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Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary

Joseph J. Beard

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CLONES, BONES AND TWILIGHT ZONES:
PROTECTING THE DIGITAL PERSONA OF THE
QUICK, THE DEAD AND THE IMAGINARY

By Joseph J. Beard†

ABSTRACT

This article explores a developing technology—the creation of digital replicas of individuals, both living and dead, as well as the creation of totally imaginary humans. The article examines the various laws, including copyright, sui generis, right of publicity and trademark, that may be employed to prevent the creation, duplication and exploitation of digital replicas of individuals as well as to prevent unauthorized alteration of existing images of a person. With respect to totally imaginary digital humans, the article addresses the issue of whether such virtual humans should be treated like real humans or simply as highly sophisticated forms of animated cartoon characters.

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A parallel world peopled with virtual humans! An intriguing concept, the stuff of a Twilight Zone or X-Files episode. But, virtual humans are
fact, not fiction. They are—real. Virtual humans have, in fact, been among us for some two decades now. But, to date, they have been no more than audio-visual marionettes controlled by techno-puppeteers. We all recall the kindly woodcarver Geppetto who wished that his wooden puppet, Pinocchio, would someday become a real boy. Geppetto’s wish will likely come true early in the twenty-first century. Research around the globe promises virtual humans who can see, speak, hear, touch and be touched, exhibit behavior, and think just as we do. Like Pinocchio, virtual humans will shed their “strings”—they will be virtually autonomous.

1. The fact that Doonesbury cartoonist Gary Trudeau devoted an episode to an agent suggesting to an actress that she create a digital replica of herself is popular evidence of the reality of virtual humans. See Gary Trudeau, Doonesbury (Jun. 28, 1998).

2. Among the early pioneers in this field is Dr. Norman Badler who began his research in virtual humans in the 1970s. He is the Director of the Center for Human Modeling and Simulation, Department of Computer Information Science, University of Pennsylvania. Professor Ken Perlin is also a pioneer in virtual human technology. He won an Academy Award for technical achievement in 1997 for a digital technique known as “Perlin’s Noise.” Professor Perlin who is a director of the Media Research Laboratory at New York University and Athomas Goldberg, founder and chief technology officer of Improv Technologies were awarded a U.S. patent involving virtual human technology. Teresa Riordan, Animated Characters That Can Make Their Own Decisions and Move More Gracefully, N.Y. TIMES, Sept. 10, 2001, at C2. Other academic pioneers are Dr. Daniel Thalman and Dr. Nadia Magnenat Thalman. Commercial pioneers include Jeff Kleiser and Diane Walzac whose special effects company Kleiser Walzac Construction Company owns the registered trademark “Synthespian.”

3. See CARLO COLODI, PINOCCIO (M.A. Murray trans., 1928).

4. See generally COMPUTER VISION SYSTEMS (Henrik I. Christensen ed., 1999). See also JOSEF PAULI, LEARNING-BASED ROBOT VISION: PRINCIPLES AND APPLICATIONS (2001); Alex (Sandy) Pentland & Tanzeem Choudhury, Face Recognition for Smart Environments, 33 COMPUTER No. 2 (2000), at 50.


6. Id.

7. This aspect of virtual human technology is known as haptic simulation. See IEEE VIRTUAL REALITY INTERNATIONAL SYMPOSIUM 363 (1998).


9. Claudio Pinhanez & Aaron Bobick, Using Computer Vision to Control a Reactive Computer Graphics Character in a Theater Play, in COMPUTER VISION SYSTEMS 66 (Henrik I. Christensen ed., 1999); see also Mike Addlesee et al., Implementing a Sentient
Who are virtual humans? Virtual humans may be the alter ego of a living person,\textsuperscript{10} the resurrection of a deceased individual,\textsuperscript{11} or may simply have their own unique identity.\textsuperscript{12} Virtual humans, at least those who populate film, television and computer screens, are silicon-based and nurtured in the womb of the digital computer. The concept of virtual humans, however, is not limited to the two-dimensional world of film, television and computer screens. They may appear as holographic three-dimensional images\textsuperscript{13} or in animatronic form. Stationary animatronic "humans" have entertained us at Disney World and at the Cheers theme bar.\textsuperscript{14} Eventually,
advances in robotics will combine with the human façade of animatronics to give us realistic, fully mobile virtual humans. In the "Pinocchio-goes-digital," Steven Spielberg film, *A.I. Artificial Intelligence,* David, the cybertronic boy is played by a real human, Haley Joel Osment. The day will come when the fictional David of *A.I.*, DATA of *Star Trek: The Next Generation* and other fictional humanoids will become fact. The major focus of this article, however, will be on the exploitation of virtual humans in film and television.

**What** do virtual humans do? Virtual humans have found steady employment in the entertainment field. Actor Robert Patrick’s digital clone performed as the liquid metal cyborg in *Terminator 2: Judgment Day.* That same clone was later devoured by a digital T-Rex in *Jurassic Park.* The blockbuster *Titanic* was peopled with virtual passengers who strode the digital deck of the digital Titanic; digital stunt doubles leapt to their "death" as the mighty ship foundered. More recently, in the film, *Pearl Harbor,* digital sailors perished in fireballs. But virtual humans can do more than simply entertain. For example, virtual humans play a significant role in ergonomics. Engineers using computer-aided design ("CAD") software employ virtual humans in equipment design to optimize the human-machine interface. In medicine, virtual replicas of real tumors are presented in the virtual replica of a patient’s skull to facilitate preop-

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15. Robots employing vision systems and sharing artificial intelligence are competing in soccer matches. Stephen Cass, *Robosoccer,* IEEE SPECTRUM, May 2001, at 75. "The ambition of the Robocup organizers is to develop a team of fully autonomous humanoid robots that can defeat the human world soccer champions by the year 2050." *Id.* at 76.


18. (Universal Pictures and Amblin Entertainment 1993).


23. For example, Transom Jack is a biomechanically accurate virtual human who works in virtual environments. *See* JOHN VINE, ESSENTIAL VIRTUAL REALITY FAST 121 (1998).
operative planning.\textsuperscript{24} Medical students palpate virtual tumors in the virtual livers of virtual patients to increase student skill in this important art.\textsuperscript{25} And, we can fly through the interiors of virtual patients!\textsuperscript{26} Anti-terrorism experts are trained in virtual environments peopled with virtual hostages and virtual terrorists, to hone the quick response of the trainees.\textsuperscript{27} Virtual humans may serve as avatars, our personal representatives, on the Internet.\textsuperscript{28} The employment of virtual humans is limited only by our imagination. Inevitably, virtual humans will play ever increasing roles in human affairs.

Why do virtual humans need protection? Virtual humans need protection for the same reasons humans do. Humans are protected from involuntary servitude by the Thirteenth Amendment to the Constitution.\textsuperscript{29} Virtual humans also need protection from involuntary servitude.\textsuperscript{30} Humans enjoy

\begin{itemize}
  \item \textsuperscript{24} See Chua Gim Guan et al., \textit{Volume-based Tumor Neurosurgery Planning in the Virtual Workbench}, PROCEEDINGS, IEEE VIRTUAL REALITY INTERNATIONAL SYMPOSIUM 167 (1998) (The Brigham and Women's Hospital Department of Radiology Surgical Planning Laboratory is an example of the application of computer graphics in medicine).
  \item \textsuperscript{25} See Michael Dinsmore et al., \textit{Virtual Reality Training Simulation for Palpation of Subsurface Tumors}, PROCEEDINGS, IEEE VIRTUAL REALITY ANNUAL INTERNATIONAL SYMPOSIUM 54 (1997).
  \item \textsuperscript{26} See Lichan Hong et al., \textit{Virtual Voyage: Interactive Navigation in the Human Colon}, in COMPUTER GRAPHICS PROCEEDINGS (SIGGRAPH 97) 27 (1997).
  \item \textsuperscript{27} See Dan M. Shawver, \textit{Virtual Actors and Avatars in a Flexible User-Determined-Scenario Environment}, PROCEEDINGS, IEEE VIRTUAL REALITY ANNUAL INTERNATIONAL SYMPOSIUM 170 (1997).
  \item \textsuperscript{28} See TOGLA K. ÇAPIN ET AL., \textit{AVATARS IN NETWORKED VIRTUAL ENVIRONMENTS} (1999); see also Togla K. Çapin et al., \textit{Virtual Human Representation and Communication in VLNet}, IEEE COMPUTER GRAPHICS & APPLICATIONS No. 17, at 42 (1997); JUSTINE CASSELL et al., EMBODIED CONVERSATIONAL AGENTS (2000); Henry Lieberman, Christopher Fry & Louis Weitzman, \textit{Exploring the Web with Reconnaissance Agents}, 44 COMM. OF THE ACM 69 (2001). San Francisco-based NativeMinds has patented a software technology called automated virtual representatives (“vReps”). These vReps are intended to conduct customer services, sales and marketing for online businesses, including answering questions from customers. Sabra Chartrand, \textit{Software to Provide 'Personal' Attention to Online Customers with Services Untouched by a Human}, N.Y. TIMES, Aug. 20, 2001, at C8.
  \item \textsuperscript{29} “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.
  \item \textsuperscript{30} As was said in \textit{Pavesich v. New England Life Ins. Co.}, 50 S.E. 68, 79 (Ga. 1904), “[t]he form and features of the plaintiff are his own. The defendant ... had no more authority to display them in public for the purpose of advertising the business in which they were engaged than they would have had to compel the plaintiff to place himself upon exhibition for this purpose.” The \textit{Pavesich} court went on to say that when a person’s features are used without his permission in an advertisement “he is no longer free, and ... is in reality a slave without hope of freedom.” \textit{Id.} at 80.
\end{itemize}
protection from libel, false light, invasion of privacy, commercial exploitation, and misassociation with commercial products and services. Virtual humans need similar protection. Where the virtual human is the digital clone of a living individual, presumably that individual will employ laws that protect his or her person to protect the virtual alter ego. Part II of this Article analyzes the effectiveness of these laws. Where the virtual human is the digital resurrection of a deceased person, interested heirs may seek to protect the digital Lazarus, even seeking to protect the resurrection itself. Part III examines the protection of this class of virtual humans. Imaginary virtual humans present novel questions of protection. Should this type of virtual human be treated as a cartoon character, a human being or, to compromise, as a hybrid? Part IV of this Article examines the protection of imaginary virtual humans.

The analysis which follows contemplates virtual humans who are realistic-looking; fully dynamic (including autonomous locomotion); and who can see, hear, speak, follow directions and exhibit an ever increasing ability to "think"—the virtual humans of the twenty-first century.

II. CLONES: DIGITAL REPLICAS OF LIVING INDIVIDUALS

Part II of this Article addresses the issues raised when a virtual human is the alter ego, or digital "clone," of a living person. The discussion and analysis focus on three topics: (1) the existence of the virtual human; (2) the exploitation of the virtual human; and (3) the alteration of the virtual human.

While the person cloned is probably most concerned about the unauthorized exploitation or alteration of the digital clone, he or she may be concerned about the very existence or duplication of the digital clone as well.

A. Preventing the Unauthorized Creation or Duplication of a Digital Clone

The preservation of dignity is important to most humans, regardless of their station in life. To some degree, society aids us in the preservation of dignity with libel and privacy laws. Furthermore, in the last half century, a right of publicity has been added to the arsenal of laws protecting us; though, admittedly, its goal may be more to preserve revenues than to maintain dignity. The advent of the computer-generated virtual human has increased the potential for mischief with respect to human dignity. When this technology matures, it may be very difficult to distinguish between audio-visual representations of a person and his or her clone. It will, there-
fore, be critical to the preservation of dignity (and possibly income) to ensure that society has adequate legal safeguards against the unauthorized creation of a digital replica or the unauthorized duplication of a legitimate digital replica.

To determine which legal safeguards are effective in preventing unauthorized creation of a clone, it is necessary to consider three aspects of the clone itself: (1) physical appearance; (2) voice synthesis; and (3) animation.

1. Physical Appearance

There are two approaches to creating the physical appearance of a digital clone of a person. The most direct is to use a digital device to scan the person "in the flesh." The second approach is to create a digital model of the person from existing conventional reference material, such as motion pictures, video, photographs or sculptures.

a) The Direct Approach

i) The Technology

The direct approach to creating a virtual human utilizes laser scanners or other recording devices. For example, Cyberware™ scanners employ laser beams to circle the head of the subject, mapping the 360° topography

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31. The laser scanner is, in a sense, a descendent of the "profile machine" mentioned in The Posthumous Papers of the Pickwick Club:

So I take the privilege of the day, Mary, my dear—as the gen’l’m’n in difficulties did, van he valued out of a Sunday,—to tell you that the first and only time I see you, your likeness was took on my hart in much quicker time and brighter colours than ever a likeness was took by the profeel macheen (wich p’raps you may have heered on Mary my dear) although it does finish a portrait and put the frame and glass on complete, with a hook at the end to hang it up by, and all in two minutes and a quarter.


This instrument . . . was adapted from a contrivance invented in 1806 by Charles Schmalcalder. It consisted of a long rod, one end of which was finely tapered, while the other held a sharp, pointed blade. The rod was universally pivoted a few inches from the blade end, and was so placed against sheets of paper mounted on a board that any motion of the rod caused the blade to cut the paper. The sitter took his place at the pointer end of the rod, facing at right angle to it. Beginning with the throat, the operator followed the sitter’s profile with the pointer, and the movement of the rod, thus transmitted to the blade end, cut out as many silhouettes as there were sheets of paper beneath the blade.

of the subject’s face and head, and converting that topography into digital data. Similarly, a Cyberware™ full body scanner maps the contours of the subject’s body. Facial expression, such as a smile or a frown, can be digitally captured, for example, by a head-mounted Face Trax™ device which uses pulsed near-infrared illumination and small retro-reflective markers. Motion can be captured by optical, harness or other motion detection systems such as United Technologies’ Multi Trax™ System.

Given the level of detail to which one can be replicated, a digital clone dwelling in a computer is a matter of no small concern for its human counterpart. With a little imagination one could conjure up horrific examples of potential misuse. Unless one has assurances against such misuse, it would be foolhardy to submit to digital “cloning.”

Actors have been the most visible subjects of digital “cloning.” In The Abyss, Mary Elizabeth Mastrantonio was scanned so that the special effects team at George Lucas’ Industrial Light + Magic could create a water pod that would mimic the actress’s face. In Terminator 2: Judgment Day, actor Robert Patrick was digitally scanned so that Industrial Light + Magic could create the liquid metal cyborg that challenged Arnold Schwarzenegger’s character. Similarly, in Virtuosity, Denzel Washington was scanned to create a digital replica of the star; in Judge Dredd, Sylvester Stallone’s face was “stitched” onto the head of a digital stunt double for a close-up. While actors are not the only ones who will be con-

32. For example, Sylvester Stallone’s head was scanned to create a digital stunt double for the actor in Judge Dredd (Cinergi and Hollywood Pictures 1995).
33. Another example of a 3D-Body laser scanning system is the German company Tecmath’s RAMSIS System which was developed in the course of a research project initiated in 1986 by the German automotive industry. There are non-laser technologies also being employed to create three-dimensional digital replicas of humans and objects. For example British-based Wicks and Wilson Limited markets Triform™ 3D Scanning systems. A series of structured light patterns is projected from the camera onto the object or human to be captured. By analyzing the way in which the pattern of light is distorted by the shape of the object or subject, the x, y, and z coordinates are calculated. Canadian-based Inspeck, Inc. also utilizes light in its 3D Capturor system to capture three-dimensional data.
34. Face Trax™ is a United Technologies system.
35. For a discussion of motion capture, see ALBERTO MENACHE, UNDERSTANDING MOTION CAPTURE FOR COMPUTER ANIMATION AND VIDEO GAMES (2000); see also Ben Delaney, On the Trail of the Shadow Woman: The Mystery of Motion Capture, in IEEE COMPUTER GRAPHICS & APPLICATIONS No. 18, at 14 (1998).
38. (Paramount Pictures 1995).
cerned about the unauthorized creation, duplication or exploitation of a
digital replica, they are likely to be the first to face these issues. Therefore,
an analysis of virtual human technology in Hollywood should prove useful
not only in this regard but in other areas involving the technology as well.

To fully appreciate the legal implications of virtual human technology
in film, one must consider the various rights involved in traditional film. First, the actor is not property; he may not be forced to act in a film even if he has contracted to do so. The actor's person is not copyrightable nor is the actor's voice. But when the actor's image and voice are captured on film, two sets of rights are involved: (1) the actor's rights in his or her image and performance; and (2) the copyright in the film. The actor will license the use of his or her right of publicity for purposes of that film; any re-use for other purposes is subject to the Producers-Screen Actors Guild Agreement if the actor is a member of the Screen Actors Guild ("S.A.G."). As an actor is typically an employee, the copy-

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40. Prior to the enactment of the Thirteenth Amendment, certain people, i.e., slaves, were routinely treated as property. See Johnson v. Tompkins, 13 F. Cas. 840, 843 (C.C.E.D. Pa. 1833) (No. 7,416) (treating slaves as property); Harris v. Alexander, 11 F. Cas. 611 (C.C.D. D.C. 1830) (No. 6,113) (same). However, since that time, the notion of treating slaves as property has become abhorrent to our system of justice. See Sutherland v. Mayer, 271 U.S. 272, 294 (1926) (recognizing that persons, by operation of law, cannot be treated as property).
41. See U.S. CONST. amend XIII.
42. No court would issue an injunction requiring the actor to perform even if he so contracted. See Lumley v. Wagner, 1 De G.M. & G. 604, 619 (1852) (stating, "it is true, I have not the means of compelling [Johanna Wagner] to sing").
43. In Remco Indus., Inc. v. Goldberger Doll Mfg. Co., 141 U.S.P.Q. (BNA) 898, 899 (E.D.N.Y. 1964), the court enjoined the defendant not only from copying the plaintiff's copyrighted dolls depicting the Beatles, but also from copying the original, the actual features of the Beatles. This is likely an erroneous interpretation of the law, as Professor Melville Nimmer proposes. In criticizing the court's issuance of an injunction regarding the original, the actual appearance of the Beatles, Nimmer recalls Justice Holmes now-hoary maxim that one is "free to copy the original" by stating, "[copying the original] might constitute an invasion of privacy or of a right of publicity of the Beatles themselves, but can hardly amount to an infringement of plaintiff's copyright." Melville B. Nimmer & David N. Nimmer, 2 Nimmer on Copyright § 8.01[C] n.34 (2001).
44. See Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).
45. For purposes of discussion here, image includes voice.
47. The Screen Actors Guild Codified Basic Agreement of 1995 for Independent Producers provides:

No part of the photography or sound track of a performer shall be used
other than in the picture for which he was employed, without separately
bargaining with the performer and reaching an agreement regarding
right in the motion picture that captures the images and voice of the actor is owned by the employer, the author in a work-for-hire. But, again, this does not give the copyright owner *carte blanche* to make any use of the actor's images.

The rights of the actor whose image has been captured in film and the rights of the copyright owner to exploit that filmed image have been well litigated. The introduction of the digital clone of an actor, however, takes us into uncharted territory. When the digital replica of an individual is used in a film, a new element is inserted into the legal equation. This involves: (1) the digitally scanned, "wetware" actor who, again, is not property; (2) the digital image of the actor which may be property; and (3) the reproduction of the digital image of the "wetware" actor in audiovisual format in the motion picture.

If the actor has been scanned to create a digital replica, presumably the actor has done so voluntarily. Thus, the *creation* of the digital clone was authorized. But that does not necessarily lead to the conclusion that *duplication* of that digital image is authorized. For example, an actor may have agreed to be digitally cloned for one film and find his digital replica being duplicated for use in a second film without his knowledge. Having agreed to the *creation* of a digital clone, what rights, if any, does an actor have to control the *duplication* of that clone?

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such use. The foregoing requirement of separate bargaining hereafter applies to re-use of photography or sound track in other pictures, television, theatrical or other, or the use in any other field or medium. Bargaining shall occur prior to the time such re-use is made, but performer may not agree to such re-use at the time of original employment. The foregoing shall apply only if the performer is recognizable and, as to stunts, only if the stunt is identifiable . . . No re-use may be made of nude photography without the performer's written contract.

Screen Actors Guild Codified Basic Agreement of 1995 for Independent Producers, at 64 [hereinafter "Producers-Screen Actors Guild Agreement"] (on file with author).

48. See 17 U.S.C. § 101 (1994) (stating that "a motion picture is one of nine enumerated categories in which the parties may expressly agree in a written instrument signed by them that the work shall be considered a work made for hire").

49. See *supra* note 47.

50. *See* Autry v. Republic Prods., 213 F.2d 667 (9th Cir. 1954); Rogers v. Republic Prods., 213 F.2d 662 (9th Cir. 1954); Rooney v. Columbia Pictures Indus., 538 F. Supp. 211 (S.D.N.Y. 1982); Fleet v. CBS, 58 Cal. Rptr. 2d 645 (Ct. App. 1996).

51. This term is used in virtual human technology to describe a carbon-based human.

52. Actor Robert Patrick's digital replica created for the part of the liquid metal cyborg in *Terminator 2: Judgment Day*, was later devoured by the digital T-Rex in *Jurassic Park* (disproving the old cliché, "[t]here's no such thing as a free lunch," as it does not appear that Patrick was paid for the re-use of his digital image).
To determine whether an actor, or anyone else for that matter, has a right to control the duplication of an original digital replica, which itself was created with the cooperation and permission of the person, it is necessary to determine whether or not the original digital data is property. Assuming that the data is property, the next questions are: who owns the data and are there any restrictions on the owner's ability to exploit that data? If the data is not property, are there, nonetheless, some legal restrictions on the unbridled use of that data by those with access to it?

ii) Copyright

Copyright law may provide adequate protection for the digital data. The fixation requirement is met when it is stored in computer memory. Thus, the only issue is whether the data is considered an original work of authorship. Assuming, arguendo, that the original scanned data involves a sufficient level of creativity, then the data would be copyrightable. But who is the author? A film producer might contract with the owner of a scanner to create a digital replica of the actor and the actor would agree to be scanned. The actor is much like the person who asks a professional photographer to have a portrait picture taken. It is the photographer, not the subject, who owns the copyright in the first instance. The photographer, not the customer, holds all duplication rights. Similarly, as between the actor and the owner of the scanner, it is the owner of the scanner who would own the copyright in the data.

There remains, however, the question of whether the scanner owner, as opposed to the film producer, is the author. If the owner of the scanner is not an employee of the producer and has not signed a work-for-hire agreement, the owner of the scanner would be the copyright owner and could as a matter of copyright law legally reproduce the data in any manner not precluded by the license to the motion picture producer. If the scanner were owned by the film producer, then, of course, the producer, whose employee operated the scanner, would be the author. If the scanner were independently owned, the producer could still be the author if the scanner owner and the producer signed a work-for-hire agreement.

54. 1 Nimmer, supra note 43, at § 2.08[E][1] ("[I]t is the photographer who constitutes the author . . . the human subject . . . does not succeed to any copyright ownership.").
56. See 17 U.S.C. § 101 (1994) ("A 'work made for hire' is . . . (2) a work specially ordered or commissioned for use . . . as a part of a motion picture . . . if the parties ex-
What is obvious from this analysis is that the actor is not the author in any of these scenarios. To protect against duplication of his image beyond that necessary to complete the film in question, the actor must either require transfer of the copyright to herself—along with physical surrender of the data fixed in some medium of expression and destruction of all other copies—or, at least, contractually limit the author's right to reproduce the data to the film for which the scan was made.

While I believe scan data will likely be held to be copyrightable, I shall also explore what protection might otherwise be necessary in the absence of copyright.

The digital capture of the actor's static visual data is the equivalent of a three-dimensional photograph or a sculpture. Photographs are among the enumerated categories of works protected by copyright. However, works are only protected to the extent they possess some modicum of creativity. Photographs have been held sufficiently creative based on such matters as pose, light, shade, costume, or time of day or type of equipment. In *Burrow-Giles Lithographic Co. v. Sarony*, the reflective pose of Oscar Wilde was an element of copyrightability; similarly, the pose in *Gross v. Seligman* was deemed creative. But, in a typical *Cyberware* scan, the "pose" is dictated by the necessity of creating an accurate three-dimensional model of the subject; the "author" "poses" the subject in only one way. Light and shade can be used to heighten the sense of contour of

pressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

57. However, if a celebrity has him or herself scanned, the actor may qualify as author. See infra notes 160-66 and accompanying text.
59. 111 U.S. 53 (1884).
60. 212 F. 930 (2d Cir. 1914).
61. See Morrissey v. Procter & Gamble, 379 F.2d 675, 678 (1st Cir. 1967) (discussing the "merger doctrine," under which expression is not protected where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself); Cont'l Cas. Co. v. Beardsley, 253 F.2d 702 (2d Cir. 1958). Note that occasionally a Cyberware scan will be used to create special effects as was done for the film, *Angels in the Outfield* (Caravan Pictures and Walt Disney Pictures 1994). See Cyberware, *Pacific Data Images Distorts the Fact for Angels in the Outfield, available at* http://www.cyberware.com/news/newsletters/newsletter05.html (last visited Nov. 25, 2001) ("[T]he actors were scanned at Cyberware with different facial expressions."). This type of scanning is arguably more creative than a straight scan and thus more likely to be held copyrightable.
the subject’s face in photographs and are elements of copyrightability, but the Cyberware scanner is normally not used to capture light and shade. It merely, but precisely, records the three-dimensional points constituting the subject’s features including flesh tones. Costume has been held to be an element in the originality of a photograph; in a full body scan, however, the subject is naked and the pose is dictated by the requirements of the full body scanner. Time has been held to be an element of originality in a particular photograph, but the particular time a cyber scan is made would not be a creative factor in the mechanical recordation of the topography of the subject. The angle from which a photograph is taken may also be a factor in determining the copyrightability of a photograph, but a Cyberware scan encompasses every angle. Thus, based on a comparison to the criteria for finding a photograph to be copyrightable, one might conclude that the data representing the static topography of an individual as captured by Cyberware or similar technical processes is not copyrightable. Nevertheless, even if the data is not copyrightable, might it be protected under a sui generis statute such as that of the European Union?

iii) Sui generis Protection

The European Union has addressed the issue of protecting uncopyrightable data that nevertheless has economic value and that has been collected by “the investment of considerable human, technical and financial resources.” The European Union Directive on the Legal Protection of Databases provides sui generis protection for databases. The sui generis

62. See Burrow-Giles, 111 U.S. at 60 (noting that the selection of costumes, draperies, and light rendered the photo copyrightable); see also Gross, 212 F. at 932 (stating that the “pose, light, and shade” made the photo protectable).
63. See Burrow-Giles, 111 U.S. at 60.
65. Id. at 142.
66. See 1 NIMMER, supra note 43, at § 2.08[E][2] (noting that a “photograph . . . if a slavish copy, might be said to lack originality because of the predetermined subject matter and angle”).
67. It is true that in Time, 293 F. Supp. at 143, the particular choice of film equipment was considered a creative factor, but that was but one of several factors. I do not believe that choosing one of several methods of creating a digital image by itself would constitute sufficient creativity.
69. Id. Recital 18, at 21.
right in no way derogates from any copyright protection the data otherwise enjoys, but does grant protection, for fifteen years,\(^7\) to the maker\(^1\) of a database where there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the data.\(^2\)

Before proceeding further, it is necessary to point out that laser scan data may not even qualify for protection under the Directive. Recital 17 provides:

> Whereas the term 'database' should be understood to include literary, artistic, musical or other collections of work or collections of other material such as texts, sound, images, numbers, facts, and data; whereas it should cover collections of independent works, data or other material which are systematically or methodically arranged and can be individually accessed; whereas this means that a recording on an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of this Directive.\(^3\)

A scan of a single individual, while it contains significant amounts of data,\(^4\) is not a "collection of works" that can be "individually accessed." However, the excluded works, such as cinematographic, literary or musical works, would typically be creative enough to not need sui generis protection. On the other hand, if scan data of a simple static pose is not sufficiently creative to warrant copyright protection, it will be an orphan if not granted database protection. The balance of this discussion will be predicated on the assumption that the EU Directive will either be modified to encompass laser scan data, or that organizing static data with voice data\(^5\) and animation data\(^6\) might be deemed a qualifying collection. The balance of the discussion of database protection for scan data is, of course, contingent on the sui generis right applying at all.

