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Hologram Images and the Entertainment Industry: New Legal Territory?

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HOLOGRAM IMAGES AND THE ENTERTAINMENT INDUSTRY:
NEW LEGAL TERRITORY?

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ABSTRACT

Modern technology allows for the holographic reproduction of a dead artist's likeness, with the ability to perform past classic works or new original artistic works. The Coachella Valley Music and Arts Festival performance by the "holographic" Tupac Shakur in April 2012 dazzled an excited crowd and made the idea of bringing back deceased musical celebrities or other public personalities a reality. The use of such holographic performances is in its infancy, but the potential for possible intellectual property infringement is real and concerns the areas of copyright, trademark, and—most importantly—the right of publicity, which protects a celebrity's name, likeness, voice and mannerisms. This new technology also creates the possibility of re-creating a past celebrity for nefarious purposes, but it is unclear what legal protections are available to the decedent's estate to challenge such potentially damaging uses. The right of publicity is a matter of state law, is granted in thirty-one states, and is extended post-mortem in only twenty of those states. Therefore, understanding what legal protections are available requires a complex examination of all relevant jurisdictions' intellectual property laws. Celebrities, public figures, and estate planners should be mindful of these new

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technologies, establish domicile in states with robust rights of publicity, and draft wills accordingly to ensure greatest posthumous protection.

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INTRODUCTION

In April 2012, the deceased rap artist Tupac Shakur returned from the grave and performed for an enthusiastic crowd at the Coachella Valley Music and Arts Festival in California.¹ Scientists

¹ Brandon Marsh, *Tupac Hologram Rocks Coachella and IP Laws*, AM.

did not actually reanimate Tupac's body to achieve this amazing feat; instead, they created a technologically elaborate holographic reproduction of his image, voice, and likeness.² As technology to create such holographic reproductions advances, more and more dead celebrities are likely to be brought back to the main stage to perform their classic hits as well as completely new musical compositions.³ Such holographic images raise various copyright and trademark issues, but the main property right at stake is the right of publicity.⁴ Because the right of publicity is only granted in thirty-one states, and the postmortem right is only recognized in twenty of those states, the protections against infringement available to the deceased artist's estate will vary depending primarily upon the state in which the artist was domiciled at the time of death, as well as the choice of law rules of the jurisdiction in which the suit is brought. This Article will first examine the new technology that allows these reproduced holographic performances to be possible. Second, this Article will examine the three main levels of intellectual property protection across the United States, varying from the lowest amount of protection to the highest. Lastly, this Article will investigate the steps that a living artist's or a deceased artist's estate can take to plan for the most robust protection.

I. NEW TECHNOLOGY ALLOWS FOR THE DIGITAL RECREATION OF DECEASED MUSICAL ARTISTS

Although the virtual Tupac Shakur at Coachella was widely called a hologram, that term was a misnomer because holograms

UNIV. WASH. COLL. OF LAW: INTELLECTUAL PROP. BRIEF (Apr. 19, 2012, 12:08 PM), <http://www.ipbrief.net/2012/04/19/tupac-hologram-rocks-coachella-and-ip-laws>.

² Jana Moser, *Tupac Lives! What Hologram Authors Should Know About Intellectual Property Law*, BUSINESS LAW TODAY (Sept. 21, 2012), <http://apps.americanbar.org/buslaw/blt/content/2012/09/article-02-moser.shtml>.

³ *Id.*

⁴ Jenny Montgomery, *'Hologram' performance by Tupac creates legal questions for IP lawyers*, THE INDIANA LAWYER (May 9, 2012), <http://www.theindianalawyer.com/hologram--performance-by-tupac-creates-legal-questions-for-ip-lawyers/PARAMS/article/28758>.

are three-dimensional whereas Tupac's likeness was presented as a two-dimensional projection.⁵ The two-dimensional image was projected onto a stage set, using the patented Musion Eyeliner 3-D Holographic Projection System, which then created the illusion of a three-dimensional image.⁶ This projection technology is not new; rather, it is based on an old theater trick called "Pepper's Ghost," introduced in the 1860s.⁷ Nick Smith, president of AV Concepts, which helped create the digital rendering, captured the significance of this performance when he said, "You can take their likenesses and voice and . . . take people that haven't done concerts before or perform music they haven't sung and digitally recreate it."⁸

