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Virtual Stardom: The Case for Protecting the Intellectual Property Rights of Digital Celebrities as Software

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Virtual Stardom: The Case for Protecting the Intellectual Property Rights of Digital Celebrities as Software

Alexander Plansky*

For the past several decades, technology has allowed us to create digital human beings that both resemble actual celebrities (living or deceased) or entirely virtual personalities from scratch. In the near future, this technology is expected to become even more advanced and widespread to the point where there may be entirely virtual celebrities who are just as popular as their flesh-and-blood counterparts—if not more so. This raises intellectual property questions of how these near-future digital actors and musicians should be classified, and who will receive the proceeds from their performances and appearances. Since, in the near-term, these entities will probably not develop sentience akin to an artificial general intelligence, they will essentially function as software licensed out to execute tasks on various entertainment projects—be it acting in a movie or delivering a performance on stage or in the metaverse. As such, this paper proposes that virtual celebrities be classified as software, and their owners (either corporate or individual) should enjoy copyright protections for their use, and image and name trademark protections in case they are unlawfully copied by third parties.

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INTRODUCTION

You have waited for this moment all week. Now it is Friday night, and you and your friends are going to the movies. A new blockbuster has just been released, and with its lavish special effects and CinemaScope camerawork, it begs to be seen on the largest screen possible. You grab your popcorn and sodas and sit down, getting comfortable. The lights dim. A series of trailers play, your anticipation for the main event growing with each one. Finally, the screen fades to black, and when the projector starts up again, the real show begins. It's a neo-noir murder mystery set in the present day. The two lead detectives are played by some of the biggest stars imaginable. Everyone has come to see this movie not just for its premise, not just for *The New York Times* bestseller it is based on, but for *them*.

Before your very eyes, here they come, striding through the alleyway, ducking under the yellow tape of a crime scene. One, clad in a fedora and trench coat, stops to take in his surroundings. Then he lights a cigarette and brings it to his lips, the glow standing out in the high-contrast lighting. He looks and sounds exactly like Humphrey Bogart,¹ yet the words he speaks are dialogue the real Bogart never performed. His partner, a rookie detective taking in her first major crime scene, is played by an actress who has never existed in corporeal form. Nevertheless, the actress has millions of Instagram followers and a devout international fanbase. All the other characters on screen are depicted by flesh-and-blood actors. Yet, in the

¹ See generally The Editors of Encyclopaedia Britannica, *Humphrey Bogart*, ENCYC. BRITANNICA (Jul. 4, 2023), <https://www.britannica.com/biography/Humphrey-Bogart> (describing the famed actor during Hollywood's Golden Age in the mid-twentieth century).

finished product you cannot tell which is which. They all seem so lifelike, so real. Aside from Humphrey Bogart dying in the 1950s and your recognition of Lil Miquela, one of the world's most prominent virtual influencers, you might not suspect a technological marvel at all.

Such a movie hails from a near future that is not only possible but probable—one where digital celebrities rule the silver screen and climb music charts around the globe. This new era will raise intellectual property law questions over how to treat these synthetic thespians and cyber-popstars. Other notes, most of them more than a decade old, have discussed the concept of virtual celebrities, particularly with how they relate to digital replicas of existing persons, living or deceased.² However, there is little scholarship on *entirely* artificial celebrities and how they will be treated under the law.

The scholarship that does exist insists that virtual actors are more analogous to cartoon or video game characters.³ One commentator, Adam Faier, goes so far as to insist that virtual actors cannot be similar to human actors because they cannot play multiple roles without arguably becoming, for legal purposes, entirely *different* virtual actors, each with their “own distinct protections.”⁴ Setting aside what a hassle this would be to implement from both a legal and business perspective, such a notion seems dated in today's age, where virtual celebrities already exist and are signing with talent agencies.⁵ This concept will not be discussed further.

The closest scholarship to this Note comes from Professor Joseph J. Beard, who provided helpful taxonomy for navigating this field. To Beard, a virtual performer is either a Real Virtual Human (“RVH”) based on an existing person (whether living or dead), or an Imaginary Virtual Human (“IVH”) who is entirely defined by computer-generated artifice.⁶ In his exploration of IVHs, Beard posits that they be viewed as cartoon

² See, e.g., Joel Anderson, *What's Wrong with this Picture - Dead or Alive: Protecting Actors in the Age of Virtual Reanimation*, 25 LOY. L.A. ENT. L. REV. 155 (2005); see Bryce Clayton Newell, *Independent Creation and Originality in the Age of Imitated Reality: A Comparative Analysis of Copyright and Database Protection for Digital Models of Real People*, 6 BYU INT'L L. & MGMT. REV. 93, 97 (2010).

³ See Joseph J. Beard, *Clones, Bones, and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead, and the Imaginary*, 16 BERKELEY TECH. L. J. 1165, 1262 (2001); Adam Faier, *Digital Slaves of the Render Farms?: Virtual Actors and Intellectual Property Rights*, 2004 U. ILL. J.L. TECH. & POL'Y 321, 335 (2004).

⁴ Faier, *supra* note 3, at 341 (concluding that a “multiple-role virtual actor cannot exist”).

⁵ See Steve Rose, *Reality Bites: Are Virtual Actors About to Put Hollywood's Humans Out of Work?*, THE GUARDIAN (May 25, 2020, 4:00 AM), <https://www.theguardian.com/film/2020/may/25/are-virtual-actors-about-to-put-hollywoods-humans-out-of-work-miquela>.

⁶ Beard, *supra* note 3, at 530-31.

characters for legal purposes.⁷ This Note also focuses on the legal ramifications of IVHs, but differs from Beard's analysis in that I propose that virtual performers ought to be treated as licensable software and afforded the same copyright and trademark protections as those programs.

First, this Note reviews the background of digital celebrities, including a brief history of how they came to be, how they have been prophesized in fiction, and an overview of their contemporary legal framework. Then, in Part II, this Note looks to the near future to address how virtual actors and singers should be treated when they are more advanced and do not require as much human oversight to create their performances—but not so far into the future where they are sentient, as in Beard's analysis. This Note will compare and contrast its proposed model to that of Beard's and argue why software is the preferable intellectual property framework for treating IVH performers in the near future. To develop this comparison, Part III discusses Beard's proposed model and its inherent shortcomings. In the end, this Note posits that virtual celebrities would be best protected under a software copyright paradigm.

I. BACKGROUND

Though not a long history, the evolution and development of virtual actors and celebrities informs much of the current understanding of this technology in both a technical and legal sense. This Note will begin with an exploration into the background of digital performance artists starting with an overview of their history in the industry and how they have been portrayed in the media. This Part will then discuss the current legal framework for both virtual actors based on real people (living or dead) and entirely synthetic personalities.

