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## Why Seeing Is No Longer Believing: Misappropriations of Image and Speech

Lauri Deyhimy

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# COMMENTS

## WHY SEEING IS NO LONGER BELIEVING: MISAPPROPRIATIONS OF IMAGE AND SPEECH

### I. INTRODUCTION

The science fiction film *Contact*,<sup>1</sup> released in the summer of 1997, featured something “alien” to other films—a cameo role by the current President of the United States.<sup>2</sup> President Bill Clinton “appears” as a member of the cast in three scenes, commenting on the film’s fictional plot developments.<sup>3</sup>

To create the appearance of the President’s participation in the film, numerous real-life clips of President Clinton were used.<sup>4</sup> Recent advances in digital technology make such visual effects possible, giving filmmakers the ability to use unwilling participants in films and make them appear to say things they never said.<sup>5</sup> As evidenced in *Contact*, this technology also allows filmmakers to use sound bites in an entirely different context from which the words were originally uttered.

*Contact*, an imaginative fictional adventure, depicts scientist Ellie Arroway’s search for meaning within the universe.<sup>6</sup> The film delves into the familiar topic of whether life exists outside the planet Earth.<sup>7</sup> In particular, the film explores the philosophical and theological aspects of the discovery of life on a distant star.<sup>8</sup> The film also embraces other themes including me-

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1. CONTACT (Time Warner Entertainment 1997).

2. See Andy Seiler, *Technology Puts Fiction in ‘Contact’ with Reality*, USA Today, July 30, 1997, at 5D, available in 1997 WL 7009294.

3. See Mark Caro, *Acting President Whether He Knows It Or Not, Clinton Has a Role in Contact*, CHI. TRIB., July 14, 1997, at 1; see also discussion *infra* Part IIA (describing how the film was made).

4. See Seiler, *supra* note 2. The use of actual news footage implies President Clinton’s authorization of its use.

5. *Id.* *Contact* producer Steve Starkey remarked that new technology makes it possible to make anyone say anything. *Id.*

6. See CONTACT, *supra* note 1.

7. *Id.*

8. Dave Jewett, *Make Contact with Smart, Thoughtful Sci-Fi Drama*, COLUMBIAN, July 10, 1997, available in 1997 WL 10811587.

dia invasiveness and the power struggle between the military and scientists with respect to extra-terrestrial exploration.<sup>9</sup>

Although fictional, *Contact*'s premise concerning the existence of extra-terrestrial life is theoretically plausible.<sup>10</sup> In addition, the film's use of cameos of real-life Cable New Network ("CNN") reporters<sup>11</sup> and appearances by President Clinton all contribute to a film where "seeing is no longer believing." President Clinton's "role" in *Contact*, while adding considerable entertainment value to the film, is highly troubling.

Blurring the line between reality and fiction in entertainment,<sup>12</sup> President Clinton's presence contributes to the veracity of the film. His role in the film would not be cause for concern had he been a willing member of the cast or had endorsed the use of his image. However, neither President Clinton nor the White House was aware of his role in the film until a week before the film's scheduled release date.<sup>13</sup> If the President does not authorize such uses, it is possible that society will be unable to distinguish whether the U.S. is really involved in a crisis. This is true when society sees an image of the President where it is not easy to distinguish a fictional use from reality. Use of the President's image in a contrived situation sent over the Internet, for example, where it appears as though the U.S. is in imminent danger is alarming.

This Comment addresses the legal issues that arise by the unauthorized use of a sitting president's image and speech. Although presidential speeches are not protected under copyright law,<sup>14</sup> there are other possible legal claims that a president can assert.<sup>15</sup> This Comment discusses the claims that a president could bring to prevent, or at least deter, the use of their image and/or speeches in a misleading context. In addition, this Comment argues that there is inadequate legal protection against distorted imagery when

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9. *Id.*

10. *Id.* "[S]o much of the science seems at least theoretically plausible." *Id.*

11. Marvin Kalb, *Journalists Blur Their Roles*, DENV. POST, July 27, 1997, at E02 (stating that at least 13 CNN journalists and pseudo journalists, ranging from Bernard Shaw to the once vice presidential candidate Geraldine Ferraro, play themselves for long stretches in the film); see also Fred Davis, *When Reporters Blur Line Between Fact and Fiction*, SEATTLE TIMES, July 25, 1997, at B5 (stating that the journalistic line is crossed when news people report on issues of fiction in a film, no matter how realistic the story). *But see Those Darn Space Aliens*, COM. APPEAL, July 19, 1997, at A6 (finding that after considerable criticism for unethical journalism, CNN has decided that this will be the last film to feature real life news reporters from its network).

12. Fred Davis, *When Reporters Blur Line Between Fact and Fiction*, SEATTLE TIMES, July 25, 1997, at B5.

13. Amy Dawes, *Hollywood Abducts the President; Clinton's Image Inserted into Film*, L.A. DAILY NEWS, July 11, 1997, at N1.

14. See discussion *infra* Part III.B.

15. See discussion *infra* Part V.

the distortion is not defamatory in nature.<sup>16</sup> Given the implications and dangers of using a president's image and speeches for commercial purposes, the current state of the law should be evaluated and modified to prevent repeated and potentially dangerous misappropriations.

Part II of this Comment discusses the technology that made President Clinton's presence in the film possible, and the White House response to the film. Part III explores present day implications of the fading line between journalism, fact, and fiction. In addition, this Part illustrates the possible disastrous consequences of using techniques like those employed in *Contact*. Part IV explains why *Contact* producers did not violate copyright laws. Part V analyzes several current legal measures that could be used to prevent presidential image misappropriations. Part VI sets forth solutions to curtail the unauthorized use of a president's image. Finally, Part VII concludes that, ultimately, the public will bear the harm from these types of misappropriations.

## II. BACKGROUND

### A. How Contact Was Made

President Clinton's appearance in *Contact* was made possible through the use of digital imaging technology.<sup>17</sup> Previous archival footage of press conferences were spliced into the film.<sup>18</sup> The first news conference in the film, which makes the most extensive use of President Clinton's image actually combines footage from three separate real-life appearances by the President. The film's first sound bite was President Clinton's actual response to the real-life announcement scientists made regarding the recovery

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16. See generally Robert W. Butler, *Tacky Or Not, Not Even the Prez Can Stop the Digital Parody Parade*, KAN. CITY STAR, July 27, 1997, at J2.