This new technology is growing in popularity because it allows anyone to recreate dead artists and program them to sing their old songs, a different artist's songs, or even completely new songs. While living artists have been digitally altering old classic tracks to sing duets with the deceased since the 1990s, this new technology allows the programmer to make the hologram sing completely new tracks. Dr. Dre, the main driving force behind the Coachella Tupac Shakur performance, said he would love to bring out other dead celebrities to perform with him, like Jimi Hendrix and Marvin Gaye.⁹ On April 25, 2012, the tenth anniversary of a crash that killed band mate Lisa "Left Eye" Lopes, the group TLC announced it was considering plans to tour with a virtual Lopes hologram.¹⁰ Marilyn Monroe's estate and Elvis Presley's estate have also shown interest in the holographic reproductions.¹¹

⁵ *Id.* While the Tupac reproduction does not exactly fit the technical definition of a hologram, this Article addresses this reproduction, and similar reproductions, as holograms because the legal significance is the same regardless of whether the finished product is two-dimensional or three-dimensional.

⁶ *Id.*

⁷ Moser, *supra* note 2.

⁸ Marsh, *supra* note 1.

⁹ Danielle Mayoras & Andy Mayoras, *What Does Tupac's Hologram Mean For Other Celebrity Estates?*, FORBES (Apr. 23, 2012, 11:15 AM), <http://www.forbes.com/sites/trilandheirs/2012/04/23/what-does-tupacs-hologram-mean-for-other-celebrity-estates>.

¹⁰ Montgomery, *supra* note 4.

¹¹ Anthony McCartney, *Tupac Hologram: The Legal Issues It And Other Celeb Likenesses Present*, THE HUFFINGTON POST (Aug. 21, 2012, 8:58 AM),

In addition to holographic reproductions of deceased musicians and singers, this technology could recreate other famous celebrities in the future for a variety of nonmusical reasons. The Port Authority of New York and New Jersey announced in May 2012 that it purchased three holograms to answer the most frequently asked questions at LaGuardia, Newark, and John F. Kennedy airports.¹² While these airport holograms may not be reanimations of deceased celebrities at the moment, they represent the wide possibilities for this new technology in the future.

II. THE RIGHT OF PUBLICITY IS THE MAIN INTELLECTUAL PROPERTY PROTECTION AGAINST INFRINGEMENT

Holographic recreations of deceased celebrities raise three main intellectual property issues: copyright, trademark, and—most importantly—the right of publicity.¹³ Copyright and trademark protections offer the celebrity's estate some avenues for redress to combat infringement, but the right of publicity provides the most robust protection because it protects a celebrity's name, likeness, voice, and mannerisms. Thus, this Article will primarily analyze the right of publicity issues. Although the right of publicity provides the most protection for a deceased celebrity's likeness against unauthorized use, it is a matter of state law and varies across the United States.

In the United States, thirty-one states recognize a right of publicity in some form, and the remaining nineteen states have not yet considered the issue.¹⁴ The right of publicity is a matter of state statutory and common law, and there is a broad range of protections among the laws of the different states.¹⁵ In recent years, twenty states have extended the protection afforded to personality

http://www.huffingtonpost.com/2012/08/21/tupac-hologram-legal-issues_n_1817418.html.

¹² Moser, *supra* note 2.

¹³ Montgomery, *supra* note 4.

¹⁴ Jonathan D. Reichman, Kenyon & Kenyon LLP, *Right of Publicity in 17 Jurisdictions Worldwide*, GETTING THE DEAL THROUGH 1, 78 (2012), <http://www.kenyon.com/~media/Files/Publication%20PDFs/2011/ROP2012%20Kenyon%20%20Kenyon.ashx>.