A. *History*

The history of virtual performance artists dates back to the late twentieth century. First, this Note will explore the history of digital actors. Then, this Note will discuss the history of their music industry counterparts.

1. Brief History of Synthespians

In 1987, a group of Canadian computer scientists brought two Hollywood stars—Humphrey Bogart and Marilyn Monroe—back to life

⁷ *Id.* at 533.

in an experimental animated work called *Rendez-Vous à Montréal*.⁸ The seven-minute short film depicted Bogart and Monroe in the afterlife deciding to come back to Earth for an evening at a Montreal establishment.⁹ Though brief in length and “crude” in design, it demonstrated even in the 1980s that movies “starring a nonexistent, computer-generated cast” were on the horizon.¹⁰ Not everyone was pleased: Bogart’s estate threatened to sue the filmmakers if they attempted to profit from the production.¹¹ Ultimately, however, there was no legal recourse because the directors “did not exploit the film for commercial gain.”¹²

But Bogart and Monroe were just the beginning. Being dead did not stop Sir Laurence Olivier from appearing in the 2004 adventure film *Sky Captain and the World of Tomorrow*, which marked “the first time a dead actor’s reanimated clone perform[ed] completely original scenes.”¹³ To achieve this feat, the filmmakers combined computer generated imagery (“CGI”) with existing footage of Olivier to enable him to play the film’s antagonist, Dr. Totenkopf, from beyond the grave.¹⁴ However, the character was voiced by a living actor.¹⁵ An intellectual property management firm, CMG Worldwide, owned the rights not only to Olivier’s likeness, but to the phrase “Laurence Olivier” itself.¹⁶ The producers had to obtain permission from CMG to use the actor and his name in their movie.¹⁷ At the time, an executive from the firm said that CMG was highly interested in employing “dead stars” in films and commercials, and that CGI had made it “much easier” to do so.¹⁸

2. Brief History of Virtual Musicians

Simulated celebrities have developed beyond the silver screen. Digital popstars date back to 1996, when Japanese corporation Horipro introduced

⁸ See Pamela Lynn Kunath, *Lights, Camera, Animate: The Right of Publicity’s Effect on Computer-Animated Celebrities*, 29 LOY. L. A. L. REV. 863, 870 (1996).

⁹ RENDEZ-VOUS À MONTRÉAL (MIRALab 1987).

¹⁰ Kunath, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

¹³ Joel Anderson, *What’s Wrong with this Picture - Dead or Alive: Protecting Actors in the Age of Virtual Reanimation*, 25 LOY. L.A. ENT. L. REV. 155, 155 (2005).

¹⁴ Jonathan Brown, *Back from the Dead: Lord Larry Olivier Returns to Movies After ‘Resting’ for 15 Years*, THE INDEP. (Jul. 28, 2004, 12:00 AM), <https://www.independent.co.uk/arts-entertainment/films/news/back-from-the-dead-lord-larry-olivier-returns-to-movies-after-resting-for-15-years-554715.html>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *Id.*

Kyoko Date (pronounced “dah-tay”), the world’s first computer-generated *idoru kashu* (“idol singer”).¹⁹ It took a three-person digital graphics crew to create her.²⁰ The first year she entered the world, Date had two hit singles that made the Japanese charts.²¹ Horipro even created a full profile for her, including blood type, favorite foods, and her childhood dream to become a private investigator.²² Her website also included a fictional interview with her.²³ Date’s virtual nature was no secret, but she still amassed a large following from all over the world.²⁴ Men “from Sweden to Singapore [were] smitten” with her, some professing their love for her on fan club websites.²⁵

Over a decade and a half later, on a Coachella stage during Snoop Dogg and Dr. Dre’s set, a third figure unexpectedly joined them.²⁶ This third figure looked, talked, and sang exactly like famed rapper Tupac Shakur—who had been murdered over fifteen years earlier in a drive-by shooting in Las Vegas.²⁷ Of course, this was not actually Shakur himself, but a computer-generated image created by the firm Digital Domain, who used a theatre technique from the nineteenth century called “Pepper’s Ghost” to make Shakur’s mirage appear to be performing alongside Snoop Dogg and Dr. Dre.²⁸ The method involves projecting an “image onto an angled piece of glass” that is then “reflected back onto the stage” to give the illusion of another person standing there.²⁹ The performers required permission from Shakur’s estate to use his likeness including explicit consent from the rapper’s mother.³⁰ The worldwide reaction was ecstatic, and Digital Domain ended up winning the Cannes Lions Titanium Award “for the most groundbreaking work in the creative communications field” that June.³¹ After the show, however, the digital asset for the projection was archived and only Shakur’s estate can access it.³²

¹⁹ J.D. Considine, *Kyoko Date: The World’s First Virtual Pop Star*, ENT. WEEKLY (May 16, 1997, 4:00 AM), <https://ew.com/article/1997/05/16/kyoko-date-worlds-first-virtual-pop-star/>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *See id.*

²⁵ *Id.*

²⁶ Aaron Dodson, *The Strange Legacy of Tupac’s ‘Hologram’ Lives on Five Years After its Historic Coachella Debut*, ANDSCAPE (April 14, 2017), <https://andscape.com/features/the-strange-legacy-of-tupacs-hologram-after-coachella/>.

²⁷ *See id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

In the late 2010s and early 2020s, the concept of entirely virtual singers started to gain more traction again. Lil Miquela is a singer and influencer who has approximately three million followers on Instagram,³³ despite being a completely digital entity created in 2016.³⁴ In 2020, she signed with Creative Artists Agency (“CAA”), a famed Hollywood talent agency, for a deal that included movies, television, and brand strategy.³⁵ The newspaper *Variety* even speculated that she could feature in a film or television show.³⁶ Lil Miquela will be “[forever nineteen] years old,” and has had drama with her “virtual boyfriends and frenemies.”³⁷ However, she is not actually a true artificial intelligence (“AI”) as she is voiced by human beings behind the scenes that read lines written by other human beings.³⁸ She is “effectively an animated character,” and her acting ability is limited by her face’s “limited range . . . [for] nuance or emotion.”³⁹

Other virtual singers have cropped up as well—though not all of them have found success. A digital rapper named FN Meka achieved a following of over ten million on TikTok and scored a deal with Capitol Records.⁴⁰ Similar to Lil Miquela, FN Meka was little more than an animated character and was dependent on human creators to generate content for him.⁴¹ His single “Florida Water” featured human rapper Gunna and video game streamer Clix Conrad.⁴² However, in August 2022, Capitol cut ties with the project after accusations that FN Meka was culturally insensitive.⁴³ His fictitious backstory involved the AI rapper spending time in prison, and he used racist expletives in his songs,⁴⁴ and activist groups accused his creators of exploiting Black stereotypes for

³³ Lil Miquela (@lilmiquela), INSTAGRAM, <https://www.instagram.com/lilmiquela/>

³⁴ Kaitlyn Tiffany, *Lil Miquela and the Virtual Influencer Hype, Explained*, VOX (Jun. 3, 2019, 7:00 AM EST), <https://www.vox.com/the-goods/2019/6/3/18647626/instagram-virtual-influencers-lil-miquela-ai-startups>.

