Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Life After Death: How to Protect Artists' Post-Mortem Rights

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After dusk settled on the final night of the 2012 Coachella Valley Music and Arts Festival, Dr. Dre and Snoop Dogg introduced an unexpected guest during their headline performance. On stage with his hallmark "Thug Life" stomach tattoo, signature Timberland boots, and characteristic gold cross necklace, emerged Tupac Shakur.[1] Beaming in exaltation and utter disbelief, the roaring crowd of over 75,000[2] heard Tupac greet them as only Tupac could: "What the f*ck is up, Coachella?"[3] He then proceeded to perform his classic single "Hail Mary" and was subsequently joined by Dr. Dre and Snoop Dogg for a rousing rendition of "2 of Amerikaz Most Wanted."[4] While this performance would have left an indelible impression

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The views and opinions expressed in this Article are entirely the author's and are not an expression of the views of Simpson Thacher & Bartlett LLP.

[1] Westfesttv, *Tupac Hologram Snoop Dogg and Dr. Dre Perform Coachella Live 2012*, YouTube (Apr. 17, 2012), https://perma.cc/JM5S-T2LF.

[2] Sarah Fitzmaurice & Donna McConnell, *Tupac. . .Lives! Snoop Dogg Joined On Stage By Slain Rapper As He's 'Resurrected' To Perform With Dr Dre At Coachella*, DailyMail.com, https://perma.cc/TLF5-3GNM (last updated Apr. 17, 2012, 3:29 PM).

[3] Westfesttv, *supra* note 1.

[4] *Id.*

on festivalgoers for simply uniting three of history's greatest rap artists on one stage, what happened that night in the blistering California desert heat was not possible just a few years earlier.[5] Tupac was shot and killed sixteen years prior to this groundbreaking performance;[6] "Hail Mary" was a posthumous release that Tupac never performed live;[7] and Tupac never uttered the word "Coachella," let alone greeted a Coachella crowd—the music festival was launched three years *after* his death.[8] The life size image that rapped and interacted with Dr. Dre and Snoop Dogg was simply that—a two-dimensional image that had been painstakingly perfected by James Cameron's Academy Award-winning visual effects and digital production company Digital Domain along with two hologram-imaging companies, U.K.-based Musion Systems and AV Concepts, to look, sound, act, and mimic even the most subtle and intimate idiosyncrasies that iconized the legendary artist.[9]

Two-dimensional and holographic concert technology's expeditious evolution has left in its wake a host of novel and significant legal questions pertaining to artists' post-mortem rights. The law has remained immutable in many critical areas on this topic and such stagnation has forced artists and their estates to operate under a miscellany of antiquated statutes and regulations that either provide no assistance or offer severely outdated forms of recourse.[10] This article will explore the problematic effects of the lack of legislative reform and propose how the law ought to be modernized for the digital era.

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[5] *See* Anthony McCartney, *Holograms Present Celebs With New Afterlife Issues*, MPR NEWS (Aug. 21, 2012), https://perma.cc/KCN7-45R5 (explaining that the idea of using holograms in concerts had been entertained for years but the technology was not yet advanced enough).

[6] Lisa R. France, *Tupac Shakur: 20 Years After His Death*, CNN https://perma.cc/X7RW-ZG8V (last updated Sept. 13, 2016) (noting that Tupac was fatally shot on September 7, 1996 and passed away six days later).

[7] "Hail Mary" was a featured single on Tupac's final studio album, which was released less than a month after his death. *See* TUPAC, THE DON KILLUMINATI: THE 7 DAY THEORY (Death Row Records 1996).

[8] *See* Festival History, COACHELLA VALLEY MUSIC AND ARTS FESTIVAL, https://perma.cc/FMC2-RDEZ (last visited Sept. 19, 2016).

[9] Claire Suddath, *How Tupac Became A Hologram (Is Elvis Next?)*, BLOOMBERG NEWS (Apr. 16, 2012, 5:35 PM), https://perma.cc/EZ4K-CF4G.

[10] The Supreme Court has stated that there may be a need to curb the progress of certain forms of technology due to the law's inability to progress as quickly as technology. *See* Whalen v. Roe, 429 U.S. 589, 607 (1977) (Brennan, J., concurring).