¹⁵ *Id.* at 79.

rights beyond the celebrity's death, with some states providing only limited protection and others continuing the protection for up to 100 years after death.¹⁶ This Article will examine the various levels of protection through three main categories: (1) states with no right of publicity protection; (2) states that recognize the right of publicity during one's lifetime; and (3) states that recognize the right of publicity during one's lifetime and postmortem.

A. States without a Recognized Right of Publicity Provide Moderate Postmortem Protection through Existing Copyright and Trademark Laws

In states that do not recognize rights of publicity, the deceased celebrity's estate will likely rely on copyright, trademark, and the right of privacy to guard against unauthorized holographic recreations. The following nineteen states do not recognize the right of publicity: Alaska, Arkansas, Colorado, Delaware, Idaho, Iowa, Kansas, Maine, Maryland, Mississippi, Montana, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Vermont, and Wyoming.¹⁷

Copyright laws provide a range of protections for a celebrity and a deceased celebrity's estate against unwanted holographic reproductions. These laws provide copyright owners with an exclusive right over original works of authorship, including literary, dramatic, musical, and artistic works.¹⁸ This exclusive control gives the owner the ability to determine who can use protected audio recordings, videos, and images. If a holographic performance is an exact reproduction of an existing recorded performance, or is a combination of different recorded performances, the various copyright owners of each performance would have a case of copyright infringement against the hologram author. However, if the holographic performance by a deceased celebrity is an entirely original work, created with entirely new content, the copyright holders will have little ground to establish a

¹⁶ *Id.* at 83–84.

¹⁷ *Id.* at 84.

¹⁸ Moser, *supra* note 2.

valid claim of infringement.¹⁹

Trademark laws provide additional protection against unwanted holographic reproductions. Celebrities can own a trademark on their name, which protects themselves and their name from dilution. Dilution occurs when a third party uses a similar mark in a way that tarnishes or weakens the brand associated with the celebrity's name or likeness. As long as use of the mark continues, the trademark can last indefinitely. If someone creates an unauthorized hologram for a marketing purpose using a deceased celebrity or causes the consumer confusion as to the source of the production, then the trademark owner would have a claim of infringement against the hologram creator.²⁰

The common law right of privacy protects individuals against unreasonable intrusions upon their seclusion, another person's appropriation of their name or likeness, unreasonable publicity given to their private life, and publicity that unreasonably places them in a false light before the public.²¹ However, the right to privacy offers a weaker protection than the statutory right of publicity and does not normally extend postmortem.

B. States that Recognize the Right of Publicity during an Individual's Lifetime Offer Similar Postmortem Protection as States that Do Not Recognize Such a Right

In states that recognize the right of publicity for only living people, the deceased celebrity's estate will likely encounter challenges similar to those in states that do not recognize the right at all. A celebrity's image and likeness is protected during the celebrity's lifetime in these states, but such protection ends with his or her death. The following eleven states recognize the right of publicity only during an individual's lifetime: Alabama, Arizona, Hawaii, Massachusetts, Minnesota, Missouri, New Hampshire, New York, Rhode Island, West Virginia, and Wisconsin.²²

One of the greatest challenges facing the practitioner

¹⁹ Moser, *supra* note 2.

²⁰ Moser, *supra* note 2.

²¹ RESTATEMENT (SECOND) OF TORTS § 652A–E (1997).

²² Reichman, *supra* note 14, at 83–84.

addressing infringement based on the publicity rights of a living person is determining which state's substantive law applies. "The court may apply the law of its own state, or the law of the state where the alleged infringement occurred (if infringement occurred outside of the forum state), or the law of the rights owner's domicile (if different from the forum state and the 'infringement state')." ²³ A court's decision will depend upon the forum state's conflict of laws rules and a determination of which state has the most significant relationship to the lawsuit. ²⁴

Because New York is home to many living and deceased celebrities, the New York right of publicity statutes and case law will be briefly examined to illustrate the state of the law in this type of jurisdiction.

