

1-1-1996

# Lights, Camera, Animate: The Right of Publicity's Effect on Computer-Animated Celebrities

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## Recommended Citation

Pamela L. Kunath, *Lights, Camera, Animate: The Right of Publicity's Effect on Computer-Animated Celebrities*, 29 Loy. L.A. L. Rev. 863 (1996).

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# LIGHTS, CAMERA, ANIMATE! THE RIGHT OF PUBLICITY'S EFFECT ON COMPUTER-ANIMATED CELEBRITIES

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In the 1981 film *Looker*,<sup>1</sup> writer/director Michael Crichton provided us with a glimpse into the future—a future he never thought would actually exist:

*Cindy was the perfect model. She was leggy and exquisite with liquid blue eyes. Digital Matrix, a futuristic advertising agency, sought her out and convinced her to allow them to scan her image for reproduction.*

*Cindy slowly rotated within a steel cylinder, her naked body laced with thin rays of light, while her image was graphed and scanned into a computer.*

*A representative of Digital Matrix dryly explained to Cindy's skeptical on-looking friend:*<sup>2</sup>

*"We can now make commercials entirely by computer with no live actors at all once the model is made. Computers animate the images, dress them, and provide voices."*

*"Really?"*

*"The computer is constructing this three dimensional duplicate from the data base. We can provide the kind of improvements we once did through surgery."<sup>3</sup>*

In reference to reality, Michael Crichton admitted that initially he thought computerizing live models for television would never be possible.<sup>4</sup> "Then we found a company . . . that is doing just that. The difference is that their computer models are not nearly as animated as ours. But how long before they catch up to our movie?"<sup>5</sup> A decade and a half later, "[w]elcome to the brave new world of digital animation, a world where humans can behave like cartoons and cartoons can seem human."<sup>6</sup>

## I. INTRODUCTION

Technology is on the verge of realistically providing filmmakers with the option of employing an actor's computer-generated likeness

1. *LOOKER* (Warner Bros. 1981). *Looker* is a high-tech thriller which features a sophisticated computer which photographs and measures humans in order to create an exact animated duplicate. The computer-generated likenesses are then used in television commercials. *Id.*

2. *Id.* (describing scene in film).

3. *Id.* (quoting dialogue from scene in film).

4. *LOOKER* (Warner Home Video 1982) (quoting Michael Crichton's comment on video jacket).

5. *Id.*

6. Tom Soter, *Brave New World*, *SHOOT*, Jan. 28, 1994, at 28, 28.

in a film, rather than hiring the live actor.<sup>7</sup> This process is referred to as “reanimation.”<sup>8</sup>

Why might this be an appealing option for filmmakers? Imagine Arnold Schwarzenegger turning in an Academy-Award-winning performance; or Marilyn Monroe baring all in a steamy X-rated romp with Brad Pitt;<sup>9</sup> or Katherine Hepburn twenty years younger; or a slender Shelly Winters; or Clint Eastwood in drag, complete with a feather boa and a wig.<sup>10</sup> Whatever the reason, it is an uncontroverted temptation and the entertainment industry awaits with baited breath for the technological ability to employ an animated cast.<sup>11</sup>

7. See Frederick Rose, *Who Needs Actors?*, WALL ST. J., Sept. 15, 1995, at R8 (describing potential practice of creating original animated thespians that will ultimately replace human actors); see also David Blum, *Stardate 2005*, WALL ST. J., Sept. 15, 1995, at R12 (hypothesizing futuristic replacement of actors with computer technology); Chris Koseluck, *Digital Acting*, SCREEN ACTOR, Mar. 1995, at 32, 32-33 (describing effect of computer animation on actors' job security); Richard Reynolds, *Electronic Movie Stars*, MACLEAN'S, Mar. 28, 1988, at 56, 56 (describing reanimation of deceased actors); Soter, *supra* note 6, at 28 (describing available software enabling creation of cartoons that appear to be human).

8. For the purposes of this Comment, reanimation refers to the process whereby a computerized animated version of a celebrity is created and so closely resembles the actual celebrity that the two are visually indistinguishable. See *supra* note 7 and accompanying text.

9. “What if studio execs, already drooling over recasting the most bankable actors in history, want to put Marilyn in an X-rated flick?” Linda Himmelstein, *Studio Back Lot of the Living Dead*, BUS. WK., Dec. 6, 1993, at 6, 6.

10. An ad featuring John Wayne in drag was the California legislature's impetus for extending celebrities' right of publicity even after a celebrity's death, providing post-mortem protection for 50 years. *Id.*; see also CAL. CIV. CODE § 990 (West Supp. 1995). Although an advertisement featuring Wayne in drag would now clearly be a violation of California Civil Code § 990, it may not be a violation to feature him in a dramatic film clad in heels and a wig. See *infra* part III.B.2 (describing application of the right of publicity).

11. See Rose, *supra* note 7, at R8. “The digital spokesman of tomorrow can have the body of Arnold Schwarzenegger, the voice of Brando, and the face of James Dean—and look real.” Soter, *supra* note 6, at 28 (quoting Mark Dippe, visual effects supervisor at Industrial Light and Magic (ILM)). “[F]or moviemakers, the prospect of creating stars who take direction willingly . . . has unquestionable appeal.” Reynolds, *supra* note 7, at 56 (describing Hollywood's desire to create animated movie stars).

Some will argue, however, that “[t]he spark of humanity, the spark of life just can't be emulated or synthesized by even the most advanced piece of software.” Koseluck, *supra* note 7, at 33 (quoting Michael A. Prohaska, Screen Actors Guild Interactive Media Contracts Administrator). Even if technology provides the film industry with digitally-animated perfection, some claim that “computers will never get to the point of replacing actors.” *Id.* (citing Dennis Muran, Industrial Light & Magic's senior visual effects supervisor). Actor Joe Nipote claims that humans will never want to watch digitalized humans, analogizing such a visual experience to sitting in a kitchen and just watching a blender. *Id.*

### A. Legal Dilemma

Given that it is both possible and desirable, the question remains: Is it legal to reanimate a live celebrity without that celebrity's consent, and star the celebrity's computerized clone in a narrative<sup>12</sup> film?<sup>13</sup>

“ “People tend to overestimate what can be done in one year and to underestimate what can be done in five or ten years.” ’ ’<sup>14</sup> Soon, we will not be able to visually distinguish between reality and animation. “In the past, the legal system has reacted to, rather than anticipated, [technological] innovation; witness the introduction of the motion picture, television, cable, VCR, and the pre-recorded videocassette . . . . It is not too soon to begin a discussion of the legal issues raised by reanimation.”<sup>15</sup>

To illustrate the potential dilemma, imagine that technology has provided the filmmaker with the cost-efficient and precise ability to exercise total control over an animated cast.<sup>16</sup> Rather than create an original animated thespian, however, the filmmaker chooses to use an animated version of a celebrity who exists in reality.<sup>17</sup> So without consent the filmmaker employs the likeness of Sylvester Stallone in a film as a sympathetic psychologist with a prevalent feminine side, a mustache, and a bald spot.

This seems an obvious infringement of some inherent right of the celebrity.<sup>18</sup> A grey area in the law exists, however, which invites the

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12. A narrative is a story, account, or tale. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (2d ed. 1984). It is the art or practice of relating stories or accounts—narration. *Id.* This Comment deals with a reanimation in the context of a narrative film as opposed to a documentary.

13. Notably, Professor Joseph J. Beard concluded, in a recent article, that it is legally permissible in some instances to reanimate a deceased celebrity without the celebrity's consent. Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law*, 8 HIGH TECH. L.J. 101 (1993).

14. *Id.* at 105 (quoting J.C.R. LICKLIDER, LIBRARIES OF THE FUTURE 17 (1965) (quoting an unspecified source)).

15. Beard, *supra* note 13, at 106 (footnotes omitted) (calling for discussion of legal ramifications regarding reanimating deceased celebrities).

16. See *infra* part I.B (delineating feasibility and desirability of reanimation).

17. Filmmakers operate under the assumption that if a film features a prominent star, the film will enjoy box office success. DAVID F. PRINDLE, THE POLITICS OF GLAMOUR 13 (1988).

18. In fact, contrary to this Comment's conclusion, Professor Beard concludes emphatically that to reanimate a live actor would violate the right of publicity in “virtually every jurisdiction.” Beard, *supra* note 13, at 108 n.29.

disconcerting conclusion that such a use may be, in fact, legally permissible.

Depending on the interpretation and application of the doctrine which addresses the reanimation issue, such a use may not be a violation at all. This Comment establishes first that there is ambiguity regarding the outcome. Born out of this ambiguity is the need for clarity in the form of legislation. It would be easy to suggest that a doctrine already in existence—the right of publicity—should be stretched to cover and preclude this activity. Although courts are likely to exercise this option, this Comment asserts that to do so would be an affront to the policy goals behind the right of publicity and other existing doctrines, and it would perpetuate existing problems.

In short, this Comment will illustrate the state of technology with regard to reanimation,<sup>19</sup> and then identify and define the legal doctrine which most appropriately addresses whether reanimating a celebrity is legally permissible—the right of publicity.<sup>20</sup> It will then articulate the complicated and unpredictable application of the right of publicity.<sup>21</sup> Additionally, it will discuss the possibility and criticize the consequences of each potential outcome—that the law either precludes or permits reanimation for the purpose of a narrative film.<sup>22</sup> Finally, it will propose a legislative solution which operates as a compromise between the two alternative outcomes contemplated above.<sup>23</sup>

### *B. State of Technology*

Computer-generated imagery (CGI) “is fundamentally changing the viewing and making of movies, in ways both intriguing and a little scary.”<sup>24</sup> CGI is predominately used to alter existing footage. “It’s basically a process that digitally breaks down and reorganizes images by computer, painting a limitless variety of ‘visual lies.’”<sup>25</sup> For example, in *Forrest Gump*,<sup>26</sup> CGI enabled Tom Hanks to speak to

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19. See *infra* part I.B.

20. See *infra* part II.

21. See *infra* part III.

22. See *infra* part IV.

23. See *infra* part V.

24. Jeffery Wells, *You Ought to Be in Pixels!; Computer Images Are Changing Filmmaking*, DALLAS MORNING NEWS, July 23, 1994, at 5C.

25. *Id.*

26. *FORREST GUMP* (Paramount Pictures 1994).

or rub elbows with Presidents Nixon, Kennedy, and Johnson.<sup>27</sup> This was achieved by blending newsreel footage with newly shot film, utilizing several forms of computerized “masking, tweaking and refining.”<sup>28</sup> Tippett Studios used CGI technology in *Jurassic Park*<sup>29</sup> to give the mechanical dinosaurs an “airbrush[ed] look—a certain level of slickness.”<sup>30</sup>

Although CGI has been criticized for appearing hollow,<sup>31</sup> this form of technology, which is admittedly in its infancy, is already, in some cases, undetectable.<sup>32</sup> For instance, in *Forrest Gump*, co-star Gary Sinise plays a double amputee whose legs actually appear to be missing. It is precisely this undetectable characteristic of CGI effects that “is giving some people the willies.”<sup>33</sup>

“‘We’ve opened up a whole can of worms,’” Ken Ralston, *Forrest Gump* special effects chief, warns.<sup>34</sup> It seems inevitable that, rather than altering existing performances, CGI will be used to create “synthespians,”<sup>35</sup> capable of entire dramatic performances.<sup>36</sup> Computer graphic research is currently in progress to address such issues as facial modeling, skin texture and hair modeling, emotion generation, and synchronization of voice and motion.<sup>37</sup> “‘Once in a while, a holy grail appears in this business . . . and right now that holy grail is the digital actor.’”<sup>38</sup>

As early as 1987, Daniel and Nadia Thalmann, who teach computer science at the University of Montreal, devised a computer program entitled the “Human Factory,” which provided a new level

27. Wells, *supra* note 24, at 5C.

28. *Id.*

29. JURASSIC PARK (Universal Pictures 1993).

30. Wells, *supra* note 24, at 6C.

31. *Id.* (quoting Phil Tippett of Tippett Studios); *see also* Rose, *supra* note 7, at R8 (describing skepticism in entertainment industry about the potential of reanimation).

