritization of adherence to legal agreements.

Another institutional consequence stemming from the Elis Regina Case is the introduction of Bill No. 3592/23 (PL 3592/23), presented by Randolfe Rodrigues. The primary objectives of this bill entail regulating the utilization of artificial intelligence for generating images and audio recordings of deceased individuals. Emphasizing ethical and responsible practices, the bill underscores the importance of preserving the dignity, privacy, and rights of individuals even posthumously.

Furthermore, the bill mandates the protection of the image and privacy of deceased individuals, affirming the authority of heirs to authorize or prohibit the usage of such image and audio materials. Currently under consideration in the Federal Senate, the bill, if passed, will establish a legal framework governing the application of artificial intelligence in generating images and audio recordings of deceased persons.

This legislative initiative aligns with other proposals aimed at instituting a legal framework for artificial intelligence, notably PL's 0021/2020 and 5051/2019. PL 0021/2020, proposed by Carlos Zarattini, awaits approval by the Plenary of the Chamber of Deputies. This bill outlines foundational principles for the development of artificial intelligence technologies, with a focus on safeguarding privacy and promoting technological transparency. It also mandates adherence to a set of principles and guidelines by developers and users, alongside the establishment of an ethics committee for artificial intelligence oversight.

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Similarly, PL 5051/2019, introduced by Styvenson Valentim, addresses similar themes but with fewer regulatory institutions. Both bills collectively aim to establish a comprehensive legal framework for the development and application of artificial intelligence technologies. This framework is envisaged to intersect with existing legislation such as the Marco Civil, which encompasses debates on copyright in digital content and personal data protection laws.

Regarding PL 3592/23 specifically, a key provision within the bill requires express and affirmative authorization from individuals or their direct heirs for the posthumous use of their image. This provision introduces what can be termed as a "negative assumption," wherein the absence of explicit authorization implies a prohibition on post-mortem image usage.

This legal institute represents a crucial aspect of the evolving legal framework for artificial intelligence, grounded in the protection of fundamental rights and rooted in the tradition of classical liberal thought in Private Law. This progression signifies a shift towards recognizing the social function of private image rights and underscores the inherently personal nature of such rights.

What both the Bill of Rights and CONAR's decision ignore is that there's an underlying ethical dilemma that escapes any issue of heir legitimacy or public perception of an artist's image. What I would like to focus on right now is the much simpler, yet important, ethical dilemma of whether it's fair and rightful to use someone's image after their death in a way that they themselves could not possibly have agreed to, simply because it involves future technologies and situations.

That is, there's an obvious difference between a case in which an actor's image is used to finish a movie they were already a part of and the complete creation of new imagery in a situation that the artist couldn't even imagine possible. In this case, there was no way for Elis Regina to know that Volkswagen would, someday, launch a new Kombi model.

3. AI Regulation, Digital Necromancy and Ethical Issues

3.1. What is Digital Necromancy?

Scholars of the digital environment have used this term to refer to technologies capable of recreating, in an extremely believable way, the image of deceased people. These technologies use a database, typically photos, videos, and audio, to produce entirely new content. It's a technique that can also be used with images of living people — the *deepfakes*, for example — and when applied to deceased people, receives this critical nickname.

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This happens due to this use raising several ethical problems. Recent polls show a widespread aversion of the general public to having their images recreated after their death (Morse, 2021), with many respondents raising serious questions about *Fake News*, the possibility of scams, and concern for their closest ones. In addition, the topic is the target of much criticism as a socially accepted practice, and experts also bring this concern with aspects of digital security (Morse, 2023).

This technology, although not new, has not yet been fully regulated. Its use so far has revolved around reproductions of deceased artists in musical performances, films and commercials, but mostly linked to the American film and music industries. For several reasons, which include the *common law* system itself and the US legal culture based on contractual relations, the controversies generated have been resolved based on notions of contractual protection and maintenance.

The image of these artists, it is understood, is part of the contractual package of showbusiness, and the prevailing opinion is that, once the use of the image is agreed upon, this use includes the possibility of these reproductions via AI — digital necromancy.