1. The Right of Publicity in New York

New York has codified the right of publicity in its "Right of Privacy" statutes. ²⁵ Sections 50 and 51 are the primary statutory provision for the right, and provide protection for a person's name, portrait, picture, and voice against unauthorized uses in advertising or other trade purposes. ²⁶ Commercialization of the identity is also not a prerequisite for an individual to possess a protectable right of publicity in New York. ²⁷

As mentioned above, New York does not recognize a postmortem right of publicity. The plain language of both sections 50 and 51 of the New York Civil Rights Act as well as case law interpreting those sections have made this clear. ²⁸ In 2010, a proposed bill would have extended right of publicity protection in New York to seventy years after death, but the legislature never enacted the bill and it is no longer pending. ²⁹

Under New York law, the right of publicity is a property right,

²³ Reichman, *supra* note 14, at 79.

²⁴ Reichman, *supra* note 14, at 79.

²⁵ N.Y. CIV. RIGHTS LAW §§ 50–52 (McKinney 2000).

²⁶ *Id.* §§ 50–51.

²⁷ Reichman, *supra* note 14, at 78.

²⁸ *Pirone v. MacMillan*, 894 F.2d 579, 585 (2d Cir. 1990).

²⁹ Reichman, *supra* note 14, at 80.

and as such, courts will sometimes apply New York “property choice-of-law rules to select the state whose law determines whether a plaintiff has a protectable right of publicity.”³⁰ New York courts will look to see where a celebrity was domiciled at death and apply the laws of that state.³¹

C. States that Recognize the Right of Publicity during an Individual’s Lifetime and Postmortem Provide the Most Robust Protection against Unauthorized Holographic Reproductions

Twenty states have extended the right of publicity past death, but the term of protection and additional requirements vary depending on the state.³² The twenty states that recognize this postmortem right are California, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Washington.³³ The main ways in which these states’ laws differ from each other in addressing the posthumous right of publicity are duration, retroactivity, protected aspects, registration requirements, commercialization requirements, continued use requirements, statutes of limitations, and available remedies.³⁴

While a state-by-state comparison in regards to the aforementioned factors would certainly be useful for the practitioner desiring a comprehensive national understanding, it is beyond the scope of this Article. Instead, this Article will focus on the right of publicity laws in California, since it is home to such a high number of celebrities in the United States.

1. The Right of Publicity in California

California protects the right of publicity under California

³⁰ *Groucho Marx Prods., Inc. v. Day & Night Co.*, 689 F.2d 317, 319 (2d Cir. 1982).

³¹ *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 281 (2d Cir. 1981).

³² Reichman, *supra* note 14, at 83–84.

³³ Reichman, *supra* note 14, at 83–84.

³⁴ Reichman, *supra* note 14, at 78–83.

common law as well as under California Civil Code sections 3344 for living persons³⁵ and 3344.1 for deceased persons.³⁶ Under California law, the right of publicity protects a person's name, voice, signature, photograph, or likeness up to seventy years after death.³⁷ In most states that recognize a postmortem right, it is necessary to determine if the postmortem right of publicity was recognized before the celebrity died. However, in 2008 the California legislature amended its statute to apply retroactively to Californians who passed away prior to January 1, 1985.³⁸ Thus, the heirs of any deceased person domiciled in California will have an enforceable publicity right regardless of the date of death, assuming all other requirements have been satisfied.

The holder of a deceased person's right of publicity must register the claim with California's Secretary of State, and the rights-holder cannot recover damages for any use that occurs before registration.³⁹ Registration is also required in Oklahoma, Texas, and Nevada for the owners of a postmortem right to fully exercise and enforce it.⁴⁰

While California does not require the commercialization of an individual's identity as a prerequisite to a protectable postmortem right of publicity, the deceased person's right of publicity must have had "commercial value at the time of his or her death, or because of his or her death."⁴¹ Similarly, Utah requires that the deceased individual's name or likeness have commercial value at the time of death for protection to exist.⁴² Tennessee will recognize the right indefinitely if the estate continually exploits it after an initial ten-year postmortem period, during which exploitation is not

³⁵ CAL. CIV. CODE § 3344 (West 2012).

