

## WHAT'S WRONG WITH THIS PICTURE?

### DEAD OR ALIVE: PROTECTING ACTORS IN THE AGE OF VIRTUAL REANIMATION

#### I. INTRODUCTION

On Sunday, September 19, 2004, the movie *Sky Captain and the World of Tomorrow*<sup>1</sup> (“*Sky Captain*”) opened number one at the box office, taking in a total of sixteen million dollars for the weekend.<sup>2</sup> The opening was notable not because of the relatively modest box office total, but because this stylish, almost totally computer-generated movie includes scenes performed by Sir Laurence Olivier, a celebrity actor who has been dead since 1989.<sup>3</sup> While audiences are used to seeing living actors placed alongside dead celebrities in films,<sup>4</sup> commercials,<sup>5</sup> and music videos,<sup>6</sup> *Sky Captain* marks the first time a dead actor’s reanimated clone<sup>7</sup> performs completely original scenes—scenes the actor never performed when he or she was alive.<sup>8</sup> *Sky Captain* showcases the latest step in the technological push toward what some call the “holy grail”<sup>9</sup> of reanimation—“virtual

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1. SKY CAPTAIN AND THE WORLD OF TOMORROW (Paramount Pictures 2004).

2. See Gabriel Snyder, “*Sky*” *High at \$16 Mil; Bernie Mac Pic Leads Sports Contenders*, DAILY VARIETY, Sept. 19, 2004.

3. See Stuart Klawans, *Ideas & Trends: Dead Stars, Alive Again; Yes, Marilyn May Fall in Love With Viggo*, N.Y. TIMES, Aug. 1, 2004, § 4 at 4.

4. See Jol A. Silversmith, *Photographic Evidence, Naked Children, and Dead Celebrities: Digital Forgery and the Law*, Part III (Apr. 1998), at <http://www.thirdamendment.com/celebrities.html>; see also Woody Allen’s ZELIG (Orion Pictures 1983).

5. See *id.* (citing Carl Reiner’s DEAD MEN DON’T WEAR PLAID (Universal 1982)); see also Kevin Goldman, *Dead Celebrities Are Resurrected As Pitchmen*, WALL ST. J., Jan. 7, 1994, at B1 (citing advertising commercials featuring Humphrey Bogart for khaki trousers; Louis Armstrong, James Cagney, and Carey Grant for Diet Coke).

6. See Silversmith, *supra* note 4 (listing music videos in which digital clones have been used).

7. For the purposes of this article, the terms virtual human, reanimated clone, synthespian, and virtual clone all refer to the computer-generated model of a person’s identifiable image or persona.

8. See Klawans, *supra* note 3.

9. See Frederick Rose, *Who Needs Actors? Computers May One Day Create Believable Characters. But They Aren’t There Yet.*, WALL ST. J., Sept. 15, 1995 at R8 (“[R]ight now that

humans who can see, speak, hear, touch and be touched, exhibit behavior, and think just as we do.”<sup>10</sup>

The fact is that virtual actors have been around for two decades. Marilyn Monroe was the first celebrity *synthespian*<sup>11</sup> in the 1987 independent film *Rendezvous in Montreal*.<sup>12</sup> More recently, Tom Hanks interacted with John F. Kennedy, Richard Nixon, John Lennon, and George Wallace in *Forrest Gump*.<sup>13</sup> Audiences have seen virtual humans as terrified passengers in *Titanic*<sup>14</sup> and as victims in *Jurassic Park*.<sup>15</sup> In the latter film, actor Robert Patrick’s digital clone, which debuted as the liquid metal cyborg in *Terminator 2: Judgment Day*,<sup>16</sup> doubled as T-Rex’s meal.<sup>17</sup> Digital technology has made it possible to watch Elton John acting with James Cagney, Humphrey Bogart, and Louis Armstrong for Diet Coke;<sup>18</sup> Paula Abdul sharing a Coca-Cola with Cary Grant;<sup>19</sup> John Wayne selling Coors beer;<sup>20</sup> and Steve McQueen driving the 2005 Ford Mustang.<sup>21</sup> Virtual actors are also used everyday in non-entertainment activities such as medical research,<sup>22</sup> anti-terrorism training,<sup>23</sup> and others—only the imagination limits the possibilities.<sup>24</sup>

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holy grail is the digital actor and digital creature.”).

10. Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 49 J. COPYRIGHT SOC’Y U.S.A. 441, 444 (2001).

11. See generally Karen Kaplan, *Old Actors Never Die; They Just Get Digitized*, L.A. TIMES, Aug. 9, 1999 (defining the term “synthespian”); see also THE WORD SPY, *Synthespian*, at <http://www.wordspy.com/words/synthespian.asp>.

12. See Klawans, *supra* note 3 (noting that the short film featured digital versions of Marilyn Monroe and Humphrey Bogart).

13. See David Einstein, *Computers Transform Tinseltown*, S.F. CHRON., May 8, 1995, at B1.

14. See Beard, *supra* note 10, at 446.

15. *Id.*

16. *Id.*

17. *Id.*

18. See Silversmith, *supra* note 4; see generally Denise Gellene, *TV Spots Feature Dead Celebrities*, CHICAGO SUN-TIMES, Sept. 15, 1997, at 53 (covering the general trend of using dead celebrities as “pitchmen”).

19. See Silversmith, *supra* note 4.

20. See Gellene, *supra* note 18.

21. See Jeremy Peters & Danny Hakim, *Advertising: Is that Steve McQueen in the Cornfield? Yes, Brought Back by Ford.*, N.Y. TIMES, Oct. 15, 2004, at C3.

22. See Chua Gim Guan et. al., *Volume-based Tumor Neurosurgery Planning in the Virtual Workbench*, Symposium, PROCEEDINGS, IEEE VIRTUAL REALITY INTERNATIONAL SYMPOSIUM 167 (1998) (describing how the Singapore General and John Hopkins Hospital uses virtual reality when planning surgeries); see also the website for MOTTEK, a company specializing in motion capture technology in the medical field, at <http://www.e-motek.com/medical/index.htm>.

23. See Beard, *supra* note 10, at 446.

24. See *id.* at 447.

When the technology matures, it may become impossible to distinguish the authorized audio-visual representations of actors from their potentially unauthorized virtual clones.<sup>25</sup> If so, it is not difficult to predict the range of unauthorized shenanigans that may be possible.<sup>26</sup> After all, there are advantages to employing virtual actors: they show up on time, perform any kind of scene (including pornography)<sup>27</sup> without complaint,<sup>28</sup> they cannot sue, require no rest, and are always available to perform. Additionally, synthespians can perform dangerous stunts that would kill a living actor,<sup>29</sup> and if an actor dies during production, his or her virtual stand-in can finish the movie.<sup>30</sup>

The legal system has historically “reacted to, rather than anticipated” technological innovation.<sup>31</sup> Reanimation raises legal issues that pre-existing case law does not adequately address. Therefore, it is critical to the preservation of actors’ dignity, as well as their income, to develop legal safeguards that will protect them—dead or alive. This comment will focus on human actors’ rights,<sup>32</sup> and analyze the legal implications the digital world imposes upon them. Part II will generally describe the historical development of the law that has been applied to actors’ issues: right of publicity law, copyright law, the fair use doctrine, and the Lanham Act. Part III will analyze and compare the lines of legal arguments regarding

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25. *Id.* at 529 (stating that eventually imaginary virtual humans will be indistinguishable from visual and audio representations of real humans, such that they will pass the “Turing Test”).

26. See Erin Giacoppo, Note, *Avoiding the Tragedy of Frankenstein: The Application of the Right of Publicity to the Use of Digitally Reproduced Actors in Film*, 48 HASTINGS L.J. 601, 626 (1997).

27. See Joseph D. Schleimer, *Problems Encountered in Protecting Living and Deceased Actors’ ‘Virtual Rights’*, 16 ENT. L. & FIN. 1, 6 (Oct. 2000) (contemplating an adult film starring the virtual clones of John F. Kennedy and Marilyn Monroe), available at <http://www.schleimerlaw.com/ELF2Synthespians.htm>.

28. See Dave Kehr, *The Face That Launched a Thousand Chips*, N.Y. TIMES, Oct. 24, 2004, § 2, at 1 (describing how virtual actors will never be in their trailers, are always in character, eliminate the risk and bother of working with child actors, and a director doesn’t have to “stand there in front of the actor and convince him to do it your way”).

29. See Paula Parisi, *Shot by an Outlaw*, WIRED, Sept. 1996, at <http://www.wired.com/wired/archive/4.09/billups.html>.

30. See Joseph D. Schleimer, *Part II: Aggressive Lawyering to Protect the “Virtual Rights” of Living and Deceased Actors*, 16 ENT. L. & FIN. (Feb. 2001) (recounting how an entire computer-generated scene was created when Oliver Reed died during production of GLADIATOR), at <http://www.schleimerlaw.com/SynthespiansII.htm>; Silversmith, *supra* note 4, (stating that “[d]igital imagery reputedly saved the 1994 film THE CROW, after its star, Brandon Lee was killed” during filming); see also Giacoppo, *supra* note 26, at 607.

31. 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, 106 (1993).

32. Human actors are living or deceased actors, as compared to silicon-based computer-generated “virtual” actors.

actors' rights, focusing particularly on the constitutional issues of the right of publicity, the commercial versus noncommercial issue, and the balancing tests courts have used in their decisions. Part IV will critique the effectiveness of the current law when applied to virtual clones and make three suggestions for the protection of actors: (1) an actor should be considered an "entire performance," according to *Zacchini v. Scripps-Howard Broadcasting, Co.*<sup>33</sup>; (2) a virtual clone should be considered a hybrid legal concept under current law, because a virtual clone removes the idea/expression dichotomy and contains principles from both copyright and right of publicity in inextricable combination; and (3) a complex, multi-factored balancing test, which borrows from the fair use doctrine, is suggested for analyzing the multitude of issues that will arise in cases involving virtual actors. Part V will conclude that new preemptive federal law will probably be necessary in order to consistently protect actors in the virtual age.

## II. OVERVIEW OF THE RELEVANT LAW

### A. *The Right of Publicity is the Offspring of the Right of Privacy*

#### 1. The Right of Privacy

The right of privacy is generally credited to the seminal article written by Professors Warren and Brandeis and published in the *Harvard Law Review* in 1890.<sup>34</sup> New York enacted the first right to privacy statute<sup>35</sup> as a reaction to the 1902 case *Roberson v. Rochester Folding Box, Co.*<sup>36</sup> In *Roberson*, the New York Court of Appeals considered the professors' proposition, but held that a common law right to privacy would result in a "vast amount of litigation . . . bordering upon the absurd."<sup>37</sup> Other courts

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33. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (citing the only Supreme Court case dealing with, and supporting, a performer's right of publicity).

34. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (offering the first clear argument for a distinct right to privacy). See generally 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 8:74 (2d ed. 2003); RESTATEMENT OF TORTS (SECOND) § 652A (1977); CAL. CONST. art. I, § 1 (establishing a self-executing right of privacy: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

35. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2002).

36. *Roberson v. Rochester Folding Box, Co.*, 64 N.E. 442 (N.Y. 1902) (establishing criminal liability and civil liability with injunctive, compensatory, and punitive relief).

37. *Id.* at 443.

have generally interpreted the common law right of privacy narrowly as the protection of dignitary and emotional interests—“the right to be let alone.”<sup>38</sup> By 1960, however, the “right of privacy had evolved into four distinct categories of invasion, as identified by Dean Prosser: (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.”<sup>39</sup>

## 2. The Right of Publicity

Dean Prosser’s fourth category above—the theory of misappropriation—spawned the “right of publicity,”<sup>40</sup> and established the “inherent right of every human being to control the commercial use of his or her identity.”<sup>41</sup> A separate, cognizable right of publicity was first recognized by the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>42</sup> The following year, in a highly influential article, Melville Nimmer<sup>43</sup> argued that laws of privacy, unfair competition, and contract were inadequate to protect the commercial interests of a celebrity’s persona,<sup>44</sup> and he urged courts and legislatures to adopt the right of publicity that *Haelan* enumerated.<sup>45</sup> Since *Haelan*, although some courts have focused on the protection of “dignitary” rights,<sup>46</sup> case law and statutes have focused almost exclusively on the commercial interest of the right’s holder. “[C]ases . . . held that a celebrity has a publicity interest in her likeness, allowing her to recover when companies publish advertisements that include her picture,<sup>47</sup> voice,<sup>48</sup> or an image intended to evoke the

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38. See Scott Jon Shagin & Matthew Savare, *The Right of Publicity: Bailing the Haystack*, in *ADVANCED SEMINAR ON COPYRIGHT LAW* 641, 647 (Practising Law Inst. ed. 2004).

39. Brief of Amicus Curiae of the Screen Actors Guild, Inc., at 3, *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (quoting William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960)).

40. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (recognizing the right of publicity as a separate and distinct commercial tort).

41. See 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2004).

42. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

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

44. *Id.* at 204.

45. See Nimmer, *supra* note 43.

46. See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 706 (Ga. 1982) (holding it was immaterial whether the owner commercially exploited King’s image prior to King’s death).

47. See Carissa Byrne Hessick, *The Right of Publicity in Digitally Produced Images: How*

identity of the celebrity.”<sup>49</sup> Thus, misappropriation, embodied in right of publicity legislation, has commonly been recognized as an intellectual property right.<sup>50</sup>

### B. *Right of Publicity Laws Are Governed by the States*

“There is no federal right of publicity and no likelihood of enactment of such legislation in the near term.”<sup>51</sup> Publicity laws are creations of state governments, and they exist in twenty-eight states, as common law, statutory law, or both.<sup>52</sup> Doctrinally, right of publicity laws are a “disjunctive morass,” because “[t]he state of the law is still that of a haystack in a hurricane.”<sup>53</sup> In other words, the law is literally all over the map. For example, “[s]ome states consider the right of publicity to be a property type right,” while “others regard it as a personal tort type right”<sup>54</sup> stemming from the right to privacy. New York, most notably, does not expressly recognize the right of publicity, but incorporates it as a privacy right within its civil rights law.<sup>55</sup>

#### 1. Statutory law

The eighteen states that have enacted statutory protection differ on the extent of the protection, its descendability, the duration of any postmortem protection, its application to non-celebrities, and the available remedies for violations.<sup>56</sup> For example, Indiana offers the broadest right of publicity

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*the First Amendment Is Being Used to Pick Celebrities' Pockets*, 10 UCLA ENT. L. REV. 1, 3 (2002) (citing *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692-93 (9th Cir. 1998)).