The concept of digital necromancy emerges through the application of techniques borrowed from the realms of cinema and music, wherein the images of deceased individuals are inserted into projects they were originally slated to participate in, or were involved in partially, but were unable to complete. This involves creating new scenes from existing footage, for instance (Hutson & Ratican, 2023). Initially, such practices were largely confined to the American cultural industry, with sporadic instances occurring beyond this sphere.

As technology progressed, it became more commonplace for artists to be "resurrected" in musical performances or commercial appearances, featuring scenes entirely fabricated from rudimentary special effects technologies, unlike earlier methods (Hutson & Ratican, 2023). The ethical dimension of this use of deceased individuals' images in popular culture is explored by Hutson and Ratican, shedding light on the moral dilemmas surrounding Western perceptions of death, mourning, and respect.

The authors draw a parallel between digital necromancy and the "pet graveyard dilemma," referencing a film wherein a family encounters a supernatural cemetery that resurrects

buried pets. They argue that the use of deceased individuals' images equates to a form of non-consensual revival, whose ethical legitimacy is questionable given the inability of the deceased to provide consent. Moreover, concerns regarding privacy violations and the impact on the grieving process of individuals, whether closely related or not, are raised.

In a related study, Morse (2023) investigates public perceptions of this practice and finds divergent opinions regarding its ethical legitimacy. However, a substantial majority believes they should have a say in the use of their image posthumously. This underscores the demand for direct influence over the usage of one's image, grounded in a longstanding tradition of private autonomy and personality rights.

While Hutson and Ratican (2023) do not primarily address legal aspects, they highlight legal challenges associated with digital necromancy, focusing on dilemmas related to privacy, consent, and the commercial exploitation of these images. Morse (2023) similarly identifies concerns among interviewees regarding fraud and inappropriate use of their own or their loved ones' images. These dilemmas intersect with the fields of bioethics and law, touching upon issues of Personality Rights and Fundamental Rights.

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In Brazil, the Elis Regina Case has sparked widespread debates surrounding the concept of digital inheritance and the family's authority over the image of the deceased. Maria Rita, Elis' daughter, granted permission for the recreation of her mother's image for the commercial (Figueira, 2023), prompting questions regarding the extent to which individuals, such as children, possess control over such images, and how much ownership of the image of public figures belongs to fans, given their historical significance. This discourse has extended Family Law discussions into the realm of Digital Law, expanding the scope of the existing concept of "digital inheritance" to encompass new dimensions.

Digital inheritance encompasses digital assets that can be bequeathed and seeks to adapt the notion of inheritance to a digital landscape, which operates under a distinct logic of ownership and possession compared to analog environments. Figueira (2023) specifically delves into this concept within the context of the Elis Regina Case, contending that mere authorization by rightful heirs does not nullify the ethical concerns surrounding the use of such images.

This discussion parallels some of the ethical dilemmas explored by Hutson and Ratican (2023), particularly concerning issues of consent impossibility. Moreover, given Elis Regina's status as a public figure of historical significance, there exists a dilemma regarding shifts in public perception of her image, which cannot be disregarded.

Overall, Figueira (2023) argues for the presence of an established digital inheritance framework within Brazilian Law, grounded in the application of principles from Family and Succession Law to the digital sphere. However, cases like the Elis Regina Case present challenges that necessitate adaptation within the legal framework. This would entail updating principles and norms to address these dilemmas, even if partially, through the lens of Private Law.

Such a resolution finds legal grounding in traditional civil doctrine, particularly in discussions surrounding the social function of property and the protection of personal rights. What is lacking, as proposed by Figueira (2023), is a pragmatic approach, which will emerge with the increasing utilization of these new technologies. The Elis Regina Case presents an opportunity to reassess this legal framework and provides a chance to reformulate certain legal institutions, aligning them with the constitutional principles that currently underpin Digital Law (Celeste, 2022).