³⁶ *Id.* § 3344.1.

³⁷ *Id.*

³⁸ *Id.* § 3344.1(b), (h); Ilene Farkas, *I See (Virtual) Dead People: Tupac Shakur and the Right of Publicity*, THE WRAP (Apr. 25, 2012, 1:36 PM), <http://www.thewrap.com/music/blog-post/i-see-virtual-dead-people-tupac-shakur-and-right-posthumous-publicity-37267>.

³⁹ CAL. CIV. CODE § 3344.1(f)(1) (West 2012).

⁴⁰ Reichman, *supra* note 14, at 79.

⁴¹ CAL. CIV. CODE § 3344.1(h) (West 2012).

⁴² Reichman, *supra* note 14, at 78.

required.⁴³

An exception in section 3344.1(a)(2) creates a roadblock for celebrities' heirs to challenge unauthorized holographic performances. This exception states:

[A] musical composition, audiovisual work, radio or television program, single and original work of art or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.⁴⁴

Subsection (n)(1) limits this exception to uses that are not advertisements or commercial announcements. Thus, if the court interprets holographic reproductions, like the Tupac Shakur example at Coachella, as a musical composition, audiovisual work, or a single and original work of art, then the deceased celebrity's estate might be powerless to stop it.

Although section 3344.1(a)(2) does not specifically mention holographic reproductions as exempt, they may still be exempt because the "language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."⁴⁵ In *Astaire v. Best Film & Video Corp.*, the Ninth Circuit Court of Appeals decided that even though the subsection did not mention video tapes as specifically exempt, exempting a film or television program but not a videotape created an absurd result.⁴⁶ Because holographic performances are similar to projected three-dimensional movies without a screen, California courts would likely include them within the (a)(2) exemption.

Thus, California's postmortem right of publicity law primarily protects the rights holder from unauthorized uses of a deceased personality's name, voice, photograph, etc., "either (1) 'on or in' a

⁴³ Reichman, *supra* note 14, at 78.

⁴⁴ CAL. CIV. CODE § 3344.1(a)(2) (West 2012).

⁴⁵ *Astaire v. Best Film & Video Corp.*, 116 F.3d 1297, 1301 (9th Cir. 1997) (quoting *Younger v. Superior Court*, 21 Cal. 3d 102, 145 (1978), *amended by* 136 F.3d 1208 (9th Cir. 1998)).

⁴⁶ *Id.*

product, *or* (2) in ‘advertising or selling’ a product.’⁴⁷ Under this statutory framework, non-advertising holographic performances based on deceased celebrities are exempt from infringement liability as long as the hologram was not the product for sale.

This approach differs from the one that California has adopted for living celebrities in section 3344, which does not contain this exemption. This indicates that the California legislature intended broader freedom for the unauthorized use of a deceased person’s publicity right than for the unauthorized use of a living person’s publicity right.⁴⁸ California also has additional safe harbor exceptions for uses related to news, public affairs, sports, and politics.⁴⁹ These exceptions create more areas in which a deceased person’s likeness may be used without authorization of the right holder.

2. The Importance of the State of Domicile for Postmortem Protection

The Ninth Circuit recently held that the law of the state in which the individual was domiciled at the time of death determines if there will be a postmortem right of publicity available to that person’s heirs.⁵⁰ In *Monroe*, the court had to determine which laws to apply given that Marilyn Monroe lived in both California and New York before her death.⁵¹ The court held that because Monroe was legally domiciled in New York at the time she died, New York law would apply and the deceased celebrity personality rights in California were not recognized.⁵²

The California Court of Appeals previously defined domicile as the “one location with which for legal purposes a person is considered to have the most settled and permanent connection, the

⁴⁷ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 (2001).

⁴⁸ Reichman, *supra* note 14, at 81.

⁴⁹ CAL. CIV. CODE § 3344.1(j) (West 2012); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 415–17 (Cal. Ct. App. 2001).

⁵⁰ *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012).