48. *Id.* (citing *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988), where the court allowed “recovery for use in commercial of ‘sound-alike’ rendition of song [Midler] had recorded”).

49. *Id.* (citing *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992)).

50. See *Shagin & Savare*, *supra* note 38, at 649; see, e.g., *Comedy III Prods., Inc., v. Gary Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001) (stating that the right of publicity is essentially an economic right, and the right to prevent others from misappropriating the economic value generated by the celebrity’s fame through the merchandising of the “‘name, voice, signature, photograph, or likeness’ of the celebrity”); see also *Hessick*, *supra* note 47, at 9.

51. *Beard*, *supra* note 10, at 516.

52. See *Shagin & Savare*, *supra* note 38, at 641.

53. *Id.* at 641 (citing *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481 (3d Cir. 1956)).

54. *Id.* at 646.

55. *Id.*

56. Statutory right of publicity is recognized in the following states: California (CAL. CIV. CODE § 3344–3344.1 (West 2004)), Florida (FLA. STAT. ANN. § 540.08 (West 2002)), Illinois (765 ILL. COMP. STAT. 1075/1 (West 2002)), Indiana (IND. CODE ANN. § 32–36–1–1 (Michie 2002)), Kentucky (KY. REV. STAT. ANN. § 391.170 (Michie 2001)), Massachusetts (MASS. GEN. LAWS. ANN. CH. 214, § 3A (West 2002)), Nebraska (NEB. REV. STAT. ANN. § 20–201 (Michie

protection; its statute protects a personality's economic interest in his name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms."<sup>57</sup> California limits its protection to unauthorized usage of name, voice, signature, photograph, or likeness.<sup>58</sup> It is also interesting to note that many states' right of publicity statutes, like California's, exempt use in *film*, and hence, do not apply to motion pictures.<sup>59</sup> Kentucky limits its right of publicity protection to unauthorized appropriations of name and likeness,<sup>60</sup> while New York protects against the unauthorized use of name, portrait, picture, or voice. However, as mentioned previously, New York's right of publicity protection is incorporated within its civil rights law.<sup>61</sup>

## 2. Common Law

Common law right of publicity protection is generally more expansive than state statutory law. In *White v. Samsung Electronics America, Inc.*,<sup>62</sup> for example, the defendant created advertising for its electronics products that featured a robot dressed similarly to Vanna White<sup>63</sup> standing next to a game board that resembled the *Wheel of Fortune* board, with a caption, "Longest-running Game Show. 2012 A.D."<sup>64</sup> The Ninth Circuit Court ultimately affirmed the lower court's dismissal of the

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2002)), Nevada (NEV. REV. STAT. ANN. § 597.770 (Michie 2002)), New York (N.Y. CIV. RIGHTS LAW § 50 (McKinney 2002)), Ohio (OHIO REV. CODE ANN. § 2741.01 (Anderson 2000)), Oklahoma (OKLA. STAT. ANN. TIT. 21, § 839.1 (West 2001)), Rhode Island (R.I. GEN. LAWS § 9-1-28.1 (Michie 2001)), Tennessee (TENN. CODE ANN. § 47-25-1101 (2001)), Texas (TEX. PROP. CODE ANN. § 26.001 (Vernon 2000)), Utah (UTAH CODE ANN. § 45-3-1 (2002)), Virginia (VA. CODE ANN. § 8.01-40 (Michie 2002)), Washington (WASH. REV. CODE ANN. § 63.60.010 (West 2002)), and Wisconsin (WIS. STAT. ANN. § 895.50 (West 2001)). Shagin & Savare, *supra* note 38, at 641 n.2.

Common law right of publicity is recognized in the following states: Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin. *Id.* n.1.

The states that recognize both a statutory and common law right of publicity are: California, Florida, Illinois, Kentucky, Ohio, Texas, Utah, and Wisconsin. *Id.* n.3.

57. IND. CODE ANN. § 32-36-1-1 (Michie 2002).

58. CAL. CIV. CODE § 3344-3344.1 (West 2004).

59. See CAL. CIV. CODE § 3344.1 (statute covering deceased celebrities exempts film); Gerald O. Sweeney, Jr. & John T. Williams, *Mortal Kombat: The Impact of Digital Technology on the Rights of Studios and Actors to Images and Derivative Works*, 17 No.1 ENT. & SPORTS LAWYER. 1, 20 (1999) (citing CAL. CIV. CODE § 3344 (West 2004)).

60. KY. REV. STAT. ANN. § 391.170 (Michie 2004).

61. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2002).

62. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

63. *Id.* at 1396 (referring to the game-show hostess).

64. *Id.*

statutory right of publicity claim, but upheld White's common law claim, saying "[i]t is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so."<sup>65</sup> Similarly, Johnny Carson<sup>66</sup> sued the maker and marketer of portable toilets dubbed "Here's Johnny: The World's Foremost Comedian," claiming that the usage appropriated his signature *Tonight Show*<sup>67</sup> greeting without his permission.<sup>68</sup> The Sixth Circuit Court of Appeals ultimately held that it was a violation of Mr. Carson's common law right of publicity. Other courts have held that the unauthorized use of a nickname,<sup>69</sup> character name,<sup>70</sup> and even a recognizable race car<sup>71</sup> that was associated with a specific driver (even though the driver was not shown) held substantial enough identification value to be a violation of a celebrity's right to publicity under common law right of publicity.

### 3. Postmortem Protection

Thirteen states, including California, have expressly recognized the descendability of the right of publicity,<sup>72</sup> but other states, such as New York, have rejected postmortem protection. The duration of the protection differs substantially among the states that have adopted statutory postmortem protection. For example, Tennessee's statute permits executors, heirs, assigns, or devisees to maintain the exclusive right for a period of ten years after the person's death; after this period, the right extends indefinitely provided the use continues.<sup>73</sup> Oklahoma's statute, however, extends the right for one hundred years after death,<sup>74</sup> whereas California's postmortem protection is for seventy years.<sup>75</sup> No term under common law protection has been defined, although a term equal to

65. *Id.* at 1398 (emphasis in original).

66. Previous host of the NBC talk show, which now stars Jay Leno.

67. *Id.*

68. *See Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983).

69. *See Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 140 (Wis. 1979).

70. *See McFarland v. Miller*, 14 F.3d 912, 914 (3d Cir. 1994).

71. *See Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

72. *See* CAL. CIV. CODE § 3341.1 (Deering Supp. 2005); FLA. STAT. ANN. § 540.08(1)(c) (West 2001); 765 ILL. COMP. STAT. ANN. § 1075/30(b) (West 2000); IND. CODE ANN. § 32-36-1-8 (West 2002); KY. REV. STAT. ANN. § 391.170 (Michie 1999); NEB. REV. STAT. ANN. § 20-208 (Michie 1999); NEV. REV. STAT. ANN. § 597.790 (Michie 1999); OHIO REV. CODE ANN. § 2741.02 (Anderson 2000); OKLA. STAT. ANN. tit. 12, § 1448 (West 1993); TENN. CODE ANN. § 47-25-1104 (2000); TEX. PROP. CODE ANN. § 26.012-13 (Vernon 2000); VA. CODE ANN. § 8.01-40 (Michie 2000); WASH. REV. CODE ANN. § 63.60.040 (West 2005).

73. TENN. CODE ANN. § 47-25-1104 (2000).

74. OKLA. STAT. ANN. tit. 12, § 1448(G) (West 1993).

75. CAL. CIV. CODE § 3344.1 (Deering Supp. 2005).

copyright protection has been suggested.<sup>76</sup> The result is that where an actor lives and/or dies determines the legal implications of each case, which highlights the inconsistency in right of publicity law.<sup>77</sup>

### C. Copyright Law

The United States Constitution provides copyright protection by granting Congress the power “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>78</sup> The underlying rationale is to encourage the production of works of authorship for the benefit of the public<sup>79</sup> while also encouraging individual creation for personal gain.<sup>80</sup> The Copyright Act of 1976<sup>81</sup> defines copyrightable material as “original works of authorship fixed in a 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.”<sup>82</sup> “Original,” in the copyright context, means only that the work was independently created by the author and that it possesses at least some minimal degree of creativity, but that requisite level of creativity can be extremely low.<sup>83</sup> Copyright protection of original works, therefore, “extends from the moment the creative work becomes fixed in a tangible form,”<sup>84</sup> but protects only the “unique components of the author’s original work.”<sup>85</sup> The protection does not extend to “any

76. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 446–47 (Cal. 1979).

77. See generally Joseph J. Beard, *Fresh Flowers For Forest Lawn: Amendment of the California Post-Mortem Right of Publicity Statute*, 17 ENT. & SPORTS LAW. 1, 23 (2000) (discussing choice of law implications of postmortem protections); see, e.g., Beard, *supra* note 10, at 517 (discussing choice of law clauses, and three approaches different jurisdictions have taken to the issue of which law determines the status of a postmortem right of publicity).

78. U.S. CONST. art. I, § 8, cl. 8.

79. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2004).

80. See *Computer Assoc. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 711 (2d Cir. 1992) (“[C]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349–50 (1991) (noting that “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work”).

81. 17 U.S.C. §§ 101–122 (2000).

82. 17 U.S.C. § 102(a) (2000).

83. NIMMER, *supra* note 79, § 2.01[B].

84. Christina M. Reger, *Let’s Swap Copyright for Code: The Computer Software Disclosure Dichotomy*, 24 LOY. L.A. ENT. L. REV. 215, 223 (2004); see 17 U.S.C. § 102.

85. See Ira. J. Kaplan, *They Can’t Take That Away From Me: Protecting Free Trade in Public Images From Right of Publicity Claims*, 18 LOY. L.A. ENT. L.J. 37, 45 (1997); 17 U.S.C. § 102(a).

[underlying] idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied.”<sup>86</sup> Thus, copyright infringement analysis requires the determination of two things: (1) the distinction between an idea and an “expression of an idea,” and (2) the point at which another expression is substantially similar enough to trigger a violation of an author’s copyright in the original work.<sup>87</sup>

Copyright law does not protect ideas, irrespective of the form in which they are embodied; it protects the expression of ideas.<sup>88</sup> For example, a photograph can be copyrighted, but the model (or unfixed object of the photograph), which is more akin to an idea, cannot be copyrighted.<sup>89</sup> Whereas right of publicity law is focused on a person’s identity or persona and protects identification elements such as name, likeness, voice, and picture,<sup>90</sup> copyright law is focused on the recorded, creative expression and authorship of those identification elements.<sup>91</sup> Thus, a human being is not copyrightable, though photographs, sculptures, or motion pictures of the person are copyrightable.<sup>92</sup> A human voice is not copyrightable, but fixation of that voice in a sound recording is copyrightable.<sup>93</sup> Reanimation, however, takes us into uncharted legal territory and correct analysis is crucial, because the “essence of the living object upon which the expression was based remains outside the reach of copyright law, [but] [r]ight of publicity law . . . makes people’s images into ‘things.’”<sup>94</sup>

### 1. Fair Use Doctrine in Copyright Law

The judicial doctrine of fair use was described and endorsed, but not defined, in the Copyright Act of 1976.<sup>95</sup> The Senate bill embodied express statutory recognition that the “fair use” of a copyrighted work is not an infringement of copyright.<sup>96</sup> The doctrine attempts to establish a “balance between the interests of the creators of works, and the interests of the

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86. 17 U.S.C. § 102(b).

87. See Beard, *supra* note 10, at 539 (stating the test for copyright infringement is whether the purportedly infringing use is substantially similar to the original).

88. See Beard, *supra* note 31, at 137.

89. See Kaplan, *supra* note 85, at 44–45.

90. See CAL. CIV. CODE § 3344–3344.1 (West 2004).

91. See 17 U.S.C. § 102.

92. See Beard, *supra* note 10, at 530.

93. See *id.*

94. Kaplan, *supra* note 85, at 45.

95. See 17 U.S.C. § 107 (2000).

96. *Id.*

public that would make their own use of them, through fair use.”<sup>97</sup> The doctrine is one of the most important and well-established limitations on the exclusive right of copyright owners, but since it is an equitable and reasonable rule, no generally applicable definition is possible,<sup>98</sup> nor was one intended.<sup>99</sup> The bill goes no further than expressing a very broad statutory explanation of what fair use is by endorsing the principle that courts must be free to adapt and apply the doctrine on a case-by-case basis.<sup>100</sup>

The policy behind the doctrine is to allow “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”<sup>101</sup> The language used, “reproductions in copies or phonorecords,” was not intended to specify particular usages that are exempted but to give examples of the types of usages that should be considered under the doctrine.<sup>102</sup> The language, “or by any other means,” anticipated that there would be future technologies, such as digital works, to be reckoned with. To determine if there is a copyright infringement, courts apply a balancing test based on four non-definitive, non-determinative factors: “(1) the purpose and character of the use [of the copyrighted work], including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”<sup>103</sup>

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97. See Silversmith, *supra* note 4, at Part. III.C. (citing Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 392 (1995), which states that “copyright doctrine mediates public interest in the production of information and the public interest in access to information”).

98. H.R. REP. NO. 94-1476, at 66 (1976) (“The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change”).

99. *Id.* (stressing that “the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute”).

100. *Id.*; see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); and *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (showing the controversy that can result from applying the generalized balancing test based on the four factors).

