The Apocalyptic Presidential Right of Publicity

Michael G Bennett, Northeastern University
INTRODUCTION

I. THE RIGHT OF PUBLICITY’S PROBLEMATIC NEXUS WITH POLITICS
   A. The Right of Publicity's Birth and Expansion in Parallel with that of other Domains of Intellectual Property
   B. Two Argumentative Axial Moments of the Doctrine in toto, and two problems in the context of politics
      1. Debating the theoretical justification for publicity rights, and intellectual property maximalists and minimalists
      2. The Political Use of Celebrity Persona by Marginalized Groups
      3. The Potential for Strategic Litigation and Avoidance of the New York Times Defamation Standard

II. THE PRESIDENTIAL RIGHT OF PUBLICITY READ PROFITABLY AS A CRITICAL ALTERNATIVE HISTORY OF PUBLICITY RIGHTS LAW
   A. Science Fiction in Legal Thought and Analysis
   B. PRoP and the Virtues of Reading it as Science Fiction
      1. Science Fictional Descriptiveness
      2. Science Fictionally Charged Normativity
         a. Metaphors, Similes and Formal Science Fictional Treatments of President Obama
         b. Hyperreality and the Prefiguration of President Obama in Cinema and Television
C. On the Fame of Barack Obama, and his Political Susceptibility to a claim of Right of Publicity Infringement

III. ON THE POLITICAL FALLOUT OF A RIGHT OF PUBLICITY SUIT AGAINST SENATOR OBAMA
A. The Right of Publicity v. The Anti-SLAPP Legislation
B. Elements of a Right of Publicity Claim Under California Common Law
   1. Obama’s Use of Haysbert’s Identity
   2. Appropriation of Haysbert’s Identity to Obama’s Advantage
   3. Lack of Consent
   4. Resulting Injury to Haysbert
C. Affirmative Defenses and Their Irrelevance

CONCLUSION
INTRODUCTION

By happenstance and design, the political persona of Arnold Schwarzenegger has always been science fictionally charged. For all his precedent, coincident and subsequent fame-generating exploits, it is the Terminator franchise, and the iconic roles he performed as a time-traveling cybernetic soldier fighting in a war between a genocidal artificial intelligence and the rebellious remnants of its thermonuclear assault on humankind in the franchise’s film installments, particularly the first two of four, that have contributed most to the overall characterization of his fame. That James Cameron, director of Terminator (1984) and Terminator 2: Judgment Day (1991), saw Schwarzenegger as a “machine,”¹ a perfect embodiment of the killer cyborg that is the films’ main character and titular inspiration, was fortune, but it was a strategic choice on the part of Schwarzenegger’s campaign to embrace, cultivate and leverage his branding as “The Governator,” apun on his cyborg character’s name, at once silly and politically savvy.² In what must be considered a masterstroke of celebrity political advertising, Schwarzenegger announced

his gubernatorial candidacy on *The Tonight Show With Jay Leno Show*\(^3\) a month before the theatrical release of *Terminator 3: Rise of the Machines*\(^4\), the billboard advertisements for the movie effectively doubling as political advertisements for the future governor, as the science fictional themes of his signature film roles intermingled, to great effect, with The People’s Governor theme of his campaign. Governor Schwarzenegger was, and arguably remains, the ultimate American celebrity politician.\(^5\)

In 2004, when then California Governor Schwarzenegger used a right of publicity lawsuit to stop an Ohio-based manufacturer from producing an assault rifle-toting, bandolier-draped bobblehead doll based on his likeness, all of the other action films in which he had starred to date — *Commando* (1985), *Predator* (1987), *Total Recall* (1990), *True Lies* (1994), *Eraser* (1996), and *Collateral Damage* (2002) — were implicated in the satirical toy’s capacity for political commentary.\(^6\) The *Terminator* films, however, would likely have come to the fore of public imagination, had the figurine not been edited, presumably as a result of the parties’ settlement, so as not to include the gun.\(^7\) *Terminator* and *Terminator 2: Judgment Day* are widely considered science fiction cinema classics,\(^8\) as well as films that are largely responsible for Schwarzenegger’s enduring fame, and in


\(5\) See John Street, *Celebrity Politicians: Popular Culture and Political Representation*, 6 (4) Brit. J. Pol. Int. Rel. 435, 437-39 (2004). John Street provides a useful taxonomy of celebrity politicians. One category includes actual or would-be office-holders who interact with “the world of popular culture in order to enhance or advance their pre-established political functions and goals,” and includes Schwarzenegger-like figures with backgrounds in the entertainment industry. *Id.* The second category contains “entertainer[s] who pronounce[] on politics and claim[] the right to represent peoples and causes, but who do[] so without seeking or acquiring elected office”; examples of this type include U2’s Bono, who has spoken out on various global justice issues, and arguably Bill Cosby, who has interjected himself into debates concerning the politics of poverty. *Id.*


\(7\) *Id.* at 547; Gallagher, *supra* note 2, at 611.

which he delivers his best theatrical performances. In other words, whatever politically satirizing effect the unedited bobblehead doll would have induced had it would-be manufacturer, defendant Ohio Discount Merchandising, Inc. ("ODM"), been successful at trial, that effect would likely have turned largely on Schwarzenegger’s association with the Terminator franchise.

The Terminator films became all the more salient in the context of this settled lawsuit by virtue of the science fictional charge already accumulated about the right of publicity. Twenty years before the Governator’s suit, the David Deutsch Associates, Inc. agency created a print advertisement for Samsung Electronics America, Inc. that depicted a robot wearing a wig, sparkling necklace, bracelet and gown, and positioned in close proximity to a large game board, intentionally and without authorization evoking the identity of Vanna White, the longtime Wheel of Fortune hostess. The agency sought to humorously express the staying power of Samsung goods by projecting them into a speculative future, underlining that intent with the advertisement’s caption: “Longest-running game show. 2012 A.D.” Vanna White took issue; she sued under California publicity rights law and ultimately won an appellate decision and a $403,000 damage award.

The doctrinal import of the U.S. Court of Appeals for the Ninth Circuit’s reversal of a grant of summary judgment for defendants in White v. Samsung Electronics America, Inc., indicating that the robotic spoof of an advertisement was a violation of Vanna White’s right of publicity, amounted to a rendering apparent of the right of publicity’s

---

12 Id. at 1396.
expansive breadth.\textsuperscript{14} White represents the right of publicity doctrine’s fullest flexing, its most muscular interpretation and application. But the case simultaneously contributed a science fictional charge to the right of publicity. Robots and futurity have been tropes of science fiction texts since at least the early twentieth century.\textsuperscript{15} White would probably have been useful to Schwarzenegger had the \textit{ODM} case gone forward.\textsuperscript{16} But regardless of how the case might have been decided, its unfolding (even though suspended) against the precedential backdrop of White served to mingle a gaggle of generic figures —robots, cyborgs, futurity, time travel, strong artificial intelligence systems— \textit{within} the context of publicity rights doctrine to an amplifying effect. Whereas post-White it was merely difficult to think of the doctrine of publicity rights in the context of celebrity politicians \textit{without} thinking of science fiction, post-\textit{ODM} it is a virtual impossibility.\textsuperscript{18}

Registering this impossibility, publicity rights law has cohabitated with science fiction at the level of scholarly discourse. Jean Baudrillard, the social theorist to whom both right of publicity scholars and science fiction scholars turn to fortify their theoretical


\textsuperscript{17} See Darko Suvin, \textit{On the Poetics of the Science Fiction Genre}, 34 (3) C. ENG. 372, 378-79 (1972) (conceptualizing science fiction as a trigger of cognitive estrangement and figures typically associated with the genre).

\textsuperscript{18} A search for law review articles citing the 9\textsuperscript{th} Circuit’s decision generates three hundred sixty-four returns. A search for “Arnold Schwarzenegger” and “bobblehead” produced twenty-five. Thirty-seven hits return from a search for “Arnold Schwarzenegger,” “Vanna White” and “right of publicity.”
armamentarium, said that classic “good old SF” was dead in the wake of postindustrial modes of production, and that “some other sort of thing” replaces it in the subsequent era of simulation and models.19 For intellectual property scholars, and particularly doctrinal minimalists, Baudrillard is an ideal theoretical companion in a world super-saturated with goods and services the primary socio-economic value of which flows from their trademarks and associations with celebrity figures; in such a milieu, legal theorists must attend to the “nature of the cultural symbols ’we’ ‘share’ … [,] the recognition the law affords them,” 20 and the cultural consequences of those affordances. 21 Meanwhile, sensing that in such a techno-social setting simulacra have begun to obsolesce the “real”, 22 theorists of science fiction have embraced Baudrillard. Csicsery-Ronay, Jr., for example, assesses Baudrillard equivalency of “SF” and “theory” as a crucial contribution to our engagement with science fiction as something more than a paraliterary genre, and, in its capacity to map the desires, anxieties and manifest strangeness of contemporary life, something akin to a type of diagnostic device.23

23 Istvan Csicsery-Ronay, Jr., The SF of Theory: Baudrillard and Haraway, 18 (3) SCI. FICTION STUD. 387, 389 (1991). See also HANNAH ARENDT, THE HUMAN CONDITION 1-2 (1958) (lamenting the neglect of science fiction and its function as conveyor of mass sentiment); PETER Y. PAIK, FROM UTOPIA TO APOCALYPSE: SCIENCE FICTION AND THE POLITICS OF CATASTROPHE 10 (2010). Due in large part to its generic legacy of philosophical speculation, science fiction can be a useful aid in exploring critical
The seemingly ever proliferating, ever advancing technological developments that have reciprocally enabled and sprung from the post-WWII shift to globalized, postindustrial capitalism, particularly the intangible products—“images, advertising, information, memories, styles, simulated experiences, and copies of original experiences”—have served to privilege Baudrillard’s theories in both scholarly camps. White branded the publicity rights doctrine with an “SF,” a complex monogram indicative of the contested commercial’s parodic sampling of classical extrapolative science fiction, yes, but the “SF” insignia also signaled White’s reiteration of the connection between science fiction tropes and high order simulacra. In related fashion, ODM put on display the volatile potential of modern political strategy based in science fictional, cinematic simulacra mixed with aggressive use of the doctrine. Vanna White, Arnold Schwarzenegger and Jean Baudrillard collectively represent the Holy Trinity of this mash-up of publicity rights and science fiction.

Tracking the infrequency of lawsuits brought by public officials attempting to enforce their right of publicity, scholarly discourse focused specifically on celebrity politicians and publicity rights is rare. Within that under-analyzed discursive zone, Sean T. problems of contemporary political life. Through its provisions of visions in which the familiar arrangements of extant laws, mores, technical artifacts and social forces constituting our actually lived lives do not hold, SF helps us to imagine those lives dynamically, as capable of change, as perishable. In this sense, by encouraging investigations of societal contingency, SF is understandable as a diagnostic tool.