This preliminary exploration of the topic unveils several significant challenges in attempts to regulate the use of artificial intelligence. Primarily, we encounter the issues highlighted by Figueira (2023) regarding the utilization of images of deceased individuals. Similar to various other applications of artificial intelligence in artistic production, this technology presents dilemmas concerning Copyright and its underlying principles (Gaon, 2021). Despite some instances attempting to fit artificial intelligence-generated works within existing copyright frameworks, they encounter substantial hurdles.

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Gaon (2021) emphasizes the difficulty in protecting these works under Copyright due to uncertainties surrounding the authorship of these technological creations, questioning the extent to which a machine can exhibit genuine creative authorship. According to Gaon, the current copyright framework inadequately accommodates advancements in artificial intelligence, suggesting the need for a hybrid system where authorship is shared between humans and machines.

However, this proposed solution also introduces a significant quandary, particularly in light of recent trends in generative artificial intelligence, which indiscriminately uses internet-available content without regard for authorship or privacy. Chesterman (2020) offers a legal perspective that partially addresses this dilemma by attributing personality to artificial intelligence. Nevertheless, this solution raises ethical concerns regarding whether it is in society's best interest to grant copyrights to machines functioning as surrogate creators.

These issues resonate with the observations made by Valente, Sartori, and Marin (2023), who identify key challenges in the field, including the attribution of authorship, intellectual property rights of artificial intelligences, and copyright infringement by artificial intelligences. Silva (2020) has even suggested that the emergence of these technologies may necessitate such a profound shift that the concept of "copyright" becomes obsolete, a viewpoint echoed by Gaon (2021) in various foreign studies.

Another regulatory challenge stems from the integration of artificial intelligence technologies into existing structural inequalities within society. Costa and Kremer (2022) delve into the use of artificial intelligence in facial recognition technologies, highlighting how these systems perpetuate biases stemming from historical discriminatory practices and racial prejudices. This tension between innovation and social inequalities underscores one of the many hurdles encountered in regulating digital technologies.

3.2. WHO Regulations: Ethical Principles and General Guidelines for the Use of AI in Health

In general, the WHO, although it has not expressed itself specifically on this topic, has already instituted a general ethical guide for the use of AI in health, in 2021, and a specific one for the use of large multimodal models — such as ChatGPT, for example — now in 2024. These documents are intended to serve as a guide for the implementation of these new technologies in healthcare, attempting to navigate the various ethical, moral, and legal dilemmas that arise along the way.

Both documents produced by the WHO have broad approaches and provide an overview of the state-of-the-art use of AI in healthcare. The most recent, which deals with a specific type of technology — large-scale multimodal models — does not even mention the use of these technologies in the afterlife, and the general ethical guide produced in 2021 only presents a single concern on this topic: the use of personal data after the death of the holder. The concern of both is much more with the use of these technologies in medical treatments and hospital facilities.

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The 2021 ethical guide, however, proposes six general principles that should, according to the WHO, guide the application of these technologies in the areas of human health. Briefly, these principles propose that AIs should: 1) protect human autonomy and ensure control, privacy, and validity of information; 2) focus on human well-being and safety, avoiding eventual harm; 3) be transparent and open; 4) submit to accountability systems, and *Accountability*; 5) focus on social inclusion and equality; and 6) promote sustainability of health systems.

Overall, these principles are very much in agreement with the interpretation that Brazilian law makes for the notion of "personality rights," a technical and theoretical framework that makes the main connection between Law and Health. It is precisely at this point that the use of AI technologies in the afterlife offers the greatest risk, as they are going almost unnoticed in the great wave of technological advancement in recent years. The dilemmas about consent, respect, dignity, and memory, all are becoming even more urgent, as technologies become more accessible.

4. Bioethical Issues Regarding the Use of AI Postmortem

The utilization of artificial intelligence (AI) in postmortem contexts raises significant bioethical concerns that warrant careful consideration. One of the primary ethical dilemmas revolves around consent and autonomy, particularly in cases where individuals did not explicitly consent to the use of their data or image in AI-driven applications after death. Without clear directives or explicit consent mechanisms in place, questions arise regarding the ethicality of using AI to recreate or manipulate the images or voices of

deceased individuals. This lack of consent infringes upon the principle of autonomy, which asserts individuals' right to make decisions about their bodies and personal information.

