

# Are Computer-Generated Movie Stars a Possibility?

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Arnold Schwarzenegger was recently reelected as governor of California. Busy with the affairs of the state, he has put his movie career on hold. But consider the millions of hardcore *Terminator* fans clamoring for yet another sequel. Must they be made to wait until Schwarzenegger's political career ends? There is also the fact that the role of the Terminator requires a certain physique and energy, and it cannot be denied that the governor is not the Mr. Olympia he once was. Does this mean that a studio would have to pass on the project even if the film promised a major return on the studio's investment? The answer to this question is "no"—or, more precisely, "not necessarily"—thanks to emerging technology and the prospect of creating digital celebrities who can be used in place of their real world counterparts.

As imagery techniques are honed, the prospect of a computer-generated Arnold Schwarzenegger starring in *Terminator 4* is increasingly possible. Somewhat surprisingly, courts have not foreclosed the possibility of something like this occurring.<sup>1</sup> In fact, the chances of seeing a computer-generated celebrity clone headline a feature film arguably have been enhanced by the recent ruling handed down by the California Court of Appeal in *Kirby v. Sega of America, Inc.*<sup>2</sup>

## Right of Publicity

Before addressing the possibility of a computer-generated *Terminator*, it is important to review the basic definition and nature of the right of publicity.

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Simply put, the right of publicity prevents the unauthorized exploitation of a person's name, voice, or likeness.<sup>3</sup> Although the right exists for everyone, it is particularly valuable to celebrities, many of whom derive significant financial benefits from their personae, and thus have a strong vested interest in reining in and controlling use of their names, voices, or likenesses. Equally important is the concern about the potential negative effects that nonpermitted use may cause. For instance, an environmentally conscious A-lister would likely consider the unauthorized use of his or her face in a Hummer ad unsavory.<sup>4</sup>

The right of publicity is not unqualified. It must, and often does, give way to the First Amendment's protection of free expression. Celebrities have fought losing battles in efforts to prevent certain kinds of uses of their personae. For instance, Dustin Hoffman did not prevail against the publisher of *Los Angeles Magazine* for a cover depicting the head of Hoffman's character from the film *Tootsie* atop a male body wearing a dress and high heels.<sup>5</sup> Most recently, the *Kirby* court found that, despite significant similarities between the plaintiff singer and the main character in a video game—similarities that caused the court to conclude that there were triable issues of fact with respect to whether the singer's likeness had been misappropriated—the plaintiff's right of publicity claim failed because the video game was protected as an expressive work under the First Amendment.<sup>6</sup>

## The Three Stooges

The California Supreme Court established a critical legal concept in right of publicity law in *Comedy III Productions, Inc. v. Saderup*.<sup>7</sup> In that case, an artist created a realistic charcoal drawing of the trio, made and sold T-shirts bearing the image, and was sued by the owners of the Three Stooges' right of publicity.<sup>8</sup> The

court held that a defendant may raise the First Amendment as an affirmative defense to an alleged right of publicity violation where the defendant's work contains "significant transformative elements."<sup>9</sup> In effect, the court established a complete defense for those who appropriate another's name, voice, or likeness, as long as the transformative elements test is met.<sup>10</sup> The court broadly defined *transformative* as artistic expression that "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message." However, the transformative test will not vitiate a right of publicity claim if the "artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain."<sup>11</sup>

The *Comedy III* court did not enumerate a finite set of factors to consider in determining whether a work violates the subject's right of publicity or, alternatively, deserves First Amendment protection. The court did, however, state that such "transformative elements" may take many forms, including parody, factual reporting, fictionalized portrayal, "heavy-handed lampooning," and subtle social criticism.<sup>12</sup> The question is whether the likeness is "one of the 'raw materials' from which an original work is synthesized" (in which case an expressive work is protected by the First Amendment) or "whether the depiction or imitation of the celebrity is the very sum and substance of the work in question" (in which case the work violates the celebrity's right of publicity).<sup>13</sup> "The inquiry is in a sense more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate in the work."<sup>14</sup>

The court, after carefully defining and explaining the transformative elements test, decided that the drawing was not sufficiently transformative and held against the artist.<sup>15</sup> The court explained, "[the artist's] undeniable skill is manifestly

subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame.”<sup>16</sup>

Perhaps because the artistic work at issue in the case was nothing more than a simple, literal portrayal of The Three Stooges, *Comedy III* appears to have left open the question of whether transformative elements must be found in the depiction of the celebrity to establish a First Amendment defense or whether a defense can be established by including such transformative elements in the setting and background in which the celebrity (or celebrity-based character) is placed.<sup>17</sup> The *Comedy III* court did not have occasion to discuss the possibility that a work’s background could serve as the basis for First Amendment protection because there was no background on the T-shirts. In cataloging transformative elements in conjunction with the First Amendment defense, courts in subsequent right of publicity cases have recognized features in the expressive works at issue relating to both the character and his or her surroundings.

