

PRESERVING PERSONALITY AND REPUTATIONAL INTERESTS OF CONSTRUCTED PERSONAS THROUGH MORAL RIGHTS: A BLUEPRINT FOR THE TWENTY-FIRST CENTURY

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In an age where every man and woman has fifteen minutes of fame, Professor Kwall examines ways in which American law should protect celebrities against unwarranted commercial exploitation. She argues that the doctrine of moral rights could be extended to constructed personas to protect the reputational and personality interests of celebrities. As other countries and international treaties move in this direction, Professor Kwall suggests that the United States should examine offering such protection to American personas.

Looking first to the similarities between moral rights and publicity rights, Professor Kwall highlights the advantages of protecting personality and reputational interests through copyright's moral-rights provision. Such an approach would be constitutionally sound, because a constructed persona falls within the definition of "a writing" as the term is used in the Constitution's Copyright Clause. She argues that a constructed persona is an original work of authorship that is sufficiently tangible to be afforded copyright protection. By protecting constructed personas in this way, people whose livelihoods depend on the preservation and integrity of their personas will be protected. Also, because the limiting doctrines of copyright law would be applied to the protection of constructed personas under moral-rights law, issues of free speech and societal access can be considered in connection with damage to the personal interests of the persona.

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I. INTRODUCTION

The United States stands at the forefront of nations regarding the development and implementation of a legal doctrine, the right of publicity, which protects celebrities against unwarranted commercial exploitation.¹ Over half the states have recognized publicity rights either by statute or common law.² However, the litigation surrounding the right of publicity has become mired in controversy, at least among academics and some segments of the judiciary, due to the difficult question of how to treat “hybrid” commercial uses. Such uses include situations that involve a mixture of commercial and political, informational, entertainment, or other expressive components.³ Interestingly, the United States’ leadership among nations in protecting publicity rights is somewhat curious in light of our far less progressive stance with respect to the protection of another personality interest, moral rights.⁴ “Moral-rights laws are concerned with preserving the artistic integrity of a creator’s work and compelling appropriate authorship recognition, thus offering protection for a creator’s personal, as opposed to economic, interests.”⁵ Fundamentally, moral-rights laws seek to vindicate damage to the human spirit, an interest that transcends the artist’s concern for property or even reputation.⁶

Moral rights encompass essentially three major components: the right of integrity, the right of attribution, and the right of disclosure.⁷ The right of integrity, which prohibits any alterations of a creator’s work that destroys the spirit and character of that work, lies at the heart of the moral-rights doctrine.⁸ This right guarantees the author that her “work is a true representation of [her] creative personality.”⁹ Moral rights also protect the right of attribution, which safeguards to the author the right to compel recognition for her work and to prevent others from naming

1. See generally Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1 (1997).

2. See ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL KWALL, *INTELLECTUAL PROPERTY: CASES AND MATERIALS ON TRADEMARK, COPYRIGHT, AND PATENT LAW* 547 (1996).

3. Compare *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (holding that Vanna White had a common-law, right-of-publicity action against company that used in an advertisement, without consent, a robot attired to resemble White posing next to a game board recognizable as the Wheel of Fortune game-show set), with *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970 (10th Cir. 1996) (holding unlicensed trading cards containing parodies of active, major-league baseball players protected by the First Amendment). See generally *Comedy III Productions*, discussed *infra* note 108.

4. See Kwall, *supra* note 1, at 18–21.

5. *Id.* at 18.

6. See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 25 (1985) (“The personality rights safeguarded by the moral right doctrine encompass more than protection for a creator’s professional reputation or relief for injured feelings.”); see also *infra* notes 52–57 and accompanying text.

7. See Kwall, *supra* note 6, at 5.

8. See *id.* at 8.

9. Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 15 (1988).

anyone else as the creator.¹⁰ The attribution right also protects a creator's negative rights of anonymity and pseudonymity.¹¹ Additionally, moral rights protect an author's right of disclosure, which allows the author to determine when a work is ready for public dissemination, and safeguards for the author the exclusive right to possess any rights in an uncompleted work.¹²

About ten states protect moral rights to some degree, primarily in the context of visual art.¹³ In addition, a federal statute, the Visual Artists Rights Act (VARA), was enacted in 1990 as part of the federal copyright law.¹⁴ VARA provides creators of visual art, as defined in the statute, with relatively limited rights of attribution and integrity when modifications to their works are made that will prejudice their honor or reputation.¹⁵ The coverage of VARA is extremely narrow, protecting only certain categories of visual art that include "a painting, drawing, print, or sculpture, . . . a still photographic image produced for exhibition purposes only, existing in a single copy . . . , or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."¹⁶ Moreover, the right of integrity under VARA is limited to intentional modifications and fails to include rights in reproductions of the protected work.¹⁷ VARA also fails to define or provide any guidance with respect to how a determination of "prejudice" should be made.¹⁸ Works made for hire are excluded from the scope of VARA's coverage.¹⁹ Significantly, the issue of waiver of VARA rights was so problematic that a separate report on the effect of VARA's waiver provisions was finalized subsequent to VARA's enactment.²⁰

10. See Kwall, *supra* note 6, at 7. The moral-rights doctrine is a personality-based doctrine distinct from the right of publicity, which historically has incorporated elements of trademark law's emphasis on commercialization and consumer confusion. This is underscored by Professor Damich's observation that "[a]tribution focuses on the work placed before the public and ensures that its author be properly identified or not, as he wishes." Damich, *supra* note 9, at 13.

11. See Damich, *supra* note 9, at 13.

12. See Kwall, *supra* note 6, at 5; see also Damich, *supra* note 9, at 8 ("If the author has the right to determine how his personality as expressed in the work is to be revealed, it follows that he has the right to control its disclosure to the public.").

13. These states include California, Connecticut, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. See Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTEL. PROP. L. REV. 1, 30 (1997).

14. See *id.* at 1.

15. See *id.* at 2.

16. 17 U.S.C. § 101 (1994).

17. See *id.* § 106A(c)(3).

18. See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 323 (S.D.N.Y. 1994) (interpreting the provision of VARA that allows an author to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation" in light of the terms' "readily understood meanings").

19. See 17 U.S.C. §§ 101(2)(B), 106A (1994); see also *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 88 (2d Cir. 1995) (holding that sculpture at issue was a work made-for-hire, and thus outside the scope of VARA).

20. See Kwall, *supra* note 13, at 45-51. One provision of VARA that was severely criticized by several parties who provided commentary to the Copyright Office regarding the waiver issue is that which allows one joint author to waive VARA rights on behalf of other joint authors. See *id.* at 49; see

Notwithstanding VARA's definitional gaps and problematic areas,²¹ the blueprint for moral-rights protection in the twenty-first century can—and should—include much more than simply patching up VARA's numerous deficiencies.²² The scope of VARA must be significantly broadened to include works other than visual art. Literary and other copyrightable works can be subject to mutilation and distortion just as readily as visual art. Additionally, federal moral-rights protection is necessary to protect the reputational and personality interests of performers and others whose personas are subject to mutilation through misappropriation. Unfortunately, in the United States, conventional moral-rights and copyright doctrines have ignored the reality that constructed personas are works of authorship, and therefore eligible for protection under federal copyright law.²³

Actor Richard Masur, the immediate past President of the Screen Actors Guild (SAG), addressed the Intellectual Property Section of the American Association of Law Schools (AALS) at the annual meeting in January 2000.²⁴ He emphasized the need for a uniform federal right that would protect the reputational interests of performers and others whose personas may be misappropriated.²⁵ As he discussed, it is already possible to do a full body and face scan of an actor, intended for use in one motion picture, and have that scanned persona appear as a newly created performance in an entirely different film.²⁶ Suppose a well-known actress appears in a film, from which a clip is posted on the Internet for promotional purposes. This digital clip is then downloaded, and the actress's

also Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 416–17 (1995).