17. See Lisa Byrne Anastasio Potter, *Altered Realities: The Effect of Digital Imaging Technology on Libel and The Right of Privacy*, Note, 17 HASTINGS COMM. & ENT. L.J. 495, 498. The image is captured after scanning a printed photograph, a videotape frame, or a television transmission into a computer. *Id.* The scanning device then breaks the image down into numerous geographic picture elements, known as pixels, assigning a number to each pixel. *Id.* Each pixel represents various attributes of the image, such as color, and the digital scanning device operator can manipulate the pixels in a variety of ways: "colors can be changed, brightness or shadow added, elements of the picture removed entirely, or elements from other images added." *Id.* The manipulated image now has many potential uses: "it can be stored in the computer for later use, transmitted to another computer, or fixed on paper or a video screen." *Id.* Tampering of the images are "virtually undetectable." *Id.* at 499.

18. Mick La Salle, *Reluctant Movie Star/White House Objects to Clinton Footage in 'Contact'*, S.F. CHRON., July 12, 1997, at A1.

of a meteorite that contained evidence of possible microbial life on Mars.<sup>19</sup> President Clinton's remark—"[i]f this finding is confirmed, it will give us stunning insight into the nature of the universe and humanity"<sup>20</sup>—could not have fit more perfectly in the script if director Robert Zemeckis wrote it himself. In other scenes, sound bites from President Clinton's comments regarding the Oklahoma City bombing were similarly digitally lifted and spliced into the film's entirely different context and setting.<sup>21</sup>

One technically complicated aspect in creating the first news conference scene was that it was scripted to take place inside the White House.<sup>22</sup> However, President Clinton's actual comments about the real-life meteorite were made outside in the Rose Garden. Accordingly, the film's visual effects made it appear as though the President was speaking from the Oval Office. Additional technical problems for the filmmakers stemmed from the fact that the first scene was a composite of three separate appearances by the President wearing three different suits.<sup>23</sup> Film engineering was again used to "dress" the President in a single suit.<sup>24</sup>

In a later scene, the President is depicted in a conference with fictional government officials and scientists.<sup>25</sup> Actual footage of the scientists came from videotaped Cabinet meetings. Through digital insertion, actors replaced the actual advisors.<sup>26</sup> Another scene uses footage of the President meeting with Japanese delegates at an Oval Office photo opportunity.<sup>27</sup> Once again, *Contact* producers were able to digitally insert actors in place of the real-life delegates.<sup>28</sup>

Although President Clinton's remarks in *Contact* were his actual words, senior special effects supervisor, Ken Ralston, has made it clear that he could have easily altered the President's statements.<sup>29</sup> In *Forrest Gump*,<sup>30</sup> another film directed by Zemeckis, voice doubles were used to mimic several presidents, thus making it possible to have these "pseudo-actors" say any-

19. *Id.*

20. See Butler, *supra* note 16.

21. *Id.* In a scene where President Clinton is reacting to a sabotage, the following quote was used: "I would warn everybody not to be influenced beyond the known facts. We are monitoring what has actually happened." *Id.*

22. See Caro, *supra* note 3.

23. *Id.*

24. *Id.*

25. See CONTACT, *supra* note 1.

26. See Caro, *supra* note 3.

27. *Id.*

28. *Id.*

29. See *infra* note 52.

30. FORREST GUMP (Paramount Pictures 1995).

thing.<sup>31</sup> *Contact* producer Steve Starkey describes the process as inputting a sampling of all the vowel and consonant sounds of a particular person's voice into a computer.<sup>32</sup> The computer then formulates a completely new sentence and re-animates the face so that it fits with the words.<sup>33</sup>

In *Forrest Gump*, Zemeckis edited footage of past presidents through the use of digital technology, to make it appear as if they were interacting with actor Tom Hanks.<sup>34</sup> Words were technologically put in the "mouths" of the presidents. Although President Clinton's words were unaltered in *Contact*,<sup>35</sup> because his comments were taken out of context, this distinction becomes irrelevant. The scenes create the appearance that the President talking about the possibility of the existence of alien life when in fact he was not. It is just as deceptive to imply that the President is talking about something he is not than to digitally change his words.

Unlike *Forrest Gump*, *Contact* was made and released while President Clinton was still in office.<sup>36</sup> While the unauthorized digital use of both dead and living personalities has been a looming legal and moral issue in recent years,<sup>37</sup> the first time use of a sitting president adds increased volatility to the issue.<sup>38</sup>

### B. White House Response

The White House was displeased when it discovered the manipulation of President Clinton's image in *Contact*.<sup>39</sup> Once alerted to the fact that the President's image and words were misappropriated<sup>40</sup> in a film about to be released, White House counsel Charles Ruff wrote Robert Zemeckis:

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31. See Seiler, *supra* note 2.

32. *Id.*

33. *Id.*

34. See Michael Ollove & Carl Cannon, *Clinton's Splice of Life*, BALT. SUN, July 11, 1997, at 1E, available in 1997 WL 5519883.

35. *Id.* Warner officials admit that although President Clinton's statements in *Contact* were authentic, he was not talking about aliens when he made them. *Id.*

36. See generally, Mike McDaniel & Ann Hodges, *Clinton, CNN Object To Appearances in Film*, HOUS. CHRON., July 15, 1997, at 1. McDaniel advises the makers of *Contact* to "stick with dead presidents." *Id.*

37. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 158 (1993); Barbara M. Lange, Note, *Shopping for the California Right of Publicity*, 16 HASTINGS COMM. & ENT. L.J. 151, 153, 161 (1993).

38. See Dawes, *supra* note 13.

39. See La Salle, *supra* note 18.

40. Misappropriation is "[t]he unauthorized, improper, or unlawful use of funds or other property for purpose other than that for which intended." BLACK'S LAW DICTIONARY 998 (6th ed. 1990).

You have manipulated images of the President's public statements, taken them out of the context in which they were uttered and adapted them to fit the plot of your film. By appropriating President Clinton's image and words in this manner, you have essentially given him a role in your film without authorization . . . . We believe your use of the role you have created for President Clinton in 'Contact' to promote and advertise the film is improper.<sup>41</sup>

Furthermore, commentators outside the White House have suggested that using the President's image for commercial purposes is insulting to the dignity of the office.<sup>42</sup> While the film industry is aware that the White House did not approve of using the President's image,<sup>43</sup> it is not likely to cease such efforts in the future. To date, White House counsel took no further legal action.

