The Publicity Rights of *Avatar*'s Avatars

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I. INTRODUCTION

As of January 19, 2010, AVATAR[1] had earned $1.86 billion, making it the highest grossing movie of all time.[2] Even after accounting for

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[1] AVATAR (Twentieth Century Fox Film Corp 2009)

[2] Dorthery Pomerantz, *Is Avatar Really King of the Box Office?*, FORBES.COM (Jan. 27, 2010), http://www.forbes.com/2010/01/27/avatar-box-office-business-entertainment-avatar.html.

higher ticket prices due to inflation over time, AVATAR is undoubtedly one of, if not the most, successful films of all time. As a result, it seems likely that there will be many copycat films in the future that rely upon both the 3-D and performance-capture technology featured throughout the film.

Performance-capture technologies bring about many uncertainties with respect to the role of actors in the future. As one commentator has asked, "Is this acting, or is it animation? And, does this suggest that actors could become obsolete?"[3] One of the most vocal actors on the subject, Jeff Bridges, has cautioned:

> Actors will kind of be a thing of the past.... We'll be turned into combinations. A director will be able to say, "I want 60 percent Clooney; give me 10 percent Bridges; and throw some Charles Bronson in there." They'll come up with a new guy who will look like nobody who has ever lived and that person or thing will be huge.[4]

In addition, without the idiosyncratic characteristics of real actors, digital actors may be far easier for directors to work with.[5] However, *Avatar* Director James Cameron has dismissed such concerns, as performance-capture remains "an actor-driven process."[6] Steven Spielberg agrees and prefers "to think of it as digital makeup, not augmented animation."[7] Only time will tell who is right. However, one thing is certain: the financial and critical successes of AVATAR will likely lead to a refocusing upon the rights of publicity of actors that act in performance-captured roles.[8]

With the increasing use of performance-capture technology, studios will probably demand contractual permission from actors to produce, copyright, and publish their images. However, these new contracts could conceivably be over and under-inclusive. For instance, even

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[3] Rachel Abramowitz, *'Avatar' stirs an animated actors debate in Hollywood*, L.A. TIMES (Feb. 18, 2010), http://latimesblogs.latimes.com/herocomplex/2010/02/avatar-stirs-an-animated-debate-in-hollywood.html.

[4] *Id.*

[5] *See* Dave Kehr, *The Face That Launched a Thousand Chips*, N.Y. TIMES (Oct. 24, 2004), http://www.nytimes.com/2004/10/24/movies/24kehr.html (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").

[6] *Id.*

[7] *Id.*

[8] The legal system has historically "reacted to, rather than anticipated" technological innovation. 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).

though an initial contract may be clear in regards to the assignment of an actor's right to publicity, a problem arises with derivative works created when the actor is no longer under contract, since it is possible that aspects of the original performance—including the scanned image of the actor, the actor's movements, etc.—may be reused in the future. Although many actors will lack the leverage to dispute such contractual arrangements with the studios, high-profile actors—the Tom Cruises of the world—will do everything they can to maintain ownership over the digital data encompassed in their captured performance.

The following article examines what legal claims and business concerns may/are likely to arise from the performance-capture technology used in AVATAR. Part I briefly explains the basics of the technology at issue. Part II analyzes the merits of potential legal claims under (1) California's statutory right of publicity, (2) the common law right of publicity, and (3) copyright law. Part III discusses the business and practical considerations that studios, actors, and attorneys will need to take into account when contracting for the data that composes an actor's captured performance. Finally, Part IV concludes that, in order to avoid possible litigation and maximize efficiency in business, good contract drafting and clear property rights are essential.

II. PERFORMANCE CAPTURE TECHNOLOGY

Performance-capture technology is most easily described as the process where "cameras are placed all around the source-actor to digitally capture his full body motion and/or facial expressions during his performance."[9] Infrared sensors are placed all over the actor, who performs in front of a green screen.[10] Once digitally captured, the filmmaker may then place the captured performance in any environment.[11] During this process, the digital image of the actor is fixed into the memory of a computer as a "digital scandata-set," which records the actor's exact dimensions."[12] This scanning has been described as "akin to Xerox copying and creates a mere likeness of the source-actor."[13] After this copy—this "scandata"—is used, it remains

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[9] Joel Anderson, *What's Wrong with this Picture? Dead or Alive: Protecting Actors in the Age of Virtual Reanimation*, 25 LOY. L.A. ENT. L. REV. 155, 171 (2004-2005); 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, 448–49 (2001).