101. H.R. REP. NO. 94-1476, at 66 (1976) (stating that the references to photocopying and phonorecords are to be interpreted as examples of technologies, and not meant to be specific, ensuring that fair use is forward-thinking and anticipatory of new reproducing technologies).

102. *Id.*

103. *Id.* at 65.

“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”<sup>104</sup> However, digital works may make fair use even more difficult to determine because the doctrine could not have anticipated digital works, including virtual actors, which are so inherently transformable, duplicable, and transferable.<sup>105</sup> Also, just as with digital audio sampling,<sup>106</sup> digital visual works can be a compilation of numerous copyrightable works, each one of which may not be an individual violation under the fair use doctrine.<sup>107</sup> Thus, courts may be reluctant to quash digital technology’s limitless potential for generating new works.<sup>108</sup> However, infringement judgments about original works involving virtual actors will be more difficult to make<sup>109</sup> because the issue will turn first on which party owns the intermediate digital clone of an actor and/or the virtual actor’s performance in a new work.<sup>110</sup> In any case, courts will be thrust ever deeper into the business of making artistic decisions, the prospect of which Justice Holmes admonished that jurists are ill-suited to judge the worth of artistic works.<sup>111</sup>

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104. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

105. See Silversmith, *supra* note 4, Part III.C.; see, e.g., Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1139 (1990) (analyzing the “muddled” statute, and its “three considerably inconsistent ways of doing nothing”).

106. See Silversmith, *supra* note 4, Part III.C (citing *Grand Upright Music v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991)); see also *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003) (describing sampling and its factors); *Bridgeport Music, Inc v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004) (adding other analytical issues associated with sampling, including fragmented literal similarity).

107. See generally *Italian Book Corp. v. American Broad. Co. Inc.*, 458 F. Supp. 65, 71 (S.D.N.Y. 1978) (discussing the issue of “fortuitousness” in copyright and fair use); see also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][3] (2004) (discussing substantial similarity).

108. See Silversmith, *supra* note 4, Part III.C. (addressing recent court decisions and the reluctance to completely deny the right to generate digital works).

109. See Weinreb, *supra* note 105, at 1139.

110. See Silversmith, *supra* note 4, at n.903 (citing Jonathan A. Franklin, *Digital Image Reproduction, Distribution, and Protection: Legal Remedies and Industrywide Alternatives*, 10 SANTA CLARA COMPUTER & HIGH TECH L.J. 347, 372 (1999)).

111. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

## 2. Copyright Protection for Characters

Even though the Copyright Act is silent on the issue, characters contained in a written work such as a novel or play have had a difficult time gaining copyright protection.<sup>112</sup> In fact, characters are generally considered “to be contributions to the copyright protected work as a whole.”<sup>113</sup> Characters within a visual medium, however, “change[] everything.”<sup>114</sup> Animated characters such as E.T.,<sup>115</sup> puppets,<sup>116</sup> and even characters played by more than one human such as James Bond,<sup>117</sup> have been protected, while other decisions have not found the threshold level of character development sufficient to bestow copyright protection. At least one commentator has suggested that “a celebrity is as much a fictional character as Superman or Sam Spade” because characters “can take on a life beyond the works in which they are depicted.”<sup>118</sup> Thus, these decisions are discretionary and courts have used various approaches in their analyses.

## 3. Copyright Versus Actors’ Right of Publicity Regarding Fictional Characters

In *Wendt v. Host International, Inc.*,<sup>119</sup> the Ninth Circuit had to decide if animatronic figures of *Cheers*<sup>120</sup> characters Norm and Cliff, featured in the defendant’s *Cheers*-themed airport bars, were substantially similar enough to constitute *likenesses* of actors George Wendt and John Ratzenberger.<sup>121</sup> Paramount Pictures owns all copyrights from the television series and had licensed the characters to Host International, but Wendt and Ratzenberger, who created the characters, sued under

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112. Shagin & Savare, *supra* note 38, at 657–58; *see, e.g.*, Warner Bros. Pictures v. Columbia Broad. Sys., Inc., 216 F.2d 945, 950 (9th Cir. 1954). *But see* Burroughs v. Metro-Goldwyn-Mayer, Inc., 491 F. Supp. 1320 (S.D.N.Y. 1980), *aff’d*, 683 F.2d 610 (2d Cir. 1982) (stating that the character of Tarzan was sufficiently developed in the written works of Edgar Rice Burroughs to gain copyright protection).

113. Shagin & Savare, *supra* note 38, at 657.

114. *Id.* at 658.

115. *See* Universal City Studios, Inc. v. J.A.R. Sales Inc., 216 U.S.P.Q. (BNA) 679, 683 (C.D. Cal. 1982).

116. *See generally* Sid & Marty Kroft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977).

117. *See* Metro-Goldwyn-Mayer v. Am. Honda Motor Co., 900 F. Supp. 1287, 1296 (C.D. Cal. 1995).

118. *See* Silversmith, *supra* note 4, Part III.C.

119. *Wendt v. Host International, Inc.*, 125 F.3d 806 (9th Cir. 1997), *en banc denied*, 197 F.3d 1284 (9th Cir. 1999).

120. *Cheers* (NBC 1982–1993).

121. *See Wendt*, 125 F.3d at 811.

California's right of publicity law. The Ninth Circuit reversed the lower court's summary judgment for the defendant and held that whether the animatronic figures were likenesses was a question for the jury to decide.<sup>122</sup> The case eventually was settled out of court, but of note was Judge Kozinski's dissent, in which he stated that right of publicity and copyright are the same in that they are both controlled by section 301 of the Copyright Act.<sup>123</sup> He stated the robots were derivatives of the show containing copyright-protected characters.<sup>124</sup> The *Wendt* majority found a potential infringement of a celebrity's persona when it is associated with a fictional character,<sup>125</sup> particularly when the character is being used primarily to sell products and the possibility of the perception of a false endorsement exists.<sup>126</sup> Conversely, and in illustration of the crazy-quilt variety of judicial decisions that show the unpredictable nature of the law associated with actors' rights,<sup>127</sup> the Ninth Circuit, in *Hoffman v. Capital Cities/ABC, Inc.*,<sup>128</sup> reversed the district court and held that Dustin Hoffman's right of publicity had not been violated when a magazine used unauthorized images of Hoffman as *Tootsie*<sup>129</sup> in a multi-page fashion pictorial.<sup>130</sup> Even though the pictorial was accompanied by very little editorial comment and Hoffman's and other celebrity images were admittedly used to sell magazines, the Ninth Circuit held it was protected by the First Amendment.<sup>131</sup>

Thus, even though the "right of publicity grew out of the right of privacy," courts have interpreted the law to be a "*sui generis* mixture of

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122. *Id.* at 814.

123. *See* *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284, 1286 (9th Cir. 1999) (Kozinski, J., dissenting).

124. *Id.* at 1286.

125. *See* *Wendt*, 125 F.3d at 810 (stating that appellants here are not seeking to prevent Paramount from exhibiting its copyrighted work in the *Cheers* series, and their "claims are not preempted by the federal copyright statute so long as they 'contain elements, such as the invasion of personal rights . . . that are different in kind from copyright infringement'").

126. *Id.* at 812.

127. *See, e.g.*, Gerald O. Sweeney, Jr. & John T. Williams, *Mortal Kombat: The Impact of Digital Technology on the Rights of Studios and Actors to Images and Derivative Works*, 17 ENT. & SPORTS L. 1 (1999); *see also* *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (stating that the athlete's name and accomplishments were used in unauthorized television advertisements for Oldsmobile); *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (finding a robot resembling the TV hostess to be a violation of her right of publicity). *But see* *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (holding that using an unauthorized image from *Tootsie* was not a violation of the actor's right of publicity and Mr. Hoffman could not show actual malice).

128. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

129. *TOOTSIE* (Columbia Pictures 1982).

130. *See Hoffman*, 255 F.3d at 1189.

131. *Id.* at 1186.

personal rights, property rights, and rights under unfair competition.”<sup>132</sup> For reasons subsequently discussed, reanimation will almost certainly add another layer of complication to an already inconsistent judicial landscape.

#### D. Unfair Competition and the Lanham Act

“Fame is valued,”<sup>133</sup> and the Lanham Act of 1946 protects personas as well as ordinary trademarks attached to goods by providing federal claims for unfair competition and false advertising.<sup>134</sup> The Act provides a right of action to persons engaged in interstate and foreign commerce, for deceptive and misleading usages of words, names, symbols, or devices, or any combination thereof, which are likely to deceive consumers as to the association, sponsorship, or approval of goods or services by another person.<sup>135</sup> In a Lanham Act action, “*mark* means the celebrity’s persona” or identity and “the strength of mark refers to the level of recognition the celebrity enjoys” for purposes of determining whether a defendant’s challenged conduct caused a likelihood of confusion about a celebrity’s endorsement of a product.<sup>136</sup> The test is whether the celebrity’s image in a product’s advertising is likely to mislead the public about the celebrity’s “sponsorship or approval of the product or service.”<sup>137</sup> The Ninth Circuit in *Wendt*, for example, employed a “well settled eight factor test” to be applied to celebrity endorsement cases.<sup>138</sup> The test requires the consideration of “(1) the strength of the plaintiff’s mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant’s intent in selecting the mark; [and] (8) likelihood of expansion of the product lines.”<sup>139</sup>

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132. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 953 (6th Cir. 2003).

133. *See* John Gibeaut, *Image Conscious*, 85-Jun A.B.A. J. 46, 47 (June 1999) (quoting Mark. S. Lee, attorney for the estates of Elvis Presley and Britain’s Princess Diana).

134. *See* 15 U.S.C. § 1125(a) (2000) (which is the amendment of section 42(a) of the Lanham Act of 1946); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (noting that “celebrities are not precluded from establishing cognizable injury to personal interests in addition to commercial loss, nor are less well-known plaintiffs precluded from establishing commercial loss in addition to injury to personal interests . . .”).

135. 15 U.S.C. § 1125(a).

136. *See Wendt*, 125 F.3d at 812 n.1 (citing *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395, 1400 (9th Cir. 1992)).

137. *ETW Corp.*, 99 F.3d at 925–26.

138. *Wendt*, 125 F.3d at 812 (citing *Newton v. Johnson*, 22 F.3d 1455, 1462 (9th Cir. 1994) and noting that “appellants would have a claim if ‘Host’s conduct had created a likelihood of confusion as to whether plaintiffs were endorsing Host’s product.’”).

139. *Id.*; *cf.* *Parks v. LaFace Records*, 329 F.3d 437, 448–450 (6th Cir. 2003) (rejecting the “likelihood of confusion” test and adopting the equally ambiguous *Rogers* test from *Rogers v.*

The “likelihood of confusion” standard for unfair competition provided by the Lanham Act is “predominantly factual in nature,” and “[s]ummary judgment is inappropriate when a jury could reasonably conclude that most of the factors weigh in the plaintiff’s favor.”<sup>140</sup> “[W]hether a claim is brought under § 1114 for infringement of an registered mark, or whether it is brought under § 1125(a) for infringement of an unregistered mark, the touchstone of the claim is likelihood of confusion.”<sup>141</sup> But, each court has formulated its own balancing test based on different, and seemingly overlapping, legal theories.<sup>142</sup>

Reanimation will likely complicate this issue even further. For example, Lanham Act violations regarding actors have heretofore involved celebrity endorsers<sup>143</sup> who have established commercial value in the marketplace. But hypothetically, if a non-celebrity actor with negligible bargaining power signs over her reanimation rights to a producer as a mandatory term of an employment contract and subsequently becomes a celebrity based on her digital clone’s performance(s), the public may incorrectly assume that she has approved endorsements in any future performances by her virtual clone. However, assuming the producer owns the copyrighted virtual clone, under current law it may not be clear what the source-actor’s rights are when her virtual clone gives subsequent unauthorized performances.<sup>144</sup> There may be no clearly defined legal protection for source-actors’ (especially non-celebrity actors) economic or dignitary interests against what are actually, if not legally, subsequent false endorsements by their copyrighted virtual clones. Also, some producers may consider any potential damages to be an affordable cost of doing business regardless of the harm to the actor’s reputation or value. In

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Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989), which interpreted a Lanham Act violation to be only when the public interest in avoiding consumer confusion outweighs the public interest in free expression).

140. *Wendt*, 125 F.3d at 812 (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 413 (9th Cir. 1996)).

141. *ETW Corp.*, 332 F.3d at 940.

142. *Compare ETW Corp.*, 332 F.3d at 915 (rejecting the eight factor test and adopting a two-prong test based on *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989)), with *Wendt*, 125 F.3d at 806 (employing the eight factor test), and *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996) (agreeing with Judge Kozinski’s dissent in *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), affirming the district court’s ruling that trading cards were expression protected by the First Amendment).

143. *See ETW Corp.*, 332 F.3d at 925 (defining a “celebrity endorser” as a celebrity associated with a product).

144. *See generally* Jordan Tabach-Bank, *Missing the Right of Publicity Boat: How Tyne v. Time Warner Entertainment Co. Threatens to “Sink” the First Amendment*, 24 *LOY. L.A. ENT. L. REV.* 247, 252–61 (2004) (describing the various right of publicity and privacy violations involving both celebrities and non-celebrities).

essence, this results in unjust enrichment for the producer, which borders on de facto virtual economic and dignitary slavery.<sup>145</sup> In any case, the result for source-actors may be a permanent inability to control and exploit their own careers, including their inability to control the process of becoming a celebrity and/or the type of celebrity they desire to become.