21. E.g., *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (discussing how to prove “recognized stature,” a standard that a visual art must meet before it will be protected from destruction under VARA).

22. It is worth noting that some believe that the recently enacted Digital Millennium Copyright Act has the potential for safeguarding authors' moral rights in a broader context than VARA. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C. and 18 U.S.C. § 4001). For a brief discussion of this viewpoint, see Roberta Rosenthal Kwall, *Moral Rights for University Employees and Students: Can Educational Institutions Do Better Than the U.S. Copyright Law?*, 27 J.C. & U.L. 53, 55–56 n.16 (2000).

23. Cf. *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 913 (2000) (“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.”) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.01[B][1][c], at 1-2 to 1-23 (1996)).

24. The speeches presented at this AALS annual meeting are published at 10 DEPAUL-LCA J. ART & ENT. L. 1 (2000).

25. See Richard Masur, *Right of Publicity From the Performer's Point of View*, 10 DEPAUL-LCA J. ART & ENT. L. 253, 253–58 (2000). Mr. Masur's comments focused specifically on unauthorized uses of an individual's persona in circumstances that “would either invade personal privacy or tend to damage, destroy, diminish or dilute the property value of that persona.” *Id.* at 257.

26. Digital scanning and motion-recapture technology enable the recreation of living actors as well as youthful images of aging or deceased stars. See Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law*, 41 J. COPYRIGHT SOC'Y 19, 20–25 (1993); see also Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 393 & n.33, 394 & n.34 (1999) (discussing the digital-scanning and computer-generated imagery phenomenon).

image is copied into a program that can manipulate and animate it, thereby creating a new piece of digital film that has a perfect copy of the actress's image. Now suppose the new work is a screen saver in which the actress's clothes have been digitally removed. In that screen saver, the actress is animated to be posing in a series of suggestive and lewd positions. If the screen saver is subsequently published on the Internet and made available to others without payment of a fee, the right of publicity would be of little use to the actress in pursuing the author of the screen saver. "Furthermore, since the original image was derived from a copyrighted work that was used to promote the original film, under current law, only the copyright holder would be entitled to seek restitution for the misappropriation of the material."²⁷ But because there is no damage to the copyrighted work, the copyright holder may have no interest in pursuing the matter. This kind of image theft already has occurred involving still photographs, and has resulted in "serious damage to the reputations of the affected performers, with little or no recourse available to them."²⁸ "As technology develops, . . . and more thefts of both still and moving images [take place], a mechanism for curtailing this type of abuse becomes increasingly necessary."²⁹

Extending moral-rights protection to personas, and thereby protecting the reputational and personality interests often at stake in right of publicity disputes,³⁰ is a fruitful area for exploration in the new century. Such protection is constitutionally sound and would be doctrinally beneficial. Moreover, the protection of performers' reputational and personality rights through copyright law comports with a growing international trend. Currently, at least six countries protect performing artists' reputational and personality rights as part of their respective copyright laws.³¹

27. Masur, *supra* note 25, at 258.

28. *Id.*

29. *Id.*; see also Haemmerli, *supra* note 26, at 389 n.21 (discussing examples of technology's ability to "kidnap" an individual's likeness and position that likeness in fictitious lewd or violent acts).

30. At times, this article uses the term "personal" interests to refer to the combination of both reputational and personality interests considered herein.

31. Dr. Adolf Dietz, *Germany*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE GER-1, § 9 (Paul Edward Geller et al. eds., 1999) [hereinafter Dietz, *Germany*] ("One moral right is recognized in Section 83, which entitles the performer to prohibit such distortion or other alteration of his performance as might prejudice his prestige or reputation . . ."); Dr. Mario Fabiani, *Italy*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE ITA-1, § 9[1][a][i] (Paul Edward Geller et al. eds., 1999) [hereinafter Fabiani, *Italy*] ("Article 81 of the Act affords to performers the moral right to relief from such dissemination, transmission, or reproduction of their performances as would be prejudicial to their honor or reputation."); Dr. Gunnar Karnell, *Sweden*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE SWE-1, § 9[1][a][i] (Paul Edward Geller et al. eds., 1999) [hereinafter Karnell, *Sweden*] ("Performers have the same moral rights as authors."); Andre Lucas, *France*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE FRA-1, § 9[1][a][i] (Paul Edward Geller et al. eds., 1999) [hereinafter Lucas, *France*] ("A performing artist has rights to respect for his name and status . . . and to respect for his interpretation, that is, for its integrity."); Alain Strowel & Jan Corbet, *Belgium*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE BEL-1, § 9[1][a][i] (Paul Edward Geller et al. eds., 1999) [hereinafter Strowel & Corbet, *Belgium*] ("The 1994 Copyright Act grants artistic performers . . . [t]he right of integrity, like that in Article 6bis of the Berne Convention, is predicated on showing prejudice to honor or reputation."); Joshua Weisman, *Israel*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE ISR-1, § 9[1][a]

Although the text of these statutes differs somewhat, several protect against alterations and modifications of a performer's work that would prejudice the performer's honor and reputation.³² Not surprisingly, the French statute appears to be the broadest in that it is not limited by the "honor and reputation" caveat and provides for inalienable and apparently perpetual protection.³³

Additionally, there is a movement underway to strengthen performers' rights through an international treaty. Originally, the Rome Convention, which was adopted in 1961, was the only multilateral treaty addressing performers' rights.³⁴ The Rome Convention was the culmination of efforts to incorporate the protection of performers in the Berne Convention.³⁵ The Rome Convention afforded performers the ability to prevent unauthorized broadcasts, fixations, and reproductions of their performances.³⁶ Article 19 of the Convention, however, extinguished these rights "once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation."³⁷ Therefore, the Rome Convention is viewed as unsatisfactory with respect to the interests of audiovisual performers.³⁸

In 1996, the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty was adopted at a WIPO Diplomatic Conference.³⁹ Article 5 of this Treaty contains a moral-rights provision, but it is limited to the protection of audio performances.⁴⁰ SAG has collaborated with the Motion Pictures Association of America (MPAA) in proposing another treaty as part of WIPO, which would also afford

(Paul Edward Geller et al. eds., 1999) [hereinafter Weisman, *Israel*] ("Performers have moral rights like those of authors, except that they are protected only against modifications of a derogatory nature . . .").

32. E.g., Dietz, *Germany*, *supra* note 31, § 9[1][a]; Fabiani, *Italy*, *supra* note 31, § 9[1][a][i]; Strowel & Corbet, *Belgium*, *supra* note 31, § 9[1][a][i].