[10] *Id.*

[11] *Id.*

[12] Anderson, *supra* note 9, at 185.

[13] *Id.*

in the hard drives of computers, available for future use.

Although performance-capture technology has played an important role in earlier films such as the LORD OF THE RINGS[14] series and POLAR EXPRESS,[15] it evolved dramatically during the making of AVATAR.[16] AVATAR is responsible for an *enhanced* performance-capture state (called "The Volume") and facial performance-capture, which is capable of interpreting the movements of an actor's face.[17]

Even though digitally-captured performances may lack some of the soul of real actors, they "are useful creatures today, and will become more so with the passage of time and the continued development of technology."[18] While it may be some time before scandata can act on its own, "films can be populated with legions of digital extras. Filmmakers can use a few extras, changing eye color, hair tint, skin tone, and clothing, and create what appears to be a vast crowd with apparently infinite variations."[19] In the future, James Cameron predicts even more improvements to the software, making the performances even more realistic.[20] Given these possibilities, one commentator has observed that "digital technology is revolutionizing our ability to manipulate, change and recreate images."[21]

For the purposes of this article, the most important aspect of performance-capture technology is that it "produces a digital blueprint of an actor that can be stored, reused, manipulated, and duplicated in any imaginable way."[22] It is this "digital blueprint" that may be exploited in ways that extract economic value for a filmmaker, while at the same time potentially depriving actors of their right of publicity.

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[14] THE LORD OF THE RINGS: THE FELLOWSHIP OF THE RING (New Line Cinema 2001); THE LORD OF THE RINGS: THE TWO TOWERS (New Line Cinema 2002); THE LORD OF THE RINGS: THE RETURN OF THE KING (New Line Cinema 2003).

[15] THE POLAR EXPRESS (Castle Rock Entertainment 2004).

[16] *See* Aili McConnon, *James Cameron on the Cutting Edge*, BUSINESSWEEK (Apr. 2, 2007), http://www.businessweek.com/magazine/content/07_14/b4028005.htm.

[17] *Id.*

[18] Leslie A. Kurtz, *Digital Actors and Copyright – From the Polar Express to Simone*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 783, 784 (2005).

[19] *Id.* In addition, digital actors can serve as stuntmen, are not limited by labors laws, and are essentially ageless. *Id.* at 784-85.

[20] *Id.* Improvements include better lighting and the ability for real actors to perform with computer-generated characters during live-action filming. *Id.*

[21] *Id.* at 783.

[22] Anderson, *supra* note 9, at 184. This information is "capable of being used in new films and other new contexts, together or separately." Kurtz, *supra* note 18, at 788.

III. MERITS OF POTENTIAL CLAIMS

As a general rule, all performers, including actors, "are entitled to the economic value of their performances. However, a performer's persona is defined by an identifiable image and is conceptually separate from, although often inextricably linked to, the performance."[23] Therefore, non-A-list actors naturally have significantly less commercial value embedded in their persona than famous actors do.[24] As such, the importance of an actor's public image and celebrity will likely be one of the key factors in determining whether a publicity claim would be successful. The following section analyzes the merits of potential legal claims available to actors under (A) California's statutory right of publicity, (B) the common law right of publicity, and (C) copyright law.

A. *California's Statutory Right of Publicity*

All states have some sort of statutory right of publicity. However, due to the concentration of filmmaking in Hollywood, California's statutory right of publicity is the most relevant to analyze. Under California law, the general rule is that one may be held liable for the unauthorized use of someone else's name, voice, signature, photograph, or likeness, "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services" without prior consent.[25]

1. Commercial Purpose

The product placement or advertising requirement stated above is conceived of as a commercial use requirement, which is subsequently clarified under California Civil Code Section 3344(e)[26]. In order to determine whether the use of one's name or likeness in a commercial medium qualifies under section (a) of this statute, there must be a factual determination as to whether the name or likeness was "*directly connected*" with the commercial purpose.[27] The Ninth Circuit has since clarified that "the plaintiff must allege a knowing use by the

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[23] Anderson, *supra* note 9, at 173.

