

My Online Me: Why Gamers Should Turn to California's Right of Publicity Laws in Protecting Their Online Avatars

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My Online Me: Why Gamers Should Turn to California's Right of
Publicity Laws in Protecting Their Online Avatars

MY ONLINE ME: WHY GAMERS SHOULD TURN TO CALIFORNIA'S RIGHT OF PUBLICITY LAWS IN PROTECTING THEIR ONLINE AVATARS

BREANNE HOKE*

ABSTRACT

California is well known for protecting against the unauthorized use of one's identity, otherwise known as the right of publicity. This historical protection is likely due to California's desire to ensure the economic prosperity of Hollywood's entertainment industry. However, California has established itself as a leader in a new entertainment industry: computer gaming. Companies such as Linden Lab and Blizzard, both located in California, have helped to create some of the most extensive and realistic games that the gaming world has ever seen. Specifically, these companies have developed extremely popular MMORPGs (massively multiplayer online role-playing games) that boast billions of dollars in revenue each year. In these realistic games, players assume the role of a character. These characters, known as avatars, are designed and controlled by gamers. Many gamers find that this online persona is an extension of their identity, and some have called for a protection against others infringing upon this identity. Currently in debate, is whether gamers can control the likeness of their online avatars under the right of publicity doctrine. This article will analyze whether gamers can and should be given the right of publicity over their avatars under California law.

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INTRODUCTION

Lillie and Hawkins met four years ago atop a waterfall overlooking a lush green valley—the kind of magical tableau you find only in romance novels, or in sophisticated virtual universes. The two had stumbled upon each other in Second Life, the 3-D computer world where nearly a million people log in regularly, communicating via digital representations of themselves, or avatars Before they'd ever seen or heard each other's real voices, they got "married" in Second Life, like 43,000 other couples, typing their vows while their avatars stood atop the waterfall where they first met.

In four years, Lillie and Hawkins have seen each other in the flesh just three times. Their life as a couple exists almost entirely online. In Second Life, they go on dates that would be impossible in the real world. They fly over cities and land on rooftops, go scuba diving on a moment's notice. Physical intimacy is out, but they use the technology to fake it as best they can. They hold hands. They kiss At night, they hookup headphones, so that even while they sleep, they can hear each other breathing.¹

Millions of people interact in online games via digital representations of themselves referred to as "avatars."² These avatars are completely controlled by the gamer.³ The avatar moves when directed to by the gamer;⁴ the avatar's voice comes from the gamer; the emotions that the avatar expresses are emoted by the gamer.⁵ The entire look of the avatar is

1. Jessica Bennett, *Avatars: Love and Desire in the Digital Age*, NEWSWEEK (Apr. 17, 2011, 10:46 PM), <http://www.thedailybeast.com/newsweek/2009/04/13/a-geek-love-story.html>.

2. See Bennett, *supra* note 1 (characterizing avatars as "digital representations" of online gamers).

3. See generally, *Basic Movement Controls*, SECOND LIFE, <http://community.secondlife.com/t5/English-Knowledge-Base/Basic-movement-controls/t-p/700033> (last visited Oct. 11, 2013) (explaining basic avatar controls to be used by the gamer including how to walk, run, fly, and jump).

4. See *id.*

5. See Bennett, *supra* note 1 (explaining that gamers show emotion through the use of their avatars by holding hands, kissing, and using their real voices to communicate to each other). *But cf.* JJ Ventrella, *Direct Manipulation of Avatar for Expression and Animation Editing*, AVATAR PUPPETEERING, <http://www.avatarpuppeteering.com/> (last visited Oct. 11, 2013) (arguing that current technology allows users to control their characters, but does not fully allow them to express their emotions online because the technology required for such actions is extremely complex); see *id.* (noting that game developers are working to improve current technology to allow players to have more creative freedom in developing real human characteristics in their avatars; characteristics such as behavior, facial and body expression, and fluid movement).

designed by the gamer, from eye shape, color, and size, to the clothes the avatar wears.⁶ Although the avatar may not look entirely like the gamer,⁷ it is clear that game users tend to genuinely identify with their online personas.⁸ To the online gaming world, these avatars are their Internet identities.⁹

Time and again, articles, blogs, and documentaries have highlighted the video game love story in which people from different ends of the world meet, and even become married through online games that do not require them to physically be in the same place.¹⁰

Some users may have a sentimental attachment to their online identities as shown above, however; others may have a monetary incentive to protect the identity of their online avatar. These MMORPG games produce billions of dollars in revenue a year.¹¹ An average gamer spends around 1,000 hours a year playing video games.¹² For each hour that a gamer spends in an MMORPG game, the gamer can increase both the popularity

6. See generally *Controlling Your Avatar's Appearance*, SECOND LIFE, <http://community.secondlife.com/t5/English-Knowledge-Base/Controlling-your-avatar-s-appearance/ta-p/700709> (last visited Oct. 11, 2013) (explaining how to create the visual look of an avatar).

7. See generally Marla Popova, *Alter Ego: Portraits of Gamers Next to Their Avatars*, BRAIN PICKINGS, <http://www.brainpickings.org/index.php/2011/12/14/alter-ego-robbie-cooper/> (last visited Oct. 11, 2013) (displaying visually avatars next to their human counterparts).

8. See generally, Kristina Dell, *How Second Life Affects Real Life*, TIME (May 12, 2008) (arguing that one's online identity is inextricably intertwined with one's real world identity; each tending to affect the other).

9. See *id.*; *What is an Avatar?*, SECOND LIFE, <http://secondlife.com/whatis/avatar/> (last visited Oct. 11, 2013) (stating that an online avatar is "you – only in [3-D]").

10. See, e.g., Stephanie Rosenbloom, *It's Love at First Kill*, N.Y. TIMES (Apr. 22, 2011), http://www.nytimes.com/2011/04/24/fashion/24avatar.html?pagewanted=all&_r=0 (writing about a couple who met and fell in love through the use of their online avatars); MY AVATAR AND ME (Milton Media ApS and Fenris Film & Multimedia ApS 2010) (documenting the developing relationship between two online avatars and their real life counterparts); *Lifestyles and Relationships*, SECOND LIFE, <http://community.secondlife.com/t5/Lifestyles-and-Relationships/Share-your-SL-love-stories/td-p/1006959> (last visited Oct. 11, 2013) (providing a forum for gamers to share their own avatar love stories).

11. See Alec Meer, *MMORPG revenue to reach \$8bn by 2014*, GAME INDUSTRY INTERNATIONAL (Aug. 11, 2010), <http://www.gamesindustry.biz/articles/2010-08-11-mmorpg-revenue-to-grow-60-percent-this-year> (stating that the MMORPG market was worth about \$5 billion in 2009, \$6 billion in 2010, and predicted to increase to \$8 billion by the year 2014).

12. See Kristina Dell, *supra* note 8 (stating that on average, gamers spend around twenty hours a week playing MMORPG games).

and the potential economic value of his or her character.¹³

Some avatars are known world-wide, and some even have a brand attached to their identity.¹⁴ Avatars can become “famous” through a variety of modes; some are well known land developers, fashion designers, models, or even creators.¹⁵ Many famous gamers have used their avatar fame to earn real world revenue.¹⁶ As a result, the gaming world has tried to retain ownership over their avatars.¹⁷ Unfortunately, gamers are usually required to license away the intellectual property rights over their avatars by agreeing to the Terms of Service in MMORPG games.¹⁸ However, as

13. See, e.g., Julia Layton, *Can I make my living in second life?*, HOW STUFF WORKS, <http://computer.howstuffworks.com/internet/social-networking/information/second-life-job.htm> (explaining that internationally known companies such as Toyota and Sony are developing a virtual presence in MMORPGs, and are paying long-time avatars to develop them).