24 McCaffery, supra note 22, at 4.
26 The bulk of law reviews focused specifically on celebrity politicians and right of publicity law followed in the wake of the ODM case. See Ochoa, supra note 6; Harder & Self, supra note 16; Gallagher, supra note 2; D.S. Welkowitz & T. T. Ochoa, The Terminator as Eraser: How Arnold Schwarzenegger used the Right of Publicity to Terminate Non-Defamatory Political Speech, 45 SANTA CLARA L. REV. 651 (2005); Shubha Ghosh, On Bobbleheads, Paparazzi and Justice Hugo Black, 45 SANTA CLARA L. REV. 617 (2005). See also A. L. Smith & L. S. Sobel, The Mickey Mouse Watch Goes to Washington: Would The Law Stop The Clock, 62 TRADEMARK REP. 334 (1972); Eileen R. Rielly, Right of Publicity for Political Figures: Martin Luther King Jr., Center for Social
Masson’s *The Presidential Right of Publicity* \(^{27}\) arguably represents the most complementary, and sympathetic contribution to post-White scholarship, in that it *lends* itself to a science fictional reading. In its descriptive mode\(^{28}\), by posing the question of whether President Obama has a protectable right of publicity, the article addresses a question that has long been a settled matter. In 1982 the Georgia Supreme Court ruled that the unauthorized manufacture and sale of busts depicting Reverend Dr. Martin Luther King, Jr. violated his right of publicity, thereby acknowledging that entering the political arena does not nullify one’s publicity rights.\(^{29}\) Leading commentary has acknowledged that individuals active in political processes—“includ[ing] judges, legislators, holders of executive office and even non-officeholders who become, voluntarily or involuntarily, part of the political process”—\(^{30}\) enjoy a right of publicity. Applying a generous \(^{31}\) and constructive interpretation principle \(^{32}\) to the article’s disinclination to acknowledge the indicators of celebrity politicians’ rights of publicity, and given the speculative charge of the post-White, post-ODM, Baudrillard-inflected right of publicity discourse, as well as, I hope to show, President Barack Obama’s science

---

\(^{27}\) See Masson, supra note 26.

\(^{28}\) *The Presidential Right of Publicity* is largely organized about the question “Can President Obama protect against unauthorized use of his image since he has arguably attained celebrity-like status?” *Id.*


\(^{31}\) See infra note 110.

fictional markers, the best reading of *The Presidential Right of Publicity* is arguably as science fiction.\(^{33}\)

Part one of this article briefly describes the right of publicity and moves on to outline two types of problems the doctrine can generate in the context of politics and political figures. The first concerns the issue of celebrity as a socially cohesive force, and the historical, unauthorized uses, arguably amounting to political speech, that marginal communities have made of celebrity personae. This problem suggests that when such communities are legally barred from these types of appropriations, their cohesiveness, their very ability to effectively come into being, is fundamentally threatened. The second notes that by effectively lowering the hurdles that a celebrity politician plaintiff must cross in order to win at trial against a defendant who has made what in the plaintiff’s opinion is an untoward use of their persona, the right of publicity for this class of figures seems to offer an attractive alternative to defamation suits, thereby increasing the likelihood of chilled political speech.

Part two turns to a piece of recent scholarship focused on political figures and the right of publicity, and assesses the possibility that it is amenable to interpretation as science fictional criticism of the doctrine. This part argues that, given some of the basic functional descriptions of science fiction offered up by several of the genre’s most respected critics, both in its descriptive and normative modes, *The Presidential Right of Publicity*’s discussion of President Obama is more coherent, and critically valuable, when read as a counterfactual work, a work of alternative history. On its surface, *The Presidential Right of Publicity* exhibits signs of being a “nugget[ ] of wisdom exist[ing] among the alien corn”\(^{34}\), a formally radical counterpoint to the pragmatists’ critique of legal scholarship as impractical.\(^{35}\) Read as alternative history —as much a descendant of

\(^{33}\) More precisely, the best reading of *The Presidential Right of Publicity* is as a form of allohistorical commentary, or alternative history.


In Part three, the article outlines a doctrinal problem that *The Presidential Right of Publicity*’s read as counterfactual analysis rather provocatively, yet subtly, suggests: namely, the possibility that a non-frivolous right of publicity suit could have been brought against Senator Barack Obama during his first presidential campaign. This scenario is largely a fusion of the strategic litigation and marginal appropriation problems discussed in parts one and two. This final part closes by describing this form of litigation as largely consistent with the irradiated state of American politics, predicts that this type of suit will be deployed in the future, and argues that the right of publicity applied to political figures is largely at odds with the enrichment and deepening of American democracy.

I. The Right of Publicity’s Problematic Nexus with Politics

A. The Right of Publicity's Birth and Expansion in Parallel with that of other Domains of Intellectual Property

---

Persona is property. The right of publicity prevents unauthorized commercial exploitation of a person's identity via appropriation of their "name, likeness, or other indicia of identity for purposes of trade. The modest origins of the doctrine are typically traced to privacy law’s failure to protect celebrities’ commercial interests in their identity. Given that it sprang forth only slightly more than a handful of decades ago, and considering its present state of doctrinal muscularity, the rate of growth of publicity rights law can be fairly described as savage. But commentary makes clear that the doctrine's growth is grossly consistent with that of the other main forms of intellectual property: patents, copyrights, trademarks and, though to a lesser extent, trade secrets.

B. Two Argumentative Axial Moments of Scholarly Doctrinal Discourse in toto, and two problems specific to the context of politics

---

37 Id. at §46.
41 See Andrew Drassinower, Copyright is not about Copying, 125 HARV. L. REV. 108, 119 (2012) (critiquing the copyright expansion debate as one overly focused on a critical theory, as opposed to a "critical theory of copyright").
1. Debating the theoretical justification for publicity rights, and intellectual property maximalists and minimalists

The contemporary commentariat debates concerning publicity rights take as their axial moments questions of justifiability and theoretical capacities for control of expansion. About the first axis spin arguments about whether utilitarian, Lockean, Hegelian or some other type of theory offers the most (or any) coherent foundation for publicity rights. Round the second, staging the minimalist versus maximalist feuds common to other areas of intellectual property, scholars fight over whether to reduce the doctrine's expansive scope, or to accept its development as “commonsensical” and unproblematically consistent with American culture and law.


46 See, e.g., Diane Leenheer Zimmerman, Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights, 50 B.C. L. REV. 1503, 1505 (2009) [hereinafter Zimmerman, Money as a Thumb] (arguing that First Amendment speech rights should not be balanced against right of publicity protection, as the latter lacks a constitutional basis); Eugene Volokh, Right of Publicity vs. The First Amendment (April 30, 2004) [hereinafter Volokh, Right of Publicity], available at http://www.volokh.com/2004/04/30/right-of-publicity-vs-the-first-amendment/ (arguing that ODM should have prevailed on First Amendment grounds against Schwarzenegger, but probably would not have, had the trial gone to a decision) (last visited Jul. 24, 2012); Eugene Volokh, Freedom of Speech and The Right of Publicity, 40 HOUS. L. REV. 903 (2003) [hereinafter Volokh, Freedom of Speech] (arguing that publicity rights are probably unconstitutional when applied to noncommercial speech and, possibly, to commercial advertisements).
Rarely have political figures\(^{49}\) initiated right of publicity suits.\(^{50}\) Preoccupation\(^{51}\); lack of knowledge\(^{52}\); fear of appearing thin-skinned\(^{53}\); avoidance of perceptions of dourness\(^{54}\); several speculative rationales are available, but the cash value of the relative infrequency with which this sub-category of suit occurs is the correspondingly relatively infrequent treatment of the implications of publicity rights in political contexts. Concern with the chilling effect that the right of publicity can have on constitutionally protected speech is discursively \textit{de rigueur}.\(^{55}\) The single Supreme Court case concerning the doctrine, \textit{Zacchini v. Scripps-Howard Broadcasting Co.}\(^{56}\), gave little aid to commentators searching for a proper balance between the First Amendment and the right of publicity.\(^{57}\)

\(^{47}\) See McCarthy, supra note 30, at §1:40 (“The right of publicity,” Professor McCarthy assures us in his great treatise, is “a very modest and commonsensical legal right” undeserving of “intense law review interest and judicial agonies….”).

\(^{48}\) See Kwall, supra note 39, at 10-11.

\(^{49}\) Following McCarthy, supra note 30, at §4:23, I use the term “political figure” to denote individuals “actively involved in the ‘political’ process, as broadly defined,” and intend to include within its scope “judges, legislators, holders of executive office and even nonofficeholders [sic] who become, voluntarily or involuntarily, part of the political process.” My use is also similar that of Rielly (supra note 26, at 1161, n.3), but is broader in scope due to its explicit indifference to any volition on the part of the political figure. \textit{Cf.} Ghosh, supra note 26, at 636 (distinguishing “public officials” from “public figures” in the context of publicity rights and politics).

\(^{50}\) See Arlen W. Langvardt, \textit{The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control}, 45 U. KAN. L. REV. 329, 340 (1997) (noting the paucity of relevant case law addressing whether a political figure has a right of publicity); Gallagher, supra note 2, at 582 (indicating the abnormality of Governor Schwarzenegger’s claim of publicity rights violation); \textit{see also} Masson, supra note 26 (positing possible explanations for the infrequency of right of publicity suits brought by politicians).

\(^{51}\) See Langvardt, supra note 50, at 340 n.67.

\(^{52}\) Id.

\(^{53}\) See Masson, supra note 26.


\(^{55}\) See Gallagher, supra note 2, at 581 (noting the difficulty in balancing First Amendment free speech rights and the right of publicity in many jurisdictions).


\(^{57}\) “Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not,” Justice White, voicing the majority’s opinion, noted, “we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.” \textit{Id.}
But, all the more salient for this scant attention and lack of guidance from the appellate, two particularly problematic issues have emerged in recent doctrinal debates: the first takes on the perspective of violators of publicity rights and concerns the significance of cultural icons to group identity formation and political speech; the second focuses on the strategic litigation potential publicity rights grant political figures.

2. The political use of celebrity persona by marginalized groups

Spectacular celebrity serves as a form of social adhesive. Like the gluons that bind together subatomic particles, celebrities exert a binding force on a fragmented society. In our fractured world, cultural theorists note, celebrity “serves to pull [ ] separate entities together and to do its bit towards maintaining social cohesion and common values.”58 But as this force works to gird and fuel “the structure and the strength with which to hold things in their proper place,”59 it does so at the pleasure of its legal owners, in large part.60 In a society so permeated with commercialized images and narratives that it becomes difficult to act and speak publicly without accessing richly connotative cultural symbols and icons, publicity rights are susceptible to critiques that they inhibit basic expressive activity. And in the context of celebrities, strong publicity rights can deny individuals “access to our collective cultural heritage and the ability to reflect upon the historical significance of the celebrity aura.”61

Historically, marginalized communities, in particular, have made use of celebrity personae for political ends. The formation of a marginalized group identity and articulation of its views can be understood as political speech.62 Drawing upon the work

58 Fred Inglis, A Short History of Celebrity, 4-8 (2010).
59 Id. at 8.
60 See Zimmerman, Who Put the Right, supra note 39, and Kwall, supra note 39, on the growth of intellectual property scope and power. See infra Part III C., for a brief discussion of affirmative defense limitations on the right of publicity, in particular; see also Ray D. Madoff, Immortality and the Law 132-41 (2010) (analyzing the societal cost of descendible publicity rights).
61 See Coombe, supra note 20, at 1876.
62 See Tan, Political Recording, supra note 26, at 32.
of Richard Dyer and other students of celebrity and stardom, some legal scholars have come to embrace the notion that marginalized groups — “the working class, women, blacks, gays, [groups] who have been excluded from the culture’s system of representations in all but marginal and demeaning forms” — are able to “appropriate power for themselves in a democracy” by using celebrity personae to create alternative identities and critique extant social arrangements symbolized by those personae. But when even the evocation of celebrity persona is enough to violate the right of publicity, marginalized groups are threatened with denial of access to the politically charged and/or chargeable dimensions of celebrity. As commodified and commercial symbols occupy more and more terrain in public imaginaries, according to this position, the “recoding” and critical appropriation of these celebrity persona should be recognized as privileged forms of political activity.