[24] *Id.* ("Although celebrity is an almost impossible label to define, generally, the more celebrity an actor enjoys, the higher the actor's commercial value.").

[25] CAL. CIV. CODE § 3344(a) (2009).

[26] CAL. CIV. CODE § 3344(e) (2009).

[27] *Id.* (emphasis added); Newcombe v. Adolf Coors Co., 157 F.3d 686, 693–94 (9th Cir. 1998).

defendant as well as a *direct connection* between the alleged use and the commercial purpose."[28]

If James Cameron were to reuse the digitally scanned images of the actors from AVATAR, or if others did the same with new films using the same or similar technology, there would arguably be a direct connection between the alleged use and commercial purpose of the film. Hollywood is in the business of making films, which now includes the enhanced use of special effects and performance capture. As such, reuse of an actor's performance and likeness to sell a film or new product is most likely for a commercial purpose and not a mere intermediate step.

2. Incidental Use

In order for a court to find liability on behalf of an actor against a filmmaker who attempts to re-use some or all of the actor's previously captured performance in another film, the use of the actor's "prepared by or in behalf of the user [must be] *only incidental, and not essential, to the purpose of the publication in which it appears*, [such that] there shall arise a rebuttable presumption affecting the burden of producing evidence that *the failure to obtain the consent* of the employee was not a knowing use of the employee's photograph or likeness."[29] Therefore, the court must make a factual determination as to whether the new work that makes use of the captured performances of the digitally scanned actors is essential to the new work.

For the next generation of AVATAR-like films, it is likely that completely copying an actor's likeness would be a non-incidental use in the creation of any new publications or film. However, a more interesting question arises when imagining a filmmaker taking only pieces of an actor's performance from the scandata, such as movement or bodily structure captured in the digitally scanned image. Although the captured performances are based upon the form and structure of an actor's particular body, it seems unlikely that the form of an actor's body would be so unique as to be "essential" to the performance. While some actors may have such distinctive forms as to be immediately recognizable, even with a distorted face or other features, in most cases the movement or body structure of the actor would merely be a tool in making a new publication, not an "essential" step in the creative process. And so, when there is merely a piecemeal use of

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[28] Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001) (emphasis added).

[29] CAL. CIV. CODE § 3344(c) (2009) (emphasis added).

a previously captured performance, there most likely will be a rebuttable presumption that the failure to obtain an actor's consent for future uses was without the knowledge of the director or producer who is reusing the actor's piecemeal performance.

3. Readily Identifiable

The California Civil Code also imposes an additional restriction for the reproduction of photographs in which a person must be "*readily identifiable* from a photograph [so that] one who views the photograph with the naked eye can *reasonably determine* that the person depicted in the photograph is the same person who is complaining of its unauthorized use."[30]

For example, the Ninth Circuit held that a beer advertisement's alleged use of a former major league baseball pitcher's likeness was not a "readily identifiable" representation of that player.[31] In *Newcombe*, Killian's Irish Red Beer published an advertisement that included a "baseball scene focused on a pitcher in the windup position and the background included a single infielder and an old-fashioned outfield fence." The Court noted that a likeness is similar to a photograph— "a visual image that is obtained by using a camera while a likeness is a visual image of a person other than a photograph"—and the court found that the "readily identifiable" "standard [is] appropriate to likenesses as well as photographs."[32] As such, the court held that there was a triable issue of fact as to whether this figure was "readily identifiable" as Don Newcombe given that "[t]he pitcher's stance, proportions and shape are identical to [a] newspaper photograph of Newcombe; even the styling of the uniform is identical, right down to the wrinkles in the pants."[33] The court disagreed with the defendant that the pitcher in the advertisement was "essentially generic" since, given the evidence in the record, Newcombe was the only one who has such a distinctive stance.[34] The court also reasoned that the pitcher's dark skin color and uniform number made him "readily identifiable, even though his facial features were not entirely visible."[35]

Although the "readily identifiable" requirement was previously limited to photographs within the statutory framework in California,

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[30] CAL. CIV. CODE § 3344(b)(1) (2009) (emphasis added).