14. See, e.g., *People*, SECOND LIFE WIKIA, <http://secondlife.wikia.com/wiki/People> (last visited Oct. 11, 2013) (hereinafter *People*) (noting “Archivist Llewellyn” as one of the most prominent players on second life); see also *id.* (crediting Archivist Llewellyn as founding and directing the Neil A. Armstrong Library and Archives, the first virtual library recognized by the Library of Congress, as well as becoming the winner of the Federal Virtual Worlds Challenge promoted by the White House and sponsored by the Department of Defense); *User: Archivist Llewellyn*, SECOND LIFE WIKIA, http://wiki.secondlife.com/wiki/User:Archivist_Llewellyn (last visited Nov. 7, 2014) (providing a comprehensive overview of Archivist Llewellyn’s on and offline achievements); *Archivist Llewellyn*, SECOND LIFE WIKIA, <http://secondlife.wikia.com/wiki/User:Archivist.Llewellyn> (last visited Nov. 7, 2014) (providing more information on Archivist Llewellyn’s successes, and also providing pictures of her online avatar as well pictures of her in real life).

15. See generally *People*, *supra* note 14 (listing some of the most prominent players in second life, followed by a brief description of why they are famous).

16. See Layton, *supra* note 13 (citing Second Life creator, David Kirkpatrick, as stating that hundreds of gamers are currently making a monthly income in excess of \$1,000); see also *id.* (noting that the lines between virtual commerce and “real world” commerce no longer exist).

17. See Mike Kent, *Massive Multi-player Online Games and the Developing Political Economy of Cyberspace*, FAST CAPITALISM, Issue 4.1 (2008), available at http://www.uta.edu/huma/agger/fastcapitalism/4_1/kent.html (stating that there is a battle between gamers and game-makers over the intellectual property rights for online gaming avatars).

18. See, e.g., *World of Warcraft End User License Agreement*, BLIZZARD ENTER. (Dec. 12, 2013), http://us.blizzard.com/en-us/company/legal/wow_eula.html (requiring users to acknowledge that “all title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any titles, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, storylines, character likenesses, methods of operation, moral rights, and any related documentation) are owned or licensed by Blizzard”); see Oliver A. Khan, *Me, Myself, and My Avatar: The Right to the Likeness of*

some have suggested, gamers may be able to retain some economic control of their avatars through the right of publicity.¹⁹

The right of publicity, which acts as a bar against unauthorized uses of identity,²⁰ is readily accepted in California.²¹ Additionally, several of the leading MMORPG gaming companies are headquartered in California.²² Thus, any claims against these companies will likely be brought in a California court.²³ Therefore, this article will first explain California's right of publicity laws. Second, this article will analyze whether a gamer can be granted the right of publicity over his or her avatar, and will further explain the rights that can realistically be retained in light of gaming user agreements. Third, this article will examine whether a gamer should be given the right of publicity over his or her avatar.

I. A DUAL ATTACK: CALIFORNIA'S STATUTORY AND COMMON LAW RIGHT OF PUBLICITY

A. *What is the Right of Publicity?*

The right of publicity is not universal; it is not accepted in all fifty states,²⁴ nor is it congruent between the states that do accept the right.²⁵ Generally, the right of publicity protects against unauthorized uses of a person's name, likeness, and identity.²⁶ Although some state right of

Our Digital Selves, 5 I/S: J.L. & POL'Y FOR INFO. SOC'Y 447, 454 (2010) (stating that "players must waive any rights they have in their characters").

19. See generally Khan, *supra* note 18 (analyzing whether a gamer could viably bring a right of publicity claim for his or her avatar).

20. See *Right of Publicity*, LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/wex/publicity> (stating that "the right of publicity prevents the unauthorized commercial use of an individual's name, likeness, or other recognizable aspects of one's persona").

21. See Max Kimbrough & Tammy Cummings, *The Right of Publicity*, <http://www.artsandbusinessphila.org/pvla/documents/RightofPublicity.pdf> (stating that of all the states that allow right of publicity claims, California is the best state in which to bring a right of publicity claim because of the state's broad statutes).

22. See LINDEN LAB, <http://lindenlab.com/contact> (last visited Nov. 7, 2014) (listing San Francisco, California as the Linden Lab headquarters); BLIZZARD, <http://us.blizzard.com/en-us/company/about/contact.html> (last visited Nov 7, 2014) (listing Irvine, California as the Blizzard headquarters).

23. Cf. Fed. R. Civ P. 4(k).

24. See Kimbrough & Cummings, *supra* note 21 (stating that "several states have laws that protect a celebrity's right of publicity, however most do not").

25. See Khan, *supra* note 18, at 450-51 (comparing how right of publicity laws vary from state to state); see also Kimbrough & Cummings, *supra* note 21 (explaining differences between New York and California right of publicity laws).

26. *Right of Publicity: An Overview*, LEGAL INFORMATION INSTITUTE,

publicity statutes only protect individuals with celebrity status, the common view is that the right of publicity extends to every individual.²⁷

The right of publicity is largely viewed as a relatively recent legal development²⁸ that stems from the right of privacy,²⁹ but is now considered a part of the intellectual property family.³⁰ Similar to other intellectual property policy rationales, the right of publicity is intended to reward those who put time and effort into their work and thereby allow the skill to be provided to the public as a whole.³¹

B. The Right of Publicity in California

California is well known for its protection of the right of publicity.³² Not only have the most notable right of publicity cases been litigated in California,³³ but the state also provides two different ways to protect

<http://www.law.cornell.edu/wex/publicity> (last visited Nov. 7, 2014); see Kimbrough & Cummings, *supra* note 21, at 1 (noting that the “right of publicity protects an individual’s interest in the commercial exploitation of his or her name or likeness” and “gives an individual the exclusive right to license the use of his or her identity for commercial endorsement”).

27. Cf. *Brief History of RoP*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited July 28, 2014) (stating that “the majority view is that the Right of Publicity extends to every individual, not just those who are famous,” but “as a practical matter, Right of Publicity disputes usually involve celebrities, since it is they who possess the names and images that help hype advertisements and sell products”).

28. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 146-149 (1993) (noting that many see the right of publicity as a new law resulting from the emergence of Hollywood’s golden age, but provides evidence that the spirit of the right of publicity has been around for several hundred years); see generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (proposing the right of publicity first).

29. See Madow, *supra* note 28, at 167 (quoting Thomas McCarthy’s view that the right of publicity was “carved out of the general right of privacy,” and questioning whether the right of publicity stems from the right of privacy or whether it stems from a frustration of it).

30. See *Brief History of RoP*, *supra* note 27 (noting that “the Right of Publicity is often confused with its more recognized cousins in the intellectual property family, copyright and trademark”).

31. See *Lugosi v. Universal Pictures*, 630 P. 2d 435, 441 (Cal. 1979) (en banc) (providing the parallels between copyright and right of publicity rationales); see also *id.* (noting that the purpose of granting copyright protection is to encourage people to expend time and money into intellectual and artistic creation, and thereby secure the benefits for society as a whole); *id.* at 840 (noting that the purpose of granting the right of publicity is to encourage people to expend time and resources to develop the skills or achievements necessary for public recognition that not only benefit the individual, but tends to benefit society as a whole).