Life Goes On[11]

In response to technology's permeation into "the sacred precincts of private and domestic life,"[12] Samuel Warren and Supreme Court Justice Louis Brandeis, in their groundbreaking 1890 *Harvard Law Review* article, established the notion that the right to privacy and the right to life inherently encompass the right to be left alone. Courts were initially unwilling to recognize that celebrities and others who actively projected themselves into the public eye could suffer reputational and emotional harm and were thus excluded from asserting this privilege.[13] However, in the ensuing decades courts increasingly expressed perturbation regarding how to establish and enforce a legal regime to equipoise individuals' right to be left alone[14] with the First Amendment's freedom of speech that also simultaneously did not stifle innovation.[15] As a result, the right of publicity was established as a distinct privilege independent of the right to privacy.[16] Although the right of publicity is widely regarded as the right "to control the commercial use of [one's] identity,"[17] which includes a person's name, image, likeness, and identifying characteristics,[18] recognition of a person's right of publicity

[11] Tupac, *Life Goes On, on* All Eyez On Me (Death Row Records 1996).

[12] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890).

[13] *See* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 981 (1964).

[14] An individual's right to be left alone emerges from a variety of sources, including the Fourth Amendment. *E.g.* Daniel J. Solove, Conceptualizing Privacy, 90 Cal. L. Rev. 1087, 1101 (2002).

[15] *See* Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203, 218 (1954) (discussing how, prior to the judicial recognition of the right of publicity, multiple courts had expressed a willingness to protect certain forms of publicity that were outside the scope of traditional intellectual property theories); *see generally* Ross D. Petty & Denver D'Rozario, *The Use of Dead Celebrities in Advertising and Marketing: Balancing Interests in the Right of Publicity*, 38 J. of Advert. 37, 39 (2009) (showing the history of the right of publicity in various jurisdictions).

[16] *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 967 (10th Cir. 1996) ("While the right [of publicity] was originally intertwined with the right of privacy, courts soon came to recognize a distinction between the personal right to be left alone and the business right to control use of one's identity in commerce.").

[17] *Cardtoons*, 95 F.3d at 967.

[18] *See* Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 Yale L.J. 1577, 1589 (1979).

is exclusively a state law matter,[19] and some states have yet to address the issue.[20] The lack of a uniform rule has created a multistate hodgepodge of divergent and antithetical state laws, spurring a "race to the bottom" where a handful of states have enacted overarching rights of publicity laws that attract forum shopping and curtail First Amendment protections and public domain interests.[21]

What's Going On[22]

Whether or not an individual's right of publicity may be passed to their heirs and assigns upon their death, known as a post-mortem right of publicity, is entirely dependent upon the theory that individual states use as the foundation for their right of publicity laws.[23] Of the thirty-one states that currently recognize a right of publicity,[24] twenty-two regard it as a property right,[25] meaning that it may be assigned either via inter vivos or testamentary transfer, it persists for a finite period after a person's death, and it may be exercised posthumously regardless of whether the individual exploited their image or name during life.[26] The remaining states that recognize a right of publicity view it as an outgrowth of the right to privacy and, just as an individual's right of privacy is inherently personal and terminates at death,[27] the right of publicity is innately tethered to the individual and is not devisable. Whether the right of publicity may be posthumously enforced is contingent upon the law of the state where the deceased was domiciled[28] at death.[29] This means that persons domiciled in California at death,

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[19] Congress has never enacted a federal right of publicity statute and the only Supreme Court decision regarding the right of publicity is *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

[20] *See* 1 J. Thomas McCarthy, The Rights of Publicity and Privacy § 6:3 (2d ed. 2016).

[21] *See* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 Comm. Law.14, 16 (2011).

[22] Marvin Gaye, *What's Going On, on* What's Going On (Tamla Records 1971).

[23] Vick & Jassy, *supra* note 21, at 14.

[24] *Id.* at 15.

[25] *See* 2 J. Thomas McCarthy, The Rights of Publicity and Privacy § 9:17 (2d ed. 2016).

[26] Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 Colum. J.L. & Arts 165, 172 (2010).

[27] Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 Yale L.J. 1125, 1127 (1980).