[31] *Newcombe,* 157 F.3d at 692.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 693.

the court in *Newcombe* held that this rule applies to likenesses as well. As such, the digitally captured performances of actors in *Avatar*-like films would likely qualify under this statutory section as likenesses or representations of people.[36] Applying the principles of *Newcombe* to performance capture technology, there is a question of *how* the previous performances may be used in the future. If, like in *Newcombe*, there is direct copying of an actor's distinctive stances (or other important moments in a film) and skin color, then reuse of an actor's performance should qualify under this section. However, if such identifiable characteristics of the actor are not present—a possibility when considering the manipulation of an actor's skin color and species in *Avatar*—then it seems more likely that such copying would be, as the Ninth Circuit phrased, of an "essentially generic" representation of the actor's performance. Finally, unless an actor's body is so completely distinctive that someone could recognize it outside its original context, it seems most likely that an actor's claim for violation of his or her right of publicity would be unsuccessful.

4. The Robot Cases

The interplay between technology and celebrity is nothing new in the right to publicity arena, as demonstrated by the following robot-related cases. The Ninth Circuit held that Samsung's video-cassette recorder advertisement featuring a robot, positioned in Vanna White's distinctive Wheel of Fortune stance, posed in front of a game show set, and dressed in a wig, gown, and jewelry did not violate her right of publicity under California law.[37] The court observed that Samsung "used a robot with mechanical features, and not, for example, a mannequin molded to White's precise features."[38] As such, the court held that, "[w]ithout deciding for all purposes when a caricature or impressionistic resemblance might become a 'likeness,' [the court] agree[s] with the district court that the robot at issue here was not White's 'likeness' within the meaning of section 3344."[39]

In *Wendt v. Host International, Inc.*, the Ninth Circuit held that defendant's placement of 3-D animatronic robotic figures ("robots") allegedly based on the likenesses of characters from the television

[36] In addition, a digital scan may actually be a compilation of photographs.

[37] White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992). The record also indicated that this character was intentionally made to look like *Wheel of Fortune*'s Vanna White. *Id.* at 1400.

[38] *Id.* at 1397.

[39] *Id.*

show *Cheers* raised issues of material fact.[40] As a general rule, the court disagreed with the district court's determination that "the robots were not likenesses of the appellants because the 'likeness' need not be identical or photographic."[41] The court directly addressed its prior avoidance in *White*, holding that "[t]he degree to which these robots resemble, caricature, or bear an impressionistic resemblance to appellants is therefore clearly material to a claim of violation of Cal. Civ. Code § 3344."[42] As such, "summary judgment would have been appropriate upon remand only if *no* genuine issues of material fact concerning that degree of resemblance were raised by appellants."[43]

The facts are distinguishable from *White*, wherein the defendant had not created "a manikin molded to White's precise features." In future cases involving the copying or reuse of an actor's captured performance, a filmmaker will have essentially created a digital manikin that was exactly "molded" to an actor's "precise features." But, such a determination would not be dispositive of an unauthorized copying of one's likeness. Instead, as the court in *Wendt* held, the three-dimensional copying of one's likeness merely raises a triable issue of fact that cannot be disposed of through summary judgment. It does not mean that the plaintiff will necessarily have any success.

In addition, as in *White*, where the contested likeness was "a robot with mechanical features," here, the reused captured performance may also have somewhat mechanical or alien features. If a filmmaker is merely using captured body structure, then that structure would not include a face or any other readily identifiable characteristic. Even under the broader rule from *Wendt*, if the new work manipulates the captured performance or digital scans into a new alien or other new identity, a reasonable finder of fact might not observe even an "impressionistic resemblance" between the new works as compared to the plaintiff's likeness.

B. *Common Law Right of Publicity*

The analysis under common law is very similar to the statutory construction in California. The similarities and differences are described herein. The Second Restatement of Torts describes the liability of common law appropriation and invasion of privacy as follows: "One who appropriates to his own use or benefit the name or

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[40] Wendt v. Host Int'l, Inc., 125 F.3d 806, 809 (9th Cir. 1997).

[41] *Id.*

[42] *Id.* at 810.