Furthermore, the ethical implications extend to issues of privacy and dignity, as AI technologies may intrude upon the private lives and memories of deceased individuals and their loved ones. The unauthorized use of personal data or images in AI-generated

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content may violate the privacy rights of the deceased and their families, potentially causing emotional distress or harm. Moreover, the manipulation of postmortem data or images without appropriate safeguards risks undermining the dignity of the deceased, treating them as mere objects for technological experimentation rather than respecting their inherent worth and humanity.

Additionally, the ethical use of AI in postmortem contexts necessitates consideration of cultural and societal norms surrounding death, mourning, and remembrance. Different cultures and communities may have distinct perspectives on death and the appropriate treatment of deceased individuals' memories. Therefore, any application of AI in postmortem settings must be sensitive to these cultural nuances and respectful of diverse beliefs and practices.

Failure to do so may lead to cultural insensitivity or offence, exacerbating ethical concerns surrounding the use of AI in these contexts. Overall, addressing the bioethical issues surrounding the use of AI in postmortem scenarios requires a nuanced understanding of consent, privacy, dignity, and cultural sensitivity to ensure ethical and respectful practices.Upon reviewing some of the man works of the "Law and Bioethics" field, especially more generalist, death-focused works such as Spielman (2006), Smith (2012) and Corrales Compagnuci et al., (2022), I noticed a distinct lack of debates regarding the subjective aspects of the deceased. It seems most concerns revolve around more "material" issues, such as cadaver rights, organs, and family issues.

The ethical dilemmas of cases like this one are more akin to the realm of subjectivity, and demand a different approach, but one that nonetheless takes into account issues of bioethical nature. Tomasini (2009) offers an interesting insight by discussing whether or not it is possible to harm the deceased. The author is trying to show possible theoretical interpretations to the idea of harming someone who isn't alive anymore. While not exactly providing a conclusive answer, the work is very effective in showing that the notion of harming a subjectivity that is no more isn't exactly universal and easy to understand. Similarly, Taylor (2012) spends an entire book discussing how harming the dead isn't possible at all, and that death itself can't be considered harm. His interpretation comes from a radical epicureanism, and he concludes that any attempt to judge someone liable for damaging the dead is null. Tomasini (2009), at some point, considers that our notions of harming the dead's *mage* or harming their heirs are ways of dodging these issues.

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no smaller than others, as it represents an urgent question that seems to be largely untouched by the field of bioethics, as it is being raised by very recent technologies. The primary question is how to assure respect to life while in death.

5. Negative Presupposition as a Partial Solution to the Ethical Dilemma

Bill No. 3592/23 aims to initiate the regulation of these technologies in Brazil. Through a model based on the idea of Personality Rights, a different approach from what we have seen so far on this topic and much akin to that of WHO, the bill establishes three important rules for the recreation of images of deceased individuals: (i) prior, express, and unequivocal consent is necessary during life or, in its absence, from their family in the event of death; (ii) heirs can control the use of this image, even going against non-express consent supposedly given during life; (iii) if the deceased person categorically expresses a desire not to allow the use of their image, heirs cannot contradict that wish.

It is the combination of these three characteristics that I refer to as "negative presumption," meaning the bill understands that, in general, a negative stance towards the use of the image post-mortem prevails. This regulation follows a history of valuing image protection, inherent in Brazilian law, as part of Personality Rights, which are more sensitive and vulnerable. It is a different interpretation from what has dominated the North American scene, focused on reducing the use of potentially harmful technology.

The concept of negative presumption, as seen in PL 3592/23, operates as a legal construct akin to others found in Private Law. It entails the presumption that in the absence of explicit endorsement for positive action, a negative stance is presumed, safeguarding individual freedoms where consent is unattainable. This absence of consent becomes particularly pertinent in cases involving individuals who passed away long before the advent of these technologies, prompting some artists to proactively prohibit such usage through contractual agreements, pre-empting potential scenarios involving artificial intelligence.