\(^7\) Id. Art. 10, at 26.
\(^1\) Id. Art. 4(1), at 25 (defining "author" of the database as the "natural person or group of natural persons who created the base or ... the legal person designated as the rightholder by legislation of the Member states").
\(^2\) Id. Art. 7(1), at 25.
\(^3\) Id. Recital 17, at 21.
\(^4\) A head scan contains about a quarter of a million bits of data. Cyberware\textsuperscript{TM} promotional video (on file with author).
\(^5\) See infra Part II.A.2.
\(^6\) See infra Part II.A.3.
The *sui generis* right prohibits the unauthorized extraction\(^7\) and/or re-utilization\(^7\) of the whole or substantial part—evaluated qualitatively and/or quantitatively—of the contents of the database.\(^7\) The right's protection will extend to makers who are nationals or habitual residents of third countries if such third countries offer comparable protection to databases produced by nationals of a member state or who are habitual residents in the territory of the community.\(^8\)

Two important exceptions to the database directives are moral rights\(^8\) and the computer programs "used in the making or operation of databases made accessible by electronic means."\(^8\) With respect to moral rights, the Preamble to the Directive states:

> whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works . . . such moral rights remain outside the scope of this Directive.\(^8\)

The identity of the "author" is of profound importance if the digital image of an actor is modified without the actor's permission. The Article addresses that question later.\(^8\)

While Europeans will enjoy protection against misuse of their digital data even where copyright protection is inapplicable, the United States has yet to provide similar protection. Since *Community For Creative Non-Violence v. Reid*,\(^8\) the U.S. Congress has considered—and considered—and considered database protection (recalling one of the opening lines in *Casablanca* where they wait—and wait—and wait). Database protection bills were introduced in the 104th, 105th and 106th Congresses—none became law. As it turns out, the first bill, introduced in the 104th Congress, provided better protection than the bills in the two subsequent Congresses.

In the 104th Congress, Congressman Moorhead introduced a database protection bill similar, but not identical, to the EU *sui generis* directive: "The Database Investment and Intellectual Property Antipiracy Act of

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78. *Id.*
79. *Id.* Art. 7(1), at 25.
80. *Id.* Recital 56, at 24.
81. *Id.* Recital 28, at 22.
82. *Id.* Art. 1(3), at 24.
83. *Id.* Recital 28, at 22.
84. *See infra* Part II.C.
1996."86 That bill would have protected the “database owner” from the unauthorized extraction or re-use of all of or a substantial part of the database. The bill defined a “database owner” as the database maker or the natural or juristic person who was the database maker’s successor in interest.87 Generally, the “database maker” would be the person “making a substantial investment, qualitatively or quantitatively, in the collection, assembly, verification, organization and/or presentation of the contents of a database.”88 Thus, the owner of the scanning company producing digital portraits generally would be considered the “database maker.”

However, where a database was made pursuant to special order or commission, the person who ordered or commissioned the database would be the “database maker.”89 Thus, when an actor had his or her scan done for personal use, the actor would be the “database maker” and, therefore, the “database owner.” Thus, if the data was covered by a database statute rather than copyright, ownership of the data by the actor commissioning the scan would be unambiguous. If the actor was being scanned at the behest of a film producer, the film producer, as the commissioning party, would be the “database maker” and consequently the “database owner.” The actor, having not commissioned the scan would not be considered a joint database maker90 with the producer, and hence, not a database owner. Again, if the actor had sufficient status, the actor might obtain a transfer of ownership of the data set such that he or she would be the “database owner” as the successor in interest of the “database maker,” subject only to the exploitation of the data in the film for which the data was created. If the producer were unwilling to transfer ownership of the data set, contractual restrictions on re-use of the data would be the next best protection for the actor.

This bill would have potentially provided greater protection to the actor than present law does. Moorhead’s bill, however died, with the demise of the 104th Congress.

The 105th Congress saw the introduction of a different data protection bill entitled the “Collections of Information Antipiracy Act.”91 It provided

86. H.R. 3531, 104th Cong. (1996) [hereinafter “Moorhead Data Bill”].
88. Moorhead Data Bill, supra note 86, § 2.
89. Id.
90. See id. (stating “where two or more persons qualify as the makers of a database, they are jointly the database maker”).
protection of data for fifteen years, but was not as detailed as the Moorhead Bill, nor was it a close kin to the European *sui generis* provisions.

Of particular significance in this bill was the provision that "nothing in this chapter shall restrict the owner of a particular lawfully made copy of all or part of a collection of information from selling or otherwise disposing of the possession of that copy." Ownership of a "collection of information"—in this case—the scan data, was in the person who invested substantial monetary or other resources in collecting the information. Presumably, this would have been either the owner of the scanning equipment or the film producer at whose behest the scan was done. Unless the scan was made for an actor's personal use, the actor would not be the owner. As the owner would have had the right to sell or otherwise dispose of the copy, an actor would have been well advised, if he or she had "clout," to contractually prohibit such transfer without his or her specific approval. However, the bill in the 105th Congress suffered the same fate as that in the 104th Congress.

On January 19, 1999, Congressman Coble introduced the "Collections of Information Antipiracy Act." It proposed a prohibition on misappropriation of "a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources." This bill was one of the latest attempts to protect data.

The Coble Bill would have prohibited *misappropriation* of:

All or a substantial part measured either quantitatively or qualitatively, of a collection of information gathered, organized or maintained by another person through the investment of substantial monetary or other resources so as to cause harm to the actual or potential market of that other person or a successor in interest.

Unlike the Moorhead Data Bill, the Coble Bill did not provide specifically for a specially ordered or commissioned database. Presumably the owner of the scanning device is the one who has invested "substantial monetary" resources and is the party, in the first instance, to be protected and not the actor nor the film producer (unless the producer is doing the scanning

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92. See id. § 1208(c).
93. Id. § 1203(f).
94. See id. § 1202.
95. See id. § 1203(f).
97. Id.
in-house). The actor, to obtain the injunctive and monetary relief provided in section 1406, would have to qualify as a successor in interest to the person whose "substantial monetary or other resources" were employed to collect the data.

Not to be outdone by the Committee on the Judiciary, Congressman Bliley introduced the "Consumer and Investor Access to Information Act of 1999." The Bliley Bill proposed to prohibit the sale or distribution of a database that is a duplicate of a database that was collected and organized by another person if it is sold or distributed in commerce in competition with that other database. The bill also provided that "nothing in this title shall restrict the rights of parties freely to enter into licenses or any other contracts with respect to the use of information." As with the Coble Bill it appears that protection would have been afforded to the owner of the scanning device, be it an independent contractor scanning the actor at the behest of the producer or the producer scanning the actor in-house. The bill would not have protected the actor against data duplication to which the actor had not agreed unless the owner of the scanner so agreed in a contract.

Virtual human data sets are but a small segment of the data world. And, it may be that the Coble or Bliley Bill would have been better for data protection overall than the European sui generis right or the Moorhead Bill but the property basis of the latter two is better suited to virtual human databases than the former two.

It is not clear when, if ever, Congress will pass a data protection act. If such an act is to become law, it is in the acting community's interest that a data protection act be crafted along the lines of the European law or the Moorhead Bill rather than the Coble or Bliley Bill.

iv) Trespass to Chattels

Even if a data protection act does not become law, or if such a law does not cover the scan data discussed here, there is yet another theory of liability. It is possible that unauthorized exploitation of that data is a trespass to chattels, subject to damage and, most importantly, injunctive relief.
v) Contract Law

Members of the Screen Actors Guild may find relief in the Producers-Screen Actors Guild Agreement, which states:

No part of the photography or sound track of a performer shall be used other than in the picture for which he was employed, without separately bargaining with the performer and reaching an agreement regarding such use. The foregoing requirement of separate bargaining hereafter applies to re-use of photography or sound track in other pictures, television, theatrical or other, or the use in any other field or medium. Bargaining shall occur prior to the time such re-use is made, but performer may not agree to such re-use at the time of original employment. The foregoing shall apply only if the performer is recognizable and, as to stunts, only if the stunt is identifiable. . . . No re-use may be made of nude photography without the performer’s written consent.103

That language, broadly interpreted, might include the digital image created by scanning the actor. Thus interpreted, the producer could not use the digital image in a subsequent film, nor presumably license any other producer to use it unless authorized by the performer subsequent to the original employment. However, narrowly construed, the original digital data was, and remains, independent of the photography and soundtrack. Thus, a cautious actor—presuming he or she has the “muscle”—would require an agreement, as a condition to being scanned, that the digital data be used only for purposes of that particular film and that no other use would be made of the digital image without the performer’s permission.104

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104. For example, one contract of an actress with “star power” provides:

Producer shall not be entitled to use the results and proceeds of Player’s services hereunder without Player’s consent in any motion picture other than (i) the Picture and/or (ii) “making-of-type” productions and Electronics Press Kits and/or awards show all in accordance with the requirements of the S.A.G. Agreement and this Agreement.

The agreement also provides:

Producers shall not use any footage from the Picture in which Players appear or any other footage showing Player or any likeness of Player (actual or simulated) in any music video, or any so-called interactive or other computer, video or similar games, or theme parks, rides, shows or attractions without Player’s prior written consent.
Where an actor is not a member of S.A.G. or where the person is not an actor, such contractual restrictions on exploitation of digital data are even more crucial. However, the reality is that contracts with S.A.G. or non-S.A.G. actors may not only not limit the scope of exploitation, but to the contrary, may require the actor to agree to as yet unenvisioned uses.\footnote{As an example, one “loan-out” agreement provides: Lender, Artist and Producer are aware and hereby acknowledge that new rights to the Work may come into being and/or be recognized in the future, under the law and/or in equity [hereinafter “New Exploitation Rights”], and Lender and Artist intend to and hereby grant and convey to Producer any and all such New Exploitation Rights in and to the Work throughout the universe in perpetuity. Lender, Artist and Producer are also aware and do hereby acknowledge that new (or changed) (1) technology, (2) uses, (3) media, (4) formats, (5) modes of transmission and (6) methods of distribution, dissemination, exhibition or performance [hereinafter “New Exploitation Methods”] are being and will inevitably continue to be developed in the future, which would offer new opportunities for exploiting the Work. Lender and Artist intend and do hereby grant and convey to Producer any and all rights in and to such New Exploitation Methods with respect to the Work throughout the universe in perpetuity. Lender and Artist further hereby agree that it and he or she will not seek (1) to challenge, through the courts, administrative governmental bodies, private organizations, or in any other manner the rights of Producer to exploit the Work by any means whatsoever or (2) to thwart, hinder or subvert the intent of the grants and conveyances to Producer herein and/or the collection by Producer of any proceeds relating to the rights conveyed hereunder.}

\begin{itemize}
  \item \textbf{vi) Summary}
\end{itemize}

In sum, personal ownership and exclusive control over one’s digital image provide the optimum protection against misuse of the data. If the individual owns and controls the data, access to the data by a producer might be predicated on the data being subject to restrictions on the use and/or re-use of the data.

While the principal focus of this discussion has been on digital clones of actors, private citizens will someday find that they, too, will have to worry about cyber scans. Today, children sit for school photos and families go to photography studios for a family portrait. The day will come when one can go to a cyber studio and have a scan done, perhaps only of the head or even of the entire person. The digital “sculpture,” when coupled with a voice and a digital animation program, will provide a “walk-
ing, talking” replica of the person. The President of Cyberware, Inc., predicted a day when video arcades will provide for a cyber scan of game players so that their images can be integrated into the video game they are playing.\footnote{106} It does not take great imagination to envision a cyber studio owner selling body parts, particularly heads, to a pornographer who could “graft” amateur faces onto professional bodies to achieve fresh talent.\footnote{107} Moreover, perhaps, the cyber studio will simply sell digital bodies for use as extras in a film. While libel laws and rights of privacy/publicity statutes offer protection, it would be more prudent to lock the barn door before the horse is stolen. The subject of the scan should insist at the time of contracting that all digital scan data be surrendered to the scanee and that no duplicates be retained by the cyber studio.\footnote{108}

b) The Indirect Approach

It is not only those who have been directly scanned who have to worry about digital clones. A digital replica of an individual can be created even without a laser or similar digital scan of that person. With the direct approach, the subject has consented to the original digital clone; but, in the indirect approach, the subject may not even be aware that a digital clone is being created.

Four techniques lend themselves as alternatives to scanning the individual: (1) create a bust from a life mask impression of the subject; (2) create a bust of the individual from reference photographs or motion picture frames;\footnote{109} (3) create a digital three-dimensional model using photogrammetry;\footnote{110} or (4) scan a look-alike and then “tweak” the data to improve the comparison to the individual being simulated, a body double providing realistic scan data for the rest of the simulated human.

\footnote{106}{See Cyberware™ promotional video (on file with author).}
\footnote{107}{In his science-fiction novel about a virtual Japanese woman, novelist William Gibson maps the face of one character onto the head of a male porn star. William Gibson, IDORU 213-17 (1996).}
\footnote{108}{The author was told by a representative of the Canadian firm, Inspeck, Inc., that once scan data has been delivered to the customer any other copies are destroyed. See supra note 33.}
\footnote{109}{A film entitled Everything George planned to star the late George Burns. To create George, the producer intended to create a “clay model of Burns’ head which will be scanned into a computer.” Hollywood Rep., Aug. 7, 1997, at 8; see also Bruce Handy, Have Gigabytes, Will Act, Time, Sept. 1, 1997, at 72.}
\footnote{110}{Won-Sook Lee & Nadia Magnenat Thalmann, Head Modelling From Pictures and Morphing in 3D with Image Metamorphosis Based on Triangulation, in Modeling and Motion Capture Techniques for Virtual Environments (Nadia Magnenat Thalmann & Daniel Thalmann eds., 1996).}
i) Bust from Life Mask

To create a digital replica of the "Godfather of Soul,"¹¹¹ James Brown, special effects house Digital Domain cast a life mask of the singer, then used the life mask as a mold for creating a bust. The bust was then laser scanned to create a digital replica of Brown's face and head which was then digitally stitched onto a body double. The digital likeness of Brown would clearly be subject to right of publicity laws as a "likeness;" but would it be protected by copyright? As previously discussed, a human—in this case Brown—is not copyrightable. The life mask is an image of Brown's face, but does it have the creativity necessary for federal copyright protection, or, does it merely involve "some 'physical' as opposed to 'artistic' skill?"¹¹² The same question arises with respect to the casting of the bust from the face mask. If the digital scan is itself not copyrightable then either the face mask and/or the bust must enjoy the necessary threshold of creativity if there is to be copyright protection. The answer admits of some difficulty.

ii) Bust Based on Reference Photographs

A clay bust created by reference to photographs of an individual would likely have sufficient originality to warrant copyright protection as a derivative sculpture.¹¹³ The sculptor would, of course, require licenses for the use of any copyrighted reference photographs where the copyrights were owned by third parties.¹¹⁴ The sculptor—or, if the bust is a work made for hire, the employer—will own the copyright in the bust as a derivative work. The digital scan of the bust is protected by copyright even though the digital scan of the person may not be. Why the difference in outcome? A person is not copyrightable, but the bust is. A noncreative digital scan of the person has no copyrightable element but the scan of the bust is a copy of a copyrighted work, the bust, and is therefore protected by copyright to the same extent, even if the scan as such may not be creative.

¹¹¹ Brown v. Twentieth Century Fox Film Corp., 799 F. Supp. 166, 168 n.2 (D.D.C. 1992) (noting that "the complaint states that plaintiff is "known throughout the world as 'The Godfather of Soul'")

¹¹² Dunham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 910 (2d Cir. 1980) (citing L. Batlin and Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir.) (en banc), cert denied, 429 U.S. 857 (1976)); see also, Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001). But see Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 35 (2d Cir. 1982) (holding that a portrait that improved upon the original model satisfies a minimal amount of "originality" for copyright).


As an alternative to scanning a clay bust, one can employ “digital sculpting.” This method involves direct computer sculpting where the animator studies the photographs and sculpts the computer model using two computer input devices: a six-degree of freedom interactive input device for spatially orienting the digital bust and a two-degree of freedom input device to do the sculpting. Digital sculpting requires levels of creativity similar to clay sculpting and should be equally copyrightable as a derivative of the reference photographs.

Does the subject of the bust have a right to prevent the creation of the digital bust by either described method? I shall postpone the answer to that question until I address the other two methods of creating a digital model.

iii) Photogrammetry

Photogrammetry has been used extensively to create three-dimensional models of architectural works from reference photography. That same technology can be used to create a digital bust of a person from reference photographs. For purposes of this discussion, I shall assume that the copyright in the reference photographs is owned by or properly licensed to those creating a digital bust from the photographs. Assuming that the reference photographs themselves are copyrighted, is the digital bust a protectable derivative work? At first glance, one might conclude the digital bust is protected just as a physical bust would be, as a derivative work. One might argue, however, that calculating a three-dimensional coordinate for a point on the surface of a person’s physiognomy by comparing common points in photographs taken at different angles does not take protectable elements from the reference photographs:

As long as the animator of the digital model does not appropriate any of the protectable elements of the photographs or motion picture frames, or if, at least, there is no substantial similarity with respect to protected elements of the reference works, there is no infringement.


117. See Thalmann & Volino, supra note 115 at 205.
As long as the reanimator uses photogrammetric techniques, he is not attempting to replicate the costuming, pose, lighting, shade, or other protectable elements; rather he is acting much as an anthropologist with a set of calipers, measuring the dimensions of the subject. By comparing identical points on the surface of the actor's face as portrayed in two photographs taken at different angles, the reanimator is able, with the aid of the computer, to establish a three-dimensional coordinate of the point. He can also establish three-dimensional coordinates of the other points which make up the surface of the subject's face and head. If nothing more than these reference points are used, then it would be stretching to suggest that a protectable element of the photographs had been appropriated since the pose as such was not copied nor would costume, light, shade, or other elements be appropriated. The most that could be said is that the respective angles of the reference photos were used in the calculation of the three-dimensional coordinates of a particular point on the surface of the actor's face.\textsuperscript{118}

If the above argument is correct, the digital model would not be a derivative work, having taken no protectable elements of the underlying work. There remains the question of whether the digital model itself is copyrightable. If it is not, it is merely a data set and the previous discussion of data protection is applicable. However, one might persuasively argue that the selection of the reference photographs and the particular reference points selected from the photographs at least constitute a copyrightable compilation.

iv) Scan of Look-a-Like

The final technique for creating a digital model is to use a look-alike. For the reasons previously given, the scan of the look-alike may not be copyrightable. However, the "tweaking" of the data—likely by using photos of the person being simulated—might be sufficiently creative as to warrant copyright protection.

v) The Law

The subject of the digital model does not have any copyright interest in the digital model, using any of the techniques described above, any more than the typical subject of a photograph has a copyright in the photo-

Is there any theory under which the subject can prevent the very creation of the digital model? The subject, of course, has a right of publicity that prevents commercial exploitation of his persona, for example, in advertisements. But, will the right of publicity be a viable tool for preventing creation of the digital model? Some states exclude “works of fine art” from the ambit of the right of publicity even where distributed in a limited number of copies, although the commercial distribution of busts has been held to be a violation of the celebrity’s right of publicity. So, the question is whether the digital bust is more like a work of fine art or more akin to the commercial distribution of busts. Were the digital bust created solely for the purpose of display in singular form, it would be akin to a work of fine art and therefore not subject to the person’s right of publicity. However, if the person who is the subject of the digital bust can demonstrate that it is intended to be used in the production of one or more films it might be argued to be for “trade purposes” and therefore, forbidden.

2. Voice Synthesis

Today, sound-alikes provide voices similar to that of the person being imitated. Where a sound-alike has been used in a commercial, the current trend has been to find the imitation to be a violation of the genuine per-

119. See supra note 54.

120. See ETW Corp. v. Jireh Publ’g, Inc., 99 F. Supp. 2d 829, 835 (N.D. Ohio 2000) (“The item at issue is a ‘limited edition;’ a certificate verifies that ‘only 5000 prints [are] available worldwide;’ it appears that the United States Supreme Court would find such expression to fall within the ambit of the First Amendment.”). California exempts a “single and original work of art.” CAL. CIV. CODE § 3344.1(a)(2) (Deering Supp. 2001). Illinois exempts “a single and original work of fine art” from its Right of Publicity Act. 765 ILL. COMP. STAT. ANN. 1075/35(b)(1) (West 2000). A Nevada statute states that “[t]he use is in connection with an original work of art except that multiple editions of such a work of art require consent.” NEV. REV. STAT. ANN. 597.790(2)(c) (Michie 1999); see also OHIO REV. CODE ANN. § 2741.09(A)(1)(c) (Anderson 2001) (“original works of fine art”); OKLA. STAT. ANN. tit. 12, § 1448(N)(3) (West 1993) (“Single and original works of fine art”); TEX. PROP. CODE ANN. § 26.012(a)(4) (Vernon 2000) (“single and original works of fine art”); WASH. REV. CODE ANN. § 63.60.070(2)(a) (West 2000) (“single and original works of fine art, including but not limited to photographic, graphic, and sculptural works of art that are not published in more than five copies”).

121. See Simeonov v. Tiegs, 602 N.Y.S.2d 1014, 1017 (Civ. Ct. 1993) (“Just because the artist incidentally intended to sell a limited number of copies of his creation, that does not mean that he was acting ‘for the purposes of trade.’”); see also J. THOMAS McCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 8.8[H] (2000).

son’s right of publicity as well as, possibly, a violation of section 43(a) of the Lanham Act. Most states that have codified the right of publicity include “voice” in their statutes. Where statutory protection is provided, “voice” has been interpreted to mean actual voice and not mere imitation, though in California, complementary common law has been held to protect against imitation. Rich Little, among other impressionists, makes his living imitating a variety of celebrities. This type of activity might be considered parody and, therefore protected by the First Amendment. On the other hand, when an impressionist limits imitation to one celebrity or group this may give rise to unfair competition and similar claims.

Films have been completed using impressionists. Rich Little imitated James Cagney in his final appearance in a made-for-TV movie, Terrible Joe Moran. He also provided the voice for David Niven in his final performance in Curse of the Pink Panther and, ironically provided the voice of Peter Sellers in the same film. Ironically, because Peter Sellers himself had once imitated Humphrey Bogart, who had been injured in an accident, in order to complete the film Beat the Devil.

Presumably, an impressionist could be employed to provide the voice for an unauthorized use of the digital clone of an actor in a film. Where a sound-alike is used in a commercial, however, this is clearly a violation of the right of publicity of the person imitated, just as would the use of a

123. See Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), cert denied, 506 U.S. 1080 (1993); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988). An early use of a sound-alike for a commercial involved President Franklin D. Roosevelt (FDR) in 1938. A cigarette company used an announcer whose voice was “startlingly similar to that of President Roosevelt.” Marion Stevens, Advertiser Rapped For Using Voice Similar to Roosevelt’s, MIAMI HERALD, Nov. 26, 1938, at 10A. FDR apparently took no action.

124. See Waits, 978 F.2d at 1106-12.


126. See Midler, 849 F.2d at 463.

127. See id.


133. See supra note 123.
look-alike for such a purpose.\footnote{134} As discussed above, courts have held that a look-alike has a right to exploit his or her “talent.”\footnote{135} Presumably, a sound-alike would also have a right to exploit that “talent” as well.\footnote{136}

Nevertheless, if a look-alike played the celebrity in a docudrama,\footnote{137} that may not be a violation of the celebrity’s right of publicity.\footnote{138} If that is the case, providing a sound-alike voice under the same circumstances may likewise be permissible. Where a sound-alike provides the voice to a digital clone playing a nonbiographical role, I would argue that the performance should clearly be subject to right of publicity laws.\footnote{139}

Voice technology, being explored in the United States and elsewhere, will eventually overtake the legal issues raised by use of sound-a-likes. ATR Interpreting Telecommunications Research Laboratories in Kyoto, Japan is developing “electronic impersonations-computer systems that can speak in a particular person’s voice.”\footnote{140} The ATR system, called CHATR, requires one hour of recorded speech of the person to be imitated. The speech is broken down into basic components and then CHATR reconstructs the sounds into new words and sentences spoken not only in the language in which it was originally recorded, but in other languages as well.\footnote{141} AT&T Labs has created Natural Voices text-to-speech software that some say “raises the specter of voice cloning.”\footnote{142} Among other re-

\footnote{135} Id. at 262.
\footnote{136} The Nevada right of publicity statute specifically exempts “[t]he use in an attempt to portray, imitate, simulate or impersonate a person in a play, magazine article, newspaper article, musical composition, film, or a radio, television or other audio or visual program, except where the use is directly connected with commercial sponsorship.” NEV. REV. STAT. ANN. 597.790(2)(d) (Michie 1999); see also 765 ILL. COMP. STAT. ANN. 1075/35(b)(1) (West 2000); IND. CODE ANN. § 32-13-1-1(c)(1)(C) (West 2000).
\footnote{137} “The term ‘docudrama’ connotes a type of film or novelization in which real-life events are embellished with fictional dramatic events.” Ruffin-Steinback v. dePasse, 82 F. Supp. 2d 723, 726 n.1 (E.D. Mich. 2000).
\footnote{139} See infra Part II.B.
\footnote{140} A. Pollack, Sound Bites and Then Some, N.Y. TIMES, BUS. DAY, Apr. 21, 1997, at I.
\footnote{141} See id. For the current status of CHATR, see Advanced Telecomm. Research Institute Int’l, Speech Information Processing, at http://results.atr.co.jp/products_e/seika/chatr.html (last visited Nov. 15, 2001).
\footnote{142} Lisa Guersney, Software is Called Capable of Copying Any Human Voice, N.Y. TIMES, July 31, 2001, at C1. However, synthetic voices are not without their problems. “Paul,” the computer-synthesized voice of the National Weather Service of the National Oceanic and Atmospheric Administrations (NOAA) has been withdrawn from service. “Paul” was based on the technology of the 1990s. NOAA is currently seeking to replace
search activities in speech communication systems are those being pursued by France Telecom’s research laboratory, I.B.M. Research and Lemout & Hauspie Speech Products. When these systems are perfected, it will be possible to use the person’s actual voice. Unless the individual to be electronically imitated has voluntarily provided a voice sample for analysis, the voice sample will presumably come from motion picture, video sound tracks or from sound recordings. If the reference samples are not in the public domain, copyright ownership or a license will be necessary, since presumably the sounds will be copied from the film or sound recording for analysis. Will a license also be required from the person whose voice is being analyzed? Inasmuch as what is being analyzed is the actual voice of the person, right of publicity statutes protecting voice will literally apply. But the analysis as such is not an advertising purpose. Is it a trade purpose? There does not appear to be any analogy in existing case law on which to draw. At this juncture, it is not being exploited, it is simply being created. If the synthetic voice is used in a commercial, right of publicity statutes protecting voice would apply. Suppose however, the voice is used in substitution for the voice of a look-alike, not unlike songs being dubbed for an actress who does not have a singing voice. If the look-alike is portraying the star, not in a fictional role, but as him- or herself, the First Amendment might protect the use. However, if a digital clone is used—coupled with the real, albeit synthesized, voice of the actor—the voice adds a degree of verisimilitude to the words spoken. By way of analogy, a quote from an individual lends a degree of credence that a paraphrase does not. While the creator of a docudrama is given some license to write “creatively” to enhance the dramatic effect, if the misquote or totally creative language casts the “speaker” in a false light or is defamatory, the celebrity may have a cause of action. Finally, the use of a digital clone and the actor’s recreated voice in a fictional role may be actionable as unfair competition.