32. Cf. Kimbrough & Cummings, *supra* note 21 (stating that of all the states that accept the right, California provides the most liberal laws).

33. See *Notable Cases*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/notable-cases>

against unauthorized uses of one's identity.³⁴ The first protection of the right of publicity is codified in California Law.³⁵ The second protection is rooted within California's common law.³⁶ The statute and the common law protect in different ways, and both can be used simultaneously in a right of publicity suit.³⁷

C. California's Statutory Right of Publicity

The California statutory right of publicity protects against unauthorized use of "another's name, voice, signature, photograph, or likeness."³⁸

The term "another's" is extremely liberal, and is not limited by celebrity status,³⁹ or even status as a living person. Several states mandate that the persona receiving protection must be famous.⁴⁰ Although many of California's right of publicity cases involve famous people, the court has never placed such limits on the protection.⁴¹ Furthermore, other states specify that the persona receiving protection must be a "living person."⁴² Again, California places no such limits.⁴³ On the contrary, California has a separate statute protecting posthumous rights of publicity.⁴⁴ The right lasts for seventy years after the death of the persona, and is treated as a property right.⁴⁵ Therefore, even after one has passed, one's heirs can still prosecute

(last visited July 28, 2014) (listing the most notable right of publicity cases; the majority of which have been litigated in California).

34. See CAL. CIV. CODE § 3344 (1971) (providing the statutory right of publicity); *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (providing the California common law right of publicity).

35. § 3344.

36. *White*, 971 F. 2d at 1397 (stating the four part test for a California common law right of publicity claim).

37. See § 3344(g) (allowing remedies to be cumulative and in addition to any others provided for by law).

38. § 3344(a).

39. See *KNB Enter. v. Matthews*, 78 Cal. App. 4th 362, 367 (2000) (stating that "although the unauthorized appropriation of an obscure plaintiff's name, voice, signature, photograph, or likeness would not inflict as great an economic injury as would be suffered by a celebrity plaintiff, California's appropriation statute is not limited to celebrity plaintiffs").

40. *Cf. supra* note 27 and accompanying text.

41. See *supra* note 39 and accompanying text.

42. See, e.g., N.Y. CIV. RIGHTS LAW § 50 (McKinney)(providing the term "living person" as a qualification for protection under the statute).

43. See CAL. CIV. CODE § 3344.1 (West) (allowing for posthumous persona protection).

44. See *id.*

45. See *id.*; see also *California Right of Publicity*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/california-right-publicity-law> (last visited Nov. 7, 2014) (stating that the California right of publicity "lasts for 70 years after death, and is considered

against unauthorized uses of the identity.⁴⁶

The term “voice” within the meaning of the statute only applies to one’s actual voice.⁴⁷ In *Midler v. Ford*, a well-known case for statutory voice infringement, Bette Midler, a popular singer, declined to sing a song for the defendant’s use in a commercial.⁴⁸ The defendant, without Midler’s consent, hired a sound-alike to sing the song instead.⁴⁹ The district court first ruled that Midler had “no grounds for protection.”⁵⁰ However, the Ninth Circuit ruled that although the statutory right of publicity did not protect imitations of one’s voice, the common law right of publicity could protect such imitations.⁵¹

The statute defines “photograph” as “any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.”⁵² A person is readily identifiable “when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.”⁵³ Thus, if a plaintiff’s image is altered to the point where the plaintiff is no longer recognizable, the statute cannot offer protection.

The Ninth Circuit determined that the statutory meaning of the word “likeness” modifies the term photograph, and is merely meant to protect a visual image of a person other than a photograph.⁵⁴ Courts have used the

a freely transferable, licensable, descendible property right”).

46. See, e.g., *The Hebrew Univ. of Jerusalem v. Gen. Motors, LLC*, No. cv-03790 AHM (Cal. Dist. Ct. Mar. 16, 2012), available at <http://rightofpublicity.com/pdf/cases/einstein-v-gm.pdf> (showing that under the California statutory right of publicity, Albert Einstein’s image could still be protected after his death; however, not for an unlimited time).

47. See generally *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

48. *Id.* at 461.

49. *Id.* at 461-62 (the impersonator was instructed by the defendant to sound as much like Bette Midler as possible); see also *id.* (noting that after the commercial aired, Midler and the impersonator were told by friends and family that the song sounded like Midler).

50. See generally *Midler v. Ford Motor Co.*, 1987 U.S. Dist. LEXIS 14367 (C.D. Cal. Aug. 13, 1987); see also *Midler*, 849 F.2d at 462 (noting that no case had ever prevailed on imitation of voice alone; additionally, while the legislature had included the term “likeness” after the term “photograph,” the legislature did not include the words “imitation of voice” after the term “voice”).

51. See *Midler*, 849 F.2d at 463-64 (ruling that although imitation of one’s voice does not violate one’s right of publicity under the statute, it is an infringement upon one’s identity which is protected under the California common law right of publicity).

52. CAL. CIV. CODE § 3344(b).

53. § 3344(b)(1).

54. See *Midler*, 849 F.2d at 463; see also *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692-93 (9th Cir. 1998).

“readily identifiable” test to conclude that a “likeness” can be infringed upon by a variety of different mediums, including but not limited to, drawings and robots.⁵⁵ Generally, the less detailed the “likeness” is, the less protection it will receive.⁵⁶

Once a plaintiff can show that his or her “name, voice, signature, photograph, or likeness” has been used without authorization, the plaintiff must then meet a three-step test.⁵⁷ First, that there was a knowing use of the plaintiff’s identity.⁵⁸ Second, the use was for advertising purposes.⁵⁹ Third, the use and the commercial purpose have a direct connection.⁶⁰

D. California’s Common Law Right of Publicity

The California common law right of publicity requires that the plaintiff supply four allegations.⁶¹ First, that the defendant used the plaintiff’s identity.⁶² Second, the appropriation of the plaintiff’s name or likeness was to the defendant’s advantage, commercial or otherwise.⁶³ Third, the plaintiff did not consent to the use.⁶⁴ Fourth, and last, the plaintiff must allege that there was resulting injury.⁶⁵

The Ninth Circuit has made it clear that the focus of the common law right of publicity is to protect one’s identity; name or likeness as described above merely help enhance the definition of identity.⁶⁶ Because of this

55. *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, (9th Cir. 1997).

56. *See, e.g., Newcombe*, 157 F.3d at 692-93 (9th Cir. 1998) (concluding that a drawing of a famous baseball player that had certain recognizable features could be considered infringement of one’s likeness under the statute); *Wendt*, 125 F.3d 806 (ruling that robots with a great deal of detail reminiscent of the persona could infringe ones likeness under the California Statute); *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992)(noting that insufficient detail reminiscent of the persona will not amount to statutory infringement of ones likeness).

57. *See Newcombe*, 157 F.3d at 692; *see also* DIGITAL MEDIA LAW PROJECT, *supra* note 45 (confirming that the Newcombe test is to be applied in all statutory cases).

58. *Newcombe*, 157 F.3d at 692.