[43] *Id.*

likeness of another is subject to liability to the other for invasion of his privacy."[44] In the comments and illustrations following this general rule, the writers of the Restatement explain that the privacy interest at stake is the "exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others."[45] This interest is a property right, not "the protection of his personal feelings against mental distress."[46]

Because the Restatement clearly defines the right of publicity as a property right, and not a protection of personal feelings, an actor-plaintiff must demonstrate her exclusive right to her identity, but only as it is represented by her "name or likeness." Because actors are in the business of selling their performances and image, it follows that an actor's right of publicity would be characterized as a property right. However, this exclusive right is limited by the language of the *Restatement* to her "name or likeness," not an actor's "identity." As such, an actor must be able to show that her "likeness" has been misappropriated, which, for all of the reasons discussed in the previous section, particularly the possible lack of distinctive or readily identifiable characteristics, may be difficult. However, for well-known and readily identifiable actors whose likenesses are copied without much manipulation, there would seem to be a strong likelihood of success.

1. Commercial Use

The invasion of privacy most commonly anticipated by this section of the Restatement is the commercial appropriation of an individual's name or likeness.[47] However, this cause of action "is not limited to commercial appropriation."[48]

It may also apply "when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one."[49] However, according to the Restatement, some states only recognize liability for commercial

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[44] RESTATEMENT (SECOND) OF TORTS § 652(c) (1977).

[45] *Id.*

[46] *Id.*

[47] RESTATEMENT (SECOND) OF TORTS § 652(c) cmt. b (1977).

[48] *Id.*

[49] *Id.*

uses.[50]

The "commercial use" prong of the common law right of publicity favors the plaintiff more than the California statutory equivalent. Because this section of the Restatement is explicitly "not limited to commercial appropriation," if an actor-plaintiff can show that the actor's name or likeness was appropriated without consent, then the plaintiff most likely will succeed in showing that it was used for the defendant's "own purposes and benefit." Without the direct connection requirement, it is much easier to show that the copying filmmaker benefitted from the actor's captured performance indirectly.

2. Incidental Use

In order for the court to make a finding of unlawful appropriation of name or likeness, there must be a non-incidental use.[51] The Restatement explains that the value of one's likeness is not "appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity."[52] In addition, even if the defendant is a for-profit entity, automatic liability for every use of a potential plaintiff's name or likeness is not always the case.[53]

In future cases involving appropriation of an actor's captured performance it is unclear whether an actor-plaintiff's likeness will be considered copied for the purpose of "taking advantage of [her] reputation, prestige, or other value associated with [her]." If the captured-performance and digital scans are not clearly identifiable as the actor-plaintiff (for the reasons discussed in Part II.A.3), the purpose of the use would certainly not be to take advantage of her reputation or prestige. Additionally, even if the actor is identifiable, the purpose of the appropriation may still be for an incidental purpose, such as merely needing an actor's digitally scanned body as an extra in the background. However, if the captured performance is used for the reasons that the Restatement implicates,[54] then the actor would have a valid claim.

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[50] *Id. See, e.g.*, CAL. CIV. CODE § 3344 (2009).

[51] RESTATEMENT (SECOND) OF TORTS § 652(c) cmt. d (1977).

[52] *Id.*

[53] *Id.*

[54] RESTATEMENT (SECOND) OF TORTS § 652(C) (1977).

3. Appropriating "Identity"

In *White*, although the Ninth Circuit denied the plaintiff's claim under California law, the Court held that the district court incorrectly dismissed her claim under the common law right of publicity.[55] Under the framework established in *Eastwood v. Superior Court,* the common law right of publicity "may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."[56] Although the Ninth Circuit agreed with the district court's finding that the defendant had not appropriated Ms. White's "name or likeness," the court held that the defendant had appropriated her "identity."[57]

As such, the question to ask is not "*how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so. . . . A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth."[58] Therefore, a court must consider more than just the "means of appropriation," and instead view all aspects of the contested use together.[59]

In dissent, Judge Alarcon observed that the court in *Eastwood* had already discussed the differences between the common law and California statutory versions of the right of publicity.[60] In this comparison, "[t]he court did not include appropriations of identity by means other than name or likeness among its list of differences

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[55] White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992).

