Date Verse Privacy! Do Data Collectors Owe Royalties?

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Avatars are you!

Avatars are computer assembled collections of identifying information meant solely to depict and transmit copies of a consumers likeness, or electronic depiction and/or likeness of individuals assembled digitally from collected information for commercial use, which are devoid of any discernable message to communicate other than to describe, depict, display, or use for commercial purposes a person’s likeness, and as such are subject to licensing and permission requirements for those data collectors and assemblers whom sell avatars for targeted advertisement purposes or other profitable commercial purposes!

嵌入式和可穿戴计算将带来下一波数字技术革命，”由Janna Anderson和Lee Rainie。两位作者对Pew Research Internet Project（http://www.pewinternet.org/2014/05/14/internet-of-things/），连同许多受人尊敬的市场分析家、社会科学家、趋势观察者一起预测并提出一个极互联的未来。

“广大受访者同意2014年未来互联网的问卷，”Pew Research Internet Project表示：

“The vast majority of respondents to the 2014 Future of the Internet canvassing agree that the expanding networking of everything and everyone—

Do data collectors and the companies that sell your information owe you royalties from the profits?

In an article titled, “The Internet of Things Will Thrive by 2025. Many experts say the rise of social scientists, gurus, and technology trend watchers all predict and make the case for an embedded and wearable computing will bring the next revolution in digital technology,” by Janna Anderson and Lee Rainie. The two authors for the Pew Research Internet Project (http://www.pewinternet.org/2014/05/14/internet-of-things/), along with a great many respected marketers, extremely connected future.

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The key is they express nothing to communication other than the likeness of a consumer for commercial purposes!
the growth of the Internet of Things and embedded and wearable devices—will have widespread and beneficial effects by 2025. They say the opportunities and challenges resulting from amplified connectivity will influence nearly everything, nearly everyone, nearly everywhere…. Some 1,606 experts responded to the following question:

‘The evolution of embedded devices and the Internet/Cloud of Things—As billions of devices, artifacts, and accessories are networked, will the Internet of Things have widespread and beneficial effects on the everyday lives of the public by 2025?’

‘Eighty-three percent of these experts answered “yes” and 17% answered “no.” They were asked to elaborate on their answer and a handful of grand themes ran through their answers.’

However, before we all go surrendering what little right to privacy and dignity as human beings we have left, “Before they put the implants in our heads,” may I offer a bit of advice and a theoretical possible push back from us dinosaurs whom still believe in privacy, the United States Constitution, and were dumb enough to graduate from law school? I know they say we’re outdated, the Legal industry that is, what with our procedures, paper books, and need for precedent, and so I’m sure this legal theory and argument may not sit well with those who prefer targeted advertising and computers that know what you want before you even do. However, should any one ever get a hair up their butt, want to save personal privacies for themselves or future generations, or just want to show people how clever they really are they could proffer forth the following legal arguments and throw some real wrenches in this over connected future of 2025.

What’s that you say, just exactly where would such a lone crusader of law, humanity, privacy, and the United States Constitution metaphorically fashion both sword and shield alike with which to fight this quest of juris prudence from? Oddly enough the answer to that question lies in several and varying State Laws on Publicity Rights, Copyright Protections, a United States Supreme Court case, the United States Copyright and Patent Office, and the licensing fees they protect. Got you curious don’t I? Well then, let’s begin shall we?

As I’m sure you’re about to ask me the relevant question of “What do Publicity Rights, copyright, and licensing ones’ own image have to do with the interconnected future?” Let me head you off at the pass, by explaining a bit more in depth. The way that publicity rights, copyright, and licensing ones’ own likeness will begin to play an ever larger part in the
defense of privacy, data collection and sales, and targeted content marketing advertising is Avatars!