32. Wells, *supra* note 24, at 6C.

33. Wells, *supra* note 24, at 6C.

34. *Id.*

35. Rose, *supra* note 7, at R8 (defining computer-animated actors as “synthespians”).

36. Mark Dippe, a special effects wizard at ILM and a principal developer of the software system used in *Jurassic Park*, warns that “[t]he next big leap you’re going to see is that the dramatic lead, the hero figure, the love interest, whatever, are going to be digital.” Kosaluck, *supra* note 7, at 32. *See* Reynolds, *supra* note 7, at 56; *see also* Wells, *supra* note 24, 5C. This inevitability has been acknowledged by Joseph Beard. *See generally* Beard, *supra* note 13 (discussing legal effect of reanimating dead actors).

37. Beard, *supra* note 13, at 104-05 (footnotes omitted); *see also* Rose, *supra* note 7, at R8.

38. Rose, *supra* note 7, at R8 (quoting Richard Edlund, president of Boss Film Studio).

of realism.<sup>39</sup> With this program, they created a seven-minute simulated live-action film starring computer-generated likenesses of Humphrey Bogart and Marilyn Monroe entitled *Rendez-Vous à Montréal*. The Thalmanns used the film to introduce the potential of computer animation.<sup>40</sup> “The film was dramatic evidence of on-going attempts to create realistic, computer-generated synthetic actors.”<sup>41</sup> Although the film was a crude simulation of reality, it was sophisticated enough to illustrate that it will not be long before it is possible to produce a film starring a nonexistent, computer-generated cast.<sup>42</sup> However, Humphrey Bogart’s estate threatened legal action if the Thalmanns used the film for commercial gain. However, because the Thalmanns did not exploit the film for commercial gain, no action was ever taken.<sup>43</sup> “Before long, Hollywood could be under siege by CGI pirates, with the images of dead actors and actresses being ripped off willy-nilly.”<sup>44</sup>

Stemming logically from this scenario is the assumption that it will be possible to reanimate actors who are not only deceased, but also those very much alive.<sup>45</sup> Only by analogy is it possible to anticipate which body of law will address this issue. Although trademark and copyright law are both implicated and therefore must be evaluated, neither can be applied in a satisfactory manner. On the other hand, the right of publicity—a celebrity’s right to control and profit from her own persona—will undoubtedly be applied to the issue; however, the outcome of such an application is uncertain.

39. Reynolds, *supra* note 7, at 56.

40. *Id.* To make the film, the Thalmanns used films and photographs as references, creating plaster sculptures of the actors’ key features, including faces and hands. *Id.* Then they divided the sculptures into hundreds of tiny “facets.” *Id.* A hand-held scanner was used to read all the facets and feed the information into a computer. This process is called “mapping.” *Id.* Using computer commands, the figures are able to speak and move. Daniel Thalmann anticipated that more advanced versions of his program would not require the three-dimensional model. *Id.* He predicted that an animator would feed in data directly from photographs or, in the case of an original character, from a computerized catalogue of features. *Id.*

41. Beard, *supra* note 13, at 104.

42. *Id.* at 105.

43. Reynolds, *supra* note 7, at 56. Regarding the threatened action, specific allegations were never articulated. *Id.* Lawyers representing Bogart’s estate were considering suing the video’s distributor because the actor’s likeness was used without permission; however, they were unable to cite specific law which would preclude the activity. *Id.*

44. Wells, *supra* note 24, at 5C.

45. Koseluck, *supra* note 7, at 33 (illustrating Hollywood’s desire to digitally clone actual celebrities rather than create original personalities).

## II. DOCTRINES IMPLICATED

### A. Copyright

Copyright law protects original works, that are fixed in a tangible medium, from duplication or imitation.<sup>46</sup> However it does not protect a person's voice or image because such an asset is not considered an original work that is fixed in a tangible medium. Copyright law, therefore, does not protect a celebrity from having her image duplicated and exploited. The law of copyright, in fact, condones imitation.<sup>47</sup>

Although the cloning of personalities is not precluded by copyright law, the issue of copyright is implicated with respect to the *creation* of the clone.<sup>48</sup> To create a realistic replica of a celebrity, the reanimator<sup>49</sup> will require reference works.<sup>50</sup> Where these reference works enjoy their own copyright protection, "issues arise as to whether, and to what extent, the reanimator may use these reference works without license."<sup>51</sup> The owner of a copyright of a reference work retains the exclusive right to permit or prevent the use of her works to create derivative works,<sup>52</sup> including a computer

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46. Copyright Act, 17 U.S.C. § 102(a) (1994) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

47. *Id.* § 114 (historical and revision notes). Specifically, voice-alikes are expressly permitted. *Id.* § 114(b) (stating that laws of copyright do not protect against "sounds [which] imitate or simulate those in the copyrighted sound recording").

48. After a computer program is created it becomes fixed and thus subject to rules of copyright and worthy of receiving copyright protection itself. 2 INTELLECTUAL PROPERTY COUNSELING AND LITIGATION § 11.03[2][a] (Lester Horwitz et al. eds., 1995) [hereinafter INTELLECTUAL PROPERTY].

49. For the purpose of this Comment, the reanimator is the computer programmer, producer, studio, or other party responsible for the creation of the computer program that will generate the celebrity's image. See generally Beard, *supra* note 13 (referring to the process of creating a computer-animated clone of a particular person as "reanimation").

50. The reference works—for example, photographs of the celebrity—will be used to create the computer program which will generate the celebrity's animated image. See *supra* note 40 and accompanying text.

51. Beard, *supra* note 13, at 106.

52. Under the copyright law, a derivative work is

a work based on a pre-existing work, such as a translation, musical arrangement, fictionalization, motion picture version, abridgment or any other form in which a work may be recast, transformed or adapted, is a derivative work. Only the holder of copyright in the underlying work (or one acting with his permission) may prepare a derivative work. The preparation of such a work by any other

program.<sup>53</sup> It is also possible that the owner of the copyright of the reference work will be the same person or entity seeking to create the derivative work—the computer program. For example, the studio may be using photographs or frames from a film over which the studio already has control of the copyright.<sup>54</sup> It is possible, however, that a license from the copyright owner of the reference work will have to be obtained. “If the reanimator does not exploit any of these rights in recreating the deceased actor, then no infringement can be successfully claimed.”<sup>55</sup>

Further, if the reference work used is unprotected by copyright, its use in the creation of a computer program is of no consequence. For instance, the work may be in the public domain,<sup>56</sup> in which case its use is not violative. It is also possible that the reference work may be a photograph or video tape, for example, obtained for the purposes of reanimation without violating any rights.<sup>57</sup>

To summarize, it is possible to create a reanimated person without violating any copyright owner’s rights.<sup>58</sup>

### *B. Federal and State Unfair Competition*

#### 1. Federal unfair competition including trademark

A federal unfair competition provision exists in the Lanham Act.<sup>59</sup> Federal trademark infringement is one type of unfair competition.<sup>60</sup> “There is . . . a fundamental distinction . . . between trade-

party constitutes infringement. See Copyright Act, 17 U.S.C.A. § 101. BLACK’S LAW DICTIONARY 444 (6th ed. 1990).

53. The copyright owner of a particular work—a photograph, for example—controls the exclusive rights of reproduction, distribution, public performance, and display of the work, *as well as the right to create a derivative work incorporating in whole or in part the underlying copyrighted work*. 17 U.S.C. §§ 102, 106.

54. For instance, the studio may have photographs or frames of film from its own films in which the celebrity has previously starred.

55. Beard, *supra* note 13, at 109.

56. Works—such as writings, documents, publications, films, and photographs—which are not protected by copyright, are in the “public domain” and available for use without permission. See BLACK’S LAW DICTIONARY 1229 (6th ed. 1990); *see also* 17 U.S.C. § 101 (historical and revision notes).

57. *See, e.g.,* Koseluck, *supra* note 7, at 32 (describing process of filming performer and using footage to create computer-generated character with human attributes).

58. *See* Beard, *supra* note 13.

59. Lanham Act § 32(1), 15 U.S.C. § 1125(a) (1994).

60. *Id.* § 43(a), 15 U.S.C. § 1114; *see also* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1.05 (3d ed. 1992) [hereinafter MCCARTHY,

mark infringement and unfair competition," the essence of which is that the doctrine of unfair competition offers broader protection than trademark law.<sup>61</sup> However, the underlying concern is similar: Each doctrine exists to preclude profiteering by deceiving the purchaser, consumer, or viewer.<sup>62</sup> "It is well settled that the crucial determinant in an action for trademark infringement or unfair competition is 'whether there is any likelihood that an appreciable number of ordinarily prudent [people] are likely to be misled, or indeed simply confused . . . .'"<sup>63</sup> In light of this crucial similarity, for the purposes of this discussion, these Lanham Act<sup>64</sup> doctrines are evaluated concurrently.

The Lanham Act can be construed to protect a celebrity from the exploitation of his or her likeness in a motion picture where the goal is not to sell a collateral product,<sup>65</sup> but merely to entertain.<sup>66</sup> It is

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TRADEMARKS].

61. *Parameter Driven Software v. Massachusetts Bay Ins. Co.*, 25 F.3d 332, 337 (6th Cir. 1994).

62. Trademark infringement is the "unauthorized use, or colorable imitation of the mark already appropriated by another, on goods of a similar class . . . . It exists if words or designs used by defendant are identical with or so similar to plaintiff's that they are likely to cause confusion, or *deceive or mislead* others." BLACK'S LAW DICTIONARY 781 (6th ed. 1990) (emphasis added) (citation omitted).

Unfair competition is "applied generally to all dishonest or fraudulent rivalry in trade and commerce." *Id.* at 1528. For example, an "imitation . . . carried far enough to *mislead the general public or deceive [the] unwary purchaser*, and yet not amounting to an absolute counterfeit or to the infringement of a trademark." *Id.* (emphasis added).

63. *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 584 (2d Cir. 1990) (quoting *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 580 F.2d 44, 47 (2d Cir. 1978) (per curiam) (citation omitted), *cert. denied*, 493 U.S. 1116 (1979)).

64. See *supra* notes 59-60 and accompanying text.

65. A "collateral" product in this context means a product which is not, itself, the work in which the likeness is exploited.

66. Although § 43(a) of the Lanham Act primarily relates to federally registered trademarks, liability under § 43(a) may also arise for a false description or representation even though no actual trademark is involved. See *Mortellito v. Nina of Cal., Inc.*, 335 F. Supp. 1288, 1294 n.8 (S.D.N.Y. 1972); see also *New West Corp. v. NYM Co. of Cal.*, 595 F.2d 1194, 1198 (9th Cir. 1979) (stating that registration of trademark is not necessary for recovery); *In re Uranium Antitrust Litig.*, 473 F. Supp. 393, 408 (N.D. Ill. 1979) (stating that misrepresentations "need not involve a trademark" (citation omitted)). Celebrity personas are protected under the Lanham Act to the extent that the Act "explicitly condemns false designation or representations in connection with 'any goods or services.'" *Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir. 1981) (quote not cited); see, e.g., *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979).

"[T]he names of movie actors and other performers may, under certain circumstances, be registered under the Lanham Act as service marks for entertainment services . . . , [but this] is not a prerequisite for recovery under section 43(a)." *Smith*, 648 F.2d at 605

an elastic statute that has been touted as “encompass[ing] any form of competition or selling which contravenes society’s current concepts of ‘fairness.’”<sup>67</sup> The Ninth Circuit noted that the Lanham Act may be given a “‘broad construction’” and regarded it as a “‘remedial kind of statute.’”<sup>68</sup> “[T]here is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today.”<sup>69</sup> Therefore, it is possible to stretch the doctrine to preclude the use of a celebrity’s reanimated likeness in a narrative film.

However, the original intent of the Lanham Act was merely to prevent consumer confusion; thus, it has been applied primarily in commercial settings.<sup>70</sup> Where the alleged misuse is in the context of an entertainment narrative rather than an advertisement, the concern remains the same. For example, although the focus in *Smith v. Montoro*<sup>71</sup> was misuse of names<sup>72</sup> in the context of a feature film rather than a commercial, the court was concerned that the viewer of the film, rather than the purchaser of a product, would be “deceived into believing that [the film] comes from a different source.”<sup>73</sup> Similarly, where the trademarked uniforms of the Dallas Cowboy Cheerleaders were used in a pornographic feature film, the court

(citation omitted) (footnote omitted). Section 45 of the Lanham Act defines “service mark” as “a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others.” Lanham Act § 45, 15 U.S.C. § 1052(e)(3), (f).