[28] "Domicile" is established by physical presence in a place in connection with intent to remain there. One acquires a "domicile of origin" at birth that persists

like Natalie Cole, have a post-mortem right of publicity because California subscribes to the idea that the right of publicity is a property right.[30] Contrarily, as with Marilyn Monroe,[31] anyone domiciled in New York, which views the right of publicity exclusively as a statutory, non-descendible, privacy right,[32] has no grounds to assert such a right. Additionally, not all states have a statute or common law right of publicity.[33] For instance, despite being domiciled in California throughout his entire life, if Tupac permanently moved to Montana immediately prior to his death, a state that lacks either a statutory or common law right of publicity,[34] California's right of publicity laws would be inapplicable. Consequently, Tupac's estate would be at a Montana judge's mercy deciding a case of first impression.

Nevertheless, impugning the validity and sagacity of strictly relying on a person's domicile to determine if their estate may to control the commercial use of their identity upon their death, some states have enacted statutes that circumvent this practice, creating uncertainty as to which law controls.[35] Indiana's right of publicity statute is one such example.[36] It explic-

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until a new one (a "domicile of choice") is acquired. "Domicile" is not always commensurate with one's "residence;" an individual may reside in one place but be domiciled in another. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989).

[29] Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 1000 (9th Cir. 2012); Hebrew Univ. of Jerusalem v. GM LLC, 903 F. Supp. 2d 932, 935 (C.D. Cal. 2012) (explaining that California's post-mortem right of publicity did not apply to Albert Einstein because he was domiciled in New Jersey at his time of death, and therefore only New Jersey's post-mortem right of publicity, if available, applied).

[30] The California Celebrities Rights Act, Cal. Civ. Code § 3344.1 (West 2009), was passed after California's Supreme Court held that Bela Lugosi's right of publicity terminated upon his death and could not pass to his heirs in Lugosi v. Universal Pictures, 25 Cal. 3d 813 (1979).

[31] Milton, 692 F.3d at 1000 (estopping Monroe's beneficiaries from asserting California's posthumous right of publicity because she was domiciled in New York at her time of death).

[32] *See* Pirone v. MacMillan, Inc., 894 F.2d 579, 585 (2d Cir. 1990).

[33] *See* McCarthy, *supra* note 19, at § 6:1.

[34] *See id.* at §§ 6:3, 6:8 (listing the states that have a common law and/or a statutory right of publicity).

[35] Anthony R. Masiello, *California's Right of Publicity—Bestowing Property Upon the Dead?*, Holland & Knight (Jan. 8, 2008), https://perma.cc/HVE5-NG5W (explaining that California's Right of Publicity Statute, codified in Cal. Civ. Code § 3344.1 (2012), was significantly expanded after the Screen Actors Guild sponsored legislation to eliminate the list of uses exempt from requiring the deceased celebrity's heirs' consent); Tenn. *ex rel.* Elvis Presley Int'l Mem. Found. v. Crowell, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987) (creating the colloquially termed "Elvis

itly rejects the domicile requirement by asserting that it "applies to an act or event that occurs within Indiana, regardless of a person['s] domicile, residence, or citizenship"[37] and provides that a person who engages in prohibited conduct within Indiana, transports or causes infringing materials to be transported, publishes, disseminates, or exhibits in Indiana submits to Indiana's jurisdiction.[38] Under a textualist view, it seems that "heirs of a celebrity who dies in a state not recognizing a postmortem right of publicity could sue a non-Indiana defendant in Indiana as long as the allegedly infringing materials were disseminated" in Indiana.[39] Nonetheless, courts have unhesitatingly struck down plaintiffs who assert the right to invoke Indiana's statute as a means to evade their domiciliary's right of publicity law when they are not domiciled in Indiana.[40] Moreover, other courts have explicitly rejected such reasoning and have steadfastly held that it is a person's domicile at death that governs what, if any, right of publicity they have after death.[41]

Law" that expanded Tennessee's right of publicity statute to provide a post-mortem right of publicity).