### **The Winter Brothers and Tiger Woods**

In *Winter v. DC Comics*,<sup>18</sup> two well-known musicians, Johnny and Edgar Winter, challenged as a violation of their right of publicity a comic book’s depiction of two half-human, half-worm, villainous characters. The comic book characters also were named Johnny and Edgar (their last name being Autumn rather than Winter), they shared similar features with the musicians, and the one named Johnny wore a tall, black top hat similar to the one Johnny Winter often wore. Nevertheless, the California Supreme Court held the Winter brothers’ likenesses had been sufficiently altered to merit First Amendment protection.<sup>19</sup>

Importantly, the court did not solely focus on the transformation of the actual characters. The court also based its holding on the transformative elements of the comic book itself—that is, the context in which the celebrity-based characters were presented. The court explained that the comic books “contain significant expressive content other than plaintiffs’ mere likenesses.”<sup>20</sup> The court further justified its holding by noting

that “the Autumn brothers are but cartoon characters—half-human, half-worm—in a larger story, which is itself quite expressive.”<sup>21</sup> The *Winter* case demonstrates how broadly a court may apply the “transformative test” when additional artistic expression is added to the depiction of a celebrity.

In another decision illustrating the breadth of the transformative elements test, the Sixth Circuit held that a painting, which realistically depicted Tiger Woods on the golf course during his historic victory at the Masters tournament in 1997, was protected by the First Amendment and not subject to a right of publicity claim. A publisher was reproducing and selling copies of the work. In the painting, the scene surrounding Woods included the visages of golf legends hovering in the sky above Woods as he played, as though looking down upon and watching over him.<sup>22</sup>

Despite the realistic portrayals of Woods, the court in *ETW Corp. v. Jireh Publishing*<sup>23</sup> based its conclusion on the “collage of images in addition to Woods’ image.”<sup>24</sup> The court found that the images, combined with those of Woods, “describe, in artistic form, a historic event in sports history and . . . convey a message about the significance of Woods’ achievement in [the Masters].”<sup>25</sup> The expansive interpretation of the transformative elements analysis set forth in *Winter* and *Jireh* has served to advance the legal argument in favor of computer-generated celebrities, and opened the door for the *Kirby* decision discussed below.

### **Does Kirby Allow Computer-Generated Celebrities?**

Both *Comedy III* and *Jireh* presented precise portrayals of celebrities, and the defendants in each case made no attempt to argue that the artwork was meant to depict anyone other than the celebrities involved in the case. Yet *Comedy III* and *Jireh* had different outcomes. One possible reason for this is that in *Comedy III*, the celebrities’ image was the entirety of the work, while in *Jireh* there was both a celebrity image and images intended to convey a sense of the history of the Masters, re-

sulting in a transformation significant enough to merit protection under the First Amendment. Similarly, although *Winter* did not deal with a realistic depiction of celebrities, its holding also was based in part on the transformative nature of the characters’ background.

Do *Comedy III*, *Jireh*, and *Winter* thus raise and answer the question of whether one can create a computer-generated celebrity replica as long as there is an expressive element in the background? Because films, by their nature, feature much more than a group of actors (e.g., setting, time, story, background sets, etc.), can a producer legally place an actor’s computer-generated clone, instead of the real thing, in a film?

The *Kirby* court had the chance to address these questions in the context of a video game whose main character was reminiscent of a celebrity. Kieran Kirby, the lead singer of the musical group Deee-Lite, sued Sega for misappropriation of her likeness and identity.<sup>26</sup> Kirby claimed that the company, which distributed the video game “Space Channel 5,” appropriated her distinctive retro look, dance moves, and catchphrase for the game’s central character, Ulala.<sup>27</sup>