³⁵ Steve Rose, *Reality Bites: Are Virtual Actors About to Put Hollywood’s Humans Out of Work?*, THE GUARDIAN (May 25, 2020, 4:00 AM), <https://www.theguardian.com/film/2020/may/25/are-virtual-actors-about-to-put-hollywoods-humans-out-of-work-miquela>.

³⁶ *Id.*

³⁷ *Id.*; Lil Miquela, *supra* note 33.

³⁸ Rose, *supra* note 35.

³⁹ *Id.*

⁴⁰ J. Clara Chan, *Are Virtual Influencers the Real Deal?*, THE HOLLYWOOD REP. (Oct. 4, 2022, 10:30 AM), <https://www.hollywoodreporter.com/business/digital/virtual-influencer-s-digital-world-1235228125/>.

⁴¹ *Id.*

⁴² J. Clara Chan, *Capitol Records Severs Ties With A.I. Rapper FN Meka, Apologizes to Black Community for “Insensitivity,”* THE HOLLYWOOD REP. (Aug. 23, 2022), <https://www.hollywoodreporter.com/news/music-news/capitol-records-fn-meka-1235204516/>.

⁴³ *See id.*

⁴⁴ *See id.*

profit.⁴⁵ Due to mounting backlash, Capitol pulled “Florida Water” from all music streaming services.⁴⁶

The music industry is also experimenting with bands entirely comprised of virtual characters.⁴⁷ In March 2022, talent agency WME signed Escapeplan, two DJ-producers with avatars from the Bored Ape Yacht Club NFT collection, in a deal that included “bookings, endorsements and other projects using their IP.”⁴⁸ That November, Universal Music Group created an entire band, Kingship, comprised of four Bored Ape NFT characters.⁴⁹ According to WME, the Bored Ape-based virtual groups have been popular and have been able to collaborate with “real celebrity talent” because the groups are rooted in already “successful IP.”⁵⁰ Kingship already has its own line of M&Ms candy and has contracted music producers Chauncey Hollis Jr. and James Fauntleroy to make content for them.⁵¹ These virtual music groups are not AI and all content they create is still driven by human performance behind the scenes; they are effectively cartoons with a social media presence.⁵²

3. Virtual Celebrities in Fiction

Authors and filmmakers have tackled the concept of virtual celebrities and their broader implications for society. The 1981 suspense thriller *Looker*, written and directed by Michael Crichton (author of *Jurassic Park* and director of the original *Westworld*), involved a sinister corporation murdering models and replacing them with digital twins in commercials and political advertisements—all to better control television audiences.⁵³ William Gibson, who coined the term “cyberspace,” and effectively created the cyberpunk genre with his 1984 debut novel *Neuromancer*,⁵⁴

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *See* J. Clara Chan, *Bored Ape NFT Duo Escapeplan Sings with WME (Exclusive)*, THE HOLLYWOOD REP. (Mar. 21, 2022, 10:36 AM), <https://www.hollywoodreporter.com/business/digital/bored-ape-nft-escapeplan-wme-1235115702/> (noting “The Bored Ape Yacht Club is a collection of 10,000 Bored Ape NFTs, and owners of those specific Bored Apes get access to member perks, like access to other tokens and merchandise”).

⁴⁸ *Id.*; *see also* Chan, *supra* note 40.

⁴⁹ Chan, *supra* note 40.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See id.*

⁵³ LOOKER (The Ladd Company 1981); Jason Shankel, *Looker is the Rare Cheesy 1980s Movie that Got the Future Right*, GIZMODO (Feb. 12, 2011), <https://gizmodo.com/looker-is-the-rare-cheesy-1980s-movie-that-got-the-futu-5758865>.

⁵⁴ Bijan Stephen, *Go Read this New Yorker Profile of William Gibson, the Father of Cyberpunk*, THE VERGE (Dec. 9, 2019, 3:57 PM), <https://www.theverge.com/2019/12/9/21003074/new-yorker-magazine-profile-william-gibson-cyberpunk-burning-chrome-short-story>.

centered his 1996 book *Idoru* around a virtual singer named Rei Toei.⁵⁵ When a character first encounters Rei Toei, he is so captivated by her that he is forced to remind himself that she is not a real human being.⁵⁶ The 2002 comedy film *Simone*, starring Al Pacino, deals with a director creating an entirely digital actress whose true nature he then struggles to keep secret after she attains a massive fanbase.⁵⁷

B. Legal Background

This Note will now explore the contemporary legal framework for virtual performers, distinguishing between virtual clones of existing persons and entirely virtual entities.

1. Virtual Clones of Existing Persons

When an actor's digital likeness is employed, two separate sets of intellectual property rights come into play: "(1) the actor's rights [to] his or her image[] and performance; and (2) the copyright in the" media for which it is used.⁵⁸ Statutory rights of publicity protect the use of a person's image, voice, and name, and applying this protection to a virtual twin of a celebrity (or a deepfake of their image superimposed over another actor) would be no different than unlawfully using their image for profit in other ways.⁵⁹

The framework is more straightforward with still-living celebrities. In 2022, a spokesperson for actor Bruce Willis clarified that Willis had not signed over rights to his digital likeness to a deepfake company named Deepcake—even though it was reported by numerous outlets that he had done so to keep "acting" in the wake of his aphasia diagnosis.⁶⁰ As Deepcake's clarification that only Willis owns the rights to his face demonstrates, it appears that one's face is protected no matter who is copying it and using it, and that content creators must get explicit permission from a living actor to use their name, image, and likeness ("NIL").⁶¹ Further demonstrating this concept, actor James Earl Jones has deliberately signed away digital rights to his voice so that "he" can

⁵⁵ See generally Bert Olivier, *Idoru: Gibson's Astonishing Glimpse of Virtual Reality's Future*, THOUGHT LEADER (Dec. 7, 2015), <https://thoughtleader.co.za/idoru-gibsons-astounding-glimpse-of-virtual-realitys-future/>.

⁵⁶ See *id.*

⁵⁷ Newell, *supra* note 2, at 99.

⁵⁸ Beard, *supra* note 3, at 1174.