[36] Indiana has the most extensive right of publicity statute in the nation. Due in large part to the lobbying efforts of Indiana-based CMG Management company, which represents the estates of some of the most iconic American celebrities including James Dean, Ingrid Bergman, Duke Ellington, Jesse Owens, Frank Lloyd Wright, Amelia Earhart, and Malcolm X (Neal Conan, *"Rights of Publicity" Extended Beyond the Grave*, NATIONAL PUBLIC RADIO (NPR) https://perma.cc/YHT3-XYGQ (Sept. 4, 2012 at 1:00 ET)), Indiana's right of publicity encompasses a person's "personality," a fluid label that encapsulates virtually every attribute any U.S. court has found to fall within the auspices of the right of publicity including their name, photograph, image, likeness, distinctive appearance, voice, signature, gesture, and mannerisms. Indiana not only recognizes a post-mortem right of publicity but also retroactively grants a right of publicity to the estate and heirs of people who died within the last century. The remedies available if one's right of publicity is violated include treble and punitive damages, injunctions, attorney's fees, as well as the impoundment and destruction of infringing goods. Vick & Jassy, *supra* note 20, at 15-16.

[37] Ind. Code Ann. § 32–36–1–1(a) (West 2012).

[38] *Id.* at § 32–36–1–9.

[39] Vick & Jassy, *supra* note 21, at 15.

[40] *E.g.*, Shaw Family Archives, LTD. v. CMG Worldwide, Inc., 589 F. Supp. 2d 331 (S.D.N.Y. 2008).

[41] Choice of law questions were the critical issues in *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981). Factors Etc. purchased the copyright to a photo of Elvis Presley and began to sell it as a poster after the King of Rock and Roll's death. Presley's estate brought a right of publicity claim against Factors Etc., arguing that, although Tennessee was where Presley was domiciled at his death, New York's right of publicity law should control because that was where the infringe-

Rather than continue to passively condone a legal system that entices states to use broad, sweeping language to create loopholes that not only usurp other jurisdictions that have a more narrowly defined right of publicity, but also interferes with First Amendment and public domain interests, something needs to change.

Thieves in the Temple[42]

Tupac is not the first entertainer to have been digitally reproduced posthumously; numerous celebrities have been "raised from the dead," appearing in advertisements, films, and television shows long after their deaths.[43] Moreover, the technology utilized for Tupac's Coachella display has existed since the 1500's.[44] Nevertheless, Tupac's "death-defying" feat was nothing less than revolutionary—the projection was "not based on archival footage," but was rather "a completely original, exclusive performance only for Coachella and that audience,"[45] making it the first time a performance was showcased that was not rendered during the artist's lifetime.[46] As the Twittersphere was set ablaze by Tupac's "resurrection," reservations regarding artists' autonomy and consent to their image being

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ment occurred. The Second Circuit Court of Appeals rejected this tort theory choice of law assertion and instead adhered to the domiciliary rule, meaning that Tennessee's law would apply. Because Tennessee did not recognize a post-mortem right of publicity, Presley's estate had no right of publicity to his name or likeness and therefore could not sue Factors Etc. for infringing his right of publicity.

[42] PRINCE, *Thieves in the Temple, on* GRAFFITI BRIDGE (Warner Bros. 1990).

[43] *See* Suddath, *supra* note 9 (explaining that a digital hologram of Frank Sinatra performed at former American Idol judge's Simon Cowell's fiftieth birthday celebration); Degen Pener, *Charlize Theron Stars With Grace Kelly, Marilyn Monroe and Marlene Dietrich in New Dior Ad (Video)*, THE HOLLYWOOD REPORTER (Sept. 6, 2011, 2:38 PM), https://perma.cc/4FUY-AGNS (observing that deceased actresses Marilyn Monroe, Grace Kelly, and Marlene Dietrich were digitally recreated for a 2011 Dior fragrance commercial); Harley Brown, *5 Other Awesome Holograms: Tupac, Janelle Monae and M.I.A., More*, BILLBOARD (May 19, 2014), https://perma.cc/TV7X-568X (listing five other instances of celebrities, both alive and deceased, performing virtually as two-dimensional images).

[44] Cyrus Farivar, *Tupac "Hologram" Merely Pretty Cool Optical Illusion*, ARS TECHNICA (Apr. 16, 2012, 6:45 PM), http://perma.cc/TT7J-ZQ22 (explaining that the Tupac image was not a hologram but rather an optical illusion technique colloquially referred to as a "Pepper Ghost" that was first described in the 16th century and is often utilized by magicians).

[45] *See* Suddath, *supra* note 9.