3. The Potential for Strategic Litigation and Avoidance of the New York Times Defamation Standard

A strategic litigation problem also troubles critics of the publicity rights doctrine. Their concern is that, when faced with unappealing critical depictions of themselves, political figures can turn to publicity rights as an alternative to defamation suits. Whereas a public figure plaintiff attempting to win a defamation suit needs to satisfy the clear and

63 Id. at 34, (citing RICHARD DYER, STARS 183-84 (1979)). SF fans have made consistent use of the science fiction television show and movies to articulate alternative universes that include them. See Coombe supra note 20. See also Ron Eglash & Julian Bleecker, The Race for Cyberspace: Information Technology in the Black Diaspora, 10 (3) SCIENCE AS CULTURE 353 (2001) (discussing the importance of Nichelle Nichols role as Uhura in the original Star Trek television series to Dr. Martin Luther King, Jr.).

64 Tan, Political Recording, supra note 26, at 43.

65 For strong rebuttals of this critique as overly speculative, see Kwall, supra note 39, at 55; Sheldon Halpern, The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality, 46 HASTINGS L.J. 853, 873 (1995).

66 See Coombe, supra note 20, at 1863-64 (describing “recoding” as political “meaning making” generated by the appropriation and adaptation of cultural forms to the end of identity formation).
convincing “actual malice” standard set forth in *New York Times Co. v. Sullivan*67, if she brings a publicity rights suit instead, her prima facie case is made relatively easily: she must show that the defendant used her identity, that the appropriation advantaged the defendant, an absence of her consent and resulting injury.68 This potential method of end-running the First Amendment’s limiting effect on defamation claims is troubling, claims the criticism, because the basic end of publicity rights — protection of one’s likeness from unauthorized commercial use — is simply inappropriate in the context of many political figures, particularly public office holders.69 Even when a public office holder has invested time and effort and money in creating a persona, the long-held belief that this class of individuals must be open to the privacy-piercing beams of public scrutiny mandates that its members’ personae are inappropriately equated with those of celebrities.70 Accordingly, the celebrity politician wielding publicity rights represents a singular problem: their fame renders their persona a potentially important source of political speech, but, simultaneously, a financially valuable sign that can be effectively shielded from numerous forms of unauthorized use, including those that should be constitutionally protected.71

Despite the analytically under-attended state of celebrity politicians’ publicity rights, these two problems have received consideration in law review articles over the last decade or so. This article’s aim is not so much to rehearse their arguments, although the implications of a hyper-muscular publicity rights doctrine would certainly bear such restatement, as to italicize them by rendering them present, albeit somewhat spectrally, in

68 See McCarthy, *supra* note 30, at §6:21. Under California common law, the advantage need not even be economic: see White, 971 F.2d at 1397. See also Dogan & Lemley, *supra* note 44, at 1162 n.1 (noting the expansive breadth of the publicity rights doctrine).
70 Id. at 620.
71 See Volokh, *Freedom of Speech*, *supra* note 46, at 930 (arguing that publicity rights may be unconstitutional when applied in the context of noncommercial speech and commercial advertising).
The Presidential Right of Publicity. The next section attempts to impress upon the reader how much richer and relevant and simply better read The Presidential Right of Publicity is when taken as a science fictional text. The reasons for this assessment are three in number. For one, the text lends itself to a reading as alternative history, a sub-category of literary science fiction. Secondly, it focuses on a political figure, President Obama, who bears a significant science fictional charge of his own. And lastly, read as science fiction, The Presidential Right of Publicity points to a speculative doctrinal problem, a hybridization of the marginalized community access and strategic litigation problems discussed above. There is much to be said for those that wonder “[I]s there really anything left to say about the [right of publicity]?” My doubts paralleling those of such critics notwithstanding, this form of reading suggests that there may indeed exist one or two as yet unuttered things.

II. The Presidential Right of Publicity Read Profitably as a Critical Alternative History of Publicity Rights Law

Here let us consider the case for a kind of creative misreading —what some literary scholars term a “misprision”— of a recent addition to right of publicity scholarship. “Misreading” in the sense that the term is deployed here is intended to mean an (ideally) innovative interpretive refashioning of a text that gives it meaning independent of what its author intended. My reading is not merely independent, however. A basic premise of this article is that the discursive space of the right of publicity crossed with politics is science fictionally charged, that the texts concerned with this nexus of politics, persona and intellectual property became associated with science fiction post-White, and that after Governor Schwarzenegger’s suit against ODM —a case in which the Governor’s celebrity politician status could not be disentangled from the Terminator franchise— that nexus is simply poorly attended to without consideration of the science fictional overtones resonating within it. White marks the extreme edge of the doctrine of publicity

72 See supra Part I B., 2-3.
73 E.g., Greene, supra note 45, at 521.
74 See HAROLD BLOOM, THE ANXIETY OF INFLUENCE (2d ed. 1997) for the theory of strongly distortive poetic readings of precursors that I wish to grossly invoke here.
rights (mere evocation as violation)\textsuperscript{75} science fictionally (a wiggled, gowned and bejeweled robot animates the case)\textsuperscript{76}; Schwarzenegger’s suit reveals the power of a form of strategic litigation the doctrine offers political figures (right of publicity law as a preferable alternative to defamation law)\textsuperscript{77} against the backdrop of a canonical science fictional story arc (strong artificial intelligence, time travel, cyborg soldiers)\textsuperscript{78} fueling much of the fame and political success of the plaintiff.\textsuperscript{79} And Baudrillard’s theories of simulacra and postindustrial consumer society, with all of its allegiance to, traffic in, and tropic similarities to science fiction, indelibly mark the minimalist wing of doctrinal discourse. This overall science fictional charge invites science fictional interpretation. And, in this section, I hope to show that The Presidential Right of Publicity (which, in the remainder of this article, will be referred to as “PRoP”)\textsuperscript{80} lends itself to such reading. To the extent that PRoP welcomes such an approach, it is not improper in the least to describe it as a work of apocalypse.\textsuperscript{81}

A. Science Fiction in Legal Thought and Analysis

\textsuperscript{75} See White, 971 F.2d at 1399. See also Dogan, supra note 14 (discussing the problematic fallout of recognition of a right to evoke). Cf. David Tan, Much Ado About Evocation: A Cultural Analysis of “Well-Knownness” and the Right of Publicity, 28 CARDOZO ARTS & ENT. L.J. 313 (2010) (justifying the evocation right and discussing the significance of cultural studies to right of publicity jurisprudence).

\textsuperscript{76} See White v. Samsung Elecs. America, Inc. 989 F.2d 1512, 1514 (9th Cir. 1993) (“The ad that spawned this litigation starred a robot dressed in a wig, gown and jewelry reminiscent of Vanna White’s hair and dress…”).

\textsuperscript{77} See Welkowitz & Ochoa, supra note 26 (describing the strategic litigation potential for public figures of right of publicity suits in comparison to defamation suits).

\textsuperscript{78} See SEAN FRENCH, THE TERMINATOR (British Film Inst. 1996).

\textsuperscript{79} See Boyle, supra note 1.

\textsuperscript{80} Since my use of Masson’s article is very likely quite far removed from his intentions for it, it seems only fair to displace the text’s title with this suggested abbreviation. My interest, after all, is primarily with what the text knows, as distinguished from its author’s knowledge. For a useful and lucid discussion of this distinction in the context of literary art, see Guy Davenport, The Critic as Artist, in EVERY FORCE EVOLVES A FORM, 99-111 (1987).

\textsuperscript{81} Etymologically, “apocalypse,” in the original Greek ἀποκάλυπτειν, concerns revealing, uncovering, disclosing. See the “apocalypse” entry, Oxford English Dictionary. For discussion of the interpretational duties apocalypses tend to impose, see infra Part II B. 2. b.
Science fiction and jurisprudence share a lineage going back at least as far as the mid-twentieth century, a time during which the contributions of Golden Age science fiction largely enabled American legal discourse in the area of space law. Legal scholars have noted the capacity of science fictional texts to serve as socio-cultural probes of considerable value to legal thought and analysis. But the genre has received harsh criticism for its large quantities of “inferior material,” and for its failure to arrive at the state of “serious literature”; more intellectually satisfying chastisement takes science fiction to task for its power to induce a Boy-Who-Cried-Wolf effect in the context of catastrophic risk assessments, and, in its moments of deepest impact, for its ability to constrain policymaking more generally. But legal discourse is not without example of science fiction’s adoption as an analytical mode. And “the potential for … using [s]cience [f]iction,” including the sub-category of “counter-histories and parallel

---

82 This phase of science fiction is typically characterized by its modernist bent, emphasis on science and technology as progressive forces—as exemplified in many of the works of authors such as Isaac Asimov, Alfred Bester, Ray Bradbury, Arthur C. Clarke, Robert Heinlein, Fritz Lieber, Frederik Pohl and Theodore Sturgeon, A. E. van Vogt—John W. Campbell’s editorial tenure at *Astounding Science Fiction*, freedom, grossly speaking, from anything but traces of the criticisms of technocracy and scientific expertise that erupted in the 1960s and, in terms of material production, a transition from science fiction stories largely consumed in pulp periodical form to the genre’s increasing availability in paperback.

83 Post-Sputnik space law was so entangled with science fictional language, concepts and tropes that the jurisprudential subfield was largely indistinguishable from the paraliterary form. See Kieran Tranter, *Terror in the Texts: Technology – Law – Future*, 13 (1) LAW AND CRITIQUE 75 (2002); Barton Beebe, *Law’s Empire and the Final Frontier: Legalizing the Future in the Early Corpus Juris Spatialias*, 108 YALE L.J. 1737 (1999).


universes,” to analyze legal concepts, practices and problems was recognized in the germinal work of law and science fiction, Bruce Rockwood’s “New Possibilities.”