33. Lucas, *France*, *supra* note 31, § 9[1][a][i] ("These rights are inalienable and not subject to any statute of limitations . . ."). In general, France's protection for moral rights is among the strongest. Cf. Kwall, *supra* note 1, at 20 (noting that in France, a cultural tradition exists "in which artists are elevated as a special class of laborers who possess almost spiritual qualities, and their works are treated as a special category of property").

34. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter International Convention].

35. Sallie C. Weaver, Analysis of Proposals for a WIPO Audiovisual Performers Rights Instrument 1 (Mar. 2000) (unpublished manuscript, on file with the author); Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention] (as last revised in Paris, July 24, 1971 and amended 1979). The Berne Convention was signed in 1886 and is the oldest multilateral treaty governing copyright protection. *Id.* at 223. Article 6bis of the Berne Convention addresses moral rights of authors, but does not cover performers. *Id.* at 235.

36. See International Convention, *supra* note 34, art. 7.

37. *Id.* art. 19.

38. See Weaver, *supra* note 35, at 1.

39. See WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 361 I.L.M. 76.

40. See *id.* art. 5.

audiovisual performers both economic as well as moral rights.⁴¹ The primary issue concerning the moral-rights provision is the performers' reputational interest.⁴² As of this writing, negotiations on this multilateral treaty are proceeding, and this effort marks the first time the United States has proposed a moral-rights provision for audiovisual performers on the international front.⁴³

Although an international treaty may be a promising way to address the concerns of performers, there is uncertainty regarding whether the United States will ever adopt this treaty. Even if it is ratified, the impact of the treaty on our current laws is an open question.⁴⁴ Therefore, it is important to consider independent proposals designed to safeguard the personal interests of performers.

Part II of this article defines the argument for protecting constructed personas through copyright law's moral-rights provisions.⁴⁵ It begins by examining the doctrinal similarities between moral rights and publicity rights and details the advantages of safeguarding the personal interests of constructed personas through moral-rights provisions. Part II argues that constructed personas are capable of copyright protection as "works of authorship." The final section of part II examines copyright law's fixation requirement, concluding that this requirement does not present a stumbling block to the type of protection outlined in this arti-

41. See *Report of the Standing Committee on Copyright and Related Rights*, World Intellectual Property Organization [WIPO], 3d Sess., Agenda Item 4: *Protection of Audiovisual Performances* (Nov. 1999) [hereinafter Agenda Item 4].

42. Article 5 of the submission, which governs moral rights of performers, provides as follows: Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his or her live performances or performances fixed in an audiovisual fixation, have the right to claim to be identified as the performer of such performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation, or other modification of his or her performance that would be seriously prejudicial to the performer's reputation. Modifications consistent with the normal exploitation of an audiovisual work undertaken by the producer of the work or the producer's successors in interest, pursuant to the exercise of rights of authorization acquired by the producer in the performance, shall not be considered seriously prejudicial to the performer's reputation. Agenda Item 4, *supra* note 41, art. 5(1).

43. See Telephone Interview with Sallie C. Weaver, National Director of Strategic Planning, Screen Actors Guild (Mar. 2000). This proposed treaty is narrower than the Berne Convention because it allows for modifications consistent with an audiovisual work's normal exploitation, which is defined as including "the use of new or changed technology, media, formats, and/or methods of distribution, dissemination, making available or communication to the public." Agenda Item 4, *supra* note 41, art. 5(4).

44. One of the requirements of compliance would be the enactment of implementing domestic legislation. Absent such legislation, the treaty would be meaningless in the United States, and other countries would not honor American performers' rights. See William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON INDEP. L. REV. 373, 374 (1995) ("[T]he Berne Convention is not self-executing, and thus its implementation depends entirely on domestic legislation."); see also SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 1886-1986*, at 906 (1987) (discussing that Berne does not provide for private cause of action); cf. Berne Convention, *supra* note 35, art. 6, 36.

45. See *infra* Part II.

cle. Part III briefly examines the mechanical operation of moral-rights protection for the personal interests of constructed personas.⁴⁶

II. THE CASE FOR PROTECTING CONSTRUCTED PERSONAS THROUGH MORAL RIGHTS

A. *Doctrinal Similarities Between Moral Rights and Publicity Rights*

The similarity between moral rights and publicity rights should be underscored at the outset. Doctrinally, moral-rights protections are analogous to publicity rights in at least two ways. First, both the right of publicity and moral rights “seek to protect the integrity of texts by rejecting fluidity of interpretation by the public in favor of the author’s interpretation.”⁴⁷

Just as the right of publicity safeguards the rights of celebrity personas to control the commercial contexts in which their images are used and allows them to decide how their images are presented to the public, moral rights allow creators of artistic works a comparable measure of control regarding the substantive presentation of their works.⁴⁸

In addition to sharing a concern for authorial control over the presentation of texts to the public, both moral rights and publicity rights focus on assaults to the author’s reputation and personality. The essence of a moral-rights injury lies in the damage caused to the author’s personality, as that personality is embodied in the fruits of her creation.⁴⁹ For this reason, the phrase “personal rights” is a more accurate translation of the French term *droit moral* than “moral rights,” because “personal rights” is more reflective of the theoretical basis underlying the concept.⁵⁰ Although moral rights are conventionally understood as protecting a creator’s personal interests,⁵¹ and the right of publicity is generally viewed as an economic right, a careful look at right of publicity litigation reveals that many decisions actually are more concerned with redressing rights of integrity over the images of the celebrity.⁵² One example of a morally based objection in a commercial context is *Waits v. Frito-Lay Inc.*,⁵³ in which singer Tom Waits sued Frito-Lay and its advertising agency for using a sound-alike who imitated Waits’s distinctive vocal

46. See *infra* Part III.

47. Kwall, *supra* note 1, at 19.

48. *Id.*

49. See Damich, *supra* note 9, at 26.

50. *Id.* at 4.

51. But see Adolf Dietz, ALAI CONGRESS: ANTWERP 1993, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 212 (1995) (“Without doubt . . . the exercise of moral rights can serve financial interests and the exercise of pecuniary rights can serve personal and intellectual interests.”).

52. See Kwall, *supra* note 1, at 19.

53. 978 F.2d 1093 (9th Cir. 1992).

style, despite Waits's firm public policy against doing commercials.⁵⁴ Waits maintains a firm belief that commercials undermine the artistic integrity of musicians.⁵⁵

Of course, morally based objections also can occur in conjunction with less patently commercial appropriations, and these often are the most difficult controversies to resolve due to the strong countervailing First Amendment interests at stake. Digital technology is creating endless possibilities for such litigation.⁵⁶ For example, in *Hoffman v. Capital Cities/ABC Inc.*,⁵⁷ the defendant magazine was found liable under both the common law as well as the California right-of-publicity statute for publishing a photograph of actor Dustin Hoffman as he appeared in the 1982 movie *Tootsie*.⁵⁸ The photograph, however, was digitally altered so that Mr. Hoffman appeared to be wearing a gown designed by Richard Tyler and shoes designed by Ralph Lauren, accompanied by the following text: "Dustin Hoffman isn't a drag in butter-colored silk gown by Richard Tyler and Ralph Lauren heels."⁵⁹ With respect to such hybrid commercial uses, more complete protection for damage to a celebrity's reputational and personality interests could be obtained if moral-rights protection were to be extended to constructed personas.