3. Animation

There remains the issue of whether dynamic data, facial animation and body movement, are copyrightable. Obviously, in a motion picture, a ma-

146. See id.
Major component of the copyrightable film is the acting. Actors speak dialogue. The dialogue would presumably be copyrightable, but is not an element of the actor himself. Dialogue unaccompanied by emotion is not acting. Fear, anger, rage and tenderness are what give meaning to dialogue. "No" may be uttered in fear, anguish, anger or love. It is the actor who interprets the word. That said, one’s voice is not copyrightable nor is the exercise of one’s facial muscles in creating smiles, snarls or knitted brows.

Face Trax™ or similar devices can record a range of facial animations. The data capture of the full range of the subject’s facial muscles, reflective of the range of human emotions in his or her visual sense, would likely not be copyrightable. Were the data copyrightable, the subject might find himself in the same position as an author whose principal character was deemed to be transferred simply because the copyright to a story using the character was transferred. As to the latter, that has not been the law. An actor may not be deprived of that which makes him an actor—his ability to create emotion. Thus, the digital data representing facial animation should not be held copyrightable. This conclusion does not, however, lead to the further conclusion that the employment of that data in the telling of the story in a particular film is not an element of the copyrightability of the film.

"Motion capture," or "performance capture," as S.A.G. prefers, is used for real-time animation of cartoon characters, but also can be used off-line to marry motion capture to virtual humans, as was done to create passengers on Titanic’s digital decks. In fact, S.A.G. has taken the position that its members who are used to create the motion or performance are entitled to residuals. It is possible that mathematically created dynamics will replace or diminish the use of motion capture. Algorithms, rather than humans, may animate digital clones in the future. Computer programs that animate virtual humans will, like other software, be protected by copyright to the extent that it is not purely functional and it has minimally sufficient creativity.

147. See Midler, 849 F.2d at 462.
148. See Warner Bros., Inc. v. CBS, 216 F.2d 945 (9th Cir. 1954).
150. See Giardina, supra note 149.
Motion capture devices capture the movements of hands, arms, legs and torso while performing activities such as walking, sitting, bending or twisting. While choreography is one of the enumerated categories of copyrightable works, the ordinary movement of the subject's limbs and body are more akin to unprotectable social dance steps than to creative choreography. Thus, motion capture data would not be copyrightable to the extent that it reflects ordinary movement. If the dynamics captured are sufficiently creative as to constitute choreography, however, copyright would of course be implicated.

Finally, static and dynamic data may not be protectable as a collective work since the selection and coordination of the data are mandated by their function, and the creation of the static and dynamic characteristics of the particular actor. Thus, the static and dynamic data captured by various recording devices may lack sufficient creativity to warrant copyright protection. If, however, the static and/or dynamic data is copyrightable, it is necessary to determine who the author is, and thereby who the copyright owner is.

If the work (i.e., the data) is not a work made for hire, then the human who created the work is the author and owner of the copyright. If the work is a work-for-hire, then the employer is the author. Clearly, the person whom the data represents is not an author simply because he or she sits for this digital portrait or is the subject of motion capture. This person

152. See generally ALBERTO MANACHE, UNDERSTANDING MOTION CAPTURE FOR COMPUTER ANIMATION AND VIDEO GAMES (2000). There are a variety of commercial motion capture devices available, such as the Polhemus FASTRACK® and Ascension Technology Corporation Motion Star® electromagnetic motion tracking systems, SIMEX SIMI® Motion Station DV4 digital camera-based system, and Ascension Corporation LaserBird® optical laser-based system.

153. See H.R. REP. No. 1476, 94th Cong., at 53-54 (1976), reprinted in 1976 U.S.C.C.A.N. 5666-67 (stating that it is unnecessary to specify that "choreographic works do not include social dance steps and simple routines"); see also Melanie Cook, Comment, Moving to a New Beat: Copyright Protection for Choreographic Works, 24 UCLA L. REV. 1287, 1298-1300 (1977) (discussing social dances and routine steps).


155. See 17 U.S.C. § 101 (1994) (defining "collective work" as "a work . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole").


would no more be the author than the person who sits for a photographic portrait. Of course, if the work is a work made for hire and the person scanned is the employer, the person qua employer but not qua subject would be the author. It would be the rare instance that the scanee would be an employer under the first prong of the definition of work made for hire. But, if the digital data fits one of the nine categories of works enumerated in the second prong of the definition of a work-for-hire, the scanee will be the author of the digital data provided that a written agreement to that effect is signed by both parties.

The combination of static and dynamic data might qualify as an audiovisual work, particularly in the form of a motion picture or a compilation, in which case the scanee could insist on a work-for-hire agreement where he is the hiring party.

If the data, though copyrightable, is not considered a motion picture or other audiovisual work or a compilation, the data could not be a work made for hire under the second prong of the rule. In that event, the subject of the scan could insist that the contract for scanning services include an agreement that the copyright be transferred to the subject of the scan. In that situation the scanee has the copyright in the data until and unless the termination right is exercised. While ownership of the copyright by the subject of the scan is important to the legal control of the data, physical control of the data is no less important. Insuring adequate physical security

\[159. \text{See supra note 54.}\]

\[160. \text{The scanee relies on the skill of the scanner or motion capture operator, is digitized at the operator's worksite, does not control the efforts of the digitizer, pays a one-time fee, and does not have the right to assign further projects. See Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).}\]

\[161. \text{See 17 U.S.C. § 101 (1994) ("A 'work made for hire' is ... (2) a work specially ordered or commissioned for use as a contribution ... as part of a motion picture or other audiovisual work, ... as a compilation ... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.").}\]

\[162. \text{See id. ("Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices ... regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.").}\]

\[163. \text{See id. ("Motion pictures' are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.").}\]

\[164. \text{See id. ("A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.").}\]

\[165. \text{See 17 U.S.C. § 203(a) (1994) (stating conditions for termination).}\]
for digital data must be a priority consideration because of its easy replication and the threat of its instant global dissemination over the Internet.

A number of actors, including Marlon Brando, have had themselves digitally scanned for personal reasons. The discussion in the preceding paragraphs is of particular relevance to that type of situation. The more typical situation is a film requiring digital images of an actor to create special effects such as in Terminator 2, Virtuosity, Judge Dredd and Titanic. While a data set prepared for an actor for personal reasons might not fit into the motion picture or compilation category for purposes of work made for hire status, where the data is created specifically for use in a motion picture, courts would consider it as much work made for hire as work specially commissioned music for the film.

Whether the scan was done by a company specializing in such activity or by a film studio, the data can be a work made for hire with the film producer being the employer and, therefore, the owner of the copyright in the data. Where does this leave the actor whose digital data is being incorporated in the film? If the actor has sufficient "clout," he or she may be able to obtain a transfer of the copyright to the data exclusive of the right to exploit the data in the film in question. Presumably the actor would also desire to control the actual data set itself. If the actor cannot obtain a transfer of the copyright in the data set, the next best thing would be covenants by the film producer not to exploit the data set for any purpose other than the film for which it was prepared. Failing specific contractual restrictions, the actor will have to rely on the re-use agreement between producers and the S.A.G.

B. Preventing Unauthorized Performance by a Digital Clone

1. Clones of Professional Performers

a) Use of the Clone as a Substitute for the Actor

The preceding section discussed preventing the unauthorized creation or duplication of a digital clone. In all probability, an unauthorized clone will remain undetected until publicly exploited. While the person whose digital clone is being exploited may have an action based on the unauthorized creation or duplication itself, it is useful to consider separately whether the unauthorized exploitation is actionable. In addition, even where a digital clone has been created with the consent of the human in

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166. See Frederick Rose, Raising the Dead, TORONTO STAR, Mar. 27, 1998, at D1.
168. See supra note 103 and accompanying text.
question, exploitation of the clone without the permission, or in excess of permission, by the human must be addressed.

The exploitation of the digital clone of a celebrity raises issues virtually identical to those raised when an analog image of the celebrity is used. The resolution of an unlicensed use of a digital clone in a commercial would be no different than if a look- or sound-a-like were used. The use of a digital clone's image on celebrity memorabilia would also presumably have the same consequences as use of the real image of the celebrity for a "trade purpose." But, where performance by a digital clone is involved, we enter uncharted waters.

There is a common thread to the various types of exploitation, be it advertising, trade purpose or performance: the tension between the right of publicity (including performance right) of the celebrity on the one hand and the First Amendment rights of the unlicensed exploiter on the other. To facilitate analysis, it is convenient to distinguish: (1) advertising exploitation, (2) trade purpose exploitation, and (3) performance exploitation.

b) Advertising

An actor, musician, singer, dancer, model, or sports figure has economic value in the first instance in performing, i.e., in exploiting his or her talent. As celebrities develop public recognition and acclaim, they create a new source of economic value: the value of their public persona. An actor may lend her image and voice to a commercial. A sports figure might endorse footwear. His persona may be exploited in fields totally unrelated to his profession. When a motion picture or stage actor appears in an advertisement, he or she is selected not so much for his or her histrionic skills but rather for his or her celebrity status.

The unauthorized use of an individual's persona for advertising purposes is uniformly prohibited by state right of publicity laws, though these laws vary as to the attributes protected. One attribute common to all right of publicity statutes is image. The digital clone of an individual would seem to fit comfortably within the definition of image. The use of look-alikes has likewise been found to be actionable either under right

169. Indiana appears to provide the broadest protection. See IND. CODE ANN. § 32-13-1-7 (West 2000) (protecting (1) name, (2) voice, (3) signature, (4) photograph, (5) image, (6) likeness, (7) distinctive appearance, (8) gestures, and (9) mannerisms).

170. In Onassis, 472 N.Y.S.2d 254, a look-alike was held to be a likeness, and in Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978), a composite photo drawing, "somewhere between representational art and cartoon," was held to be a likeness. Id. at 726.
of publicity laws\textsuperscript{171} or section 43(a) of the Lanham Act.\textsuperscript{172} Presumably, the digital modification of an actor's image to look like another individual would be actionable as a \textit{replication} of that individual, or at least as a \textit{simulation} of that individual, akin to a look-alike.\textsuperscript{173}

\textbf{c) Trade Purpose}

Trade purpose cases typically involve static visual images of the celebrity in publications, posters, T-shirts, statuettes and the like. As a practical matter, it is unlikely, though not impossible, that an unlicensed exploiter would use static images of the clone as opposed to images of the celebrity himself. What is more likely is the use of the celebrity's digital clone as an animated image in a video game, a screen saver or a commercially available avatar for use on the Internet. These three possible exploitations would, arguably, be a "trade purpose" use. The difficulty in so-called "trade purpose" cases is deciding whether a particular exploitation is merely for trade purpose and therefore subject to the right of publicity or is "speech" insulated from right of publicity claims by the First Amendment.\textsuperscript{174}

Where a person's digital image is used without authority in the creation of advertising, the applicability of the right of publicity is clear.\textsuperscript{175} Equally clear is the virtual inapplicability of a First Amendment defense.\textsuperscript{176} Where the exploitation, without authority, of a digital image is for a use other than advertising, the applicability of the right of publicity is less clearly defined and the inapplicability of a First Amendment defense is less certain.\textsuperscript{177} If the use is deemed to be for the "purpose of trade" then

\begin{quote}
\textsuperscript{171} See, e.g., \textit{Onassis}, 472 N.Y.S.2d 254.
\textsuperscript{173} \textit{Binns v. Vitagraph Co. of Am.}, 103 N.E. 1108, 1110 (N.Y. 1913).
\textsuperscript{174} \textit{See Beverley v. Choices Women's Medical Ctr. Inc.}, 587 N.E.2d 275, 278 (N.Y. 1991) (stating that "[a] picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising ... unless it has no real relationship to the article").
\textsuperscript{175} See, e.g., \textit{Onassis}, 472 N.Y.S.2d 254.
\textsuperscript{176} See, e.g., \textit{Midler v. Ford Motor Co.}, 849 F.2d 460 (9th Cir. 1988) (rejecting any First Amendment defense).
\textsuperscript{177} First Amendment concerns limit the applicability of the right of publicity's "purpose of trade" prong. A person's right to exploit his name or likeness is trumped by right to make public newsworthy or public interest events. \textit{See Stephano v. News Group Publ'ns, Inc.}, 474 N.E.2d 580, 584 (N.Y. 1984). The "purpose of trade" cases have involved weighing these competing rights. \textit{See Titan Sports, Inc. v. Comics World Corp.}, 870 F.2d 85, 87 (2d Cir. 1989); \textit{Lerman v. Flynt Distrib. Co.}, 745 F.2d 123, 131 (2d Cir.)
\end{quote}
the right of publicity is applicable. A T-shirt with a picture of a celebrity has been considered a “purpose of trade,” as has the exploitation of a parody of a corporate logo, despite a First Amendment parody defense. Similarly the appearance of name or likeness on bubble gum cards and other memorabilia are considered trade purposes. Posters have generally been treated as being solely for purposes of trade, with no First Amendment overtones, but not always. If the use is communicative, it is freighted with First Amendment considerations.

Stories, whether in print, film or theater have been treated as protected by the First Amendment. Presumably, the First Amendment protects the various elements of the story including the action and the dialogue. That brings us to the question of whether the exploitation of the digital image of


180. See Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953) (holding bubble gum cards are a trade purpose). But see Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 976 (10th Cir. 1996) (holding that “[l]ittle is to be gained, and much lost, by protecting MLBPA’s right to control the use of its members’ identities in parody trading cards”) (emphasis added).


182. See, e.g., Factors, 579 F.2d at 222 (2d Cir. 1978) (rejecting First Amendment argument).

183. See, e.g., Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501 (Sup. Ct. 1968) (stating that poster of announced presidential candidate was not a use for purposes of trade). Then, in ETW Corp. v. Jireh Publ’g, Inc., 99 F. Supp. 2d 829 (N.D. Ohio 2000), Tiger Woods “bogied” when his Ohio common law right of publicity claim was trumped by the First Amendment with respect to a 5,000 copy, limited-edition print of a painting of the golfer. Id. at 835.

184. Id.; see also U.S. CONST. amend. I (stating “Congress shall make no law . . . abridging the freedom of speech, or of the press”).

an actor without that actor’s permission is a “trade purpose” unprotected by the First Amendment, and therefore subject to that actor’s right of publicity; or whether it is an element of free expression. The problem with focusing on the right of publicity is that it deals solely with representations of the person, name, likeness and voice (as reproduced), etc.; it does not deal with the person. Where a representation of the person involves First Amendment considerations, the right of publicity may be inapplicable. Not even the most ardent champions of the First Amendment have argued that a person must perform against their will. Our freedom not to do something is, with rare exception, our right. At the same time, we recognize the right of one to earn a living. In fact, there are laws to protect against discrimination in employment. At the outset, I suggested that one’s digital alter ego was a hybrid of the representation of the person and the person him- or herself. A focus on the representational aspect of digital persona appears to implicate the right of publicity and its protection of the representation of persona. But, if one focuses on the digital replica as the very person, right of performance, as opposed to right of publicity, must be addressed.

d) Performance

Motion pictures have enjoyed strong First Amendment protection as a communications medium. But, as was said in Grant v. Esquire, “the First Amendment does not absolve movie companies . . . from the obligation of paying their help.” Motion picture and television actors earn their living principally by performing. They may also earn money from the exploitation of their persona in advertising and other commercial purposes. It would be helpful to distinguish between performance rights and publicity rights even though the former are often considered to be encompassed by the latter. For purposes of this discussion, I shall treat performance as a right separate from the right of publicity.

186. E.g., the obligation to serve in the armed forces pursuant to the draft, appear when summoned by a judge or Congress under a subpoena, or surrender such rights while incarcerated.


188. A half-century ago in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), the Supreme Court concluded that “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.” Id. at 502; see also Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978) (affording First Amendment protection to motion pictures); Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790 (Ct. App. 1993); Donahue v. Warner Bros. Pictures Distrib. Corp., 272 P.2d 177 (Utah 1954) (same).

When an actor acts, a singer or musician performs, or a model poses, that person is exploiting his or her professional value as a person. When they lend their name or likeness to an endorsement or to inclusion in a product, it is an exploitation of their publicity value. The right of publicity has been called a property right. But since the Thirteenth Amendment to the Constitution, no human being in this country has been considered property. Thus, when an actor contracts for his or her services as an actor he or she is not selling a property right. In Zacchini v. Scripps-Howard Broadcasting Co., the Supreme Court recognized the distinction between the person and his public persona: “the broadcast of petitioner’s entire performance, unlike the unauthorized use of another’s name for purposes of trade . . . goes to the heart of petitioner’s ability to earn a living as an entertainer.” The Court went on to note that what was involved was not “the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.”

If the digital clone of an actor were used to create a motion picture or television program without the actor’s permission, would this be a violation of the actor’s performance right? Motion pictures and sound recordings capture the performance of an individual. They are historical records of the individual’s live performance. They are representations of the person but are not the person himself. I have previously suggested that the digital clone of an actor is a combination of a representation of the person and the person himself. When the clone acts in a motion picture, the clone is substituting for the actor. An unauthorized performance may deprive the actor of a professional opportunity and, even worse, may even damage the reputation of the actor because of a poor quality performance by the clone or by the very subject matter of the film. The clone is in competition with the actor. In Chaplin v. Amador, a film, The Racetrack, starred the defendant “Charlie Aplin,” whose garb and performance imitated that of Charlie Chaplin’s “Tramp.” In enjoining the performance of the film, the court stated that the imitation deprived Chaplin of patronage that he might otherwise have enjoyed. This was held to be unfair competition.

193. Id. at 546.
194. Id.
v. Worldvision Enterprises, Inc.,\textsuperscript{195} the defendants were enjoined from producing and distributing a television series entitled “Stan ‘n’ Ollie” in which actors Chuck McCann and Jim McGeorge would portray Stan Laurel and Oliver Hardy.\textsuperscript{196} Presumably, the unauthorized use of a digital clone to portray other actors would also constitute unfair competition. Nevertheless, there is language in Onassis v. Christian Dior-New York, Inc.\textsuperscript{197} which must be considered. In Onassis, the court found that the use of a look-alike of Jacqueline Onassis in an advertisement was a violation of her rights under N.Y. Civil Rights law.\textsuperscript{198} The court went on to say, however, that the look-alike, Barbara Reynolds, “may capitalize on the striking resemblance of facial features at parties, television appearances and dramatic events.”\textsuperscript{199} Presumably, had Miss Reynolds portrayed Ms. Onassis in a docudrama, such portrayal would be protected by the First Amendment.\textsuperscript{200} Ms. Onassis was not an actress. Had she been so, might the court have more narrowly drawn Miss Reynolds’ right to perform on television?

While unauthorized competition from a digital clone is likely to be enjoined when the clone is playing a fictional role, what if the clone is playing the actor himself? Actors have portrayed themselves in films. Audie Murphy portrayed his Medal of Honor exploits in the autobiographical film To Hell and Back.\textsuperscript{201} Monty Wooley, a real-life friend of Cole Porter, portrayed himself in the highly fictionalized film biography of Porter, Night and Day.\textsuperscript{202} Of course, in these two and similar films, the actors agreed to perform. The more analogous case is where an actor is portrayed by someone else in a biography. The subjects of unauthorized biographies have been singularly unsuccessful in enjoining publication of works.\textsuperscript{203}

\textsuperscript{195} 455 F. Supp. 252 (S.D.N.Y. 1978).
\textsuperscript{196} Larry Harmon, whose corporation, Larry Harmon Pictures Corporation, was a plaintiff in Price, co-produced The All New Adventures of Laurel & Hardy: For Love of Mummy in 1998 starring Bronson Pinchot as Stan Laurel and Gailard Sartain as Oliver Hardy.
\textsuperscript{199} Onassis, 472 N.Y.S.2d at 262. Ron Smith’s Celebrity-Look-Alike “rents out more than 30,000 celebrity look-alikes.” Al Young, All-new familiar faces, USA TODAY, Apr. 2, 1998, at 2D.
\textsuperscript{200} U.S. CONST. amend. I.
\textsuperscript{201} (Universal International Pictures 1955).
\textsuperscript{202} (Warner Brothers 1946).
\textsuperscript{203} As powerful as he was, Howard Hughes was unable to stop publication of an unauthorized biography. Rosemont Enters., Inc. v. Random House, Inc., 294 N.Y.S.2d 122 (Sup. Ct.1968), aff’d, 301 N.Y.S.2d 948 (App. Div. 1969).
Actress Elizabeth Taylor brought an action to enjoin a broadcast by NBC of an unauthorized biographical film. In denying Miss Taylor the injunction, the court, in *Taylor v. NBC*, contrasted earlier cases in which the defendants imitated celebrity performers Charlie Chaplin and Elvis Presley: "[s]urely a dramatic presentation of the life of the plaintiff will not be construed as being actually played by plaintiff . . ." Sherilyn Fenn, who portrayed Miss Taylor in the televised two-part mini-series, *Liz: the Elizabeth Taylor Story* did not particularly resemble Miss Taylor, except in the most general way, and no one familiar with the actress would believe that Taylor had played herself.

The case may have come out differently if the actress had been a look-alike, since some in the audience might have then believed Taylor played herself. If this were the case, Miss Taylor might have had a Lanham Act section 43(a) claim. The Lanham Act has been employed to protect various aspects of persona. There is a degree of overlap between Lanham Act protection and that afforded by rights of privacy and publicity, but in some regard the Lanham Act may be more flexible in the protection it extends. The applicability of section 43(a) to actors was made clear in *Smith v. Montoro*. The use of a look-alike has been held to violate section 43(a), as has the use of a sound-alike. A photorealistic clone of the

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207. (NBC 1995).
209. 648 F.2d 602(9th Cir. 1981). The court stated:

> [I]t is clear that appellant, as one in the business of providing his talents for use in the creation of an entertainment product, is uniquely situated to complain of injury resulting from a film distributor’s misidentification of appellant’s contribution to the product. According to one commentator, the “dispositive question” as to a party’s standing to maintain an action under section 43(a) is whether the party “has a reasonable interest to be protected against false advertising” [citation omitted]. The vital interest of actors in receiving accurate credit for their work has already been described. Accordingly, we hold that appellant has standing to sue in federal court based on defendant’s alleged violation of section 43(a).

*Id.* at 608.
211. *Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).*
actor is even more likely to create consumer confusion than a look-alike (or a sound-alike). However, it should be emphasized that if the film producer includes a prominent announcement in the credits, for example, that a clone is being used, this may eliminate consumer confusion and therefore the applicability of section 43(a) to the actor. But, the actor would still be left with his or her performance right claim.

Suppose Miss Taylor had been played by a digital clone. Might Taylor, in such an instance, invoke her right of performance, as an aspect of the right of publicity? First, it must be remembered that likelihood of confusion is not an aspect of the right of publicity. Second, the right of performance aspect of right of publicity, as opposed to advertising or trade purposes, is arguably entitled to protection notwithstanding First Amendment claims. Finally, while a “living and breathing actor... has the right to exploit his or her own face,” the digital clone no matter how life-like is not “a living and breathing” actor. Therefore, whatever rights a human look-alike may have cannot be applied to a clone—he, she, or it does not have to put bread on the table.

2. Clones of Public Officials

Public officials have often been the subject of film and theater. Presidents, governors, and mayors have been portrayed by actors, Allen v. Nat’l Video, Inc., 610 F. Supp. 612, 630 (S.D.N.Y. 1985).

213. “The right of publicity is considered an intellectual property right.... It is a more expansive right than any common law or statutory trademark infringement right because it does not require a showing of likelihood of confusion.” Henley v. Dillard Dep’t Stores, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999); see also Elvis Presley Enters., Inc. v. Capece, 950 F. Supp. 783, 801 (S.D. Tex. 1996).

214. “[W]e are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.” Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575 (1977). “Ohio has recognized what may be the strongest case for a ‘right of publicity’ involving, not the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.” Id. at 576. The Supreme Court’s incentive rationale “is obviously more compelling in a right of performance case than in a more typical right of publicity case involving the appropriation of a celebrity’s identity.” Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 973 (10th Cir. 1996).


216. E.g., Alexander Knox as “Wilson” (WILSON (20th Century Fox 1944)); Ralph Bellamy as F.D.R. in Sunrise at Campobello (Scharly Brothers Inc. and Warner Brothers 1960); J.F.K. has been portrayed by Cliff Robertson in PT 109 (Warner Brothers 1963), William Devane in The Missiles of October (Viacom 1974) (ABC television broadcast 1974), and Martin Sheen in Kennedy (Alan Landsburg Productions 1983).
some of whom may have borne some resemblance to the official, perhaps enhanced by makeup. Some officials have portrayed themselves in television programs. Congressman Newt Gingrich appeared as himself in *Countdown to Looking Glass.*\(^\text{220}\) Cheer's, based on the now-famous "Bull and Finch" cellar bar in Boston boasted appearances by Speaker of the House Tip O'Neill\(^\text{221}\) and Chairman of the Joint Chief's of Staff Admiral William Crowe.\(^\text{222}\) Some former public officials, including former Senator Bob Dole\(^\text{223}\) and Tip O'Neill,\(^\text{224}\) have even appeared in commercials. On the one hand, professional actors portray political figures in, at times highly fictionalized, biographical works. On the other hand, political figures have themselves appeared *voluntarily* in otherwise fictional works. A new dimension was added with the production of the Academy award-winning fictional film *Forrest Gump.*\(^\text{225}\) In this film starring Tom Hanks, director Robert Zemeckis used digital technology to create the illusion that Hank's character, Forrest Gump, was actually meeting Presidents Kennedy, Johnson and Nixon. Actors did not play the Presidents. Instead, Zemeckis used digital technology and news footage of the three Presidents to create the fictional meetings. Permission to use these images was not sought from the estates of the Presidents.