67. *Smith*, 648 F.2d at 604 (quoting 1 MCCARTHY, TRADEMARKS, *supra* note 60, § 25.1).

68. *Id.* at 603 (quoting district judge from May 1, 1978 proceedings in same matter).

69. *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603, 604 (2d Cir. 1925) (L. Hand, J.), *rev’d on other grounds*, 273 U.S. 132 (1927).

70. The Ninth Circuit expressed that “‘the Lanham Act is limited in its scope and intent to merchandising practices in the nature of, or *economically equivalent* to, palming off one’s goods as goods of a competitor, and/or misuse of trademarks and trade names.” *Smith*, 648 F.2d at 603 (emphasis added) (citation omitted).

71. 648 F.2d 602 (9th Cir. 1981).

72. Paul Smith contracted to star in a film ultimately distributed by defendants. *Id.* at 602. Smith was supposed to receive star billing in the screen credits and advertising, but another actor’s name was substituted in place of Smith’s name. *Id.* The court considered this “reverse passing off” and, thus, constituted a § 43(a) claim. *Id.* at 605.

Reverse passing off is accomplished “expressly” when the wrongdoer removes the name or trademark on another party’s product and sells that product under a name chosen by the wrongdoer. . . . “Implied” reverse passing off occurs when the wrongdoer simply removes or otherwise obliterates the name of the manufacturer or source and sells the product in an unbranded state.

*Id.* (citations omitted).

73. *Id.* at 607 (citation omitted).

found that there was a violation, reasoning that it was possible for viewers to believe that the Dallas Cowboys Cheerleaders endorsed the production of the film.<sup>74</sup> Additionally, in *Newton v. Thomason*<sup>75</sup> the court found no likelihood of confusion where Wood Newton, a country/western celebrity, alleged unfair competition because the main character of "Evening Shade" was also named Wood Newton.<sup>76</sup> The court reasoned that, despite the similarity in name, enough differences existed between the character and the actual Wood Newton so that the viewer would not be misled into believing that the country star had any connection to the television series.<sup>77</sup>

These holdings are consistent with the trademark infringement concerns that arise in the context of commercials. More importantly, these cases suggest that no violation exists if no confusion surrounds the celebrity's identity.<sup>78</sup> In other words, if the viewer was deceived into believing that the animated likeness of a celebrity was, in fact, the actual celebrity, then there would be a clear violation; however, if the on-screen persona was properly credited as an animated version of the personality it resembles, then no violation would exist.<sup>79</sup>

## 2. State common-law unfair competition

Often, common-law unfair competition claims at the state level will be applied in much the same way as at the federal level—the concern being that there is no likelihood of confusion on the part of the buying or viewing public.<sup>80</sup> In order to find unfair competition,

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74. *Dallas Cowboys Cheerleaders*, 467 F. Supp. at 376-77.

75. 22 F.3d 1455 (9th Cir. 1994).

76. *Id.* at 1461-62.

77. *Id.*

78. See, e.g., *id.* at 1462; *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1400 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

79. See *John Wright, Inc. v. Casper Corp.*, 419 F. Supp. 292, 313 (E.D. Pa. 1976), *modified*, 587 F.2d 602, and *aff'd in part and rev'd in part*, *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 603-04 (3d Cir. 1978) (holding that imitation of master model of building was not Lanham Act violation, but advertising it as authentic reproduction of a building rather than a reproduction of original model was a violation; suggesting that had proper credit been given, no violation would have been found).

Furthermore, where the likeness is used in order to promote the film, it must be made clear that the film stars the reanimated version of the celebrity rather than the celebrity herself.

80. See, e.g., *Cesare v. Work*, 520 N.E.2d 586, 590 (Ohio Ct. App. 1987) (looking to federal guidance on issues covered by Ohio statute); see also *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 833 (6th Cir. 1983) (stating the "likelihood of confusion" standard applies to both § 43(a) and Michigan common law) (citations omitted).

courts may require evidence that customers purchased tickets to a film starring an animated likeness of a celebrity based on the mistaken belief that they had purchased tickets to view the actual celebrity.<sup>81</sup> Again, however, a disclaimer would eliminate the likelihood of confusion.<sup>82</sup> Unfair competition, however, is in part a common-law doctrine; it is thus sometimes expansively and protectively applied.<sup>83</sup> Therefore, courts may find a violation based on grounds other than public confusion.<sup>84</sup>

In sum, copyright is an inappropriate doctrine to apply to the reanimation issue, and unfair competition, including trademark law, will not likely offer protection either.<sup>85</sup> The right of publicity, however, looms as a large protective umbrella over the issue and threatens to shield the celebrity from harm at the expense of First Amendment of the United States Constitution.<sup>86</sup>

### III. RIGHT OF PUBLICITY

The right of publicity offers protection over a celebrity's intangible asset—her persona, often referred to as name, voice, or

81. *See Cesare*, 520 N.E.2d at 590.

82. *See id.*

83. *Id.* at 596.

84. *See infra* note 275.

85. Also note that the Uniform Single Publication Act forces, in some cases, the reliance upon only one cause of action for relief, which further demonstrates the impotence of any optional causes of action found under copyright, unfair competition, or trademark law. *See* CAL. CIV. CODE § 3425.3 (West 1970). The Uniform Single Publication Act bars persons from bringing more than one cause of action for damages for an infringement of the right of publicity "founded upon any single publication or exhibition or utterance." *Id.* (providing in relevant part: "No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture."); *see also* *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 756 & n.5 (N.D. Cal. 1993) (recognizing right of publicity as "any other tort"). When applying California law or the law of jurisdictions which have a similar standard, the court must dismiss all but one claim. *See, e.g., id.* at 756 (asserting that plaintiff's right of publicity claim may be considered but plaintiff's claims for intrusion on seclusion, trespass, unfair competition, fraud, and intentional and negligent infliction of emotional distress must be dismissed to extent that claims rely on actual broadcast of program at issue). Thus, the above mentioned potential causes of action along with other attenuated possibilities will not likely be viable because the right of publicity is the most appropriate cause of action. *Id.* at 753 (asserting "Appropriation of Likeness for Commercial Purposes," based upon § 3344(a) of the California Civil Code, as the appropriate cause of action).

86. *See infra* part III.

likeness.<sup>87</sup> If a celebrity is reanimated, protection and vindication will be sought under either the common-law right of publicity, the statutory right of publicity, or a combination of both.<sup>88</sup> However, the purpose of the use will affect whether protection is available.<sup>89</sup> In other words, where the animated clone of a particular celebrity is employed in a narrative feature, the actual celebrity *may* receive protection,<sup>90</sup> but it is the nature of the use which afflicts the prediction with uncertainty.<sup>91</sup>

*A. Definition: From Inception to Current State of Confusion*

The right of publicity emerged from the unassignable right of privacy in *Haelan Laboratories v. Topps Chewing Gum, Inc.*<sup>92</sup> Prior to this precedent-setting case, the New York Civil Rights Law had provided for injunctive relief and damages for invasion of the "right of publicity."<sup>93</sup> The Second Circuit provided celebrities with a cause of action against advertisers' unauthorized use of their photograph<sup>94</sup>—a cause of action which had previously been considered precluded by the First Amendment.<sup>95</sup> The plaintiff, a chewing gum vendor, made a contract with a baseball player providing for a designated period of time in which plaintiff had the exclusive right to use the player's photograph in connection with the sale of gum; the player agreed not to grant any other gum manufacturer a similar right during such time.<sup>96</sup> The defendant, a competing gum manufacturer, aware of the plaintiff's contract, deliberately induced the player to authorize defendant's use of the player's photograph in connection with the sales of defendant's gum.<sup>97</sup> According to then-existing law, the defendant committed no actionable wrong.<sup>98</sup> However, the

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87. See generally Nimmer, *infra* note 103 (referring throughout to right of publicity's protection of name, likeness, and voice).

88. See *infra* part III.B.

89. See *infra* part III.B.

90. See *infra* part III.B.

91. See *infra* part III.C.

92. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

93. *Id.* at 868 (referring to New York Civil Rights Law §§ 50, 51).

94. *Id.* at 868-69.

95. See generally 2 INTELLECTUAL PROPERTY, *supra* note 48, § 28.05 (discussing relationship between privacy rights and First Amendment). The First Amendment was initially the right of publicity's most ominous obstacle, and it continues to be the right of publicity's nemesis. *Id.*

96. *Haelan*, 202 F.2d at 867.

97. *Id.*

98. *Id.*

majority asserted that the deprivation, which prominent persons would suffer if they were unable to exclusively authorize the use of their "countenances" for purposes of advertisements, justified protection of such personality rights.<sup>99</sup> The court noted:

[I]n addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

This right might be called a "*right of publicity*."<sup>100</sup>

The court acknowledged the existence of this right of publicity and supported its assignability by distinguishing it from unassignable privacy rights.<sup>101</sup>

The disassociation of the distinctly economic interest in personality—the right to profit from celebrity status—from the privacy interest in solitude—the right to be free from the public's prying eye—has been the source of much confusion.<sup>102</sup> This separation was inevitable considering the developing technology and the emerging forms of entertainment which had enabled personalities to become widely recognized—famous—*prior* to the invasion rather than *because* of the invasion.<sup>103</sup>

99. *Id.* at 868.

100. *Id.* (emphasis added).

101. *Id.* at 869. "[T]he right of privacy was 'purely personal and not assignable' because 'rights for outraged feelings are no more assignable than would be a claim arising from a libelous utterance.'" *Id.* (citation omitted).

"The *Haelan* decision . . . recognized the independent right of publicity by differentiating that right from the already existing right of privacy." Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1203 (1986) (footnote omitted).

102. Halpern, *supra* note 101, at 1203. For an early discussion of the right of privacy, see *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). In each case a vendor used a photograph of a "theretofore private person" to advertise its product. Halpern, *supra* note 101, at 1203.

103. Professor Nimmer agreed with the distinction drawn and the resulting decision. Seeing *Haelan* as predicated upon the separation of the celebrity's economic right from 'privacy' considerations, he detailed the inadequacy of the right of privacy and other existing models.

"In general, the post-*Haelan* cases and commentary consistently evidenced a movement toward recognition of the independent right."<sup>104</sup> "While virtually all states have some type of right of privacy laws, . . . the right of publicity is still in search of a separate identity."<sup>105</sup>

[Although] *Haelan* and its progeny in the federal courts in New York have been the principal support for the doctrine [of] the right of publicity, . . . the doctrine . . . has not been confined to New York; the *Haelan* formulation of the right of publicity generally has been accepted, and, in the course of the period of more than thirty years since *Haelan* was decided, the doctrine has become more sophisticated.<sup>106</sup>

Currently, the right of publicity is understood to be a common-law doctrine, codified in some jurisdictions.<sup>107</sup> Both the statutory

[The privacy concept] . . . is not adequate to meet the demands of the second half of the twentieth century . . . . With the tremendous strides in communications, advertising, and entertainment techniques, the public personality has found that the use of his name, photograph, and likeness has taken on a pecuniary value undreamed of at the turn of the century.

Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203-04 (1954).

104. Halpern, *supra* note 101, at 1211.

105. Beard, *supra* note 13, at 146.

106. Halpern, *supra* note 101, at 1202 (footnotes omitted).

107. The right is directly protected by statute in fifteen states. Another sixteen states recognize violations of the right of publicity under the rubric of misappropriation or as a form of invasion of privacy under common law. Moreover, a right of publicity claim may also be based on § 43(a) of the Lanham Act.

2 INTELLECTUAL PROPERTY, *supra* note 48, § 28.01 (footnotes omitted).

The history of the right of publicity in California is an illustration of common-law codification: California has long recognized a common-law right of privacy, which provides protection against four distinct categories of invasion.

These four distinct torts identified by Dean Prosser and grouped under the privacy rubric are: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

*Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 416, 198 Cal. Rptr. 342, 346 (1983) (footnote omitted) (citations omitted).