Recent science fiction scholarship has theorized its object of concern as “modal” and “ethically hesitant,” by which we can understand that “science fiction” should not be taken to signify only a literary genre, but, as well, a “mode of awareness” that predominantly colors our Weltanschauung, that presides over “the quotidian consciousness of people living in the post-industrial world,” struggling to grasp its regular manifestations of societal flux —predominantly technoscientific, always imbued with ethical implications— that are largely “beyond their conceptual threshold.” This expanded concept of science fiction —call it “SF”— is ethically hesitant as a result of its penchant for reflection, for axiological assessments of the flux. It is the capacity of science fiction for effectively expressing changes, specifically

---

89 Rockwood, supra note 84, at 272. See also David ClaudiLL, STORIES ABOUT SCIENCE IN LAW: LITERARY AND HISTORICAL IMAGES OF ACQUIRED EXPERTISE 8-9 (2011).
90 Csicsery-Ronay, supra note 23, at 389.
91 For a discussion of “technoscience” in the context of nanoscale research and development, and its use over that of “science and technology,” see Matthias Wienroth, DISCIPLINARITY AND RESEARCH IDENTITY IN NANOSCALE SCIENCE AND TECHNOLOGIES, in SIZE MATTERS: ETHICAL, LEGAL AND SOCIAL ASPECTS OF NANOBIOTECHNOLOGY AND NANO-MEDICINE 159 (Johann S. Ach & Christian Weidemann eds., 2009). See also Michael Bennett, DOES EXISTING LAW FAIL TO ADDRESS NANO техносилость?, IEEE TECHNOLOGY AND SOCIETY MAGAZINE, Winter 2004, at 27; Alfred Nordmann, MOLEcular DISJUNCtIONS: Staking Claims at the Nanoscale, in DISCOVERING THE NANOSCALE (Davis Baird, Alfred Nordmann & Joachim Schummer, eds., 2004). For earlier discussions of technoscience, see Bruno Latour, SCIENCE IN ACTION (1987); Donna Haraway, MODEST WITNESS@SECOND_MILLENNIUM.FEMALEMAN_MEETS_ONCOMOUSE (1997).
92 Csicsery-Ronay, supra note 23, at 389. “Science fiction does have one superiority over all other forms of literature,” the influential science fiction author Robert Heinlein noted, “It is the only branch of literature which even attempts to cope with the real problems of this fast and dangerous world.” See Robert A. Heinlein, CHANNEL MARKERS, ANALOG, Jan. 1974, at 170-71.
93 See Csicsery-Ronay, supra note 23, at 402 n.4 (discussing a useful taxonomic distinction between “science fiction” and “SF” adopted in this article); see Samuel R. Delany, THE JEWEL-HINGED JAW: NOTES ON THE LANGUAGE OF SCIENCE FICTION, at ix-xiii (2009) (discussing the significance of “science fiction,” “speculative fiction” and “SF”).
94 Csicsery-Ronay, supra note 23, at 387.
jurisprudential changes, in excess of our available conceptual devices\textsuperscript{95}, and for ethical hesitancy in the presence of such changes, that I wish to harness here. My reading of it argues that \textit{P}Ro\textit{P} accumulates its science fictional charge by simply contributing to the scholarly discourse on political figures and publicity rights, and by centering President Obama in that contribution. But, this treatment of \textit{P}Ro\textit{P} is also consistent with a functional description of SF in terms of modality and ethical perspective. Although in its particulars, my use of science fiction in this broader sense draws heavily on contemporary literary theory, it is largely aligned with the most recent contributions to legal scholarship considering science fiction and it potential jurisprudential melding.\textsuperscript{96} In the next section, I will extend my treatment of \textit{P}Ro\textit{P} as a science fictional alternative history by considering a more extreme issue provoked\textsuperscript{97} by my mis-reading of it.

\textbf{B. \textit{P}Ro\textit{P} and the Virtues of Reading it as Science Fiction}

If \textit{P}Ro\textit{P} were reduced to a topographic mapping of science fictional moments, two massive features would predominantly characterize its image, one dominating its descriptive register, the other residing in its normative program. The first feature would be \textit{P}Ro\textit{P}’s decidedly anti-empirical approach to the question of whether a political figure has a right of publicity. Such a deviation from readers’ reality is so typical of science fictional works that it has come to designate something like a genetic signature of the genre, and even to have its own technical designation: novum.\textsuperscript{98} And due to his

\textsuperscript{95}A regularly cited failure of the right of publicity is its resistance to explanation by means of widely accepted foundational theories of intellectual property; \textit{see} Dogan and Lemley, \textit{supra} note 44.


\textsuperscript{97}\textit{See} WILLIAM SIMS BAINBRIDGE, DIMENSIONS OF SCIENCE FICTION 204 (1986) (discussing science fiction’s capacity for proposing solutions and “provok[ing] the revelation of as yet unconsidered” and unattended to problems).

\textsuperscript{98}“A novum …is a totalizing phenomenon or relationship deviating from the author’s and implied readers’ norm of reality,” a classic work of formalist science fiction
significant associations with the genre, PRoP’s second science fictional feature would be President Obama himself. Though it has gone largely unacknowledged, the president’s affinity with science fiction is both multifaceted and relevant to political affairs.

1. Science Fictional Descriptiveness

Descriptively, PRoP proceeds as if politicians have no right of publicity. Seemingly equating “non-traditional celebrities” with celebrity politicians, in its opening it wonders whether they “deserve the same rights,” and determines that “the time is ripe for this issue to be decided in favor of a celebrity politician having an explicit right of publicity.” PRoP goes on to note that First Amendment concerns about potentially chilled political speech should not shield unauthorized uses of a celebrity politician’s — in this case, the President’s — persona, and that the President should exercise his publicity rights, if he so chooses, through private counsel, so as not to burden taxpayers with his personal litigation costs.

This line of argumentation is strikingly curious.

_____________________________________________________________

theorization tells us, continuing on to note that the novum is “‘totalizing’ in the sense that it entails a change of the whole universe of the tale, or at least of crucially important aspects thereof…”. See DARKO SUVIN, METAMORPHOSES OF SCIENCE FICTION 64 (1979). For a discussion of the significance of science fiction nova in the context of the emergence of nanotechnoscience, see COLIN MILBURN, NANOVISION 24 (2008). My use of the phrase “science fictional charge” should be read as roughly equivalent to Milburn’s use of “semiotic residue.” It may not be unfair to argue that the science fictionalization of candidate Obama was analogous to that of nanotechnoscience, in that in both cases the effect was largely one of hyperbolic endorsement, the imbuing of the sense of a thing that is actual despite its being, at the time, extra-empirical.


100 Id.
Authoritative commentators have regularly noted that political figures have publicity rights. The context of the unauthorized use of their images can lead to debate about whether publicity rights should be restricted by the First Amendment. But the question of whether the right of publicity extends to political figures—including politicians—has not been an actual question for some time now. The publicity rights of political figures were recognized in the case of *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products*. There the plaintiff attempted to stop the defendant’s production and sale of plastic busts of Dr. King. The case is perhaps more important for recognizing that Georgia’s right of publicity’s descendibility is not contingent upon the owner’s commercial exploitation, but the greater significance for this analysis is that the ruling clearly held that political figures have publicity rights.

In the famous case of Pat Paulsen, the notorious comedian contrived a performance-art-like presidential campaign, satirically entering the 1968 presidential election as the “Put-On Presidential Candidate” and running as the nominee of the “Stag party.” The court determined that Paulsen became a “public figure,” and his comedic campaign a matter of public interest; accordingly, any publicity rights he held in his image were superseded by First Amendment protection afforded “political expression.” Paulsen was a “political

---

101 See McCarthy, *supra* note 30; Volokh, *Right of Publicity, supra* note 46 (noting that Schwarzenegger would probably have won his case if it has gone to a decision, even though he should have lost on First Amendment grounds); Gallagher, *supra* note 2, at 583.

102 See Volokh, *Freedom of Speech, supra* note 46 (proposing a new framework under which First Amendment commercial speech should be analyzed in the context of right of publicity suits); Zimmerman, *Money as a Thumb, supra* note 46.

103 *Martin Luther King, Jr., 694 F.2d at 683.*

104 The ruling did not extend to “public officials,” but considering Dr. King’s overtly political activities during the 1950s and 1960s, it is difficult to argue that he was not a political figure. See Rielly, *supra* note 26, at 1163 (noting that, despite its limitation, *King* holds that political figures have publicity rights).


106 *Id.* at 449-51.
“figure,” as I use the term here, and he had a right of publicity, albeit of a constitutionally “limited” nature.  

And in the case of Schwarzenegger suit against ODM, the issue was not whether the Governor possessed valid publicity rights, but whether his rights were trumped by the nature of the defendant’s unauthorized use. Against the backdrop of empirically verifiable agreement across opinions and commentary as to its existence, PRoP’s contention that the “time is ripe for this issue to be decided in favor of a celebrity-politician having an explicit right of publicity” requires explanation. And given the science fictional charge of the publicity rights discourse, it seems that a generous reading of this descriptive plank of PRoP, and arguably the best reading of it, is as science fiction. To read PRoP science fictionally turns its descriptive deviation from contemporary right of publicity discourse into less a mark of oversight or error, and more an indicator of its offering itself up as an allohistorical text, or what science fiction scholars term an “alternative history.”

Alternative histories are parallel world stories. They represent that sub-category of science fiction depicting “[e]vents that have not happened in the past,” as well as the sub-sub-category of events that might have happened, but didn’t. As a literary form,

---

107 Id. at 451. See also Browne v. McCain, 611 Supp F.2d 1062, 1072 (D. Cal. 2009) (“[T]he plaintiff in Paulsen actually injected himself into the 1968 Presidential election through his comedy routine based on his candidacy as the ‘Put-On Presidential Candidate of 1968,’ which was discussed in the national media, and actually resulted in him receiving several votes in primary elections.”).

108 See Ochoa, supra note 6.

109 I use the term “generous” in a technical sense to mean a reading that “works to find a coherent defensible new argument/concept within the text,” even if that new argument/concept “goes beyond the ‘author’s intention’ but could be demonstrated to be nascent or latent within it....” See Joseph Dumit, How I Read (Full date, e.g., Feb. 29, 2000) (unpublished manuscript) (on file with author) (describing generous and other modes of reading).

alternative history has been used to pose “possible solutions” to societal problems of considerable import.\textsuperscript{111} So, in reading \textit{PRoP} in this fashion, not only does it resonate with the extant shards of science fiction in the doctrine, it also subtly suggests a need for criticism, provoking us to critique. From this perspective, as it delivers a depiction of the doctrine that contemporary discourse recognizes as not having existed for nearly thirty years, \textit{PRoP} opens a radical critique by introducing the reader into a world in which politicians actually don’t have publicity rights.

2. Science Fictionally Charged Normativity

In its normative register, \textit{PRoP} might initially appear conventional, even if arguably indifferent to political forces impinging on President Obama.\textsuperscript{112} The text argues that diverges from what we regard as actual history.”). From this perspective, \textit{The PRoP} can be interpreted as describing a legal world in which celebrity political figures have no right of publicity and then proceeding to make normative arguments for why they should. The author takes this interpretation as a radical, and radically subtle, critique of the actually existing doctrine, resonant with the most extreme critics’: see Ghosh, \textit{supra} note 26, at 617-18 (arguing against publicity rights for public officials). \textit{Cf.} McCarthy, \textit{supra} note 30.

\textsuperscript{111} Darko Suvin, \textit{Victorian Science Fiction, 1871-85: The Rise of the Alternative History Sub-Genre}, 10 (2) SCIENCE FICTION STUD. 148, 148-49 (1983) (noting that the alternative history sub-category may have even initially emerged as an artistic articulation of the “uneasiness and gloom” pervading the United Kingdom in the years leading up to the Great Depression of 1873-1896); \textit{see also} Gordon B. Chamberlain, \textit{Afterword; Allohistory in Science Fiction, in ALTERNATIVE HISTORIES: ELEVEN STORIES OF THE WORLD AS IT MIGHT HAVE BEEN} 280 (Charles Waugh & Martin Greenberg eds., 1986) (describing alternative history as “social-commentary SF”). On the ethico-diagnostic value of SF, \textit{see} Paik, \textit{supra} note 23, at 2-3:

Due in large part to its generic legacy of philosophical speculation, science fiction can be a useful aid in exploring critical problems of contemporary political life. Through its provision of visions in which the familiar arrangements of extant laws, mores, technical artifacts and social forces constituting our actually lived lives, the genre helps us to imagine those lives dynamically, as capable of change, as perishable. In this sense, by encouraging investigations of a societal contingency, science fiction is understandable as diagnostic.