“What are Avatars you ask?” I knew you were a sharp one, so allow me to reward your sharp powers of observation and practical relevance with the following: “Avatars; noun;

An avatar is a computer assembled collection of identifying information meant solely to depict and transmit a copy of a consumers likeness, or copies of an individuals’ likeness assembled digitally from collected information for commercial uses that are devoid of any discernable message, artistic creativity in its assembly, or attempt to communicate or convey any idea either privately or publically other than an individuals’ likeness for commercial purposes.”

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For those of you who are still confused, think of Avatars as, simply put, your digital character or character likeness snap shot. An avatar is the sum total of all your electronic capturable or collectable personal information an on-line data and information collecting and aggregating algorithm, bot, or program can capture, store, and sell to any interested party for marketing purposes. Most Avatars are compiled into a likeness profile or snapshot so personal most people would rather a naked picture of themselves be for sale on the retail data market, as opposed to the extraordinarily intimate information that actually do comprise an avatar. An avatar is your digital likeness, an on-line perfect reflection of you created from the compound information trail you leave behind, when every time you do anything in our modern interconnected world. Think about it. Your identifiable information that is unique to only you is monitored, collected, and combined as often as possible to willing marketing purchasers, so they can use that aggregated information to target and market specifically to you. The information collected is so personal and compiled so much that it quite literally becomes your digital likeness; or an avatar.

This information is gather and collected in our modern connected age any time you turn on your computer or TV to find out the media you consume, what time you consumed it, and how long it took you to consume it; every time you make a phone call, to find out who you talked to, from where, and for how long; every time you make a purchase of almost anything unless by cash and without utilizing any “member” or “preferred customer” code or card, to find out your purchasing habits and product tastes; every time you check out a book at the library, to find out what you’re reading and are interested in; smart
connected homes now monitor the hours you have the lights on in your home, to find out your sleep patterns; when you’re home, to find out your travel patterns; when you’re at work, to find out your life patterns; what you like; who you know; how many kids you have; do you want kids; your favorite color; the type of car you drive; where you last vacationed; doctor visits and prescriptions; your eating habits; and that’s just to name a few. I often vision avatars as little computer generated on-line characters of all of us, created from the aforementioned information and meta-data we leave behind on the net, and if the theorists are right the types and amounts of information comprising an avatar will only grow. Meanwhile your privacy will obviously suffer and decline, as avatars will soon also include your where-about, where-have-been, heart rate, breathing, and so much more. These likenesses and characters are created and sold for and to any and every paying retailer or marketer looking to get you to spend your money buying their goods and services.

The information your likeness provides is then used to market goods and services to you directly and individually. This form of targeted advertising is often done in such a manner it often times blurs the line between a consumer’s conscious decision to make a purchase of goods or services; and a targeted media propaganda campaigns of consumerism. These individually targeted propaganda campaigns of consumerism can be and are spread across several different media distribution platforms such as TV, smartphone, internet, radio, and more, at different times of the day, utilizing various content based advertising methods. These content marketing methods often hide the fact one is even being marketed or advertised to. These targeted campaigns bombard the senses of the targeted consumer buyer so often and in so many settle and nonobvious ways that the practice can arguably be considered a form of light brainwashing.

“Ok, I get it! Our information is constantly being collected, updated, and collected, which creates avatars of our likenesses. So what if our likenesses are being used like this? What can be done about it anyway?”

I love it when you ask me the right questions, and once again allow me to reward your curiosity with the following legal facts and arguments in answer. A California statute Grants the right of publicity to specified successors in interest of deceased celebrities, prohibiting any other person from using a
celebrity’s name, voice, signature, photograph, or likeness for commercial purposes without the consent of such successors. (Former Civ. Code, § 990.) In other words to create and sell avatars, these companies must pay royalties for the use of our personal information!