Section 3344(a) of the California Civil Code provides in pertinent part:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner . . . or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person . . . injured as a result thereof.

CAL. CIV. CODE § 3344(a) (West Supp. 1995).

and the common-law right may be asserted simultaneously, enabling the common law to provide protection where the statute may not.<sup>108</sup> Some jurisdictions have created a postmortem right, extending protection of celebrity persona even after death.<sup>109</sup> However, "[t]his amicable unanimity in defining the right is somewhat illusory . . . for there is considerable disagreement about what the definition means."<sup>110</sup>

The interest in prohibiting unpermitted exploitation of celebrity personas<sup>111</sup> must be weighed against the First Amendment fundamental right to freedom of expression.<sup>112</sup> The right of publicity has developed in light of this consideration, and it is this necessary balancing that has contributed to the inconsistency and confusion among decisions that are dictated by the right of publicity.<sup>113</sup>

Generally, the extent of protection provided by the right of publicity is determined by a fact-intensive analysis.<sup>114</sup> The decisions made based on this fact-intensive approach indicate that a spectrum

108. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988). The Ninth Circuit found that although Midler's statutory right of publicity was not violated by the use of a voice-alike in a commercial, her common-law right of publicity was violated. *Id.* The court held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California." *Id.*

However, some states, New York for example, have held that the right of publicity is solely a creature of statutes and that no independent common-law right may be asserted. *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586 (2d Cir. 1990); *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984); see also *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp 826, 838 (S.D.N.Y. 1990) (acknowledging that the common-law and statutory right of publicity may be applied simultaneously).

109. Beard, *supra* note 13, at 147 (Nine states have passed post-mortem right of publicity statutes: California, Florida, Kentucky, Nebraska, Nevada, Oklahoma, Tennessee, Texas and Virginia). In four states, the law has been interpreted in either state or federal court to include a postmortem common-law right of publicity. *Id.* The rationale behind recognizing the right of publicity as an inheritable right is the fact that a persona may have obtained value as a commodity during the life of the personality. *Id.* at 155-57.

Note that even where there is an established postmortem right of publicity, the statutory application of the right of publicity is generally less protective when the personality is deceased. Moreover, there is a time limit, which varies depending on the jurisdiction, before the personality eventually falls into the public domain and their likeness may be commercially exploited by anyone. See *id.*

110. Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1589-90 (1979).

111. See *supra* note 87 and accompanying text.

112. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); see *infra* part IV.A.2.b (discussing First Amendment).

113. See *infra* part III.B.2.

114. See *infra* part III.B.2.

has been created:<sup>115</sup> One end represents nonviolative appropriation of a person's likeness, the other represents violative appropriation.

The nonviolative end of the spectrum represents the use of a person's likeness in a *biographical* setting. Generally, the unauthorized use of one's name, likeness, or voice in a film *about* that person or about some other historical incident to which that person has some sort of a connection, is not a violation of the right of publicity wherever the right is applied.<sup>116</sup> The policy behind such a standard is that the right to report the news or history supersedes the protection the individual has from exploitation.<sup>117</sup>

However, the other end of the spectrum represents the most offensive activity, and a clear violation of one's right of publicity—appropriating one's name, likeness, or voice for commercial purposes.<sup>118</sup> For example, if one's persona is used to endorse a vendor's product for the commercial gain of the vendor, then it is an uncontroverted violation of the right of publicity.<sup>119</sup>

Based on the existence of this spectrum, with respect to names, likeness, and voice, determining what a judge will do in a situation which represents either end of the spectrum is fairly obvious and predictable.<sup>120</sup> However, situations which fall in between are less

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115. See 2 INTELLECTUAL PROPERTY, *supra* note 48, § 28.05; *infra* part III.B.2.

116. See *infra* part III.B.2.

117. *Maritote v. Desilu Prods.*, 230 F. Supp. 721 (N.D. Ill. 1964), *aff'd*, 345 F.2d 418 (7th Cir.), and *cert. denied*, 382 U.S. 883 (1965) (dealing with a movie about the late Al Capone). Literary and cinematographic biographies are usually outside the right of privacy on First Amendment grounds. See *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P.2d 177, 184 (Utah 1954).

The assumption is that the work is factually based and, as such, will not cause any undeserved harm to an individual's reputation. *Id.* at 183. Also, note that this does not preclude a defamation cause of action if there is an injury to the person as a result of untruths revealed in the biography. *Id.* at 182.

118. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974); *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962); *Onassis v. Christian Dior-New York*, 472 N.Y.S.2d 254 (Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (App. Div. 1985); *Commerce Union Bank v. Coors*, 7 Media L. Rep. (BNA) 2204 (Tenn. Ct. App. 1981), *aff'd on other grounds*, No. 83-327-II (Tenn. Ct. App. 1987). "[These] cases are instructive of the courts' philosophy with respect to advertising." Beard, *supra* note 13, at 159. In each of the above-listed cases, a violation of the right of publicity was found where the persona, either in voice or likeness, was appropriated without permission and used for the endorsement or sale of a product.

119. See, e.g., *Waits*, 978 F.2d 1093; *White*, 971 F.2d 1395; *Midler*, 849 F.2d 460.

120. See *supra* note 118 (listing relevant cases).

predictable.<sup>121</sup> The reanimation of an actual actor to be used in a fictional setting falls somewhere in the middle of the spectrum.<sup>122</sup> It is this confusion which begs the question: Does the right of publicity preclude reanimation in the context of neither a commercial nor news but rather a fictional, narrative feature film?

*B. Application: Various Possible Approaches*

For the purposes of applying the right of publicity doctrine to assess whether the unauthorized exploitation of computer-generated clones is a violation, assume the jurisdiction is one in which both *inter vivos* and *postmortem* rights of publicity are afforded. There are a couple of ways to approach the legal dilemma: Either apply a literal reading of the statutes,<sup>123</sup> or apply the law based on an interpretation of the convoluted cases which the past few decades have provided.

The latter approach is the most challenging in that there are several possible interpretations which spring from the cases—that, according to case law, the right of publicity (1) precludes all unauthorized appropriation of likeness *unless* it is for use in a news-oriented or historical context;<sup>124</sup> (2) allows all unauthorized appropriation of likeness *unless* it is used to promote the sale of a collateral<sup>125</sup> product;<sup>126</sup> or (3) *may* preclude or allow unauthorized appropriation of a personality's likeness depending on where upon the spectrum the exploitative activity falls between advertising of a collateral product and a biographical work about the personality.<sup>127</sup> Employing a celebrity's animated clone in a narrative film is neither a purely commercial use, nor a biographical or historical use; therefore, depending on the interpretation of the law, the right of publicity may not preclude such use.

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121. 1 MCCARTHY, TRADEMARKS, *supra* note 60, § 28.48 (discussing every possible setting in which a celebrity's persona could be used—except dramatic, narrative setting—and the legal ramifications for doing so)

122. *See infra* part III.B.2.b (describing spectrum which can be used to determine whether use of celebrity's likeness is violative of celebrity's right of publicity).

123. *See infra* part III.B.1.

124. *See infra* part III.B.2.a.i; *see, e.g.,* Maritote v. Desilu Prods., 230 F. Supp. 721 (N.D. Ill. 1964).

125. *See supra* note 65 (defining collateral product).

126. *See infra* part III.B.2.a.ii.

127. *See infra* part III.B.2.b.

1. A literal application of the statutes

When evaluating the statutes regarding traditional rights of publicity and those regarding postmortem rights of publicity, the subtle difference in each case creates the possibility that the law may differ depending on whether the celebrity whose likeness has been appropriated for the animated feature is alive or deceased.

a. *the alive-and-well actor*

Generally statutory rights of publicity doctrines preclude the appropriation of one's likeness, name, or voice. Since the computer-animated version of a personality is a *likeness* and the synthesized or imitated voice is considered the *voice* of the personality, then it is accurate to seek protection under the right of publicity against the unauthorized appropriation of a celebrity's persona.<sup>128</sup> A straight, literal read precludes computer-animated cloning.<sup>129</sup>

b. *the actor six-feet-under*

Assuming that a computer-animated image of the late actor is a likeness and the synthesized voice, or human imitation, is considered the voice of the late actor, and further assuming the postmortem right of publicity has not terminated, there remains the question of whether the unlicensed exploitation of a deceased actor in a postmortem film is proscribed by existing postmortem statutes and common law.<sup>130</sup>

In California, the postmortem right of publicity statute was enacted despite First Amendment concerns voiced by the American Civil Liberties Union and other interested parties.<sup>131</sup> However, in response to their concerns, it was enacted with the following caveat: "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: . . . [a] play, book, magazine, newspaper, musical composition, *film*, radio or television program other than an advertisement . . . ."<sup>132</sup>

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128. See *infra* part III.B.1.b.

129. See Beard, *supra* note 13, at 146 (assuming that all forms of reanimation without consent of a live celebrity are prohibited based upon statutory interpretation).

130. See *supra* note 109 and accompanying text (discussing ways in which various states have handled issue of postmortem protection).

131. See *infra* part IV.A.2.b (discussing First Amendment).

132. CAL. CIV. CODE § 990(n)(1) (West 1982 & Supp. 1995) (emphasis added).

Oklahoma, Texas, and Nevada, for example, have adopted similarly worded statutes.<sup>133</sup> The drafters of these exclusions intended to prevent the postmortem right of publicity from suppressing stories about the celebrity, or stories in which the celebrity played some role in real life.<sup>134</sup> However, such an exemption was unnecessary, in that even without the exemption, where a living personality's likeness was appropriated for purposes of a biography, the courts have held generally that the First Amendment right to free speech outweighs the individual's right of publicity.<sup>135</sup> Nonetheless, as currently drafted, the postmortem statutes of California, Nevada, Oklahoma, and Texas appear to expressly permit the unlicensed use of a reanimated deceased actor in a creative medium like film.<sup>136</sup>

## 2. Interpretation of cases

The *Restatement (Second) of Torts* provides that "[o]ne who appropriates for his own use or benefit the name or likeness of another is subject to liability to the other."<sup>137</sup> "The cases in this area have turned on such factors as whether the event reported was predominately commercial or of news or historic value."<sup>138</sup> There is no common-law precedent, however, for a situation in which a character is portrayed by a celebrity's likeness in a dramatic work which is neither biographical nor historical in nature. In a situation like this, a decision must be born out of analogizing current case law.

A quagmire of confusing and conflicting court decisions has been created.<sup>139</sup> The inconsistencies have opened the door for arguments on either side of the assertion that appropriation of a personality's likeness in the form of a computer-animated replica to be exploited in a film is a violation of the right of publicity.

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If one adopts the policy that re-animation should be governed by post-mortem rights of publicity, then states with statutes similar to California must amend the exclusion of film from the post-mortem statute so as to exclude from the exclusion "re-animation" or, as Sam Goldwyn once so colorfully put it:  
"Include me out."

Beard, *supra* note 13, at 157 n.280.

133. NEV. REV. STAT. § 598.984 (1989); OKLA. STAT. ANN. tit. 12 § 1448(N) (West 1985); TEX. PROP. CODE ANN. § 26.012(a)(1) (West 1987).

134. Beard, *supra* note 13, at 158.

135. See *infra* part IV.A.2.b (discussing First Amendment).

136. Beard, *supra* note 13, at 158.

137. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

138. *Tellado v. Time-Life Books*, 643 F. Supp. 904, 908 (D.N.J. 1986).