Kirby’s look consists of platform shoes; knee socks; brightly colored form-fitting clothes and unitards; short pleated or cheerleader-type skirts; bare midriffs; cropped tops with words or a numeral written on the chest; space or other helmets; a blue backpack; and red/pink hair worn in a pageboy flip held back by a headband, pigtails, and other styles.<sup>28</sup> The video game character Ulala is tall and thin and wears a few different costumes, but is primarily seen in an “almost entirely orange outfit which includes a midriff-exposing top bearing the numeral ‘5,’ a mini-skirt, elbow-length gloves, and stiletto-heeled, knee-high platform boots.”<sup>29</sup> Ulala’s “hot pink hair is always worn in short pigtails placed high on the back of her head, and she wears a blue headset and jet pack and a blue gun holster strapped to her right thigh.”<sup>30</sup> The name “Ulala” is a phonetic variant of “ooh la la,” which is a phrase “often used by Kirby and associated with Kirby.”<sup>31</sup> Both Kirby and Ulala use the phrases “groove,”

“meow,” “dee-lish,” and “I won’t give up.”<sup>32</sup> “Space Channel 5” is set in Outer Space in the twenty-fifth century.<sup>33</sup> Kirby was once contacted to determine whether she was interested in promoting the video game through the use of Deee-Lite’s biggest hit, “Groove is in the Heart,” but declined.<sup>34</sup>

Kirby lost on summary judgment, and the California Court of Appeal affirmed, finding her claims foreclosed by the First Amendment.<sup>35</sup> In upholding the trial court’s grant of summary judgment, the appellate court, despite finding that triable issues of fact existed as to whether Kirby’s likeness had been misappropriated, nevertheless upheld summary judgment on First Amendment grounds.<sup>36</sup> The court expressly concluded that “Ulala resembles Kirby in certain respects,” and noted that Kirby had been contacted to endorse the game.<sup>37</sup> Even though the court felt that “Ulala and Kirby also differ in significant respects,” the similarities between the two gave rise to triable issues of material fact.<sup>38</sup>

In granting summary judgment for defendant, the court relied on the transformative elements test, as set forth by the California Supreme Court in *Comedy III* and *Winter*. It found transformative elements in both the character at issue and the broader work (the game). The court held that “Ulala is more than a mere likeness or literal depiction of Kirby,” and that “Ulala contains sufficient expressive content to constitute a ‘transformative work.’”<sup>39</sup> The court reasoned that, although Kirby and Ulala share similarities, they also “differ quite a bit: Ulala’s extremely tall, slender computer-generated physique is dissimilar from Kirby’s . . . Ulala was based, at least in part, on the Japanese style of ‘anime.’ Ulala’s typical hairstyle and primary costume differ from those worn by Kirby who varied her costumes and outfits, and wore hair in several styles.”<sup>40</sup> The court also noted that “the dance moves performed by Ulala—typically short, quick movements of the arms, legs, and head—are unlike Kirby’s movements in any of her music videos. Taken together, these differences demonstrate that Ulala is ‘transforma-

tive,’ and respondents added creative elements to create new expression.”<sup>41</sup>

The *Kirby* court was not concerned with transformative elements in the character alone. Like the *Winter* court, the *Kirby* court found transformative elements in the character’s surroundings. The court stated, “the setting for the game that features Ulala—as a space-age reporter in the 25th century—is unlike any public depiction of Kirby.”<sup>42</sup>

*Kirby* thus pushes the discussion surrounding computer-generated celebrities one step further. After all, if a video game creator who offers some variance from the celebrity’s general appearance and milieu is protected from right of publicity claims, even when the character is deliberately based upon a real celebrity (without the celebrity’s permission), no significant leap is required to recognize that film producers who use computer-generated stars, but alter the details of appearance and context, also may be protected.

It is also possible to see in *Kirby* the underpinnings of an argument against computer-generated stars. The *Kirby* court briefly addressed the fact that Ulala’s “consistently short and choppy dance movement and style differ markedly from Kirby’s.”<sup>43</sup> Implied in the finding that Kirby and Ulala dance differently is the notion that if their dance moves were more similar, the similarity would weigh in favor of a right of publicity violation. This may present film producers with a Catch-22: how do they vary a computer-generated Schwarzenegger enough to transform him, without diluting or losing the very elements that make him a star? Unfortunately, the court offered no guidance as to when an artistic work features enough transformative material to earn itself protection even when it clearly appropriates a celebrity’s likeness. Moreover, even if Ulala danced exactly like Kirby, the other factors noted by the court giving rise to First Amendment protection in the case would presumably suffice to protect the game.