⁵¹ *Id.*

⁵² *Id.*

place where he intends to remain and to which, whenever he is absent, he has the intention of returning.”⁵³ Because a person can only have one domicile, the court will evaluate where that person was last domiciled. If that person claims a different state of domicile, then the court will examine whether there is any intention to return to the previous state.⁵⁴ In *Monroe*, the court determined that Monroe’s state of domicile was New York “because Monroe’s executors consistently represented during the probate proceedings and elsewhere that she was domiciled in New York at her death to avoid payment of California estate taxes.”⁵⁵ Considering this recent decision, it becomes increasingly important for people to choose states that recognize the postmortem right of publicity as their domicile if they are concerned about their right of publicity after death.

In contrast to the California right of publicity law and other jurisdictions that recognize this right postmortem, Washington and Indiana have statutes that recognize publicity for a deceased individual regardless of the state of domicile at the time of death.⁵⁶ However, Washington’s right of publicity has recently come under attack. The United States District Court for the Western District of Washington held that the Washington Personality Rights Act, which recognized publicity regardless of the state of domicile, was an unconstitutional violation of the Full Faith and Credit Clause as well as the Dormant Commerce Clause.⁵⁷ Although the Indiana statute was not at issue in this case, it could face a similar fate if challenged.⁵⁸

⁵³ *Whittell v. Franchise Tax Bd.*, 231 Cal. App. 2d 278, 284 (Cal. Ct. App. 1964).

⁵⁴ *In re Phillips’ Estate*, 269 Cal. App. 2d 656, 659 (Cal. Ct. App. 1969).

⁵⁵ *Monroe*, 692 F.3d at 986.

⁵⁶ Reichman, *supra* note 14, at 79.

⁵⁷ *Experience Hendrix, L.L.C. v. HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1140 (W.D. Wash. 2011).

⁵⁸ Reichman, *supra* note 14, at 79.

III. STEPS TO PLAN FOR THE MOST ROBUST PROTECTION AGAINST UNWANTED HOLOGRAPHIC REPRODUCTIONS

Establishing domicile in a state with robust right to publicity protections is the most powerful step available to a person concerned with potential misuse of his or her likeness. While California has some of the most robust protection, it only provides protection for up to seventy years after death. Indiana and Oklahoma recognize the right for up to 100 years after death.⁵⁹ Tennessee will recognize the right indefinitely if the estate continually exploits it, after an initial ten-year postmortem period during which exploitation is not required.⁶⁰

Celebrities and non-celebrities alike should also clearly state whether their name and likeness can be utilized as a holographic performance when negotiating contracts.⁶¹ Similarly, the forward-thinking individual should specify in his or her will what happens to his or her right of publicity after death. Rights of publicity should also be registered by the estate after a celebrity's death where required in order to maximize protections.

CONCLUSION

Modern technology now allows for the holographic reproduction of a dead artist's likeness with the ability to make them perform classic or new artistic works. As this technology further develops, it is likely that there will be more holographic reproductions in the future. While copyright and trademark laws protect some aspects of holographic performances by deceased artists, the most robust protection exists in jurisdictions that recognize the right of publicity, and especially those jurisdictions that recognize this right postmortem. Given the fact that only thirty-one states grant the right of publicity, and only twenty of those recognize the postmortem right, the protections against infringement available to the deceased artist's estate will vary depending primarily upon which state the artist was domiciled in at

⁵⁹ Reichman, *supra* note 14, at 78.

⁶⁰ Reichman, *supra* note 14, at 78.

⁶¹ Moser, *supra* note 2.

the time of death, as well as the choice of law rules of the jurisdiction in which the suit is brought.

PRACTICE POINTERS

- Establishing domicile in a state with robust right to publicity protections is the most powerful step a person can take to guard against potential misuse of his or her likeness.
- Celebrities and non-celebrities alike should clearly state whether their names and likenesses can be utilized in a holographic performance when negotiating contracts.
- Draft a will specifying what will happen to your right of publicity after death.
- Where required, rights of publicity should be registered by the estate after a celebrity's death in order to maximize protections.