Under the approach proposed in this article, the personal interests that celebrities currently attempt to protect through publicity law would be governed instead by copyright law's moral-rights provisions. This approach has at least two advantages. First, from a theoretical standpoint, it emphasizes the damage to a performer's reputation and/or personality, thereby eliminating the need to struggle with the extent to which a given use is commercial. Although the commercial/noncommercial distinction is critical under the right-of-publicity doctrine, which applies only to commercial usages, this limitation is not relevant to moral-rights doctrine.⁶⁰ Second, this approach would allow copyright law's inherent mechanisms—such as the fair-use doctrine—to cabin the application of this protection in situations where important countervailing interests ex-

54. See *id.* at 1096.

55. See *id.* at 1097.

56. In one recent right-of-publicity case, Bret Michaels and Pamela Anderson Lee obtained a preliminary injunction barring the display on the Internet of a videotape depicting them engaging in sexual intercourse. See *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998). The court held that the couple's state-law rights to exploit their names and likeness for commercial gain were not preempted by the Copyright Act. See *id.* at 837. In this case, the plaintiffs alleged both economic as well as reputational damage. See *id.* at 829. First, plaintiffs asserted that the defendant's publication of the tape on the Internet "deprived [them] of money they could have made by exploiting their right to publicity on their own or through licenses." *Id.* at 837–38. "Second, [they] have presented evidence that publicity in association with pornography has damaged their attempts to establish and maintain careers in mainstream entertainment." *Id.* at 838.

57. 33 F. Supp. 2d 867 (C.D. Cal. 1999).

58. See *id.* at 875.

59. *Id.* at 870.

60. See *infra* notes 106–07 and accompanying text.

ist.⁶¹ Indeed, one frequently articulated objection to the right of publicity is that it lacks a similarly principled mechanism for limiting the scope of the rights.⁶² Therefore, if copyright law's moral-rights doctrine were extended to constructed personas, the personal interests of all personas could be treated in a principled manner, consistent with the dictates of copyright law generally.

B. Constructed Personas Should Be Considered Original "Works of Authorship" Within the Meaning of Copyright Law

The critical issue is whether the inclusion of personas within the confines of a federal moral-rights law, presently contained in the copyright statute, is constitutionally sound. The Constitutional predicate for copyright protection is the Copyright Clause that seeks to "Promote the Progress of Science and useful arts . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."⁶³ My argument is that a constructed persona should be considered a "writing" within the meaning of the Constitution.

Building on this constitutional source of authority, the current copyright statute extends protection to "original works of authorship fixed in a tangible medium of expression."⁶⁴ The statute illustrates the concept of "works of authorship" by providing an illustrative, rather than an exhaustive, number of examples that include pantomimes, choreography, architectural works, and motion pictures.⁶⁵ The illustrative nature of this provision is designed "to allow the courts as much flexibility as possible to adapt the law to new technologies and media."⁶⁶ Undoubtedly, when the Framers of the Constitution contemplated the meaning of the term "writing," many of the categories enumerated in the current statute were completely outside of their frame of reference. Indeed, the legislative history of the 1976 Copyright Act expressly recognizes that "the historic

61. See *infra* notes 104, 108, 116, 118 and accompanying text; see also Haemmerli, *supra* note 26, at 473-77, 486 (approving the application of the first-sale doctrine to limit the right of publicity, but exempting from first sale those reuses that materially alter the original, authorized use); cf. *Alison v. Vintage Sports Plaques*, 136 F.3d 1443 (11th Cir. 1998) (upholding the application of copyright law's first-sale doctrine to limit the common law right of publicity under Alabama law).

62. Judge Kozinski, a notable critic of the right of publicity, has emphasized the doctrine's failure to incorporate limiting principles. *E.g.*, *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284 (9th Cir. 1999) (Kozinski, J., dissenting from denial of petition for rehearing in case upholding the ability of actors to claim a right-of-publicity violation by defendant's use of animatronic robotic figures based upon their likenesses); *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of rehearing en banc); see also Ralph S. Brown, *Copyright and Its Upstart Cousins: Privacy, Publicity, Unfair Competition: The Sixteenth Donald C. Brace Memorial Lecture*, 33 J. COPYRIGHT SOC'Y 301, 304 (1986); Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long*, 10 DEPAUL-LCA J. ART & ENT. L. 283 (2000).

63. U.S. CONST. art. I, § 8, cl. 8.

64. 17 U.S.C. § 102(a) (1994).

65. See *id.*

66. CRAIG JOYCE ET AL., COPYRIGHT LAW 109 (2d ed. 1991).

expansion of copyright has applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection.”⁶⁷ In addition, the legislative history states, “[t]he first copyright statute in this country, enacted in 1790, designated only ‘maps, charts and books’; additional forms of expression, such as music, drama, and visual art” were specifically provided for only through subsequent enactments.⁶⁸ Clearly the framers never contemplated computer programs, now protected by copyright law.

Moreover, these types of works do not necessarily implicate the concept of “writings” in a purely definitional sense that would involve words, letters, characters, or something at least minimally written. Thus, the constitutional grant of power is sufficiently broad to extend to any “writing” as long as the writing is the product of an “author.”⁶⁹ In discussing the term “writing” in this context in 1879, the Supreme Court in the *Trademark Cases* stated that the writings that are to be protected are the “fruits of intellectual labor.”⁷⁰

In *Goldstein v. California*,⁷¹ the Supreme Court observed that the constitutional grant of authority concerning copyrights does not require Congress to act with respect to all categories of materials that may meet the constitutional definitions.⁷² Instead, “whether any specific category of ‘Writings’ is to be brought within the purview of the federal statutory scheme is left to the discretion of the Congress.”⁷³ Moreover, the Court emphasized that the “history of federal copyright statutes indicates that the congressional determination to consider specific classes of writings is dependent, not only on the character of the writing, but also on the commercial importance of the product to the national economy.”⁷⁴ Although disagreement exists about whether our society’s intense fascination with fame is a positive sociological force,⁷⁵ few would dispute that U.S. culture is driven by personality.⁷⁶ One of the primary reasons underlying America’s fascination with celebrities is the role that they play in our consumer culture. One of the defining characteristics of the famous is their ability to consume, and Americans love to model celebrities’ buying patterns. Indeed, our capitalist culture ensures that the

67. H.R. REP. NO. 94-1476, at 51, 56–57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664–65, 5670.

68. *Id.* According to one casebook, Congress has “granted protection over the years to an increasingly long list of types of writings that as yet does not encompass all constitutional writings.” JOYCE ET AL., *supra* note 66, at 78.

69. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (defining an author as “he to whom anything owes its origin; originator; maker”).

70. *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

71. 412 U.S. 546 (1973).

72. See *id.* at 559.

73. *Id.* at 562.