59. *Id.*

60. *Id.*

61. *White*, 971 F.2d at 1397 (providing the four necessary allegations).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *See Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 413-414 (9th Cir. 1996) (providing that California’s common law right of publicity is not limited to the appropriation of name or likeness, but instead is focused on the appropriation of the plaintiff’s *identity*); *see also* DIGITAL MEDIA LAW PROJECT, *supra* note 45 (commenting that “though the second prong of the standard four-step test mentions ‘name or likeness,’ courts have held that the common law right is actually much broader; the focus instead is on the

focus, the common law is generally more expansive than the statutory protection.⁶⁷ For example, in *Midler v. Ford*, Midler could not prevail under the statute for voice imitation, but could proceed under the common law because her voice equated to her identity.⁶⁸ Additionally, in *White v. Samsung*, the court ruled that a robot with some of Vanna White's identifying characteristics (wig, jewelry, and dress) was not a statutory violation of her likeness, but was a common law violation of her identity.⁶⁹ Lastly in, *Motschenbacher v. F.J. Reynolds Tobacco*, one of the broadest interpretations of identity, the Ninth Circuit found that a racecar driver's car equated to his identity under the statute even though the driver could not be seen.⁷⁰

E. Comparing the Statute and the Common Law

Liberality, knowledge, and use differentiate the common law right of publicity from the statutory right of publicity.⁷¹ As previously mentioned, a common law claim for the right of publicity is much more liberal than a statutory claim.⁷² Additionally, the statute requires a knowing use,⁷³ whereas mistake or negligence are not defenses against commercial appropriation under common law.⁷⁴ Lastly, the statute requires that the use be for commercial purposes,⁷⁵ yet the common law prohibits any type of misappropriation.⁷⁶

term 'identity').

67. See DIGITAL MEDIA LAW PROJECT, *supra* note 45 (noting that "courts have interpreted 'identity' broadly, covering more uses than does the statutory right of publicity").

68. See generally *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

69. See generally *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395(9th Cir. 1992).

70. See *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974) (ruling that defendant's use of a car that was identical to plaintiff's well known racing car was a violation of his common law right of publicity).

71. See generally DIGITAL MEDIA LAW PROJECT, *supra* note 45 (comparing the California statutory right of publicity claim to the California common law right of publicity claim).

72. See, e.g., *Midler*, 849 F.2d 460; *White*, 971 F.2d 1395; *Motschenbacher*, 498 F.2d at 822 (9th Cir. 1974) (demonstrating that the common law right of publicity is more flexible than the statutory right).

73. See CAL. CIV. CODE § 3344(a)(1971) (stating that "[A]ny person who knowingly uses another's name, voice, signature . . . shall be liable. . ."(emphasis added)).

74. See *White*, 971 F.2d at 1397 (explaining that the common law infringement test merely requires that the "defendant used the plaintiff's identity" without consent).

75. See *Newcombe*, 157 F.3d at 692 (explaining the second prong of the statutory infringement test requires "use for advertising purposes" only).

76. See *White*, 971 F.2d at 1397 (requiring that "the appropriation of the plaintiff's

F. The Benefits of Bringing Both Claims to Court – Two is Always Better Than One

The common law right of publicity is additional to, not codified by, the statute.⁷⁷ Therefore, one can bring both a right of publicity common law suit and a statutory suit.⁷⁸ Several right of publicity cases have been brought under both the common law and the statute.⁷⁹ Usually where one claim fails, the other prevails.⁸⁰

G. Limitations on the Right of Publicity

California's right of publicity laws may be extremely expansive; however, the right can be limited by copyright preemption, First Amendment limitations, and statute of limitations.⁸¹

i. Copyright Preemption

Because copyright law is provided for in the U.S. Constitution,⁸² a state right of publicity claim (either statutory or common law) can be preempted if it is too similar to a copyright claim.⁸³ Copyright protection is limited to original works of authorship that have been fixed in a tangible medium of expression.⁸⁴ The six exclusive rights granted by copyright are limited to the right to copy, to produce derivative works, to distribute copies, to perform publically, to display publically, and to digitally perform the

name or likeness was to the defendant's advantage, commercial or otherwise").

77. See § 3344(g) (stating that "the remedies provided for in this section are cumulative and shall be in addition to any others provided for by law").

78. See *id.*

79. See, e.g., *Midler*, 849 F.2d 460 (asserting both a common law and right of publicity claim); *White*, 971 F.2d 1395 (asserting both a common law and right of publicity claim); *Motschenbacher*, 498 F.2d 821 (9th Cir. 1974) (asserting both a common law and right of publicity claim).

80. See, e.g., *Midler*, 849 F.2d 460 (losing under the statute but prevailing under the common law); *White*, 971 F.2d 1395 (losing under the statute but prevailing under the common law); *Motschenbacher*, 498 F.2d 821 (losing under the statute but prevailing under the common law).

81. See DIGITAL MEDIA LAW PROJECT, *supra* note 45 (noting that "a right of publicity claim—either statutory or under the common law—fails if it is too similar to a copyright claim"); see also *id.* (noting that "the First Amendment also limits the extent to which rights of publicity can limit speech about matters of public interest"); see also *id.* (noting that "both the statutory and common law right of publicity claims are subject to a two-year statute of limitations.").

82. See U.S. CONST. Art. I, § 8, cl. 8 (providing Congress the power to regulate copyright protection).

83. DIGITAL MEDIA LAW PROJECT, *supra* note 5.

84. See 17 U.S.C. § 102 (2014) (providing the subject matter and scope of copyright law).

work.⁸⁵ In *Fleet v. CBS, Inc.*, a case in which the state right of publicity claim was preempted by federal copyright law, the court ruled that for preemption to occur, a two-part test must be met.⁸⁶ First, the claim must fit within the subject matter of copyright protection.⁸⁷ Second, the right asserted must be equivalent to the exclusive rights granted by copyright.⁸⁸

ii. First Amendment Limitations

Similarly, because free speech stems from the U.S. Constitution,⁸⁹ a free speech defense will trump a state right of publicity claim.⁹⁰ The California right of publicity statute clearly lays out First Amendment exceptions.⁹¹ Specifically, the statute allows for one's identity to be used in connection with news, public affairs, sports, and politics.⁹² Thus, the Ninth Circuit usually refers to the statutory exemptions when a defendant argues a First Amendment defense.⁹³ However, the common law right of publicity does not provide these same exceptions, and therefore the court has had to weigh First Amendment considerations with right of publicity considerations.⁹⁴

iii. Statute of Limitations

Any right of publicity claim brought in California has a two-year statute of limitation.⁹⁵ For material appearing on a website, the Ninth Circuit has held that the statute retriggers when the subject matter is "substantively

85. *Id.* § 106 (listing the six exclusive rights of copyright law).

86. *See Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 650 (1996) (explaining the two part test); *see also Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 976 (9th Cir. 1987); *Trenton v. Infinity Broad. Corp.*, 865 F. Supp. 1416, 1427-28 (C.D. Cal. 1994).

87. *See Fleet*, 58 Cal. Rptr. 2d at 650 (describing the first part of the two part test).

88. *See id.* (describing the second part of the two part test).

89. *See U.S. CONST. amend. I* (mandating that Congress cannot abridge free speech).

90. *See DIGITAL MEDIA LAW PROJECT, supra note 45.*

91. CAL. CIV. CODE § 3344(d).

92. *Id.* § 3344.

93. *See, e.g., Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 415-17 (Cal. Ct. App. 2001); *see also DIGITAL MEDIA LAW PROJECT, supra note 45* (stating that "courts often focus on this statutory safe harbor, instead of the First Amendment directly, when confronting statutory right-of-publicity claims").