### III. ANALYSIS AND COMPARISON OF THE LAW

#### A. *The Technology*

There are two basic technological approaches to creating a silicon-based virtual actor: the direct approach and the indirect approach.<sup>146</sup> One method of direct approach employs a scanning process called “performance capture.”<sup>147</sup> In this method, infrared cameras are placed all around the source-actor<sup>148</sup> to digitally *capture* his full body motion and/or facial expressions during his performance. The cameras record the light bouncing back from several dozen infrared sensors placed all over the source-actor’s face and body suit.<sup>149</sup> The source-actor generally performs in front of a solid blue (or green) background.<sup>150</sup> The digital, three-dimensionally-captured performance then becomes the “human blueprint”<sup>151</sup>—the virtual actor—which can be “realistically placed in any kind of computer-generated environment the filmmakers can dream up.”<sup>152</sup> For example, Tom Hanks’ digitally recorded persona was used in the creation of five different characters<sup>153</sup> in the computer-generated, animated movie *The Polar Express*.<sup>154</sup> The scanning technology in *The Polar Express* is the latest improvement over that used to capture actor Andy

145. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”).

146. See Beard, *supra* note 10, at 448–49.

147. See Kehr, *supra* note 28.

148. As used herein, the term “source-actor” means a human performer or actor, living or dead, who is the source for the virtual clone.

149. See Kehr, *supra* note 28.

150. See *id.* (referring to blue-screen work); see also Krista Smith, *Rule of Law*, VANITY FAIR, Oct. 2004, at 305 (Jude Law shot all of his action in *Sky Captain* in front of a blue screen).

151. See Kenneth Turan, *A Bumpy, Noisy Ride: Robert Zemeckis’ Visually Striking ‘Polar Express’ Pumps Up a Classic Children’s Book*, L.A. TIMES, Nov. 10, 2004, at E6.

152. *Id.*

153. Glenn Whipp, *Tom Hanks, Version 2.0; Actor Teams Up with Robert Zemeckis and Cutting-Edge Technology to Bring ‘Polar Express’ to the Screen*, L.A. DAILY NEWS, Sept. 19, 2004, at E5; see also Peter Biskind, *Express to the Future*, VANITY FAIR, Oct. 2004, at 220.

154. THE POLAR EXPRESS (Warner Bros. 2004). See Kehr, *supra* note 28.

Serkis' performance of Gollum in *Lord of the Rings*.<sup>155</sup> The blue-screen process was also used with Jude Law, Gwyneth Paltrow, and the other living actors in *Sky Captain*,<sup>156</sup> except that the intention in this film was to exploit the celebrities' recognizable star personas rather than distorting them into animated characters. Thus, the actors in *Sky Captain* performed in front of a blue screen, wearing costumes (instead of the blue or black suit or the reflectors),<sup>157</sup> and their conventionally captured performances were then digitally placed into computer-generated settings for each scene.<sup>158</sup> Computer-generated imagery ("CGI") technology is also extensively used in the creation of video games such as the newly released *Sims 2*.<sup>159</sup>

The indirect approach, used when a dead celebrity is involved, entails creating the deceased actor's virtual clone from existing conventional reference material, such as photographs, sculptures, or movie clips.<sup>160</sup> Photogrammetry, for example, is a technique that compares common points in two photographs taken at different angles in order to calculate a three-dimensional coordinate.<sup>161</sup> Another technique employs a sculpted bust of an actor which is then digitally scanned to produce a three-dimensional computer model.<sup>162</sup> A third technique is direct computer sculpting, where an artist-animator, while looking at reference material, uses electronic input devices to visually sculpt the image onto the computer screen.<sup>163</sup> Once a digital bust of the identifiable elements (primarily the face and hair) is created, human-movement-tracking technology is employed to provide any required physical movement by using a living actor as a body double.<sup>164</sup> In addition, a dead celebrity's voice is supplied in various ways, such as by a digital compilation of spoken words extracted from the soundtracks of

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155. LORD OF THE RINGS (New Line Cinema 2002); see Jamie Painter Young, *The Race is On: This Year the Performances Were Often Stronger Than the Movies—Which Should Make the SAG Actor Awards All the More Competitive*, 43 BACK STAGE, Dec. 20, 2002 (describing the process by which Serkis' performance was digitally captured, subsequently animated, and edited into the story as the lizard-like character that audiences see on the screen and the dilemma of whether or not Serkis should be eligible for a best supporting actor award).

156. See Smith, *supra* note 150, at 304–05 (featuring Jude Law and discussing his roles and the cast of *Sky Captain*).

157. *Id.* at 305.

158. See, e.g., Young, *supra* note 155; Kehr, *supra* note 28.

159. See Kehr, *supra* note 28.

160. See Beard, *supra* note 10, at 462–63.

161. See Introduction to Photogrammetry, at <http://www.univie.ac.at/Luftbildarchiv/wgv/intro.htm> (last visited Jan. 12, 2005).

162. See Beard, *supra* note 10, at 463.

163. See Nadia Magnenat Thalmann & Pascal Volino, *Sculpting, Clothing and Hairdressing Our Virtual Humans*, in INTERACTIVE COMPUTER ANIMATION 205, 206 (Nadia Magnenat Thalmann & Daniel Thalmann eds., 1996).

164. See Beard, *supra* note 31, at 117.

archival movie footage, or by an impersonator who mimics the celebrity's voice.<sup>165</sup> Therefore, a deceased actor's virtual persona is a combination of separate digital components. By contrast, a living actor's clone is directly created by digitizing his or her entire performance—body, face, voice, hair, emotional response, and movements.

### B. *Persona and the Law*

All performers, including actors, musicians, singers, dancers, models, or sports figures are entitled to the economic value of their performances.<sup>166</sup> However, a performer's persona is defined by an identifiable image and is conceptually separate from, although often inextricably linked to, performance. Differences in the *identifiability* of performers result in a gradation of commercial value ranging from non-celebrity performers with little commercial value outside their own performances to star performers whose personas wield separate and independent commercial leverage. Although *celebrity* is an almost impossible label to define, generally, the more celebrity an actor enjoys, the higher the actor's commercial value.

All actors are protected against an unauthorized use of their identities for advertising purposes,<sup>167</sup> but some postmodern authors argue that a celebrity actor's persona should be part of the public domain because, as an inherently derivative cultural icon, a celebrity actor's persona is a shared creation.<sup>168</sup> The argument is that iconic status relies as much upon audience perception and support as upon the performer's skill and hard

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165. See David Ansen, *Send Back the Clowns*, NEWSWEEK, Aug. 22, 1983, at 73.

166. See *Zacchini v. Scripps-Howard Broad., Co.* 433 U.S. 562, 573 (1977) (giving plaintiff performer exclusive right to his act or "entire performance"); see generally Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954) (stating that because individuals have a natural right to enjoy the fruits of their labor, they are also entitled to protect the value of their publicity).

167. See, e.g., *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 690 (9th Cir. 1998) (using a baseball player's image in a printed advertisement); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 414–15 (9th Cir. 1996) (using a basketball player's former name in an automobile commercial aired on television); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (using a game-show hostess's identity in a printed advertisement). Cf. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184–86 (9th Cir. 2001) (concluding that the article's use of an altered photograph of plaintiff was not purely commercial and thus was protected by the First Amendment).

168. See Vincent M. de Grandpre, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 74–75 (Autumn 2001); see also Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (1993) (rejecting the Lockean Labor Theory justification for the right of publicity because celebrities do not create their own images—images are created by a complex network of social and democratic factors).

work.<sup>169</sup> As such, it should be part of the marketplace of ideas, which enjoys First Amendment protection.<sup>170</sup> Various legal theories, including statutory and common law right of publicity, copyright and trademark law, and unfair competition (the Lanham Act)<sup>171</sup> have been applied in an effort to balance a performer's primarily economic interests with the public's interest in free expression. At least one commentator has suggested that applicable legislation should be based on moral rights.<sup>172</sup> In any case, under current law, the inevitable impasse centers on two issues: (1) whether an unauthorized use of an actor's persona is constitutionally protected by the First Amendment freedom of expression or is a violation of a performer's proprietary right to control and exploit his or her image, and (2) the correlative distinction between constitutionally protected speech and commercial speech.

### C. *The Constitutional Quagmire*

#### 1. Overview of the First Amendment Defense

The two distinct, commonly acknowledged purposes of the First Amendment are (1) to preserve an uninhibited marketplace of ideas and repel efforts to limit the “‘uninhibited, robust and wide-open’ debate on public issues,”<sup>173</sup> and (2) “to foster a ‘fundamental respect for individual development and self-realization.’”<sup>174</sup> However, there is an inherent tension between protecting a performer's right to commercially exploit his or her persona and insuring a free flow of ideas and creativity for the public's benefit.<sup>175</sup> The only semi-certainty in legal decisions regarding this inherent conflict is the judicial and jurisdictional distinction between commercial speech and noncommercial speech. Noncommercial speech,

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169. See Giacoppo, *supra* note 26, at 622.

170. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

171. 15 U.S.C. § 1125(a); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (“[C]elebrities are not precluded from establishing cognizable injury to personal interests in addition to commercial loss, nor are less well-known plaintiffs precluded from establishing commercial loss in addition to injury to personal interests . . .”).

172. See Beard, *supra* note 31, at 191 (calling for a sui generis moral rights law).

173. See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 803 (Cal. 2001) (citing *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979)).

174. *Id.*

175. See *Computer Assn. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 711 (2d Cir. 1992) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”).

including parody,<sup>176</sup> even if false or misleading, is generally protected by First Amendment freedom of expression.<sup>177</sup> Thus, any statute restricting noncommercial speech receives strict constitutional scrutiny, and, consequently, the statute will generally be held as unconstitutional.<sup>178</sup> Conversely, statutes regarding commercial speech receive only rational-basis (the lowest level) scrutiny, which means commercial speech can be regulated, and false or misleading commercial speech is generally prohibited.<sup>179</sup>

In an attempt to remedy the constitutional conflict, many right of publicity statutes, such as California Civil Code section 3344(d), have expressly incorporated protective First Amendment provisions.<sup>180</sup> Section 3344(d) states that “[F]or purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).”<sup>181</sup> Other states’ right of publicity statutes offer various and sometimes substantially different categorical protections,<sup>182</sup> but, with few exceptions, “right of publicity claims have been denied when use was made of a person’s identity in books, newspapers, magazine articles, on television or radio shows, in films or plays, and sometimes in advertising incidental to such permitted uses.”<sup>183</sup>

Professor McCarthy describes a three-part hierarchy of speech,<sup>184</sup> which has varying levels of constitutional protection. The first two levels of speech receive the highest level of constitutional protection. At the top

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176. *See* *Cardtoons, L.C. v. Major League Baseball Player’s Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996) (asserting that the parodic baseball trading cards are not commercial speech, but “[a]n important form of entertainment and social commentary that deserve First Amendment protection.”); *see generally* F. Jay Dougherty, *All the World’s Not a Stooge: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 44–53 (2003) (describing different arguments for levels of scrutiny and right of publicity laws).

177. *See* *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983); *see also* *Kasky v. Nike, Inc.*, 45 P.3d 243, 251 (Cal. 2002).

178. *Bolger*, 463 U.S. at 65.

179. *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–71 (1976) (stating that untruthful speech has never been protected).

180. CAL. CIV. CODE § 3344(d) (West 2004).

181. *Id.*

182. *See, e.g., Zacchini* 433 U.S. at 562; *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

183. Kaplan, *supra* note 85, at 52; *see, e.g., ETW Corp. v. Jireh Publ’g, Inc.*, 99 F. Supp. 2d 829, 834–36 (N.D. Ohio 2000).

184. MCCARTHY, *supra* note 34, § 8.13.

is news or “information about the real world.”<sup>185</sup> Next are stories of fiction and entertainment. At the bottom is advertising, which receives, at best, limited constitutional protection.<sup>186</sup> However, the “hazy line between commercial and non-commercial speech does not separate valuable speech from worthless speech,”<sup>187</sup> as “[a]dvertising has a long tradition in this country as an important means of expression.”<sup>188</sup> Thus, the Supreme Court has held that commercial speech can be constitutionally protected.<sup>189</sup>

## 2. Noncommercial Versus Commercial Speech

“The distinction between commercial and noncommercial speech within a single medium seems particularly arbitrary.”<sup>190</sup> For example, a right of publicity claim may be brought against the makers of a television commercial but not against the program the commercial endorses.<sup>191</sup> Therefore, whether a First Amendment defense for an unauthorized use of an actor’s persona will prevail over a right of publicity claim turns on the dispositive, although nebulous, issue of how a specific jurisdiction will classify the media work containing the virtual actor—as commercial, expressive, or some combination of the two. The problem for actors is that since there is no federal statute governing this issue, jurisdictions have created their own balancing tests for distinguishing expressive from commercial speech, resulting in a patchwork of judicially subjective decisions.<sup>192</sup>

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185. *Id.*

186. *See Bolger*, 463 U.S. at 65; *Kasky*, 45 P.3d at 251.

187. *See Kaplan*, *supra* note 85, at 55.

188. *Id.*

189. *Id.* (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S., 748, 761–62 (1976)).

190. *Kaplan*, *supra* note 85, at 59.

191. *Id.*

192. *See Gibeaut*, *supra* note 133, at 49 (“In the resulting hybrid jurisprudence, judges weave property rights and First Amendment principles with concepts borrowed from related, yet distinct, copyright law. Sometimes judges appear to engage in constitutionally prohibited evaluations of content.”).

### 3. Definitions of Commercial Speech

Drawing the line between commercial and noncommercial speech has been accurately described as a “‘notoriously unstable and contentious domain of First Amendment jurisprudence’ that is ‘currently in confusion.’”<sup>193</sup> The Supreme Court has steadfastly declined to create a bright-line rule to distinguish commercial from noncommercial speech and has generally chosen to apply the “common sense” test on a case-by-case basis.<sup>194</sup> This is because, as Justice Stevens stated, “[w]e must be wary of unnecessary insistence on rigid classifications, lest speech entitled to ‘constitutional protection be inadvertently suppressed.’”<sup>195</sup>

The *newsworthy* approach was developed through cases involving non-advertising news and entertainment works.<sup>196</sup> Under this approach, if content is used because of its newsworthy quality, the court will not consider it to be a use for “purposes of trade” and it will be constitutionally protected speech.<sup>197</sup> Use of persona in news, public affairs, sports broadcast or its account, or any political campaign is often expressly exempted in states’ right of publicity law.<sup>198</sup> However, later decisions generally held that “non-informational entertainment media works are also speech privileged against appropriation privacy and publicity claims without requiring a showing of newsworthiness.”<sup>199</sup>

Since the Supreme Court gave First Amendment protection to purely commercial speech for the first time in the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>200</sup> the trend has been to expand the constitutional protection of truthful commercial speech. Courts have created various categorical definitions and tests to try to balance society’s need for a free exchange of ideas with the economic interests of individuals.

*Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* defined commercial speech as “expression related solely to the

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193. See Shagin & Savare, *supra* note 38, at 664.

194. See *N.Y. Publ. Interest Research Group v. Ins. Info. Inst.*, 531 N.Y.S.2d 1002, 1010–11 (N.Y. 1988).

195. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 81 (1983).

196. See MCCARTHY, *supra* note 41, § 6.86.

197. *Id.*

198. See, e.g., CAL. CIV. CODE § 3344(d).

199. Dougherty, *supra* note 176, at 6 (citing *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979); see also *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 336 (E.D. Pa. 1996).

200. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

economic interests of the speaker and its audience.”<sup>201</sup> In 1983, the Supreme Court made its only attempt to define commercial speech in *Bolger v. Youngs Drug Products Corp.*,<sup>202</sup> stating that commercial speech is “speech which does ‘no more than propose a commercial transaction.’”<sup>203</sup> The *Bolger* test for commercial speech has three factors: (1) the speech is an advertisement, (2) that refers to specific products, and (3) the speaker is economically motivated.<sup>204</sup>

The California Supreme Court, in *Kasky v. Nike, Inc.*,<sup>205</sup> developed its own three-part test for commercial speech which includes these factors: (1) the message in question is directed by a commercial speaker, (2) to a commercial audience, and (3) the representations are made primarily to sell the speaker’s products.<sup>206</sup> Unfortunately, the Supreme Court, after initially granting certiorari, dismissed the *Kasky* case, and thereby “passed on the chance to clarify an area of the law that has been riddled with doctrinal incoherence for some time.”<sup>207</sup>

As the above tests illustrate, the balancing approaches used to distinguish noncommercial from commercial speech are conceptually general and inherently subjective, thus making them unpredictable and inconsistent. By way of illustration, the opinions in *White v. Samsung Electronics American, Inc.*<sup>208</sup> and *Hoffman v. Capital Cities/ABC, Inc.*<sup>209</sup> show inconsistencies exist even within the same jurisdiction. In the former case, the defendant created a commercial featuring a robot resembling Vanna White and placed the robot in the context of a game show that simulated the program in which White appeared, *Wheel of Fortune*.<sup>210</sup> The Ninth Circuit chose not to accept a parody defense and found a common law infringement of Vanna White’s economic interests. On the other hand, the Ninth Circuit held that an actual picture of Dustin Hoffman as *Tootsie* in a pictorial in *Los Angeles Magazine* featuring then-current fashions by various designers was not an “advertisement printed merely for the purpose of selling a particular product.”<sup>211</sup> The court adopted a merger-type

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201. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

202. *Bolger*, 463 U.S. at 66 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 762).

203. *Id.*

204. *Id.* at 66–67.

205. *Kasky v. Nike, Inc.*, 45 P.3d 243, 256 (Cal. 2002).

206. *Id.*

207. *See* Shagin & Savare, *supra* note 38, at 665.

208. *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

209. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

210. *See White*, 971 F.2d at 1396.

211. *Hoffman*, 255 F.3d at 1185.

approach and explained that “commercial aspects are ‘inextricably entwined’ with expressive elements, and so they cannot be separated out ‘from the fully protected whole.’”<sup>212</sup> Because “common sense” told the court that the article, which had very little editorial content, was “not a simple advertisement,” the court treated the article on the whole as noncommercial speech.<sup>213</sup> Contrary to the result in *White*, the court found the use of the picture amounted to a non-infringement of Hoffman’s economic interests. The court’s interpretation of the fashion pictorial resulted in First Amendment protection for the magazine article even though Hoffman’s image may have sold magazines.<sup>214</sup>

The balancing analysis has become progressively complicated as more and more advertising is mixed, or blended, speech—meaning it contains both noncommercial and commercial components.<sup>215</sup> Motion pictures, for example, have become veritable billboards in the past decade,<sup>216</sup> as product placement is being used more and more by advertisers who are scrambling to maintain exposure in today’s competitive media environment.<sup>217</sup> Hence, the commercial versus noncommercial/expressive distinction has become progressively attenuated as “Hollywood is more interested in producing feature length advertisements than in making films.”<sup>218</sup> In illustration, consider Carina Chocano’s review of *National Treasure*, a recently released Walt Disney film starring Nicolas Cage.<sup>219</sup> Chocano wrote that *National Treasure*:

Has all the soul, wit and originality of a major co-branding

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212. *Id.* (quoting *Gaudiya Vaishnava Soc’y v. City & County of San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1990)).

213. *See Hoffman*, 255 F.3d at 1186.

214. *Id.*

215. *See* MCCARTHY, *supra* note 34, § 8.97; Symposium, *Welcome to the World of Advertisment*, 2004 INSTITUTE ON ENTERTAINMENT LAW & BUSINESS, Sept. 18, 2004, at section 7 (on file with author); C.C. Laura Lin, *Corporate Image Advertising and the First Amendment*, 61 S. CAL. L. REV. 459, 459-60 (1988) (citing the “phenomenal upsurge in corporate image advertising” and how it fails to fit into the two traditional speech categories). *But see White*, 971 F.2d at 1401 (denying a First Amendment parodic defense, and holding that “[t]he difference between a ‘parody’ and a ‘knock-off’ is the difference between fun and profit”). *See generally Kasky*, 45 P.3d at 243 (showing there are contrary commercial versus noncommercial holdings, which were based on similar factual issues).

216. *See* William Benjamin Lackey, Comment, *Can Lois Lane Smoke Marlboros?: An Examination of the Constitutionality of Regulating Product Placement in Movies*, 1993 U. CHI. LEGAL F. 275, 275 (1993) (arguing, generally, that product placement, whether paid or unpaid, constitutes commercial speech as defined by the Supreme Court).

217. *See id.* at 276–77.

218. *Id.* at 275.

219. *See* Carina Chocano, *Bankrupt ‘National Treasure’: The Bruckheimer Bombast Knocks This Hunt for Loot Off Course*, L.A. TIMES, Nov. 19, 2004, at E1.

campaign, [and] . . . its prodigious marketing effort overwhelms ‘National Treasure,’ and not just because of its impressive number of promotional tie-ins. (McDonald’s, Verizon, Visa, Kodak, Dodge and NASCAR are part of the cross-promotion, as are the cities of Washington and Philadelphia.) The movie is just too willing to veer off into memorable merchandising moments.<sup>220</sup>

Furthermore, journalism and entertainment are becoming more and more intertwined as ratings-conscious media executives and producers try to find ways to keep the audience interested and away from the dreaded remote control button. For example, some local television news programs regularly spend a significant portion of their broadcast minutes promoting their parent network’s entertainment programming, as if it is newsworthy.<sup>221</sup> Thus, the line between commercial and noncommercial speech has become steadily more, and not less, distinct.

#### *D. Battle of the Balancing Tests*

##### 1. The Relatedness Test

The Restatement of Unfair Competition authorizes the use of an individual’s name or identity in a work that is “related to that person.”<sup>222</sup> Permissible related uses include:

The use of a person’s name or likeness in news reporting, whether in newspapers, magazines, or broadcast news . . . use in entertainment and other creative works, including both fiction and nonfiction . . . use of a celebrity’s name or photograph as part of an article published in a fan magazine or in a feature story broadcast on an entertainment program . . . dissemination of an unauthorized print or broadcast biography . . . [and] [u]se of another’s identity in a novel, play, or motion picture.<sup>223</sup>

The relatedness test stems from the rationale that “celebrities take on public meaning, [and] the appropriation of their likenesses may have important uses in uninhibited debate on public issues, particularly debates

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220. *Id.*

221. Local Los Angeles CBS affiliate, CBS2 News, often promotes network entertainment programming such as *Survivor* and other shows as part of the newscast, rather than in traditional promotional advertising during commercial breaks.

222. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47, cmt. c (1995).

223. *Id.*

about culture and values.”<sup>224</sup> Celebrities are important communicative and expressive resources in our culture, and the right of publicity “has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity’s meaning.”<sup>225</sup> The relatedness inquiry thus helps insure that there is no shield against biography, caricature, parody, and satire.<sup>226</sup>

## 2. The Transformativeness Test

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,<sup>227</sup> the plaintiff was the registered owner of all the rights to the Three Stooges, and sued artist/entrepreneur Gary Saderup when Saderup sold lithographs and T-shirts bearing the comedy trio’s likeness.<sup>228</sup> Saderup claimed the First Amendment provided his defense, and the California Supreme Court developed a new balancing test by which to gauge whether or not an infringing work infused enough creative input, or *transformative* value, to convert the work into something more than a mere imitation of the Three Stooges’ likeness.<sup>229</sup> “[T]he California Supreme court attempted to develop a middle ground—a categorical test under which some art would be fully protected speech under the First Amendment but other art would be treated as mere merchandise.”<sup>230</sup> The court’s concern was that if all exploitations, such as Mr. Saderup’s, were constitutionally protected, an “enormous source of celebrity wealth recognized for decades would be lost.”<sup>231</sup> Yet to absolutely deny First Amendment protection for the creation and rendering of artistic works would be inconsistent with substantial Supreme Court precedent.<sup>232</sup> Under the California Supreme Court’s transformativeness test, which was taken from the fair use doctrine in copyright law,<sup>233</sup> if the work contains significant transformative elements and does not derive its value primarily from the underlying protected work (such as the Three Stooges’ fame) it must be accorded First Amendment

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224. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 803 (Cal. 2001).

225. *Id.*

226. *Id.*

227. *Comedy III Prods.*, 21 P.3d at 797.

228. *See id.* at 800–01.

229. *See id.* at 801.

230. *See Dougherty, supra* note 176, at 28.

231. *Id.*

232. *See id.*

233. *See id.*

protection.<sup>234</sup> Here, again, judges determine what is “significant transformativeness” by using a relatively subjective balancing process in order to distinguish art from advertising.

In *Comedy III*, the California Supreme Court used Andy Warhol as an example of an artist whose work transcends a celebrity’s image and deserves First Amendment protection,<sup>235</sup> whereas Saderup’s creative efforts, although recognized as expressive work, were held to contain “no significant transformative or creative contribution.”<sup>236</sup> Thus, Saderup’s work was not protected by the First Amendment.<sup>237</sup> On the other hand, the Sixth Circuit Court, citing with approval the dissent in *White v. Samsung Electronics America, Inc.*,<sup>238</sup> the holding in *Hoffman v. Capital Cities/ABC, Inc.*,<sup>239</sup> and the transformative test used in *Comedy III*,<sup>240</sup> found for the defendant publishing company in *ETW Corp. v. Jireh Publishing*.<sup>241</sup> The defendant company was selling hundreds of reproductions of an art print entitled “The Masters of Augusta,” by artist Rick Rush, which showed pictures of the famous golf course, centered around a painting of Tiger Woods, the famous golfer. The plaintiff, the exclusive licensing agent for Woods, alleged various violations, including trademark infringement, false advertising under the Lanham Act, unfair competition, right of publicity under Ohio common law, and others. The Sixth Circuit held that Rush’s work is expression that has sufficient transformative elements to be entitled to the full protection of the First Amendment.<sup>242</sup> *Comedy III* and *ETW Corp.*, in two different jurisdictions, show how subjective and potentially arbitrary the commercial versus noncommercial distinction can be.

The fair use doctrine, on which the transformativeness test is based, is vague and unpredictable,<sup>243</sup> and courts tend to focus on one or more (generally only one) of the non-exclusive factors described in the copyright statute. Therefore, “[fair use] has not done a good job prescriptively or normatively in copyright,”<sup>244</sup> and it is not reasonable to expect courts

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234. See *Comedy III*, 21 P.3d at 808.

235. *Id.* at 811 (Andy Warhol, a modern artist whose craft was developed in advertising, often used celebrity images such as Marilyn Monroe in his artwork.).

236. *Id.*

237. *Id.*

238. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1402 (9th Cir. 1992).

239. *Hoffman v. Capital Cities/ABC, Inc.* 255 F.3d 1180 (9th Cir. 2000).

240. See *Comedy III*, 21 P.3d at 797.

241. *ETW Corp. v. Jireh Publ’g*, 99 F. Supp. 2d 829, 836 (N.D. Ohio 2000), *aff’d* 332 F.3d 915 (6th Cir. 2003).

242. *ETW Corp.*, 332 F.3d at 937–38.

243. See MCCARTHY, *supra* note 34, § 8.39.

244. See Dougherty, *supra* note 176, at 28.

applying the transformativeness test to fare any better, or any more consistently.

### 3. The Predominant Purpose Test

In the latest twist in this constitutional quagmire, the Missouri Supreme Court, in *Doe v. TCI Cablevision*,<sup>245</sup> rejected both the relatedness and the transformative tests<sup>246</sup> and adopted its own “predominant use” test:

If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some “expressive” content in it that might qualify as “speech” in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.<sup>247</sup>

In a clear showing of concern for protecting actors’ and other artists’ rights, the court rejected the relatedness and transformative tests, which “operate to preclude a cause of action whenever the use of the name and identity is in any way expressive, regardless of its commercial exploitation,”<sup>248</sup> because “they give too little consideration to the fact that many uses of a person’s name and identity have both expressive and commercial components.”<sup>249</sup>

*Doe v. TCI Cablevision* involved defamation and misappropriation claims brought by the professional hockey player Tony Twist against the creator of the comic book *Spawn* because it contained a character sharing Twist’s name and characteristics and was marketed primarily to hockey fans. The defendant asserted a First Amendment defense, but the court, applying its predominant purpose test, held that the “use and identity of Twist’s name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity.”<sup>250</sup>

*Doe v. TCI Cablevision* implies that unauthorized usage of a celebrity’s image associated with a particular demographic market may tip

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245. *Doe v. TCI Cablevision*, 110 S.W. 3d 363 (Mo. 2003).