[46] *Id.*

reimagined were raised, drawing parallels to the ongoing ethical and moral debate over the virtues of genetic engineering.[47]

One of the most hotly debated aspects of digitally recreating Tupac for Coachella is that, in addition to interpolating words into the performance that the actual Tupac never uttered, the masterminds that erected the show purposefully expurgated Tupac's more controversial lyrics.[48] What made Tupac both a polarizing and revered figure was his unapologetic fearlessness addressing topics previously considered taboo through his lyrics, including, *inter alia*, racial profiling, police brutality, and drug use;[49] this indomitable attitude transmogrified Lesane Parish Crooks into Tupac Amaru Shakur.[50] Censoring Tupac's lyrics without explanation intentionally distorts and extinguishes the very aspects of his identity that made him a household name. Some claimed that this was the digital equivalent of genetic modification[51]—excluding aspects of Tupac that the programmers deemed unsavory or inconsistent with their artistic creation is synonymous to scientists modifying traits they deem unworthy of being passed down to future generations through genetic manipulation. In both instances, the person is stripped of their autonomy and an outside party is given complete dominion to affirmatively select the traits they judge worthy of being preserved for future generations. However, a stark contrast between artists' digital re-creation and genetic modification is that there are federal statutes in place that, in no uncertain terms, elucidate what is and is not permissible with respect to

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[47] "Genetic engineering is a process in which recombinant DNA (rDNA) technology is used to introduce desirable traits into organisms. A genetically engineered (GE) animal is one that contains a recombinant DNA (rDNA) construct producing a new trait. While conventional breeding methods have long been used to produce more desirable traits in animals, genetic engineering is a much more targeted and powerful method of introducing desirable traits into animals." *Genetic Engineering*, U.S. FOOD AND DRUG ADMINISTRATION, https://perma.cc/S8XK-FAVX (last updated Sept. 16, 2016).

[48] The lyrics "Killuminati, all through your body; The blow's like a twelve gauge shotty" were omitted from Tupac's Coachella performance. *2Pac Lyrics "Hail Mary,"* AZ LYRICS, http://www.azlyrics.com/lyrics/2pac/hailmary.html (last visited Oct. 10, 2016); *see* Westfesttv, *supra* note 1.

[49] *E.g.*, TUPAC, *Violent, on* 2PACALYPSE NOW (Interscope Records 1991); TUPAC, *Words of Wisdom, on* 2PACALYPSE NOW (Interscope Records 1991); TUPAC, *Changes, on* GREATEST HITS (Interscope Records 1998); TUPAC, *Me Against the World, on* ME AGAINST THE WORLD (Interscope Records 1995).

[50] *See Tupac Shakur Biography*, IMBD.COM, https://perma.cc/33DY-L3P6 (last visited Oct. 10, 2016) (stating that Tupac's birth name is Lesane Parish Crooks).

[51] *See generally* Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law*, 8 High Tech. L.J. 101, 108–09 (1993).

gene manipulation,[52] whereas there is no such counterpart to prevent computer scientists from gerrymandering specific aspects of artists' physical and personal traits to fit their artistic vision.

Justice Brandeis and Samuel Warren warned that when technology is utilized to misrepresent or re-engineer what a person says or does without observers knowing of its falsity, "[i]t both belittles and perverts,"[53] and such is true with respect to computer programmers punctiliously orchestrating avatars to conform to their creative vision, irrespective of what the actual artists would have wanted. By manipulating, injecting, and omitting specific aspects of artists' physical and personal traits, programmers beget a fictitious reality, where they re-introduce artists that, unbeknownst to the public, are imbued with new, hand-picked "genetics."

Mo Money Mo Problems[54]

Jay-Z famously rapped, "I'm not a businessman. I'm a business, man!"[55] With the increasing demand for two-dimensional and holographic performances,[56] this subtle yet profound distinction has never rung truer, both for deceased and living artists.

Michael Jackson's estate experienced a "commercial rebirth" after his death, moving from reportedly being half-a-billion dollars in the red[57] to

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[52] Steven Reinberg, *FDA Issues Final Regulations for Genetically Engineered Animals*, U.S. News and World Report (Jan. 15, 2009, 4:00 PM), https://perma.cc/S8XK-FAVX (explaining that the Food and Drug Administration must pre-approve genetically engineered animals before they may be sold and people that produce such animals must adhere to the rules and regulations set forth by the National Environmental Policy Act).

[53] Warren & Brandeis, *supra* note 12, at 196.

[54] Notorious B.I.G., *Mo Money Mo Problems*, *on* Life After Death (Bad Boy Records 1997).