### III. BLURRING THE LINE BETWEEN FACT AND FICTION: SECURITY ISSUES

The use of President Clinton's image in a film implies consent.<sup>44</sup> The unauthorized use of the President's image in *Contact* is disturbing, misleading and deceptive. By incorporating his image into the film, the filmmakers of *Contact* sought to make the film as realistic as possible.<sup>45</sup> In doing so, viewers of *Contact* might have been misled, believing that President Clinton either authorized the use of his image and speech or directly participated in the making of this film.

The American presidency has long been considered a hallmark of the stability of our government.<sup>46</sup> The power and credibility of the presidency depends upon the prestige of the White House.<sup>47</sup> Commercial use of the presidential image degrades this prestige.<sup>48</sup> In a democracy, it is important for the presidency to be respected. Thus, as a social policy matter, a

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41. See La Salle, *supra* note 18 (quoting White House counsel Charles Ruff).

42. See generally Bill Gershbein, *Films Damage Prestige of Presidency*, SUN-SENTINEL, Aug. 3, 1997, at 4G.

43. See La Salle, *supra* note 18.

44. See *Seeing is no Longer Believing; The Makers of "Contact" Used the President's Image Without His Consent*, L.A. DAILY NEWS, July 14, 1997, at N2. This article asserts that "[s]howing a lectern bearing the Great Seal of the United States implies the authority of office and the official approval of the government for a specific cause." *Id.*

45. *Id.*

46. See generally Gershbein, *supra* note 42.

47. *Id.*

48. See Gershbein, *supra* note 42.

president should not willingly or even unwillingly endorse products or take part in fictional films.<sup>49</sup>

In response to the White House letter, Zemeckis answered that "[t]he president works for us"<sup>50</sup> and producer Steve Starkey further commented that "[t]he speeches the President makes are in the public domain . . . [w]e didn't alter a word [President Clinton] said . . . [and only] digitally replaced the setting."<sup>51</sup> This statement stresses the emphasis Zemeckis places on the fact that he did not change the President's words.<sup>52</sup> However, this position ignores the fact that by removing President Clinton from the context where he made these remarks and putting him in a fictional film, Zemeckis has dishonestly created the impression that the President played a role in the film. It is irrelevant whether the President's words were altered; a distortion was created nonetheless.

As an outgrowth of the digital technology used in films like *Forrest Gump* and *Contact*, the reality of the moving visual image is quickly eroding.<sup>53</sup> While it is true that there is little fear that the public would rely on a fictional film for accurate information, the technology can be used to manipulate the media that people rely on for factual information.<sup>54</sup> Consequently, there is a legitimate fear that people will soon fail to differentiate between what is authentic and what is fiction.<sup>55</sup>

Not knowing if the sitting president is speaking of an actual event, or if his image and voice are being manipulated is disturbing. Accurate information is necessary for a well-functioning democracy.<sup>56</sup> The public has a fundamental need to rely on the media for accuracy. A film that manipulates footage of the sitting president causes public mistrust of the media.

49. La Salle, *supra* note 18.

50. *Movie Black Magic: CNN Learns That Hollywood Glamour Might Not Serve the Interests of Truth*, INTELLIGENCER, July 21, 1997, at A6.

51. Dawes, *supra* note 13.

52. The senior special effects supervisor clearly acknowledges that he had the ability to change the President's words. See Seiler, *supra* note 2. Zemeckis stated, "I did it in *Forrest Gump* . . . it's a very easy thing to do." *Id.*; see generally, James Bennet, *Lights! Camera! Executive Action!*, ORANGE COUNTY REG., July 13, 1997, at F12.

53. See generally LaSalle, *supra* note 18. Zemeckis, in his own defense, stated "I do think it is something people have to be aware of: Just because images are moving doesn't mean they are truth." *Id.*

54. See generally Kalb, *supra* note 11.

55. See Dawes, *supra* note 13 (quoting Dr. Judith Grant, a professor of political science at the University of Southern California).

56. *Id.*; see generally Jon Lawrence Dartley, *Lost Horizons?: Tortious and Philosophical Implications of Computer Imaging*, 19 RUTGERS COMPUTER & TECH. L.J. 199, 200 (1993).



It is not hard to imagine how the use of the presidential image and voice could be deliberately misused for malevolent purposes.<sup>57</sup> The 1938 Orson Welles radio prank illustrates the potential for large numbers of people to mistake what was intended only as a joke for the truth.<sup>58</sup> As a Halloween prank, Orson Welles broadcast a story using fictitious news reports that Martians were invading the earth and spreading poisonous gas.<sup>59</sup> The story sent Americans into a state of panic and disarray.<sup>60</sup> The following broadcast was heard by over six million people:

Ladies and gentlemen, I have just been handed a message that came in from Grover's Mill by telephone. Just a moment. At least forty people, including six state troopers lie dead in a field east of the village of Grover's Mill, their bodies burned and distorted beyond all possible recognition. . . . Ladies and gentlemen, I have a grave announcement to make. Incredible as it may seem, both the observations of science and the evidence of our eyes lead to the inescapable assumption that those strange beings who landed in the Jersey farmlands tonight are the vanguard of an invading army from planet Mars. The battle which took place tonight at Grover's Mill has ended in one of the most startling defeats ever suffered by an army in modern times; seven thousand men armed with rifles and machine guns pitted against a single fighting machine of the invaders from Mars. One hundred and twenty known survivors. The rest strewn over the battle area from Grover's Mill to Plainsboro crushed and trampled to death under the metal feet of the monster, or burned to cinders by its heat ray.<sup>61</sup>

Although the broadcast was announced as fictional at the outset, many tuned in after this announcement was made and believed that the radio broadcast was real.<sup>62</sup> Mobs of terrified listeners filled the streets, jammed telephone lines and sought refuge in crowded churches.<sup>63</sup> In subsequent interviews, people explained that they were confident that radio was a reliable source of information and, therefore, believed the broadcast realistically

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57. *See generally id.*

58. *See generally* HADLEY CANTRIL, *THE INVASION FROM MARS: A STUDY IN THE PSYCHOLOGY OF PANIC* 47-54, 70-71 (1940).