246. *Id.* at 374.

247. *Id.* (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 488–98 (2003)).

248. *Id.*

249. *Id.*

250. *TCI Cablevision*, 110 S.W.3d at 374.

the balancing analysis toward a determination that it is advertising, rather than speech that deserves First Amendment protection. However, the predominant purpose test seems at least as subjective as any other balancing test for commercial speech. It still depends upon a subjective, even if well-reasoned, balancing analysis that necessarily attempts to determine the state of mind of the creator-defendant, and possibly an aesthetic distinction between art and commerce. Based on its decisions in *Zacchini*<sup>251</sup> and *TCI Cablevision*,<sup>252</sup> what seems clear is that courts are currently supportive of artists' economic rights when producers try to enrich themselves at artists' expense.<sup>253</sup> In any case, the battle of the balancing tests will most likely continue.

#### IV. APPLICATION AND ANALYSIS OF THE LAW

Under current law, "when an actor's image and voice are captured on film, two sets of rights are involved: (1) the actor's rights in his or her image and performance; and (2) the copyright of the film."<sup>254</sup> Even though the rights of actors and producers have been well-litigated, digital virtual actors are "uncharted territory."<sup>255</sup> Performance capture technology produces a digital blueprint of an actor that can be stored, reused, manipulated, and duplicated in any imaginable way. Reanimation will thus require courts to apply the predominant purpose, transformativeness, common sense, or some balancing test to *moving* expressions of actors in motion pictures or digital works. These works involve "multiple expressions" by actors,<sup>256</sup> compared to the still photographs or paintings illustrated in *Hoffman*, *Comedy III*, or *ETW*. Hence, courts will have to first determine such issues as whether or not the source-actor is, and therefore owns, the actor's virtual clone.

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251. *Zacchini v. Scripps-Howard Broad., Co.*, 433 U.S. 562 (1977).

252. *TCI Cablevision*, 110 S.W. 3d. at 363.

253. See, e.g., Brief of Amicus Curiae Screen Actor's Guild, Inc., *supra* note 39 at 8–9.

254. See Beard, *supra* note 10, at 451.

255. *Id.* at 452.

256. See Brief of Amicus Curiae Screen Actor's Guild, Inc., *supra* note 39, at 12–13.

### A. Copyright

#### 1. The Source-Actor is an Idea

Under copyright law, a source-actor cannot be copyrighted,<sup>257</sup> but any scanned clone of the source-actor will be a copyrightable recording.<sup>258</sup> The fixation requirement is satisfied when the digital data is recorded and stored into memory by a computer.<sup>259</sup> Copyright, however, only protects works that contain some modicum of creativity.<sup>260</sup> Therefore, under current legal theory, courts may have to determine whether or not simply scanning a living actor, or digitally recreating a dead actor, meets the minimum level of creativity necessary to give a producer authorship. In performance capture, a digital scandata-set<sup>261</sup> is created when a source-actor is scanned while wearing a body suit covered with sensors which reflect light in order to read the actor's exact dimensions.<sup>262</sup> The scanning procedure is akin to Xerox copying and creates a mere likeness of the source-actor. Therefore, the resulting scandata-set may not reach the level of creativity required under copyright law.<sup>263</sup> The basic virtual actor/scandata-set is conceptually and aesthetically different from a conventional photograph, because other than the actor's image or skeletal performance, or both, all artistic elements such as lighting, costumes, setting, and even other actors, are subsequently added in the computer.<sup>264</sup> Arguably then, the scandata-set is simply a mere likeness of the source-actor. Also, if a posed actor (meaning one who is arguably not performing at all) is scanned, the resulting scandata-set is even less likely to meet the minimal required threshold of creativity.<sup>265</sup> It is

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257. See NIMMER, *supra* note 79, § 1.01[B][1][c] (stating that a persona cannot be a writing by an author).

258. See generally 17 U.S.C § 102 (2000) (HOUSE REPORT NO. 94-1476 within this section describes the subject matter, the general distinction between ideas and expression of ideas, and the fixation requirement, including that it "makes no difference what the form, manner, or medium of fixation may be").

259. *Id.*

260. *Id.* ("This [copyright originality] standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them."); see also NIMMER, *supra* note 79, § 2.01[B].

261. I use this term to mean the recorded digital data that comprises a virtual actor.

262. See Kehr, *supra* note 28; see, e.g., Eyetronics – Experts in High Resolution Textured 3D Scanning, at <http://www.eyetronics.com>.

263. See NIMMER, *supra* note 79, § 2.01[A] (even a fine artist who fails to create a "distinguishable variation" from a Rembrandt painting is not an author.).

264. See generally Beard, *supra* note 10, at 454–55 (discussing how a typical virtual actor/scandata-set is created).

265. See NIMMER, *supra* note 79, § 2.01[A] (stating that "similarity as is due to copying . . . suffices to establish copyright infringement").

interesting to note that under the Federal Rules of Evidence 1001(3), “[i]f data [is] stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’”<sup>266</sup> Thus, Rule 1001(3) may support the idea that a virtual clone is a mere likeness of the source-actor—a copy of the original expression. Therefore, if the source-actor is deemed to be an original expression, the virtual clone is a derivative work.<sup>267</sup> On the other hand, at least with a posed source-actor (but conceptually applicable to all virtual clones), the scandata-set may not be sufficiently creative enough to be copyrightable to begin with. In other words, the specific performance by the source-actor via her virtual clone will be copyrightable, but the latent scandata-set, which is capable of unlimited performances, may not be.

Additionally, if the scandata-set of a source-actor is not sufficiently creative to warrant copyright protection, it will be “an orphan if not granted database protection” under the law.<sup>268</sup> Unlike in Europe, there is currently no federal database protection law in the United States.<sup>269</sup>

In any case, unless the source-actors have commissioned their own scans, they will probably be employees of the producer, and thus they may not be considered the author of their own clones.<sup>270</sup> By analogy, if a professional photographer takes an actor’s picture, the photographer generally owns the copyright and duplication rights. Similarly, either the owner of the scanner, or the producer who pays for the scan, will be considered the original author and copyright owner of a source-actor’s virtual clone.<sup>271</sup> Therefore, in order to prevent subsequent unauthorized performances by their virtual clones, source-actors will have to bargain for ownership of their own scandata-sets, which is a doubtful prospect unless the actors have some degree of economic leverage. If the copyright owner refuses to bargain, or the source-actors cannot afford to buy their clones, an owner/producer may be entitled to use the virtual clones for an unlimited number of subsequent unauthorized original performances. Consequently, digital cloning may substantially increase the number of unauthorized usages of a source-actor’s persona in digital media works.

In order to protect the source-actors from subsequent unauthorized usages of their digital clones, even if the original use was authorized, it is

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266. FED. R. EVID. 1001(3) (2000).

267. *See generally* NIMMER, *supra* note 79, § 2.01[A] (describing a derivative work as one that flows from and owes to an original copyrighted work).

268. *See* Beard *supra* note 10, at 456.

269. *Id.* at 455.

270. *Id.* at 453.

271. *Id.*

crucial to determine: (1) whether or not the original digital data—the virtual clone—is property, (2) who owns it if it is property, and (3) if there are any restrictions on the owner's use.<sup>272</sup>

## 2. The Source-Actor Is an Expression

The Supreme Court in *Zacchini* expressly held rights of publicity are analogous to copyright and patent law.<sup>273</sup> Since a virtual actor is the mere likeness of a source-actor, each digital clone is just as unique as its source-actor is unique in the human population.<sup>274</sup> As such, a source-actor's "name and likeness may encompass a range of expression that nonetheless falls within a protected image."<sup>275</sup>

In fact, any dichotomy between free expression of ideas or facts, as opposed to protectable forms of expression, collapses through the personhood of an actor. An actor's ability to become the physical manifestation of an idea is the essence of the actor's craft. It is this ability to project ideas or a particular sensibility through an image, likeness or voice that in large measure provides performers with their value as commercial icons.<sup>276</sup>

Therefore, one approach is to deem each source-actor to be a unique particularized expression or set of expressions of a universal idea.<sup>277</sup> Under current copyright law, if a source-actor in the reanimation context is deemed to be an expression (or multiple expressions) of an idea,<sup>278</sup> then the virtual clone is a derivative work.<sup>279</sup> Assuming that to be true, even if a producer owns a source-actor's bargained-for performance in a particular copyrighted film, the producer cannot use the source-actor's virtual clone for subsequent original performances without the source actor's authorization.<sup>280</sup> Conversely, if the producer owns the source-actor's virtual clone, including all potential original performances, the producer will have much less incentive to consider the economic or dignitary interests of the source-actor, especially the non-celebrity source-actor.

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272. *Id.* at 452.

273. *See Zacchini v. Scripps-Howard Broad.Co.*, 433 U.S. 562, 573 (1977).

274. *See, e.g.*, Brief of Amicus Curiae Screen Actor's Guild, Inc., *supra* note 39, at 12–13 (citing *Zacchini*, 433 U.S. at 572).

275. *Id.* at 12.

276. *Id.* at 19.

277. *Id.* at 12–13.

278. *Id.* at 13.

279. *See NIMMER, supra* note 79, § 3.01 (defining a derivative work as one that flows from, and owes to, an original copyrighted work).

280. *Id.*

Under the approach discussed above, source-actors control their own virtual clones as authors would a copyright or inventors would a patent. This enables source-actors to protect their personas from potentially rampant unauthorized usages of their virtual selves, while also leaving producers free to create new works using virtual actors they license or contract for. This approach thus embodies copyright and patent law's rationale, which strives to encourage creativity for the public's benefit while preserving the economic interest of authorship.<sup>281</sup>

### *B. Right of Publicity: The Entire Performance*

In *Zacchini*, the Court held that a producer is not protected by the First Amendment where the producer usurps an artist's "entire performance,"<sup>282</sup> even in the newsworthy context.

Hugo Zacchini's "human cannonball" performance can be categorized as a stunt act, which is conceptually different from that of an actor such as Tom Hanks, whose face the audience pays to see and whose performance changes according to each specific character he creates. A human cannonball act has relatively exact dimensions in time, activity, and predictability, and does not necessarily require personality or sensibility to perform. It is mechanical in nature, indefinitely repeatable, and it is intended to work the same every time. Thus, at least in the stunt-act context, the Court thought that if an audience saw Zacchini's entire act on a television newscast, there could be a disincentive to subsequently pay to see it in person.<sup>283</sup>

However, it is arguable that the *Zacchini* decision is still unclear on what the analogous protectable "entire performance" is in the context of a non-stunt actor such as Tom Hanks. Certainly, an entire film starring Hanks cannot be shown without authorization, but the balancing process regarding the performances of non-stunt actors has been based on a "fair use" or other type of analysis, which determines how much of an actor's performance can be used without authorization. Therefore, in order to determine the First Amendment or fair use issues, or both, the threshold question is: "What does 'entire performance' mean regarding the performance of a non-stunt actor?"

One way to protect actors, including celebrities, is to extend the Court's concept of "entire performance" to include the actors

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281. See NIMMER, *supra* note 79, § 1.03[A].

282. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

283. *Id.*

themselves.<sup>284</sup> If a non-stunt actor's ability to "project ideas . . . through an image, likeness or voice that . . . provides performers with their value as commercial icons,"<sup>285</sup> is conceptually analogous to a stunt-actor's "entire performance," then any performance by the non-stunt actor's virtual clone is protected by *Zachini*. Thus, the non-stunt actor is entitled to authorize all performances by his virtual clone and a balancing analysis can be employed to address First Amendment concerns. As with copyright analysis, this "entire performance" approach puts source-actors in the best position to protect against the potentially unlimited, unauthorized, and uncompensated misappropriation of their skills and personas<sup>286</sup> in digital works.

### C. The Hybrid Approach

As previously described, it is not clear what the legal implications of ownership of the copyrightable scandata-set/virtual clone will be. For example, if a source-actor is considered to be an idea and not an expression of an idea, then it is not clear if the copyright owner of the virtual clone will be legally entitled to use the scandata-set for future original performances. However, a virtual clone can be defined as an inextricably intertwined combination of a person and that person's copyrightable expressions.<sup>287</sup> As such, a virtual actor is arguably a new legal concept requiring a new analytical approach under current law. But, as Justice Cardozo noted, "[t]he reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of law."<sup>288</sup>

If a virtual clone is a conceptual hybrid of idea and expression, then it cannot be analyzed under the idea/expression dichotomy,<sup>289</sup> which is one of the essential principles and conceptual differences that separates right of publicity from copyright rationale.<sup>290</sup> Virtual clones complicate traditional

284. See Beard, *supra* note 10, at 479 (stating that "the digital clone of an actor is a combination of a *representation* of the person and the *person* himself").

285. Brief of Amicus Curiae of the Screen Actors Guild, Inc., *supra* note 39, at 19.

286. *Id.* at 1, 9 (skills and persona are generally developed through much personal effort, time, and training).

287. See *supra* note 284 and accompanying text; see, e.g., Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185 (9th Cir. 2001) (stating "commercial aspects are 'inextricably entwined' with expressive elements, and so they cannot be separated out from the 'fully protected whole'").

288. See NIMMER, *supra* note 79, § 1.10[A].

289. See NIMMER, *supra* note 79, § 1.01[B][2] (describing the idea/expression dichotomy).

290. See Dougherty, *supra* note 176, at 33 ("This important legal doctrine [the

analysis because a copyrighted virtual clone represents not just one specific copyrightable performance; it literally contains *all* potential performances by its source-actor. This goes beyond the scope of copyright concerns because copyright law was generally meant to apply to only one original or derivative expression at a time, but a copyrighted virtual actor literally contains unlimited latent original expressions. Similarly, a typical right of publicity case involves possible infringement in only one work at a time. But with a copyrighted virtual clone, a decision of non-infringement of right of publicity may arguably apply to all potential performances by that copyrighted clone. In any case, both right of publicity and copyright protection are inextricably intertwined in the hybrid virtual clone.