94. *See, e.g., Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (weighing free speech interests with right of publicity interests, and stating that in a non-commercial free speech use, the plaintiff cannot prevail unless actual malice is shown); *see DIGITAL MEDIA LAW PROJECT, supra note 45* (stating that "the First Amendment is more often directly relevant in common law right of publicity cases, since there is no statutory safe harbor.").

95. *See generally Christoff v. Nestle USA, Inc.*, 47 Cal. 4th 468, 474 (2009); *accord DIGITAL MEDIA LAW PROJECT, supra note 45.*

altered or added to, or the website is directed towards a new audience.”⁹⁶

II. A GAMER’S RIGHT OF PUBLICITY OVER HIS OR HER AVATAR

This section will argue that the gamer’s real life identity is protected under the right of publicity, and that the avatar is simply a legal extension of that protection. This is necessary not only to be afforded protection under California right of publicity laws, but also necessary to avoid being limited by a gaming company’s Terms of Service. Further, this section will show that the California statutory right of publicity is more limited than the common law right of publicity, and thus, a right of publicity suit for an avatar will be more successful under the common law. Lastly, this section will use a well-known avatar to help facilitate an understanding of the key differences between a statutory claim and a common law claim, and also demonstrate the value of having rights over one’s avatar.

A. *Creating an Avatar*

Current technology has allowed gamers to create avatars in all shapes and sizes.⁹⁷ Some are created to look like two-dimensional replicas of their human counterparts, while others are designed to be more fantastical.⁹⁸ One of the most famous players on Second Life, Archivist Llewellyn,⁹⁹ designed her avatar to look like a replica of her true self.¹⁰⁰ The avatar has the same hair color and length as the gamer; the avatar has the same body type as the gamer; and the avatar’s facial features match the gamer.¹⁰¹ Archivist Llewellyn, being the founder and director of the first virtual library recognized by the Library of Congress, as well as becoming the winner of the Federal Virtual Worlds Challenge promoted by the White House and sponsored by the Department of Defense, has an obvious incentive to retain economic control over her avatar.¹⁰² Therefore, this article will use Archivist Llewellyn’s avatar to show how California’s

96. See *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 2026 (2013), *reh’g denied*, 12-1047, 2013 WL 4045219 (U.S. Aug. 12, 2013) (noting the statute of limitations website standard); see also *id.* (noting that the statute of limitations is not retrigged every time the website is revised).

97. See Popova, *supra* note 7 (displaying a wide range of different avatars next to their human counterparts).

98. See *id.*

99. See *supra* note 14 and accompanying text.

100. Archivist Llewellyn, *supra* note 14 (providing pictures of her online avatar as well pictures of her in real life).

101. See *id.* (providing a video of Archivist Llewellyn in avatar form, and providing pictures of the true gamer behind the avatar).

102. See *supra* note 14 and accompanying text.

statutory and common law right of publicity claims can help gamers retain some economic control over their avatars.

B. A Gamer's Right of Publicity Over His or Her Avatar Under the California Statute

When bringing a statutory right of publicity claim for an online avatar, the gamer will necessarily need to claim that another is infringing upon his or her human "likeness." Not only is likeness the most lenient term in the statute,¹⁰³ but it is also the most relevant.

As previously stated, the term likeness modifies the word photograph within the statute.¹⁰⁴ Without authorized consent, it is illegal under the statute to take a photo ("a visual image that is obtained by using a camera")¹⁰⁵ and similarly illegal to create a likeness ("a visual image of a person other than a photograph")¹⁰⁶ where the plaintiff is readily identifiable.¹⁰⁷

To determine if the plaintiff is readily identifiable, the court relies on recognizable characteristics of the known personality to show infringement.¹⁰⁸ For example, in *Newcombe v. Adolf Coors Co.*,¹⁰⁹ a case wherein a famous pitcher sued the Coors beer company over an advertisement of a faceless baseball player, the court determined that Newcomb's likeness was misappropriated because the photograph contained certain recognizable features such as Newcomb's jersey number, similar style of jersey, and pitcher stance.¹¹⁰ Conversely, in *White v. Samsung Electronics America, Inc.* a case wherein Vanna White sued Samsung for advertising a futuristic robot that mimicked Vanna White, the court ruled that there was no "likeness" infringement because although the robot shared Vanna's same style of dress, hair, and jewelry, these elements were too generic, and no real recognizable aspects of Vanna's persona were used.¹¹¹

Given the current case law, if Archivist Llewellyn were to bring a

103. See *supra* note 56 and accompanying text.

104. See *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 690 (9th Cir. 1998) (ruling that "likeness" is intended to modify the word photograph).

105. *Id.* at 692.

106. *Id.*

107. See *Newcombe*, 157 F.3d at 692; accord *Wendt v. Host Int'l*, 125 F.3d 806, 811 (9th Cir. 1997); *White v. Samsung Electr. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (interpreting likeness in the same fashion).

108. See generally *Newcombe*, 157 F.3d at 692; *White*, 989 F.2d at 1514.

109. See *Newcombe*, 157 F.3d 686 (9th Cir. 1998).

110. See *id.* at 693.

111. See generally *White*, 989 F.2d 1512.

statutory right of publicity claim, her avatar would likely be seen as a readily identifiable likeness.¹¹² First, her avatar is a moving visual and interactive character that arguably fits the likeness test (a visual image of a person other than a photograph).¹¹³ Second, because her avatar shares nearly all the same physical qualities as her human counterpart,¹¹⁴ similar to the *Newcombe* case, it would be difficult for a court to determine that she is not “readily identifiable.” However, if Archivist Llewellyn’s avatar were visually different than her human form, a court would likely compare and contrast prominent characteristics of the gamer and the avatar. If the characteristics were not similar enough, as seen by the *White* case, the court would be unable to allow the right of publicity claim to prevail.¹¹⁵ Therefore, it is clear that under the statute, avatar protection hinges on whether the avatar resembles the gamer.

If Archivist Llewellyn proves that her avatar is a readily identifiable likeness, the statute requires her to show that an infringer knowingly used Llewellyn’s avatar.¹¹⁶ Second, the use of her avatar was for advertising purposes.¹¹⁷ Finally, the use of her avatar and the subsequent use’s commercial purpose have a direct connection.¹¹⁸ These elements combined would make Llewellyn’s avatar claim actionable.

C. A Gamer’s Right of Publicity Under the California Common Law

The common law right of publicity is much more liberal than the statutory right,¹¹⁹ and would likely be a more viable route through which a plaintiff may initiate a right of publicity suit for any avatar, regardless of whether the avatar resembles the gamer.

Under the common law right of publicity, the plaintiff must allege four things.¹²⁰ First, that the defendant used the plaintiff’s identity.¹²¹ Second, that the appropriation of the plaintiff’s name or likeness was to the

112. *See id.* (requiring the plaintiff to be readily identifiable in a likeness dispute).

113. *See id.* (defining “likeness”).

114. *See Archivist Llewellyn, supra* note 14.

115. *See Newcombe*, 157 F. 3d at 692 (requiring that the plaintiff be readily identifiable).

116. *Id.* (listing the first step of a statutory infringement suit).

117. *Id.* (listing the second step of a statutory infringement suit).

118. *Id.* (listing the third step in the statutory infringement suit).