⁵⁹ See Kunath, *supra* note 8, at 883.

⁶⁰ Ben Derico & James Clayton, *Bruce Willis Denies Selling Rights to His Face*, BBC NEWS (Oct. 2, 2022), <https://www.bbc.com/news/technology-63106024>.

⁶¹ See *id.*

continue to play the villainous Darth Vader through AI in *Star Wars* media for generations to come.⁶²

The law grows hazier regarding *deceased* celebrities. State law varies regarding whether a right of publicity exists after death.⁶³ In California, an individual has a post-mortem right of publicity for seventy years, which allows their estate to control their NIL for more than half a century after their demise.⁶⁴ For example, in 2019, when producers of a film called *Finding Jack* wanted to create a digital clone of James Dean to star in their movie, they had to ask his family for permission because Dean had died while legally a resident of California.⁶⁵ However, New York has no post-mortem right of publicity.⁶⁶ As a result, movie producers would be unrestricted from using a digital clone of Marilyn Monroe because her estate decided “for tax reasons” that she died a New York resident in 1962.⁶⁷

2. Current Legal Framework for Entirely Virtual Entities

Though they are still an emerging trend, entirely virtual celebrities, who are not at all modeled on current or once-living persons, have already begun to fall into a legal framework. Revenue “ultimately flows to the owner of the avatar.”⁶⁸ For example, any artist who performs work on the virtual band Kingship, which is not based on living or deceased persons, is paid royalties from the company that owns the band.⁶⁹ As CAA’s Adam Friedman notes, virtual celebrities cannot enter into contracts themselves; instead, they rely on a human team to do so for them.⁷⁰ He also points out that there are additional costs of getting an imaginary virtual human to “show[] up” that do not “exist with human clients.”⁷¹ The IVH cannot just walk onto a set or take a picture, and the content for any “brand or content deal” must still (at this point) be generated by human animators and that generation costs money to produce.⁷² Despite these additional costs that

⁶² Imad Khan, *James Earl Jones Is Reportedly Retiring From Voicing Darth Vader*, CNET (Sep. 26, 2022, 7:06 PM), <https://www.cnet.com/culture/entertainment/james-earl-jones-is-reportedly-retiring-from-voicing-darth-vader/>.

⁶³ Kyle Jahner, *Dead Actors’ Fortunes May Hinge on Where They Die in a CGI World*, BLOOMBERG LAW (Dec. 6, 2019, 5:30 AM), <https://news.bloomberglaw.com/ip-law/dead-actors-fortunes-may-hinge-on-where-they-die-in-a-cgi-world>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ *Id.*

⁶⁸ Chan, *supra* note 40.

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *Id.*

must be factored into an appearance contract, the “overall deal could” still “be cheaper than one with a traditional, human influencer” or celebrity.⁷³

However, as Greg Cross, the CEO of the digital avatar firm Soul Machines, posits, employing virtual persons instead of real ones does not mean a company should ignore regulations and anti-discrimination laws.⁷⁴ To prevent problems from arising, Soul Machines created an ethics policy and an “ethics board to review its projects.”⁷⁵ Cultural sensitivity and diversity are still factors to consider when creating entirely synthetic personalities.⁷⁶ However, it is unclear how the current laws Cross alludes to would prevent discrimination against digital avatars who are not legal persons.⁷⁷ Nor does Cross allude to any specific regulations.⁷⁸

II. SPECULATIVE TERRITORY - A VISION OF NEAR-FUTURE IVHS

In his article, Professor Beard compares IVHs to cartoon characters and notes that their existence depends on a “fixation in some medium,” as opposed to humans, who are fixed in reality.⁷⁹ However, Beard’s main concern was AI actors who “could ‘live’ indefinitely not unlike a corporation.”⁸⁰ He explicitly compared IVHs to the new, “unnatural life-forms” that terrorize the characters in the 1966 science fiction horror film *Island of Terror*.⁸¹ It is important to distinguish Beard’s focus from ours. This Note does not examine the legal implications for sentient digital celebrities powered by artificial general intelligence (at which point they would arguably be legal persons), but rather focuses on the near-future of IVHs, where they are merely responsive computer programs that can be licensed to different projects by their creators.

Experts are split over when AI will attain human-like intelligence: roughly half believe it will occur by the year 2060 while many others believe it will never be completely attainable.⁸² Therefore, it appears that we are decades away from having to address the problem Beard tackles in

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ Beard, *supra* note 3, at 1257.

⁸⁰ *Id.* at 1255.

⁸¹ *Id.* at 1254.

⁸² Louis Rosenberg, *Mind of Its Own: Will “General AI” Be Like an Alien Invasion?*, BIG THINK (Feb. 25, 2022), <https://bigthink.com/the-future/general-ai-artificial-intelligence/>.

his article.⁸³ In the interim, though, what will happen when virtual singers like Lil Miquela and the members of Kingship do not need humans to animate their every move but instead can merely be fed lines or lyrics that software will automatically animate into a performance for them? Ten years from now, a virtual movie star may not be able to negotiate their own contracts, but what if film studios can simply place them into a virtual set, feed them lines from the screenplay, and click a button to let a software perform their dialogue like a non-player character in a video game? Chatbots programmed with artificial intelligence, natural language processing software, and machine learning are already used widely for customer service in industries from banking to healthcare.⁸⁴ And since the advent of ChatGPT, there has been widespread concern that AI will automate many white-collar jobs in the coming years.⁸⁵ It is not a stretch to imagine that a similar level of automation will arrive for actors and singers within the next decade.

In contrast to Beard's self-aware AI model for IVHs, let us define the near-future conception of virtual performance artists for the purposes of this Note. Our IVHs will run based on software programmed by human beings. When given a script, they will perform lines much like a text-to-speech program. In fact, this concept was already demonstrated over a decade ago with programs such as Xtranormal and GoAnimate, which allowed users to "pick out characters, voices, motions, backgrounds, and facial expressions" and then type dialogue for the software to animate.⁸⁶ However, the graphics of these programs were "simplistic" and the virtual actors "crude-looking."⁸⁷ Our hypothetical IVHs will be far more advanced and nearly indistinguishable from real human beings. Their motions and hand gestures will be fluid and their faces expressive. Perhaps they will begin by playing stoic, quiet roles until the technology becomes sufficiently advanced, but the day will come when these digital puppets are ready for more complex characters. The crucial defining aspect of these near-future IVHs is that they will be able to perform very human actions even with limited prompting from humans. In essence, they will be to the performing arts what ChatGPT is to writing.

⁸³ See Beard, *supra* note 3, at 1257.