Assuming this to be true, source-actors may thus be protected against subsequent unauthorized usages of their personas in at least two ways. First, if a source-actor is considered an expression or multiple expressions of an idea (as argued by the Screen Actors Guild),<sup>291</sup> then the virtual clone is a derivative copyright,<sup>292</sup> and any future performance by the virtual clone would require the source-actor's authorization.<sup>293</sup> On the other hand, if the virtual clone is not derivative but instead deemed to be an original copyrighted work, then the source-actor should still be protected by right of publicity in subsequent performances by the virtual clone.

Therefore, when the idea/expression dichotomy disappears and the virtual clone represents both the right of publicity and copyright protection inextricably intertwined, the source-actors' personas are protected by principles of copyright, right of publicity, or possibly both, at every step of reanimation. If a producer argues that right of publicity is not triggered in subsequent original performances by the copyrighted hybrid clone because federal copyright law preempts right of publicity,<sup>294</sup> the counter-argument is that the traditional rules apply only to the original bargained-for performance, and not to potential future unlimited latent expressions.

Arguing that the owner of a copyrighted virtual clone is entitled to unlimited original expressions by the copyrighted scandata-set is analogous

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idea/expression dichotomy in copyright] has no analogue in the right of publicity jurisprudence . . .").

291. See Brief of Amicus Curiae Screen Actors Guild, Inc., *supra* note 39, at 13.

292. See NIMMER, *supra* note 79, § 3.01.

293. See *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284, 1286–87 (9th Cir. 1999) (Kozinski, J., dissenting) (stating the robots in *Cheers*-themed bars were derivative works and actors do not lose the right to control commercial exploitation of likenesses, via common law right of publicity, by portraying fictional characters).

294. The preemption issue is beyond the scope of this Comment. However, for a general overview of the issue, see Shagin & Savare, *supra* note 38, at 657 (describing the preemption issues with right of publicity and stating that there is a split of Circuit courts on preemption).

to stating that an owner of a copyrighted song has proprietary ownership of *all* subsequent original songs by that composer containing those musical notes.

Furthermore, giving producers proprietary ownership over any subsequent performance by a source-actor's virtual clone may also affect a source-actor's ability to profit from a performance.<sup>295</sup> This is due to two predictable reasons: (1) there may be less incentive to hire the source-actor to perform if the producer already owns unlimited performances by the source-actor's virtual clone, and (2) potential overexposure of the source-actor due to unauthorized performances by the virtual clone (particularly in undesirable subject matter) may render the source-actor less attractive to other producers. In any case, this situation directly falls within the definition of unjust enrichment<sup>296</sup> and is contrary to the rationale behind right of publicity and copyright.<sup>297</sup>

#### D. A Balancing Test for Reanimation in the Digital Age

In developed nations at least, global culture continues to shift from primarily an aural basis to a visual digital basis.<sup>298</sup> This transition is reflected in the exponential rise in popularity and economic importance of computers, the Internet, and video games.<sup>299</sup> Presumably, when reanimation technology matures, virtual actors will be extensively used for the communication of ideas in both expressive and commercial works.

Right of publicity decisions have generally turned on the commercial versus noncommercial distinction, which is embodied in various balancing tests, such as the predominant purpose test.<sup>300</sup> The trend has been to expand First Amendment protection for commercial speech, but as product placement<sup>301</sup> and other correlative advertising methods<sup>302</sup> are being inserted

295. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

296. BLACK'S LAW DICTIONARY: SECOND POCKET EDITION 737 (2d ed. 2001) (unjust enrichment is defined as: (1) the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected; (2) a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense).

297. See NIMMER, *supra* note 79, § 1.03[A] (stating the purpose of copyright is to encourage original authorship for the benefit of both the individual and society).

298. THOMAS A. MAUET, TRIAL TECHNIQUES § 6.1 (6th ed. 2002) (stating that "[s]ocial science research supports the shift from the aural and written to the visual").

299. James Schneider, *The Ever-Growing Presence of Video Games in Pop Culture (Part I)*, MAJOR LEAGUE GAMING (2005), at <http://mlgpro.com/modules.php?op=modload&name=News&file=article&sid=414> (last visited Feb. 17, 2005).

300. See *supra* Part III.D.3.

301. See generally Lackey, *supra* note 216, at 275 (arguing that product placement, whether

more and more into expressive works, the commercial versus noncommercial distinction will become more difficult to discern. Some might argue that the First Amendment defense eventually should swallow right of publicity entirely. However, recent decisions show that the Supreme Court supports right of publicity protection of the economic value of individuals' personas, as well as of their "entire performance[s]," even in a newsworthy context.<sup>303</sup>

The Supreme Court has steadfastly refused to create specific bright-line rules for decisions involving the First Amendment.<sup>304</sup> The Court has generally applied ad hoc balancing tests on a case-by-case basis in these scenarios. Based on past history, it is hard to imagine that the Court will apply a definitive categorical or definitional test to reanimation scenarios. Therefore, even with causes of action for unfair competition,<sup>305</sup> the Court will need a complex, multi-factored balancing test capable of providing consistent and flexible analytical guidelines for reanimation scenarios involving right of publicity and the First Amendment. Flexibility will be necessary because reanimation cases will undoubtedly involve unlimited nuanced combinations of such correlative issues as identifiability,<sup>306</sup> substantial similarity to the source-actor,<sup>307</sup> expressive versus commercial speech considerations, fair use of virtual actors' performances in desirable media works,<sup>308</sup> and economic value of and infringement of the source-actor's marketability. It is reasonable to believe that the analytical model will be well-grounded in the four factors from copyright's fair use doctrine.<sup>309</sup> The four illustrative, non-exclusive factors considered together will provide the consistency and flexibility needed for these complex scenarios. The four factors are: (1) the purpose and character of the use;

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paid or unpaid, constitutes commercial speech as defined by the Supreme Court); Symposium, *Welcome to the World of Advertainment*, 2004 INSTITUTE ON ENTERTAINMENT LAW & BUSINESS, (2004) (describing the current advertising trends today) (on file with author).

302. *Id.*

303. *See* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

304. *See* *N.Y. Pub. Interest Research Group, Inc. v. Ins. Info. Inst.* 531 N.Y.S.2d 1002, 1010 (N.Y. App. Div. 1988); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 81 (1983) ("[W]e must be wary of unnecessary insistence on rigid classifications. . .," quoting *J. Stevens concurrence in Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 579 (1980)).

305. 15 U.S.C. § 1125(c)(1) (2000) (listing factors for determining whether or not a mark is famous for false endorsement analysis).

306. *See* MCCARTHY, *supra* note 41, § 3.18.

307. *See generally* *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004) (describing substantial similarity in music sampling); NIMMER, *supra* note 107, § 13.05[A][3].

308. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c at 549 (1995) (stating desirable usages include use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses).

309. *See* 17 U.S.C. § 107 (2000).

(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the [copyrighted] work as a whole; and (4) the effect of the use upon the potential market for or value of the [copyrighted] work.<sup>310</sup>

The fair use doctrine has often been criticized, but landmark Supreme Court decisions in 1984, 1985, and 1994 treat the equitable doctrine of fair use at length.<sup>311</sup> Even though the fair use inquiry has been disparagingly characterized as “necessarily a flexible one, and the endless variety of situations that may arise precludes the formulation of exact rules,”<sup>312</sup> flexibility may be necessary in the reanimation context.

### 1. The Right of Publicity and Copyright Share the Same Rationale

Professor Nimmer recognized that those who are strong proponents of copyright protection may also denounce censorship. He considers this to be a reflection of the accepted but ignored paradox that even though the First Amendment expressly states that “Congress shall make no law . . . abridging the freedom of speech,” copyright law directly violates this commandment.<sup>313</sup> This can be seen as the beginning of a historical chain of competing legal theories that have tried to justify this paradox by boldly attempting to determine which kinds of speech abridge the First Amendment.<sup>314</sup> Professor Nimmer criticizes both “ad hoc” balancing theories and “definitional balancing” theories as being equally limited in their ability to solve the dilemma that ensued when the American judiciary generally decided not to accept an absolutist approach to constitutional law.<sup>315</sup> Thus, our jurisprudence contains contradictions and accepted paradoxes, one of which may be the idea that copyright and right of publicity are incompatible because they seek to protect different things.<sup>316</sup>

It has been said that the attempt to read protection of privacy into copyright law is mistaken because that trend evolved from an aberrational British case of the mid-nineteenth century.<sup>317</sup> The Lord Chancellor used

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310. *Id.*

311. See NIMMER, *supra* note 107, § 13.05 (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

312. *Sony*, 464 U.S. at 480.

313. U.S. CONST. amend. I.

314. See NIMMER, *supra* note 79, § 1.10.

315. *Id.* § 1.10[A] (defining “ad hoc” and “definitional balancing” theories).

316. See *Shagin & Savare*, *supra* note 38, at 649 (stating that the right of publicity seeks to protect a person’s name, likeness, picture, and voice, and these associational elements are not protected by copyright).

317. See Pierre N. Leval, *Commentaries: Toward a Fair Use Standard*, 103 HARV. L. REV.

copyright law to protect Queen Victoria and Prince Albert's privacy interest in their personal etchings against a Mr. Strange who surreptitiously obtained copies of the etchings and wanted to publish them.<sup>318</sup> The Chancellor resorted to copyright law because, unlike in America, there was no law of privacy in Britain, just as there was no strong commitment to the protection of free speech.<sup>319</sup> However, it is interesting to note that this Prince Albert case, which relied on copyright principles, was "the seed from which grew the American right of privacy, after fertilization by Brandeis and Warren."<sup>320</sup>

It has also been said that incorporating privacy concerns into copyright would "burden us with a bewilderingly schizophrenic body of law that would simultaneously seek to reveal and to conceal."<sup>321</sup> However, the fact is that privacy law in the United States has steadily evolved from protecting individuals' dignitary interests into protecting economic identity interests via the right of publicity.<sup>322</sup> For example, it seems that celebrities are not so concerned these days with their right to be left alone as much as they are concerned with their right to the value of their personas.<sup>323</sup> Thus, the economic interests that right of publicity laws are designed to protect are not that far removed from original authors' interests in copyright rationale.

## 2. The Purpose and Character of the Use

The utilitarian goals of copyright and right of publicity can be seen as conceptually closely related. For example, the first factor of the fair use doctrine, "the purpose and character of the use,"<sup>324</sup> seeks to identify noncommercial versus commercial usages of authors' copyrighted works. This mirrors the goal of right of publicity decisions, which is to determine when an unauthorized usage of a persona should be discounted in favor of freedom of expression. That line has generally been drawn between commercial and noncommercial usages. Interestingly, courts and commentators have analyzed the first factor in the fair use doctrine by employing the transformative test to help determine whether or not the

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1105, 1129 (1990).

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 1130.

322. See Shagin & Savare, *supra* note 38, at 647-48.

323. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 n.1 (9th Cir. 2001); *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 810 (9th Cir. 1997).

324. 17 U.S.C. § 107 (2000).

defendant's unauthorized use of a copyrighted work qualifies for the fair use defense.<sup>325</sup> The fair use transformative test seems literally and conceptually to be the same transformativeness test used in right of publicity cases.<sup>326</sup> The tests in both these areas of law determine whether an unauthorized infringement of an individual's property interest, be it a copyrighted work or an identity interest, offers society enough benefit to allow the unauthorized use.<sup>327</sup> This reflects the fact that the underlying objectives of copyright law parallel those of the First Amendment, because "[T]he Framers intended copyright . . . to be the engine of free expression."<sup>328</sup>

In any case, practically speaking, the first factor can conceptually contain any test courts adopt for determining commercial from noncommercial speech.<sup>329</sup>

### 3. The Nature of the Copyrighted Work

Fair use has been criticized as vague and leading to unpredictable results in copyright.<sup>330</sup> Also, commentators have argued that the fair use factors should not be applied to the right of publicity because it does not have internal mechanisms that protect the First Amendment.<sup>331</sup> For example, one argument is that copyright has the idea/expression dichotomy, which provides categorical protection for First Amendment expressive works, whereas right of publicity does not have such an internal mechanism.<sup>332</sup> Virtual actors, however, as described above, conceptually contain both idea and expression; therefore, copyright principles alone are not sufficient. Thus, right of publicity is also implicated and a balancing test should be applied for First Amendment issues.

Under the second fair use factor, "the nature of the copyrighted work," the more creative a work, the more protection from copying it should get.<sup>333</sup> Conversely, the more informational or functional the work, the broader the scope of the fair use defense.<sup>334</sup> Thus, unauthorized

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325. See NIMMER, *supra* note 107, § 13.05[A].

326. See MCCARTHY, *supra* note 34, § 8:72 n.8 (describing the fact that the transformative test was borrowed from the fair use doctrine).

327. See *Comedy III Prods., Inc., v. Gary Saderup, Inc.*, 21 P.3d 797, 803 (Cal. 2001).

328. Leval, *supra* note 317, at 1135.

329. See *Comedy III*, 21 P.3d at 808 (describing the transformativeness test); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (describing the predominant purpose test).

330. See MCCARTHY, *supra* note 34, § 8.38.

331. See Dougherty, *supra* note 176, at 31–33.

332. *Id.* at 32.

333. See NIMMER, *supra* note 107, § 13.05[A][2][a].

334. *Id.*

infringements of entertainment works are less likely to receive the fair use defense.<sup>335</sup> This may also make sense for right of publicity analyses in the reanimation context. Furthermore, I suggest an additional analytical usage of the second factor. It may also be used to directly engage the potential legal paradox (as well as the delicacy of analysis that may be needed) of the proposed hybrid concept of virtual actors.