59. *See id.*

60. *See id.*

61. HOWARD KOCH, *THE PANIC BROADCAST: PORTRAIT OF AN EVENT* 52-57 (1970).

62. *Id.*

63. CHARLES HIGHAM, *ORSON WELLES, THE RISE AND FALL OF AN AMERICAN GENIUS* 123-27 (1985).

portrayed “scientists” and “officials” who urged immediate action.<sup>64</sup> Welles’ use of familiar towns and highways increased both the broadcast’s legitimacy and listeners’ alarm.<sup>65</sup>

It is easy to envision a situation similar to the Orson Welles incident arising from the use of the a sitting president’s image and speeches out of context. In one frightening scenario, a commentator theorizes what would occur if someone used President Clinton’s image on a comedy channel to say derogatory remarks about Russian President Boris Yeltsin. Russians might view the broadcast and fail to see the joke.<sup>66</sup>

Aside from this potential for political and diplomatic crises, there is legitimate concern that citizens will be confused.<sup>67</sup> While it is unlikely that a large number of people viewing *Contact* would believe it to be a work of non-fiction,<sup>68</sup> it is highly probable that people would believe the President either acted in or endorsed this film. It is also easy to envision how this technology could be used in more serious situations which would actually mislead or deceive the public.

Under the current state of the law regarding presidential speeches and images it seems that such technological irresponsibility is unchecked.<sup>69</sup> The current state of the law leaves the nation unprotected from mischievous filmmakers whose intentions may be innocuous and those with more dangerous ends.

#### IV. COPYRIGHT LAW FAILS TO PREVENT USE OF THE PRESIDENT’S SPEECH AND THE VIDEO CLIPS OF HIS IMAGE IN *CONTACT*

The exclusive right of authors to publish their work for a limited time period is the cornerstone of copyright law.<sup>70</sup> Copyright protection extends to speeches if they are fixed in a tangible medium of expression.<sup>71</sup> The Copy-

64. See CANTRIL, *supra* note 58, at 70–71.

65. *Id.* at 52.

66. Bennet, *supra* note 52 (interviewing Marvin Kalb, director of the Shorenstein Center on the Press, Politics and Public Policy at Harvard University).

67. See generally Kinney Littlefield, *News Stars Blur the Line: News or Show Biz?*, ORANGE COUNTY REG., July 18, 1997 (Show), at 1 (implying that a CBS news anchor’s role in the film *Contact* “might confuse average folks about the relationship of entertainment to news”).

68. See discussion *supra* Part V.A.3. (discussing parody).

69. One commentator notes that “in less playful hands the use of the presidential image and voice, deliberately misused for malicious purpose, could kick off a political or diplomatic crisis.” See Kalb, *supra* note 11.

70. Public Affairs Assoc. v. Rickover, 284 F.2d 262, 267 (D.C. Cir. 1960).

71. 17 U.S.C. § 101 (1996). This requirement is easily met if an author of a speech writes down the work prior to its delivery. *Id.*

right Act of 1976 uses the phrase "original works of authorship,"<sup>72</sup> instead of limiting protection solely to written works. Such language broadens the scope of protectable works outside the realm of a printed form.<sup>73</sup> In passing the Copyright Act of 1976, Congress made its intent clear:

it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'<sup>74</sup>

Thus, the value of original authorship remains unabridged whether the work is presented in written, oral, or visual form.<sup>75</sup>

#### A. Governmental Works Exception

Although Title 17 of the United States Code<sup>76</sup> offers numerous copyright protections, there is one notable exception. Works produced for the United States Government by its employees are generally not subject to copyright protections.<sup>77</sup> A governmental work is defined as "a work prepared by an office or employee of the United States Government as part of that person's official duties."<sup>78</sup> Such publications include "the Presidents' messages . . . the Congressional Record, departmental pamphlets, maps, regulations, and judicial decisions . . ." <sup>79</sup> Notwithstanding this exception, government employees are entitled to copyright protection for any works they produce outside the scope of their employment duties.<sup>80</sup>

72. *Id.*

73. The language of the current amended statute was broadened from the previous statute in order to avoid inequitable distinctions. See generally 17 U.S.C. § 102 (1996); *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908) (stating the medium in which the work was fixed determined its copyrightability).

74. H.R. REP. NO. 94-1476, (1976), reprinted in 1976 U.S.C.C.A.N. 5659.

75. See *Rickover*, 284 F.2d at 273 (D.C. Cir. 1960) (stating that "[s]peeches . . . are unique among literary products.").

76. Title 17 constitutes federal copyright law. 17 U.S.C. (1996).

77. 17 U.S.C. § 105 (1996). "Copyright protection under this title is not available for any work of the United States Government . . ." *Id.*; see H.R. REP. NO. 94-1476 (stating that the intended effect of section 105 is to place all works of the United States Government, published or unpublished, in the public domain).

78. 17 U.S.C. § 101 (1996).

79. *Rickover*, 284 F.2d at 268 (emphasis added).

80. See *id.* In *Rickover*, the work in question was afforded copyright protection despite the Plaintiff's government employment. See also *United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958) (holding a private journal was found not to be kept in the course of a govern-

President Clinton's remarks regarding a meteorite from Mars, or any other official speeches he makes, are part of his presidential duties. Thus, these speeches fall under the "uncopyrightable" governmental works provision of section 105 and enter the public domain, which gives "writings, documents, or publications that are not protected by copyrights"<sup>81</sup> public ownership status. The public domain represents works the public may freely use without obtaining permission from the authors.<sup>82</sup> Works in the public domain include works categorically excluded from copyright protection and works with expired copyright protection.<sup>83</sup> The public domain is an essential tool in a democracy where the people's knowledge and political influence depend on broad discussion of governmental matters.<sup>84</sup> It is in the public's interest to have free access to public information.<sup>85</sup>

### B. Video Footage of President Clinton Used in *Contact*

The video footage of President Clinton used in *Contact*, to the extent that it constitutes an original work, is subject to copyright protection.<sup>86</sup> While President Clinton's speeches used in *Contact* would not be afforded copyright protection, it is likely that there is a copyright in the video footage. As such, there are several plausible explanations for the use of the video footage at issue.

The most obvious explanation is that the video footage used in *Contact* may have been licensed or obtained from CNN. It is not likely that CNN would bring suit against *Contact* producers because of common ownership. *Contact* was produced by Warner Brothers which is a subsidiary of Time Warner.<sup>87</sup> Time Warner, in addition to owning Warner Brothers, also owns CNN.<sup>88</sup>

Even if the footage was not shot by CNN, but by another news organization or individual, the producers of *Contact* could have easily contracted for a license to use the video footage in *Contact*. Alternatively, the video footage may be considered a fair use. The fair use doctrine allows a third

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ment employee's duties).

81. BLACK'S LAW DICTIONARY 1229 (6th ed. 1990).

82. Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y USA 137 (1993).

83. *Id.* at 151.

84. *Rickover*, 284 F.2d at 268 (D.C. Cir. 1960).