⁸⁴ Meaghan Yuen, *Chatbot Market in 2022: Stats, Trends, and Companies in the Growing AI Chatbot Industry*, INSIDER INTEL. (Apr. 15, 2022), <https://www.insiderintelligence.com/insights/chatbot-market-stats-trends/>.

⁸⁵ See James Paul, *Are You Prepared For the Big Layoff? IBM CEO Believes ChatGPT Like AI's Will Takeover White Collar Jobs*, MASHABLE INDIA (Feb. 21, 2023), <https://in.mashable.com/ibm/47604/are-you-prepared-for-the-big-layoff-ibm-ceo-believes-chatgpt-like-ais-will-takeover-white-collar-job>.

⁸⁶ Ellen Gamerman, *Animation Nation*, WALL ST. J. (Feb. 11, 2011, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704858404576134203647487090>.

⁸⁷ *Id.*

To employ such an IVH in a film, moviemakers will have to digitally insert the synthesian into the shot most likely during post-production. However, it is possible for human actors to interact with entirely fictitious elements during filming itself by wearing virtual reality headsets.⁸⁸ During the production of Steven Spielberg's 2018 science fiction blockbuster *Ready Player One*, Industrial Light & Magic ("ILM") made "three-dimensional computer-generated" movie sets.⁸⁹ On these sets, the actors would walk around a "physical soundstage" while wearing VR headsets, which enabled them to see the digital environment as ILM had created it.⁹⁰ Theoretically, IVHs could be placed into such virtual sets, which would enable actors to directly face their digital costars while performing scenes. An effects supervisor will hit a key on a computer to prompt the IVH's line, and the human actor will respond accordingly with their own dialogue. Given the machine learning involved in chatbots, IVHs will likely be able to be programmed to read their next line after they detect that a human co-star has uttered theirs.

As the software advances, filmmakers will likely have far more complex options to choose from regarding how they want the IVH to perform its lines. Effects supervisors and directors may have control panels with hundreds of options for facial expressions and body language. Machine learning might make it possible to select a certain tone or attitude and let the IVH take it from there. Different IVHs may have different approaches to the same attitude, such as confrontational, shy, suspicious, and many more. These advancements could lead to filmmakers selecting different IVHs based on their programmed styles much like they currently audition and select human actors for contemporary movie roles.

In the virtual musician space, we can likely expect something similar. IVH singers and band members will be fed lines through whatever software dictates their commands, but the music and lyrics will still be composed and written by humans. Perhaps different IVH singers will perform even the same lyrics in their own unique way as individual pieces of software running code similar to MusicLM, which already has the power to generate music from text.⁹¹ Just as they would with virtual actors, this could lead to music producers licensing different IVH singers or bands

⁸⁸ See Richard Trenholm, *How Spielberg Used VR to Create Ready Player One's VR World*, CNET (Apr. 6, 2018, 1:55 AM), <https://www.cnet.com/culture/entertainment/ready-player-one-how-stein-spielberg-used-virtual-reality-to-create-vr-world/>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Cindy Gordon, *Is Google Displacing Musicians With Its New Generative AI System: Music LM? (Part 1 Of A 2 Part Series)*, FORBES (Jan. 29, 2023, 03:01 PM EST), <https://www.forbes.com/sites/cindygordon/2023/01/29/is-google-displacing-musicians-with-its-new-generative-ai-system-music-lm-part-1-of-a-2-part-article-series/?sh=683ab4141859>.

for projects (such as collaborations and duets) based on their different strengths and weaknesses.

Ultimately, one thing is almost certain based on the trajectory we have seen from the evolution in this space: near-future virtual celebrities will likely require less human input to perform actions than the ones that exist now (such as Lil Miquela and Kingship). It will still probably be some time—decades even—before IVHs can sign their own contracts, if ever. But we can expect them to be at least semi-automated in the next decade or so. All of this raises the question: if the near-future IVHs won't control themselves, who will hold the reins of their IP?

III. TREATING IVHs UNDER SOFTWARE COPYRIGHT AND IMAGE TRADEMARK

If IVHs become just another software tool used by movie studios and music producers, then it logically follows that they should be legally treated as software. In the United States, software is classified as a literary work, which means it is protected by federal copyright under 17 U.S.C. § 101.⁹² However, in the model most similar to the one proposed by this Note, Beard argues that IVHs should be treated like cartoon characters and receive copyright protection under that paradigm.⁹³ While this may seem a semantic difference, a cartoon model is ineffective. To critique it and contrast it with the software conception that is proposed here, this Note will first examine Beard's theory.

A. *The Beard Model*

Beard stresses that a cartoon character's entire essence "depends on its fixation in some medium, be it analog or . . . digital."⁹⁴ He contrasts this with an actual human being because a human's "very existence does not depend on [their] replication in some medium;" human beings exist in real life, whereas IVHs only inhabit the digital realm.⁹⁵ Beard posits that RVHs, based on actual people who have actually lived, will enjoy both copyright and right of publicity protections.⁹⁶ However, he argues that the federal government is unlikely to grant IVHs a right of publicity because it would then likely have to grant "such a right to corporations or other nonhuman entities."⁹⁷ Therefore, Beard states that IVHs will most likely

⁹² *Apple Comput. Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983).

⁹³ Beard, *supra* note 3, at 1257.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *Id.*

be protected only by copyright and trademark laws.⁹⁸ From my perspective, it also makes sense to disregard the right of publicity as relating to IVHs because in the near-future they will not be sentient enough to qualify as legal human beings anyway.

1. Beard's IVH Copyright Theory

Beard then lays out his conception of copyright protection for IVHs.⁹⁹ By treating them as animated cartoon characters, U.S. "law would protect the image of the IVH to the same extent . . . it would a cartoon character's."¹⁰⁰ Despite dismissing a right of publicity for IVHs earlier, Beard also posits that if IVHs have synthetic voices those voices may be entitled to copyright protection too, because voices of real people are subject to the voice owner's right of publicity.¹⁰¹ The right of publicity for real people lasts for life, and, depending on the state, for post-mortem terms that may extend for "up to 100 years after death."¹⁰² Therefore, under the Beard model, IVHs would be protectable for the "life of the author plus seventy years" or until seventy years after the last surviving author's death if the cartoon was created by more than one author.¹⁰³ The exception to this formula, Beard states, arises if the IVH is classified as a "work-for-hire," since then it would be protected until "ninety-five years from publication or 120 years from creation, whichever expire[s] first."¹⁰⁴ Beard does note that, depending on a state's post-mortem right of publicity laws, a hypothetical right of publicity may provide more protection than copyright in one state and less in others.¹⁰⁵

He then explores the definition of copyright as it relates to IVHs.¹⁰⁶ Federal copyright protections require only "that the work not be a copy of an existing work and that it have some modicum of creativity."¹⁰⁷ Beard admits the computer software underlying IVHs will be protected by copyright but argues that the "strongest protection" for IVHs will lie with protecting their "exterior" attributes that distinguish "one . . . from another."¹⁰⁸ As such, Beard argues that an IVH's physical characteristics

⁹⁸ *See id.*

⁹⁹ *See id.* at 1257-59.