74. *Id.*

75. See Kwall, *supra* note 1, at 13.

76. See generally *id.*

benefits of the American Dream accrue not only to the celebrities themselves, but also the businesses and causes the celebrities endorse.⁷⁷ In light of the tremendous impact of celebrity endorsements upon our consumer culture, the rationale of *Goldstein* provides further support for recognizing constructed personas as writings for purposes of copyright law.

The copyright statute also requires originality.⁷⁸ Moreover, the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*⁷⁹ declared that originality mandates a minimal level of creativity.⁸⁰ *Feist* also enshrined creativity as a constitutional directive.⁸¹ The original-authorship requirement demands only that a work be an expression of a separately cognizable idea, and that this expression originates from the author.⁸²

Constructed personas are indeed original works of authorship.⁸³ Celebrities themselves laboriously construct their personas, and they enlist the cooperation of the media and other entities to package and promote their personas as images.⁸⁴ In fact, virtually all branches of the modern mass media engage in this complex celebrity packaging and its cumulative effect is what gives celebrity status its current impact.⁸⁵ True, the celebrity does not act alone, given the substantial assistance provided by publicists, fashion advisors, media consultants, fitness trainers, and the like. Moreover, postmodernists emphasize that celebrities often invoke earlier celebrities as well as cultural reference points in constructing their personas.⁸⁶ Nevertheless, celebrities still maintain the most direct connection to their personas despite the efforts of other parties.⁸⁷ Those who assist the celebrity in creating a marketable image typically are paid handsomely for their time and efforts. Further, when a celebrity borrows from the cultural fabric in creating her persona, it is still the unique com-

77. See *id.* at 24–26 for a more developed treatment of this theme.

78. See 17 U.S.C. § 102(a) (1994).

79. 499 U.S. 340 (1991).

80. See *id.* at 345.

81. See *id.* at 345, 358; see also Marci A. Hamilton, *Justice O'Connor's Opinion in Feist Publications, Inc. v. Rural Telephone Service Co.: An Uncommon Though Characteristic Approach*, 38 J. COPYRIGHT SOC'Y. 83, 87–89 (1990) (noting that Justice O'Connor emphasizes the constitutional basis of originality and creativity).

82. See Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1368 (1997).

83. Cf. *Bleinstein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (“Personality always contains something unique.”).

84. See Kwall, *supra* note 1, at 32–34 for a detailed treatment of this process of construction.

85. See *id.*

86. See ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 88–129 (Stanley Fish & Fredric Jameson eds., 1998); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 179–205 (1993).

87. See Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 55–56 (1994); see also Haemmerli, *supra* note 26, at 431 (“Identity remains something intrinsic to the individual, subject to individual control as an autonomy-based property right, no matter what or who has affected its level of fame.”).

bination of the past and the celebrity's original contributions that give the persona its present appeal.⁸⁸ The effort in constructing the celebrity persona represents an intellectual, emotional, and physical effort on the part of the celebrity similar to that engaged in by any author. This effort requires protection, not just from economic encroachment, but also from damage to the human spirit. In other words, personas should have the legal ability to maintain the integrity of their texts.

C. The Fixation Requirement Does Not Pose an Obstacle to Including "Constructed Personas" Within Copyright's Moral-Rights Provision

The 1976 Copyright Act also requires that original works of authorship be "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."⁸⁹ Personas certainly can be fixed in a tangible medium for purposes of satisfying this statutory mandate. More importantly, however, "fixation" in and of itself is not a constitutional requirement under the Copyright Clause.⁹⁰ Many countries protect both fixed and unfixed works under their copyright laws without differentiation.⁹¹ Moreover, neither of the two major treaties to which the United States is a party, the Berne Convention for the Protection of Literary and Artistic Works⁹² and the Universal Copyright Convention,⁹³ limits member states to protecting fixed works.⁹⁴

Neither the Constitution itself nor the legislative history accompanying the various copyright statutes indicates that tangibility is an express Constitutional requirement.⁹⁵ The closest the Supreme Court has come to deciding this issue was in *Goldstein v. California*,⁹⁶ where the Court commented that the Constitution's use of the word "'writings' may be in-

88. See Kwall, *supra* note 87, at 56.

89. 17 U.S.C. § 102(a) (1994).

90. See Leslie Erin Wallis, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1447 (1986).

91. E.g., Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 814 (1999) (noting that the Tunis Model Law protects folklore and works derived from folklore as original works regardless of whether the folklore is fixed).

92. See Berne Convention, *supra* note 35.

93. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731.

94. See JOYCE ET AL., *supra* note 66, at 53. Of course, once fixation is satisfied, any debate regarding the constitutionality of protection is satisfied because recordation of subject matter automatically makes it a "writing" under the currently accepted meaning of that term.

95. See S. REP. NO. 93-982, at 103-04 (1972) ("[I]t makes no difference what the form, manner or medium of fixation may be."); see also Wallis, *supra* note 90, at 1456; Maryam Ahmad, *Fixed on Fixation: Reformulating the Constitution's Copyright Clause to Protect Orally Delivered Lectures* (unpublished manuscript, on file with the *University of Illinois Law Review*) (concluding that "tangibility represents not a constitutional mandate but a misdirection of the Constitution's clearer mandate of advancing inventors' intellectual conceptions").

96. 412 U.S. 546 (1973).

terpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."⁹⁷ However, a physical rendering is not necessarily synonymous with a tangible rendering. For example, in *MAI Systems Corp. v. Peak Computer, Inc.*,⁹⁸ the Ninth Circuit concluded that a copy of copyrighted software created in a computer's random access memory meets the statute's fixation requirement because it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."⁹⁹ Just as the copy at issue in *MAI Systems* was regarded by the court as "fixed" because it could be perceived for more than a transitory period of time, a constructed persona also qualifies as a "physical rendering," especially if that phrase is read expansively to include physical manifestations that are evident in ways that can be perceived by others.¹⁰⁰

Moreover, even if there are lingering doubts about whether extending moral-rights protection to constructed personas offends the Copyright Clause of the Constitution, such protection can be obtained under the Commerce Clause. In 1996, section 1101 of the Copyright Act, as codified, widely referred to as the antibootlegging provision, was added to the copyright statute in order to bring the United States into compliance with the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs). Section 1101 prohibits the unauthorized fixation of "sounds or sounds and images of a live musical performance,"¹⁰¹ and it "marks the first time that federal copyright law has afforded any protection to unfixed works."¹⁰² Recently, the Eleventh Circuit held that this provision could be sustained under the Commerce Clause. In *United States v. Moghadam*,¹⁰³ the court relied on the Supreme Court's analysis

97. *Id.* at 561.

98. 991 F.2d 511 (9th Cir. 1993).

99. *Id.* at 518 (quoting the 1976 Copyright Act's definition of "fixed"). In *MAI Systems*, the court held that a computer-servicing company performing maintenance duties infringed the copyright in plaintiff's software by its unlicensed transfer of the computer programs from a permanent-storage device such as a floppy disk to the computer's random access memory. *Id.* at 519. Congress, however, subsequently reversed the specific holding in this case when it enacted Title III of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2887 (1998) (codified at 17 U.S.C. § 117 (Supp. IV 1998)). This Title amended § 117 of the 1976 Copyright Act, as codified, to provide that "it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes *only of maintenance or repair of that machine*" as long as the new copy is not used in any other manner and is destroyed immediately after the maintenance or repair is finished. 17 U.S.C. § 117(c) (1994 & Supp. IV 1998) (emphasis added). Thus, although the specific holding of *MAI Systems* has been reversed, the court's ultimate observations regarding the "fixation" requirement still has relevance in other contexts.