[56] Eastwood v. Super. Ct. of L.A. Cnty.,149 Cal. App. 3d 409, 417 (1983).

[57] *White*, 971 F.2d at 1397.

[58] *Id.* at 1398; *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (rejecting Bette Midler's California right of publicity claim concerning a Ford television commercial in which a Midler "sound-alike" sang a song which Midler had made famous); *see also* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (holding that California right of publicity claim should reach jury when the defendant had used a photograph of the plaintiff's race car in a television commercial); *see also* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) (holding that "the right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity").

[59] *White*, 971 F.2d at 1399 (finding that the long gown, blond wig, and large jewelry; the process of turning a block letter on a game-board; and what appears to be the 'Wheel of Fortune' game show set, all "leave little doubt about the celebrity the ad is meant to depict").

[60] *Id.* at 1403 (Alarcon, J., dissenting).

between the statute and the common law."[61]

Despite the Ninth Circuit's reasoning in *White*, an actor-plaintiff may still have a claim, albeit weak, under the common law right of publicity. Unlike in *White*, in which Vanna White's "identity" had been appropriated through the combined use of dress, setting, and stance, in cases involving performance-capture, the reuse of an actor's the digital scan and some aspects of her performance may not share the dress, setting, or stance of the plaintiff. Although an actor may be a member of the Na'vi species in one film, she may be a human, robot, or other alien in the next. Rather, the captured images are copies of the form of an actor's body itself. As such, even if the digital scan captured every individual curve of an actor's body, it would not capture her personality or "identity," but merely her indistinguishable figure.

In addition, as discussed earlier, although the Restatement's formation of the common law right of publicity protects the "exclusive use of his own identity," it is only protected "in so far as it is represented by his name or likeness," not all potential uses of one's identity. Therefore, Judge Alarcon's dissent correctly observed that there is no such distinction between the state and common law right to publicity.

C. *Copyright*

1. Subject Matter

Copyright protection is limited by subject matter restrictions.[62] Under the Copyright Act, copyright protection only exists for "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[63] Original works of authorship do not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[64]

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[61] *Id.*

[62] 17 U.S.C.A. § 102 (West 2006).

[63] *Id.* at (a) ("Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.").

[64] *Id.* at (b).

Although "motion pictures and other audiovisual works" are among the enumerated works of authorship listed in Section 102, the contested subject matter in these AVATAR-like cases would involve the digital rendering of the actors, not the film itself.[65] As such, they are better characterized as "pictorial, graphic, and sculptural works - like architectural renderings or computer models."[66] These works include "two-dimensional and three-dimensional works of fine, graphic, and applied art, . . . charts, diagrams, models, and technical drawings, including architectural plans." They may only be copyrighted for their "form but not their mechanical or utilitarian aspects."[67] As such, a pictorial, graphic, or sculptural work only qualifies for copyright protection if it "incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[68]

In *Downing*, the Ninth Circuit established that the creative work of authorship was the photograph itself, not the names and likeness of those pictured within the photograph.[69] The court then adopted *Nimmer on Copyright*'s understanding of what constitutes a copyrightable "work" as follows:

> The 'work' that is the subject matter of the right of publicity is the persona, i.e., the name and likeness of a celebrity or other individual. A persona can hardly be said to constitute a 'writing' of an 'author' within the meaning of the copyright clause of the Constitution. *A fortiori* it is not a 'work of authorship' under the Act. Such name or likeness does not become a work of authorship simply because it is embodied in a copyrightable work such as a photograph.[70]

As such, the California right of publicity is not preempted by federal copyright law. Therefore, copyright does not apply in right of publicity cases.[71]

In future cases involving performance-capture filmmaking, the digital scans of actors are most likely non-copyrightable works of the actor-plaintiff. Even though copyright extends to pictorial, graphic, or sculptural works, such works only qualify for copyright protection if they contain features that may be "identified separately from, and are

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[65] *Id.* at (a).

[66] *Id.*

[67] 17 U.S.C.A. § 101 (West 2006).

[68] *Id.*

[69] Downing v. Abercrombie & Fitch, 265 F.3d 994, 1003-04 (9th Cir. 2001).

[70] *Id.* (quoting 1 Nimmer on Copyright § 1.01[B][1][c] at 1–23 (1999)).