The United States Constitution however prohibits the states from abridging, among other fundamental rights, freedom of speech. (U.S. Const., 1st and 14th Amends.). In one of the seminal California State Supreme Court cases to resolve the legal conflict between the First Amendment and Civil Code section 3344 (hereafter section 3344.) The Court of Appeal concluded that the lithographs and silkscreened T-shirts at issue in the case received no First Amendment protection simply because they were reproductions rather than original works of art. The California Supreme Court ruled, “This was error: reproductions are equally entitled to First Amendment protection. The Court formulated instead what is essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation. Applying this test to the silkscreen shirts that depicted the likenesses of the Three Stooges in the case, the Court concluded that there are no such creative elements and that the right of publicity prevails.

In the State of California and many others the right of publicity is both a statutory and a common law right. The statutory right originated in Civil Code section 3344 (hereafter section 3344), enacted in 1971, authorizing recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent. Eight years later, in Lugosi v. Universal Pictures (1979) 25 Cal.3d 813 (Lugosi), the Court also recognized a common law right of publicity, which the statute was said to complement (id. at p. 818 and fn. 6). But because the common law right was derived from the law of privacy, the Court held in Lugosi that the cause of action did not survive the death of the person whose identity was exploited and was not descendible to his or her heirs or assignees. (25 Cal.3d at pp. 819-821.)

In 1984 the Legislature enacted an additional measure on the subject, creating a second statutory right of publicity that was descendible to the heirs and assignees of deceased persons. (Stats. 1984, ch. 1704, § 1, p. 6169.) The statute was evidently modeled on section 3344: many of the key provisions
of the two statutory schemes were identical. The 1984 measure was the statute at issue in the case involving the likenesses of the Three Stooges on t-shirts. At the time of trial and while the appeal was pending before the Court of Appeal, the statute was numbered section 990 of the Civil Code. Section 990 declares broadly that "Any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof." (Id., subd. (a).) The amount recoverable includes "any profits from the unauthorized use," as well as punitive damages, attorney’s fees, and costs. (Ibid.)

The statute provides a number of exemptions from the requirement of consent to use. Thus a use "in connection with any news, public affairs, or sports broadcast or account, or any political campaign" does not require consent. (§ 990, subd. (j).) Use in a "commercial medium" does not require consent solely because the material is commercially sponsored or contains PAID ADVERTISING; "Rather it shall be a question of fact whether or not the use . . . was so directly connected with the sponsorship or advertising that it requires consent. (Id., subd. (k).),” which is an obvious slam dunk with a meta-data avatars, which are assembled or the digital likenesses created exclusively for the purposes of advertising.

The statutory right originated in Civil Code section 3344, enacted in 1971, “authorizing recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent.” The avatars in question are sold and marketed by data miners and algorithm creators that ever so cleverly “capture” the data of unsuspecting, uninformed, unasked, and unpaid consumers. The avatars once assembled are sold on an electronic bidding and advertising exchange market(s) for vast amounts of profit to which the digital likenesses or avatars’ true owner is denied. These avatars or digital likenesses composed of ones likes, shopping habits, name, age, medical conditions, address, years married, financial status, phone number, age of children, and any other varying level of target information captured, recorded, reproduced, sold, and broadcasted on the most modern of media platforms available to eager
retailers without the true owners’ permission, and without the addition of any artistic change or creative expression what-so-ever is clearly the sort of usage of a persons’ likeness that requires permission, a licensing agreement, and royalties to be paid to the true owner of the digital likeness.

Imagine if you will that corporate America created photo and highly personal stat rich cards that were just like baseball cards, only instead of baseball players the photos of average consumers adorned these cards. Moreover, instead of bases stolen and balls hit, the information given was “best time to offer product A with the success of a purchase,” and based on all the personal information included on the back of the card. Then imagine those trading cards were bought and sold daily by companies around the country, do you suppose the courts would require royalties to be paid consumers then?

If you answered yes, then guess what? You have officially agreed with the crux and point of the point of the argument I am making. The reason why? It’s because that’s exactly what is happening everyday on-line, only those playing cards are electronic and are called digital advertising avatars.