85. Samuels, *supra* note 82, at 182.

86. See *Feist Publications, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340 (1990). In *Feist*, the Supreme Court declared that originality, the constitutional requirement for constitutional protection, exists in independent creations that reflect a modest level of creativity. *Id.*

87. See *Kalb*, *supra* note 11.

88. See *id.*

party to use to use the copyrighted material in a reasonable manner without the consent of the copyright owner.<sup>89</sup>

Regardless of whether the video footage of President Clinton used in *Contact* is protected by copyright law, it is certain that the speech is not. As such, other avenues of protection against misuses of the President's speech and image must be explored.<sup>90</sup>

#### V. ALTERNATIVE METHODS TO PREVENT UNAUTHORIZED USES OF THE PRESIDENT'S SPEECH AND IMAGE – THE RIGHTS OF PUBLICITY AND PRIVACY

In simplistic terms, the right of privacy is an individual's right to be left alone.<sup>91</sup> Although privacy rights are not explicitly mentioned in the United States Constitution, such rights have been found to arise from the concept of personal liberty found in the Bill of Rights.<sup>92</sup> The United States Supreme Court has recognized two separate interests that may establish an invasion of privacy claim.<sup>93</sup> The first interest is an individual's right to avoid disclosure of personal matters.<sup>94</sup> Second, individuals have a right to autonomy in making various important decisions.<sup>95</sup>

The history of litigation involving general invasion of privacy causes of action has led to the classification of four distinct torts: intrusion, public disclosure of private facts, false light, and appropriation.<sup>96</sup> The tort of appropriation focuses on the proprietary interests of protecting against misappropriation of one's name or likeness for commercial value.<sup>97</sup> If a private person's name or likeness is misappropriated to advertise a product, that

89. See HORACE G. BALL, *LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944). Four factors are evaluated to determine if a use is a "fair use." 17 U.S.C. §107 (1996). These factors include the "purpose and character of the use," "the nature of the copyrighted work," "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," and "the effect of the use upon the potential market or value of the copyrighted work." *Id.*

90. See *infra* Parts V.-VI.

91. Hon. John L. Breeden, Jr. & Douglas M. Zayicek, *False Light Invasion of Privacy, a New Tort in Town?*, 9 S.C. LAW. 39 (1997); see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

92. See *Griswold v. Conn.*, 381 U.S. 479, 484 (1965) (stating that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy.") (citations omitted).

93. Breeden, *supra* note 91.

94. *Id.*

95. *Id.*; see generally *Griswold*, 381 U.S. at 485-86 (1965) (holding that an individual has the right to use contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a woman's right to an abortion within certain time constraints).

96. William L. Prosser, *Privacy*, 4 CAL. L. REV. 383, 389 (1960).

97. Prosser, *supra* note 96, at 406.

person may recover for such an invasion of private life under appropriation.<sup>98</sup>

The right of publicity stems from the tort of appropriation.<sup>99</sup> Because public figures cannot persuasively argue that their privacy is invaded when their name and likeness is appropriated,<sup>100</sup> the right of publicity emerged to protect their commercial interests in the appropriation of their persona.<sup>101</sup> The purpose of the right of privacy is to prevent injury to feelings while the right of publicity seeks to avoid commercial harm.<sup>102</sup> This Comment suggests that either the right of publicity or false light invasion of privacy are applicable causes of action for the type of privacy invasion experienced by the President in *Contact*.

### A. Right of Publicity

A right of publicity claim arises when an individual's name or picture has been appropriated by another for his own financial benefit.<sup>103</sup> This tort recognizes an individual's right to own, protect, and profit from the commercial value of their own name or likeness.<sup>104</sup> In essence, the publicity value that public figures have in their name, face and speech is a form of property.<sup>105</sup>

#### 1. The Right of Publicity for Political Figures

Political figures, like entertainers, are public figures and are entitled to the right of publicity as a property right.<sup>106</sup> Similar to entertainers, political figures have usually invested considerable time, money and effort in establishing their public image.<sup>107</sup> Political figures have created publicity value in their names and images by their own labors in a very competitive field.<sup>108</sup>

98. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

99. *See Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 Fd. 866, 868 (2nd Cir. 1953), *cert. denied*, 346 U.S. 816 (1953).

100. Eileen R. Rielly, *The Right of Publicity of Political Figures: Martin Luther King, Jr., Center for Social Change v. American Heritage Prods.*, 46 U. PITT. L. REV. 1161, 1165 (1985). Those who actively cultivate a public image, including celebrities and other public figures cannot claim a privacy right to be left alone. *Id.* at 1164-71.

101. *Haelan*, 202 Fd. at 868.

102. *See Rielly, supra* note 100, at 1164.

103. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-50 (1995).

104. *Id.*

105. *See Rielly, supra* note 100, at 1167.

106. *Id.* at 1163; *see Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods.*, 694 F.2d 674 (11th Cir. 1983) (holding that a political figure has a right of publicity).

107. Rielly, *supra* note 100, at 1170.

108. *See id.*

The right of publicity for a political figure was considered for the first time in *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Products*.<sup>109</sup> In that case the plaintiffs sought an injunction to prevent the defendant from marketing plastic busts of Rev. Dr. Martin Luther King, Jr. as funeral accessories.<sup>110</sup> The Court of Appeals for the Eleventh Circuit certified, *inter alia*, the following issues to the Supreme Court of Georgia: 1) whether the right of publicity was distinct from the right of privacy, 2) whether the right of publicity survives the death of its owner and 3) whether an owner must commercially exploit his right of publicity in order for that right to survive him.<sup>111</sup>

The Georgia Supreme Court held that the right of publicity was distinct from the right of privacy, that this right continues after death and that commercial exploitation is not necessary in order for this right to descend to the decedent's heirs.<sup>112</sup> The importance of the holding in *King* for the purpose of this Comment lies in the determination that political figures are entitled to a right of publicity.

## 2. The Right of Publicity in the Context of Films

In most states, the right of publicity only applies to uses of an image associated with a commercial product.<sup>113</sup> Thus, use of an image in a film often would fall outside the ambit of a right of publicity claim because it would not be considered a commercial product. In these states, a film would constitute an expressive work and, thus, be immune from right of publicity liability because of the First Amendment protection afforded to expressive works.<sup>114</sup>

Some states, however, have a broader right of publicity statute that may provide a claim for use of an image in a film. Under New York's "appropriation of privacy" statute,<sup>115</sup> for example, courts have distinguished between non-fictional news and fictionalized entertainment.<sup>116</sup> Accordingly, while "commercial damage [is] not actionable for use of identity in 'news', [it is] . . . actionable for use in 'entertainment,' even entertainment based on 'news.'"<sup>117</sup>

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109. 694 F.2d 674 (11th Cir. 1983).