119. *See generally* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); *White v. Samsung Electr. Am., Inc.*, 971 F.2d 1395, 1395 (9th Cir. 1992); *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974) (all cases demonstrating that the common law right of publicity is more flexible than the statutory right); *see also*, DIGITAL MEDIA LAW PROJECT, *supra* note 45.

120. *See White*, 971 F.2d at 1397.

121. *See id.*

defendant's advantage, commercial or otherwise.¹²² Third, the plaintiff did not consent to the subsequent use.¹²³ Fourth, and lastly, the plaintiff must allege that she suffered an injury as a result of the other's use.¹²⁴ Because the common law focuses so heavily on the "identity" analysis,¹²⁵ a gamer will necessarily have to argue that an avatar is an "identity" of the gamer.

The most supportive case in favor of showing that an avatar can be considered an identity is *Motschenbacher v. F.J. Reynolds*.¹²⁶ In *Mostchenbaracher*, a professional racecar driver sued a cigarette company under the California common law right of publicity for using his identity in connection with a national commercial.¹²⁷ In the commercial, the racecar driver's human likeness was not identifiable; in fact, the body of the driver was not visible at all.¹²⁸ Instead, the commercial exploited the driver's uniquely decorated car.¹²⁹ Originally, the lower court found that because no human image was visible in the commercial, there could be no infringement on the plaintiff's identity.¹³⁰ Thus, he could not prevail under the common law.¹³¹ However, the appellate court, finding in the spirit of the right of publicity, held that the plaintiff could prevail.¹³² The court determined that although the public could not see the driver, the distinct decorations of the driver's car led some to infer that the person driving the car was the plaintiff.¹³³ This decision shows the following: first, policy rationale is important when deciding a common law claim.¹³⁴ Second, the court can protect an image that does not look like a person.¹³⁵ Finally, the court can find infringement where the public assumes association.¹³⁶

In a common law right of publicity suit, an avatar in the gaming world is likely equivalent to a distinctive automobile on the racetrack. Similar to a

122. *See id.*

123. *See id.*

124. *See id.*

125. *See supra* note 66 and accompanying text.

126. 498 F.2d 821 (9th Cir. 1974).

127. *See id.* at 822.

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974); *see also* *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) (noting that the purpose of granting the right of publicity is to encourage and reward people to expend time and resources to develop the skills or achievements necessary for public recognition that not only benefit the individual, but tends to benefit society as a whole).

133. *See Motschenbacher*, 498 F.2d at 827.

134. *See generally id.*

135. *See generally id.*

136. *See generally id.*

racecar on the track, an avatar in the gaming world is the physical representation of the human figure to the public. Although the representation may not look like the human figure, similar in nature to a racecar, the sight of the avatar is inextricably intertwined with the identity of the human. The audience knows key facts about the gamer's reputation simply by looking at the avatar or hearing the avatar's name. Similar to a racecar driver, gamers spend hours enhancing their skills, their reputation, and their persona for the public.¹³⁷ It would be incongruent for a California court to award protection for a racecar driver's specially designed car, but not award gamer's protection for their specially designed avatars.

Avatars may have an even more compelling case for publicity rights because key attributes of the gamer are provided to the public through the avatar (whereas this is not true of a racecar).¹³⁸ For example, the voice of the avatar is usually that of the gamer, the emotions that the avatar exudes are those of the gamer, and in totality, the gamer puts more of his or her personal attributes into an avatar than a racecar driver puts into a car.¹³⁹

Under current case law, if Archivist Llewellyn's was to bring a claim under the common law, she could cite to *Motschenbacher* in supporting the proposition that her online avatar is her virtual identity,¹⁴⁰ and likely be provided protection. Additionally, even if her avatar did not look like her human form, she could still be afforded protection under the common law. *Motschenbacher* eliminates the need to compare and contrast distinguishing characteristics between the image and the persona, it merely requires that the public associate the image with the identity of the persona.¹⁴¹

Once Archivist Llewellyn proves that her avatar is her online identity, the common law also requires her to show that another used her avatar to their advantage,¹⁴² without her consent,¹⁴³ and this caused her injury.¹⁴⁴

137. See Dell, *supra* note 8 (stating that people on average spend around twenty hours a week playing MMORPG games: twenty hours a week for fifty two weeks is at least 1,040 hours of gaming a year).

138. See Bennett, *supra* note 1 (showing how gamers control the interactions of their online characters, i.e., holding hands, kissing, using real voices to communicate to each other).

139. See *id.*; *Motschenbacher*, 498 F.2d 821 at 827 (observing that a car is an inanimate object).

140. *But see* Robinson v. HSBC Bank USA, 732 F. Supp. 2d 976, 984 (N.D. Cal. 2010) (suggesting that *Motschenbacher* should only be applied to cases in which the association between the object and the persona are immediately identifiable).

141. See *Motschenbacher*, 498 F.2d at 827 (ruling based on public's association of the racecar driver with his specially designed racecar).

142. See Newcombe v. Adolf Coors Co., 157 F.3d 686, 692 (9th Cir. 1998) (ruling that when a likeness is used to advertise a product, this is a commercial advantage, and it meets

Hypothetically, this could play out in a variety of different ways. Similar to regular right of publicity cases, a company could use Archivist Llewellyn's avatar image to promote or advertise a product; alternatively, another gamer could create an avatar that looked like Archivist Llewellyn (and possibly use a similar character name) in an attempt to ride off her avatar's game experience and prestige.¹⁴⁵ In these scenarios, Archivist Llewellyn could clearly meet the common law requirements insofar as advertising using another's identity without consent has been ruled to be a commercial advantage.¹⁴⁶ Additionally, injury is easily proven when compensation is absent.¹⁴⁷

D. How Will Right of Publicity Limitations Affect a Gamer's Claim?

i. Copyright Preemption

If a gamer brings a right of publicity claim over his or her avatar, a plaintiff will most likely assert that federal copyright law preempts the claim.¹⁴⁸ A right of publicity claim will be prevented from prevailing if the court finds that the claim is better suited as a copyright claim.¹⁴⁹ Specifically, a right of publicity claim needs to fit within the subject matter of copyright,¹⁵⁰ and be limited to the six exclusive rights granted by copyright law.¹⁵¹

the first prong of the test).

143. See *id.* (noting that the no consent requirement is straight forward).

144. See *id.* (ruling that a plaintiff is injured when he or she is not compensated for the use of his or her likeness when said likeness is used in an advertisement); see *White v. Samsung Electr. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (laying out the four necessary allegations).

145. See *supra* note 14 and accompanying text.

146. See *supra* note 142 and accompanying text.

147. See *Newcomb*, 157 F.3d at 692 (ruling that a plaintiff is injured when he or she is not compensated for the use of his or her likeness when said likeness is used in an advertisement).

148. See *Khan*, *supra* note 18.

149. See *id.*; *KNB Enterprises v. Matthews*, 78 Cal. App. 4th 362, 368 (2000) (writing "California law concerning right to publicity, as any state statute or law, is subject to preemption under the supremacy clause of the United States Constitution if it 'actually conflicts with a valid federal statute' or 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (citing *Edgar v. MITE Corp.* 102 S.Ct. 2629 (1982)); see DIGITAL MEDIA LAW PROJECT, *supra* note 45.