\textsuperscript{112} Just as some of the President’s critics exercise insufficient “attentiveness to the discipline of electoral politics,” so, too, does \textit{The Presidential Right of Politics. See
President Obama is a “non-traditional” celebrity figure whose fame is potentially quite valuable to merchandisers and advertisers, and that, despite his holding the office of the chief executive of United States, the President should exercise his right of publicity to prevent the unauthorized commercial exploitation of his likeness. The familiar Lockean labor theory is offered up as a justification for the president’s publicity right: because he has “invested a lot of time, money, and effort in building his image,” an image “no less deserving of protection” than any other celebrity’s, the President should be granted exclusive right to commercially exploit his persona. This argument is consistent with actions taken by the Obamas, and its indifference to the disciplinary forces at work in electoral politics aside, PRoP’s prescription is mundane.

a. Metaphors, Similes and Formal Science Fictional Treatments of President Obama

The normative beneficiary of this argument, however, is another story. President Obama is riddled with science fictional markers, many of them sourced from political commentators, but also, occasionally, coming from other political figures; for example, when the debt limit negotiations between Congress and the White House failed to reach a mutually acceptable resolution in 2011, House Speaker John Boehner described the negotiating parties as being relatively alien, noting that they were akin to “two groups of


113 See Masson, supra note 26.

114 Id. This article is not directly concerned with pointing out the theoretical shortcomings of publicity rights. For extensive discussion of the doctrine’s problems in those regards, see Dogan and Lemley, supra note 44, at 1180-90.

people from two different planets who barely understand each other.”116 The Speaker later characterized his personal relation with the President in similar terms: “We have a good relationship,” Boehner stated in the winter of 2012, “[w]e just come from two different planets.”117 Commentators have followed suit, comparing President Obama to an extraterrestrial invader of Earth118. On at least one occasion, in a comical, jujitsu-like move, the President embraced this science fictional slander, stating he “was actually born on Krypton” and “was sent here by [his] father Jor-El to save the planet Earth.”119

The political comedian Jon Stewart has spoken of the President as a Terminator-like cyborg, and wondered whether he was technologically augmented.120 This allusion to Schwarzenegger’s signature role in The Terminator couples effectively for this essay’s purposes with the President’s own indirect, and certainly unintentional, allusion to the

---

Vanna White evoking robot in the Samsung advertisement: “You might not know this,” President Obama told an audience during his visit to Carnegie Mellon University’s National Robotics Engineering Center, “but one of my responsibilities as Commander-in-Chief is to keep an eye on robots. […] And I'm pleased to report that the robots you manufacture here seem peaceful […] at least for now.”

But by far the most frequently deployed science fictional reference used to discuss President Obama has been Commander Spock, the iconic Vulcan science officer in the 1960s television show Star Trek. The President’s notorious intelligence, aloofness, and coolness were regularly compared to Spock’s signature rational and emotionless demeanor. “[H]e’s too intellectual, too Mr. Spock,” and his dispassionate, Vulcanelike behavior makes him a poor “Feeler in Chief,” critics have noted, while more admirable commentary has approvingly pointed out that “[t]he Vulcan side of Obama, the core of his character, hasn't changed [since the election],” and that the President is capable of “mind melds,” a Vulcan technique of directly linking their mind to that of another being, and that his administration’s “diversity” is an illustrative application of his

---

121 See supra Introduction.
123 Notably, Obama was not widely associated with Tuvok, the black Vulcan character of Star Trek: Voyager.
124 See INA RAE HARK, STAR TREK 26-27 (2008) (describing Spock as an empirically-minded thinker who tends to “see all sides of a question” while not being “swayed by ideology”).
“Vulcan philosophy of ‘infinite diversity in infinite combinations’.” Candidate Obama having received a $2,300 campaign donation from Leonard Nimoy, the actor who portrayed Spock in the original series and several subsequent films, and President Obama having made a Vulcan hand sign while standing alongside Nichelle Nichols, the actor behind the Lieutenant Uhura character in the Star Trek franchise only serves to deepen the President’s links to the cult show, entrenching yet further his political persona in one of the most intensely active sectors of science fiction fandom. Complementing this marshaling of science fictional tropes—alien civilizations, robots, cyborgs, space travel—used metaphorically and in similes to describe qualities of the President’s politics or emotional disposition, even more ambitious treatments have effectively contextualized the President within an extended science fictional narrative form. In August 2008, for example, during the late phase of his presidential candidacy, in one of the earliest and most involved examples of such formal treatment, the Obama administration was anticipated in satirical and futuristic fashion, the soon-to-be President effectively cast as the central character in a rather apocalyptic futuristic short story. And as the 2010 mid-term election approached, the New York Times columnist David Brooks published an alternative history of the then concluding first half of the President’s

---

130 See Dan Koller, Offers They Couldn’t Refuse, DALLAS MORN. NEWS, Aug. 26, 2007, at 3A (discussing the political campaign donations of celebrities).
first term, describing a course of actions that could have followed, but didn’t, starting in December 2008.\textsuperscript{134}

Even a crucial element of the President’s reëlection strategy came to sound a science fictional ring. When the Romney campaign effectively re-animated the question that Governor Ronald Reagan put to the American public at the close of his second debate with President Jimmy Carter one week before the presidential election of 1980 — \textit{Are you better off now than you were four years ago?}\textsuperscript{135} — the Obama team opted to refashion the aphorism, and present voters with a slightly, yet \textit{critically}, modified question: “is the country better off than it \textit{would} have been if Republicans had been in charge for the past three and a half years?"\textsuperscript{136} Considering Reagan’s own penchant\textsuperscript{137} for SF films, perhaps this should be taken as a deliciously appropriate gesture on the part of the President’s reëlection campaign, a neo-Reaganesque invitation to the American electorate to imagine an alternative history, a set of “[e]vents that have not happened in the past,”\textsuperscript{138} as it determined how it would vote in November 2012.

\textbf{b. Hyperreality and the Prefiguration of President Obama in Cinema and Television}

\textit{PRoP} opens itself to a constructive science fictional interpretation not only by exhibiting formal congruence with a narrative mode common to the genre, but as well by taking as its normative object of concern President Obama, a political actor who bears a large number of markers that are meaningless outside of direct reference to science fictional

\begin{itemize}
\item[\textsuperscript{136}] See Michael D. Shear, \textit{G.O.P. Seizes on a Question: Are You Better Off Than You Were 4 Years Ago?}, Blog for \textit{The Caucus Blog}, N.Y.TIMES (Sep. 3, 2012, 1:12 PM), http://thecaucus.blogs.nytimes.com/2012/09/03/g-o-p-seizes-on-a-question-are-you-better-off-than-you-were-4-years-ago/.
\item[\textsuperscript{137}] See Peter Beinart, \textit{The Icarus Syndrome: A History of American Hubris} 231-39 (2010) (discussing Reagan’s love of science fiction and how it influenced his administration’s policies, particularly in the context of national defense and nuclear weapons negotiations with the Soviets).
\item[\textsuperscript{138}] See Delany, \textit{supra} note 110, at 62.
\end{itemize}
works and figures. But it is what Baudrillard might have described as Obama’s “hyperreality,” his susceptibility to being described as a real figure “derive[d] from a model” originating in American cinema and television, that renders him susceptible to a claim of publicity rights infringement in a past that did not happen, but could have. Candidate Obama’s celebrity begat a potentially devastating angle of criticism for his opponents, particularly the McCain campaign during the late phase of the 2008 election cycle. What if an actor, particularly a black actor, had initiated a non-frivolous right of publicity suit against candidate Obama, in, say, 2007 or 2008? As fantastic as the scenario may seem, I propose that it was possible, and that, had it been made to happen, the candidate would likely have suffered considerable political fallout.

As a matter of historical fact, Barack Obama is the first black president of the United States. But, in cinema and television, the two main windows onto the landscape of “virtual America,” popular culture has presented us with a series of black (and male) Presidents. Several of the most recent, and most popular, depictions have been characters in science fictional narratives. In Deep Impact, theatrically released in 1998, Morgan Freeman played the role of President Tom Beck against the backdrop of an impending potentially life extinguishing comet on a collision course with Earth. Terry Crews acted as the chief executive in 2006’s Idiocracy, the plot of which was motored by a satirically rendered twenty-sixth century America populated by cognitively degraded citizens living on more or less constant streams of junk culture and junk food. And from 2001 to 2006, in the television show 24, a political techno-thriller with hints of

139 See Csicsery-Ronay, supra note 23, at 390.
140 The issue of Barack Obama’s race, whether he was black enough, or black at all, was intensely debated during his campaign, especially among his African-American critics. See Kennedy, supra note 112, at 76-79.
142 Id. As the adaptor of Irving Wallace’s 1964 novel The Man into its move script form, Rod Serling, creator of The Twilight Zone, contributed a subtle science fictional association to the notion of a black president two decades before the first feature length science fictional film included such a character.
143 Id.
144 Id.
parallel or future world narration about it, President David Palmer was played by Dennis Haysbert. In addition to their common membership in this imaginary black executive fraternity, several cultural critics have proposed that these characters contributed to a transformation of our collective political imaginary, working a “David Palmer Effect on politics,” and thereby helping the American electorate become comfortable with an actual black President by enabling it to “imagine Mr. Obama’s transformative breakthrough before it occurred,” perhaps even accelerating the occurrence.

From among this ersatz fraternity’s members this article’s remainder focuses on Dennis Haysbert’s character, in particular, and mainly for two reasons. First, in addition to race, there are the various similarities that the fictional David Palmer shares with the actual Barack Obama: both are noted basketball players; both were senators; both ran for the presidency as a forty-something year old; both are noted for exuding a cool executive demeanor.

Palmer and Obama also both faced daunting, arguably quasi-apocalyptic political conditions as they governed. For Palmer, political apocalypse took the form of a partially thwarted nuclear attack in California, a barely survived attempt on his life by way of a biological weapon, an attempt by his Vice President to remove him from office using the

---

146 Id.
147 Id.
25th Amendment, and ultimately an assassination strikingly reminiscent of Dr. King’s.\textsuperscript{150} The apocalypse of President Obama is more socio-politically complex and multidimensional. For example, for some commentators President Obama operates in the public imaginary as apocalyptic indicator. Professor Sutton has noted the way Obama’s “charisma and global popularity” fitted him neatly into the central role of the Antichrist figure in an Americanized vision of apocalyptic political thought and activism.\textsuperscript{151} Even sympathetic commentators have described President Obama’s first term as apocalyptic, in

\textsuperscript{150} See Jack Bauer for President: Terrorism and Politics in 24 (Richard Miniter ed., 2008).
\textsuperscript{151} See Matthew Avery Sutton, Why the Antichrist Matters in Politics, N.Y. TIMES, Sept. 25, 2011, at A29 (describing the effects of Christian apocalypticism on American politics over the last eight decades). This politically apocalyptic reading of President Obama folds smoothly into the perception of an America in decline. As Professor Knorr-Cetina encapsulates the latter so precisely, I quote her, largely wholesale:

Could it be that a nation that senses itself to be in trouble economically and politically, as weak in war, and as ill regarded and denounced by the outside world, might also seek a corporate savior? America experienced the massive decline of its currency, an enormous economic deficit, a creeping loss of jobs to cheaper countries, and a poor performance in the Iraq war and in its war on terrorism, during the Bush years. It experienced severe direct attacks on its self-esteem and symbolic status from the rest of the world – America appeared to have the worst image in the world ever […]]. It also suffers from a generally slow, and periodically rapid, transformation of the geopolitical situation – the economic and political rise of emerging nations like China and India, and the economic consolidation of Europe are examples. This more latent, long-term, geopolitical change cannot be blamed on Bush, and it will not be halted by future presidents – though it might be delayed, and the transition to a lesser world power might become more orderly and less felt if it were guided by a wiser administration. To top it all off, America was afflicted by an acute financial break- down, the worst since the Great Depression, with heinous consequences for the population, six weeks before the election. America has reason to seek a corporate savior, someone who can articulate a vision that promises to address the acute and the long-term geopolitical decline of a dominant nation.

a secular sense. But President Obama is arguably also symbolically apocalyptic through association with fictional black presidents, figures that can be read as end time signs “inadvertently affirm[ing] ‘doomsday’ predictions of a black presidency.” Citing Wagner’s *Götterdämmerung* and reminding the reader of the etymological meaning of “apocalypse” as a “discovery” or “unveiling” of a phenomenon or state of affairs that “will be seen to need interpretation,” comments from the author and science fiction critic Professor Samuel R. Delany resonate with some of the more strikingly revealing findings of political scientists studying President Obama’s racially polarizing effects on public opinion. It is as if his occupation of the most prominent and powerful political position in America pulled back the scrim on and exacerbated some of the deepest and most politically volatile problems in American. This state of affairs has yet to be adequately interpreted.