110. *Id.* at 675.

111. *Id.* at 674.

112. *Id.* at 683.

113. See, e.g., CAL. CIV. CODE § 3344 (West 1997).

114. See J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 8.8 (1998).

115. *Id.* at § 8.9[C].

116. *Id.*

117. *Id.*

If a film is not specifically excluded from a state's right of publicity statute or under that state's common law, the next issue is whether the use of personal identity in a fictional work gives rise to such a cause of action.<sup>118</sup> Perhaps, the only rationale for putting a real person into a fictitious story that is unrelated to that person is for commercial benefit.<sup>119</sup> Using the identity of a real person attracts attention and enhances the value of what is essentially a product: the fictional work.<sup>120</sup> This is similar to using a public figure to attract attention to a tangible product, such as a computer or a car.<sup>121</sup>

This argument posits that the creative efforts of the author should determine whether the work is deserving of First Amendment protection. A use deserving First Amendment protection would be one where the media portrayal provides pertinent information in the public's decision making process.<sup>122</sup> However, if a "work merely capitalizes on the attributes of another, without contributing anything substantially unique or new, [then it should] be subject to liability."<sup>123</sup> The latter type of work should not be afforded First Amendment protection because they do not add to the cultural experience of the consumers of the work.<sup>124</sup> Applying this argument to use of President Clinton's speech and image in *Contact*, President Clinton should be afforded a right of publicity cause of action because his presence in *Contact* was not necessary and was unrelated to the plot; his purpose as a character in the film is only to attract attention to the film.

### 3. A Right of Publicity Claim for President Clinton Based on the Use of His Persona in *Contact*

In *Brown v. Twentieth Century Fox Corp.*,<sup>125</sup> the plaintiff sued for the unauthorized use of his image in the film *The Commitments* on right of publicity grounds.<sup>126</sup> In the film, actors viewed a twenty-seven second clip of James Brown's appearance on a television show from 1965.<sup>127</sup> The plaintiff

118. *Id.* at § 8.9[A].

119. *Id.* at § 8.9[B].

120. *See* MCCARTHY, *supra* note 114, § 8.9[B].

121. *Id.*

122. *Id.*

123. Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1604-05 (1979).

124. *Id.*

125. 799 F. Supp. 166 (D.C. Cir. 1992), *aff'd*, 15 F.3d 1159 (D.C. Cir. 1994).

126. *Id.* at 168 (alleging violations of the Copyright Act and the Lanham Act, as well as other common law causes of action).

127. *Id.*



asserted that viewers would believe that he endorsed the film, thus violating his right of publicity.<sup>128</sup> The court held that using the clip of James Brown did not violate Brown's publicity rights because there was little chance that viewers would believe that he was endorsing the film.<sup>129</sup>

The circumstances in *Contact* are distinguished from *Brown* because President Clinton's image and speech were integrated into *Contact*. The actors in *Contact* were not merely watching him on television, instead, the President appeared as an actual cast member. The likelihood that viewers would believe that President Clinton endorsed *Contact* is much higher than the likelihood that viewers would believe that Brown endorsed *The Commitments*.

In *Marcinkus v. NAL Publishing, Inc.*,<sup>130</sup> Paul Marcinkus, a Vatican official, sued the defendants on the grounds that they commercially exploited his personality in a work of fiction.<sup>131</sup> This case involved a fictitious novel where the plaintiff was depicted as one of the lead characters who assassinated a Soviet official.<sup>132</sup> The issue in *Marcinkus* was whether a fictional work that uses the actual name and office of the plaintiff would violate New York's right of privacy statute which encompasses the right of publicity in that state.<sup>133</sup> In finding that the plaintiff's complaint was sufficient to support a cause of action the court stated, ". . . the placing of the plaintiff's name in a prominent place and the quoting of statements from the book uttered by the character with the plaintiff's name and office raises the question to whether or not the defendants commercially appropriated his name."<sup>134</sup>

If President Clinton were to posit a right of publicity claim he could legitimately rely on the findings in *Marcinkus*. The appropriation of President Clinton's persona in *Contact* is similar to the commercial appropriation that occurred in *Marcinkus* because President Clinton's speech, image and name

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128. *Id.* at 172.

129. *Id.* at 173.

130. 522 N.Y.S. 2d 1009 (Sup. Ct. 1987).

131. *Id.*

132. *Id.* at 1010.

133. *Id.* at 1009. Section 50 of the New York Civil Rights Law holds that "a person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person is . . . guilty of a misdemeanor." N.Y. CIV. RIGHTS LAW § 50 (McKinney 1998). Section 50 is New York's right of privacy statute which was held to encompass the right of publicity in *Stephano v. News Group Pubs., Inc.* *Stephano v. News Group Pubs., Inc.*, 474 N.E.2d 580, 584 (Sup. Ct. 1984).

134. *Marcinkus*, 522 N.Y.S. 2d at 1014. In *Marcinkus*, the plaintiffs requested an injunction instead of damages. *Id.* The injunction was ultimately denied because of the great harm that the publisher would have had to bear and because the publisher agreed not to use the plaintiff in any further advertisements. *Id.* at 1014-15.

were used in a prominent place throughout the film and were taken out of context. In *Marcinkus*, the plaintiff argued that the incorporation of his name and office was unnecessary to the plot and that the same novel was published in a different region using a different name.<sup>135</sup> Likewise, in *Contact* there is little rationale for using President Clinton rather than obtaining an actor to play the president. *Contact*, unlike *Forrest Gump*, was not a historically based film and there was no need to use the actual president.<sup>136</sup> In fact, in the novel on which *Contact* was based, the president was a woman.<sup>137</sup> Thus, it appears that use of President Clinton's image in a film that is unrelated to him constitutes a commercial use and should give rise to a right of publicity claim.<sup>138</sup>

#### 4. The "Newsworthy" Exception Does Not Apply to the Use of President Clinton's Persona in Contact

Actions of political figures often fall under the umbrella of "newsworthy."<sup>139</sup> The First Amendment protects newsworthy information in order to safeguard our nation's commitment to lively debate on political issues.<sup>140</sup> These constitutional protections, however, are not unlimited. Commercial misappropriation is not considered to be privileged by the First Amendment.<sup>141</sup> First Amendment interests are minimal in cases of economic misappropriation "because advertisers are not interested in making any statement other than 'buy me.'"<sup>142</sup> Furthermore, commercial misappropriations are denied constitutional protection because it is fraudulent to give the public a false implication of a business relationship between a public figure and some media fixture.<sup>143</sup> Because the makers of *Contact* committed this type of fraud, the sound bites used in the film would not fall under the newsworthy exception.