150. See 17 U.S.C. § 103 (providing that copyright subject matter only exists in "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

151. *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1919 (1996) (noting the two part copyright test); accord *KNB Enterprises v. Matthews*, 78 Cal. App. 4th at 369; *Khan*, *supra*

California courts have very rarely determined that a right of publicity case is preempted by copyright. One prominent preemption case that exists in California is *Fleet v. CBS*.¹⁵² The case arose when several actors were not paid for their performance in a movie that CBS later distributed to the public.¹⁵³ One of the many claims that the actors brought was for infringement of their right of publicity.¹⁵⁴ The court ruled that their state right of publicity claims were preempted because the totality of the actors' claims were limited to the copyrighted work.¹⁵⁵ However, *Fleet v. CBS* is not the norm. In *KNB Enterprises v. Matthews*,¹⁵⁶ a subsequent case to *Fleet* with similar right of publicity claims, the court ruled that there was no copyright preemption, and stated that *Fleet v. CBS* only "stands for the solid proposition that performers in a copyrighted film may not use their statutory right of publicity to prevent the exclusive copyright holder from distributing the film."¹⁵⁷ Lastly, the court in *KNB Enterprises* stated that right of publicity claims are "generally not preempted by the Copyright Act" because the essence of the right of publicity lies within its privacy roots, and although one's persona may exist in copyrightable works, the claims protected by the right of publicity are extremely different.¹⁵⁸

Therefore, if a gamer such as Archivist Llewellyn were to bring a right of publicity suit, and a defendant argued that federal copyright laws preempted her claim, she could argue that her claim is not preempted because she is not seeking protection for the copyright in the avatar, but is seeking protection of her persona. She would additionally cite to *KNB Enterprises* to show that right of publicity claims are generally not preempted by the copyright act because the purpose and subject matter of both rarely overlap.¹⁵⁹ Lastly, she would need to distinguish her case from *Fleet v. CBS* by stating that *Fleet* is limited to performances in copyrighted films, and her case does not fit within those bounds. Additionally, she could parallel her case to cases like *KNB Enterprises* in which the right of

note 18.

152. 50 Cal. App. 4th 1911 (1996).

153. *See generally id.*

154. *See generally id.*

155. *See generally id.*

156. *KNB Enterprises v. Matthews*, 78 Cal. App. 4th 362 (2000).

157. *Id.* at 372.

158. *See id.* at 722-23 (stating that "right of publicity claims generally are not preempted by the Copyright Act" and "Invasion of privacy may sometimes occur by acts of reproduction, distribution, performance, or display, but inasmuch as the essence of the tort does not lie in such acts, pre-emption should not apply", and similarly "the same may be said of the right of publicity . . . name and likeness do not become a work of authorship simply because they are embodied in a copyrightable work such as a photograph").

159. *See id.*

publicity claims were not preempted despite the fact that the personality's image existed in a copyrighted work.

ii. First Amendment Limitations

In a suit for the right of publicity over one's avatar, First Amendment limitations will likely come up in ways that the court has never seen before. Generally, the court does not have to adjudicate First Amendment claims under the statute because the statute clearly lays out First Amendment exceptions to the right of publicity.¹⁶⁰ However, in the past, the court has had to weigh First Amendment claims with right of publicity claims when the claim was brought under the common law because the common law does not expressly lay out First Amendment exceptions.¹⁶¹ In such instances, the court has usually dealt with the use of one's image in connection with a media source, usually a newspaper or news report.¹⁶² In cases where the right of publicity has been used in connection with a noncommercial speech from a media source, the Ninth Circuit requires a showing of actual malice.¹⁶³ Although the court has not balanced the First Amendment claims of online media sources (such as chat rooms, and discussion boards) and one's right of publicity, it is unlikely that the Ninth Circuit would develop a new standard for those forums. Therefore, a court is likely to require that in the online world, First Amendment claims trump right of publicity claims unless the plaintiff can prove actual malice.¹⁶⁴

iii. Statute of Limitations

The statute of limitations will present several interesting problems that will center around when the statute of limitations begins. California courts have determined that in the online context, the statute of limitations is retriggered when the content is substantially altered.¹⁶⁵ It is unclear how this will transfer over to an online video game. Thinking in a paralleled manner, it might be imagined that a court would start the statute of limitations as soon as an infringement occurred, and would retrigger the statute of limitations every time the image was substantially altered.¹⁶⁶ However, the court may go a different route all together and retrigger the statute of limitations every time the infringer intentionally posed as the

160. See DIGITAL MEDIA LAW PROJECT, *supra* note 45.

161. See *id.*

162. See *id.*

163. See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186-87 (9th Cir. 2001).

164. See *Hoffman*, 255 F.3d at 1186-87 (showing that actual malice is required).

165. See *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 2026 (U.S. 2013) *reh'g denied*, 2013 WL 4045219 (U.S. Aug. 12, 2013).

166. See *Yeager*, 693 F.3d at 1082.

persona. However, it is unlikely that the court will retrigger the statute every time the infringer logs onto the game and leads the public to believe that he or she is the plaintiff. This would inevitably diminish the purpose of the statute of limitations.¹⁶⁷

E. Do MMORPG User Agreements Prevent a Gamer From Retaining the Right of Publicity Over One's Avatar?

Generally, MMORPG user agreements license away a gamer's intellectual property rights created in the game,¹⁶⁸ but respect intellectual property rights created outside of the game.¹⁶⁹ A key example would be if someone created a popular trademark in the game world, he or she could not retain economic control over that trademark because of user agreement limitations.¹⁷⁰ However, if a company had an established trademark (say the Nike Swoosh), the company could both use the mark inside of the game to market its shoes, and at the same time prevent others from using the mark. In the latter, the license agreement would merely act as a bar against bringing a claim against the gaming company.

The key to retaining economic control over an intellectual property right in the gaming world, one would need to show that the right existed prior to using the game.¹⁷¹ The prior existence of a right of publicity claim over an avatar would be easier to show than a copyright or trademark claim for an avatar because the right of publicity springs from the identity of the gamer (which exists before the user plays the game), whereas copyright and trademark rights spring from the creation of the avatar itself (which only exists after the gamer logs into the game and creates the character).¹⁷²

167. See Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 74-75 (2005) (stating that "the general law of limitations has been justified by the federal court system as serving primarily three major purposes: providing fairness to the defendant, promoting efficiency, and ensuring institutional legitimacy").

168. See BLIZZARD ENTERTAINMENT, *supra* note 18 (stating that all intellectual property rights in and to the Game, including characters, character names, and character likenesses are owned or licensed by Blizzard). *But cf. Terms of Service*, LINDEN LAB, <http://lindenlab.com/tos> (last visited July 30, 2014) (allowing players to have more liberal intellectual property rights in user generated content).

169. *Cf. Intellectual Property*, LINDEN LAB, http://wiki.secondlife.com/wiki/Intellectual_Property (last modified Apr. 24, 2012).

170. See BLIZZARD ENTERTAINMENT, *supra* note 18 (stating that all "intellectual property rights in and to the Game . . . are owned or licensed by Blizzard").

171. See LINDEN LAB, *supra* note 169.

172. See 17 U.S.C. § 102 (2012) (copyright subject matter eligibility); 15 U.S.C. § 1051 (trademark registration requirements); CAL. CIV. CODE § 3344 (2014) (California's right of publicity requirements).

Therefore, if a gamer argues that his or her right of publicity springs from his or her person, and existed prior to the signing of the licensing agreement, the agreement will likely bar a right of publicity claim against the gaming company, but will not prevent gamers from bringing appropriate right of publicity claims against other parties that use the avatar likeness for commercial or other exploitation.