Furthermore, Bill No. 3592/23 extends this presumption to heirs, empowering them to make decisions on behalf of the deceased in the absence of explicit directives during their lifetime. This perspective acknowledges the family's legitimacy in deliberating on the usage of the deceased's image by Artificial Intelligence, thereby presenting heirs with the ethical dilemma of honouring the deceased's wishes, among other complexities highlighted in the realm of digital necromancy.

However, by shifting the ethical dilemma onto heirs, the institution of negative presumption does not fully resolve one of the key dilemmas posed by the Elis Regina Case: whether heirs can, and should, make decisions on behalf of the deceased. This issue resonates in broader parenting contexts as well. Initially, CONAR expressed

concerns regarding the ownership of Elis Regina's image, questioning whether it solely belonged to Maria Rita or also to the public and the broader history of Brazil.

While negative presumption may not resolve all the dilemmas of the Elis Regina Case, it offers an intriguing avenue for upholding Fundamental Rights and Personality within a classical liberal framework. This framework views external manifestations as a continuation of subjective personality, wherein Elis Regina's image is regarded as an integral aspect of her individual subjectivity, thus deserving protections akin to those afforded to her physical person.

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Moreover, negative presumption serves as a corollary of applying Copyright principles to artificial intelligence. Gaon (2021) contends that copyright concepts require updating in light of challenges in regulating creativity levels and delineating boundaries between artificial intelligence and its creators, a sentiment echoed in discussions by Aplin and Pasqualetto (2023). In this context, negative presumption provides a temporary regulatory mechanism, allowing for adaptation and mitigating potential misuse.

What I argue here is that this negative presumption institute is a partial solution for the bioethical dilemmas raised in cases such as the Elis Regina one. Although it doesn't address the most pressing issues, it manages to offer a practical solution for legislators and regulators to work for a future path. By tying the use of a deceased's image to first their manifestation in life and second to the heir's desires, the Bill categorically prioritizes a person's personality rights, giving second place to their heir, and throwing to a more peripheric place any contractual or commercial rights.

6. Conclusion

In conclusion, the Elis Regina Case serves as a microcosm of the broader ethical and legal challenges arising from the intersection of technology, bioethics, and law. As highlighted throughout our discussion, the case not only raises immediate concerns but also foreshadows future dilemmas that will become increasingly pertinent as technology continues to advance. Central to these discussions are the complex bioethical questions surrounding the use of artificial intelligence in postmortem contexts, as exemplified by the concept of digital necromancy.

This controversial technology, which manipulates the images and voices of deceased individuals, evokes widespread ethical unease and underscores the need for robust ethical frameworks to govern its use. There is a clear tendency that more similar tech will be created and become more accessible, which raises even more issues about whether or not we should remove the possibility of a "full death" (Düwell et al., 2008).

Amidst these complexities, the proposed Bill of Rights No. 3592/23 emerges as a potential regulatory response, albeit one that offers only a partial solution to the

multifaceted issues at hand. While the bill provides a practical mechanism for legally addressing future cases involving the use of AI in postmortem scenarios, it sidesteps some of the most pressing ethical concerns, such as consent, privacy, and dignity. Nevertheless, it represents a significant step towards establishing a legal framework to navigate the evolving landscape of digital inheritance and artificial intelligence.

Ultimately, the Elis Regina Case reminds us of the urgency of addressing these ethical and legal challenges head-on. As society grapples with the implications of emerging technologies, it is imperative to prioritize ethical considerations, uphold individual rights and dignity, and foster dialogue between stakeholders in the fields of technology, bioethics, and law. By doing so, we can work towards ensuring that future advancements in technology are accompanied by responsible and ethical practices that uphold the values of humanity and respect for the deceased.

References

Aplin, T., & Pasqualetto, G. (2023). Artificial Intelligence and Copyright Protection. *SSRN Electronic Journal*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3419481

Brasil, Câmara dos Deputados, Projeto de Lei n.º 21/2020. Estabelece fundamentos, princípios e diretrizes para o desenvolvimento e a aplicação da inteligência artificial no Brasil; e dá outras providências, 2020.