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135. *Id.* at 1010.

136. Joseph J. Beard, *Will The Reel, Er, Real Bill Clinton Please Stand Up*, 15 ENT. & SPORTS LAW. 3 (1998).

137. *Id.*

138. See MCCARTHY, *supra* note 114, at § 8.9[B].

139. See Rielly, *supra* note 100, at 1172.

140. *See id.*

141. *See id.* at 1163; see generally Albert F. Smith & Lionel S. Sobel, *The Mickey Mouse Watch Goes to Washington: Would the Law Stop the Clock?*, 62 TRADEMARK REP. 334, 346 (1972). "We are dealing with nothing more than commercial interests and economic gain as the purpose of and motive for the appropriation, and it should make no difference whether the name or likeness appropriated is that of a ballplayer, a Vice President or even a President." *Id.*

142. See Rielly, *supra* note 100, at 1163.

143. *Id.* at 1173.

### B. False Light Invasion of Privacy

The tort of false light invasion of privacy may be established "when something factually untrue has been communicated about an individual, or when the communication of true information carries a false implication."<sup>144</sup> Generally, to establish this tort there are two minimal requirements to satisfy. First, the falsehood must be substantially material.<sup>145</sup> Second, a significant portion of the population must be exposed to the misinformation.<sup>146</sup> Because the latter requirement usually entails widespread publicity,<sup>147</sup> false light invasion of privacy is primarily a legal restriction imposed upon the use of speech by the mass media.<sup>148</sup>

The current status of this newly established tort is still in a state of evolution. While some courts have permitted false light actions to proceed for innocuous or even complimentary misinformation,<sup>149</sup> other courts have required the falsehood to be defamatory and damaging to one's personal reputation.<sup>150</sup> Another area of disagreement among the courts is whether the false information must pertain to an intimate area of the plaintiff's private life.<sup>151</sup> Finally, the courts have disagreed as to whether the newsworthiness of the plaintiff's status should influence the viability of the action.<sup>152</sup>

144. Diane L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 370 (1989).

145. *Id.*

146. *Id.*; see generally *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967); see also RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977) (stating that even deliberate untruths are not actionable if minor or "unimportant").

147. See Zimmerman, *supra* note 144, at 371.

148. Nevertheless, "a non-media defendant who communicates misinformation about the plaintiff to a sufficiently large group of people potentially could be held to satisfy the widespread publicity requirement." *Id.* at 371 n.40.

149. See *Time*, 385 U.S. at 387 (finding that the plaintiff retained a cause of action even though there was no negative connotation in the way that he was portrayed).

150. See *Bernstein v. Nat'l Broad. Corp.*, 129 F. Supp. 817 (D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir.), *cert. denied*, 352 U.S. 945 (1956) (holding the plaintiff to a reasonable person standard regarding whether he should have been offended). *But see Dartley*, *supra* note 56, at 207 (explaining the key difference between defamation and false light is that defamation requires proof of harm to a plaintiff's reputation whereas false light does not).

151. Compare *Goldman v. Time, Inc.*, 336 F. Supp. 133, 138 (N.D.Cal. 1971) (holding that intrusion into 'private affairs' is a necessary factor in a false light claim) with RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977) (stating "the form of invasion of privacy covered by the rule stated in this Section does not depend upon making public any facts concerning the private life of the individual. . . . [What] is essential to the rule stated in this Section [is] that the matter published concerning the plaintiff is not true.").

152. See Zimmerman, *supra* note 144, at 373.

## 1. Supreme Court Treatment of False Light Claims

During the past thirty years, the United States Supreme Court has examined false light actions in the following cases: *Time, Inc. v. Hill*<sup>153</sup> and *Cantrell v. Forest City Publ'g Co.*<sup>154</sup> The plaintiffs in *Time* were a family who had been held captive as hostages in their own home.<sup>155</sup> The dispute arose when *Life* magazine published an article concerning the play, "The Desperate Hours," accompanied by illustrative photographs of the actors' performances in the home where the plaintiffs had been held captive.<sup>156</sup> While the play itself was a work of fiction, the plaintiffs real-life experience was one of the events upon which the story was based.<sup>157</sup> Although the plaintiffs emerged from their real life hostage situation unharmed,<sup>158</sup> the play depicted the family as subjected to both verbal and physical abuse.<sup>159</sup> The play also portrayed the family as heroic and courageous in confronting their captors.<sup>160</sup> The depiction of the plaintiffs was a positive or, at least, not a derogatory presentation. Despite this complimentary portrayal, the Court found in favor of the plaintiffs finding a viable false light claim when a falsehood is either intentional or is misrepresented recklessly.<sup>161</sup>

In *Cantrell*, the viability of non-derogatory false light claims was reaffirmed. The dispute revolved around a magazine article that discussed the impact on the lives of a victim's family after a bridge collapsed across the Ohio River.<sup>162</sup> The article referred to the emotions of the plaintiff, despite the fact that she was not present during the interview.<sup>163</sup> Relying on its previous analysis in *Time*,<sup>164</sup> the Court again found liability because the article about the plaintiff was "made with knowledge of falsity or reckless disregard of the truth."<sup>165</sup>

Notably, in both *Time* and *Cantrell*, the newsworthiness of the respective events did not vitiate the false light claim. This finding lies in contrast

153. 385 U.S. 374 (1967).

154. 419 U.S. 245 (1974).

155. *Time*, 385 U.S. at 377.

156. *Id.* at 377-78.

157. The article was entitled "True Crime Inspires Tense Play: The Ordeal of a Family Trapped by Convicts Gives Broadway a New Thriller, *The Desperate Hours*." *Id.* at 377.

158. *Id.* at 378.

159. *Id.*

160. The play portrayed the daughter as "daring," "biting the hand of a convict to make him drop a gun," and the father as bravely trying to save his family. *Id.* at 377-78.

161. *Time*, 385 U.S. at 390.

162. *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 247 (1974).

163. *See id.*

164. *See id.* at 249.

165. *See id.* at 250.

to the right of publicity tort which allows the newsworthiness of the subject matter to be a complete defense.<sup>166</sup> If the information is falsely presented either intentionally or recklessly, the false light cause of action remains viable notwithstanding the subject matter.