III. SHOULD THE CALIFORNIA RIGHT OF PUBLICITY LAWS EXTEND TO ALLOW GAMERS TO CONTROL THE COMMERCIAL USE OF THEIR AVATARS?

A. Under the statute?

Under current statutory law, only avatars that look like their human counterpart can receive protection. Although this leaves out a great majority of the avatar population, the statute should not expand to give all gamers commercial control of their avatars. Expanding the statute beyond what it currently covers would diminish the legal effect of the statute.¹⁷³

The statute was established to create a separate, coherent, and clear way for the public to establish the right of publicity.¹⁷⁴ If courts expand the statute beyond the bounds of its explicit words, the court will more or less bring the statute back into the realm of the common law. This will likely have the effect of taking away the two different causes of action, and give plaintiffs one route to receive protection where they would have previously had two.¹⁷⁵

B. Under the Common Law?

Courts should grant gamers the right of publicity over their avatars under the California common law because compared to other cases that have received protection, it seems that protecting gaming avatars is well within the bounds of case precedent; specifically, it is within the bounds of the *Motschenbacher* decision which mandates that any symbol which the public readily associates with a persona's identity is protectable.¹⁷⁶ Because online avatars are gamer's online identities in more way than one, *Motschenbacher* appropriately paves the way for protection. Additionally, courts would not need to expand upon any of the key elements of the

173. See generally DIGITAL MEDIA LAW PROJECT, *supra* note 45 (noting that the statute was created in an effort to complement and enhance the common law right of publicity).

174. See *id.*

175. CAL. CIV. CODE § 3344(g) (allowing plaintiffs to bring both a statutory and common law claim).

176. See generally *Motschenbacher*, 498 F.2d 821.

common law right of publicity, as it would with the statute.¹⁷⁷

C. Policy Concerns

As it stands now, gamers have not currently found a viable way to economically control the use of their avatars.¹⁷⁸ Gaming companies have explicitly tried to prevent this ownership through the use of mandatory licensing embedded in User Agreements and Terms of Service.¹⁷⁹ It is not clear why gaming companies refuse to allow gamers to retain rights over their avatars; however, a few suggestions might be that by not granting users rights over their avatars, the gaming companies avoid litigation of their users infringing on each others avatars.¹⁸⁰ With less litigation, the game has less problems, less unhappy users, and the company continues to profit.¹⁸¹ Another theory could simply be that the gaming companies believe that the avatars are built by the use of company technology and believe that others should not profit off of their creation (even if the gamer personally designed the character).¹⁸² In the end, the bottom line is that gaming companies have tried their best through the use of licensing agreements to keep avatar infringement and ownership suits out of the courts.¹⁸³ As a result, courts have not had very many cases involving ownership of video game avatars.

Because the courts have not had many cases that deal with these circumstances, the court should be wary about inviting this kind of litigation into the courtroom. If gamers are found to have the right of publicity over the gaming avatars, there may be a large influx of gamer infringement cases, and the court must be ready to draw the line on what infringement means in this context, and further draw the line on how far the right extends. In today's ever increasing use of Avatars, not only in the game space, but also in the social media space, this cause of action may

177. See *Motschenbacher*, 498 F.2d 821; CAL. CIV. CODE § 3344.

178. See *Your Avatar Forum*, SECOND LIFE, <http://community.secondlife.com/t5/Your-Avatar/Selling-Avatars-in-world-RL/td-p/1240225> (last visited Nov. 7, 2014) (users explaining why they believe gamers are not granted ownership of their avatar accounts).

179. See, e.g., *Terms of Service*, LINDEN LAB, <http://lindenlab.com/tos> (last visited Nov. 7, 2014); BLIZZARD ENTERTAINMENT, *supra* note 18.

180. See *Your Avatar Forum*, SECOND LIFE, <http://community.secondlife.com/t5/Your-Avatar/Selling-Avatars-in-world-RL/td-p/1240225> (last visited Nov. 7, 2014) (users explaining why they believe gamers are not granted ownership of their avatar accounts).

181. See Mike Kent, *Massive Multi-player Online Games and the Developing Political Economy of Cyberspace*, FAST CAPITALISM (2008) http://www.uta.edu/huma/agger/fastcapitalism/4_1/kent.html.

182. See *id.*

183. See, e.g., *Terms of Service*, LINDEN LAB, <http://lindenlab.com/tos> (last visited Oct. 11, 2013).

affect more than just the gaming world. If a court allows the right of publicity cause of action as described above, a right of publicity claim may theoretically also apply to users who bring a suit for their social media accounts.

Additionally, the larger policy behind California's liberal use of the right of publicity is to promote its economy, which is dependent upon the entertainment industry.¹⁸⁴ In this new entertainment industry however, there is a worry that granting gamers the right of publicity over their avatars may actually hinder rather than spur the gaming industry.

On the other hand, there are policy implications for not granting gamers the right of publicity over their avatars. First and foremost, granting gamers the right of publicity over their avatars comports with the larger policy rational behind intellectual property; namely to reward those who expend time and effort in creating a profitable product, and hinder the efforts of those who intend to profit off of another's hard work without paying for the rights to use it.¹⁸⁵ Failing to address the policy behind intellectual property rights could stifle a potentially profitable online gaming marketplace.

Balancing the benefits with the risks; specifically not granting the right of publicity and risk losing a potentially profitable new marketplace, with the alternative of granting the right of publicity and risking new and unclear litigation, a court should grant the right of publicity. As stated above, granting the right of publicity comports with intellectual property policy, and would create a whole new marketplace for thousands of users. Not granting the right would simply ask courts to do what they have always done, interpret old doctrines in new circumstances. Although the litigation may cause some havoc for gaming companies, it is doubtful that this will decrease their user numbers. In fact, the ability to profit off of one's avatar may entice more users to play these types of games.

CONCLUSIONS

When looking to whether a gamer can be given the right of publicity in California over his avatar, it is likely that one will not receive protection under the statute, unless the avatar is virtually identical to the gamer. In contrast, because the common law focuses on the term "identity," which has shown to be very liberal, a gamer can easily be afforded the common

184. See Madow, *supra* note 28.

185. See generally Andrew Beckerman-Rodau, *The Right of Publicity: A Doctrine Gone Wild?*, IPWATCHDOG (Mar. 11, 2010, 7:15 PM), <http://www.ipwatchdog.com/2010/03/11/the-right-of-publicity-a-doctrine-gone-wild/id=9647/>.

law right of publicity over his or her avatar. However, when bringing a suit, a gamer must be aware of the three limitations on the right of publicity. Copyright preemption only occurs where a copyright claim is brought under the guise of a right of publicity claim. As the courts have mentioned, this is a very rare occurrence, and would not likely preclude a claim over an avatar. Additionally, First Amendment and statute of limitations issues are an unknown danger in an avatar right of publicity case. Lastly, potential litigants may assert that right of publicity claims are barred by gaming licensing agreements, and this may be true if the gamer was to assert a claim against the gaming company, but this does not prevent the gamer from bringing a claim against other entities that may wish to misappropriate the image of an avatar for commercial benefit.

In sum, a gamer can and should be able to bring a right of publicity claim against an infringer under the common law, and will not likely be stifled by copyright preemption, First Amendment preemption, statute of limitations, or licensing agreement issues.