Brasil, Senado Federal, Projeto de Lei n.º 3592, de 2023. Estabelece diretrizes para o uso de imagens e áudios de pessoas falecidas por meio de inteligência artificial (IA), com o intuito de preservar a dignidade, a privacidade e os direitos dos indivíduos mesmo após sua morte, 2023.

Brasil, Senado Federal, Projeto de Lei n.º 5051, de 2019. Estabelece os princípios para o uso da Inteligência Artificial no Brasil, 2019.

Celeste, E. (2022). *Digital Constitutionalism: The Role of Internet Bills of Rights*. Routledge. https://doi.org/10.4324/9781003256908

Chesterman, S. (2020). Artificial Intelligence and the Limits of Legal Personality. *International & Comparative Law Quarterly, 69*(4), 819-844. https://doi.org/10.1017/S0020589320000366

Corrales Compagnucci, M., Wilson, M. L., Fenwick, M., Forgó, N., & Bärnighausen, T. (eds.). (2022). *AI in eHealth: Human Autonomy, Data Governance and Privacy in Healthcare* (Cambridge Bioethics and Law series). Cambridge University Press. https://doi.org/10.1017/9781108921923

Costa, R. S., & Kremer, B. (2022). Inteligência Artificial e Discriminação: Desafios e Perspectivas para a Proteção de Grupos Vulneráveis Frente às Tecnologias de Reconhecimento Facial. *Revista Brasileira De Direitos Fundamentais & Justiça, 16*(1). https://doi.org/10.30899/dfj.v16i1.1316

Düwell, M., Rehmann-Sutter, C., & Mieth, D. (2008). *The contingent nature of life: Bioethics and the limits of human existence* (International Library of Ethics, Law, and the New Medicine, Vol. 39). Springer. https://doi.org/10.1007/978-1-4020-6764-8

Figueira, H. L. M. (2023). Herança Digital e o Caso Elis Regina: implicações jurídicas no uso da imagem de pessoas mortas pela inteligência artificial. *Revista Jurídica, 3*(5), 527-545.

Gaon, A. H. (2021). *The Future of Copyright in the Age of Artificial Intelligence*. Edward Elgar. https://doi.org/10.4337/9781839103155

Hutson, J., & Ratican, J. (2023). Life, death, and AI: Exploring digital necromancy in popular culture – Ethical considerations, technological limitations, and the pet cemetery conundrum. *Metaverse, 4*(1), 2166. https://doi.org/10.54517/m.v4i1.2166

Morse, T. (2023) Digital necromancy: users' perceptions of digital afterlife and posthumous communication technologies. *Information, Communication & Society, 27*(2), 240-256. https://doi.org/10.1080/1369118X.2023.2205467

Nafziger, J. A. R. (2022). The Law and Bioethics of End-of-Life Decisions. *The American Journal of Comparative Law, 70*(Supplement_1), i394-i416. https://doi.org/10.1093/ajcl/avac013

Silva, J. M. (2020). *A Sociedade Midíocre: Passagem ao Hiperespetacular (O Fim do Direito Autoral, do Livro e da Escrita)*. Editora Buqui.

Smith, S. W. (2012). *End-of-life decisions in medical care: Principles and policies for regulating the dying process*. Cambridge University Press. https://doi.org/10.1017/CBO9780511793929

Spielman, B. (2006). *Bioethics in Law*. Humana Press.

Taylor, J. S. (2012). *Death, Posthumous Harm, and Bioethics* (Routledge Annals of Bioethics). Routledge. https://doi.org/10.4324/9780203106426

Tomasini, F. (2009). Is post-mortem harm possible? Understanding death harm and grief. *Bioethics, 23*(8), 441-449. https://doi.org/10.1111/j.1467-8519.2008.00665.x

Valente, C., Sartori, R., & Marin, J. P. (2023). Inteligência Artificial e Direitos Autorais: Um Mapeamento da Produção Científica. *Cadernos de Prospecção, 16*(4), 1137-1150. https://doi.org/10.9771/cp.v16i4.50583

Wachowicz, M. (coord.). (2015). *Direito Autoral e Marco Civil da Internet*. GEDAI.