¹⁰⁰ *Id.*

¹⁰¹ *See id.*

¹⁰² *Id.*; *see* Jahner, *supra* note 63.

¹⁰³ Beard, *supra* note 3, at 1257.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1257-58.

¹⁰⁶ *Id.* at 1257.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1265.

are copyrightable, particularly their facial features, gestures, voice, “and mannerisms.”¹⁰⁹

2. Exterior Copyright Factors to Determine Infringement

Beard then lays out the core of this “exterior” copyrightability. First are facial characteristics.¹¹⁰ Everything from cheekbones, nose shape, forehead size, hairstyle, and type of glasses frequently worn by a celebrity have been considered in right of publicity cases.¹¹¹ Oddly, Beard does not tie the facial features component specifically back to copyright or trademark for cartoons.¹¹²

Second is voice.¹¹³ Celebrity voices *have* “received protection under trademark . . . law,” such as Bette Midler’s and Tom Waits’s.¹¹⁴ Nevertheless, Beard stresses that the protectability of a celebrity’s voice depends on its “distinctiveness;” when a voice is not found to be “uniquely personal,” it will not qualify for IP protection.¹¹⁵ Here, again, Beard does little to explain when copyright *will* attach and focuses more explicitly on when it does *not* attach.¹¹⁶

Third are other physical characteristics.¹¹⁷ Courts have “consistently held” that these are protectable, even including Woody Allen’s distinctive physique.¹¹⁸ A celebrity’s build is also viewed as a determinative factor, such as the “portly build” of a famous chef¹¹⁹ and the “recognizable personae of overweight young singers” in a rap group.¹²⁰ Mannerisms, such as Charlie Chaplin’s body movements, “have also [been] given weight,” as have Elvis’s signature gyrations.¹²¹

Lastly, Beard describes ancillary identifiers.¹²² These may include clothing, such as the distinctive outfit of Dallas Cowboys cheerleaders or gold name necklaces worn by rappers.¹²³ They may include “the setting in

¹⁰⁹ *Id.* at 1260.

¹¹⁰ *See id.* at 1266.

¹¹¹ *Id.* at 1266-67.

¹¹² *See id.*

¹¹³ *Id.* at 1267.

¹¹⁴ *Id.*; *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106 (9th Cir. 1992).

¹¹⁵ *Beard, supra* note 3, at 1267.

¹¹⁶ *See id.*

¹¹⁷ *Id.* at 1268.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (quoting *Prudhomme v. Procter & Gamble Co.*, 800 F. Supp. 390, 393-95 (E.D. La. 1992)).

¹²⁰ *Id.* (quoting *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 833 (S.D.N.Y. 1990)).

¹²¹ *Id.*

¹²² *Id.* at 1269.

¹²³ *Id.*

which a character is portrayed” such as depicting Muhammad Ali in a boxing ring.¹²⁴ Signature props that celebrities often use are also “indicative of a famous personality,” like Chaplin’s cane or the “instantly recognizable” game board of a Wheel of Fortune set.¹²⁵ Beard posits that IVH makers who endow their creations with “distinctive facial characteristics, voice, dress, and accessories” stand the best chance of “receiving protection under copyright and trademark law.”¹²⁶ However, he notes that if a digital thespian has features that are too unusual, it may “detract from [them] playing a variety of roles” and damage their usability as “[a]n all purpose synthetic actor.”¹²⁷ Therefore, IVH creators would have to balance the particularity of their product’s features with its multipurpose functionality.¹²⁸

B. *Why Software?*

With Beard’s model laid out, this Note now turns to why focusing on software copyright as the dominant mode for viewing IVHs in terms of intellectual property law is a preferable conception. First, I begin by pointing out the flaws in Beard’s analysis.

1. Critiquing the Beard Model

Ultimately, Beard’s model is inherently flawed. Even though he stresses that the exterior appearance of an IVH is more important for IP protection purposes by likening IVHs to cartoon characters, Beard does not actually apply any of his four infringement factors back to cartoons. He only discusses facial characteristics, voice, physical characteristics, and ancillary identifiers in relation to actual human beings¹²⁹ instead of relating this framework to an animated character like Homer Simpson or SpongeBob SquarePants. Beard spends a great deal of time comparing cartoon characters to real humans with regards to the right of publicity¹³⁰ while dodging his main conceit about copyright instead of tackling it head on.

He also does not sufficiently explain why “exterior” protections are more important than the underlying software copyright, which he does concede will exist.¹³¹ Creating an IVH that looks similar, albeit not

¹²⁴ *Id.*

¹²⁵ *Id.* at 1270

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See id.* at 1270-71.

¹²⁹ *See id.* at 1265-1271.

¹³⁰ *See id.* at 1254-1265.

¹³¹ *See id.* at 1265.

identical, to a well-known digital celebrity would be in practice no different than casting an actor or actress who is similar in appearance to a more popular star. The performer themselves is ultimately what matters—or, in this case, the tech underlying the performance. If the software itself is stolen by another company and used to create a similar IVH, then that company would be committing a clear copyright violation and potentially an act of corporate espionage. Additionally, enabling people to sue anyone who creates a similar-looking IVH could discourage competition between software developers to create the best, most advanced virtual performers. Even if two sets of software produce similar-looking IVHs, so long as each party can prove that it used its own code, there should be no violation found. In an extreme scenario, if a competitor went so far as to give its derivative IVH the same name as a more popular one (especially a more popular one that their IVH closely resembles in appearance), the competitor would logically violate trademark law. It would presumably be akin to Apple naming its Pages word processing software “Word,” even though its competitor Microsoft already uses that name for its similar program.

Further, Beard is inconsistent in the level of artificial intelligence that he attributes to his IVHs. It seems at times that Beard views them as advanced AIs, specifically referring to them as “new ‘life-forms’” not unlike the synthetic creatures in *Island of Terror*.¹³² Beard also predicts that they will pass the Turing Test used to measure AI sentience.¹³³ Yet he fails to describe how a living organism is similar to a cartoon character, a human-created entity, that, by his own admission, only exists in either an analog or digital medium.¹³⁴ It seems that Beard oscillates between viewing IVHs as semi-sentient and viewing them as licensable software (albeit advanced) owned and guided by human beings, similar to this Note’s own near-future conception of IVHs. Nor does Beard elucidate how exactly a “work-for-hire” situation would operate with an IVH, such as who would be responsible for licensing out the IVH in the first place if it has attained a level of sentience.¹³⁵

2. Differences Between the Proposed Model and Beard’s

Perhaps most importantly, Beard talks of IVHs becoming indistinguishable from humans and passing the Turing Test, making them for all intents and purposes sentient beings.¹³⁶ This stands in stark contrast

¹³² *See id.* at 1254.