[55] *See* Lola Ogunnaike, *Jay-Z, From Superstar to Suit*, N.Y. Times (Aug. 28, 2005), https://perma.cc/WJ4C-XQ97 (observing that these are Jay-Z's lyrics on the remix version of Kanye West's song "Diamonds From Sierra Leone").

[56] Patricia Garcia, *Would You Pay to Watch A Hologram Sing?*, Vogue (May 20, 2016, 5:56 PM), https://perma.cc/L29C-EE2M (hoping to capitalize on the success of previous holographic-type performances, the estates of Billie Holiday, Elvis Presley, the Notorious B.I.G., and others have independently discussed creating digitalized versions of the artists for touring and other promotional purposes).

[57] Gil Kaufman, *The Michael Jackson Estate's Billion-Dollar Turnaround: From $500 Million in Debt to $500 Million in Cash*, Billboard (Mar. 15, 2016), https://perma.cc/7PGT-X46R (stating that, plagued by costly high profile criminal and civil legal battles and having last released an album in 2001, Michael Jackson's estate was rumored to be $500 million in debt).

having over $500 million in cash.[58] This billion-dollar turn-around is largely due to the partnership between Jackson's estate and Cirque du Soleil to create the tremendously prosperous extravaganza utilizing the same technology to reimagine the King of Pop that reincarnated Tupac for Coachella.[59] Other deceased musicians' estates have also established multi-million dollar posthumous entertainment empires through album sales, memorabilia, and advertisements,[60] but are now beginning to recognize the potential to further capitalize on fans' nostalgia through virtual, posthumous touring. Despite the positive aspects this modern frontier brings, the financial temptation to capitalize on the demand for an artist after their death is ripe for abuse.

Tupac was fortunate that Dr. Dre and Snoop Dogg, his close friends during his life, only began actively pursuing the idea of bringing him back for their headlining performance after receiving permission from Tupac's mother, remained deeply committed to ensuring their friend was respectfully replicated, and donated to the Tupac Amaru Shakur Foundation.[61] The issue is that other celebrities may not have their legacies so well preserved and honored.

Babe Ruth's avaricious estate illustrates the quandary of allocating total control over a celebrity's image to their estate and the renunciation of the artist's wishes in pursuit of financial gain. At the height of his career, the Bambino was enjoined from naming his line of candy bars "Babe Ruth" due to possible confusion with Curtiss Candy's "Baby Ruth" candy bars.[62] However, fifty years after his death, his estate permitted Curtiss Candy to use his name, persona, and likeness to promote its Baby Ruth line of candy bars, which undoubtedly would have made the Sultan of Swat "choke[ ]."[63] Disregarding Ruth's detest of Curtiss Candy and coveting money over his

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[58] Zack O'Malley Greenburg, *Infographic: Michael Jackson's Multibillion Dollar Career Earnings, Listed Year by Year*, FORBES (May 28, 2014, 9:01 AM), https://perma.cc/4Q87-2SR2.

[59] *See* Zack O'Malley Greenburg, *Michael Jackson and the Economics of Touring After Death*, FORBES (Oct. 25, 2011, 10:35 AM), https://perma.cc/ZJ6C-TNTL; *see also* Arion McNicoll & Nick Glass, *The Technology Bringing Sinatra, Tupac Back to Life*, CNN, https://perma.cc/SYF4-NPFC (last updated Jan. 8, 2014, 3:45 PM).

[60] *See Michael Jackson, Elvis Presley Are Top-Earning Dead Musicians*, ROLLING STONE MAGAZINE (Nov. 1, 2012), https://perma.cc/834M-8XKW.

[61] Fitzmaurice & McConnell, *supra* note 2.

[62] George H. Ruth Candy Co. v. Curtiss Candy Co., 49 F.2d 1033 (C.C.P.A. 1931).

[63] *See* Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*,16 CARDOZO ARTS & ENT. L.J.. 209, 232 (1998).

desires encapsulates the dangers of permitting those who never knew the celebrity to decide how to preserve their image.