139. See *infra* part III.B.2.

The arguments generally hinge on interpretation. The law may be viewed as either providing a "black and white approach"<sup>140</sup> or a more unpredictable "spectrum approach"<sup>141</sup> which may be used in order to analyze the legalities of reanimation.

a. *black & white approach*

As illustrated above, courts are not at all sympathetic to the unlicensed advertiser. On the other hand, courts have been extremely lenient regarding appropriation for use in a biography or history piece.<sup>142</sup> But the question remains: If the film is neither *about* the celebrity, nor for purposes of *advertising* a product, is the use of the personality's likeness a violation?

i. appropriation is a violation *unless* used to inform

It is possible to assert that only those works which are biographical or historical in nature are nonviolative forums for likeness appropriation. While one who is a celebrity, or is an otherwise-newsworthy personality, may be the proper subject of informative presentations, such as news or a biography, the privilege does not extend to the exploitation of his persona through a form of treatment "distinct from the dissemination of news or information."<sup>143</sup> "From a review of the authorities," using the likeness of a celebrity for purposes other than the dissemination of "news or articles or biographies" constitutes a violation of the right of publicity.<sup>144</sup> Following this interpretation, appropriating an actor's likeness for use in a narrative work of pure fiction would be a violation; only a *biographical* narrative work about that particular celebrity would be nonviolative.<sup>145</sup>

However, authority exists suggesting that the right of publicity may be much less protective, in that a violation may be found only

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140. See *infra* part III.B.2.a.

141. See *infra* part III.B.2.b.

142. See *infra* part III.B.2.a.ii-b.ii.

143. *Tellado*, 643 F. Supp. at 909 (citing *Gautier v. Pro-Football*, 107 N.E.2d 485 (N.Y. 1986)); see also *Cardtoons v. Major League Baseball Players Ass'n*, 838 F. Supp. 1501, 1511 (N.D. Okla. 1993) ("The right of publicity has developed to protect the commercial interest of celebrities in their identities.").

144. *Tellado*, 643 F. Supp. at 909 (quoting *Palmer v. Schonhorn Enters.*, 232 A.2d 458, 462 (N.J. 1967)).

145. See, e.g., *Hicks v. Casablanca Records*, 464 F. Supp. 426, 431 (S.D.N.Y. 1978).

where the use is for a commercial purpose—any other use may not be violative.<sup>146</sup>

ii. appropriation *is not* a violation *unless* used for a commercial purpose

To determine if a violation of the right of publicity has occurred, often the focus of the analysis is solely whether the use was a purely commercial one.<sup>147</sup> The concept of commercial use, however, has “present[ed] significant problems because no uniform definition of ‘commercial use’ has emerged from the case law.”<sup>148</sup> For example, in *Cardtoons v. Major League Baseball Players Association*<sup>149</sup> the court found that it was a violation to place a caricature<sup>150</sup> of a baseball player on baseball cards, considering *any* profiteering from recognizable likenesses as an exercise of commercial purpose and, thus, a violation of the right of publicity.<sup>151</sup> In *Paulsen v. Personality Posters, Inc.*,<sup>152</sup> however, the court held that since the celebrity’s likeness that appeared on a satirical poster was not being used to endorse or sell a product, its use was not considered a commercial purpose.<sup>153</sup> In other words, the hopes of earning a profit from selling a caricature did not constitute a commercial purpose, unless the caricature was used to endorse or market a collateral product.<sup>154</sup>

146. See *infra* part III.B.2.b.ii.

147. See Beard, *supra* note 13, at 160.

148. *Cardtoons*, 838 F. Supp. at 1515 (quoting James Barr Haines, *First Amendment II: Developments in the Right of Publicity*, 1989 ANN. SURV. AM. L. 211 (1990)).

149. 838 F. Supp. 1501 (N.D. Okla. 1993).

150. The parties stipulated that the baseball cards at issue depicting major league baseball players were “as a matter of fact, ‘parodies’ of the players they depict[ed].” *Id.* at 1508 (emphasis omitted).

151. *Id.* at 1510-11. The court noted that use of one’s identity in connection with “news [or] public affairs” would not constitute a violation. *Id.* at 1513; see also *Grant v. Esquire*, 367 F. Supp. 876, 880-81 (S.D.N.Y. 1973) (suggesting that if defendant had used plaintiff’s picture “merely to attract attention” then the use would have been for purposes of commercial trade and thus violative of the right of publicity).

152. 299 N.Y.S.2d 501 (Sup. Ct. 1968).

153. *Id.* at 508. *Cardtoons* inaccurately interprets the *Paulsen* holding as protecting political speech—also known as news—in an attempt to distinguish the case and justify its own contrary decision. *Cardtoons*, 838 F. Supp. at 1513. In fact, the court in *Paulsen* found it was not necessary to evaluate the posters as political speech because it had already determined that there was no violation which needed a political speech defense. *Paulsen*, 299 N.Y.S.2d at 508 (holding that the use should not be considered a violation whether it “be . . . social criticism or pure entertainment”).

154. *Paulsen*, 299 N.Y.S.2d at 508; see also *supra* note 65 (defining collateral product).

“Appropriation of name or likeness generally becomes actionable when used ‘to advertise the defendant’s business or product, or for some similar commercial purpose.’”<sup>155</sup> Courts have defined celebrities’ names and likenesses as things of value because they have been appropriated for the commercial benefit of the vendor.<sup>156</sup> Similarly, “courts have concluded that the value of the right of publicity lies in the association between celebrity and product.”<sup>157</sup> Following, a celebrity’s persona has not been used for a commercial purpose where the persona appears in the context of a narrative feature film; the purpose of such a use is not to endorse a collateral product, but rather to construct a story.

Profiting from featuring a celebrity’s likeness in a dramatic, fictional work does not constitute the commercial benefit with which the right of publicity is concerned.<sup>158</sup> A producer’s motive to profit from employing a celebrity’s computer-generated clone does not alone constitute a commercial purpose, “as many nontortious uses of someone’s likeness result in profits for their promoters.”<sup>159</sup> To be nonviolative, the use must be primarily of public interest—a rubric under which news, biographies, and history fall.<sup>160</sup> Arguably, *any* exploitation of a personality in a *dramatic* work in which the creator has chosen, for artistic reasons, to use the likeness of a particular celebrity is in the public’s best interest in that such use is an example of free expression.<sup>161</sup> For example, according to the court in *Estate of Presley v. Russen*,<sup>162</sup> the purpose of the portrayal in question must be examined to determine if it serves a social function valued by the

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155. *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994) (quoting the RESTATEMENT (SECOND) OF TORTS § 652C cmt. b).

156. *E.g.*, *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994).

157. *Id.* at 919.

158. Contrast the assertion here under the “black and white” approach—if there is no commercial purpose then there is no violation—with the assertion made under the “spectrum” approach, *see infra* part III.B.2.b—some noncommercial uses *are* a violation while others are not.

159. *Tellado*, 643 F. Supp. at 910.

160. *Id.*

161. The scope of the subject matter which may be considered of ‘public interest’ or ‘newsworthy’ has been defined in most liberal and far reaching terms. The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even *entertainment and amusement, concerning interesting phases of human activity in general.*

*Paulsen*, 299 N.Y.S.2d at 506 (emphasis added).

162. 513 F. Supp. 1339 (D.N.J. 1981).

protection of free speech.<sup>163</sup> "If the portrayal mainly serves the purpose of contributing information . . . or of providing the free expression of creative talent which contributes to society's cultural enrichment, then the portrayal generally will be immune from liability."<sup>164</sup> It is arguable that *all* narrative works fall within this purview.

Similarly, in *Frosch v. Grosset & Dunlap, Inc.*,<sup>165</sup> New York's Appellate Division permitted the appropriation of a celebrity's likeness so long as the use was not "simply a disguised commercial advertisement for the sale of goods or services."<sup>166</sup> The Second Circuit in *Rogers v. Grimaldi*<sup>167</sup> followed the same logic, determining that the appropriation of Ginger Rogers's name in the title of a novel, which was not about her, was not a violation of the right of publicity. The court reached this conclusion since her name was used in a literary, dramatic setting and not for the purpose of selling or promoting a product.<sup>168</sup> Rather, the court found the author was exercising creative license by deciding that the name was an appropriate choice for part of the title.<sup>169</sup>

It is not necessarily considered a commercial purpose to use a likeness in order to endorse a film in which the likeness appears.<sup>170</sup> In other words, if the synthespian—the reanimated version of a celebrity—plays a significant role in the feature, and the synthespian's likeness is used to promote the film, there may be no infringement, whereas if the synthespian held merely a cameo role, the use of the likeness to endorse the film would perhaps be an infringement.<sup>171</sup>

In the recent case of *Matthews v. Wozencraft*,<sup>172</sup> Matthews's likeness was depicted first in a novel and then in the film version,

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163. *Id.* at 1356.

164. *Id.* (emphasis added); cf. *Cartoons*, 838 F. Supp. at 1512 (illustrating confusion by inferring that term "public affairs" does not include artistic expression).

165. 427 N.Y.S.2d 828 (App. Div. 1980).

166. *Id.* at 829.

167. 875 F.2d 994 (2d Cir. 1989).

168. *Id.* at 1005.

169. *Id.* at 1004.

170. See *Newton v. Thomason*, 22 F.3d 1455, 1460-61 (9th Cir. 1994). "[C]ommercial purpose means more than merely using a person's name as part of a cast of characters in a television program advertisement that highlights the program's general plot." *Id.* at 1461.

171. But note that if the likeness is used merely to "attract consumers' attention and provide a commercial advantage over [a] competitor," then the use may be considered to be for a "commercial purpose." *Id.* (citing *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 421-22, 198 Cal. Rptr. 342, 349-50 (1983)).

172. 15 F.3d 432 (5th Cir. 1994).

both entitled *Rush*.<sup>173</sup> The story was a fictionalized version of an event in which he played a significant role.<sup>174</sup> In deciding there had been no violation of Matthews's right of publicity, the court asserted that "[i]t [was] immaterial whether *Rush* 'is viewed as an historical or fictional work,'<sup>175</sup> so long as it is not 'simply a disguised commercial advertisement for the sale of goods or services.'<sup>176</sup> The court, however, did concede that "there is no binding authority directly on point."<sup>177</sup>

The conclusion that use in advertising is the only violation may be reached by examining the policy behind similar laws. The right of publicity has been analogized to the Lanham Act.<sup>178</sup> The Act ideally applies "only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."<sup>179</sup> Courts have cited the only difference between the Lanham Act and the right of publicity doctrine—aside from the fact that the former is a federal statute and the latter is a state common-law or statutory doctrine—is that the right of publicity doctrine is more expansive than the Lanham Act because, unlike the Lanham Act, the right of publicity does not require the likelihood of confusion.<sup>180</sup> Based on this precedent, although deception is not required to assert a right of publicity violation, the right of publicity may be implicated only when the Lanham Act is implicated—where advertising or promotion is the issue.

*b. spectrum analysis approach*

If a spectrum does exist, rather than the black or white approaches discussed above,<sup>181</sup> then where on the continuum does computer cloning lie? A feature film starring an animated actor is neither a purely commercial nor a purely news-oriented work. Rather, it falls within the realm of literary and dramatic works. Whether it is

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173. *Id.* at 436.

174. Note that this was considered a potential invasion of the right of publicity rather than of privacy because Matthews had been converted into a public figure through the events and subsequent publishing of the book.

175. *Matthews*, 15 F.3d at 440 (quoting *Meeropol v. Nizer*, 560 F.2d 1061, 1067 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978)).

176. *Id.* (quoting *Rogers*, 875 F.2d at 1004 (quoting *Frosch*, 427 N.Y.S.2d at 829)).

177. *Id.*

178. See, e.g., *Rogers*, 875 F.2d at 997, 999; see also *supra* part II.B.1.

179. *Rogers*, 875 F.2d at 999.

180. *Id.* at 1003-04.

181. See *supra* part III.B (introducing notion of spectrum approach).

considered a violative activity is contingent upon how it is perceived in light of the following discussion.

- i. is the cloned star's appearance in the film a "cultural" contribution?

According to *Midler*, if the reanimation is "informative or cultural" the use should be exempt from the right of publicity.<sup>182</sup> However, if the use is merely "exploitative," or merely to attract attention, a different conclusion should be drawn.<sup>183</sup> What criteria or standards should be used to distinguish between the permitted and the proscribed? Professor Joseph Beard suggests:

[a]t one extreme might be situations where it is clear that the . . . star is being used only for exploitative purposes, purposes that had minimal communicative content, for example a brief cameo as a corpse on a slab. At the other end of the spectrum would be the reanimated actor appearing in his own, unfictionalized life story.<sup>184</sup>

If the reanimated personality has a significant role in the film, then Professor Beard would argue that the exploitation is not a violation.<sup>185</sup>

In *Estate of Presley v. Russen*<sup>186</sup> the court found a violation of the right of publicity in that the *Big El Show*,<sup>187</sup> while a dramatic work rather than an advertisement, "serve[d] primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society."<sup>188</sup> However, would the result have been the same had the work in question been a narrative program with a worthy storyline starring an Elvis impersonator? The fact that the court qualifies its position by inferring that had the *Big El Show* been of "substantial value to society"<sup>189</sup> the decision would have been different suggests that perhaps the court would have been more lenient in the case of a narrative work.