The statutory right originated in Civil Code section 3344 (hereafter section 3344), enacted in 1971, authorizing recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent. As noted above, the statute makes liable any person who uses another’s identity "in any manner, for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of" such purchases. (Stats. 1971, ch. 1595, § 1, p. 3426.) The Legislature inserted the phrase, "on or in products, merchandise, or goods, or," when it amended section 3344 in 1984. (Stats. 1984, ch. 1704, § 2, p. 6172.) And in the very same legislation, the Legislature adopted section 990 and inserted the identical phrase in that statute as well. (Stats. 1984, ch. 1704, § 1, p. 6169.)
The Courts therefore give effect to the plain meaning of the statute: it makes liable any person who, without consent, uses a deceased personality’s name, voice, photograph, etc., either (1) "on or in" a product, or (2) in "advertising or selling" a product. The two uses are not synonymous: in the apt example given by the Court of Appeal, there is an obvious difference between "placing a celebrity’s name on a ‘special edition’ of a vehicle, and using that name in a commercial to endorse or tout the same or another vehicle." Moreover, the United States Supreme Court has made it clear that a work of art is protected by the First Amendment even if it conveys no discernable message: "[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ [citation], would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." (Hurley v. Irish-American Gay, Lesbian and Bisexual Group of BOSTON, Inc. (1995) 515 U.S. 557, 569.)

In the aforementioned Saderup’s case the Court stated, “The fact that Saderup’s art appears in large part on a less conventional avenue of communications, T-shirts, result in reduced First Amendment protection. As Judge Posner stated in the case of a defendant who sold T-shirts advocating the legalization of marijuana, "its T-shirts . . . are to [the seller] what the New York Times is to the Sulzbergers and the Ochses ¾ the vehicle of her ideas and opinions." (Ayres v. City of Chicago (7th Cir. 1997) 125 F.3d 1010, 1017; see also Cohen v. California (1971) 403 U.S. 15 [jacket with words "Fuck the Draft" on the back is protected speech].) First Amendment doctrine does not disfavor nontraditional media of expression.”

Turning to the present case, we note that the trial court, in ruling against Saderup, stated that "the commercial enterprise conducted by [Saderup] involves the sale of lithographs and T-shirts which are not original single works of art, and which are not protected by the First Amendment; the enterprise conducted by the [Saderup] was a commercial enterprise designed to generate profits solely from the use of the likeness of THE THREE STOOGES which is the right of publicity . . . protected by section 990." Although not entirely clear, the trial court seemed to be holding that reproductions of celebrity images are categorically outside First Amendment protection. The Court of Appeal was more explicit in adopting this rationale: "Simply put, although the First
Amendment protects speech that is sold [citation], reproductions of an image, made to be sold for profit do not per se constitute speech."

"Rather, the inquiry is into whether Saderup’s work is sufficiently transformative. Correctly anticipating this inquiry, he argues that all portraiture involves creative decisions, that therefore no portrait portrays a mere literal likeness, and that accordingly all portraiture, including reproductions, are protected by the First Amendment. We reject any such categorical position. Without denying that all portraiture involves the making of artistic choices, we find it equally undeniable, under the test formulated above, that when an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist’s right of free expression is outweighed by the right of publicity. As is the case with fair use in the area of copyright law, an artist depicting a celebrity must contribute something more than a "merely trivial" variation, [but must create] something recognizably "his own" (L. Batlin & Son, Inc. v. Snyder (2d Cir. 1976) 536 F.2d 486, 490), in order to qualify for legal protection."