Alone, *PRoP*’s re-reading of publicity rights doctrine as if it had never included Martin Luther King, Jr., Center for Social Change, Inc. *v.* American Heritage Products, Inc. might have warranted an interpretation as merely ambiguous writing. Similarly, had *PRoP* chosen a celebrity politician other than President Obama to center its prescription, a reader might have been absolved of any duty of acknowledging its introductory descriptive claim as generically suggestive. But combined, these features render a standard reading of *PRoP* more or less wasteful. To read it as other than science fiction is

---

akin to steeping a fine black tea in cold water. The maximal possible yield of such an exercise is simply foregone; its potential dividend, overlooked.

C. ON THE FAME OF BARACK OBAMA, AND HIS POLITICAL SUSCEPTIBILITY TO A CLAIM OF RIGHT OF PUBLICITY INFRINGEMENT

But why? the reader might understandably wonder, why would an actor have even considered initiating a right of publicity suit against a presidential candidate, claiming that the politician had, without authority, appropriated the actor’s persona by evocation, and benefited, financially or politically, as a result? Strategic intellectual property litigation’s end tends to be cessation of use, but in the context of political campaigns, especially those as dramatic and fiercely fought as a modern-day American presidential election, the strategic value of such a suit would be its yield in a political register. The patently false accusation that Barack Obama was not born in the United States, and was therefore constitutionally ineligible to become the nation’s president, was born in a lawsuit filed in Pennsylvania District Court. The absurdity of the “birther” position was an obstacle to neither its central role in legal argument launched for political purposes, nor its attractiveness to the presidents’ enemies, once acknowledged by the official trapping of the legal process. By comparison, a publicity rights suit would have been significantly less ridiculous on its face. When we recall the magnitude of opposition that Obama’s ascendancy ignited, it quickly becomes apparent that any surreal qualities of such a suit would have actually been consistent with the “Obama Derangement Syndrome” that seems to have governed much of the opposition to his candidacy and his subsequent administrations. “The eruption of such hostility and discontent so shortly after the election of a black president,” one particularly apt assessment notes, “marks an open renewal of white male backlash, ‘Dixiecrat […]’ racism and anti-multiculturalism,

156 See Gallagher, supra note 2.
157 U.S. Const. art. II, § 1, cl. 5 (Stating that “No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President…”). See Berg v. Obama, 574 F. Supp. 2d 509 (E.D. Pa. 2008). See also JONATHAN ALTER, THE CENTER HOLDS: OBAMA AND HIS ENEMIES 33 (2013).
158 Id. at xi.
which can be read as a collective response to a perceived political and economic nightmare,” a so-called “Obamanation”\(^\text{159}\). If one imagines life as apocalyptic, apocalyptic political strategies, deployed through any means, including the legal system, become not only imaginable, but appropriate, even arguably necessary.

Paradoxically, a prerequisite for perceiving just how such a suit might have been of use to his opponents demands that we consider the crucial role that fame has played throughout the entire professional life of Barack Obama, and how his fame was tactically appropriated by his critics and his main opponent leading up to the 2008 presidential election.

Fame has accreted about Barack Obama since his days as a law student at Harvard.\(^\text{160}\) Alone, his ascent to the presidency of the Harvard Law Review, the first by an African American\(^\text{161}\), earned him a place in history books. Fourteen years later, his electrifying keynote address at the 2004 Democratic National Convention\(^\text{162}\) rocketed him to national stardom. Political culture commentators struggled to explain the magnitude of his fame. For Naomi Klein, its basis lay in candidate Obama’s “natural feel for branding” and his skilled “team of top-flight marketers”:

Together, the team [ ] marshaled every tool in the modern marketing arsenal to create and sustain the Obama brand: the perfectly calibrated logo (sunrise over stars and stripes); expert viral marketing (Obama ringtones); product placement (Obama ads in spots video games); user-generated content (Obama-girl?

\(^{159}\) See Brayton, supra note 153, at 66.


Genius!); a thirty-minute infomercial (which could have been cheesy but was universally heralded as “authentic”); and the choice of strategic brand alliances (Oprah for maximum reach, the Kennedy family for gravitas, and no end of hip-hop stars for street cred).163

In a mash-up of classical Weberian sociological theorization and post-modernist business management analysis, Professor Knorr-Cetina points to irresistible charisma as the ultimate explanation for Obama’s celebrity, describing his as a Pied-Piper-esque “corporate savior” figure, not unlike a troubled corporation’s “star storyteller”164, “the outside CEO hired by a beleaguered board of directors to save a troubled company,”165 a chief executive able to deliver a convincing “vision that promises to address the acute and the long-term geopolitical decline of a dominant nation.”166

Regardless of the correctness of these possible explanations, however, candidate Obama’s fame was rather paradoxical. For, at the same time that it provided the highly energetic fuel for the 2008 Obama campaign, it also became one of the campaign’s most potentially damaging vulnerabilities.

Picking up and revitalizing a criticism of Obama born during his law school days, that he was a star far beyond other merely mortal students, the campaign of Senator John McCain, Obama’s Republican opponent in the 2008 presidential election, effectively

163 NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES, at xxiv (2009). Randall Kennedy, the legal scholar of race relations and legal institutions, also points to the “manicured” nature of candidate Obama’s persona, particularly his blackness. See Kennedy, supra note 112, at 84. But Kennedy also notes the black candidate’s raw effectiveness as a politician on the national stage, his “having best[ed] along the way scores of people who were seemingly better positioned then he to win the presidency,” (Id. at 30), as a source of the intense adoration leading up to candidate Obama’s first presidential election victory.
164 Knorr Cetina, supra note 151, at 133 (quoting RAKESH KHURANA, SEARCHING FOR A CORPORATE SAVIOR: THE IRRATIONAL QUEST FOR CHARISMATIC CEOs 169 (2002)).
165 Id.
166 Id.
labeled the Democratic nominee a “self-consumed star” who suffered from a messianic complex. The McCain campaign generated considerable media attention with a television advertisement that compared Obama’s fame to that of Britney Spears and Paris Hilton, branding him as “the biggest celebrity in the world” and questioning his capacity to lead. McCain’s criticism was also grossly aligned, albeit to different ends, with some of the structural critiques that came from commentators on the political Left. Pointing to inadequate voting incentives, corporate agenda capture and congressional obstructionism exercised through filibusters, among other things, such commentary effectively characterized President Obama as an actor occupying the center of an elaborate show of government theater in a system the then present state of which offered no real possibility of progressive developments. The result from this perspective was that “even with supermajorities in both houses of Congress behind [him]” President Obama would not have been able to “pass the kind of transformative progressive legislation that [he] promised in his 2008 presidential campaign.” The candidate, in other words, was a star performer, an actor in a political theater, emotionally affective and without substantial political effect.

And Knorr-Cetina, too, essentially theorized President Obama as primarily a gifted, yet likely only largely rhetorically effective, performer. The President’s primary objective is to mollify an American populace—perhaps even a world audience—presented with the

---

167 Jodi Kantor, A Consistent yet Elusive Nominee, N.Y. TIMES, Aug. 28, 2008, at 4A.
168 See Kennedy, supra note 112, at 152-54 (describing the various interpretations, ranging from a smear turning on American anxieties about miscegenation to commentary on the candidate’s all-too-close association with “the pathology of American celebrity culture,” to which “The Celebrity” advertisement lends itself). At a relatively early juncture, David Ehrenstein predicted that these celebrity qualities of candidate Obama, whom he described as a “Magic Negro” would increase his desirability in the estimation of white Americans, “[f]or as with all Magic Negroes, the less real he seems, the more desirable he becomes. If he were real, white America couldn't project all its fantasies of curative black benevolence on him.” David Ehrenstein, Editorial, Obama the ‘Magic Negro’, LA TIMES, Mar. 19, 2007, http://www.latimes.com/news/opinion/commentary/la-oe-ehrenstein19mar19,0,3391015.story.
spectacular demise of the United States. Knorr-Cetina’s organizing metaphor in *What is a Pipe?*—Obama as Pied Piper—suggests a spectacular form of political mesmerization. And her essay doubles down on its political ineffectiveness critique through a nominal allusion to René Magritte’s 1928-29 painting *La Trahison des Images*—often referred to as *The Treachery of Images*, or *The Treason of Images*, among English speakers—that famous surrealist art work that so explicitly warns against confusion of the *genuine* and *simulated*, an admonition that translates, in the context of contemporary political analyses, into a suggestion that, no matter the measure of the actor’s mesmerizing fame, we not confuse a genuinely effective presidency with a merely simulated one.\(^{171}\)

If a non-frivolous right of publicity suit had been initiated against candidate Obama, not only would the two problems discussed above\(^{172}\)—publicity rights’ capacity for blocking the use of celebrity persona by marginalized groups for political ends, and political-speech-chilling strategic intellectual property litigation—have been merged into a possibly devastating legal claim, but, more importantly for this article’s position, the candidate would likely have been compelled to defend himself against the *political* claim that he was even less substantial than a celebrity actor—that he was an *imitation* of an actor, an actor’s *simulacrum*.\(^{173}\) Such a suit would have simply been an extension of the superstar critique of Barack Obama that has followed him about since he was a 1L. Again the goal of such strategic litigation would *not* have been a *legal* victory, but, rather, a *political* one. The McCain campaign’s efforts to frame Obama as a foppish celebrity

\(^{171}\) See Knorr Cetina, *supra* note 151. In *The Simulacra*, one of his dark, futuristic science fiction novels, Philip K. Dick presents a literary version of the critique, bridging Magritte’s image and Knorr Cetina’s analysis. The novel depicts a world in which the president of “The United States of Europe and America” is a simulacrum; see PHILIP K. DICK, *THE SIMULACRA* (2002). Baudrillard apparently read Dick’s works as exemplars of, perhaps symptomological indicators of, the western imagination’s “reversion” into hyperreality. See Baudrillard, *supra* note 19.

\(^{172}\) See *supra* Part I B., 1-2.

\(^{173}\) Another authenticity attack, leveled against late 19\(^{th}\) century German culture by Nietzsche, seems also an untimely aphoristic rhetorical question for Barack Obama: “Are you genuine? Or merely an actor? A representative? Or that which is represented? In the end, perhaps you are merely a copy of an actor. Second question of conscience.” See *Twilight of The Idols, Maxims and Arrows #38*, in *THE PORTABLE NIETZSCHE* 472 (Walter Kaufman, ed. and trans., 1954).
seem to have been effective in narrowing their opponent’s lead in the polls.\textsuperscript{174} The Obama campaign’s deputy manager, Steve Hildebrand, recalled a “freak out” moment upon the release of McCain’s “Celebrity” advertisement: “I thought if they can brand him as a celebrity rather than as a serious leader we’re going to be in serious trouble.”\textsuperscript{175}

That freak out was appropriate, as the critique had traction, exposing a kind of Achilles’ heel in the Obama campaign. And by initiating a non-frivolous publicity rights suit at whose base sat, in effect, an echoing restatement of the “Celebrity” advertisement and the old superstar critique of Obama, Hilderbrand’s fears might well have been realized, and to great negative effect for the chances of a win for Obama.