Copyright law is based on the conceptual difference and separation between an idea and an expression of an idea.<sup>336</sup> But, virtual actors can be seen as both an idea and an expression simultaneously. Therefore, when applying their ad hoc balancing tests, it may be important for courts to “strike a balance between the dual risks created by the copyright system”<sup>337</sup> as well as keep in mind that a source-actor—who may be deemed to be the “fact or idea” that cannot be copyrighted—is also contained within this hybrid clone.

In illustration, the second factor could provide guidance in determining whether or not a particular virtual actor/scandata-set meets the threshold level of creativity necessary to qualify for copyright protection to begin with. As previously described, the initial step of the “performance capture” process is to record the source-actor first, without any other creative elements involved.<sup>338</sup> At this stage, the nature of the clone is just the mere likeness of the source-actor and may not be copyrightable. This is conceptually similar to a typical fair use analysis, since courts have supported the fair use defense in cases involving unauthorized usages of copyrighted material, and not in those involving uncopyrighted works.<sup>339</sup> In other words, if a particular scandata-set is simply the three-dimensional digital recording of posed source-actors, then the purpose of the scan is to record and store their digital blueprint for future performances of any imaginable type. Arguably, this virtual clone has not met the minimum amount of creativity necessary for copyright protection, and can be seen as an idea and not an expression. Thus, any subsequent unauthorized usages of the uncopyrighted virtual clone should not get a fair use defense. As previously stated, this argument is supported by Federal Rules of Evidence 1001(3), which says that “[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the

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335. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981).

336. 17 U.S.C. § 102 (2000).

337. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 479 (1984) (Blackmun, J., dissenting).

338. *See, e.g., Kehr, supra* note 28; *Turan, supra* note 151.

339. 17 U.S.C. § 107 (2000) (fair use defense is for an infringement of copyrighted works).

data accurately, is an 'original.'"<sup>340</sup>

If the source-actor begins to perform and the producer begins to add creative elements to the skeletal performance, the analysis should begin to consider the point at which the minimum level of creativity necessary for secondary or derivative copyrightability is reached. That decision, in turn, will determine when the producer has an ownership claim to that specific original performance.<sup>341</sup> However, under this analytical approach, the point at which derivative or secondary copyrightability begins may also be the point at which the source-actor's right of publicity is triggered, thereby preventing the producer from unjust enrichment via the source-actor's virtual persona creating unauthorized original performances.

The second factor may also prove useful when regarding the economic value of a particular source-actor, whose marketability is generally in direct ratio to his or her celebrity. Thus, the nature of the source-actor's economic value will range from one of non-celebrity, where the source-actor's only value is in his or her performance, to a star celebrity who has great economic value even when not performing. The nature of a particular source-actor's value, then, can be considered an illustrative application of the second factor.

#### 4. The Amount and Substantiality of the Portion Used

Another criticism of fair use is that it does not produce predictable results, because the factors are easily argued both ways by opposing parties and by judges.<sup>342</sup> However, usually courts have relied on only one or two of the fair use factors in their decisions, primarily because they were deciding the commercial versus noncommercial distinction and the first and fourth factors seemed to suffice.<sup>343</sup> This is contrary to what the Supreme Court has stressed, which is that all four factors should be considered together.<sup>344</sup> Insistence on the Court's edict will be necessary in the reanimation context because reliance on only one or two factors will be insufficient to cover all the nuanced issues virtual actors will create. For example, the third fair use factor, "the amount and substantiality of the portion used,"<sup>345</sup> may play an important role in reanimation analyses

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340. FED. R. EVID. 1001(3) (2000).

341. *See, e.g.,* Beard, *supra* note 10, at 453.

342. *See* NIMMER, *supra* note 107, § 13.05 (stating that powerful arguments exist on both sides of each factor).

343. *See* Dougherty, *supra* note 176, at 30 (describing cases where courts have concentrated on one or two factors and not all four).

344. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

345. 17 U.S.C. § 107.

because both copyright and right of publicity turn initially on recognizability.

In the reanimation context, it will be necessary to determine whether or not a virtual actor's performance is "substantially similar" enough to be recognized as the source-actor for both right of publicity and First Amendment decisions. Thus, along with the First Amendment versus commercial speech distinction, reanimation will require courts to apply their balancing approaches (or "common sense" test) to right of publicity's *identifiability*<sup>346</sup> element as well. This is because "[d]igital technology will not only create clones of individuals, it may also be used to modify (and/or remove) existing images."<sup>347</sup> This third factor from copyright can be viewed as related to the identifiability element in right of publicity analysis. This is because fair use in copyright determines whether or not a secondary or derivative copyrighted work (or parts therein) is substantially similar enough to be recognized as the same as the original copyrighted work,<sup>348</sup> which is analogous to recognizability of a source-actor in right of publicity cases.

In *Motschenbacher v. R.J. Reynolds Tobacco Co.*,<sup>349</sup> the Ninth Circuit found a violation of a celebrity race car driver's right of publicity from the defendant's advertising depicting the driver's race car without the driver.<sup>350</sup> If identifiability can be triggered when the celebrity's image isn't shown,<sup>351</sup> courts will do an analogous identity determination when virtual clones are used in digital works. If, for instance, the creator of the film chooses not to show the source-actor's face in the virtual actor's performance, but wishes to take advantage of the source-actor's identifiable characteristics in a character, courts will decide if recognizable body movements, body parts, voice inflections, identifiable tattoos, clothing worn, or other identifiable characteristics utilized in the virtual actor's performance are substantially similar to the source-actor. This establishes the actor's identity, thereby triggering right of publicity implications.<sup>352</sup> In other words, courts will have to determine where the line of *transformation* past recognizable

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346. See CAL. CIV. CODE § 3344(b)(1) (West 1997); see also the Screen Actors Guild basic employment agreement (stating that "the foregoing shall apply only if the performer is recognizable" and, as to stunts, only if the stunt is identifiable) (on file with author).

347. Beard, *supra* note 10, at 486.

348. See NIMMER, *supra* note 107, § 13.05[A][3].

349. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

350. *Id.* at 822.

351. *Id.* at 827.

352. See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (stating that the producers of the comic book *Spawn* were not entitled to First Amendment defense in the creation of an animated character resembling Tony Twist, the famous hockey player).

identity is drawn, particularly since virtual actors will have more capability than their source-actors.

Additionally, if the clone's performance was substantial enough to be identifiable as a source-actor, but not used in great enough proportion to the completed whole, that may help support a court's decision to allow a First Amendment defense and negate a right of publicity claim. Analogous to music *sampling*,<sup>353</sup> when analyzing a virtual actor scenario, courts will sometimes have to apply a balancing analysis not only to the motion picture itself, but also to each virtual actor's performance within the motion picture.

The bottom line is that virtual actor scenarios will undoubtedly contain unlimited variations of performance and gradations of identifiability. Therefore, if a source-actor's clone has been modified, or is only partially recognizable in the resulting digital work, this third factor will offer a guiding principle in determining the point at which the performance (1) becomes a separately identifiable image, thereby negating the source-actor's right of publicity, and/or possibly negating the source-actor's claim to future performances by the derivative, copyrighted character; (2) remains recognizable as the source-actor, thus retaining right of publicity protection; and (3) is substantial enough either quantitatively or qualitatively to either negate or garner a First Amendment defense.

#### 5. The Effect of the Use Upon the Potential Market for or Value of the Work

Factor four, "the effect of the use upon the potential market for or value of the copyrighted work,"<sup>354</sup> is also conceptually the same for both right of publicity and copyright marketability analyses involving virtual actors. In right of publicity cases, courts may use this guideline to determine the adverse economic impact, if any, that a virtual clone's unauthorized performance has on the source-actor's market value.<sup>355</sup> Potential scenarios include the dilution of economic value in a particular market,<sup>356</sup> which may occur when a virtual clone's unauthorized performance affects a celebrity's image—an image that had been carefully

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353. See *Newton v. Diamond*, 349 F.3d 591, 594–96 (9th Cir. 2003) (describing sampling and its factors, which include substantial similarity, de minimis usage, fair use, and quantitative and qualitative use); *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 396 (6th Cir. 2004) (describing other analytical issues associated with sampling).

354. 17 U.S.C. § 107 (2000).

355. See NIMMER, *supra* note 107, § 13.05[A][4] (describing generally how markets can be affected).

356. See, e.g., Beard, *supra* note 31, at 178.

controlled and established in previously chosen works or because the celebrity has chosen not to endorse commercial products.<sup>357</sup> Conversely, courts may also use this guideline in evaluating whether or not a celebrity's economic value is suddenly enhanced by his clone's unauthorized performance(s), and moves the source-actor into new markets. Sometimes, any publicity is considered to be good publicity. Or, if non-celebrity actors become celebrities because of their virtual clones' unauthorized performance in an undesirable film, but the source-actors then take economic advantage of their sudden notorious celebrity, courts can use this factor as a useful guideline in any subsequent right of publicity or copyright claims.

The valuation analysis may be particularly interesting in a business environment where, for instance, source-actors are suddenly confronted with the bizarre possibility of having to compete for jobs against their own virtual clones. In any case, common sense tells us that unauthorized performances by virtual clones will impact the ability of source-actors to control their economic value in the marketplace because of overexposure or false endorsement of their personas in the public's eye, and also because their virtual clones' unauthorized performances may involve undesirable subject matter. This factor, in combination with the others, will likely cover any potential market-valuation scenarios that may arise with reanimation.

## V. CONCLUSION

When current law was written, unauthorized usages of an actor's persona were not as easily available, changeable, duplicable, or transferable as reanimation technology has made it today, especially when considered in combination with the Internet.<sup>358</sup> Since CGI technology will reduce the costs and geographical limitations of making films,<sup>359</sup> as the technology matures it will become possible for producers to make films starring virtual actors in a single well-equipped room anywhere in the world, especially

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357. See generally Dougherty, *supra* note 176, at 67 (discussing the exploitation of celebrity images).

358. See Hooray for Hollywood: Battling Piracy, Debating Vertical Integration and Helping Stars Adjust to Changing Times—Where Else But the Entertainment Industry Can a Lawyer Have This Much Fun?, *DAILY JOURNAL EXTRA*, July 19, 2004, at 11 (one can now “press a button, and everybody can have a [media work] copy around the world all at once.”); Erin E. Arvedlund, *Hollywood Competes With the Street in Russia; To Combat Rampant DVD Piracy, U.S. Film Companies Cut Prices*, *N.Y. TIMES*, April 7, 2004, at E1 (“[P]iracy accounts for 9 out of every 10 DVDs sold [in Russia]).

359. See Biskind, *supra* note 153, at 222, 224 (describing the minimalist “capture space” and how CGI technology will reduce production costs).

where the costs and the law are most favorable. Cutting transactional costs, along with insuring the maximum number of future revenue streams, are two of the most important goals for a producer. Ownership of actors' scandata-sets will reduce production costs by eliminating the cost of hiring actors, thereby increasing revenue and profits.<sup>360</sup>

Virtual clones will predictably be used in unauthorized motion pictures produced in states that offer the least amount of right of publicity protection or postmortem protection, or both. They will also be used in films made outside the United States where there is no legal protection or where the law is unenforced. Thus, if CGI producers own or control source-actors' virtual clones, we will have visual works producers "asserting a right to appropriate personalities without regard to the investment such personalities—artists in their own right—have made in creating commercial value for such personalities, and without regard for the personalities' wishes concerning exploitation of their image."<sup>361</sup>

Furthermore, digital technology, especially in combination with the Internet, is profoundly changing the world that current law is based upon. It has the potential to change history as well, because, when this technology matures, even expert viewers will no longer be able to tell what is real from what is not real. Reanimation technology is creatively exciting, but there is no consistent, reliable body of law that uniformly protects individuals (much less actors) from unauthorized usages of their personas in the digital context. This context includes digital imagery, modification of imagery, or deletion of imagery in digital visual works. State law is inconsistent, or, in some states, nonexistent.<sup>362</sup> Digital piracy,<sup>363</sup> sampling,<sup>364</sup> and the Internet have exposed actors and producers alike to easy and escalating abuse in the marketplace and in culture.

The ultimate solution is the enactment of new federal law, specifically tailored to digital technology and written with the global picture in mind, which guarantees both a personal and proprietary right to one's persona. In

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360. See *Hooray for Hollywood*, *supra* note 358, at 12 (stating that as more technology companies partner with motion picture and television companies, problems such as lowering of income and lack of income that has been happening in the music industry "are definitely" coming to the motion picture and television industry as broadband rolls out).

361. See Brief of Amicus Curiae Screen Actors Guild, Inc., *supra* note 39, at 14.

362. See Shagin & Savare, *supra* note 38, at 641 (stating right of publicity exists in some fashion in twenty-eight states).

363. See Carolyn Said, *Studios to Sue Pirates: Film Industry Fights Illegal File Sharing*, S. F. CHRON., Nov. 5, 2004, at C1 ("Illegal movie trafficking represents the greatest threat to the economic basis of movie-making in its 110-year history . . .").

364. See *Newton v. Diamond*, 349 F.3d 591, 592 (9th Cir. 2003); *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 393 (6th Cir. 2004).

the meantime, however, several suggestions may help insure source-actors' right of publicity in the face of reanimation. These suggestions are: (1) a source-actor should be considered an "entire performance"; (2) a virtual actor is a hybrid legal concept that erases the idea/expression dichotomy, therefore, a correlative legal approach, which combines principles from both right of publicity and copyright, should be applied; and (3) courts will need a complex multi-factored balancing test that offers a flexible set of guidelines for the "endless variety of situations and combinations of circumstances that can rise in particular cases [which] precludes the formulation of exact rules" in the digital world.<sup>365</sup>

*Joel Anderson*

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365. S. REP. NO. 94-473, at 62 (1976) (regarding the Copyright Act of 1976).