100. *Cf. Donat*, *supra* note 82, at 1398 (noting that performances are clearly "physical" undertakings—rendered manifest by the very bodily movements of the performers"); Wallis, *supra* note 90, at 1461, 1466 ("A choreographic work clearly is a physical rendering of the fruits of aesthetic labor" because it "is capable of being perceived, reproduced, or otherwise communicated through the dancer's movements and expressions.").

101. 17 U.S.C. § 1101(a)(1) (1994).

102. *See Donat*, *supra* note 82, at 1392.

103. 175 F.3d 1269 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000).

in the *Trademark Cases*¹⁰⁴ to support the view that Congress is not “automatically forbidden from extending protection under some other grant of legislative authority to works that may not be constitutionally protectable under the Copyright Clause.”¹⁰⁵ The court explicitly declared that “the Copyright Clause does not envision that Congress is positively forbidden from extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term ‘Writings.’”¹⁰⁶

An additional question is whether extending moral-rights protection to constructed personas would conflict with, or preempts, state right-of-publicity protections.¹⁰⁷ Currently, most state right-of-publicity statutes cover only commercial uses.¹⁰⁸ In contrast, the type of federal protection

104. 100 U.S. 82 (1879).

105. *Moghadam*, 175 F.3d at 1278. The court continued by observing that “modern trademark law is built entirely on the Commerce Clause, and we have found no case which suggests that trademark law’s conferral of protection on unoriginal works somehow runs afoul of the Copyright Clause.” *Id.* at 1278–79 (citations omitted).

106. *Id.* at 1280. The court continued its discussion as follows:

The [constitutional] grant itself is stated in positive terms, and does not imply any negative pregnant that suggests that the term “Writings” operates as a ceiling on Congress’ ability to legislate pursuant to other grants. Extending quasi-copyright protection to unfixed live musical performances is in no way inconsistent with the Copyright Clause, even if that Clause itself does not directly authorize such protection. Quite the contrary, extending such protection actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause. A live musical performance clearly satisfies the originality requirement. Extending quasi-copyright protection also furthers the purpose of the Copyright Clause to promote the progress of the useful arts by securing some exclusive rights to the creative author. Finally, with respect to the fixation requirement, upon which this option focuses, although a live musical performance may not have been fixed, or reduced to tangible form, as of the time the bootleg copy was made, it certainly was subject to having been thus fixed.

Id. at 1280; see also Donat, *supra* note 82, at 1400 (advocating a relaxation of the fixation requirement under the Commerce Clause to protect improvisational performers); Wallis, *supra* note 90, at 1468–69 (suggesting alternate protection for choreography through copyright legislation under the Commerce Clause).

107. *E.g.*, *Brown v. Ames*, 201 F.3d 654, 661 (5th Cir. 2000) (holding that because a person’s name and likeness are not copyrightable, and because the state-law misappropriation tort does not conflict with federal copyright law, musicians’ claims against a record company for misappropriation of their names and likenesses are not preempted by federal copyright law).

108. *E.g.*, *Comedy III Prods., Inc. v. Saderup, Inc.*, 80 Cal. Rptr. 2d 464 (Cal. Ct. App. 1998) (upholding the Three Stooges publicity rights against artist’s use of a charcoal sketch of the Three Stooges on posters and T-shirts for profit). This case currently is on appeal to the California Supreme Court. See *Comedy III Prods., Inc. v. Saderup, Inc.*, 83 Cal. Rptr. 2d. 533 (1999) (petition for review granted). The California right-of-publicity statute regarding deceased celebrities was amended in 1999 to delete the list of exemptions for works of creative art. The new provision states that the statute does not apply “to the extent the use is protected by the constitutional guarantees of freedom of speech or freedom of the press.” CAL. CIV. CODE § 3344.1 (1999). See generally Bela G. Lugosi, *California Expands the Statutory Right of Publicity for Deceased Celebrities While Its Courts Are Examining the First Amendment Limitations of That Statute*, 10 DEPAUL-LCA J. ART & ENT. L. 259 (2000). At the time the California bill was being debated, actor Richard Masur, who was then serving as the President of SAG, testified before the California Senate that new digital technology adds greater urgency to the need for stronger publicity rights. Representative of this technology is a process called “morphing,” computer manipulation of old images in which deceased individuals are transformed into live characters in films and videos. Opponents of the bill worried that its enactment would stifle creativity and cause much uncertainty regarding the scope of appropriate protection for celebrities.

that I am proposing concerns misappropriations or mutilations of one's persona in situations where damage to the human spirit, rather than economic harm, is the focus. Moreover, the preemption problem could be eliminated completely if the economic aspects of publicity rights were to be protected through an amendment to section 43(a) of the Lanham Trademark Act,¹⁰⁹ which would govern instances where personas are misappropriated for commercial purposes causing consumer confusion.¹¹⁰ In fact, several groups such as SAG, MPAA, the International Trademark Association, as well as a subcommittee of the American Bar Association's Intellectual Property Law Section have worked on such an endeavor.¹¹¹

III. OPERATIONAL MECHANICS

The mechanics of how moral-rights protection would operate for the personal interests of constructed personas is an open, but critical, question. This article does not attempt to resolve all of the operational variables but instead offers some preliminary observations in the hope of stimulating further discussions. Initially, I note that my proposal would necessitate a semantic change in the title of VARA because more than visual art would be included within the scope of moral-rights protection. More substantively, a system of "persona" registration would also need to be established. In keeping with traditional copyright doctrine, a plain-

109. 15 U.S.C.A. § 1125(A) (West 1998 & Supp. 2000).

110. Cf. Haemmerli, *supra* note 26, at 411-30 (advocating a reorientation of the right of publicity under the Lanham Trademark Act that would incorporate recognition for the right's economic, as well as moral, protections).

111. The author learned of SAG and MPAA's current collaboration in a telephone interview with Sallie C. Weaver. See *supra* note 43 and accompanying text. The International Trademark Association (INTA) formulated a draft right-of-publicity statute in 1996, but INTA's board of directors failed to approve it and the draft was withdrawn until further research could be done. See Haemmerli, *supra* note 26, at 477-78. In May, 1998, however, INTA's President testified before Congress that INTA endorsed a "single national law rather than the present patchwork." *Protection Against Artistic "Knock-Offs": Hearings on H.R. 3891 and H.R. 3119 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 11 (1998) (statement of Frederick Mostert, President, International Trademark Association) (quoted in Haemmerli, *supra* note 26, at 389 n.21). Currently, the Right-of-Publicity Subcommittee of the American Bar Association's Intellectual Property Law's Federal Trademark Legislation Committee also is working on amending section 43(a) of the Lanham Act to include publicity rights.