We Need A Resolution[64]

Unnerved by the sharp dichotomy between technology's meteoric rate of progression and the legal system's lethargic state of development, Warren and Brandeis clarified that it was Congress' and the courts' duty to define the law anew to best accommodate the ever-changing political, social, and economic ecosystem.[65] Post-mortem live concerts represent a "fundamental shift in the monetization of fame"[66] and current intellectual property,[67] privacy, and publicity laws are unequipped to address the unconventional legal, ethical, and moral questions posed by this new technology form. To ameliorate the lack of uniformity brought about by this deficient patchwork of conflicting laws and regulations, a federal opt-in right of publicity statute grounded in the Commerce Clause that preempts state right of publicity laws is the ideal solution.[68]

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[64] AALIYAH, *We Need A Resolution, on* AALIYAH (Blackground Records 2001).

[65] *See* Warren & Brandeis, *supra* note 12, at 195.

[66] *See* Greenburg, *supra* note 58.

[67] An action for trademark infringement under the Lanham Act requires the involvement of goods and services, an effect on interstate commerce, false designation of origin or description, and a false or misleading factual representation (*see* 15 U.S.C. § 1125(a) (2012)). Only permitting trademark infringement cases to advance if they satisfy each of these requirements excludes a host of potential identity misappropriation cases. Therefore, the limited scope of cases that the Lanham Act protects means that the right of publicity cannot be based upon current trademark law. With respect to copyrights, "[t]here is no copyright claim if the image is not actually copied, but rather recreated and manipulated in cyberspace" (Usha Rodrigues, Note, *Race to the Stars: A Federalism Argument for Leaving the Right of Publicity in the Hands of the States*, 87 VA. L. REV. 1201, 1202 (2001); *see* 17 U.S.C. § 102 (2012)). This excludes holographic and other three-dimensional concert images from copyright protection. Lastly, federal law states that for an invention to be eligible to be patented, it must be a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof," and adhere to a host of other restrictions (*see* 35 U.S.C. § 101 (2012)). The projected images used in post-mortem shows do not meet this criterion and are therefore ineligible to be patented.

[68] An artist's descendants or intestate heirs may be blinded by the potential profits of leasing out their legacy to the highest bidder with little to no regard for what the artist would have wanted. Without revealing the exact cost of creating the Tupac illusion, Nick Smith, president of AV Concepts, the San Diego company that projected and staged the Tupac optical illusion, explained that a comparable display would cost between $100,000 and $400,000 (Gil Kaufman, *Exclusive: Tupac*

One concern may be that a federal right of publicity statute would unconstitutionally infringe on state sovereignty.[69] However, this is unwarranted. Through the Commerce Clause, the Constitution is solicitous of Congress' right to regulate interstate commerce.[70] Expounding on the depth of this right, the Supreme Court explained that Congress' power "over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."[71] As countless people across various states will purchase tickets, posters, apparel, and other merchandise from such concerts,[72] the right of publicity undoubtedly affects interstate commerce, thereby falling squarely under the Commerce Clause's auspices.[73] Therefore, it is within Congress' constitutionally guaranteed right to regulate the right of publicity. Moreover, the Commerce Clause is a necessary safeguard as the Copyright Clause fails to protect matters not considered "[w]ritings."[74]

Limiting the right of publicity to preserve celebrities' interest in the commercial use of their identities, and not biographies or other factual, newsworthy stories about them,[75] ensures that the First Amendment's pro-

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Coachella Hologram Source Explains How Rapper Resurrected, MTV (Apr. 16, 2012), https://perma.cc/BZ6J-34CG). When factoring in the prodigious expense of producing post-mortem virtual tours, artist's estates would undoubtedly be tempted to sacrifice part of the performance quality in exchange for higher revenues, much to the artist's chagrin if they were still living. This begs the question, even if all states defined rights of publicity as fully devisable property rights that automatically create post-mortem rights of publicity, is it advisable for the celebrity's estate and afterlife animator to automatically have the right to exert total control over their legacy upon death?

[69] Rodrigues, *supra* note 67, at 1226–27.

[70] U.S. CONST. art. I, § 8, cl. 3.

[71] United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942).

[72] *Nine Ways Musicians Actually Make Money Today*, ROLLING STONE (Aug. 28, 2012), https://perma.cc/2ZXZ-7BP4 (explaining that a large percentage of artists' concert revenue comes from selling concert merchandise).