¹³³ *Id.* at 1253.

¹³⁴ *Id.* at 1257.

¹³⁵ *See id.*

¹³⁶ *Id.* at 1253.

to the proposed model where virtual performers are *not* sentient in any way but merely responsive computer programs who, not unlike non-player characters in a video game, can be instructed to do a variety of tasks (either in a digital environment or via a projection into the real world), including speaking lines from screenplays or singing human-written lyrics.

Additionally, this Note focuses on the underlying software of an IVH because, until virtual celebrities gain human-level self-awareness and intelligence, they will continue to be tools used by existing persons. Right now, every image an IVH influencer posts on Instagram, every song they perform, and every dialogue line they utter is crafted by a team of human content creators. Although in the near future IVHs will likely become more advanced and will not need *as much* human input (as discussed in Part II), they will still likely require human input to initiate their basic functions. Unlike Beard, this Note does not explore IVHs as pseudo-persons but as merely another digital tool in filmmakers' and music producers' arsenals.

Even with that foundation established, one may ask: Why not embrace a near-term cartoon model? Ultimately, IVHs are too dissimilar from cartoon characters. Beard *did* admit that cartoons exist in a fixed medium, unlike people, but what he did not stress enough is that they usually *originate* in works of fiction.¹³⁷ While it *is* true that a cartoon representation can be made from an actual human being, IVHs are different in that they have no basis in real life or fiction whatsoever. Their existence is created first and foremost for their capacity to perform tasks with real world effects. They are, in essence, fictional characters created for the story that is reality. They are not representations or pantomimes. Even when cartoon characters are made into plush toys or when people dress up as cartoons at amusement parks (owned by the corporation that holds or has licensed the rights to said cartoon), these tangible, "real-world" appearances are all made to reference a source—either the piece of animated fiction in which the character initially appeared or, occasionally, a real person whom they represent and possibly parody.

In contrast to this, if a virtual singer sells tickets to a real concert at a real venue, and appears onstage via hologram, then the singer's fans would not be in attendance in reference to some work of fiction or pre-existing person. They would view the virtual singer as a contemporary of actual human singers, because both exist in the concertgoers' minds as real-world artists, albeit perhaps to varying degrees. The virtual singer or actor is *meant* to be considered a real-world performer on their own merits—just

¹³⁷ *Id.* at 1257.

as AI art is meant to be viewed as a type of real art¹³⁸—unlike someone dressing up as a cartoon, which is meant to invoke a reference to another medium or another individual. The purpose of our hypothetical IVH is to automate a profession performed by real people without the need for human motion capture underlying its performance. The purpose of the animated cartoon character is to fulfill a role in a cartoon television show, movie, or Internet sketch.¹³⁹

Apart from their core purpose, the legal ramifications of IVHs differ from cartoons as well. One may ask why licensing out a cartoon character is any different from licensing out an IVH. Even Beard admitted that under his cartoon model the underlying software would still be copyrighted.¹⁴⁰ Yet, we have already established why Beard’s hyperfocus on the IVH’s appearance is flawed.¹⁴¹ Beyond that, it is crucial to recognize that although IVH singers will likely adopt one persona and stick with it in order to develop a fanbase, IVH actors, much like human thespians, will be designed to play a variety of roles across a variety of projects in various genres. Fictional characters may “play” other characters in some media, such as *Family Guy*’s “Blue Harvest” episode where the lead characters played the parts of the heroes and villains in *Star Wars*¹⁴² or, although not animated, one of the Muppet films where the characters were recast in other roles.¹⁴³ However, when doing so, these characters are still playing other roles *in a work of fiction that is part of their own franchise*. A film like *Muppet Treasure Island* is still a Muppet movie, and “Blue Harvest” was still an episode of *Family Guy*. Meanwhile, actors play different roles across franchises, and, to fulfill their role as substitutes for human actors, IVHs will do the same.

That is not to say cartoon characters are *incapable* of appearing in media outside of their respective franchises. Although characters are usually kept “in house,” so to speak, this becomes difficult when copyrights expire. A recent example of this is *Winnie the Pooh: Blood and Honey*, which took the beloved children’s character Winnie the Pooh and

¹³⁸ See Rachel Metz, *Is AI Art Really Art? This California Gallery Says Yes*, CNN BUS. (Nov. 20, 2022, 10:18 AM), <https://www.cnn.com/2022/11/20/tech/ai-art-exhibit-ctpg/index.html>.

¹³⁹ See Beard, *supra* note 3, at 1267.

¹⁴⁰ See *id.* at 1265.

¹⁴¹ See *supra* Part III, Critiquing the Beard Model.

¹⁴² FAMILY GUY: BLUE HARVEST (Fox television broadcast Sep. 23, 2007).

¹⁴³ See, e.g., MUPPET TREASURE ISLAND (Walt Disney Pictures 1996) (in which the Muppet characters play the roles of characters from Robert Louis Stevenson’s novel *Treasure Island*).

depicted him as a murderous slasher villain.¹⁴⁴ Other characters such as Donald Duck, Superman, and James Bond will enter the U.S. public domain in 2029, 2033, and 2034 respectively.¹⁴⁵ There is a possibility that these characters could also be legally used in stories in ways counter to their original purpose and brand.¹⁴⁶ Hypothetically, this could apply to IVHs too under either a cartoon or software framework because both are protected by copyright, which does not last forever. Yet the purpose between cartoons and IVH software are different, which is why the different forms of copyright protection serve different ends. The purpose of the IVH is for its creators to make a piece of software that can be licensed to different filmmakers or music producers, therefore earning more profits. The purpose of cartoon characters as part of a franchise is to create recognizable personas to which fans become attached, making it more likely that they will continue to consume branded content for that franchise.