Zemeckis' next step was to incorporate images of then incumbent President, William Jefferson Clinton, in the fictional film *Contact.*\(^\text{226}\) By using existing news footage of the President that fit the fictional events portrayed in the film, Zemeckis created the illusion that Clinton had actually voluntarily participated in the filming.\(^\text{227}\) The President was not pleased and made that displeasure known to Warner Brothers. Zemeckis

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218. E.g., Tom Bosley as New York Mayor Fiorello LaGuardia in the musical *Fiorello* (1958); Bob Hope as LaGuardia's predecessor James J. Walker in Beau James (Hope Enters. and Paramount Pictures 1957).
219. Occasionally in a role reversal, actors become public officials, the best example being "The Gipper," President Ronald Reagan.
220. (HBO television broadcast, 1984).
223. Dole has done Pepsi and Visa Commercials but is perhaps best known for his Viagra advertisements.
224. O'Neill starred in commercials for American Express, Hush Puppies and rose magically out of a suitcase for a commercial for Quality Inns among other "gigs."
226. (South Side Amusement Co. and Warner Brothers 1997).
defended his unauthorized use of Clinton on the basis that the President was a public figure. Subsequently, President Clinton made “guest” appearances in several episodes of the television series, J.A.G. Here we have living politicians involuntarily appearing as themselves in otherwise fictional works. The appearances are, to large degree, as previously recorded, though some degree of digital manipulation is possible. But, eventually, the limitations imposed by the use of archival footage will be obviated by the use of digital clones. Public officials, no less than actors, may find themselves digitally cloned. What rights, if any, does an official, present or former, have with respect to the exploitation of a digital clone in advertising, trade or film and television performances?

a) Advertising

Unauthorized commercial or print ads featuring a clone of a present or former government official without that person’s consent would be a violation of the right of publicity under the typical state statute. It would also constitute a false attribution under section 43(a) of the Lanham Act. Given that a public official is involved, there is a likelihood of First Amendment claims being raised by the advertiser. Though it is true that advertisements have recently been treated more favorably with respect to First Amendment claims than in the past, I would suggest that, unless the commercial has a political context, such a defense should fail. But what about a political debate? One might envision in the future a commercial for a political campaign in which one candidate debates the clone of his or her opponent. That scenario might well be protected against right of publicity or other claims by the real opponent, based on a First Amendment defense, particularly if the opponent were ducking an actual debate!

228. Belisarius Productions & Paramount. In one episode, the hero, Lieutenant Commander Harmon Rabb, has been falsely accused of maligning President Clinton. Clinton’s image is used to play a role rather than simply being “window dressing.” JAG: Contemptuous Words (CBS television broadcast, Nov. 23, 1999).

229. J.F.K.’s lips were morphed in Forrest Gump to synch with the created dialogue: “[h]e needs to pee.”


233. See MCCARTHY, supra note 121, at § 4.23 (A political figure “should have the same scope of rights and remedies as anyone else against the unpermitted use of identity to draw attention to an ordinary commercial advertisement.”). For an example of a political context in which the First Amendment trumped right of publicity, see Stem v. Delphi Internet Servs. Corp., 626 N.Y.S.2d 694 (Sup. Ct. 1995) (“Shock-jock” Howard Stern promoted himself as a candidate for governor of New York.).
b) Trade Purpose

The sale of collector's plates and busts of various presidents and other political figures is certainly encompassed by the term "trade purpose," as would be the sale of T-shirts or posters. As was said with respect to actors in Part II.B.1.c, it is unlikely that images of a digital clone, rather than images of the actual public figure, would ever be used for those types of trade purposes. A more likely scenario would be an animated, rather than static, image of the clone, such as one appearing as a character in a video game or as an avatar in the Internet setting. In the event that the clone's image was used, it would certainly be considered a "likeness" of the actual public figure. Such a use would be a violation of the typical right of publicity law unless it is "sufficiently relevant to a matter of public interest to be a form of expression which is constitutionally protected."234

c) Performance

The most likely use of a digital clone (or a digitally altered actor) would be to portray the political figure in a biographical role in a docudrama or to add an air of verisimilitude to a fictional, "period" piece.236 When the clone of a living actor is used instead of the actor, that exploitation robs the actor of his performance right as suggested in Part II.B.1.d. Where the clone is of a political figure, there is typically no unfair competition, assuming the political figure was not personally interested in playing the role. If the clone were used to perform a fictional role rather than a biographical role, however, that might be considered as a "trade purpose" not protected by First Amendment considerations since, presumably, the clone was used for its sensational value.238 Assuming the clone is portraying the politician in a biographical role, the only issues that might arise

236. I use the term "biographical role" to include any role in which the clone is portraying the politician as himself or herself rather than as the politician playing a fictional role. E.g., now-U.S. Senator Fred Thompson played himself in the film Marie: A True Story (Viacom 1974), whereas he played the fictional role of Admiral Painter in The Hunt for Red October (Paramount Pictures 1990).
237. This in essence is what was done, not with digital clones, but with digitally altered news clips of the presidents in Forrest Gump (Paramount Pictures 1994).
would be if the production cast the politician in a false light or was libelous. 239

3. Clones of Other Public Figures

There are many others besides performers and politicians who come into the public eye, and here I distinguish between a public official and a public figure. 240 For some, fame is long-lasting, like that of Charles Lindberg and Neil Armstrong. For others fame is more fleeting. For example, when Monica Lewinsky became a focal point of national and international news, a veritable cottage industry in Monica memorabilia sprang up including cigars with her image on the wrapper, presumably without her permission. 241 That particular cottage industry disappeared as quickly as it arrived.

Protection against the use of clones in commercials should be as available to public figures as it is to performers and politicians. The same can be said for trade purposes, such as the Monica cigars. With respect to clones or digitally altered actors playing the celebrity, such portrayal, if biographical, would be protected by the First Amendment, 242 but subject to false light and libel claims under an "actual malice" standard. 243

C. Digital Alteration of an Actor's Performances in a Film

Digital technology will not only create clones of individuals, it may also be used to modify existing images. Imagine Pinocchio's nose being lengthened, 244 even when he is not telling a fib! And suppose that Pinocchio found his head being replaced by Charlie McCarthy's or worse, by

242. See Benavidez v. Anheuser Busch, Inc., 873 F.2d 102 (5th Cir. 1989).
244. British Prime Minister Tony Blair was pictured with a very long nose in a Conservative Party ad in the run-up to the 2001 election. THE GUARDIAN, May 24, 2001, at 15.
Mortimer Snerd. Pinocchio might find his eyes or ears or voice being kidnapped for use elsewhere. How can Pinocchio or, for that matter, a Tom Cruise or a Michelle Pfeiffer prevent this type of digital mayhem? We will take a look at each of these problems, starting with digital manipulation of one’s image.

1. **Digital Plastic Surgery In Post-Production**

With the introduction of virtual actors, and with technology approaching the ability to digitally manipulate images in a manner which makes them indistinguishable from the real actors, computers are being used to alter an actor’s appearance and, perhaps, performance in the latter stages of editing. While perhaps not technically a clone of an actor, it is necessary to consider post-production modification of an actor’s appearance and, possibly, aspects of his performance. “We’ll fix it in post . . . [is] . . . becoming as common on movie sets as the cry ‘Action’.”

In post-production, it will be possible to lengthen or shorten a nose, move eyes closer or farther apart, and age or “youthen” the appearance of an actor.

Historically, an actor’s appearance has been enhanced, or at least changed, through the use of makeup, lighting or soapboxes—but this was done with the permission of the actor. In post-production, the actor may not even be aware of change until the film is released. If the actor has “muscle,” he or she can insist on control of any post-production modification of appear-

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245. For those unfamiliar with Charlie McCarthy and Mortimer Snerd, see GERALD NACHMAN, RAISED ON RADIO 133-38 (1998).

246. Digital alteration of still photographs is a bellwether of what will happen in the motion picture industry. Actress Mira Sorvino posed as a number of silver-screen stars of yesteryear including Frances Farmer and Lana Turner for Allure magazine. She apparently balked at posing as Joan Crawford axing her rosebushes. Photographer David La Chapelle reportedly used his computer to superimpose Sorvino dressed as Marlene Dietrich in his Crawford tableau, “going so far as to alter her makeup digitally to make it look more Crawfordesque.” Beth Landham Keil & Deborah Mitchell, Intelligencer, NEW YORK, May 19, 1997, at 11; see also Amy M. Spindler, Making the Camera Lie, Digitally and Often, N.Y. TIMES, June 17, 1997, at B7.


248. Post-production digital surgery permitted a singer to shed forty pounds for a music video; a leading man had his calves thickened to make them look more muscular; and, actors have had bald spots digitally covered. Id. “One digital company is reportedly working on inserting Clint Eastwood into a forthcoming studio movie, but as he appeared in his Dirty Harry hey day—current Clint doing the acting, then de-aged in postproduction.” Jeff Dawson, We're Just Dying to Work with You, SUNDAY TIMES (London), Jan. 7, 2001 (Culture Supp.), at 11. In 1991, Jimmy Cagney, who died in 1986, was digitally made taller so as not to be overshadowed by the live actress sitting next to him in a Diet Coke ad. Michael Quinn, Ghosts in Commercials, TIME, Dec. 23, 1991, at 56.
If the actor does not obtain such contractual rights then, absent any future S.A.G. agreement providing such rights generally, an actor would be left to whatever legal remedies might be appropriate.

As the Second Circuit has acknowledged, American copyright law "does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal rights." Moreover, since actor usually would not own the copyright in the motion picture that he stars in, he would not be able to resort to copyright law for relief. Aggrieved thespians have at times been able to successfully sue under section 43(a) of the Lanham Act.

To successfully sue under section 43(a) of the Lanham Act, a plaintiff has to show: (1) he or she is "any person who believes that he or she is likely to be damaged"; (2) a reasonable interest to be protected; and (3) a belief that the plaintiff has suffered, or is likely to suffer, damage.

In Gilliam v. Am. Broad. Co., Inc., the famous comedy group, "Monty Python," sued the ABC television network for the unauthorized editing of two of their programs. The comedy group claimed that excessive editing by the ABC network mutilated their television programs to

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250. Gilliam v. ABC, 538 F.2d 14, 24 (2d Cir. 1976); see also Lee v. A.R.T. Co., 125 F.3d 580, 582 (7th Cir. 1997) (noting that it is "accepted wisdom that the United States d[oes] not enforce any claim of moral rights"). However, the long standing rule has been eroded with the introduction of 17 U.S.C. § 106A(a)(3)(A) (1994), which gives authors of a "work of visual art" the right to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation." A "work of visual art" is "a narrow class of art defined to include paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes, existing in a single copy or limited edition of 200 copies or fewer." Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83 (2d Cir. 1995). A "motion picture" is specifically excluded as a "work of visual art." 17 U.S.C. § 101 (1994).


253. 538 F.2d 14 (2d Cir. 1976).
such an extent as to lose the "iconoclastic verve" typical of the group’s comedy style.254 The court noted that an action under section 43(a) of the Lanham Act was proper because the Act is violated when "a representation of a product, although technically true, creates a false impression of the product's origin."255 In this case, the edited versions of the program would be unequivocally associated with the comedy group, in effect creating a false impression of its origin. The court stated that, when someone attributes a distorted work to the original author, in essence, it is such that "[t]o deform his work is to present him to the public as the creator of a work not his own, and thus makes . . . him subject to criticism for work he has not done."256

The court further held that section 43(a) of the Lanham Act can be "invoked to prevent misrepresentations that may injure the plaintiff's business or personal reputation, even when no registered trademark is concerned."257 Given that the edited program was likely to reflect badly on the comedy group, the court granted relief, holding that the airing of the modified program would injure the group's business reputation and portray "a mere caricature of their talents."258

Using this type of analysis, an actor who discovers that the producers have digitally altered his or her image during editing may pursue a section 43(a) claim by alleging that allowing the "performance" of the digital actor would be injurious to the real actor's reputation and business interest,259 would portray "a mere caricature of their talents,"260 and would cause him or her to lose audience appeal, the cornerstone of stardom and the crucial element in an actor's ability to command a high salary.261

In Smith v. Montoro,262 the Ninth Circuit held that replacing one actor's name for another in a motion picture amounted to "reverse passing off," a cognizable claim under section 43(a) of the Lanham Act.263 In

254. Id. at 18.
255. Id. at 24.
256. Id. (citing Martin A. Reoder, The Doctrine of Moral Right, 53 HARV. L. REV. 554, 569 (1940)).
257. Id. at 24.
258. Id. at 25.
259. See id.
260. Id.
262. 648 F.2d 602 (9th Cir. 1981).
263. Id. at 607. "A wrongdoer who removes a person's name or mark from a product and then sells that product as his own may violate the Lanham Act; such a practice is known as reverse passing off." Netzer v. Continuity Graphic Assocs., 963 F. Supp. 1308, 1322 (S.D.N.Y. 1997); see also Cafferty v. Scotti Bros. Records, Inc., 969 F. Supp. 193
PROTECTING THE DIGITAL PERSONA

Smith, the plaintiff starred in an Italian motion picture, later released in the United States.\textsuperscript{264} Prior to the film’s American release, the distributor removed the plaintiff actor’s name from the credits of the movie and substituted the name of another actor.\textsuperscript{265} The Ninth Circuit recognized that the distributor’s actions damaged the plaintiff actor because an actor’s career is strongly dependent on his or her screen performance and movie credits.\textsuperscript{266} The court noted that the removal of the plaintiff’s name from the credits resulted in the movie misrepresenting the origin of the performance of the lead actor, which constituted “express reverse passing off,”\textsuperscript{267} prohibited under section 43(a) of the Lanham Act.

Looking at the other side of the coin, motion picture producers and directors could attempt to justify digital editing with critical actors by claiming implied consent.\textsuperscript{268} A producer would argue that an actor’s acceptance of a role in a motion picture gives the producer an implied right to manipulate the film to achieve the desired result. Just as an actor has no saying on what “takes” end up on the cutting room floor, a director or producer would argue that digital manipulation of the actor’s performance or features may be necessary to achieve the director’s vision. Implied consent would be ascertained from the conduct of the parties and from their contractual relationship.

2. Bette Davis’ Eyes: The Digital Theft of Body Parts

Not so many years ago, Bette Davis Eyes was a popular song.\textsuperscript{269} Bette Davis’ eyes were certainly the most memorable aspect of her physical be-

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\textsuperscript{264} Id. at 603.
\textsuperscript{265} Id.
\textsuperscript{266} Id. at 607.
\textsuperscript{267} Id. The court noted that “express reverse passing off” occurs where “the originator of the misidentified product is involuntarily deprived of the advertising value of its name and of the good will that otherwise would stem from public knowledge of the true source of the satisfactory product.” Id.
\textsuperscript{268} See Gilliam v. ABC, 538 F.2d 14, 23 (2d Cir. 1976).
\textsuperscript{269} See KIM CARNES, Bette Davis Eyes, on MISTAKEN IDENTITY (Columbia Records 1975) (written by Jackie DeShannon & Donna Weis). Kim Carnes received a Grammy in 1981 for her recording of the song. For the use of celebrity names in the title of works, see, e.g., Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989). The court noted that “[m]any titles ... include a well-known name without any overt indication of authorship or endorsement—for example, the hit song “Bette Davis Eyes,” and the recent film “Come Back to the Five and Dime, Jimmy Dean, Jimmy Dean.” Id. at 999). See also Parks v. LaFace Records, 76 F. Supp. 2d 775, 778 (E.D. Mich. 1999) (describing a song entitled “Rosa Parks” with chorus “includ[ing] the words ‘Ah, ha, hush that fuss. Everybody move to the back of the bus’”).
ing apart from her voice. It was the attribute most highlighted in carica-
tures of her.\textsuperscript{270} With digital technology, Bette Davis’ eyes or Kirk Douglas’ chin or Bob Hope’s nose can be digitally transplanted to a virtual ac-
tor. Had Mary Shelley written \textit{Frankenstein} today, the creature might have looked less like a gothic nightmare and more like an agent’s daydream.\textsuperscript{271} It is possible to steal Bette Davis’ eyes and put them into someone else’s head. In fact, in one scene of the film \textit{Titanic}, the face of the young Rose Dawson transforms into the weathered visage of her ancient self. Because the shape and color of the eyes of actress Kate Winslet (the young “Rose”) were different from those of Gloria Stuart (the centenarian “Rose”), Direct-
or Jim Cameron had Stuart’s eyes digitally replaced by Winslet’s.\textsuperscript{272} Of course, this use of an actress’s eyes was done with permission. In contrast, Robert Patrick’s torso and limbs in digital form, first used in \textit{Terminator 2: Judgment Day}\textsuperscript{273} to create a liquid metal cyborg, was used again as lunch for a T-Rex in \textit{Jurassic Park}, apparently without Patrick’s knowledge or permission.\textsuperscript{274} Actor Robin Williams mused that “[i]t’ll be only a short time before they can punch up my face, give me Brando’s voice and Rob Lowe’s body.”\textsuperscript{275} Contractual prohibition on “borrowing” body parts or some future guild agreement prohibiting such exploitation would pro-
vide some protection against the practice. But absent contractual or guild restrictions, or where third parties are borrowing body parts, an aggrieved individual must look to other legal redress, particularly privacy laws. The pivotal issue in this type of case is whether the plaintiff is “identifiable.”

In \textit{Cohen v. Herbal Concepts, Inc.},\textsuperscript{276} the New York Court of Appeals addressed this issue squarely. There, the defendant, a consumer products manufacturer, purchased an unauthorized photograph of the plaintiffs, a mother and daughter, bathing nude in a stream. The picture depicts the two nude persons standing in water a few inches deep, with their backs and

\textsuperscript{270} \textit{See} \textsc{Vincent Sardi, Jr. \& Thomas Edward West, Off the Wall at Sardi’s} 27 (1991).

\textsuperscript{271} “The man with the Bogart face warmed by blue Robert Redford eyes and just a rippled hint of Schwarzenegger muscle in the shoulders, looks across at the blonde whose Bergman features are set off by the cascading locks of Veronica Lake and a Dietrich highlight on the cheekbones.” Nigel Andrews, \textit{A Grand Illusion: Hollywood’s First All-'synthespian’ Film Will Debut in 2000 With No Real People in It. Who will the Paparazzi Chase?}, \textsc{FIN. Post}, July 18, 1998, at R3.

\textsuperscript{272} \textit{See} \textsc{CINEFLEX No. 72, at 105 (Dec. 1997)}.

\textsuperscript{273} (Carolco Pictures, Le Studio, Canal+, Lightstorm Entertainment, and Pacific Western 1991).

\textsuperscript{274} \textit{See supra} note 52.

\textsuperscript{275} John C. Tibbets, \textit{The Bay Area’s Wild Child}, \textsc{Guest Informant, 1996-97 San Francisco/South Bay}, at 10, 12.

\textsuperscript{276} 472 N.E.2d 307 (N.Y. 1984).
The representation was deemed sufficiently identifiable to amount to the likeness of the mother and daughter under New York’s Civil Rights Law sections 50-51. The court there found that the identifiable features included the hair, bone structure, and posture, and that someone familiar with the persons could identify them from the photo.

The court found a lesser use might amount to "likeness" in *Cheatham v. Paisano Pubs., Inc.* There, a T-shirt manufacturer made shirts bearing a photograph of plaintiff’s “backside from her waist to her thighs.” The court found this depiction to amount to the “image” of plaintiff. In both this case and the *Cohen* case, the court focused on actual evidence of recognizability. In *Cohen*, the husband of the older woman in the photo identified the subjects as his wife and daughter; while in *Cheatham*, the friends of the plaintiff recognized plaintiff from the shirts. The *Cheatham* court may have best stated the measure of sufficient identifiability when it stated, “if the recognition of Plaintiff’s image is sufficiently clear and sufficiently broad-based, it may be an unlawful appropriation for which Plaintiff could receive damages.”

Where the identifiability of body parts has been at issue, an invasion of privacy is not always found. In *Brauer v. Globe Newspaper Co.*, a photo of a young boy was taken in conjunction with an article about needy families at Christmas time. Two years later the newspaper used that same photo in an article about mental retardation. The photograph was a “side view of a six to nine-year-old boy sitting bent over on a stairway in apparent dejection. His face is turned and, with the exception of one ear and the partial outline of the back of his head, none of his features or facial characteristics is visible.” In this case, the court found that the depiction was insufficient to amount to a “likeness” within the right of publicity. Again, friends and neighbors recognized the photo as that of the plaintiff, but contrary to the holding in *Cohen*, the court felt that, “recognition by a small group of intimates, familiar not only with the subject but with the circumstances under which the photograph was taken, falls short of the kind of publicity upon which an action for the invasion of privacy... would have to be based.”

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277. See id. at 385.
279. Id. at 387.
280. The court focused on “image” as the element to be protected. See id.
281. Id.
283. Id. at 738.
284. Id. at 740.
The infamous bombing of the Alfred P. Murrah Building in Oklahoma City in 1995 gave rise to a post-mortem right of publicity suit by the parent of a victim. The photograph at the heart of the action showed a fireman carrying the body of child. The relevant Oklahoma statute required that, as a condition, the person whose post-mortem right of publicity was claimed had to be \textit{readily identifiable} in the photograph.\textsuperscript{285} In finding that the child was not readily identifiable, the court stated, \textit{“h[er] face is completely obscured. A person viewing the photograph could not provide any sort of description of the child depicted, other than her hair color and approximate size . . . even the child’s family could not identify her as the child in the photograph.”}\textsuperscript{286} As to the plaintiff firefighter, Field, carrying the dead child, the court said:

Most of his face is covered in shadow formed by his helmet. It appears he may have a moustache, but that too may be a shadow. It is clear the firefighter is a white male, but other than that there are no distinguishing qualities or characteristics to the firefighter in the photograph.\textsuperscript{287}

Captions on the photograph identifying the child and the firefighter were not relevant under the statute’s “readily identifiable” standard.\textsuperscript{288}

3. \textit{“We’re not in Kansas Anymore”: Digital Insertion into New Works}

The observation of young Dorothy to her dog Toto that “we’re not in Kansas anymore”\textsuperscript{289} might be the apt exclamation of anyone who found themselves digitally transported from one motion picture or television film into a later film or video. An early example of this latter use was the clever juxtaposition of actors from prior films with actor Steve Martin in the 1982 film \textit{Dead Men Don’t Wear Plaid}.\textsuperscript{290} It has happened to Bogart and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{285} OKLA. STAT. ANN. tit. 12, § 1448 (West 1993) (deceased persons); OKLA. STAT. ANN. tit. 12, § 1449 (West 1993) (living persons).
\item \textsuperscript{286} Oklahoma Natural Gas Co. v. Larue, No. 97-6087, 1998 WL 568321, at *9 (10th Cir. Sept. 1, 1998).
\item \textsuperscript{287} \textit{Id.} at *10.
\item \textsuperscript{288} \textit{Id.} at *10.
\item \textsuperscript{289} \textit{THE WIZARD OF OZ} (Metro-Goldwyn-Mayer 1939).
\item \textsuperscript{290} (Universal 1982). This 1982 black and white film starring Steve Martin is a send-up of the film noir private eye classics of the 1940s. Clips of films starring Humphrey Bogart, Alan Ladd, Charles Laughton, and others were creatively spliced with scenes and dialog of Steve Martin and other live actors. Writing credits went to Carl Reiner, Steve Martin, and George Gipe. Gipe will be remembered as the author of “Nearer to the Dust,” the pro-author/publisher monograph published by Williams & Wilkins at the time they were suing the U.S. government for copying W& W’s medical jour-
\end{enumerate}
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Cagney, Monroe, the “Duke,” the “King,” and Astaire, among others, for television commercials.

In 1995, Humphrey Bogart was digitally resurrected to play a fictional role in the fictional television episode, Tales from the Crypt: You Murderer. As previously mentioned, in 1997, President Clinton found himself acting in the fictional film Contact. The director had digitally extracted the President from existing television news footage and inserted him in various scenes in the film. While the President was portraying himself in Contact, the footage used was taken out of context. So, the President while portraying himself did so in a fictionalized way in the film.

What rights are implicated in the re-use of the image of the person who is “not in Kansas anymore?” Before addressing those issues, it is appropriate to note that, to the extent the images are extracted from copyrighted works, permission of the copyright owners would be necessary. To the extent a person’s image is used in a commercial or for a trade purpose, the right of publicity and trademark law may be implicated. If the person is living, the right of publicity should protect against unlicensed exploitation; and trademark law, particularly section 43(a) of the Lanham Act, may also be applicable. If the person is deceased, the post-mortem right

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291. Bogart and Cagney appeared together in a Diet Coke television commercial.
292. Monroe appeared in a Chanel commercial as well as in a Christmas 2000 British commercial for Nestle’s “After Six” dinner mints. The latter commercial also featured Albert Einstein, James Dean and Liberace.
293. John Wayne has appeared in a number of commercials for Coors beer. He was also featured without permission of the Wayne family in a British commercial for a German beer.
295. Astaire appeared in Dirt Devil commercials, dancing with the product.
296. (HBO television broadcast, Feb. 15, 1995). This television production was directed by Robert Zemeckis who also directed Forrest Gump (Paramount Pictures 1994) which digitally inserted actor Tom Hanks into scenes with JFK, LBJ and Nixon. See Diane Werts, Here’s Looking at You, Kid, FANFARE, Feb. 12, 1995, at 18.
297. (South Side Amusement Co. and Warner Brothers 1997). This film was directed by—yes, Robert Zemeckis!
298. But see Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001). (reversing the district court’s finding that a digitally altered photograph of Dustin Hoffman’s head from the film Tootsie put on a male model’s body in a designer gown violated Hoffman’s right of publicity, and that the altered photograph did not constitute commercial speech); Henley v. Dillard Dep’t Stores, 46 F. Supp. 2d 587 (N.D. Tex. 1999) (finding that an ad using Don Henley’s name was a misappropriation).
of publicity will, if in force in the relevant jurisdiction, provide protection within its prescribed term. Even if the post-mortem right of publicity is not available, section 43(a) may provide protection.