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182. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

183. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1107 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

184. Beard, *supra* note 13, at 163.

185. *Id.*

186. 513 F. Supp. 1339 (D.N.J. 1981).

187. The *Big El Show* was a variety show often depicting skillful imitations of Elvis Presley. *Id.* at 1348.

188. *Id.* at 1359.

189. *Id.*

However, in order to accommodate First Amendment concerns, courts have refused to extend the right of publicity to preclude the use of a celebrity's persona in the text of a fictional or semifictional book or movie.<sup>190</sup> In *Guglielmi v. Spelling-Goldberg Productions*<sup>191</sup> the nephew of the late Rudolph Valentino brought suit to bar a fictional television broadcast of "Legend of Valentino: A Romantic Fiction" as a violation of the star's right of publicity.<sup>192</sup> Although the majority of the en banc California Supreme Court rejected the claim on the ground that in this particular jurisdiction the right of publicity is not descendible, Chief Justice Bird, writing for a three-member concurrence, stated: "[P]rominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction."<sup>193</sup> The court noted that had the defendant published "Valentino's Cookbook," which was comprised of recipes having no connection to Rudolph Valentino, a cause of action may have existed.<sup>194</sup> The right of publicity applied because the celebrity's likeness would be "wholly unrelated" to the cookbook.<sup>195</sup> The court asserted that had the name been used for the promotion or endorsement of a collateral commercial product, the celebrity's right of publicity would have been violated.<sup>196</sup> This reasoning is another illustration of the room for creative interpretation created by courts' decisions. Chief Justice Bird makes it clear that appropriating a celebrity's likeness for the purpose of selling a collateral product is a violation; however, appropriating that same likeness for use in a noncommercial setting is only a violation where the likeness is "wholly unrelated" to the work in

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190. See *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 865-66, 603 P.2d 454, 458, 160 Cal. Rptr. 352, 356 (1979); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (App. Div. 1980); see also James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 655-60 (1973) (noting that courts focus on whether work is fictional when determining if right of publicity has been violated).

191. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979).

192. *Id.* at 862, 603 P.2d at 455, 160 Cal. Rptr. at 353 (Bird, C.J., concurring).

193. *Id.* at 869, 603 P.2d at 460, 160 Cal. Rptr. at 358 (Bird, C.J., concurring).

194. *Id.* at 865 n.6, 603 P.2d at 457 n.6, 160 Cal. Rptr. at 355 n.6 (Bird, C.J., concurring). Note the similarity to the *Rogers* case, where the court held that to use Ginger Roger's name in the title of a film was a creative use and thus not actionable. *Rogers*, 875 F.2d at 994.

195. *Guglielmi*, 25 Cal. 3d at 865 n.6, 603 P.2d at 457 n.6, 160 Cal. Rptr. at 355 n.6 (Bird, C.J., concurring).

196. *Id.* (Bird, C.J., concurring).

which it is used.<sup>197</sup> But what does the court mean by wholly unrelated? It has been defined as gratuitous use of the actor's likeness for purposes of self-promotion, for instance a cameo computer-generated Madonna.

ii. distinction between actor and character

Cases in which the imitation serves a story-telling role are, of course, most closely analogous to the circumstances surrounding the use of a reanimated actor in a narrative, feature film.<sup>198</sup> Where an advertisement or endorsement is not at issue—in other words, where the appropriated likeness is found in a dramatic or literary context—a distinction has been drawn by the courts between an *actor* and a *character* created by that actor. This distinction adds to the artillery of arguments, including those cited above,<sup>199</sup> from which an unauthorized appropriation may be deemed permissible. In *Lugosi v. Universal Pictures*,<sup>200</sup> an unsuccessful suit was brought by Bela Lugosi's widow and surviving son to recover profits made by the defendant movie company in its licensing of the "Count Dracula" character, portrayed by Lugosi in the 1930 film *Dracula*.<sup>201</sup> In his concurrence, Justice Mosk asserted that "[m]erely playing a role [such as Bela Lugosi as Dracula] . . . creates no . . . property right in an actor, absent a contract so providing."<sup>202</sup> "Where an actor plays a well-defined part which has *not* become inextricably identified with his own person, it has been suggested the actor receives no right of exploitation in his portrayal of the character."<sup>203</sup>

However, an actor could obtain proprietary interests in a screen persona and, thus, be protected under the right of publicity with regard to that persona where the character has become so associated with the actor that it becomes inseparable from the actor's own public image.<sup>204</sup> In other words, "[a]n original creation of a fictional figure played exclusively by its creator may well be protectible."<sup>205</sup> This

197. *Id.* (Bird, C.J., concurring).

198. *See* cases cited *infra* note 206.

199. *See supra* part III.B.2.b (discussing *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981)).

200. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

201. *Id.*

202. *Id.* at 825, 603 P.2d at 432, 160 Cal. Rptr. at 330 (Mosk, J., concurring).

203. *McFarland*, 14 F.3d at 920 (emphasis added).

204. *Id.*

205. *Id.* (quoting *Lugosi*, 25 Cal. 3d at 825, 603 P.2d at 432, 160 Cal. Rptr. at 330

line of reasoning has become popular.<sup>206</sup> The “‘basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference.’”<sup>207</sup> The actors are being rewarded not for portraying themselves, but rather for creating and cultivating their own characters.<sup>208</sup>

To reward actors for their own natural personality, by protecting their likeness, flies in the face of the above-illustrated intention of the courts to reward actors for their effort and their contribution to the character, aside from merely acting the role. Thus, if an actor's likeness, which is not identified with a particular *character*, is appropriated for the purposes of exploitation in an animated film, no infringement has taken place because there is no proprietary interest being violated.

### C. Predictions

Despite the validity of any of the above arguments, the climate of the courts on the right of publicity issue may determine which of the above arguments will likely prevail. The courts have been consistently expanding the reach of the right of publicity since its birth in *Haelan Laboratories v. Topps Chewing Gum, Inc.*<sup>209</sup> in the early 1950s. Clearly the law affords more protection to the commercial value of celebrity status<sup>210</sup> now than at any previous time.<sup>211</sup> A

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(Mosk, J., concurring)).

206. See, e.g., *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 362, 371 (S.D.N.Y. 1988) (enjoining look-alike's misappropriation of “schlemiel” persona of Woody Allen cultivated in the film *Annie Hall*); *Groucho Marx Prods. v. Day and Night Co.*, 523 F. Supp. 485, 491 (S.D.N.Y. 1981) (noting that the Marx Brothers had a protected property right in on-screen images and actions), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843-44 (S.D.N.Y. 1975) (holding comedy team Stan Laurel and Oliver Hardy had common-law right of publicity in on-screen images).

207. *McFarland*, 14 F.3d at 919 (quoting *Palmer v. Schonhorn Enters.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967)).

208. *Id.* at 921.

209. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

210. Prosser states:

A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession of calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a “public personage.” He is, in other words, a celebrity. Obviously to be included in this category are those who have achieved some degree of reputation by appearing before the public, as in the case of an actor, a professional baseball player, a pugilist, or any other entertainer. The list is, however, broader than this. It includes . . . even ordinary soldiers . . . It includes, in short, anyone who has arrived at a position where public attention

clear example is the fact that, in many jurisdictions, celebrity personas enjoy protection after—as well as during—life.<sup>212</sup>

Recent cases further illustrate the significant expansion of the right. For example, in *Carson v. Here's Johnny Portable Toilets, Inc.*,<sup>213</sup> Johnny Carson sought relief for the unauthorized use of the phrase “Here's Johnny” in the marketing of a portable toilet.<sup>214</sup> The court rejected the previously accepted contention that a common-law right of publicity does not extend beyond an individual's actual name and likeness, and found that there had been a violation of the celebrity's right of publicity based on the fact that the familiar introductory phrase *conjures up images of the late-night talk show host*.<sup>215</sup> Later, in *Waits v. Frito-Lay, Inc.*<sup>216</sup> the court expanded upon *Midler* by holding that a “gravelly voice” which sounded “like how you'd sound if you drank a quart of bourbon, smoked a pack of cigarettes and swallowed a pack of razor blades . . . [l]ate at night” could be protected from imitating as long as it conjures up the image of a specific celebrity—in this case, Tom Waits.<sup>217</sup> Then *Cardtoons v. Major League Baseball Players Association*<sup>218</sup> included caricatures in the expansive pot of violative likenesses, a further insult to the First Amendment.<sup>219</sup> These cases are extreme illustrations of the extent to which the right of publicity will protect a personality.

This climate of favoring protection culminated in the much-criticized recent decision in *White v. Samsung Electronics America, Inc.*<sup>220</sup> where the Ninth Circuit broadened the definition of likeness to include virtually *anything* which would “evoke” the identity of a

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is focused upon him as a person.

WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 844-45 (3d ed. 1964) (footnotes omitted).

211. *See, e.g., White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (expanding “identity” to include dress and gestures that are characteristic of a celebrity), *cert. denied*, 113 S. Ct. 2443 (1993); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (expanding “likeness” to include voice-alikes); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (expanding “likeness” to include phrases associated with a celebrity).

212. *See supra* note 109 and accompanying text.

213. 698 F.2d 831 (6th Cir. 1983).

214. *Id.* at 832-33.

215. *Id.* at 837.

216. 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

217. *Id.* at 1097 (quoting a Tom Waits fan).

218. 838 F. Supp. 1501 (N.D. Okla. 1993).

219. *Id.* at 1511-12.

220. 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

celebrity.<sup>221</sup> There, when an appliance manufacturer depicted an unnamed robot, dressed in a slinky gown, standing in front of a board of letters, the court found that Vanna White's right of publicity had been infringed.<sup>222</sup> But more importantly, these cases depict the climate which seems to favor the individual celebrity rather than the First Amendment and creative capitalism. Thus, it is likely that the courts will continue their allegiance to the celebrities and, thereby, find in favor of prohibiting the unauthorized use of a celebrity's computer-generated likeness in a film when it is neither biographical nor historical.

On the other hand, courts may be growing intolerant of this beast—the right of publicity—which is growing in a confusing and consuming manner. The doctrine has suffered much recent academic criticism.<sup>223</sup> Recently the Third Circuit criticized the expansion of the right by labeling the *Carson* decision as an “offensive” example of the right's largess.<sup>224</sup> In addition, the Ninth Circuit did attempt to temper the affect of its decision in *Midler* by warning “[w]e need not and do not go so far as to hold that every imitation of a voice to advertise merchandise is actionable.”<sup>225</sup> New York, in fact, completely rejected extending the right of publicity to instances of sound-alikes.<sup>226</sup>

However, courts have primarily exercised their liberal interpretation of likeness only when the celebrity is being exploited in order to sell or endorse a product; therefore, the courts may not necessarily address the reanimated actor in the same way when the actor is placed in a dramatic narrative such as a fictional film.

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221. *Id.* at 1399 (referring to the “identity” of Vanna White rather than her “likeness,” but the effect is as if the two terms were synonymous).

222. *Id.* The dissent aptly pointed out the fact that the most familiar image in the commercial was the set of *Wheel of Fortune* rather than the image of Vanna White. *Id.* at 1405 (Alarcon, J., dissenting).

223. See generally Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?* 19 NOVA L. REV. 1013 (1995) (commenting on right of publicity's unclear definition); Felcher & Rubin, *supra* note 110 (criticizing right of publicity as confusing).

224. *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994).

225. *Midler*, 849 F.2d at 463.

226. *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 838 (S.D.N.Y. 1990) (commenting on *Midler*, 849 F.2d 460).