What follows is an illustration of how a political victory could have been scored, in large part, due to the expansive scope of publicity rights law.

III. ON THE POLITICAL FALLOUT OF A RIGHT OF PUBLICITY SUIT AGAINST SENATOR OBAMA

Since he is domiciled there and its law clearly grants him a right of publicity\textsuperscript{176}, Dennis Haysbert could have initiated his suit under California common law.\textsuperscript{177} Haysbert might have alleged that during the book tour for \textit{The Audacity of Hope}, in October of 2006, Senator Obama evoked the persona of Dennis Haysbert by effectively simulating Haysbert in his role as David Palmer in the television series \textit{24}. The statute of limitation

\textsuperscript{175} Id.
\textsuperscript{176} Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979); see also McCarthy, \textit{supra} note 30, at §6:21.
\textsuperscript{177} Comedy III Prodcutions, Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001), (“In this state the right of publicity is both a statutory and a common law right.”), \textit{cert. denied}, 534 U.S. 1078, 122 S. Ct. 806, 151 L. Ed. 2d 692 (2002).
for a right of publicity claim is two years in California, and so Haysbert would have been safe had he filed a complaint before the middle of October 2008. The suit could have been timed to coincide with Senator Obama’s announcement of his intention to seek the Democratic nomination for presidency on February 10, 2007; or it might have been timed to coincide with the release of the McCain “Celebrity” advertisement.

A. The Right of Publicity v. The Anti-SLAPP motion

Considering the timing of the suit in relation to the presidential election cycle, and the claim’s direct connection to creative expressions and political activities, Senator Obama would probably have attempted to have the suit dismissed as quickly as possible. Recognizing the claim as a move to curtail his validly exercised free speech, a classic end of a strategic lawsuit against public participation (“SLAPP”), Obama would likely made a special motion to strike under California’s Anti-SLAPP statute, as the latter was designed specifically to provide a “quick, inexpensive method of dismissing SLAPP suits.” Right of publicity suits may not be among the typical causes associated with SLAPP suits, but the California Supreme Court has explicitly noted that “[n]othing in the statute itself categorically excludes any particular type of action from its operation,”

---

178 See Cusano v. Klein, 264 F.3d 936, 950 (9th Cir. 2001) (dismissing a right of publicity claim because plaintiff failed to file before two years had passed since the alleged infringement); see also McCarthy, supra note 30, at §11:41.
181 See Browne, 611 F. Supp. 2d at 1068.
and that its “definitional focus is not the form of the plaintiff’s cause of action, but, rather, the defendant’s activity that gives rise to his or her asserted liability.”

In order to meet his initial burden on the Anti-SLAPP motion, Obama would have had to show that Haysbert’s right of publicity claim stemmed from a protected activity as contemplated in the California Anti-SLAPP statute. Protected activities under the statute are acts “made in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” The Audacity of Hope book tour would most certainly qualify. And as the court must construe the statute broadly, it is likely that Senator Obama would have met his burden, and, accordingly, the burden would have then shifted to Haysbert to establish a probability of success on the right of publicity claim.

B. Elements of a Right of Publicity Claim Under California Common Law

In order to prevail, Haysbert would have needed to satisfy the common law’s four elements for a cause of action: “(1) the defendant's use of the plaintiff’s identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” Under the California common

183 Navellier v. Sletten, 52 P.3d 703, 711 (Cal. 2002).
184 See CAL. CIV. PROC. CODE § 425.16 (West 1992) (describing the applicability of California’s Anti-SLAPP statute).
185 See id. at § 425.16(b)(1).
186 CAL. CIV. PROC. CODE § 425.16(e) includes among its illustrative list of “acts in furtherance of a person’s right of petition or free speech…”:

… (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance or the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Senator Obama read from his book in a public forum; this activity would seem to satisfy either of these two protected categories.
187 Id. at § 425.16(a).
188 See Browne, 611 F. Supp. 2d at 1068-1069.
law doctrine, it is worth noting, the appropriation of a person’s identity does not have to be intentional in order to be a violation of the right of publicity.”

1. Obama’s Use of Haysbert’s Identity

Under this first element, Haysbert might have argued that Senator Obama evoked Haysbert’s persona as depicted in the character of David Palmer in the 24 television program. Haysbert would have needed to prove that, to a de minimus number of individuals, he was identified by Senator Obama’s “use.” Since Barack Obama would go on to derive significant income from book sales, his “use” might have been described as comparable to an advertiser’s: by evocatively associating Dennis Haysbert’s distinctive performance as David Palmer with Senator Obama’s books, even if unknowingly and unintentionally, Obama used Haysbert’s persona to advertise the book. The proto-apocalyptic conditions that swirled about Senator Obama, and, in part, that his presidential campaign ignited; his Spock-like emotional coolness; his having

---

189 Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001).
190 See White, 971 F.2d at 1399. For critical discussion of the “right to evoke,” see Dogan, supra note 14.
191 McCarthy, supra note 30, at §3:18.
192 See Jesse Lee, Release of the President and Vice President’s Tax Returns, THE WHITE HOUSE BLOG (Apr. 15, 2009), http://www.whitehouse.gov/blog/09/04/15/Release-of-the-President-and-Vice-Presidents-Tax-Returns (“[The President] and First Lady filed their income tax returns jointly and reported an adjusted gross income of $2,656,902. The vast majority of the family’s 2008 income is the proceeds from the sale of the President’s books.”). See also Norm Eisen, President Obama and Vice President Biden’s Tax Returns, THE WHITE HOUSE BLOG (Apr. 15, 2010), http://www.whitehouse.gov/blog/2010/04/15/president-obama-and-vice-president-bidens-tax-returns (noting that the Obamas reported earnings of $5,505,409 in 2009, the vast bulk of which was income from book sales).
193 See White, 989 F.2d at 1513; See Dogan, supra note 14.
194 See McCarthy, supra note 30, at § 3:34 (noting that courts have tended not to accept a lack of intent to infringe as a defense).
195 I use the term “proto-apocalyptic” because signs of the impending economic depression would not become widely known until practically the eve of the presidential election. As Senator Gary Hart, one-time presidential candidate himself, noted, President Obama’s first term’s troubles predated it’s beginning: “You have a president who in the last days of his campaign began to understand that he was going to have to make fundamental adjustments in everything he had intended. We’ll never know what an
successfully run for Senate in his forties; his vying to become the first black President of the United States of America: all of this, the argument would have gone, adds up to actionable evocation of Haysbert’s persona.

This first element actually involves two prongs. Haysbert would have needed to first show that Senator Obama evoked his persona in his role as David Palmer. In other words, Haysbert would have had to show that Senator Obama’s use identified Haysbert. “Identifiability” is a fundamental question in publicity rights cases. Haysbert could likely have presented affidavits attesting to at least a small number of Americans having approached him in 2008, roughly a year after Senator Obama announced his candidacy, and apparently confusing him with the actual senator. Haysbert publicly noted on at least one occasion that people regularly approached him in public and asked him to run for president during this period. Considering that Haysbert would like have needed to show a “mere possibility of success,” and that only if his suit lacked “even minimal Obama presidency absent the economic catastrophe would have looked like.” See James Fallows, Obama, Explained, ATLANTIC (Mar. 2012), http://www.theatlantic.com/magazine/archive/2012/03/obama-explained/308874/. On the possibility that Senator Obama’s campaign may have ignited a racially charged backlash, see Tesler, supra note 155, at 701. And on the relationship between anti-black racism and apocalyptic political thought, see Sutton, supra note 151; see THE SOUTHERN POVERTY LAW CTR., THE SECOND WAVE: RETURN OF THE MILITIAS (2009), available at http://cdna.splcenter.org/sites/default/files/downloads/The_Second_Wave.pdf (describing the role of President Obama’s race in the post-2008-presidential-election revitalization of American militias).

196 Humanities Professor Henry Jenkins makes one of the earliest public comparisons of Barack Obama’s and Spock’s emotional mutedness. See Ticking Each and Every Box, IR. TIMES, Jun. 7, 2008, Seen and Heard, at 16; Keslowitz, supra note 149, at 2799 n.67 (discussing the age and emotional restraint of David Palmer).

197 See Keslowitz, supra note 149.

198 See McCarthy, supra note 30, at § 3:18 (discussing tests of identification).


200 Such affidavits could have been instrumental in satisfying at least one of the four tests McCarthy lists as adequate methods of showing more than de minimus identifiability: “… (3) Evidence of unsolicited identification by reasonable persons, who made comments to plaintiff about the similarity….”


202 Browne, 611 F. Supp. 2d at 1069.
merit” would it not survive the Anti-SLAPP motion, it seems reasonable to imagine that such affidavits would have satisfied this prong of the first element.

The second prong of this first element would have been tougher for Haysbert. Since his role as Senator-turned-President Palmer is arguably a type or a trope, he would likely have needed to satisfy the indelibly linked identification standard of \textit{Lugosi} v. \textit{Universal Pictures}. The \textit{Lugosi} decision teaches that in order for an actor to successfully claim that her persona has been misappropriated by another’s use of a character that she has played, that actor must show that she has become exclusively linked to that character. Even though \textit{Lugosi} represented a “hard case” for the California Supreme Court, following leading commentary, we can articulate its rule more precisely as follows: “an actor [can] play a role so distinctively and uniquely that that particular characterization is indelibly linked with that actor.” Haysbert would have needed to produce evidence that his characterization of David Palmer made him publicly identifiable in Senator Obama’s use. At trial, this question would have been an issue of fact. Haysbert might possibly have been able to draw upon the same affidavits that pointed to his identifiability in Obama’s use to satisfy this prong. Presuming that such evidence would have been forthcoming, again, due to his very low burden, Haysbert would have had a good chance of satisfying the use element of his prima facie case.

2. Appropriation of Haysbert’s Identity to Obama’s Advantage

\footnotesize

\begin{itemize}
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} See Patterson, \textit{supra} note 141.
\item \textsuperscript{205} \textit{Lugosi}, 603 P.2d 425.
\item \textsuperscript{206} See McCarthy, \textit{supra} note 30, at § 4:72 (describing “hard” right publicity cases as those in which an actor has not created the allegedly appropriated character and may or may not be exclusively identified with it).
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} See \textit{CHECK IT OUT!}, \textit{supra} note 201.
\item \textsuperscript{210} See \textit{Browne}, 611 F. Supp. 2d at 1069.
\end{itemize}
This second element of the prima facie case would have required that Haysbert provide evidence that Senator Obama benefited from using Haysbert’s identity.211 Had Haysbert been able to satisfy the first element of his claim, the same evidence would likely have been effective in showing that Senator Obama had appropriated Haysbert’s identity.212 And Haysbert would have had little trouble generating evidence that the appropriation might have benefitted Senator Obama, both commercially and politically. In terms of commercial benefit, Haysbert might have pointed to the uptick in Senator Obama’s book sales in 2007. The Obamas’ jointly filed 2006 federal tax return lists adjusted gross income of $983,826 213, while their 2007 tax return states that their income was approximately $4.1 million214. In both cases, the couple’s income was largely a result of book sales.215 This evidence would likely have been sufficient to show that Senator Obama might have benefited from use of Haysbert’s identity, and, therefore, sufficient to satisfy the mere possibility standard.