### The Bottom Line

The result in *Kirby* is important because it takes a major step past *Comedy III*, *Winter*, and *Jireh* toward answering the

question of whether computer-generated movie stars will receive First Amendment protection when their real-life counterparts raise right of publicity claims. As described above, *Kirby* evolves beyond *Comedy III* and its progeny in that it deals with a moving character on screen who is placed in dynamic and fluid background scenes. Films, like video games, include things going on behind the actors on screen—most directors and production designers carefully design and craft a film’s background imagery. More generally, the producers hone a story that includes the characters—but those characters live in a broader world. To borrow a phrase from the *Winter* court, a film’s characters are part of “a larger story, which is itself quite expressive.”<sup>44</sup> *Kirby*’s holding thus leaves the door open for an argument that the inclusion of computer-generated stars in films could be considered transformative enough to earn constitutional protection.<sup>45</sup>

If technology advances to the point that a digitally rendered, walking, talking Arnold Schwarzenegger clone is impossible to differentiate from the original, the courts will be forced to determine whether a film in which such a replica is placed merits First Amendment protection against a right of publicity challenge from the actor. Only time and technology will dictate how the issue evolves.<sup>46</sup> 

### Endnotes

1. Certain legal issues implicated by the prospect of computer-generated celebrity likenesses are beyond the scope of this article. For instance, note that any producer digitally recreating a celebrity also must consider options for impersonating his or her voice—the state of the law relating to voice appropriation is the subject of another discussion. See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), as examples of prominent cases dealing with voice appropriation. The analysis of this article focuses on the legality of the visual reproduction of celebrities.

2. 144 Cal. App. 4th 47 (Ct. App. 2006).

3. See, e.g., *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (recognizing common law claim for misappropriation of name, likeness, or identity in California); CAL. CIV. CODE § 3344 (West)

(providing a statutory cause of action for misappropriation for use of an individual's "name, voice, signature, photograph or likeness" in connection with products and advertisements in California); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (recognizing common law cause of action for misappropriation/right of publicity in Missouri); N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney) (prohibiting and creating a statutory cause of action for the use of "the name, portrait or picture of any living person" for trade or advertising purposes without that person's written consent in New York).

4. *See, e.g., Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (Muhammad Ali granted summary judgment in suit against magazine that published unauthorized "objectionable" picture of him nude); *Waits*, 978 F.2d 1093 (singer Tom Waits, who objects to musicians' commercial endorsement of products as damaging to their artistic integrity, successfully sued Frito Lay for employing a Tom Waits sound-alike in one of their commercials).

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

6. *Kirby*, 144 Cal. App. 4th at 63.

7. *Comedy III Prods., Inc. v. Saderup*, 25 Cal. 4th 387 (2001).

8. *Id.* at 393.

9. *Id.*

10. *Id.* at 405.

11. *Id.*

12. *Id.* at 406.

13. *Id.*

14. *Id.* at 407.

15. *Id.* at 409.

16. *Id.*

17. In the context of *Terminator 4*, is a literal depiction of Schwarzenegger, in a variety of story lines with a variety of backgrounds, sufficiently transformative to be afforded a First Amendment defense?

18. 30 Cal. 4th 881 (2003).

19. *Id.* at 886.

20. *Id.* at 890.

21. *Id.*

22. *ETW Corp. v. Jireh Publ'g*, 323 F.3d 915 (6th Cir. 2003).

23. *Id.*

24. *Id.* at 938.

25. *Id.*

26. *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 50 (Ct. App. 2006).

27. *Id.* at 50–53.

28. *Id.* at 51.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 52.

34. *Id.*

35. *Id.* at 50.

36. *Id.*

37. *Id.* at 56.

38. *Id.* at 56–57.

39. *Id.* at 59.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 57.

44. *Winter v. DC Comics*, 30 Cal. 4th 881, 890 (2003).

45. Although the transformative elements test is the law in California, it is not the law everywhere. There is another approach, the predominant purpose test, under which computer-generated celebrities could not legally survive. Under this test (as adopted by the Supreme Court of Missouri), expressive works are protected against right of publicity claims only if the predominant purpose of the use of the celebrity's persona is to make an expressive comment about the celebrity, such as a parody directly relating to the celebrity, as opposed to a predominant purpose of merely exploiting the commercial value of the celebrity's persona. *See Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

46. For an excellent discussion of this issue when this technology was in its infancy, see Pamela Lynn Kunath, *Lights, Camera, Animate: The Right of Publicity's Effect on Computer-Animated Celebrities*, 29 *LOY. L.A. L. REV.* 863 (1996).