#### IV. OPPOSING THE RIGHT OF PUBLICITY'S PROTECTION

The invasive and eerie nature of the activity, coupled with the current expansionist climate regarding the right of publicity, indicates that the right of publicity may preclude reanimation for the purpose of starring a celebrity's likeness in a film.<sup>227</sup> However, the right of publicity doctrine is a vague and murky body of law, and the ambiguity of precedent opens the door for permitting the unauthorized cloning of a personality.<sup>228</sup> In fact, reanimating celebrities for feature films should *not* be prohibited by the right of publicity.

It must be noted that the right of publicity was created prior to the development of the current state of technology, which includes the potential ability to reanimate. The entertainment industry has developed significantly as a result of technology.<sup>229</sup> The doctrine was not necessarily intended to deal with the situations which have arisen out of the industry's technological maturity.<sup>230</sup>

Although the courts have legal authority to support a finding that CGI appropriation does not run afoul of a celebrity's right of publicity, the courts will probably decide that it is a violation because the conduct would otherwise go without remedy.<sup>231</sup> The doctrine of the right of publicity, however, should not be applied because its application will have negative repercussions. Rather, a compulsory licensing scheme<sup>232</sup> should be erected to contend with the issue of reanimation for noncommercial purposes. Dramatic narratives, including feature films, should be included in this definition of noncommercial.

The restrictive nature of the right of publicity should be contained. At least to the extent that the celebrity's likeness is appropriated for use in a dramatic, noncommercial setting, the right of publicity should not be prohibit appropriation. The reasons include

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227. See *supra* part III.C.

228. See *supra* part III.A.

229. See, e.g., Digital Domain, *Dreaming With Your Eyes Wide Open* (Nov. 1995) (copy on file with *Loyola of Los Angeles Law Review*); see also *supra* note 7 and accompanying text.

230. See Nimmer, *supra* note 103, at 203-04; see also RESTATEMENT (SECOND) OF TORTS § 652A cmt. c (1977).

231. See *supra* part III.A.

232. See *infra* part V.B. A compulsory license is a license "created under the Copyright Act to allow certain parties to make certain uses of copyrighted material without the explicit permission of the copyright owner, on payment of specified royalty." BLACK'S LAW DICTIONARY 288 (6th ed. 1990).

the following: (1) the doctrine suffers from inherent problems in that it conflicts with federal and state laws as well as the United States Constitution which, at the very least, justifies preventing its expansion, if not doing away with it completely;<sup>233</sup> (2) the doctrine's prohibition in the case of reanimation would provide the celebrity with an obscene windfall;<sup>234</sup> and (3) the doctrine's prohibition with regard to computer animation will tempt many to litigate with every new technological advance.<sup>235</sup>

### A. *Inherent Conflict*

#### 1. Clashing with federal and state laws

The right of publicity has been violated as a result of depicting a personality's face,<sup>236</sup> style of dress,<sup>237</sup> mannerism,<sup>238</sup> and distinctive voice, for example.<sup>239</sup> These elements, while recognizable characteristics of particular celebrities, are also distinct facts.<sup>240</sup> The issue is who has the right to control the exploitation of these facts. A public figure does not have the right to control the dissemination of information; by virtue of the public figure's status, the public figure has in essence become news.<sup>241</sup> The problem is that, by definition, the facts that make up one's likeness, and are thus unavailable to exploit according to the right of publicity, are the same facts that comprise "information" available for all to exploit under the right to privacy and copyright laws.<sup>242</sup> This conflict merits resolution.

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233. See *infra* part IV.A.

234. See *infra* part IV.B.

235. See *infra* part IV.C.

236. E.g., *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 537 (W.D. Tex. 1980).

237. E.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993).

238. E.g., *id.*

239. E.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102 (9th Cir. 1992) (quoting *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988), for the proposition that a "voice is as distinctive and personal as a face" (emphasis omitted)), *cert. denied*, 113 S. Ct. 1047 (1993).

240. Beard, *supra* note 13, at 143.

241. See *Douglass v. Hustler Magazine*, 769 F.2d 1128, 1139 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986); see also *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451-52 (3d Cir. 1958), *cert. denied*, 357 U.S. 921 (1958).

242. *Paulsen v. Personality Poster, Inc.*, 299 N.Y.S.2d 501, 507 (Sup. Ct. 1968) (suggesting celebrity status makes celebrities "news").

## 2. Running roughshod over the Constitution

### *a. preemption*

The right of publicity doctrine is worthy of much criticism in that it conflicts with the goals of the United States Constitution. Congress has created copyright law<sup>243</sup> and trademark law<sup>244</sup> to provide protection for intangible property. Congress has set standards for obtaining such protection. For example, to earn copyright protection material must be original, fixed, and creative,<sup>245</sup> to obtain a trademark it must carry a secondary meaning such that the public associates it with the sale of something.<sup>246</sup> Likewise, Congress has established a set of criteria which constitute a violation or infringement of copyright and trademark protection.<sup>247</sup> There are gaps of noncoverage as a result of Congress's purposeful specificity.<sup>248</sup>

With the advent of right of publicity law, federal statutory intellectual property law is being preempted.<sup>249</sup> The right of publicity offers protection of celebrity personas—protection which was contemplated, but denied by Congress. Thus, the courts have run counter to the scheme set up by Congress—the body given the constitutional charge of this area.<sup>250</sup> For this reason, rights of publicity law should be subjected to severe scrutiny.

### *b. First Amendment*

The right of publicity is in direct opposition to the First Amendment.<sup>251</sup> The right of publicity, whether tied to name, likeness,

243. 17 U.S.C. §§ 101-1101 (1994).

244. 15 U.S.C. §§ 1051-1127 (1994).

245. 17 U.S.C. § 102.

246. 15 U.S.C. §§ 1051-1054.

247. See *supra* part II.A-B.1.

248. See 17 U.S.C. § 201(a). "[A]spects of a person . . . [such as] name, likeness, characteristics and life history . . . are excluded from copyright protection by . . . statute." Felcher & Rubin, *supra* note 110, at 1578 n.11.

249. The court in *Cardtoons v. Major League Baseball Players Ass'n*, 838 F. Supp. 1501, 1516-19 (N.D. Okla. 1993), recognized that parody is a defense to trademark and copyright infringements and acknowledged that parody has been considered a form of artistic expression protected by the First Amendment. Nevertheless, the court decided that parody is *not* a defense to a right of a publicity violation. *Id.* at 1519-21.

250. U.S. CONST. art. II, § 8, cl. 8.

251. See Felcher & Rubin, *supra* note 110, at 1590 (discussing First Amendment's effect on development of right of publicity).

achievements, or any other identifying characteristics conflicts with the expressive interests of others.<sup>252</sup> Society's interest in free expression must be balanced against the interests of an individual seeking protection in the right of publicity where the right is being expanded beyond established limits.<sup>253</sup> This call for balancing is merely a euphemistic way to acknowledge the inherent conflict between the First Amendment and the doctrine of the right of publicity.

### B. Windfall

*As Cindy prepared to enter the cylindrical scanner, the technician attempted to ease her nerves:*<sup>254</sup>

*"I assure you there's nothing to worry about."*

*"Yah? Does it hurt?"*

*"No. It's completely painless."*

*"And I get two hundred thousand dollars a year?"*

*"That's the standard modeling fee."*

*"And I don't have to do anything?"*

*"Not once the model is made."*

*"Seems like an awful lot."*

*"It's because of who you are."<sup>255</sup>*

In fact, it does seem like an "awful lot" for simply enduring a couple of moments within the scanner. The above is an illustration of the following concern: Several decades ago a celebrity attained fame and profits by performing on stage for an isolated audience.<sup>256</sup> Years later, a celebrity expounds the same energy yet makes a significantly greater profit delivering a performance on a set which is then broadcast to thousands—perhaps millions—of viewers.<sup>257</sup> Present day, a celebrity—exerting no more energy than originally, yet making an even greater profit—delivers a performance which is then broadcast, video-taped, filmed, placed onto CD-ROM (read-only

252. *Id.*

253. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) (exemplifying Court's struggle with First Amendment issue).

254. LOOKER, *supra* note 1 (describing scene in film).

255. *Id.* (quoting dialogue from scene in film).

256. PRINDLE, *supra* note 117, at 204 (asserting that the "stage is the actor's medium" and that technological advancements in the film industry have had a negative impact on the nature of acting).

257. *See id.* at 90 (detailing technology's effect on actors).

memory), and so on.<sup>258</sup> It is the advancing technology rather than the increased efforts of the performer which create the worth of the celebrity.<sup>259</sup> This could be considered a great windfall.

When the right of publicity was originally applied to preclude others from profiting from a celebrity's fame, it served as an acknowledgment that a persona was worth money and that the celebrity carrying the persona deserved to profit from it more than those attempting to sell a product because, of the two, the celebrity expounded more energy in establishing the value of her persona.<sup>260</sup> However, in the reanimation scenario,<sup>261</sup> the celebrity is not the one, of those implicated, who is expounding the most energy. There are filmmakers, animators, and computer programmers, for example, all of whom are exerting effort to create a piece of entertainment, and thus the celebrity should not be granted the windfall. The right of publicity, if applied, would provide celebrities with this extraordinary windfall, which runs counter to the original rationale behind the doctrine.<sup>262</sup>

Historically the right of publicity was created to acknowledge the star system which was developing as a result of rapid technological advancements in the media. Celebrities were being created and thus becoming valuable commodities.<sup>263</sup> But at its inception in the early 1950s, did this doctrine contemplate the worth of a celebrity in a technically advanced world of multimedia? "The right of publicity serves both individual and societal interests by preventing what our legal tradition regards as wrongful conduct: unjust enrichment and deceptive trade practices."<sup>264</sup> However, the celebrity has already been enriched by virtue of whatever performance(s) resulted in her fame and by virtue of the property rights which she undoubtedly has

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258. *See id.*

259. *See Nimmer, supra* note 103, at 203-04 and accompanying text (crediting advancing technology with providing celebrities with pecuniary worth "undreamed of at the turn of the century").

260. *Haelan Lab. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953) (setting precedent by recognizing that ball player should be able to earn money from his persona).

261. *See supra* part I (introducing issue of reanimating a live celebrity for purpose of employing celebrity in narrative film).

262. *See supra* note 267 and accompanying text.

263. *See Nimmer, supra* note 103 and accompanying text.

264. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 838 (6th Cir. 1983) (Cornelia, J., dissenting) (citation omitted).

in her persona with regard to advertising and endorsements.<sup>265</sup> In the case of a CGI replica, the original celebrity has expended absolutely no effort or time in terms of creating the simulated performance; thus, the celebrity is not deserving of any compensation.<sup>266</sup> Will someone else be profiting? Yes, everyone involved in the film and the creation of the computer program that simulates human movement—all deserving of compensation because of their expended effort—will be profiting.

In *Zacchini v. Scripps-Howard Broadcasting Co.* the Supreme Court stated that a mechanism to vindicate an individual's economic rights is indicated where the appropriated thing is "the product of . . . [the individual's] own talents and energy, the end result of much time, effort and expense."<sup>267</sup> However, is the popularity of an actor the result of that particular actor's time, effort, and expense exclusively? Probably not. The producer, director, manager, agent, and studio play a role in the success of an actor.<sup>268</sup> Is the celebrity really responsible for her own fame, or is the film and television industries' ability to exploit talent through all technological options the reason for the scope and worth of a celebrity's fame? If the latter is responsible, doesn't the right of publicity bestow an undeserving windfall upon the celebrity—a circumstance which is in direct opposition with one of the original policies behind the right of publicity?

### C. *Inviting Litigation*

By allowing the right of publicity to hover over every situation born out of the newest technological creation, the courts will be bombarded with questions of first impression and will be forced to contend with them in light of a doctrine which itself is already confused and ambiguous.<sup>269</sup> This will also have a chilling effect on

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265. See *supra* part III (depicting the unlicensed use of a celebrity for a commercial purpose as a definite violation of the right of publicity).

266. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 443 U.S. 562, 575 (1977).