3. Lack of Consent

In this alternative history, this element’s satisfaction would have been a given, as Haysbert would not have been bringing the suit otherwise.

4. Resulting Injury

Since Haysbert would not have been seeking to recover damages, but aiming instead for injunctive relief, he would not have been required to prove quantified commercial

211 Id. at 1070.
212 See supra notes 200-210.
215 See Lee, supra note 192.
damages.\textsuperscript{216} This element would have been easily satisfied if Haysbert had cleared the hurdle of the first element, as courts regularly presume commercial damage to identity when plaintiff proves that the defendant has use persona indicia in “such a commercial context that one can state that such damage is likely.”\textsuperscript{217} Senator Obama’s \textit{The Audacity of Hope} book tour would likely have been considered a commercial setting, as the senator advertised and sold his books during the tour, and, arguably more importantly, the entire two-week long, twelve-city tour was funded entirely by Crown Publishing Group, publisher of \textit{The Audacity of Hope}.\textsuperscript{218}

C. Affirmative Defenses and Their Irrelevance

At least three affirmative defenses would have been available to Senator Obama, had Haysbert been able to meet his burden of showing a mere possibility of success on his right of publicity claim: the public interest defense; First Amendment protection of political expression; and the \textit{Saderup} transformative use defense. Under California law, Obama would have had to produce evidence barring Haysbert’s claim as a matter of law on each of them.

Senator Obama’s public interest defense would have turned on an analogizing of Dennis Haysbert’s role as David Palmer to the satirical antics of the comedian, Pat Paulsen.\textsuperscript{219} Paulsen’s right of publicity claim was unsuccessful because, even though he was “only kidding”\textsuperscript{220} when he satirized the 1968 presidential election by presenting himself as the “Put On Presidential Candidate of 1968”\textsuperscript{221}, he was deemed to have entered the political

\textsuperscript{216} See McCarthy, \textit{supra} note 30, at § 3:2.  
\textsuperscript{217} \textit{Id.}  
\textsuperscript{219} See \textit{supra} Part II B., 1.  
\textsuperscript{220} See Paulsen, 9 Misc. 2d at 449.  
\textsuperscript{221} See \textit{supra} note 105.
arena and become “newsworthy.” His performance became “sufficiently relevant to a matter of public interest [as to have become] a form of expression which is constitutionally protected and ‘deserving of substantial freedom.’” Senator Obama would have argued that Haysbert had “injected” himself into presidential politics by playing the role of a president on television.

The First Amendment would likely have offered Senator Obama his strongest line of defense. Political expression of the sort that he made during the book tour, arguably a campaign event, receives broad First Amendment protection. Even though the Supreme Court has clearly noted that the First Amendment is no absolute bar to publicity rights suits, in this context Senator Obama would have had a good chance of successfully defending against Haysbert’s claim.

Lastly, the senator could have argued that his use of Haysbert’s persona was so transformative that Haysbert’s likeness became Obama’s own, in which case, under the Saderup ruling, Haysbert’s infringement claim would have been barred on First Amendment grounds.

The discussion of each of these defenses here is purposefully cursory because they are not important when we keep the strategy of the suit in mind. The end is political. And if Senator Obama had been compelled to turn to affirmative defenses, his Anti-SLAPP motion would probably have succeeded, but at a potentially high political cost. Senator Obama would have been effectively looking to excuse his use, as opposed to refuting it. Invoking the public interest defense, the First Amendment defense, and/or the

222 See Paulsen, 9 Misc. 2d at 449.
223 Id. at 450 (quoting University of Notre Dame v. 20th Century Fox, 22 A.D.2d 452, 458 (N.Y. App. Div. 1965).
224 The tour ended on October 30, 2006, roughly three months before Senator Obama announced his intention to enter the 2008 presidential election.
226 See Volokh, Freedom of Speech, supra note 46 (describing the categories of protected and unprotected expressions).
227 See Comedy III, 21 P.3d at 808-09.
transformative use defense would have implicitly acknowledged that Senator Obama had used Dennis Haysbert’s persona for commercial and political gain. Had this scenario unfolded as described, McCain’s “Celebrity” critique of Senator Obama — the one line of attack that seemed to threaten the Obama campaign, and tantalize the McCain campaign, with tightening polls in the fall of 2008 — would have received the imprimatur of the law. Steve Hildebrand, the 2008 Obama deputy campaign manager has candidly stated that the “Celebrity” advertisement worried him deeply, with its implicit equation of the candidate with Britney Spears and Paris Hilton.228 A California District Court acknowledging the validity of one or more of the affirmative defenses would have effectively equated to its saying This is a non-trivial claim on the part of Haysbert, and, by extension, McCain’s critique had some modicum of merit. We should imagine that Senator Obama would have had a more difficult time rebutting the “Celebrity” critique had his motion to dismiss failed, as it could have, or if the motion had succeeded on the basis of his affirmative defenses, as is probably more likely. This analysis points to the problematic application of California’s Anti-SLAPP legislation in right of publicity cases.229 But the more fundamental issue is the breadth of the right of publicity, its expansion and the chilling implications for political expression.

CONCLUSION

“Criticism of science fiction,” Joanna Russ wrote in her classic 1975 essay Towards an Aesthetic of Science Fiction, “cannot possibly look like criticism we are used to. [ ] Science fiction criticism will discover themes and structures (like those of Olaf Stapleton’s Last and First Men) that may seem recondite, extra-literary or plain

228 See supra note 174.
229 “It has become clear, after Hilton, that California’s anti-SLAPP statute is not the cure for the right of publicity doctrine’s problems,” Lindsay Hanifan notes. See Hanifan, supra note 182, at 295-300 (discussing the application of California’s anti-SLAPP statute to publicity rights cases).
Among other things, in this essay I have attempted to contribute to a re-ignition of criticism brought to bear on the right of publicity. Though they are persistent, our critiques are increasingly perfunctory, and have yet to show much impact on the doctrine’s development. Legal scholarship has only barely begun to tap the energetic potential of science fiction and its rich criticism, hence this essay’s turn to them. By linking a radical science fictional reading of scholarship consonant with some of the more lamentable aspects of the doctrine, by risking affixation of the adjectives Russ warned of, I hope to encourage both further analyses that are, in terms of energy and critical yield, commensurate with the problems they address, and reconsideration of “how publicity in the political sphere differs from that in the market place.”

As is the case with its expansive scope, the right of publicity for political figures is regrettable law. By allowing the two democratic culture-dampening problems discussed above—denial of use of celebrity personas by marginalized social groups for political speech, and the lowering burdens for strategic litigation based on doctrinal claims that can deliver quick political dividends before affirmative defenses are able to defuse legal threats—to merge, the doctrine reveals itself as a political weapon-in-waiting.

The value of innovative pop cultural images to democratic praxis in this simulacra-dense era is evident: if the signature of such an era is the advent of simulations before any actual arrival of the phenomena they model, then the delivery of empowering, democracy-deepening visions capable of serving as gravitational centers of new forms of persona, or calling forth new forms of human arrangements, are also potential preemptive negations of their own actualizations. The avatar of the politically salutary event impedes the event itself: this is the political lesson of the most muscular forms of publicity rights law.

---

230 JOANNA RUSS, *Towards an Aesthetic of Science Fiction, in To Write Like a Woman: Essays in Feminism and Science Fiction* 12 (1995).
232 See *supra*, Part I B.
The arguments arrayed in this article seek to show that the doctrine’s science fictional qualities can be of value to those who seek to constrain democracy’s deepening, particularly in the context of formal politics. The generic associations of some of the doctrine’s most expansive cases; its conceptualization in terms of Baudrillard’s poetic, largely science fictional theoretical framing; its granting of rights to political figures like President Obama who are themselves science fictionally charged and preceded by their own simulacra: at a bare minimum, the various moments of the doctrine’s science fictional charge strung together foreground the links between the expanded extremities of the right of publicity (in White, e.g.) and the availability of persona rights to powerful political figures (such as Governor Schwarzenegger). Who can really imagine that in a period marked by so degraded a state of political discourse that the President of the United States can be called a liar, by a senator, during a nationally televised address to Congress, that a claim of a persona evoking misappropriation initiated by perhaps another senator (or a governor, or a mayor) will be foreclosed as an option because of that politician’s concern for public relations fall-out? Given the fact that political activists have used the legal system for great tactical value despite the frivolity of their central legal claim, why should we imagine that the latent political explosiveness of the doctrine will remain untapped?

And for those who are concerned about the future of American politics, particularly those who put store in the potential of mediatized imagery to inspire and summon up new political forms by way of exemplification, a science fictional perspective on the doctrine images a pernicious problem of the right of publicity’s potential as a terminator of nascent political movements and figures. The writer or producer or director of a television show or film who aims to create a work in which characters represent new forms of political actors can find herself in the position of contributing to the disablement

---

233 Csicsery-Ronay, supra note 23, at 393.
235 See supra note 157.
of the very images she helps create. The actor who portrays a would-be inspirational role in her creation with sufficient distinctiveness currently wields the legal power to effectively block, or at least seriously complicate, the appropriation of the new political form by the individuals or groups it calls forth. In fact, the more resonant the portrayal of the new type, the more affective the actor’s presentation of it, odds are, the more likely it is that the role will be strongly identified with the actor’s persona and, therefore, more likely to be protectable in many instances by publicity rights.

The more technologically savvy culture-worker can counter this potential by foregoing live actors and using virtual humans in critical roles. And modifications of actors’ contracts and compensation packages such that they promise to forbear on legal action against perceived misappropriation of likeness through the use of roles that may have performed with great distinction in a film, television show or other dramatic performance represent possible legal methods of insuring against the problem. But the typical politically-minded culture worker who is likely more concerned with creating compelling forms of characters that represent novel political modes, novel perspectives or novel figure types, rather than boning up on legal doctrines or finding (and affording the services of) sophisticated legal counsel will possibly find herself in a position not terribly dissimilar from that in which the science fiction author J. G. Ballard found himself during Ronald Reagan’s ascendency.

Appalled by what he considered to be then-Governor Reagan’s “far-right” politics, and the “complete discontinuity” between the ur-celebrity politician’s ability “to exploit the

---

236 Joseph Beard, Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary, 16 BERKELEY TECH. L.J. 1165 (2001) (Discussing the intellectual property implications of the creation of imaginary digital humans).
237 Contracts doctrine recognizes that a promise of forbearance to bring suit on a claim one has a legal right to initiate can serves as consideration sufficient to enable formation of a contract, if the forbearer actually had a valid actionable claim. See generally Restatement of Contracts §§ 76(b) & 78 (1932); A. Corbin, Contracts § 139 (1993); S. Williston, A Treatise on the Law of Contracts § 135B (4d ed. 2008).
239 Id.
fact that his TV audience would not be listening too closely, if at all, to what he was saying,” Ballard wrote a notorious and obscene booklet designed to counter Reagan’s political powers. To his chagrin, the effort failed, and in a strikingly paradoxical fashion. “At the 1980 Republican Convention in San Francisco,” Ballard recounts in The Atrocity Exhibit, “a copy of my Reagan text […] furnished with the seal of the Republican Party, was distributed to delegates. I’m told it was accepted for what it resembled, a psychological position paper on the candidate’s subliminal appeal, commissioned from some maverick think-tank.” The very forces which Ballard sought to contest simply appropriated his efforts to their own ends. Incipit trageodia. Incipit parodia.

---

240 Id.
241 Id., at 165-170.
242 Id., at 170.