[71] *Id.* at 1004; *see also* KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 374–75 (Ct. App. 2000).

capable of existing independently of, the utilitarian aspects of the article." Although the particular measurements of the digital scan are unique, the data composing the actor's performance is not an independently copyrightable expression or an original work of authorship, but merely a means to an end. To put it another way, "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."[72] Assuming that the future contested appropriation is not a complete copying of the original performance, which would be a very easy case for the artist to succeed upon, the piecemeal aspects of a captured performance are utilitarian tools for constructing the final performance, not artwork in and of itself.[73] Even if captured performance met the criteria for art, following the reasoning in *Nimmer*, the "author" for such works would be their creator, not their model or actor.[74] Thus, it would likely be the director or even animator who would possess the copyright.

2. Works Made for Hire

In the alternative, even if the appropriation of a captured performance qualified under the subject matter restrictions for copyright, it most likely would be considered "works made for hire," and therefore would belong to the original filmmaker. A "work made for hire" is defined as "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, . . . as an instructional text, . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[75] Additionally, an "instructional text" is defined as "a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities."[76]

Any contested digital scan and captured performance most likely would be considered "work[s] prepared by an employee within the

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[72] Anderson, *supra* note 9, at 186.

[73] One commentator has observed that filmmakers will attempt to characterize their appropriation of digital clones as merely "seek[ing] to replicate as close as possible the *elements* of a human being, rather than those created *by* a human being. The arrangement of facial features and expressions, and the movement of face and body muscles are not themselves copyrightable." Kurtz, *supra* note 18, at 793 (emphasis added).

[74] *See* Beard, *supra* note 8, at 453 ("What is obvious from this analysis is that the actor is not the author in any of these scenarios.").

[75] 17 U.S.C.A. § 101 (West 2006).

[76] *Id.*

scope of his or her employment," since they would be created while the plaintiff was employed as an actor. And, even if they were not within the scope of employment, as long as the original contract grants the filmmaker permission to produce and publish the actor's image as specified in the employment contract, any digital scan or other piecemeal aspects of the captured performance would seem to qualify as a graphical "instructional text" for purpose of future animation.

IV. BUSINESS AND PRACTICAL CONSIDERATIONS[77]

The merits of the legal claims discussed above create the business framework within which studios, actors, and attorneys, will fight for control of a captured performance's underlying scandata. Whoever maintains the property rights to this library of digital information may reuse it accordingly, thus deriving a potentially great economic benefit. Given the tremendous potential value of the scandata at issue, rational studios will most likely demand that actors assign their rights of publicity to the studio and agree to explicit work for hire contracts, thus ensuring that the studio maintains ownership over the digital scans.

A. *Assignable Rights of Publicity*

Both the statutory[78] and common law[79] rights of publicity are assignable. For this reason, it is essential for the filmmakers—or, more practically speaking, the filmmaker's lawyers—to ensure that an actor's right of publicity is *properly* assigned as the actor's "image" when the actor contractually agrees to appear in the film. Similarly, clearly defined and explicitly contracted works made for hire will ensure that the actor's copyright claims are quickly dismissed as a matter of law.[80]

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[77] The business and practical considerations discussed throughout this section are based on general observations about rights of publicity and common industry negotiation practices. *See generally* SCHUYLER M. MOORE, THE BIZ: THE BASIC BUSINESS, LEGAL, AND FINANCIAL ASPECTS OF THE FILM INDUSTRY (Silman-James Press, 3rd ed. 2007).

[78] *See* KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 365 (Ct. App. 2000).

[79] The Restatement of Torts clearly states that the property right of publicity "may be given to a third person, which will entitle the licensee to maintain an action to protect it." RESTATEMENT (SECOND) OF TORTS, § 652(c) (1977).

[80] *See* Wilkes v. Rhino Records, Inc., 133 F.3d 931 (9th Cir. 1997).

B. *A-List Actors*

Actors who have great leverage in negotiation—the Tom Cruises of the world—are going to resist giving up any control over the scandata of their captured performance. Although the studios have a very strong leg to stand on in regards to the legal control over the actor's rights to publicity and the copyright of the scandata, it is impossible for a studio to make a Tom Cruise film without Tom Cruise. As such, all of the legal leverage in the world cannot force A-list actors to give up ownership of their scandata without a fight.