The question of protection where the “repurposing” is to provide a character element for a motion picture or television program, as was the case of Bogart in the *Tales from the Crypt* episode and Clinton in *Contact*, is one that admits of some difficulty. Members of S.A.G. are protected to some degree against unauthorized re-use of existing performances by the S.A.G. agreement with producers. However, it should be noted the S.A.G. restrictions on re-use apply “only if the performer is recognizable.” Actor Robert Patrick’s digital replica starred as liquid metal cyborg T-1000 in *Terminator 2: Judgment Day*. The digital replica was re-used as “lunch-meat” for the digital T-Rex in *Jurassic Park*. But, that scene showed only his body and limbs—not his face. He was thus not “recognizable” and the S.A.G. re-use restriction would not apply.

If a film is not a S.A.G.—or analogous guild—governed production, the question arises as to what relief an actor might have against unauthorized re-use of the actor’s performance in a later film. If the re-use were in an obscene film subject to criminal law sanctions, libel law might provide relief. Moreover, the mere fact that a viewing public might believe the actor willingly appeared in a pornographic film is in and of itself defamatory. Libel law, or perhaps false light, might apply if the quality of

300. Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188 (5th Cir. 1998).
301. See supra note 103 and accompanying text.
302. Id. (emphasis added).
303. See supra note 52.
304. (Universal Pictures and Amblin Entertainment 1993).
306. Juxtaposition of a segment of bread commercial featuring plaintiff with videotape of scantily clad couples, apparently engaged in oral sex and vaginal and anal intercourse raised claims of defamation: “Because I find that the adaption is subject to a defamatory interpretation—that Ms. Geary willingly participated in a pornographic video segment ... I conclude that Ms. Geary has stated a course of action for defamation.” Geary v. Goldstein, 831 F. Supp. 269, 277-78 (S.D.N.Y. 1993), modified, No. 91 Civ. 6222 (KMW), 1991 U.S. Dist. LEXIS 11288, at *6 (S.D.N.Y. 1996). In a subsequent opinion in the case, the judge revised her holding because she concluded that “most reasonable viewers would understand that the parody was both a composite and a parody.” Geary v. Goldstein, No. 91 Civ. 6222 (KMW), 1996 WL 447776, *2 (S.D.N.Y. Aug. 8, 1996). Presumably had she not found the juxtaposition to be a parody, recognized as such by the viewing audience, her original opinion would have stood.
the reusing film were markedly inferior to the quality of the film from which the extraction was made. Relief might also be had under Lanham Act section 43(a) if the role itself were inferior to customary roles, suggesting that the actor's star power was on the wane.

Federal trademark law may also provide relief under section 43(a) of the Lanham Act since the performance of the actor is taken out of context. It is true that a film in the public domain, as a matter of copyright law, was held not to be protected against unlicensed exploitation under a trademark theory: "[i]f material covered by copyright law has passed into the public domain, it cannot then be protected by the Lanham Act without rendering the Copyright Act a nullity." However, that decision, Comedy III Prods., Inc. v. New Line Cinema involved the use of a thirty second film clip from the Three Stooges' "short" Disorder in the Court, playing on a television set in the background of the film The Long Kiss Goodnight. The Three Stooges were not playing roles in the New Line film. Thus the holding in Comedy III would be inapplicable to a situation where the re-use involves use as a character in the new film.

307. Carroll v. Paramount Pictures Inc., 3 F.R.D. 95 (S.D.N.Y. 1942). Legendary producer Earl Carroll brought an action for libel with respect to a motion picture "A Night at Earl Carroll's" which film contained the false legend that it had been produced by Carroll. The opinion in Carroll recited Carroll's complaint that the film "was of poor quality and vastly inferior to the plays and motion pictures with which the plaintiff has been associated as producer in the past and reflects adversely on his name, standing and reputation." Id. at 96; see also Clevenger v. Baker Voorhis & Co., 168 N.E.2d 643 (N.Y. 1960) (claim of libel for false attribution of revision to author of original work where revision claimed to contain numerous errors).

308. In ascertaining the damages to be awarded to actor Dustin Hoffman for unauthorized use of a digitally modified picture of the actor the court took into consideration the "[s]elf-perception by plaintiff of what impact the commercial use of the Plaintiff's name and likeness would have on executives in the motion picture industry as being less of a box office draw." Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867, 872 (C.D. Cal. 1999) (emphasis added), rev'd on other grounds, 15 F.3d 1159 (D.C. Cir. 1994). And, in Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997), jury award was supported, in part, because Clint Eastwood fans who read what purported to be an exclusive interview to a tabloid might conclude he "was essentially washed up as a movie star if he was courting publicity in a sensationalist tabloid." Id. at 1256.

309. Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981); Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976).

310. Comedy III Prods., Inc. v. New Line Cinema, 200 F.3d 593, 595 (9th Cir. 2000).

311. 200 F.3d 593 (9th Cir. 2000).

312. (Columbia Pictures Corp. 1936).

313. (Forge and New Line Cinema 1996).

The actor might also raise right of publicity and unfair competition claims. These two state law claims, unlike Lanham Act claims, may be subject to the federal copyright pre-emption under Title 17 of the U.S. Code.\textsuperscript{315}

In \textit{Fleet v. CBS, Inc.},\textsuperscript{316} the court held that plaintiff’s California right of publicity claim was preempted by federal copyright law. The plaintiffs had acted in the film \textit{White Dragon}\textsuperscript{317} but claimed that they had not been fully paid. They did not raise a copyright claim, but claimed only a violation of section 3344 of the California Civil Code\textsuperscript{318} and unfair business practices.\textsuperscript{319} The court focused on the facts that: (1) the actors’ performances were dramatic works; (2) the performances were fixed in a tangible medium of expression, the film; and (3) the actors’ “performances in the film were recorded with their active participation and consent.”\textsuperscript{320} Accordingly, the court concluded that the performance of the actors was governed by copyright law and any right of publicity claims were preempted.\textsuperscript{321}

Clearly, as to the owner of copyright in the original film, the actor’s right of publicity is preempted for that film. But, does it follow that the actor’s right of publicity is preempted as to the unauthorized re-use? A superficial analysis of \textit{Fleet} might lead to the conclusion that the right of publicity is preempted as to an unauthorized re-use of a previously fixed performance: (1) the actor did authorize the fixation of his performance; and (2) the actor’s performance, whether measured as underlying subject matter or simply as a component of the original film, is a dramatic work protected by copyright.

I would, however, suggest that the re-use issue is distinguishable. It is important to note that the court in \textit{Fleet} distinguished the case before it from \textit{Zacchini v. Scripps-Howard},\textsuperscript{322} based on the fact that “Zacchini had not consented to the taping.”\textsuperscript{323} The court stated that “a work is fixed in a tangible . . . [medium] of expression for purposes of the Act, only if re-
corded by or under the authority of the author (17 U.S.C. § 101)." It seems likely that the integration of an actor's performance from an earlier film in the new film is, with respect to the new film, not fixed with the authority of the performer.

The Fleet court also went on to state that to determine "whether . . . [a right of publicity] claim is preempted, the creative aspects of the motion picture as a whole must be separated from the creative aspects of the underlying subject matter (the actors' performances in the film) to determine whether the underlying subject matter is itself copyrightable." It is true, the court went on to note, in the case before it, that the distinction had no import "where the underlying subject matter consists of performances in a film." While the Fleet court held the distinction had no import in the case before it, it must be remembered that the underlying performance was integrated into that film with the active participation and consent of the actors, unlike the situation under discussion. A similar result was reached in Ahn v. Midway Mfg. Co., where choreographed moves of martial arts experts were used to create characters in the arcade video games Mortal Kombat and Mortal Kombat II. The choreography was a copyrightable performance fixed with the permission of the martial arts performers. The court held that, under those circumstances, copyright law preempted the performers' rights of publicity.

Fleet and Ahn found the actors' rights of publicity were preempted because their respective performances were fixed with their permission and were sufficiently creative as to warrant copyright protection. While Hoff-

324. Id.
325. Id. at 652.
326. Id.
328. Id. at 1138. For situations in which right of publicity was held not preempted by the Copyright Act see Brown v. Ames, 201 F.3d 654, 657-61 (5th Cir. 2000) (use of name and likeness of performers on cassettes and CDs); Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 623 (6th Cir. 2000) (action figure); Wendt v. Host Int'l, Inc., 125 F.3d 806, 810 (9th Cir. 1997) (animatronic robots); Jarvis v. A & M Records, 827 F. Supp. 282, 297 (D.N.J. 1993) (voice); KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713 (Ct. App. 2000). "In our view a section 3344 claim is preempted under Fleet where an actor or model with no copyright interest in the work seeks to prevent the exclusive copyright holder from displaying the work. We do not believe a section 3344 claim is preempted under Fleet, where, as here, the defendant has no legal right to publish the copyrighted works." Id. at 723. See also Roy Export v. CBS, 672 F.2d 1095 (2d Cir. 1982) for a discussion of preemption.
man v. Capital Cities/ABC, Inc. involved the use of a photograph of Dustin Hoffman for an advertisement, it is important to note that the district court held that Hoffman’s right of publicity as to his name and likeness was not preempted by copyright law—despite the fact that the photograph was a still from the film Tootsie, a frame from Hoffman’s performance. It is instructive that the court stated “plaintiff’s right of publicity claims proceed under the theory that Defendant’s computerized manipulation of the Tootsie image and Defendant’s publication of that manipulated image amount to an unauthorized use of the plaintiff’s name and likeness.”

The court held that “the photographs were manipulated and cannibalized to such an extent that the celebrities were commercially exploited and were robbed of their dignity, professionalism and talent. To be blunt, the celebrities were violated by technology.”

I would suggest that the digital extraction of actors from one film for insertion in a new film is distinguishable from Fleet and Ahn. Such digital manipulation is subject to the actor’s right of publicity and is not preempted by the copyright in the original film, nor by the copyright in the film into which the extracted image is inserted.

If the re-use were by the owner of the copyright in the original film, copyright clearance would be unnecessary. If the re-use is by a third party, clearance from the owner of the copyright in the original film would be necessary. But, I would argue that as between the creator of the new film, be it the copyright owner of the film or a third party, the actor’s permission to re-use would be required as a matter of right of publicity law. True, the actor’s performance is dramatic and copyrightable if fixed with his authority. Thus, as to the re-use of film, as opposed to the original film, the actor’s right of publicity and unfair competition claims are not preempted. If the re-use had been in a television commercial, as has been done with a

329. 33 F. Supp. 2d 867 (C.D. Cal. 1999), rev’d on other grounds, Nos. 99-55563, 99-55686 (9th Cir. Jul. 6, 2001). The Ninth Circuit panel stated “we need not address LAM’s argument that Hoffman’s state law claims are preempted by the federal Copyright Act” since the photograph was protected by the First Amendment. Id. n.4.


332. 33 F. Supp. 2d at 871 (emphasis added), rev’d on other grounds, Nos. 99-55563, 99-55686 (9th Cir. Jul. 6, 2001).

333. 33 F. Supp. 2d at 873 (emphasis added), rev’d on other grounds, Nos. 99-55563, 99-55686 (9th Cir. Jul. 6, 2001). One of the other digitally manipulated celebrities was the late actor, Cary Grant. For Grant, having his head placed on someone else’s body was deja vu. See Grant v. Esquire, 367 F. Supp. 876 (S.D.N.Y. 1973).
number of deceased celebrities, the use would be subject to right of publicity law;\textsuperscript{334} the right of publicity claim would not be preempted by copyright law.\textsuperscript{335} If copyright would not bar a right of publicity claim for re-use in a copyrighted television commercial there is no justification for preempting a right of publicity simply because re-use is in a copyrighted film. As the Fleet court noted, a distinction must be drawn between the individual performance and the work into which it is integrated.\textsuperscript{336}

Finally, it should also be noted that contract limitations may narrow the scope of copyright preemption of the right of publicity. For example, the Seventh Circuit "has suggested that if an employee has contractually limited the media in which his performance may be shown by the employer, should the employer exceed this authority, the employee's right of publicity claim is not preempted."\textsuperscript{337}

4. The Stalin Strategy: Digital Erasures

Joseph Stalin had a reputation for "eliminating" enemies. But, he also "erased" them from photographs.\textsuperscript{338} He made an art form out of deleting enemies from photographs using that era's now-crude technology. Today,

\begin{itemize}
\item \textsuperscript{334} "Such a commercial use of the image of a deceased actor would be a clear violation of the post-mortem right of publicity of the actor, absent a license." MCCARTHY, supra note 121, at § 8.122; see Grodin v. Liberty Cable, 664 N.Y.S.2d 276 (App. Div. 1997) (Plaintiff had appeared in the film Network shouting "I'm mad as hell and I'm not going to take it anymore." The scene was used by Liberty Cable in a television commercial).
\item \textsuperscript{335} MCCARTHY, supra note 121, at § 11.52 n.22 ("[A]n actor whose filmed performance is used without permission in a television advertisement for toys has a valid state right of publicity claim which is not preempted by copyright law.").
\item \textsuperscript{336} Fleet v. CBS, 58 Cal. Rptr. 2d 645, 652 (Ct. App. 1996).
\item \textsuperscript{337} Pesina, 948 F. Supp. at 42 n.3, citing Baltimore Orioles v. Major League Baseball Players Ass'n, 805 F.2d 663, 679 n.29 (7th Cir. 1986). The court in Baltimore further stated, "The [p]layers also are at liberty to attempt to negotiate a contractual limitation excluding performances before broadcast audiences from the scope of their employment." Balt. Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 679 n.29 (7th Cir. 1986); see also McFarland v. Miller, 14 F.3d 912, 923 (3rd Cir. 1994) (noting "The 1936 contract does not seek to convey such publicity right in perpetuity"); Ainsworth v. Century Supply Co., 693 N.E.2d 510, 513 (Ill. 1998) (finding "Plaintiff . . . alleged that TCI used footage from the instructional video in which plaintiff appeared in creating the television commercial . . . Plaintiff has sufficiently pleaded an appropriation claim").
\item \textsuperscript{338} See generally DAVID KING, THE COMMISSAR VANISHES (1997). It is ironic that the famous photograph of Churchill, Roosevelt and Stalin at Yalta was digitally modified to show a young lady in shorts leaning over Stalin's left shoulder in an advertisement. WIRED, May 1997, at 66-67.
\end{itemize}
digital technology provides a more sophisticated method of eliminating individuals and replacing them.

In the twentieth anniversary, dramatically revised, reissue of Star Wars, Han Solo is confronted by Jabba the Hutt. This scene was not in the original release of the film. The scene, though filmed, wound up on the cutting room floor because of time and fiscal constraints. In the original scene, a portly human actor played the part opposite a then very young Harrison Ford as Han Solo. Now, two decades later, an older Harrison Ford could not be refilmed to appear in the deleted scene with Jabba the Hutt, a nonhuman character first seen in Star Wars: Episode VI - Return of the Jedi. Instead, the digital wizards at Lucas' Industrial Light + Magic "erased" the human actor from the "out take" and substituted the animal-like Jabba the Hutt.

Director Phillip Noyce mused about the possibility of Bogart being decapitated in Casablanca and a George Clooney look-alike being a head transplant. Far fetched? Far from it! As previously noted, to complete The Crow after the tragic death of Brandon Lee, a filmed image of his head was transplanted onto a stunt double. At the Fourth Annual John Huston Awards, his daughter Angelica Huston said: "[I]f an actor became box office anathema, might the owner of a film or films starring the actor replace the actor digitally, perhaps only the head, and worse, perhaps the whole person." Had this technology been available during the "Red Scare" days, might blacklisted stars, who were unable to find new roles, find to their horror that they no longer even existed on film? Or, supposing that an actor is accused of a heinous crime, even though not convicted—Fatty Arbuckle in the 1920s, or O. J. Simpson in the 1990s—could he stop the owner of films in which he starred from substituting another actor? At present, the cost of such digital removals might be prohibitive, but with time....

339. (LucasFilms 1997).
340. (LucasFilm Ltd. 1983).
341. Peter Stack, 'Star Wars' Trilogy Returns to the Big Screen After 20 Years, S.F. CHRON., Jan. 26, 1997, at 27.
342. (Warner Brothers 1942).
In *Zelig*, Woody Allen appears with luminaries of another day such as William Randolph Hearst and Fannie Brice. Whose place did Allen take? In 1991, a Diet Coke television commercial resurrected the late Jimmy Cagney to pour the product for a very alive actress. The scene in which Cagney originally appeared was taken from the 1939 film, *The Roaring Twenties*, where Cagney was pouring champagne for actress Gladys George, as speakeasy owner Panama Smith. Special effects house R. Greenberg Associates digitally replaced Gladys George with the actress in the commercial. In *Forrest Gump*, Tom Hanks appears to be talking to JFK, LBJ and Nixon. And, he appears seated next to John Lennon while being interviewed by talk-show host Dick Cavett. Hanks, as Gump, was virtually sitting in someone’s lap, the person who was really seated next to Lennon—Yoko Ono! In 1997, an episode of *Suddenly Susan*, starring Brooke Shields, has the actress inserted into a scene with Errol Flynn in the 1938 film *The Adventures of Robin Hood*. She digitally replaced the original actress, Olivia De Havilland as Maid Marian.

Does an actor, or for that matter, any person who has been captured in film have a right to demand that the film in which they appear not be altered in a way in which they disappear from frames of a film which are otherwise preserved?

If one’s image is used without permission, right of publicity, copyright or libel law might provide redress depending on the situation. Where a use of persona involves advertising or trade purpose, the right of publicity has been successfully invoked by any number of celebrities, including: a race car driver, a singer/actress, a talk show host, a game show hostess, and a football player. Trademark and unfair competition law have protected a producer/actor, “The King,” a chef and a singer.

345. (Orion Pictures Corp. 1983). This 1983 film, written and directed by Woody Allen and starring Allen and Mia Farrow, wove film clips of such long dead celebrities as Fanny Brice, Billy Rose, Tom Mix, and Charlie Chaplin into scenes in the film about Leonard Zelig (Allen), the human chameleon. The technical elements integrating Allen and the vintage film clips were undertaken by R. Greenberg Associates.

346. (Warner Brothers 1939).
348. (NBC television broadcast, Sept. 22, 1997).
349. (First National Pictures, Inc. and Warner Brothers 1938).
among others. But, in every instance cited, it was the use—not the non-use—that was at issue.

Right of publicity laws address the unauthorized use of a person's image. Such laws do not address nonuse. Thus, it would appear right of publicity laws provide no succor to the person whose image has been erased. However, section 43(a) of the Lanham Act may provide relief. Failure to identify\textsuperscript{359} has been held actionable, as has been misidentification\textsuperscript{360} and alteration of a program.\textsuperscript{361} And, courts have suggested that cuts to a film that constituted "mutilation"\textsuperscript{362} or an "emasculcation"\textsuperscript{363} might well be actionable.

III. BONES: THE DIGITAL RESURRECTION OF DECEASED CELEBRITIES

A. The Perils of Prediction

After winning the 2001 Masters golf tournament, Tiger Woods was asked "If you were to meet Bobby Jones in the clubhouse what would you say to him?"\textsuperscript{364} After a pause and a smile, Woods replied, "Wow. Well how did he come back is what I want to know."\textsuperscript{365} That question, or at least a variation of it, was anticipated almost a decade ago by Steve Williams,\textsuperscript{366} then employed by George Lucas' special effects house, Industrial Light + Magic. Williams predicted "[a]ctors who died 50 years ago will be starring next to contemporary actors."\textsuperscript{367} Today's efforts to resurrect the dead, or at least visual images of the dead for entertainment purposes, date back at least to the days following the French Revolution. Belgian illusionist Étienne-Gaspard Robertson entertained Parisian audiences with his

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{358}] Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).
\item[\textsuperscript{359}] Lamothe v. Atlantic Recording Corp., 847 F.2d 1403 (9th Cir. 1988).
\item[\textsuperscript{360}] Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981).
\item[\textsuperscript{361}] Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976).
\item[\textsuperscript{363}] See, e.g., Autry v. Republic Prods., 213 F.2d 667, 670 (9th Cir. 1954), cert. denied, 348 U.S. 858 (1954) ("As to the question of the appellees' emasculating the pictures, we have attempted to leave that question open, to be properly presented when and if the occasion arises . . . .").
\item[\textsuperscript{364}] Dave Anderson, With Stakes Raised, Woods Draws a Straight, N.Y. TIMES, Apr. 9, 2001, at D1.
\item[\textsuperscript{365}] Id.
\item[\textsuperscript{366}] Williams was a 1995 Oscar\textsuperscript{TM} nominee for his work in the Jim Carrey film, The Mask. (Dark Horse Entertainment and New Line Cinema 1994).
\item[\textsuperscript{367}] Richard Corliss, They Put the ILM in Film, TIME, Apr. 13, 1992, at 68-69.
\end{enumerate}
\end{footnotesize}
Fantasmagorie, using slides projected on smoke above a coffin to make the dead appear to rise. And, in the nineteenth century, the dramatization of Charles Dickens' Christmas story, The Haunted Man, at the Theatre Royal, New Adelphi included a ghost created by the reflection of an actor, below the stage, on a sheet of glass on the stage. Today, digital technology has replaced the smoke and mirrors of yesteryear. But, the digital reanimation of the deceased, particularly celebrities, raises a host of legal issues.

I have previously addressed the copyright issues raised by the creation of a digital replica of a deceased performer and the various other legal theories that might be relevant to preventing unauthorized exploitation of a digital doppelganger, including the post-mortem right of publicity, trademark and related rights and moral rights. I shall not separately discuss the copyright issues implicated in the creation of a digital replica of a deceased celebrity. If a digital clone is created from a scan of the celebrity while alive, the discussion of copyright protection in Part II (direct method) is applicable. If the creation of the clone was post-mortem, the discussion in Part II (indirect method) and analysis in Casting Call would be relevant. I shall, however, update the discussion of the post-mortem right of publicity to take into account post-1993 statutes and decisions, and in particular address the conflict of laws issues only briefly alluded to in Casting Call.

"When will this Lazarusian technology be upon us?" I asked rhetorically in Casting Call. I answered with a quote from the owner of Café Americain, Bogart's Rick Blaine: "Maybe not today, maybe not tomorrow but soon . . ." That answer illustrates the perils of prediction. With

369. The Great Spectral Illusion was invented by Mr. H. Dirck and was perfected by a Professor J.H. Pepper and became known as Pepper's Ghost. The apparition "was achieved by a sheet of glass, invisible to the audience, set at an angle on the stage above a concealed trap. When the 'ghost' stood in the trap and was illuminated by a strong light . . . the eerily realistic figure seemed to be actually on stage." PETER HAINING, CHARLES DICKENS' CHRISTMAS GHOST STORIES 19 (1992). Today Pepper's Ghost lives on in the digital technology studios of Pepper's Ghost Productions Ltd., appropriately located in England at http://www.pgstudio.com.
370. See generally, Beard, supra note 118.
371. See infra Part II.A.1(a).
372. See infra Part II.A.1(b).
373. See Beard, supra note 118, at 107-44.
374. See id. at 169-170.
375. See id. at 104.
376. CASABLANCA (Warner Brothers 1942).
the benefit of hindsight, I perhaps should have answered the question with one of Blaine's less definitive statements: "I never make plans that far ahead."377

It is true that we continue to see commercials starring deceased actors: Marilyn Monroe for Chanel, Fred Astaire for Dirt Devil, John Wayne for Coors, Elvis for Pizza Hut. In England, Monroe, Einstein, James Dean and Liberace gathered to sell Nestle's "After Eight" mints and Steve McQueen drives a Ford Puma. But these commercials, as clever as they are, depend on the digital manipulation of films made during the lifetime of the now-deceased celebrities. There have been digital replicas of W.C. Fields,378 Ed Sullivan379 and Marlene Dietrich,380 but they would not be mistaken for films of the actual celebrities. Fully autonomous, realistic replicas of deceased celebrities will not be with us "soon" but it is only a matter of time and money, and so, I repeat my exhortation in Casting Call, it is still "not too soon to begin a discussion of the legal issues raised by reanimation."381

Part III.B will provide a brief survey of the current state of the post-mortem right of publicity in the United States. That review will be followed, in Part III.C, with an analysis of the interplay between the California Legislature and the federal courts' interpretation of California's post-mortem right of publicity. The lessons to be learned reach well beyond California's borders. Part III.D will focus on choice of law issues with a particular focus on Indiana and Nevada. Finally, in Part III.E, the issues of film completion where a principal actor has died, exemplified most re-

377. Id.
378. W.C. Fields was created by Virtual Celebrity Productions as a real-time, interactive digital celebrity. An actor behind the screen—á la the Wizard of Oz—would respond to audience questions. The actor's facial movement was digitally tracked as were his gestures. The project was discontinued when no market was found for exploitation.
379. "The Virtual Ed Sullivan Show" was the brainchild of UPN CEO Dan Valentine. "The computer-generated Sullivan was accomplished by wiring comedian John Byner in an electrode-covered body suit which recorded his gestures and transmitted them to the animated host. Byner... also provided the voice." Daniel M. Kimmel, Viewers Can Get a Double Dose of Ed Sullivan, BOSTON HERALD, May 18, 1998, at 36. The program aired on UPN on May 18, 1998. Digital Domain combined digitally manipulated images of TV impresario Ed Sullivan from his program, The Ed Sullivan Show, with the voice of an impressionist to create commercials for Mercedes-Benz in 1997. In life, Sullivan drove a Lincoln, his sponsor's product.
381. Beard, supra note 118, at 106.
cently by the death of Oliver Reed while filming *Gladiator*, will be examined.

**B. The Post-Mortem Right of Publicity—Alive and Well, Sort of!**

The number of states recognizing a post-mortem right of publicity has grown since the publication of *Casting Call* in 1993, but many states have yet to address the issue of a post-mortem right of publicity by statute or common law. Some states have enacted statutes creating a post-mortem right of publicity, while other states have a common law post-mortem right of publicity, in addition to statutory protection in some instances. New York, Ohio, and Wisconsin have been held not to protect a post-mortem right of publicity. The Ohio legislature, however, recently enacted a statutory post-mortem right of publicity for domiciliaries or residents who died on or after January 1, 1998. The term of protection is not uniform in those states that have adopted statutory protection for deceased celebrities ranging from as few as ten years to indefinite. Where the protection has been a matter of common law, the term

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382. (DreamWorks SKG, Scott Free Productions, and Universal Pictures 2000).
383. Alabama, Michigan, Oregon, Pennsylvania, and Vermont are examples of such states.
385. California (to the extent *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979) provides such a common law right), Connecticut, Georgia, New Jersey, Tennessee, and Utah are the states with common law protection.
390. See OHIO REV. CODE ANN. § 2741.03 (Anderson 2000).
391. See CAL. CIV. CODE § 3344.1(g) (Deering Supp. 2001) (70 years); FLA. STAT. ANN. § 540.08(4) (West 1997 & Supp. 2001) (40 years); 765 ILL. COMP. STAT. ANN. 1075/30(b) (West 2000) (50 years); IND. CODE ANN. § 32-13-1-8 (West 2000) (100 years); KY. REV. STAT. ANN. § 5391.170 (Michie 1999) (50 years); NEB. REV. STAT. ANN. § 20-208 (Michie 1997) (indefinite); NEV. REV. STAT. ANN. 597.790(1) (Michie 1999) (50 years); OHIO REV. CODE ANN. § 2741.02(A) (Anderson 2000) (60 years);
has not been defined, though it has been suggested that a post-mortem term equal to that granted to authors under copyright law might be appropriate. Not only does the term of protection vary from state to state, but the scope of statutes varies as to the attributes of persona protected, with Indiana being the most generous. Where common law rights of publicity exist, they can be more elastic in the aspects of persona that will be protected.