Another question concerns whether the inclusion of personas within the scope of federal moral-rights protection would ever transpire from a political standpoint. The reason VARA was so narrowly crafted had to do with Congressional lobbying on the part of powerful politically entrenched groups such as publishers and the motion-picture industry. See *Moral Rights in Our Copyright Laws: Hearing on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 101st Cong. 659-79, 1065-78 (1990) (statements of Nicholas A. Veliotis, President, Association of American Publishers and J. Nicholas Counter III, President, Alliance of Motion Picture and Television Producers); see also Kwall, *supra* note 13, at 3 & n.4. If written works and films could not be brought within the scope of moral rights, it might be unrealistic to assume that personas would ever be included within the scope of protected works. Although any debate in this regard is highly speculative, I would note that recent cooperative efforts between SAG and MPAA might have some promise in this respect. See *supra* notes 34-36 and accompanying text. Also, the ideal moral-rights law for this century would include, in addition to personas, much more extensive subject matter.

tiff should be required to file an application to register her persona prior to initiating a suit for damage to her persona under moral-rights doctrine.¹¹²

As far as establishing liability is concerned, I suggest that a defendant must do more than simply use the persona's name¹¹³ or provide information about the persona.¹¹⁴ Indeed, the concept underlying "persona" is one which embraces "*physical* characteristics that act as indicia of identity."¹¹⁵ Other commentators have attempted to grapple with this difficult question. For example, Sheldon Halpern has posited that a challenged use must "unequivocally . . . 'closely and uniquely'" identify the plaintiff.¹¹⁶ Building on this standard, Alice Haemmerli has suggested that the challenged use should also be "immediate," which she defines as evoking "the reaction that 'this is X' rather than 'this reminds me of X' or 'this sounds/looks like X.'"¹¹⁷

These observations provide support for incorporating the following limiting principle: arguably only the duplication and manipulation of a persona's actual voice and image should be actionable as moral-rights violations.¹¹⁸ This approach would, parenthetically, track the relevant

112. The 1976 Copyright Act, as codified, provides that even if a copyright claimant has been refused registration, she can maintain an infringement action under § 411(a), which allows an applicant to institute an action if "deposit, application and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused." 17 U.S.C. § 411(a) (Supp. IV 1998). Courts are split on whether a copyright plaintiff can initiate an infringement suit during the interim period between the filing of an application and a final decision respecting registration. *Compare* *Noble v. Town Sports Int'l Inc.*, 46 U.S.P.Q.2d 1382, 1383-84 (S.D.N.Y. 1998) (holding that registration is a jurisdictional requirement), *and* *Hudson's Bay Co. of New York, Inc. v. Seattle Fur Exch.*, 15 U.S.P.Q.2d 1316, 1317 (S.D.N.Y. 1990) (finding that a registration decision is necessary before a court can exercise jurisdiction), *with* *Int'l Kitchen Exhaust Cleaning Ass'n v. Power Washers of N. Am.*, 53 U.S.P.Q.2d 1505, 1507 (D.C. D.C. 2000) (holding that a plaintiff may sue "once the Copyright Office receives the plaintiff's application, work, and filing fee").

113. *Cf.* *Parks v. LaFace Records*, 76 F. Supp. 2d 775, 779-80 (E.D. Mich. 1999) (holding that civil-rights activist could not rely on the right of publicity to prevent the use of her name as the title of a song containing profane and offensive language). Additionally, because single words and simple phrases are not protected by copyright law, names, even those that the persona has created, would not qualify as original works of authorship.

114. *See* *Ruffin-Steinback v. de Passe*, 53 U.S.P.Q.2d 1823, 1827 (E.D. Mich. 2000) (finding that the right of publicity cannot be extended to preclude depiction of a person's life story); Kwall, *supra* note 87, at 88-92 (arguing that primarily informational uses should not be actionable under the right of publicity); *cf.* *Andrea S. Hirsch, Copyrighting Conversations: Applying the 1976 Copyright Act to Interviews*, 31 AM. U. L. REV. 1071, 1086 (1982) ("[A]n interviewee may not enjoin the publication of truthful material regarding his own life.").

115. Haemmerli, *supra* note 26, at 418 n.149 (emphasis added). Professor Haemmerli also applauds the concept of "persona" because it captures the qualities of the "Kantian person (i.e., the autonomous human being capable of rationality and morality) as the source of a moral and economic property right in objective indicia of personality." *Id.* at 480.

116. Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 863-64 (1995) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. j (1995)).

117. Haemmerli, *supra* note 26, at 461.

118. *Cf.* WIPO Performances and Phonograms Treaty, *supra* note 39, art. 6. Article 6 of this Treaty provides that performers have the exclusive right to authorize the broadcasting and communication of their unfixed performances and the fixation of their unfixed performances. *See* Donat, *supra* note 82, at 1393-94 & n.154. Because the WIPO treaty defines fixation narrowly as sounds or the rep-

protections for sound recordings under section of the 1976 Copyright Act, as codified, which provides the copyright owner of a sound recording with the ability to prevent only works that use the *actual* sounds of the protected sound recording.¹¹⁹ Works that consist of entirely independent fixations are not actionable, even though they imitate those in the copyrighted sound recording.¹²⁰

The fair-use doctrine, which applies to VARA,¹²¹ provides a mechanism to consider the foregoing limitations as part of the application of the doctrine's first factor, which focuses on the purpose and character of the defendant's use.¹²² Although this factor also typically addresses whether the defendant's use is "of a commercial nature or is for non-profit educational purposes,"¹²³ such an inquiry would be of less importance in an action where reputational and personality damage is the key component.¹²⁴

resentations thereof, it only protects performers from audio fixation. See text accompanying note 40. This narrow definition, however, was only adopted after rejection of a proposal to define fixation as both sound and image. See Donat, *supra* note 82, at 1394. The United States had supported this broader definition. See *id.*

119. 17 U.S.C. § 114 (Supp. IV 1998).

120. Section 114 of the Copyright Act, as codified, states that the exclusive rights of the owner of a copyright in a sound recording are limited to the rights of reproduction, distribution, and preparation of derivative works under § 106, but do not include the right to perform it publicly (except for performances of sound recordings by means of a digital audio transmission under § 106(6)). *Id.* § 114(a). Section 114 also provides that with respect to the rights of reproduction and preparation of derivative works, the copyright owner has the exclusive right to duplicate the recording in forms that directly or indirectly recapture "the actual sounds fixed in the recording," but her rights "do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." *Id.* § 114(b).

It is unclear why Congress adopted a lower standard of protection for sound recordings than for other copyrighted works. The copyright law contained no protection for sound recordings until 1971, at which time the Sound Recording Amendment was enacted. These protections were further refined in the 1976 Copyright Act. See generally Robert T. Mowrey, *The Rise and Fall of Record Piracy*, 27 COPYRIGHT L. SYMP. (ASCAP) 155 (1982). The main goal of these newly created protections for sound recordings was the elimination of record piracy. See H.R. REP. NO. 94-1476 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674. According to one commentator:

Congress' decision to subject sound recording to the "actual reproduction" standard of infringement could have stemmed from a desire to encourage multiple renditions of a musical composition, thereby generating royalties for the song's writer This reasoning, however, ignores the importance of the performer's artistically expressive role in recording, implicitly placing it lower in the hierarchy of public merit than works of the fine artist or author.