Additionally, since copyright lasts for ninety-five years from the year of the work's first publication,¹⁴⁷ it stands to reason that by the time the copyright on the IVH's software expires there will be far, far more advanced IVHs, and the code would not be worth much anyway. By then, the corporations making IVHs will have created newer software to make virtual celebrities, which would have copyright protections extending well beyond the initial IVH software publication date. However, if IVHs were copyrighted as characters their protections would expire. So long as the IVHs are powered with newer software, a corporation could hypothetically keep an IVH as theirs forever by remaking that IVH with new software. The older version of the IVH software would enter the public domain but would likely pale in comparison to the capacity and function of the updated iterations. With regard to the look and name of the IVH, the trademark protection afforded to the IVH owner will never wane so long as the IVH is continuously used in commerce and certain documents are filed with the U.S. Patent and Trademark Office at "regular intervals."¹⁴⁸

¹⁴⁴ Michael Grothaus, *After Winnie the Pooh, These Other Characters Will Soon Enter the Public Domain*, FAST CO. (Feb. 21, 2023), <https://www.fastcompany.com/90853397/winnie-the-pooh-public-domain-mickey-mouse-superman>.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

¹⁴⁷ *How Long Does Copyright Protection Last?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-duration.html> (last visited Feb. 21, 2023).

¹⁴⁸ *Keeping Your Registration Alive*, U.S. PAT. AND TRADEMARK OFF., <https://www.uspto.gov/trademarks/maintain/keeping-your-registration-alive> (last visited Feb. 21, 2023).

3. Protecting the Rights of Content Creators

Focusing on protecting IVHs as software more closely aligns with protecting the rights of the content creators who have brought these virtual celebrities into existence in the first place. To protect software, we turn to copyright and trademark law.

In the United States, software has been viewed as a literary work and given copyright protection since the 1980s.¹⁴⁹ In *Apple Computer Inc. v. Franklin Computer Corp.*, the Third Circuit was presented with a case where a competitor to Apple had deliberately copied Apple's computer programs (a fact which the competitor even admitted), and Apple sued them for copyright infringement.¹⁵⁰ In 1980, amendments to the Copyright Act had classified a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."¹⁵¹ The Third Circuit reasoned that it had previously "considered the issue of copyright protection for a computer program in" the case *Williams Electronics, Inc. v. Artic International, Inc.*, where it found that the 1980 amendment to the Copyright Act definitively recognized the "copyrightability of computer programs."¹⁵² Having accepted this premise, the Third Circuit then declared that both the object code and source code of computer programs are literary works and are "protected from unauthorized copying."¹⁵³

Therefore, under this paradigm, IVHs would absolutely be protected through copyright. They are computer programs that will carry out functions based on code, and this underlying code will be considered a literary work by law. A competitor may be able to make similar software to design their own virtual performers, but those IVHs will have to be made from that competitor's own source code. Recognizing and protecting the underlying code gets around the idiosyncrasies of Beard's face-voice-appearance model in a predictable, irreducible fashion.

Also, trademark protections will likely be able to safeguard an IVH's name from infringement so long as the IVH owner can clearly demonstrate that the name is being used to "distinguish . . . the creator's goods and services."¹⁵⁴ For example, the phrase "MIQUELA" has been trademarked

¹⁴⁹ *Apple Comput. Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983).

¹⁵⁰ *Id.* at 1245.

¹⁵¹ *Id.* at 1247 (quoting 17 U.S.C. §101).

¹⁵² *Id.* at 1248 (quoting *Williams Elecs., Inc. v. Arctic Int'l, Inc.*, 685 F.2d 870, 875 (3d Cir. 1982)).

¹⁵³ *Id.* at 1249.

¹⁵⁴ *Pixel Perfect: The Legal Implications of Virtual Influencers and Supermodels*, ROBINS KAPLAN LLP (Summer 2019), <https://www.robinskaplan.com/resources/publications/2019/09/pixel-perfect-the-legal-implications-of-virtual-influencers-and-supermodels>.

with regard to virtual influencers.¹⁵⁵ Therefore, even if a competitor creates a similar-looking IVH with their own code, they will still be unable to copy another IVH's name and capitalize off that IVH's brand without violating the law. Furthermore, the IVH's visual appearance itself may be able to be trademarked too, because the "image of a 'person' or character can" qualify for trademark protection where the image "functions as an individual's or company's logo."¹⁵⁶ To maximize their protections, corporations could possibly set up a subsidiary company for each IVH they own so that each IVH would be trademarked as the logo of that subsidiary. Registering and maintaining this trademark would provide "additional protections" for the purposes of litigation, such as "nationwide protection and a presumption of validity."¹⁵⁷ Between copyright and trademark law, treating IVHs as software should be more than sufficient to protect the rights of the content creators behind the virtual celebrities.

Lastly, treating IVHs as software would be the easiest framework to implement and enforce because it is an extension of the framework we already have today. Presently, any money made by a virtual performer "flows to the owner of the avatar," be it a corporation or an individual.¹⁵⁸ Why should this change in the near future when the performer is an imaginary virtual human? If a company creates a digital actor and film studios "hire" that actor to star in a film of theirs, paying the copyright owner of the digital actor for his use simply makes sense. How would this be any different from a software company, such as Adobe, licensing out one of its products, such as Premiere Pro editing software, to a film studio? Both would be used in the production of a film. In both cases, there are no royalties paid to the holder of the software copyright. Both editing software and IVHs are technological tools used to create movies. Just as paying a Creative Cloud¹⁵⁹ subscription allows filmmakers to keep having access to the Premiere Pro editing software, paying to license an IVH from its corporate owner will allow filmmakers to keep using that IVH for acting in their movies. By treating non-sentient IVHs as software, there is already a tried-and-true framework in place for how creators (and IP owners) are compensated.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Chan, *supra* note 40.

¹⁵⁹ Adobe, *Creative Cloud*, <https://www.adobe.com/creativecloud.html> (last visited Dec. 1, 2023).

CONCLUSION

A future where movie stars on our screens and singers on our concert stages are not human rapidly approaches. In some respects, it is already here. What began in 1987 with the experimental film *Rendez-Vous à Montréal* has progressed to the virtual influencers and bands of today. We live in a world where deepfakes can impose one actor's face over another's, and stars sign away rights to their voice so that they can continue to play characters like Darth Vader from beyond the grave. Tomorrow, names like Lil Miquela and Kingship may not only be amusing Internet oddities but household names with chart-topping hits. Entirely invented digital persons may star in blockbuster movies alongside human A-listers like Tom Cruise and digitally resurrected Hollywood legends like Humphrey Bogart.

While Beard makes a case for imaginary virtual humans to be treated legally akin to cartoon characters, his analysis is flawed and his contention unnecessary. He insufficiently compares virtual humans to cartoon characters in both form and function and even admits that software copyright will be a factor. Software copyright along with name and image trademark should more than suffice as a framework for licensing and protecting the digital celebrities of tomorrow.

There may come a time beyond the near-future term we have discussed here when IVHs *are* sentient entities capable of signing their own contracts and choosing their own projects. At that point, they will likely be considered legal persons and would not be classified as another individual or corporation's intellectual property, but AI personhood is an entirely other discussion for an entirely different day. Until then, sit back, grab some popcorn, and watch the movies.