“Likeness” has proven to be a very flexible term. As the term is used in both post-mortem right of publicity statutes and statutes protecting the living, decisions under both types of statutes are equally instructive.

\[\text{OKLA. STAT. ANN. tit. 12, § 1448(G) (West 1993) (100 years); TENN. CODE ANN. § 47-25-1104 (2000) (10 years); TEX. PROP. CODE ANN. § 26.012(d) (Vernon 2000) (50 years); VA. CODE ANN. § 8.01-40(B) (Michie 2000) (20 years); WASH. REV. CODE ANN. § 63.60.040 (West 2000) (10 years for “individuals” and 75 years for “personaliies”).}

392. “Since we are not directly faced with the issue of whether there should be a durational limit on the right of publicity after it is inherited, we will not decide this question.” Estate of Presley v. Russen, 513 F. Supp. 1339, 1355 (D.N.J. 1981).

393. “The court suggests that a length of time should be set by the New Jersey State legislature. The Federal Copyright Act, 17 U.S.C. § 302, 305 provides guidelines which may be informative in this situation.” Id. at 1355. “The Copyright Act . . . provides that copyright in new works shall be recognized during the author’s life and for fifty years thereafter . . . That period represents a reasonable evaluation of the period necessary to effect the policies underlying the right of publicity. Therefore, I would hold that the right of publicity should be recognized during the subject’s life and for 50 years thereafter.” Lugosi v. Universal Pictures, 603 P.2d 425, 446-47 (Cal. 1979) (Bird, C.J., dissenting).

394. See CAL. CIV. CODE § 3344.1 (Deering Supp. 2001) (name, voice, signature, photograph, and likeness); FLA. STAT. ANN. § 540.08 (West 1997 & Supp. 2001) (name, photograph, likeness, and portrait); ILL. COMP. STAT. ANN. 1075/5 (West 2000) (name, voice, signature, photograph, image, and likeness); IND. CODE ANN. § 32-13-1-7 (West 2000) (name, voice, signature, photograph, image, likeness, distinct appearance, gestures, and mannerisms); KY. REV. STAT. ANN. § 391.170 (Michie 1999) (name and likeness); NEB. REV. STAT. ANN. § 20-202 (Michie 1997) (name, picture, portrait, personality, and other likeness); NEV. REV. STAT. ANN. 597.790 (Michie 1999) (name, voice, signature, photograph, and likeness); OHIO REV. CODE ANN. § 7241.01(A) (Anderson 2000) (name, voice, signature, photograph, image, likeness, and distinct appearance); OKLA. STAT. ANN. tit. 12, § 1448 (West 1993) (name, voice, signature, photograph, and likeness); TEX. PROP. CODE ANN. § 26.012 (Vernon 2000) (name, voice, signature, photograph, and likeness); VA. CODE ANN. § 8.01-40 (Michie 2000) (name, portrait, and picture); WASH. REV. CODE ANN. § 63.60.010 (West 2000) (name, voice, signature, photograph, and likeness).

395. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992). A robot wearing a blond wig and white dress was held not to be a likeness under California Civil Code section 3344 but was protected by California common law right of publicity. Id. at 1397.
look-alike has been held to be a “likeness” of a celebrity.\textsuperscript{396} A composite photo-drawing “somewhere between representational art and a cartoon” has been held to be a likeness.\textsuperscript{397} Even an animatronic figure may be a likeness.\textsuperscript{398} When it comes to protecting “voice,” however, statutes may be limited only to replication and not imitation of a celebrity.

The Ninth Circuit has held that California Civil Code section 3344 protection of “voice” does not extend to protection against a sound-alike but that the California common law right of publicity would protect against it.\textsuperscript{399} There is a significant question as to whether deceased celebrities are protected against voice imitation under California law. California Civil Code section 3344.1 protects against an unauthorized exploitation of the deceased celebrities “voice.” To be consistent with \textit{Midler}, a court would be forced to conclude that section 3344.1 does not protect against a sound-alike. Unless there is a common law post-mortem right of publicity in California, voice imitation of a deceased celebrity is not actionable, at least under California law. While \textit{Lugosi v. Universal Pictures},\textsuperscript{400} was not a model of clarity it certainly raises serious doubt as to whether a future decision would find such a common law right existed.\textsuperscript{401} However, it may ultimately be possible to dispense with a sound-alike if the promise of AT&T Labs’ \textit{Natural Voices} or similar products live up to expectations. AT&T Labs have been quoted as saying that the software can “bring the voices of long-dead celebrities back to life” by using archival recordings from film sound tracks or phonorecords to create a voice database.\textsuperscript{402}

\textsuperscript{398} Wendt v. Host Int’l., Inc., 125 F.3d 806 (9th Cir. 1997).
\textsuperscript{399} See Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).
\textsuperscript{400} 603 P.2d 425 (Cal. 1979).
\textsuperscript{401} No less an authority than the plaintiff in \textit{Lugosi}, Bela G. Lugosi, son of the late star and an attorney who represents the estates of a number of deceased celebrities, including his father’s co-star Boris Karloff, has stated that “the common law right descends only where (and possibly only to the extent that) the celebrity exploited the right during his or her lifetime.” Bela Lugosi, \textit{California Expands the Statutory Right of Publicity for Deceased Celebrities While Its Courts are Examining the First Amendment Limitations of that Statute}, 10 DEPAUL-LCA J. ART & ENT. L. & POL’Y 259, 263 (2000)(citing Lugosi v. Universal Pictures, 603 P.2d 425, 818-22, 824 (Cal. 1979)). For Lugosi’s involvement with The Three Stooges, see Ted Fishman, \textit{The Three Stooges Meet the Son of Dracula}, 68 GQ No. 12, Dec. 1998, at 180.
New York, did not protect “voice” for most of the life of its right of publicity statute, N.Y. Civil Code sections 50-51. Finally, in 1995, New York added voice to the aspects of persona protected by the statute. Curiously, while the legislature amended section 51 to include voice, it did not revise section 50 in that regard. New York decided almost two decades ago that there was no common law right of publicity, though it left the question of right of publicity protection for the dead unanswered. The Second Circuit has concluded that, contrary to its earlier views, the right of publicity is protected only by statute and that—as the statute only applies to the living—there is no post-mortem protection in New York. Two observations arise: (1) if the relevant law is that of New York, protection will likely extend only to replication and not imitation of a living celebrity’s voice; and (2) of course, no protection whatsoever is available to deceased celebrities.

C. “Dancing in the Dark”—The Astaire Celebrity Image Protection Act

In the film Bandwagon, Fred Astaire danced to the song Dancing in the Dark. The song seems an apt description of the drafting of California’s post-mortem right of publicity statute and the interpretation of the statute by the courts. Most notable among the judicial interpretations are the decisions by the Ninth Circuit and the Federal District Court for the


404. There is proposed legislation in New York the “Personal Privacy Act of 2001” which would add “voice” to section 50 to make it consistent with section 51. Notably, the bill does not include a post-mortem right of publicity.

405. Stephano v. News Group Publ’ns, Inc., 474 N.E.2d 580 (N.Y. 1984): “In view of the fact that the plaintiff is asserting his own right of publicity we need not consider whether the statute would also control assignment, transfer or descent of publicity rights.” Id. at 584 n.2 (emphasis added).

406. Pirone v. MacMillan, Inc., 894 F.2d 579, 586 (2d Cir. 1990). The court in this case added that the Stephano case created uncertainty as to whether New York’s statutory remedy preempts an heir’s common law right of publicity claim, but [it] believe[d] recognition of such a right will have to await either clarification from the Court of Appeals or action by the New York legislature, which has thus far declined to amend the statute to make a right of publicity descendible.

See id. at 586 n.6.


409. See CAL. CIV. CODE § 3344.1 (Deering Supp. 2001) (replacing CAL. CIV. CODE § 990 (Deering 1990)).
Central District of California in *Astaire v. Best Film & Video Corp.* and the various decisions in the actions brought by the Estate of Diana, Princess of Wales against the Franklin Mint Company.

Following the adverse decisions in *Lugosi v. Universal Pictures* and *Gugliemi v. Spelling-Goldberg Productions* with respect to a post-mortem right of publicity, the estates of a number of deceased celebrities, including the family of John Wayne, lobbied the California legislature to enact a right of publicity for the deceased. The proposed legislation went through several revisions but was finally enacted as California Civil Code section 990 in 1984. Of particular relevance to this discussion are the activities exempted from the protection granted by section 990:

(n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:

(1) a play, book, magazine, newspaper, musical composition, film, radio or television program, other than an advertisement.

This exemption reflected the concerns of the American Civil Liberties Union and the Writers Guild of America about the possible chilling effect a post-mortem right of publicity would have on the ability of authors to write about celebrities. But, the response of the legislature was overly broad. Marshall McLuhan had once boldly claimed that “[t]he Medium is the Message.” The California legislature must have believed McLuhan because the section 990 exemption focused on the medium—book, magazine, film, etc.—and not the message—biographies, docudrama’s, fictional accounts, etc. In a sense, the California Legislature “threw the baby out

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410. 116 F.3d 1297 (9th Cir. 1997).
413. 603 P.2d 454 (Cal. 1979).
414. One example of the egregious unauthorized exploitation of celebrity was a greeting card featuring John Wayne wearing lip rouge. The sentiment inside was “It’s such a Bitch being Butch!” The card bore the legend © 1983. Another unauthorized card featured a caricature of actress Joan Crawford with the legend “I never laid a fucking hand on those kids!”
417. MARSHALL MCLUHAN, UNDERSTANDING MEDIA 7-21 (1964).
with the bath water" in responding to First Amendment concerns. This was borne out, unfortunately, in Astaire v. Best Film & Video Corp.418

In Astaire, Fred Astaire’s widow claimed that the use of clips of Fred Astaire from two public domain films, Second Chorus419 and Royal Wedding420 violated section 990. The district court had, in finding for Mrs. Astaire, held that Best’s use of the Astaire film clips was not exempt under section 990(n).421 The Ninth Circuit disagreed. In reversing the district court, the Ninth Circuit traced the legislative history of Senate Bill 613 and reached the conclusion that the “[l]egislature demonstrated an intent to adopt a broader exemption that was not limited to constitutionally protected uses.”422 Unfortunately, the Ninth Circuit’s own analysis suggests that its conclusion as to the breadth of the exemption was flawed.

The court referred to the June 12, 1984 introduction of a proposed section 990(n) amendment to the bill:

Nothing in this section shall be construed to derogate from any rights protected by constitutional guarantees of freedom of speech or freedom of the press, such as the right to use a deceased personality’s name, voice, signature, photograph, or likeness in a play, book, magazine, newspaper, film, television program, or similar medium of expression, to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press.423

Next it cited to a staff report that analyzed the draft language as being superfluous: “[I]rrespective of this stated intent, a defendant who has used a person’s name, voice, etc. without authorization, may assert a First Amendment privilege.”424 The court then noted, “[s]hortly thereafter section 990(n) was amended to its current version, which does not contain the language explicitly limiting the scope of its exemption to constitutionally protected uses.”425 The court went on to state, “[t]he Legislature’s removal of the language ‘to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press’ from Senate Bill

418. 116 F.3d 1297 (9th Cir. 1997).
419. (Astor Pictures Corp. and Paramount Pictures 1940).
420. (Loew’s, Inc. and Metro-Goldwyn-Mayer 1951).
421. Astaire, 116 F.3d at 1300.
422. Id. at 1303.
425. Id.
613 is a telling clue as to the Legislature’s intent." The court then, concluded, “[b]y deleting this language, the Legislature demonstrated an intent to adopt a broader exemption that was not limited to constitutionally protected uses.” Having itself characterized the staff report as criticizing the original language “for being superfluous,” the court somehow treated the excise of the language as not merely removing the superfluous but of somehow indicating a “broader exemption.” Its interpretation of the Legislature’s reaction to the staff report is troubling to say the least.

Having lost in Astaire, Mrs. Astaire, joined by the S.A.G., lobbied for an amendment to section 990 to address what they thought was an incorrect interpretation of the California Legislature’s intent as to the scope of the exemption. Section 990 was amended and renumbered as section 3344.1 in 1999. Section 3344.1(a)(2) provides:

For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article or merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.\footnote{Astaire Celebrity Protection Act, 1999 Cal. Stat. 3344.1(a)(2) (emphasis added).}

While section 3344.1(a)(2) narrows the types of exploitation exempted from its purview as opposed to the broad exemption provided by section 990(n) at least as interpreted by the Ninth Circuit in Astaire, it is not clear that Mrs. Astaire would have fared any better under section 3344.1(a)(2) than she actually did under section 990(n)(1). Arguably, the dance instruction video in Astaire including the clips from Second Chorus and Royal Wedding would qualify for exemption as nonfictional entertainment. But, if the loss in Astaire accomplished nothing else, it did lead to an exemption that focused on the message and not the medium.

The Astaire decision clearly influenced the Legislature to craft more narrowly the exceptions to the applicability of the post-mortem publicity statute, but Astaire was not the only deceased celebrity to play a role in the revision of section 990. Princess Diana also played a role. Princess Diana,

\footnote{\textit{Id.}}\footnote{\textit{Id.} (emphasis added).}\footnote{CAL. CIV. CODE § 990 (Deering 1990); CAL. CIV. CODE § 3344.1 (Deering Supp. 2001).}\footnote{Astaire Celebrity Protection Act, 1999 Cal. Stat. 3344.1(a)(2) (emphasis added).}
or more properly, her estate, was the plaintiff in Cairns I. California law provided a post-mortem right of publicity; the United Kingdom did not. As the uses to which Franklin Mint put the name and image of Princess Diana, dolls, sculptures, commemorative plates, etc., were trade purposes, the estate would have been successful in its publicity claim if California law applied, but not if British law applied. The district court, applying California choice of law rules, as the forum state, held that, though California normally resolves conflict of laws questions through a “governmental interest” analysis with respect to personal property, California Civil Code section 946 controlled. That section dictates that “[i]f there is no law to the contrary, in the place where the personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile.” The court concluded that, as section 990 did “not constitute law to the contrary” even if California and not the United Kingdom was “the situs of the property, the law of Great Britain would control because no California law provides that the law of the decedents domicile should not apply.”

In Cairns I, the district court stated that “[a]lthough there is no indication in section 990 that the legislature intended to limit the post-mortem right of publicity to California domiciliaries, the statute clearly identifies the right as a property right and section 946 governs choice of law questions involving personal property.” The court then went on to state that the existing statutory scheme permitted only California domiciliaries to devise a right of publicity to their heirs under section 990. In dicta, however, the court said that perhaps the statutory scheme also permits “domiciliaries of other states that recognize a right of publicity to devise a right of publicity to their heirs under section 990.” Presumably, the judge would have limited the scope of that dicta to states that did not merely have a right of publicity but a right that was also descendible. While the language is dicta, it certainly appeared to undercut the holding that non-domiciliaries were not eligible for protection under section 990.

434. Cairns, 24 F. Supp. 2d at 1027.
435. Id. at 1028.
436. Id. at 1029.
437. Id.
438. Id.
In responding to Cairns I, Senate Bill 209, which also addressed the Astaire issue, was drafted to include a provision making its rules applicable to non-domiciliaries as well as to celebrities domiciled in California at the time of their death:

A plaintiff has standing to bring an action pursuant to this section if any of the acts giving rise to an action occurred in this state, whether or not the decedent was a domiciliary of this state at the time of death.439

However, the legislature amended Senate Bill 209 to read:

This section shall apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in this state.440

The legislature made the change to “comply with the U.S. Supreme Court’s pronouncement in BMW of North America v. Gore441 and to eliminate unnecessary references to ‘standing and jurisdiction.’”442 The Assembly Committee on the judiciary emphasized, that despite the rewording, the section was still intended “not . . . [to limit] the bill’s applicability to heirs of celebrities who were domiciliaries of California at the time of death.”443 The Ninth Circuit appeared to agree with that assessment. In Cairns II, the Ninth Circuit agreed with the district court that section 990 did not constitute a law to the contrary with respect to the applicability of section 946.444 To reinforce this conclusion, the Ninth Circuit referred to the soon-to-be effective amendment to section 990: “[T]he California legislature has amended Section 990, effective January 1, 2000, to expressly include a provision that expands coverage of the statute to heirs of celebrities who were not domiciliaries of California at the time of death.”445 However, the Ninth Circuit subsequently amended its ruling to delete the words “choice of law,” but did not delete dicta that the revision of the post-mortem statute “expands coverage of the statute to heirs of ce-

443. Id.
444. Cairns v. Franklin Mint Co., 216 F.3d 1082 (9th Cir. 1999).
445. Id.
lebrities who were not domiciliaries of California at the time of death.” In Cairns III, the district court, stating it was not bound by the Ninth Circuit dicta in Cairns II, held that the provision of section 3344.1(n) “is not a choice of law provision.” The court concluded that California Civil Code section 946 applied, and as the law of Great Britain did not recognize post-mortem right of publicity, no right was violated in California.

In Astaire, as discussed above, the Ninth Circuit referred to the Staff of the Assembly Committee on the Judiciary Report on Senate Bill 613 (as amended June 12, 1984) as supporting the court’s interpretation of the purpose of the deletion of the language “to the extent the use is protected by the constitutional guaranties of freedom of speech or freedom of the press” from Senate Bill 613 on July 3, 1984. In contrast to Astaire, in Cairns III, the district court ignored the California Assembly Committee on the Judiciary Analysis of Senate Bill 209 (as amended March 3, 1999) that suggested that subsection (n) like the previous subsection (o) was intended to overturn Cairns I. In doing so, the district court said that it gave “little weight to legislative history predating the amendment to the statute which occurred on June 29, 1999.” Second, both the Ninth Circuit in Astaire and the district court in Cairns III, held that letters or statements from the bill’s authors and statements of aides as evidence of intent could not be considered. Yet, the district court in Cairns III referred to a letter from a number of professors to Assembly Member Kuehl expressing, among other things, concern with the territorial reach of subsection (o). The district court stated that “it appears that the letter influenced the final language in the bill.” The court appeared to give weight to a letter from professors while disregarding legislative history and declarations from legislative aides.

Apart from the argument that the legislature’s intent to include non-domiciliaries can be divined from the Assembly analysis, there is an additional argument why section 3344.1 should be interpreted as applying regardless of the domicile of the decedent. Subsection (n) states that it applies to “acts occurring directly in this state.” There is no comparable language in section 3344. Yet, in a section 3344 action by a living celebrity in a California court, the California court could only properly address acts

447. Id.
448. Astaire v. Best Film & Video Corp., 116 F.3d 1297, 1303 (9th Cir. 1997).
450. 116 F.3d at 1302.
452. Id.
The same would be true for an action brought by the estate of a deceased celebrity. Given that section 3344 does not contain the language of section 3344.1(a), and if the language of section 3344.1(n) is not to be treated as surplusage, it certainly may be interpreted—consistent with the conclusion of the Assembly Committee on the Judiciary—that the substitution of subsection (n) for (o) was not intended to limit the bill’s applicability to celebrities who were domiciliaries of California at the time of death.

The federal courts have interpreted the legislation; whether they have done so correctly is another matter. The decisions are on appeal to the Ninth Circuit and it is unclear what the court will decide.

D. “I Would Rather Be Living in Philadelphia”—Whose Law Governs, Anyway?

Contrary to popular myth, the plaque on W.C. Fields’ crypt does not say “I would rather be living in Philadelphia.” But, where you live, or more to the point, where you are domiciled when you die, may be of great significance.

There is no federal right of publicity and no likelihood of enactment of such legislation in the near term. Thus, the existence and terms of such a right are a matter of state law. While the issue of which state’s law will apply in connection with a living celebrity is obviously important, the issue is particularly critical with respect to a post-mortem right of publicity claim. For states that have a post-mortem right of publicity, there is variance among those states as to the duration of the right and as to the aspects of persona covered. If, (1) the plaintiff beneficiary of a “post-mortem right of publicity” lives in the same state as the defendant; (2) the “tort” occurs solely in that state; and (3) the deceased celebrity was domiciled in that state at the time of death, the law of that state clearly would apply. But, which state’s law applies becomes a major issue if plaintiff beneficiary and defendant are not located in the same state, the “tort” took


454. Both the International Trademark Association and the American Bar Association have labored on a proposed federal right of publicity but so far it does not seem either organization has reached a consensus on the matter.


456. See supra note 391.

457. See supra note 394.
place in another jurisdiction, or the deceased were domiciled in another state. If all courts and legislatures were to apply uniform rules in determining the existence and scope of a post mortem right of publicity, that would be one thing; unfortunately, uniformity is sorely missing, as the following paragraphs will illustrate.

The Second Circuit has consistently held that the existence of a post-mortem right of publicity is to be determined by the laws of the jurisdiction in which the celebrity was domiciled at the date of death, as has the New York Court of Appeals. Most recently, California's revised post-mortem right of publicity statute has been interpreted as determining the status of a post-mortem right of publicity, or lack thereof, under the laws of the jurisdiction where the celebrity was domiciled at the date of death. Presumably, these jurisdictions would find that James Cagney, who died domiciled in New York, has no post-mortem right of publicity under New York law though his persona would be protected to the extent of trademarks and, presumably, section 43(a) of the Lanham Act.

The Federal District Court for New Jersey determined that Elvis Presley enjoyed a post-mortem right of publicity under New Jersey law, the situs of the tort. The same court later applied New Jersey law with respect to “Spanky” McFarland but in that case McFarland was alive when the tort was committed in New Jersey. So, the issue was not really one of the existence of a post-mortem right of publicity under New Jersey law, but rather whether an action for breach of McFarland’s right of publicity during his lifetime survived his death, which the court held it did. Another Federal District Court of New Jersey decision involved a determination of whether the law of New Jersey, the law of Nevada, or the law of Louisiana should govern the determination of whether or not Louis Prima enjoyed a post-mortem right of publicity. Prima's widow resided in New Jersey, and the defendant’s principal place of business was in Flor-

458. See, e.g., Groucho Marx Prods. Inc., v. Day & Night Co., 689 F.2d 317, 320 (2d Cir. 1982). (“Though the conduct alleged to impair plaintiffs’ rights occurred in New York, the existence of their rights must be determined under the law of California.”).
463. See McFarland v. Miller, 14 F.3d 912, 914 (3d Cir. 1994). This was not the only time McFarland sued. See McFarland v. E & K Corp., 18 U.S.P.Q.2d (BNA) 1246 (D. Minn. 1991) (bar known as “Spanky's Saloon” selling hats and T-shirts with name and image of “Spanky”).
464. See McFarland, 14 F.3d at 917-18.
ida. The late Prima’s will was probated in Nevada where he was domiciled from 1954 to 1978. However, shortly before his death, he was relocated to a hospital in Louisiana, the state of his birth. The determination was important because Nevada—by statute—and New Jersey—by common law—provided a post-mortem right of publicity, whereas Louisiana did not. The court decided that the Louisiana contact was miniscule. Having determined that there was no conflict between New Jersey law and Nevada law, the court applied the law of the former state, New Jersey, since the plaintiff, Prima’s widow, was domiciled in New Jersey.

The Eleventh Circuit has also recognized the problem of determining which state’s law to apply in post-mortem right of publicity cases:

It is not clear whether the locus of the injury would be the location of the plaintiff or instead the situs of the allegedly tortious conduct. To complicate matters, the right of publicity has been treated in some jurisdictions as a property right, and some courts accordingly have used choice-of-law rules applicable to personal property.

The Eleventh Circuit chose to treat the action as involving personal property akin to a right of publicity, but invoked Alabama law, not because the deceased was domiciled in Alabama at the time of his death, but rather because the widow was so domiciled at the time she brought the action.

To further complicate matters, Nevada and Indiana provide post-mortem right of publicity protection with respect to exploitation within the state regardless of the domicile of the decedent at the time of death. As previously discussed, the California legislature, in the process of revising Civil Rights section 990, had at one point in the deliberative process included a provision similar to that of Indiana and Nevada: “if any acts giving rise to the action occurred in this state, whether or not the decedent was a domiciliary of this state at the time of death.” That provision was subsequently deleted and replaced. However, as previously noted, the

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466. See id. at 345-46.  
467. See id. at 347.  
469. See id.  
472. See CAL. CIV. CODE § 3344.1(n) (Deering Supp. 2001) (“This section shall apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in this state.”).
federal district court found that the revision, as enacted, did not expand coverage to decedents not domiciled in California at the date of death but, rather, the law of the place of such domicile was determinative of the existence of a post-mortem right of publicity.473

The preceding discussion reveals three approaches to the issue of which law determines the status of a post-mortem right of publicity: (1) the domicile of the celebrity at the time of death, the approach of the Second Circuit474 and the Federal District Court for the Central District of California;475 (2) the situs of the tort, the statutory approach of Nevada476 and Indiana,477 and the tack taken by the Federal District Court for New Jersey in Estate of Presley v. Russen;478 and (3) the domicile of the plaintiff, the holding in Prima v. Darden Restaurants, Inc.479 and Allison v. Vintage Sports Plaques.480

Until there is a federal right of publicity, those taking a post-mortem right of publicity license need to be mindful of the inconsistent approaches taken to the validity, scope, and duration of the underlying rights. For those representing a deceased celebrity who died domiciled in a state that does not provide a post mortem right of publicity, federally registered trademarks provide a degree of protection, but are limited to the mark itself. Section 43(a) of the Lanham Act provides more flexible coverage and has been invoked successfully by both living and deceased celebrities.481 Of particular note is the fact that, with the possible exceptions of Nebraska482 and Tennessee,483 statutory rights of publicity are for a finite term; Lanham Act section 43(a) is indefinite in duration, though admittedly limited by the likelihood of confusion test.484 In addition to possible Lanham Act protection, the language of the Indiana and Nevada statutes

474. See, e.g., Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317 (2d Cir. 1982).
475. See Cairns, 120 F. Supp. 2d at 883-86.
476. See NEV. REV. STAT. ANN. 597.790 (Michie 1999).
480. See 136 F.3d 1443 (11th Cir. 1998).
482. See NEB. REV. STAT. ANN. § 20-208 (Michie 1997).
would be a source of protection for celebrities who died in a state that does not provide a post-mortem right of publicity. But are these statutes subject to the claim of being an unconstitutional burden on interstate commerce?