## 2. Applying False Light Tort to *Contact*

The common law progression of false light seems to have created a quasi-proprietary interest in one's own image which would allow individuals to have at least "minimal control over the manner in which [they are portrayed] to the world."<sup>167</sup> Thus, despite President Clinton's status as a figure in the public arena, a false light action exists if he is portrayed with either intentional dishonesty or reckless disregard for the truth.<sup>168</sup> Furthermore, the portrayal of President Clinton in *Contact* need not be characterized as derogatory in order for the false light claim to survive.<sup>169</sup>

Given the preceding discussion of false light, the tort suggests a very plausible solution to combat situations like the one presented in *Contact*. Extending false light to protect against the misappropriation of the President's image would actually serve to benefit the public, protecting them from false and misleading images by deterring future misappropriation.<sup>170</sup>

A counter argument to a valid false light claim is that it potentially encroaches on First Amendment rights.<sup>171</sup> President Clinton's speeches are in the public domain, and, as Zemeckis believed, he had every right to make use of them.<sup>172</sup> In balancing these competing interests, courts would need to weigh the prevention of injury to the general public with the protection of free speech.<sup>173</sup> Arguably, false images "should not be unqualifiedly protected by the First Amendment, but balanced against the competing interest of society in not having its world misrepresented by an overzealous media."<sup>174</sup> Thus, First Amendment encroachment is justified by the undeniable injury inflicted on society by untruths regarding the sitting president and,

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166. Zimmerman, *supra* note 144, at 373-374.

167. See Dartley, *supra* note 56, at 209.

168. See generally *id.*

169. In *Time*, Justice Brennan made the following comment in a footnote "the published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery." *Time*, 385 U.S. at 385 n.9 (quoting *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 (N.Y. 1966)).

170. False light protection not only serves individuals but is also beneficial to the public, insulating them from misleading statements. See Dartley, *supra* note 56, at 212.

171. See *id.* at 214.

172. See Dawes, *supra* note 13.

173. See *id.*

174. See Dartley, *supra* note 56, at 215.

potentially, the national security of the country.<sup>175</sup> The Supreme Court in *Time* stated that the “constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function.”<sup>176</sup> Thus, the producers of *Contact* would have difficulty defending a false light claim here by that arguing that the First Amendment protects their film.

## VI. POTENTIAL SOLUTIONS TO PREVENT UNAUTHORIZED USES OF THE PRESIDENT’S SPEECH AND IMAGE

This Comment has shown that a sitting president currently has two legal causes of action against a misappropriation of his image: right of publicity and false light invasion of privacy. A decision of a sitting president to bring a civil suit against a Hollywood film producer, however, is likely to be highly politicized. A president must consider his reputation and public image at all times. Because of these political concerns, it is necessary to advocate further legislative safeguards that would stymie misappropriations of a sitting president’s image and words.

### A. *The Use of Disclaimers*

One approach would be to legislatively mandate that filmmakers who wish to follow in Zemeckis’s footsteps print a noticeable disclaimer in the credits both preceding and following the film. *Contact* could have easily displayed a short screen message explaining that President Clinton’s “role” in the film was the result of technology. With a simple message, the possibility of potential misrepresentations could have been reduced. Thus, with such a disclaimer viewers would not have thought that President Clinton had participated in or endorsed the use of his image.

One author has suggested that a conspicuous label ought to be used for digitally altered photographs.<sup>177</sup> This idea could easily, and inexpensively, be extended to moving images. Advantages of this requirement are twofold. It addresses the national security issues as well as philosophical issues of misrepresenting a president. More importantly, it would “bring a renewed sense of trust and belief in the [moving] image.”<sup>178</sup>

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175. See Zimmerman, *supra* note 144, at 370; see generally Goodrich v. Waterbury Republican-Am., Inc. 448 A.2d 1317 (Conn. 1982) (holding that individuals have an interest in not being misrepresented).

176. See *Time*, 385 U.S. at 389.

177. See Dartley, *supra* note 56, at 215.

178. *Id.*; see also Meese v. Keene, 481 U.S. 465, 480–81 n.15 (1987) (upholding a requirement with computer altered photographs stating that “[r]esting on the fundamental constitutional

### B. Criminalizing "Dangerous" Misappropriations

While the use of a disclaimer might potentially mitigate the harm of presidential misappropriations, its effect could be tempered if the audience does not read it. Another alternative that would supplement the protection afforded by a disclaimer, would be to criminalize misappropriations falling under a legal classification of "dangerous."<sup>179</sup> One possibility would be to advocate an "Accurate Presentation Law." This kind of law would criminalize intentional or reckless misappropriations of current politicians. The benefit of criminalizing conduct like this is that the state would be the plaintiff rather than the political figure, who may not bring suit due to conflicting interests.

## VIII. CONCLUSION

The type of technology used in films like *Contact* will only become more accessible with time. Whether one sees the danger in this particular instance is less important than seeing the potential danger of the type of technology used in the film.<sup>180</sup> While this new technology can be used for innocuous entertainment, it can also be used for dangerous pursuits.<sup>181</sup> Further, use of the President's moving image in any film implies consent. Essentially, a fraud has been committed against the public when filmmakers lift speech and place it in their film without receiving permission or acknowledging the falsity of their actions.<sup>182</sup> Beyond this, and more importantly, it is the public who potentially will bear the ultimate harm from situations that this technology can produce. In line with protecting the pub-

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principle that our people, adequately informed, may be trusted to distinguish between the true and the false. . . . [s]uch legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment" (quoting Justice Black's dissent in *Viereck v. United States*, 318 U.S. 236, 251 (1943)).

179. For instance, the hypothetical posed earlier—if someone portrayed President Clinton on a comedy channel saying derogatory remarks about Boris Yeltsin and the Russians failed to see the joke—it could be classified as "dangerous" because national security is at stake. See *supra* Part IV.

180. See Dawes, *supra* note 13. "[T]his is a science fiction movie so I think this is a fairly innocent context, but it does have significant implications. Where does it stop?" *Id.* (citing interview with Professor Vivian Sobchack).

181. See *supra* Part IV A.

182. "[A] cynical public is going to assume the [P]resident cooperated with the makers of the movie and profited handsomely from it." See *Seeing Is No Longer Believing*, *supra* note 44.

lic, mandatory use of disclaimers and possibly criminalizing presidential misappropriations are both plausible solutions.

*Lauri Deyhimi\**

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