Just as studios will want to maintain ownership over the library of scandata for each actor in each film, an A-list actor could also derive great benefit from maintaining his own personal library of digital information. Instead of having to be re-scanned every time he makes a performance-capture film, Tom Cruise could create his own digital scans and could license the right to use that data to the new filmmaker. This would allow him to not only protect his economic interests, but also his interests in digital bodily integrity.

Of course, no studio would want to let an actor, whether A-list or not, keep ownership over his scandata. Not only is the commodity valuable in itself—for the original film as well as sequels, prequels, and yet undiscovered uses—but ownership of this data also appears to be necessary to ensure efficient and cost-effective filmmaking. If a studio had to get a license from an A-list actor to use the scandata for a sequel the cost would be enormous, as the actor would have tremendous leverage.[81] Consequently, a studio will likely demand that an actor give up any and all rights to that digital information. Although it will likely cost the studio a significant amount of money, it will prevent the risk of future litigation while at the same time giving the actor fair compensation for his digital body scan.

Finally, it is worth noting that not all actors will be willing to sign such agreements giving up any and all current and future rights to use their scandata. However, unless the actor has immense leverage, he most likely will just get passed over for another actor willing to sign the contract.[82]

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[81] Just as an example, Summit Entertainment has had difficulty finalizing deals with its actors from the "Twilight" series of films. Matt Beloni, *Salary dispute holding up 'Twilight 5' announcement*, THE HOLLYWOOD REPORTER (Dec. 21, 2010), *http://www.hollywoodreporter.com/blogs/thr-esq/salary-dispute-holding-twilight-5-63880*. The more successful that a franchise becomes, the more money its stars demand.

[82] *See id.* (As the "Twilight" dispute demonstrates, actors are replaceable—"After the success of the first film, Summit axed Rachelle Lefevre, who played Victoria, in part because her reps played hardball on money and scheduling. (Bryce Dallas Howard got the job

C. *No Leverage Actors*

In contrast to A-list actors, most actors will have no leverage with the studios.[83] As such, because legal conclusions in Part III above greatly favor the studios and not the actors, non A-list actors have little leverage in negotiation. As such, studios will likely offer little to no compensation for an actor giving up his rights to any and all current and future uses of his scandata. The actors will just be happy to have a job. Ironically, it is these actors who might be most at risk for having their digital bodies appropriated as they can easily be turned into digital extras without too much effort or hassle by the filmmaker. Although it may take some time, the Screen Actors Guild may be able to protect these property interests for non A-list actors, or, at the very least, ensure some fair compensation[84].

V. CONCLUSION

For all the reasons discussed above, actor-plaintiffs will face serious obstacles when attempting to protect their statutory right of publicity, common law right of publicity, and copyright claims, as they relate to performance-capture technology. For both plaintiffs and defendants, good contract-drafting and clear assignment of rights of publicity and copyright are essential for avoiding litigation. Celebrities capable of financing or commissioning their own digital body scans can be considered authors of their own digital clones.[85] Thus, the best way for an actor to prevent unlawful appropriation of her right of publicity or copyright is to own her digital scan from the start.[86] Of course, it is highly unlikely that directors or studios would be willing to bargain away such a valuable property, particularly in our digital age where they are already losing money. Therefore, it will most likely

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instead.)").

[83] *See id.*

[84] See *Mission Statement,* SCREEN ACTORS GUILD, http://www.sag.org/about-us/mission-statement (last visited Mar. 18, 2011) ("Screen Actors Guild is the nation's largest labor union representing working actors. Established in 1933, SAG has a rich history in the American labor movement, from standing up to studios to break long-term engagement contracts in the 1940s to fighting for artists' rights amid the digital revolution sweeping the entertainment industry in the 21st century. With 20 branches nationwide, SAG represents over 125,000 actors who work in film and digital motion pictures and television programs, commercials, video games, industrials, Internet and all new media formats. The Guild exists to enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights.").

[85] Anderson, *supra* note 9, at 186.

[86] *Id.*

become a question of leverage, and just how much a studio is willing to pay for an actor's present and future rights to his or her own digital body.