267. *Id.*

268. NINA BLANCHARD, *HOW TO BREAK INTO MOTION PICTURES, TELEVISION, COMMERCIALS & MODELING* 120 (1978).

269. There is a current case in which a greeting card company is being sued by Humphrey Bogart's estate for using the phrase "happy birthday, *sweetheart*" which conjures up the image of the deceased Bogart. Jeff Barge, *Deceased Stars Haunting the Courtroom*, A.B.A. J., May 1995, at 33, 33. Stuart Sinder of New York's Kenyon & Kenyon, representing the greeting card company, notes that, "although the law on the issue is hazy . . . [it] is an interesting case of first impression." *Id.* This situation is

artistic expression and possibly on the incentive to advance technologically in the entertainment industry. Difficult questions arise as a natural extension of coverage by the right of publicity. This can of worms further illustrates the impending mounds of litigation: Even if the right of publicity did apply and preclude reanimation without consent, would it apply to a mutated likeness? For example, would it preclude combining Arnold Schwarzenegger's body with Mick Jagger's face? Would it prohibit taking years off Drew Barrymore and giving her pigtails again or aging her by adding wrinkles and a few pounds around the middle? If it did provide protection in these instances as well, the windfall is compounded exponentially by the fact that celebrities not only control their own likenesses for the present moment but for every moment past or forthcoming.<sup>270</sup> Protection over mutated versions of one's likeness is even more of an affront to the senses in that many of the concerns over cloning an exact replica do not exist: no possible confusion, no market saturation problem, no competition problem.

## V. PROPOSAL

### A. *Problems If No Protection Exists*

Suspend disbelief and assume for a moment that the right of publicity will be applied in a manner such that featuring a celebrity's computerized clone in a film is not a violation. Although the previously-mentioned problems would no longer exist, glaring problems would exist which would demand regulation.

For example, the celebrity will have no right to her animated image; but the computer programmer, or someone else, can hold the rights to the tangible program.<sup>271</sup> This has the flavor of injustice;

similar to *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983), in that the phrase is what "conjures" the identity of the celebrity; it is distinguishable, however, in that the phrase here is not used solely to market a product, but rather is the creative fodder for the product itself.

270. See, e.g., *McFarland v. Miller*, 14 F.3d 912, 915 (3d Cir. 1994) (regarding George McFarland's likeness as a child, rather than as a 64-year-old man—his age when he initiated the action).

271. Although the U.S. Supreme Court has yet to speak on these issues, the consensus of lower court opinions is that programs are copyrightable subject matter, and that copyright extends both to source code and object code of application programs and system programs. Also, a chip or diskette embodying code constitutes a copy. Moreover, program design and architecture are also within the ambit of copyright.

someone other than the celebrity herself dictates the integrity of the celebrity's likeness in that the activities of the likeness are controlled by whomever legally controls the computer program.<sup>272</sup> Although there are other doctrines of law which may address this problem,<sup>273</sup> the lack of right of publicity protection would be an invitation to appropriate nonetheless. Additionally, without any protection, the celebrity's likeness will most definitely be exploited financially. Tempting red doors are opened. There is a potential for pornography to become a popular arena for synthespians—naughty nude images of celebrities who otherwise would absolutely refuse to be caught on film garbless. There are serious moral implications here which must be weighed against the First Amendment.<sup>274</sup> However, this balancing problem is not unique to the reanimation scenario: Whenever pornography is an issue, a common society-wide moral rears its head and shakes it in disgust.<sup>275</sup>

### B. Compulsory Licensing Scheme

A compulsory licensing scheme<sup>276</sup> would enable celebrities to retain some rights in their persona, but preclude them from retaining *all* rights;<sup>277</sup> it is a perfect compromise between celebrities and the industry which created them.<sup>278</sup> Compulsory licensing would address

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2 INTELLECTUAL PROPERTY, *supra* note 48, § 11.03[2][a].

272. *See id.*

273. "A significant number of states have anti-dilution statutes . . . . One form of dilution is 'tarnishment,' a use by the defendant of plaintiff's [likeness] 'in an unwholesome or degrading context,' or 'out-of-keeping with plaintiff's high quality image.'" Beard, *supra* note 13, at 178. "Dilution arguments based on a 'quality and prestige' argument might be raised against a reanimator because the quality of the synthetic actor is poor." *Id.* at 179. However, "[d]efendants have been successful in defeating trademark infringement or dilution claims based on First Amendment considerations." *Id.* at 180. For a description of other doctrines which threaten to protect celebrities, see *supra* part II.

274. *See supra* part IV.A.2.b. (discussing the First Amendment).

275. For example, in *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 374 (S.D.N.Y. 1979), the court based its decision in favor of the plaintiff on the fact that "[o]ccasionally the misappropriation of a mark is used in connection with goods or services which the customers of the true owner of the mark would find repugnant. This presents a special threat to the good name and goodwill of the true owner."

276. *See supra* note 273 and accompanying text.

277. The imposition of licensing schemes in copyright law is exemplary of this proposed solution. *See* 17 U.S.C. § 111(d) (1994) (cable systems); *id.* § 111(a)(4), 119(b) (satellite); *id.* § 115 (music publishing); *id.* § 118 (public television).

278. Such a scheme enables each party involved to profit from their investment in the

the concerns regarding the right of publicity as well as the concerns regarding a complete lack of protection.<sup>279</sup> The proposition is not extraordinary; Congress has not been adverse to addressing technological advancements in entertainment by imposing compulsory licensing schemes.<sup>280</sup>

### 1. Suggested scheme

Personalities must license their likeness to those who request it; however, they will be compensated by a statutorily determined figure.<sup>281</sup> Their likenesses may be licensed on a per use basis.<sup>282</sup> Personalities will not be forced to accept every request, which could result in glutting the market with their likeness; however, there will be a statutory minimum requirement of acceptances.<sup>283</sup> Those who create the programs may copyright them.<sup>284</sup> However, it will not be possible to obtain the exclusive rights to the celebrity's likeness.<sup>285</sup>

### 2. Policy: justification for the scheme

The effect of refusing to apply the right of publicity to the use of CGI in feature films and enacting a compulsory scheme instead, will have a positive effect upon society and the celebrities as well.

star system proportionally rather than have the money pile up in the celebrities' corner while they figuratively file their nails.

279. See *supra* part V.A.

280. See Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 (1994) (compensating the industry for the loss in prerecorded sales anticipated from the introduction of digital-audio technology to the market).

281. For example, the current compulsory license rate for music publishers is \$.0625 per recording for records. This aspect of the scheme prevents the unfair windfall which is a result of bidding wars. However, the amount will be a scientific figure proportionate to the celebrity's worth—for example, an equation based on the film's gross receipts.

282. A celebrity's persona may be licensed for one particular film—use—at a time.

283. The ability to refuse will enable the celebrity to be somewhat selective, and thereby maintain some control over his or her likeness. A specified number of required acceptances will be set forth in the statute—for example, one project per month or twelve per year—if offers are extended.

284. See *supra* note 53 and accompanying text.

285. Therefore, owners of copyrighted programs do not have to allow their programs to be copied, but no one else is precluded from creating their own.

Also, exclusive rights would run counter to the purpose of the scheme in that they would create a competitive, bidding-war situation. Further, to allow exclusive licensing would enable celebrities to maintain complete control over their personas by licensing solely to themselves through a shell agent of some sort.

*a. where the wind blows*

The receipt of the windfall would not be unjust if the entire benefit were not bestowed upon the celebrity, but rather distributed along par with the effort the celebrity has expended in nurturing his or her career. In return for their forfeiture, celebrities will have a persona which represents every moment of their life, and each persona may be for sale.<sup>286</sup> In those jurisdictions which recognize a postmortem right of publicity,<sup>287</sup> celebrities will be able to make an additional profit by selling postmortem rights before they die.<sup>288</sup>

*b. some semblance of control remains*

To rationalize the loss of control this scheme imposes upon the celebrity, two points must be highlighted. First, the celebrity had virtually no control over his persona pre-*Haelan*.<sup>289</sup> After which point the law intended only to bestow such protection upon the celebrity in the face of commercial profiteering.<sup>290</sup> Second, even in the contemporary ideal situation for the celebrity—where the celebrity has dictated the terms of the performance contract, is enjoying the benefits of bargaining, and is actually performing himself—his control is illusory.<sup>291</sup> So his loss of control under the compulsory licensing scheme, in fact, is not so dramatic.

*c. preserving the star system and avoiding virtual reality*

Employing a computer licensing scheme rather than precluding the activity through the right of publicity will prevent the demise of the star system. To prevent the actor from ultimately being replaced by an original computer-generated movie star,<sup>292</sup> the actor must be willing for his or her own likeness to be generated. If in fact an

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286. A licensee may seek a license to use the likeness of a particular celebrity as they appeared 20 years prior to the date of the compulsory licensing agreement.

287. See *supra* note 109 and accompanying text.

288. Himelstein, *supra* note 9, at 6 (quoting Professor Joseph J. Beard).

289. *Haelan Lab. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert denied*, 346 U.S. 816 (1953); see *infra* part III.A.

290. *Haelan*, 202 F.2d at 868 (recognizing that "prominent persons . . . would feel sorely deprived" if they did not receive money for authorizing the use of their personas in advertising).

291. PRINDLE, *supra* note 17, at 214.

292. Sotor, *supra* note 6, at 28 ("You now have the freedom to construct a character that doesn't exist and make [it] three-dimensionally real." (quoting Mark Dippe, visual effects supervisor at ILM)); see *infra* note 296.

actor's likeness is used rather than a fictional character then the actor will remain valuable.<sup>293</sup> If this effort is not mandatory, however, it will fail. Without compulsory licensing, when celebrities are asked to license their likeness for use in narrative works, they will inevitably and understandably attempt to get the most money for their image,<sup>294</sup> will lack the foresight to see the ramifications such stubbornness will have on the future of the star system as a whole. Because in effect, if the actor's demands are met, reanimating the live actor will no longer be a cost-efficient option for the filmmaker and the filmmaker will default to the logical alternative—an original creation of an animated human being, resembling no one in particular.<sup>295</sup> Does that mean human talent will be excluded from the virtual reality star system?<sup>296</sup> Compulsory licensing forces the existence of a connection between virtual reality and actual reality which will enable actual celebrities to maintain some value and thus ultimately their jobs.<sup>297</sup> Otherwise, actual actors may only find jobs imitating animated personalities.

#### VI. CONCLUSION: A WARNING

The future: As anticipated, the law stretched the right of publicity over dramatic works like a blanket, prohibiting any appropriation without consent. Television mega-station; long corridors; the buzz and glow of technology. The haggard wizards fiddle with the computers and controls and suck down troughs of coffee. They smoke and chat and hitch up their outdated corduroys. They manipulate beautiful images of bubbly, blonde-haired, hard-

293. PRINDLE, *supra* note 17, at 13 (crediting actors as an ingredient necessary to financing a film project).

294. BLANCHARD, *supra* note 268, at 117 (describing the art of bargaining). A good agent, negotiating on behalf of the actor, "will try to get every last penny for the job as well as the best contract and billing conditions." *Id.*

295. *See* Rose, *supra* note 7, at R8 (describing entertainment industry's desire to create computer-animated actors—synthespians). So if it is legally impermissible to create synthespians who resemble celebrities, then the industry will be compelled to create a computer-animated star system. *See id.* ("Hollywood's many worriers project an exponential swelling in the ranks of unemployed actors.").

296. Koseluck, *supra* note 7, at 33 (acknowledging the actor's struggle to remain a necessary element in Hollywood in light of rapidly developing technology).

297. The industry's practice of employing actual celebrities in interactive media rather than creating original life-like characters is an illustration of Hollywood's desire to maintain the connection between reality and virtual reality. *See id.* "It was only when digital video was a reality and the ability to bring to the medium the big-screen quality of star talent that things really start to happen." *Id.*

bodied, two-dimensional synthespians. This virtual reality is carried over the airwaves to an appreciative audience separated by walls of stucco, but laughing and clapping in unison. Outside the television station a thin, crusty fellow recites Shakespeare in a raspy voice while a dirty hat rests at his feet in which two pennies, an expired credit card and a subway token sit. The streets are empty and grey. Windows are aglow with the blue flicker of entertainment.

*Pamela Lynn Kunath\**

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\* Thanks to the *Coven* for supporting me and making me laugh and to my non-law school friends, especially Kerry Prior, for still speaking to me. Special thanks to the editors and staff of *Loyola of Los Angeles Law Review* for their effort and patience.