Indiana and Nevada are the only two states to statutorily mandate that the post-mortem right of publicity apply to unlicensed exploitation in their respective states regardless of the celebrity’s domicile at the date of death. Thus, the Indiana statute would provide post-mortem protection for celebrities domiciled in New York or Wisconsin at the time of death notwithstanding that neither of those states provide post-mortem protection. And, it would provide protection for 100 years after death against unlicensed exploitation in Indiana even if the domicile of the deceased provided for a lesser time. It would also protect against unlicensed exploitation of “distinctive appearance,” “gestures,” and “mannerisms,” even if they were not among the characteristics of persona protected in the domiciliary state.

It is the advertising industry and its customers and those who manufacturer and/or market celebrity memorabilia who are the ones that are potentially burdened by the Indiana statute. A person seeking to exploit the deceased celebrity’s persona nationwide is faced with three choices: (1) pay those owning the Indiana rights in the deceased celebrity’s persona; (2) “blackout” Indiana; or (3) simply violate the Indiana statute. If the licensing fee is nominal, paying it may, as a business matter, be the appropriate decision. “Blacking out,” an ad, for example, while, perhaps, technically feasible, does not appear to be a commercially acceptable alternative. If the person elects not to choose either alternative (1) or (2), what are the ramifications of violating the Indiana statute?

Consider the following hypothetical: The producer of an over-the-counter weight loss product decides to launch a national television campaign in 2004 using silent screen star “Fatty” Arbuckle as its “poster boy” and, further, decides not to obtain a license from Arbuckle’s successors in interest.


Roscoe Conkling Arbuckle died in New York on June 29, 1933. The two jurisdictions that might arguably have been Arbuckle’s domicile at the date of his death would be New York (where he was residing, at least for the moment, when he died) or California, where he spent his professional career. As previously noted, New York does not provide post-mortem right of publicity protection. California would provide protection for Arbuckle assuming California law applied, but only until 2003, seventy years after his death. By contrast, if Indiana law applies, Arbuckle is protected against unauthorized exploitation in Indiana until 2033.

Assuming that Arbuckle was survived by persons entitled to succeed to his right of publicity, the unauthorized exploitation of Arbuckle’s name, photograph or likeness for a commercial purpose would be actionable. Advertising is a use for a “commercial purpose.”

Assume that the successors in interest to Arbuckle’s right of publicity bring an action for violation of the Indiana right of publicity in a federal district court in Indiana. The advertiser might challenge the constitutionality of the jurisdiction provisions of the Indiana statute and/or claim that the protection of a non-domiciliary deceased celebrity is a proscribed burden on interstate commerce.

The federal district court in Indiana must first inquire whether there is jurisdiction as to a non-Indiana defendant. That involves a two-step process: (1) does the Indiana statute provide for jurisdiction over nonresidents; and (2) is the exercise of jurisdiction consistent with the due process requirements of the Fourteenth Amendment?

The Indiana right of publicity statute provides that “[a] person who... knowingly causes advertising or promotional material created or used in
violation of section 8 of this chapter to be published, distributed, exhibited, or disseminated within Indiana; submits to the jurisdiction of the Indiana courts.” Thus, the first prong of the two-part test is satisfied: the statute specifically provides for jurisdiction. But does the application of the statute to an out-of-state defendant violate due process? Jurisdiction may either be “general jurisdiction” or “specific jurisdiction.” In as much as the offending TV advertising is itself the subject of the suit, “specific jurisdiction” seems applicable and is, arguably, consistent with the due process requirements. It should be noted that local and national TV and cable services, even if amenable to process, are not subject to injunctive relief even though the advertiser itself might be.

Assuming that Indiana jurisdiction with respect to a national advertiser does not offend the due process provision, does the statute nonetheless run afoul of the Commerce Clause?

In the recent case, Santa Fe National Tobacco Co. v Spitzer, the court stated:

The Commerce Clause is more than an affirmative grant of power to Congress... [T]he Commerce Clause has a negative sweep as well. In what commentators have come to term its “negative” or “dormant” aspect, the Commerce Clause restricts the individual states’ interference with the flow of interstate commerce in two ways. It prohibits discrimination aimed directly at interstate commerce... and it bars state regulations

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498. Section 8(a) of the Indiana Code states: “A person may not use an aspect of a personality’s right of publicity for a commercial purpose during the personality’s lifetime or for one hundred (100) years after the date of the personality’s death without having obtained previous written consent...” IND. CODE ANN. § 32-13-1-8(a) (West 2000).


500. “General jurisdiction” over a defendant exists if the defendant has continuous and systematic contacts with the forum, even though those contacts have no relation to the underlying controversy. See, e.g., Protective Ins. Co. v. Cody, 882 F. Supp. 782 (S.D. Ind. 1995).

501. “Specific jurisdiction” is present if the defendant has contacts from which the cause of action arises, and which constitutes at least the minimum level of contact with the forum that allows the exercise of jurisdiction to be reasonable. See, e.g., Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Gallent v. Courtaulds Packaging Co., 4 F. Supp. 2d 825 (S.D. Ind. 1998).


504. Nos. 00 Civ. 7274 (LAP), 00 Civ. 7750 (LAP), 2001 WL 636441 (S.D.N.Y. Jun. 8, 2001).
that, although facially nondiscriminatory, unduly burden interstate commerce.\textsuperscript{505}

Thus, the question becomes, does the Indiana right of publicity statute discriminate against interstate commerce, i.e., does it favor Indiana entities and persons as against those not Indiana-based or, if not, does it unduly burden interstate commerce?

First, it should be observed that the Indiana statute treats celebrities not domiciled in Indiana at the time of death identically to those who were. And, non-Indiana exploiters of deceased celebrity persona are not treated any differently than Indiana-based exploiters. Indianapolis-based Curtis Management Group ("CMG") represents a number of deceased icons including Ingrid Bergman, Marilyn Monroe and James Dean.\textsuperscript{506} Obviously the 100 year term, the broad range of aspects of persona protected and the fact that the deceased celebrity's last domicile is irrelevant is certainly a significant plus for CMG, but, the statute is not anti-competitive. Roger Richman Agency, Inc. and Global Icons LLC, both based in California, represent a variety of deceased celebrities.\textsuperscript{507} They and others in that business are as able as CMG to avail themselves of the Indiana right of publicity statute. Thus, there is no resident/nonresident based discrimination in the Indiana statute.\textsuperscript{508} But the statute might still be unconstitutional if it is a burden on interstate commerce.

\textit{Pike v. Bruce Church, Inc.}\textsuperscript{509} articulates the test as to whether a statute is a burden on interstate commerce:

\begin{flushright}
505. \textit{Id.} at *10 (citation omitted).
506. James Dean was the subject of a docudrama, \textit{James Dean}, that aired Sunday, Aug. 5, 2001, on the TNT cable channel. Whether CMG received any payments with respect to any aspect of the program or the Citadel Press book, \textit{James Dean: Behind the Scene}, is not known by the author.
508. Indeed, the Supreme Court has upheld an Indiana statute that imposes additional expenses on takeover bidders (whether in-state or out-of-state) regardless of the fact that the burden falls most often upon out-of-state entities attempting hostile takeovers of Indiana corporations. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.") (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978)).
\end{flushright}
Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.  

The question is whether protecting non-domiciliary celebrities effectuates a legitimate local public interest. What is the “local benefit” which is to be balanced against the burden on commerce? Where a particular state’s statute of limitations is longer than that of any other jurisdiction, there is a legitimate local public interest and a local benefit: resident plaintiffs are given a longer time in which to bring a claim.  

But is there a legitimate Indiana public interest in extending its right of publicity to non-Indiana deceased celebrities?  

In analyzing the Indiana statute, it is worth noting that, in addition to section 32-13-1-1(a) providing that the chapter applies “regardless of a person’s domicile,” section 32-13-1-16(6) provides for descendability of the right by intestate succession according to the laws of the state administering the estate “regardless of whether the state recognizes the property rights set forth” in the Indiana statute. This clearly indicates Indiana’s recognition that it may be protecting a deceased celebrity even where the late celebrity’s domicile state chooses not to at all or chooses a term of protection less than 100 years.  

Certainly Indiana has a legitimate public interest in protecting the personality rights of residents of Indiana and to extend that protection to nonresidents as well, whether the right of personality is considered a personal right or a property right. And, as a number of other states have done, Indiana has a right to statutorily create a property right in the persona of deceased celebrities domiciled in Indiana at the date of death. But, in extending its right of publicity to deceased nonresidents, Indiana has in effect created a property right which may be at odds with the domicile state. This adds an additional complexity to an already jumbled array of statutory and common law post-mortem right of publicity provisions.

510. Id. at 142 (citation omitted).

511. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). That nonresidents may also be able to avail themselves of the longer statute of limitations does not change the conclusion that the longer statute of limitations is not a burden on commerce.
There is an argument that Indiana does have a legitimate local public interest. Where post-mortem protection has been unavailable, unlicensed exploitation has led to any number of tasteless and, to say the least, disrespectful celebrity memorabilia.\textsuperscript{512} It was in part, a reaction to this type of memorabilia that led California to create a post-mortem right of publicity.\textsuperscript{513} Indiana could argue that not tolerating such exploitation—regardless of the deceased celebrity’s domicile—does serve a legitimate local public interest.

Until such time as a court addresses the constitutionality of the Indiana—or the Nevada—statute with respect to the protection of deceased non-domiciliary celebrities, I leave the reader to his or her own conclusion.

\textbf{E. \textit{As The Crow Flies: A New Direction in Post-Mortem Film Completion}}

When Brandon Lee was killed by an improperly loaded prop gun, he joined the melancholy list of actors who died before completing a film. In days gone by stand-ins and other stratagems were used to complete the film. In the 1930s, for example, Jean Harlow died suddenly of uremic poisoning in the middle of filming \textit{Saratoga}.\textsuperscript{514} MGM decided to finish the picture by having a prudently lit double interact with Clark Gable.\textsuperscript{515} In the 1940s, Robert Walker died of a heart attack in the midst of filming \textit{My Son John}.\textsuperscript{516} In that instance, the studio was able to re-use footage from the deceased actor’s previous film, Alfred Hitchcock’s \textit{Strangers on a Train}.\textsuperscript{517} Today, digital technology would permit even more sophisticated use of prior films to complete the post-mortem film.\textsuperscript{518}

\textsuperscript{512} See, \textit{e.g.}, Martin Luther King, Jr. Center for Social Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982). Dr. King’s family has “a right to prevent the exploitation of his likeness in a manner they consider unflattering and unfitting.” \textit{Id.} at 706.

\textsuperscript{513} Attorney Roger Richman, a pioneer in the post-mortem right of publicity, displayed to the California legislators an array of tasteless items of unauthorized celebrity memorabilia including a card with a vial of liquid with the legend “Let Elvis’ [sic] perspiration be your inspiration” and a sex toy featuring the head of President Ronald Reagan at its tip. \textit{See} Michael Neill & Johnny Dodd, \textit{On the Job: Buried Treasures, People}, Nov. 17, 1997, at 202.


\textsuperscript{515} \textit{Id.}

\textsuperscript{516} \textit{Id.} \textit{MY SON JOHN} (Paramount Pictures 1952).

\textsuperscript{517} \textit{Id.} \textit{STRANGERS ON A TRAIN} (Warner Brothers 1951).

\textsuperscript{518} \textit{See} \textit{IN THE LINE OF FIRE} (Castle Rock Entertainment and Columbia Pictures Corp. 1993). Clint Eastwood is shown in Dallas with President Kennedy. An early clip
died before filming of *The Crow*\(^{519}\) was complete, digital technology resurrected Lee to complete the film. One critical scene was constructed using digitally modified out-takes from an earlier scene. In the final scene, Lee’s head was digitally placed on the body of a double. More recently, the popular HBO program *The Sopranos* used similar technology to resurrect the late Nancy Marchand to play her character Livia Soprano “to speak her final corrosive words to her son, Tony” before she dies.\(^{520}\)

In the future, it might be possible to use footage from earlier films, digitally alter them and complete the present film.\(^{521}\) It may also be possible to reconstruct a totally digital model by using earlier films and photogrammetry. Also, cast insurance companies may require stars to be scanned as a hedge against the star’s death at a point where reshooting the film with a new star would be more expensive than completing the film with the late star’s digital clone.\(^{522}\)

Post-mortem use of an actor’s image ensures that the star’s last performance will make it to the screen. In such an instance, the post-mortem use of the deceased star’s digital image would implicate the applicable post-mortem right of publicity statute; the producer might be well advised to obtain an inter-vivos assignment of the post-mortem right of publicity for the sole purpose of completing the film. Such an agreement would not

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\(^{519}\) See id.


\(^{521}\) See supra note 518 and accompanying text.

\(^{522}\) When Tyrone Power died of a heart attack during the filming of *Solomon and Sheba* (Edward Small Productions and Theme Pictures 1959), it was necessary to reshoot the film. Yul Brynner replaced Power. Insurance companies play a significant role in the decision whether to complete a film despite the death of a star. When Natalie Wood drowned before the completion of *Brainstorm* (JF Productions and Metro-Goldwyn-Mayer 1983), MGM preferred to scrap the film and seek $11 million from Lloyd’s of London. The insurance company deemed it more prudent to pay $6 million to complete the film using rewrites and creative editing of existing film. In contrast, when River Phoenix died before completion of the film *Dark Blood* (1993) and a number of significant scenes featuring Phoenix remained to be shot, the insurance company agreed with the producer to scrap the film. Jeff Silverman, *From the Grave the Show Still Goes On*, N.Y. TIMES, May 1, 1994, at H17. It is interesting to note that Forrest Gump director, Robert Zemeckis, has been quoted as saying “I’ve taken to making digital scans of all of the actors in my movies.” He went on to say “I know some are worried about what uses will be made of it.” Rick Lyman, *Movie Stars Fear Inroads by Upstart Digital Actors*, N.Y. TIMES, July 8, 2001, at A1, A16.
violate the S.A.G. Agreement. Obviously, the star would want contractual safeguards against misuse of the digital image including any changes in the script that would adversely affect the reputation of the star. While the S.A.G. agreement may preclude an actor from agreeing in a present contract to re-use of his image from the present production in future productions, the agreement would not prevent the actor from agreeing in a present production to the re-use of his image from prior productions. Of course, permission of the owner of the copyright in the earlier films would be needed. The inter-vivos transfer should contain explicit provisions for the ownership of the digital model once the film is complete.

IV. TWILIGHT ZONE: THE IMAGINARY

“If I am elected president, synthetic parts will go to synthetic actors”—so pledged Nestor Sexton in his bid to be president of S.A.G. No, not that S.A.G., but, rather the Synthetic Actors Guild. It seems Sexton is starting to make good on that pledge.

*Toy Story* with its totally digital toys was a harbinger of a new type of actor—a digital one with its own personality, not merely the alter ego of some human being and not simply an animated cartoon. Not surprisingly, although the actors in *Toy Story* were toys, synthetic—or virtual, if you please—actors are not limited to play only things. Some synthetic actors will be aliens or some other nonhuman species, but many will be virtual humans: they will look like humans, walk and talk like humans, smile, frown, cry, the full panoply of human emotion. Names like Kyoko Date,
Ananova, Webbie Tookay and Aki Ross will become as well known as those of Cindy Crawford, Jane Pauley, and Kim Basinger.

She is a Japanese pop star. Thousands adore her. Letters, flowers, the lot from stage door johnnies. She is an idol. "Her legs are impossibly long, her face utterly flawless, her movements precise and flowing." Like other stars she has her own website. But, she is not like other stars: Kyoko Date is not flesh and blood; she is virtual, the creation of the Japanese firm, Horipro. And, in an "art imitates life ... well, virtual life, anyway," science fiction writer William Gibson, of "cyberspace" fame, has written a novel, *Idoru*, about a Japanese digital heroine, *Rei Toei*, who gains an actual consciousness. But, a virtual person with artificial consciousness, a self awareness, is not only the subject of science fiction, it is also a matter receiving serious attention from the computer technology community as well. Kyoke Date is not the only virtual woman inhabiting our world. John Casablancas, the founder of Elite Model Management, is now managing the career of Webbie Tookay, the cyber creation of Swedish animator Steven Stahlberg. She has posed in a Nokia phone ad and has been "signed" by Sony Music Latin America to join a Spice Girls-style virtual band. And Britain's Press Association boasts a digital anchor, Ananova who reads news and weather in a "trans-Atlantic" accent


529. Another Japanese virtual teenage idol, high school junior Shiori Fujisaki has been the subject of a copyright infringement and moral rights violation. Fujisaki is the principal character in a computer game, *Tokimeki Memorial*, where the players take the role of male high school students with the goal of getting a confession of love from Fujisaki. The defendant produced a pornographic animated video featuring a female high school student who looked substantially similar to Fujisaki. The plaintiff was awarded damages of ¥275,000 for copyright infringement and ¥2 million for moral rights violation. An injunction was also granted. John A. Tessensohn, *Mishima & the Virtual Sweetheart-Moral Rights Protection in Japan*, 11 EN'T. L. REV. 109 (2000). For a detailed discussion of Shiori Fujisaki and the game, *Tokimeki Mommorial*, see Andrew Pollack, *Japan's Newest Young Heartthrobs Are Sexy, Talented and Virtual*, N.Y. TIMES, Nov. 25, 1996, at D5.


Another virtual woman on the web is Vivian Livingston in Vivianlines.com. The silver screen is also beginning to feature virtual humans like Princess Fiona in Shrek and Aki Ross in Final Fantasy: The Spirits Within.

"Science fiction becomes science fact" is a mantra that is repeatedly validated. In the 19th Century, Jules Verne’s submarine Nautilus was powered by an exotic energy source. In 1955, the U.S. Navy Submarine, Nautilus, reported “underway on nuclear power.” Verne’s novel From the Earth to the Moon became fact in 1969 when Neil Armstrong stepped onto the moon’s surface. In the Steven Spielberg film A.I. Artificial Intelligence, the central character, David, is a robotic human programmed to love his “adopted” family. David is played by the talented young actor Haley Joel Osment. Nestor Sexton presumably would have preferred a synthetic actor to play the role of the synthetic boy, but, virtual actor technology cannot yet match a human actor’s nuanced performance. The fiction of the film A.I. will, however, ultimately become fact.

If Sexton is somewhat frustrated by A.I., he would be pleased by Final Fantasy: The Spirit Within released shortly after A.I. Final Fantasy: The Spirits Within boasts an entire cast of virtual humans. The film, loosely based on the Final Fantasy video games, took four years to create. The film produced by Square Pictures is being distributed by Columbia. Human actors provide the voices and motion capture provides the animation, but the physical features of the virtual actors are completely computer-generated. The virtual humans of this film are more than cartoon charac-

533. Id. at 8.
534. Id.
536. (Chris Lee Productions and Square Co. Ltd. 2001). See generally STEPHEN L. KENT & TIM COX, THE MAKING OF FINAL FANTASY, THE SPIRITS WITHIN (2001). Hiro-nobu Sakaguchi, the director of Final Fantasy, has talked about casting Aki Ross “in a range of roles in new movies, as though she were just another Michelle Pfeiffer on Jennifer Lopez.” Michael A. Hiltzik & Alex Pham, Synthetic Actors Guild, available at http://www.latimes.com/cgi-bin/print.cgi (May 8, 2001) (on file with author). This echoes a comment made by George Lucas that “conceivably you can get to a point where you can create a character that anybody can use, and you can put him in any kind of environment.” Kevin Kelly & Paula Parisi, Beyond Star Wars—What’s Next for George Lucas, WIRED, Feb. 1997, at 160, 216.
ters, they are a step in the evolution of virtual human technology: "From skin pores to eye moisture, the designers of the movie have worked to achieve a near-photographic level of detail."\textsuperscript{539}

Eventually, imaginary virtual humans will be indistinguishable from visual and audio representations of real humans. They will pass the "Tur-
ing Test"\textsuperscript{540} as to their physical aspects. In fact, today we are even seeing the beginning of synthetic minds. Intelligent, software-based agents are acting as our representatives gathering and distributing information and making decisions.\textsuperscript{541} "Given the current pace of advances in artificial intelligence and neural computing . . . [m]any people now believe that artificial consciousness is possible and that, in the future, it will emerge in complex computing machines."\textsuperscript{542} Thus, the day may come when the imaginary virtual human gets a brain. At the same time, we humans are becoming more machine-like with hearing aids, hip replacements and artificial hearts. We are becoming the bionic man or woman. The differences that distinguish the real from the virtual human will narrow. \textit{The Age of Spiritual Machines}\textsuperscript{543} is one futurist's blueprint to an age when "there is no longer any clear distinction between humans and computers."\textsuperscript{544}

As previously discussed we protect real humans and their digital clones against unauthorized exploitation through right of publicity, copyright and trademark law. The next section addresses the question of how to protect imaginary virtual humans against unauthorized exploitation. Should we protect imaginary virtual humans in exactly the same way we do real humans?

\textsuperscript{539} Id.
\textsuperscript{540} The "Turing Test" was developed by computer science pioneer Alan Turing. The test uses two keyboards, one connected to a computer and the other in front of a human operator. Both are hidden from view. An examiner poses questions to be answered. If the examiner cannot distinguish between the computer response and the human operator response, the computer passes the "Turing Test." See N. Katherine Hales, \textit{How We Became Posthuman} (1999).
\textsuperscript{541} Simon Case et al. \textit{Enhancing E-Communities With Agent-Based Systems}, 34 Computer No. 7, at 64 (2001).
\textsuperscript{542} Giorgio Buttazzo, \textit{Artificial Consciousness: Utopia or Real Possibility}, 34 Computer No. 7, at 24 (2001).
\textsuperscript{543} Ray Kurzweil, \textit{The Age of Spiritual Machines} (1999); see also N. Katherine Hales, \textit{How We Became Posthuman} 3 (1999) ("The posthuman view configures human beings so that it can be seamlessly articulated with intelligent machines. In the posthuman, there are no essential differences or absolute demarcations between bodily existence and computer simulation.").
\textsuperscript{544} Kurzweil, \textit{supra} note 543, at X.
A. It's a Bird! . . . It's a Plane . . . It's . . . an IVH!

In the 1960s British science fiction/horror film Island of Terror, actor Peter Cushing's character must save visitors to the island from unnatural life-forms. In the story, a laboratory experiment seeking a cure for cancer goes tragically awry when carbon-based material transmogrifies into silicon-based material from which the life-forms evolved. Suddenly, Cushing was faced with the dilemma of dealing with living things that were not carbon-based. Old solutions would not work. New solutions were needed. Luckily for the surviving visitors, Cushing found a solution. Virtual humans are born in the silicon innards of the digital computer. Like the creatures in Island of Terror, the synthetic humans are silicon-based. We carbon-based humans who live in a carbon-based culture must, like Peter Cushing, decide how to deal with this new "life-form."

Do we treat a virtual human, who is not the digital clone of a living or deceased person, as a person or as some form of technologically sophisticated animated cartoon? And, to what extent does selecting one choice over the other lead to a different level of protection? Although it may seem to be an odd bit of terminology, I shall refer to a virtual human that is not a digital clone of a human, living or deceased, as an "Imaginary Virtual Human" ("IVH") and a clone of a real person, living or dead, as a "Real Virtual Human" ("RVH").

At the outset of this section, I asked whether an IVH should be treated as a person or as a cartoon. Anticipating a further discussion, infra, with respect to copyright, I suggest that the scope of copyright protection will be identical whether one treats the IVH as a person or as an animated cartoon. I further suggest that trademark protection would be available on equal terms regardless of how the IVH is classified. The only question is should an IVH have a right of publicity like an RVH and if not, to what degree, if any, is the overall protection of an IVH less than that of an RVH?

First, an RVH does not have a right of publicity; rather, it is the person whom the digital clone represents who has the right of publicity. The protection of the clone is determined by the extent to which, during his or her lifetime, the human counterpart is protected, and, after death, the extent to which, if any, there is post-mortem right of publicity protection. With

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545. (Planet Film Products and Protelco 1966).
546. At SIGGRAPH 2001, the annual international graphics conference held in Los Angeles, Aug. 12-17, 2001, one panel cleverly chose to call such digital humans VIP's, Virtually Invented People.
some few possible exceptions, protection will terminate at some point, either at death—as is the case in New York and Wisconsin—or at some finite time after death—such as seventy or 100 years. In contrast, an IVH could “live” indefinitely not unlike a corporation. The late professor Melville Nimmer once suggested that, “since animals, inanimate objects and business and other institutions all may be endowed with publicity values, the human owners of these nonhuman entities should have a right of publicity.”

Professor Nimmer’s suggestion a half-century ago has not been met with great enthusiasm. But, if the law were to give an IVH a right of publicity, the question would need to be asked would the term of protection be for a finite or for an indefinite period? Given that right of publicity statutes for humans are for limited periods such as life—a finite life of publicity protection for an IVH would be consistent with the protection provided an RVH. Perhaps borrowing the terms extended to works-for-hire under copyright law would be appropriate—i.e., ninety-five years from publication or 120 years from creation whichever expired first. On the other hand, Lanham Act section 43(a) protection against likelihood of confusion with respect to celebrities is not subject to any prescribed term


553. See generally MCCARTHY, supra note 121, at § 4.37.

554. See 17 U.S.C. § 302(c) (1994). For an analogous suggestion, see the dissent of Chief Justice Bird in Lugosi v. Universal Pictures, 603 P.2d 425, 446-47 (Cal. 1979) (“The Copyright Act of 1976 . . . provides that a copyright in new works shall be recognized during the authors life and for 50 years thereafter . . . That period represents a reasonable evaluation of the period necessary to effect the policies underlying the right of publicity. Therefore, I would hold that the right of publicity should be recognized during the subject’s life and for 50 years thereafter.”).
limitation; a fact which might support an argument for a right of publicity for an IVH that was indefinite as to duration.

If the law established a right of publicity for an IVH, the same persona characteristics of humans that are protected by the typical right of publicity statutes such likeness, voice and name would be appropriate for the IVH. However, if a human provided the voice, as opposed to a synthetically created voice, it would be the human’s voice, not the IVH’s that would be protected; though the related image would be protected by the IVH right of publicity.

Presumably, the law would protect an IVH against advertising and trade purposes uses. However, if an IVH were subject to the same types of unlicensed performance exploitation that an RVH would be, the IVH might—as is explained infra—be better off being treated as an animated cartoon figure. Either the states or the federal government could fashion a right of publicity statute, perhaps along the lines discussed above, to protect the IVH against unauthorized exploitation. But is it likely that such a statute will become law?

A human being is not copyrightable, though images of the person are, be they photographs, drawing or sculptures. A human’s voice is not

556. See Pollack, supra note 140 and accompanying text.
copyrightable but fixation of that voice in some medium is, provided only
that some modicum of creativity is contained in the vocal effects so
fixed.\textsuperscript{560} Thus, fixed representations of the person are copyrightable
though the human, as such, is not. A cartoon character has no such inde-
pendence—its “being” depends on its fixation in some medium, be it ana-
log or be it digital. An IVH is like a traditional cartoon in that regard.
Unlike a real human whose very existence does not depend on its replica-
tion in some medium, an IVH does not exist except as it is fixed in some
medium. Assuming the necessary, constitutionally-required “originality,”
an IVH is federally copyrighted at birth—i.e., at first fixation. So, it is
unlikely that any state or the federal government would entertain a pro-
posal to create a statutory right of publicity for an IVH, unless it was being
done in connection with granting such a right to corporations or other
nonhuman entities. And, even that last possibility is remote, given that al-
mast fifty years have past since Professor Nimmer proposed such protec-
tion.