In sticking with the Court's guidance, it is clear that the mere collecting of various types of information utilize no artistic contribution. In other words, avatars possess no variations or transformative expression of creativity, and are merely collections of information combined to create an avatar so personally identifiable and recognizable it becomes the likeness of the consumer or avatar mimicking individual. These copies of collected, stolen, leaked, or even granted information, which only vary in the amounts and types of information, are created with the intent to profit directly off of who the avatar mimics, or to profit from the personal fame of every celebrity or consumer. For example, ones recorded daily, weekly, or even monthly travels throughout the world, the stores they visit, what they purchased, their name, age, likes and tastes, purchasing habits, amounts of gas used, the websites they visit, articles they read, movies and TV shows they watch, friends they contact, employment, vacation destinations, medical conditions, shoe size, favorite color, and all the nuanced idiosyncrasies that are no more than a human going about the world being a human in this modern era of interconnected technologies and data gathering, all of which has an ascertainable and highly marketable value to the correct purchaser and/or interested party.
None of this information collected is original, other than the manner in which the collection methods and amounts are hidden from the victims. The only originality being done is by the avatar creator, or the individual who is being mimicked. The individual creates themselves, the data is merely a monitored collection, expressionless, and compiled for profits sake only.

**The Transformative Use Test**

In both of the aforementioned cases, all judges agreed (at least theoretically) that the appropriate test was the “transformative use defense” developed by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (2001). The test is “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” To make this determination, both courts ostensibly looked at the five Comedy III factors, including whether:

1. **the celebrity likeness is one of the raw materials from which an original work is synthesized;**

   Avatars are nothing but raw celebrity likeness. Essentially, different snapshots or bits of information about the owner of the avatar (The person the avatar is imitating.) are merely observed, collected, and often even stolen, and then compiled into a singular profile or consumer avatar. Therefore, without the raw essence of being who we are, an avatar could not be constructed.

2. **the work is primarily the defendant’s own expression if the**

   expression is something other than the likeness of the celebrity;

   There is absolutely no new artistic expression, change in the material or collected information what so ever. Information is merely compiled in an unexpressive or transformative manner.

3. **the literal and imitative or creative elements predominate in the work;**

   The entire avatar is nothing but literal imitative collections of personal information, compiled in a manner devoid of transformative artistic expression.

4. **MARKETABILITY and economic value of the challenged work derives primarily from the fame of the celebrity depicted; and**

   The entire point of an avatar is to market and profit from the fame and celebrity of each consumer individual, as an avatars value is in its ability to
depict the avatars owner doing exactly what the owner does on a daily basis. The shopping habits, spending habits, payment cycles, doctors’ visits, food eating habits, gas bills, and every other collectable peace of observable information all compiled to form a highly personal likeness of the individual doing exactly what makes the individuals’ avatar of commercial value; simply being themselves as we’re monitored by intrusive data collection practices.

(5) an artist’s skill and talent has been manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit the celebrity’s fame.

That is an excellent description of exactly what an avatar is. Any skill or talent in collecting the information or compiling the information is grossly subordinated, by the only goal in creating an avatar, which are commercial and financial gains.

In both cases, the majority opinions relied heavily on the case of No Doubt v. Activision Publishing, Inc., 192 Cal.App.4th 1018 (2011). In the No Doubt case, members of the rock band “No Doubt” appeared in a game published by Activision called Band Hero where users could simulate performing in a rock band in time with popular songs. Activision licensed No Doubt’s likeness, but exceeded the scope of the license. When the 9th U.S. Circuit Court of Appeals analyzed Activision’s “transformative use” defense, the court ruled against Activision because the video game characters were “literal recreations of the band members” doing “the same activity by which the band achieved and maintained its fame.” The court ruled that the fact that the avatars appear in a context of a videogame that “contains many other creative elements[,] does not transform the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.”

Sound familiar? In a data drunk world, our right to own the rights to ourselves may just be our only legal line of defense. As the data bots and marketers continue to encroach ever deeper into the information generated by ever increasingly personal and intimate aspects of our daily lives, this legal theory may be our only weapon! Some may argue avatars are not likenesses, but then what are they if not collections of identifiable information baring our names and more? That argument is a fool’s argument, and therefore I have not given such a ridiculous notion any lip-service or time. These theories are just that legal untested legal theories and arguments, no matter how sound they may be. Maybe
legislation will be passed and it will not be up to the Courts to sort this mess out, but as the Legislature grows ever more out of touch the data minors grip on our avatars becomes ever stronger!