Note, *Tuning Up the Copyright Act: Substantial Similarity and Sound Recording Protections*, 73 MINN. L. REV. 1175, 1196-97 (1989); see also Kamesh Nagarajan, *Public Performance Rights in Sound Recordings and the Threat of Digitalization*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 721, 724-25 (1995) (suggesting that sound recordings were not afforded a public-performance right because radio broadcasts assisted in the sales of copies of sound recordings). Of course, musicians are afforded somewhat greater protection with respect to sound recordings made from live musical performances under the antibootlegging provision of the Copyright Act, as codified, § 1101, discussed *supra* at note 101 and accompanying text.

121. See 17 U.S.C. § 107 (1994).

122. See *id.* § 107(1).

123. *Id.*

124. See generally Agenda Item 4, *supra* note 41, art. 5, ¶ 1 ("Performer may object to any modification of performance that would injure the performer's reputation.").

The remaining three fair-use factors also could be invoked to determine whether a given usage should be actionable as a moral-rights violation. The second fair-use factor concerns “the nature of the copyrighted work.”¹²⁵ The application of this factor, in the context of the right of publicity, would require consideration of the nature of the attribute appropriated.¹²⁶ In light of the specific application of the first fair-use factor focusing on the nature of the defendant’s use, however, this separate inquiry would appear to be unnecessary. Instead of incorporating a “fair-use” factor that focuses on the nature of the attribute, the “fair-use” discussion in this context could consider when the defendant’s use occurred in relation to the life span of the individual whose persona has been appropriated.¹²⁷ Currently, the duration of rights specified in VARA varies, depending on when the work was created with respect to VARA’s effective date.¹²⁸ Works of visual art created after VARA’s enactment are protected for the life of the author.¹²⁹ Of course, if VARA was amended to incorporate protection for the personal interests of constructed personas, it could also be amended to extend protection coextensive with that of copyright law.¹³⁰ A strong argument can be made, however, that protecting the personal interests of constructed personas for the life of the persona plus an additional seventy years is far too long.¹³¹ Indeed, state-based protection for the right of publicity varies considerably.¹³² Therefore, rather than adopt a blanket number of years during which unauthorized uses can be actionable, it might be preferable to consider this factor as part of a “fair-use analysis.”¹³³

The third fair-use factor, which focuses on the amount and substantiality of the appropriation,¹³⁴ clearly would also be applicable to determining whether a defendant’s appropriation of a constructed persona

125. 17 U.S.C. § 107(2).

126. See Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 232 (1983–84).

127. See *id.* at 233.

128. See 17 U.S.C. § 106A(d)(1)–(2).

129. See *id.* § 106A(d)(1). For works created before the effective date of VARA, but to which title has not been transferred as of the effective date, the duration of rights under § 106A is coextensive with those under copyright law. See *id.* § 106A(d)(2). Neither VARA nor its legislative history offers any explanation for this strange dichotomy, but in its original form VARA provided a duration of protection equal to that of copyright law for all covered works. See Kwall, *supra* note 13, at 33.

130. In fact, the National Endowment for the Arts has already suggested that the duration of VARA should be modified so that it terminates with the term of copyright rather than at the author’s death. See Kwall, *supra* note 13, at 34.

131. In 1998, President Clinton signed into law the “Sonny Bono Copyright Term Extension Act,” which extends the copyright term for an additional twenty years. See Francis M. Nevins, *Little Copyright Dispute on the Prairie: Unbumping the Will of Laura Ingalls Wilder*, 44 ST. LOUIS U. L.J. 919, 920 (2000). Copyright protection now generally lasts for the life of the author plus seventy years. See 17 U.S.C. § 302(a) (Supp. IV 1998).

132. See DREYFUSS & KWALL, *supra* note 2, at 547.

133. See Kwall, *supra* note 87, at 84 (advocating in the context of right of publicity protection a minimum period of twenty years following the persona’s death, with judicial discretion to be invoked afterward).

134. See 17 U.S.C. § 107(3) (1994).

should be actionable in this context. As a general matter, de minimis usages of an individual's persona should be sanctioned far more readily than usages in which the persona is responsible primarily for the value or appeal of the defendant's work.¹³⁵ Similarly, the fourth fair-use factor, which addresses "the effect of the [defendant's] use upon the potential market for or value of" the plaintiff's identity,¹³⁶ has significant potential for application in this context.¹³⁷ Indeed, this factor would allow for a direct measure of the impact of the defendant's use upon the plaintiff's reputation or personality. The stronger the plaintiff's showing of personal damage, the less likely the defendant's use would be excused as fair.

IV. CONCLUSION

Some may argue that authorship and personas are "public goods which should not be constrained by ownership, except where a right to seek a reward is a necessary stimulus to authorship."¹³⁸ Perhaps celebrity would continue to be "produced aplenty" absent protection.¹³⁹ Still, as the late Professor Ralph Brown once observed, the economic argument is only one strand in the search for principled standards for copyright protection.¹⁴⁰ Another consideration includes a morally principled approach that exalts authors who are "the bearers and creators of our culture, both high and popular."¹⁴¹

In sum, there are several advantages of protecting the personal interests of personas as part of federal copyright law's moral-rights doctrine. First, such protection would reduce the current controversies engendered by the commercial/noncommercial distinction that have plagued right-of-publicity theory. Second, this approach would provide much needed uniformity to this area of the law.¹⁴² Third, by invoking the

135. Cf. Kwall, *supra* note 87, at 80–81, 85–86 (discussing this factor in the context of fashioning appropriate remedies for the right of publicity). I should candidly admit, however, that this article argued that copyright law's fair-use doctrine should not be invoked automatically as a means of resolving the conflict between the right of publicity and the First Amendment. *See id.* at 58–63. The focus of this earlier work, though, was on developing a framework in which the right of publicity and the First Amendment could coexist peacefully. The notion of expanding moral-rights protection to include the personality interests of personas was not a concept I explored in that piece. If this proposal were to find favor with Congress, however, then the extension of fair-use principles already applicable to copyright disputes clearly would be appropriate to resolve disputes involving unauthorized usages of a plaintiff's constructed persona. For a recent treatment of the applicability of fair use to right of publicity, see Haemmerli, *supra* note 26, at 472.

136. 17 U.S.C. § 107(4).

137. *See* Haemmerli, *supra* note 26, at 469–70; *see also* Kwall, *supra* note 126, at 244–50.

138. Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 607 (1985); Diane L. Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. 35, 37–38 (1998).

139. Zimmerman, *supra* note 62, at 306.

140. *See* Brown, *supra* note 138, at 607.

141. *See id.* at 589.

142. *See* Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227, 242–43 (1999); Haemmerli, *supra* note 26, at 389.

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limiting doctrines of copyright law to disputes concerning personal damage to constructed personas, this interest properly can be balanced against issues of free speech and societal access. So, when I contemplate a blueprint for publicity rights and moral rights in the twenty-first century, I envision a system that provides more complete and satisfying protection for those whose livelihoods depend upon maintaining the integrity of their personas. I also imagine that such a system will provide this protection while simultaneously grappling with society's need to grow, develop, and express itself.