If, as is likely to be the case, an IVH will not receive right of publicity
protection but rather will be left with copyright and trademark protection
only—as contrasted to an RVH that will enjoy right of publicity protection
in addition to copyright and trademark protection—will the absence of
right of publicity protection disadvantage the IVH vis-à-vis an RVH? The
answer to that question depends on an analysis of: (1) the term of protec-
tion; (2) the aspects of persona protected; (3) the criteria for determining if
a use of persona has taken place; and (4) the types of exploitation by third
parties that would require permission as between a right of publicity on the
one hand and copyright on the other.

1. The Term of Protection

Treating an IVH as an animated cartoon figure would provide copy-
right protection for the IVH.\textsuperscript{561} The law would protect the image of the
IVH to the same extent as it would a cartoon character’s. If the voice were
synthetic then, unlike a real voice, it would, arguably, be protected by
copyright. If a human voice-over were used in a work-for-hire situation,\textsuperscript{562}
the voice would be subject to the human voice-over actor’s right of pub-
licity, presumably assigned to the owner of the rights in the IVH.\textsuperscript{563} In either
case the actual words spoken would be copyrightable. The IVH’s term of

\textsuperscript{561} See, e.g., Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).
\textsuperscript{563} See, e.g., Rooney v. Columbia Pictures Indus., Inc., 538 F. Supp. 211 (S.D.N.Y.
1982).
protection would be, if not a work-for-hire, life of the author plus seventy years, or, if jointly authored, for the life of the last surviving author plus seventy years. If the IVH is a work-for-hire, the term of protection would be ninety-five years from publication or 120 years from creation, whichever expired first. And, while there might have been an issue as to whether a laser-scan-created clone of a person was copyrightable, that issue would not arise where the virtual human is created from “whole cloth.”

The right of publicity of a human is available for life and, in some states, for post-mortem periods as well—even up to 100 years after death. As just mentioned, the term of protection for a cartoon is the life of the creator plus seventy years or, if a work-for-hire, ninety-five years from publication (or in a long-postponed publication, 120 years from creation). With average longevity, some state post-mortem statutes will provide a longer period of protection for a person than a copyright would provide for a cartoon. In other states the reverse will be true. If Congress passes a federal right of publicity law, its provisions might be in a stand-alone statute or integrated into the Lanham Act—perhaps as part of section 43—or the Copyright Act—not unlike the provision against recording live performances. Wherever codified by Congress, the term of protection of such a right of publicity is very likely to be for the life of the person plus some fixed period after death, probably identical to that provided authors of copyrighted works. If this conjecture becomes fact, then whether one treats an IVH as a human or as a cartoon, the term of protection would be identical (or virtually so). So term of protection is not, in
general, dispositive of the question. But, there is one situation in which treating the IVH as a cartoon rather than as a human may be to the advantage of the IVH.

If a human actor were made up to appear as a character, such as Jack Nicholson's portrayal of the "Joker" in Batman, any exploitation would implicate the actor's right of publicity and the copyright in the character. In contrast, if an IVH were made up to appear differently from its "normal" image, that would possibly be considered a derivative work under copyright law. While this would have no effect on the term of copyright in a non-work-for-hire situation (inasmuch as original works and their derivatives are protected for the life of the author plus seventy years), if it were a work-for-hire scenario, there would be a term of protection for the derivative component measured, not from the creation/publication of the underlying IVH, but rather from the creation/publication of the derivative. Thus, depending on the longevity of the human counterpart of an RVH, a copyright-protected IVH might have a longer term of protection as to its derivative copyright than provided to a similarly used RVH relying on the right of publicity of its human counterpart. But, it should be noted that if the RVH is copyrightable, then, as a matter of copyright law, the term of protection for the derivative component would be identical for both the RVH and the IVH.

2. The Aspects of Persona Protected

Right of publicity laws vary in the aspects of persona protected. States with only statutory protection are limited to the statutorily mandated list of personal attributes. New York, for example, protects only "name, portrait, picture or voice." Indiana provides, as previously mentioned, the most

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574. (Polygram Filmed Entertainment and Warner Brothers 1989).
575. See, e.g., Silverman v. CBS, 870 F.2d 40, 49-50 (2d Cir. 1988); see also Heijo E. Ruijenaans, The World of Fictional Characters: A Journey of Fantasy, 4 ENT. L. REV. 182 (1993). "If an author 'adapts' his comic character ... [s]uch modifications of a character, if original, make it possible that the subsequent characters can be regarded as 'derivative works' with their own part of copyright." Id. at 183.
577. See infra Part II.A and Part III.A.
578. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1992 & Supp. 2001). Before the New York statute was amended in 1995 to include "voice" in section 51 (but curiously not in section 50), the court in Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990) held that "New York Civil Rights Law does not yet extend to sound-alikes." Id. at 838. It is questionable, even now, whether New York law applies to sound-alikes since section 51 applies to "voice" and in Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), the Ninth Circuit held "voice" meant actual voice and not
generous "laundry list" of statutorily protected aspects of persona.\textsuperscript{579} States that rely on common law or, as in California, common law as a complement to statutory protection, have flexibility in the aspects of personality to be protected and the types of exploitation that will be considered an infringement.\textsuperscript{580}

Federal copyright law is like the common law right of publicity in that it is not limited with respect to the aspects of persona that it protects. Its only requirements are that the work not be a copy of an existing work and that it have some modicum of creativity.\textsuperscript{581} Thus, copyright can protect an IVH's physical characteristics—facial features in particular—and voice as well as gestures and mannerisms. The protection of copyright has also been extended to "traits, characteristics and qualities"\textsuperscript{582} and to "uncanny calm under pressure . . . a dry sense of humor and wit."\textsuperscript{583} Depending on which state's law was relevant, an IVH may well be better off relying on copyright rather than the right of publicity, but in no event will it be worse off.

3. Criteria for Determining if an Infringement has Taken Place

Is there a difference between right of publicity protection, on the one hand, and copyright, on the other, as to the criteria for determining whether the defendant had actually used aspects of another's persona? The issue may be illustrated by two hypotheticals: (1) a human is exploited by a cartoon replica;\textsuperscript{584} and (2) a human portrays a cartoon character.\textsuperscript{585} In

\textsuperscript{579} See supra note 169.

\textsuperscript{580} E.g., in Midler, 849 F.2d 460 (9th Cir. 1988), the plaintiff, while unable to prevail against the use of a sound-alike in a commercial under the California statute, which the court concluded limited the term "voice" to actual voice, was able to prevail under California common law. \textit{Id.} at 463.


\textsuperscript{582} Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108, 113 (N.D. Cal. 1972). In \textit{DC Comics Inc. v. Filmaton Assocs.}, 486 F. Supp. 1273 (S.D.N.Y. 1980) the Lanham Act was held not to protect personality traits. \textit{Id.} at 1277. But see Warner Bros., Inc. v. ABC, 523 F. Supp. 611 (S.D.N.Y.), \textit{aff'd.}, 654 F.2d 204 (2d Cir. 1981). "[U]nder a Lanham Act claim of character similarity, a disclaimer notice was required although the similarities were primarily as to physical abilities and personality traits." 1 NIMMER, \textit{supra} note 43, at § 2.12 n.25.


both instances we have a human and a cartoon. The difference is the first scenario is governed by right of publicity law and the second by copyright law. When dealing with the right of publicity, the test of whether the persona of the individual has been taken is identifiability. With respect to copyright, the test is whether the purportedly infringing use is substantially similar to the original, with respect to copyrighted elements of the latter.

There are some situations in which the identifiability requirement would be satisfied whereas substantial similarity would not be satisfied. In Motschenbacher v. R.J. Reynolds Tobacco Co., the plaintiff was not identifiable as such, but because his racing car was, his right of publicity was properly invoked. Had the unauthorized image been of the Batmobile in the Batman cartoon, and had Batman himself not been visible in the drawing, there would have been no copyright infringement as to Batman himself, though perhaps infringement as to the Batmobile. Thus, in such a scenario, the law would protect an IVH against unauthorized exploitation if a right of publicity applied but not if copyright law applied. And, in Cohen v. Herbal Concepts, Inc., the court held the nude rear and side of the two subjects to be identifiable as a matter of right of publicity law. The same aspect might not be sufficient, were copyright law applicable, to satisfy the substantial similarity test. And, in the case of Vanna White, a bejeweled robot dressed in a blond wig and white gown was held to invoke her image as a matter of right of publicity law; but, as a matter of copyright law, it is highly unlikely a court would find substantial similarity between a photograph of Vanna White, and a robot, despite the blond wig, white dress and jewelry.

However, while there are demonstrable differences between the results under the two tests, I suggest that the typical IVH exploitation would lead to identical results whether a court applied the identifiability test or substantial similarity test. I reach that conclusion based on what is the likely use of an IVH. If an unauthorized user exploits the IVH in a film, it is likely to be seen from various aspects and, so, not only readily identifiable

588. 498 F.2d 821 (9th Cir. 1974).
589. "Having viewed a film of the commercial, we agree with the district court that the 'likeness' of plaintiff is itself unrecognizable; however the court's further conclusion of law to the effect that the driver is not identifiable as plaintiff is erroneous in that it wholly fails to attribute proper significance to the distinctive decorations appearing on the car." Id. at 827.
but also substantially similar to the legitimate IVH. Consider facial characteristics. Generally, people have two eyes, two ears, one nose and one mouth. But, it is the particular shape, color and spatial relationship of those attributes and shape of head that let us distinguish, i.e., identify, one human from another and that allows us to say that one person is a look-alike, an image, of another, or that a drawing is the image of the person portrayed. Those same individualized characteristics that create identifiability with a respect to a flesh-and-blood human can elevate a human cartoon character from the generic level of idea to copyrightable expression and it is the taking of those characteristics that creates substantial similarity. If the unauthorized exploiter makes changes to the IVH, it is likely that when the so-called derivative is not substantially similar to

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592. At the 35th Superbowl in Tampa, Florida, police used FaceIt, a computer software program by Visionics Corp., to electronically scan every face in the crowd and then match those faces against a database of known criminals. The Pentagon is spending $50 million in a project called “Human ID at a Distance” which includes face recognition. The Digital Eye Is on You, L.A. TIMES, Aug. 13, 2001, at B10. Another company involved in face matching, Visage, digitizes a face and reduces the data to a string of 128 numbers which are used to find a match. Rob Turner, Faceprinting, N.Y. TIMES MAGAZINE, Aug. 12, 2001, at 18. For a prescient 1994 article on face recognition, see Matt Crenson, Distinctly Different on the Face of It, SEATTLE TIMES, Mar. 15, 1994, at E1. (“Computers programmed to recognize faces will catch criminals in the not-too-distant future.”); see also Alex (Sandy) Pentland & Tanzeem Choudhury, Face Recognition for Smart Environments, 33 COMPUTER No. 2 (2000), at 51-52. For an interesting experiment in the computer manipulation of images to transform facial characteristics along dimensions such as age, gender, race or health, see Bernard Tiddeman, Michael Burt and David Perrett, Prototyping and Transforming Facial Textures for Perception Research, in 21 IEEE COMPUTER GRAPHICS & APPLICATIONS No. 5, at 42 (2001).


595. E.g., Dick Tracy, Brenda Starr, and Superman. See Country Kids ‘N City Slicks, Inc. v. Sheen, 77 F.3d 1280 (10th Cir. 1996), and cited cases, for an excellent analysis of protectable versus not protectable elements of a copyrighted work.

596. Warner Bros., Inc. v. Am. Broad. Cos.’ Inc., 720 F.2d 231, 241 (2d Cir. 1983) (quoting 3 NIMMER ON COPYRIGHT §13.03[B] at 13-38: “a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to that of plaintiff’s”)). The court further noted:

[u]ltimately, care must be taken to draw the elusive distinction between a substantially similar character ... and a somewhat similar though noninfringing character whose appearance, behavior, or traits, and especially their combination, significantly differ from those of the copyrighted character, even thought the second character is reminiscent of the first one.
the original it also will not be identifiable as the IVH. Thus, the tests of identifiability on the one hand and substantial similarity on the other are indistinguishable from one another in most instances of IVH exploitation.

4. The Types of Exploitation Requiring Permission

As previously mentioned, both the right of publicity and copyright protect against unauthorized exploitation for advertising and trade purposes subject only to First Amendment considerations. So, it would not appear that an IVH is disadvantaged in having to rely on copyright law rather than right of publicity law with respect to those types of exploitation. Unauthorized performance exploitation is the third area that is possibly subject to right of publicity and copyright law.

Part II.B discussed the use of a person’s image—whether actual image, look-alike, or, in the future, an RVH. The conclusions to draw from that discussion are: (1) that if the person was being portrayed in a biographical work, docudrama or to add an air of verisimilitude, to a “period” piece, then such exploitation, even if unauthorized by the person portrayed, would be subject to the First Amendment, notwithstanding right of publicity claims; but (2) if the image was used to play a fictional role, such exploitation would be subject to the right of publicity.

With respect to cartoons, Walt Disney Productions v. Air Pirates provides an example of a cartoon character playing a “fictional” role. In Air Pirates, Mickey Mouse and his companions were portrayed, not as in plaintiff’s works as “an image of innocent delightfulness,” but, rather, in a manner that “could not fairly be called innocent.” A First Amendment defense failed.

In United Feature Syndicate, Inc. v. Koons, the defendant argued that as a result of the commercial success of the Garfield cartoon charac-
ters and their pervasive presence in society, the characters had become public figures.\textsuperscript{604} The defendant further argued that these characters had “a factual existence as such” which entitled them to less protection under the copyright laws.\textsuperscript{605} In response, the court stated “[t]he popularity and commercial success of the Garfield characters cannot transform them into the ‘factual’ realm any more than Mickey Mouse, Snoopy, Superman or Bart Simpson could be said to have acquired a ‘factual existence’ which results in a loss of their copyright protection.”\textsuperscript{606} The court noted, however, that “such characters like other types of copyrighted works, can be the subject of parody which is protected by the fair use doctrine.”\textsuperscript{607} With respect to the parody comment, one could conclude that if Superman can be legitimately parodied by Ralph Hinkley\textsuperscript{608} there is no reason to believe that an IVH could not also be parodied. That leaves the question of whether one could tell the life story of a famous IVH using the voice and image of the IVH to tell that story. With respect to humans, such telling of a life story would be protected by the First Amendment.\textsuperscript{609} But the First Amendment generally protects stories about persons who are, or at least were, in the public eye, even if only for “15 minutes.” Since an IVH has no more a factual existence than a cartoon character, \textit{Koons} may suggest that one could not use the image of an IVH without permission to tell the story of that IVH.

The above analysis suggests that, for the most part, denying an IVH a right of publicity will not particularly disadvantage an IVH as opposed to a flesh-and-blood person. True, in certain states, the term of protection may be longer for a human than an IVH, but in certain jurisdictions the reverse will be true. With respect to the aspects of persona protected, copyright provides a flexibility not available under a statutory right of publicity and is on a par with common law right of publicity. It is true that identifiability may be a less demanding criteria than substantial similarity; but, as discussed above, for most unauthorized appropriations of an IVH there would be no practical distinction between identifiability and substantial similarity. Finally, with respect to unauthorized exploitation, an IVH is on a par with a real human as far as advertising and trade purpose are con-

\textsuperscript{604} Id. at 380.
\textsuperscript{605} Id.
\textsuperscript{606} Id.
\textsuperscript{607} Id. at 380 n.5.
\textsuperscript{608} Warner Bros., Inc. v. ABC, 720 F.2d 231 (2d Cir. 1983).
cerned and may be somewhat better off with respect to performance exploitation. Therefore, denying a right of publicity to an IVH does not appear to be particularly prejudicial to the ownership interests in the IVH.

We now turn to the issue of maximizing the protectability of those ownership interests in the IVH.

**B. Mr. Potato Head Goes Digital: Maximizing IVH Identifiability.**

Imaginary Virtual Humans will find themselves employed in a variety of settings: actors in film, characters in video games, instructors in educational and training endeavors and personal representatives on the Internet. The works in which the IVH appears will be protected by copyright and possibly trademark law. But those who create an IVH will want to protect their investment in the IVH itself. An IVH is a combination of the computer program that animates it and its audiovisual “exterior.” To the extent of its original expression, the computer software will be protected by copyright. But, the strongest protection will be with respect to the IVH’s “exterior” much as a human’s right of publicity is not based on its brain, heart, lungs, digestive or circulatory system, but rather on how that human looks and sounds and the other attributes that help us distinguish one human from another. If, as previously discussed, one analogizes a virtual human to an animated cartoon character, then copyright protection and, possibly, trademark protection are the appropriate legal vehicles for guarding them. The degree of protection the law will give a virtual human can be directly influenced by the physical appearance, voice, and idiosyncrasies with which the virtual human is endowed. Mr. Potato Head is a popular children’s game in which various eyes, noses, mouths, etc. can be put on Mr. Potato Head. In a more sophisticated way, a virtual human creator can begin with a generic human, male or female, and, like a Mr. Potato Head artist, select from a palette of noses, lips, weight and height and produce a particularly singular virtual human.

Decisions dealing with the protection of flesh and blood humans by right of publicity, copyright, and the Lanham Act are instructive. Face and voice are the two main characteristics by which we identify one another, but they are not the only characteristics. In deciding whether a representation is, or suggests, a particular person, courts have looked to a variety of characteristics, typically in various combinations.

610. Mr. Potato Head was created in 1952 by Hasbro, Inc. He had a supporting role in *Toy Story* (Pixar Animation Studios and Walt Disney Pictures 1995).
1. Facial Characteristics

"We had faces then" is not only a memorable quote from the film Sunset Boulevard, but also underscores the significance of the face in establishing identity. Courts have considered as significant facial features such as Muhammad Ali’s "cheekbones, broad nose and widest brown eyes," and his "distinctive smile" and Woody Allen’s "high forehead." Hairstyle has also been a significant factor in a number of cases. Charlie Chaplin’s mustache, the "close cropped black hair" of Muhammad Ali, Woody Allen’s "tousled hair" giving the impression of an "endearing schlemiel," the distinctive Beatles’ "mid-1960’s" haircuts, the hair "style" of Elvis Presley, the distinctive "coiffure" of Jackie Kennedy Onassis, the "dark hair and full dark beard" of the chef Prudhomme, and Vanna White’s "blond hair" have all been considered protectable elements of a persona in right of publicity cases. Even Woody Allen’s "heavy black glasses," and a rap group’s "square studded eye-
glasses" have been considered part of a protectable persona. The court for the Southern District even considered Woody Allen’s “quizzical and somewhat smug” expression as significant.

2. Voice

A celebrity’s voice has also received protection under trademark and right of publicity law. A distinctive voice is more readily protected than a more pedestrian one. But a voice may be distinctive without being a caricature. For example, using “Liverpool accents” and performing “only songs which the Beatles recorded or performed” have been held to be aspects of persona. Similarly, Elvis’ “singing voice,” Bette Midler’s “distinctive voice,” and Tom Waits’ “raspy, gravelly singing voice” were all found to be protectable. Even a famous comic’s “style of vocal comic delivery” has been held to be considered worthy of protection. However, the finding of liability regarding a celebrity’s voice centers around its distinctiveness, and courts have held that where a voice is not “uniquely personal,” relief will not be granted.

629. Waits, 978 F.2d at 1097.
631. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 716 (9th Cir. 1970) (stating that “[o]ne wonders whether her voice, and theatrical style, would have been identifiable if another song had been presented, and not ‘her song’”). With respect to a right of publicity as to a “signature” song, see Oliveira v. Frito-Lay, Inc., 251 F.2d 56, 61 (2d Cir. 2001). (Astrud Gilberto, “The Girl from Ipanema.” The real girl from Ipanema who was the inspiration for the song itself is currently embroiled in a dispute in Brazil. Héloísa Pinheiro, better known as Helô has been sued by the heirs of the two men who wrote the
3. **Other Physical Characteristics**

Courts have also consistently held that physical characteristics as a whole may be protected: Woody Allen's characteristic "physical features,"632 and the "recognizable personae of overweight, young singers” of a rap group633 have been considered as protectable elements of a person’s image. Pose has been seen as a protectable element: Woody Allen “leaning on his hand” with “an elbow on the counter,”634 Muhammad Ali’s “seated on a stool” in a boxing ring “with both hands taped and outstretched resting on the ropes on either sides,”635 and the “distinctive poses, and body movements made famous by Presley.”636

Courts have even seen a celebrity’s build as important. Chef Paul Prudhomme’s “portly build”637 and the “overweight” bodies of three young rappers638 have been included in the comparison for a finding of liability. Courts have also given weight to mannerisms. Chaplin’s “mannerisms facial expression and movements of his body,”639 the “musical performance” style of the Beatles,640 the “distinctive and original combination of pitch, inflection, accent and comic sounds” of a famous comic,641 the “lovable but mischievous urchin” image of Spanky McFarland’s character in “The Little Rascals,”642 the distinctive singing style known as “rapping,” described “to be spoken or semi-sung rhyming verse recited over a powerful rhythm track created by drums and drum sounds,”643 and song demanding that she change the name of The Girl from Ipanema boutique and to remove photographs from the store picturing her with the composer Antônio Carlos Jobim and Vinicius de Moraes. Larry Rohter, *Still Tall and Tan, a Muse Fights for a Title*, N.Y. TIMES, Aug. 11, 2001, at A1).

Elvis' "hips and leg gyrations" have all been considered as aspects of persona.

4. Ancillary Identifiers

While physical characteristics are usually the focal point of a celebrity's image, courts have held other traits to be part of an individual's persona. Courts have considered ancillary identifiers such as clothing design, setting, props, and jewelry in deciding whether an alleged infringer was impermissibly copying a celebrity's persona.

Clothing has often entered into a court's calculus. Chaplin's "decrepit derby, ill-fitting vest, tight fitting coat, and trousers and shoes much too large for him," the "blue bolero blouse, white vest decorated with three blue five-pointed stars on each side of the front of the vest and white fringe at the bottom of the vest, tight white shorts with a belt decorated with blue stars, and white boots" of a Dallas Cowboys cheerleader, the "white cap and bandana" of Chef Paul Prudhomme, the "T-shirts, striped sneakers, satin baseball jackets" of a rap group, the "jumpsuit" of the king of rock and roll, or the plush "gown" of Vanna White have been significant factors in court decisions.

Even jewelry has played a part, for example, the "large, gold, name pendants" worn around the necks of a rap group were considered an element by the Southern District of New York.

Another important element used in finding an infringing use of celebrity's persona has been to examine the setting in which a character is portrayed. Courts have considered the fact that Muhammad Ali's was "in the corner of a boxing ring," the presence of a racing car in the midst of "several racing cars on a racetrack," a look-alike of a "famous restaur-

651. Tin Pan Apple, 737 F. Supp. at 833; see also Estate of Presley, 513 F. Supp. at 1348 (noting the infringer's use of "the same style and design of ... jewelry as did Presley"); White, 971 F.2d at 1405 (noting that the defendant had selected the same style of jewelry as plaintiff was known to wear on her popular show).
ranteur” in a restaurant, the placement of characters reminiscent of the Cheers’ characters, Norm and Cliff “in bars.”

Courts have considered props as indicative of a famous personality, Chaplin’s “flexible cane, swung, and bent,” videotape cassettes of Annie Hall and Bananas” on a counter next to a Woody Allen look-alike, Muhammad Ali sitting “on a stool,” a group using the same musical “equipment” as the Beatles as well as having “placed The Beatles logo on the group’s bass drum,” using the “distinctive narrow white pinstripe” against “solid red” car, adorned with a number set in a white “oval medallion” of a famous car driver; the “hand[ing] out to the audience [of] scarves as did Presley” and the opening of shows with the same “theme from the movie ‘2001—A Space Odyssey’ which Elvis Presley also used; and displaying a “game board instantly recognizable as the Wheel of Fortune game show set.” As the decisions discussed above demonstrate, a wide variety of factors from face to clothing and surroundings help to establish persona as well as to identify copycats. The lessons to be learned from these decisions should aid those who create IVHs to maximize the protection of their virtual humans. Using distinctive facial characteristics, voice, dress, and accessories will maximize a creator’s chance of receiving protection under copyright and trademark law.

However, eccentricities of physiognomy, voice or mannerisms may not be the best solution for an all-purpose synthetic actor. There are, and were, actors who essentially play the same character even if the character’s stories, and sometimes name, change: Laurel and Hardy, Abbot and Costello, Groucho Marx, Jean Claude Van Damme, Chuck Norris. On the other hand, there are actors who range, or did, across a wide variety of roles: Spencer Tracy, Paul Muni, Katherine Hepburn, Helen Hayes, Anthony Hopkins, Robert Duvall, Sally Field, Glenn Close, to name a few. An all purpose synthetic actor should not have such unusual features or built-in mannerisms that would detract from playing a variety of roles and yet should be sufficiently distinctive that their persona is easy to recall—

and to protect. Where the virtual actor is committed to the same role, regardless of his character's name or plot, such as a dispenser of slapstick or action adventure hero, the creator of the actor can be more adventurous in assigning characteristics and idiosyncrasies to the IVH.

V. CONCLUSION

Virtual human technology has been with us for over a quarter of a century now. Virtual humans entertain us on film, television, and in video games. They educate us and help us better design the things we use. They are playing a critical role in the field of medicine including diagnostic routines and treatment, particularly surgery. Virtual humans are beginning to represent us on the globe-girdling Internet, answering questions, and, most significantly, making decisions. In the future, they will take on more and more tasks, saving us time, making us more efficient, and keeping us safe. With time, they will look and sound more and more like us. Eventually, virtual humans will pass the "Turing Test," being indistinguishable from us carbon-based humans. How effectively we protect these virtual humans, whether replicas of actual humans or totally imaginary, has been the subject of this article, drawing on and applying the existing right of publicity, copyright and trademark laws. If existing laws are an imperfect fit, then the laws must be changed to accommodate the era of the virtual human. And, while this article limited its scope to the protection of the virtual human against unauthorized reproduction and exploitation, there are many other issues that will ultimately need to be addressed. For example, who will be liable if a virtual human libels a real human or vice-versa? Who will be responsible for criminal acts, such as larceny by trick, committed by a virtual human? What will be the result if a virtual human exceeds the authority given him in contract negotiations? I leave these and other questions for another day. But eventually these issues, like the intellectual property and personality issues addressed in this article, will themselves have to be addressed.

Finally, if the predictions of futurists like Ray Kurzweil and Katherine Hales come true, perhaps the time will come when a virtual human will write a law review article about us. Who knows?

663. See supra note 540.
664. See supra note 543.