[73] *See, e.g.,* NLRB v. Fainblatt, 306 U.S. 601, 605–09 (1939) (concluding that it is immaterial that the employers themselves were not engaged in interstate commerce, and the only matter of significance was the fact that the company's materials were transmitted to them and the final product was transported from them through channels of interstate commerce, thus triggering the Commerce Clause); *see also* United States v. Moghadam, 175 F.3d 1269, 1276-77 (11th Cir. 1999) (finding that making and selling unauthorized recordings of live concerts has a substantial impact on interstate commerce and thus falls within the scope of the Commerce Clause).

[74] *See* U.S. CONST. art. I, § 8, cl. 8.

[75] *See* Rosemont Enters., Inc. v. Urban Sys., Inc., 340 N.Y.S.2d 144, 146 (N.Y. Sup. Ct. 1973).

tection of free speech is preserved.[76] Part of freedom of speech is freedom *from* speech, and courts have held that the right of publicity takes precedence over freedom of speech[77] when entities use others' names, personas, and likeness for their own commercial enterprise and not to share news or otherwise educate the public.[78] Even when the "commodity or article sold is closely identifiable with the major events" in a celebrity's life, if it is used for commercial purposes, the celebrity's rights of publicity outweighs First Amendment interests.[79] Lastly, the Supreme Court has found where "the invasion of [privacy] is mental rather than physical, it [is] possible to protect a right of privacy without doing serious damage to First Amendment interests."[80]

The mélange of inconsistent rulings within the Ninth Circuit alone regarding the precise scope of artists' estates' power to protect the commercial use of their identity further evidences the vitality of federalizing the right of publicity. In *Experience Hendrix I*,[81] Jimi Hendrix's estate rigorously contested a third party's use of the late rockstar's image. The U.S. District Court for the Western District of Washington was tasked with determining the constitutionality of Washington's Personality Rights Act ("WPRA"), which extended the state's liberal right of publicity statute to all individuals, regardless of their domicile at death.[82] The court held the statute unconstitutional for violating the Due Process Clause,[83] Full Faith and Credit

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[76] William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 Ark. L. Rev. 43, 89 (2005) ("[T]he First Amendment protects publications made for the primary purpose of parody or reporting items of general interest. However, when the primary purpose is promoting trade—as in the case of merchandise—a right of publicity claim can survive the assertion of a First Amendment defense. Many of the right of publicity statutes incorporate these First Amendment defenses (and even if not stated in the statute, the First Amendment defenses would be available)."); *see* Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639 (1995).

[77] *See* Felcher & Rubin, *supra* note 18 at 1589.

[78] *Rosemont*, 340 N.Y.S.2d at 146; Abdul-Jabbar v. GMC, 75 F.3d 1391, 1400 (9th Cir. 1996).

[79] *Rosemont*, 340 N.Y.S.2d at 146.

[80] Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 204 (discussing Erznoznik v. Jacksonville, 422 U.S. 205 (1975)).

[81] Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd., 766 F. Supp. 2d 1122 (W.D. Wash. 2011).

[82] *See id.* at 1133.

[83] *Id.* at 1135 (explaining that, because the WPRA pertains to substantive matters, it must have sufficient contacts to people outside the State of Washington).

Clause,[84] and Commerce Clause.[85] However, on appeal in *Experience Hendrix II*,[86] the Ninth Circuit shockingly reversed. Finding the WPRA constitutional, the court held that when the statute was applied to the current dispute, which involved selling goods within Washington's borders, the WPRA neither violated the Due Process, Commerce, nor the Full Faith and Credit Clauses because this particular dispute only involved transactions within Washington.[87] Notably, the court failed to decide the statute's constitutionality when implicated in transactions occurring outside Washington.[88]

This marked the first time a court upheld and enforced a statute granting post-mortem rights to an individual who was not its domiciliary. The ruling's peculiarity is exacerbated by the fact that it directly contradicts the Ninth Circuit's own holding in *Milton H. Greene*,[89] where the court declined to even entertain the idea of applying California's right of publicity statute to any economic transactions pertaining to Marilyn Monroe because she was a New York domiciliary at her death. And yet, in *Experience Hendrix II*, the court embraced this very line of reasoning in upholding WPRA's legality.[90] The bifurcation of logic within the Ninth Circuit alone leaves artists' and their estates in a state of uncertainty and further explicates the need to federalize this area of law.

Furthermore, this type of regulation is not unprecedented. In 1984, Congress enacted the Semiconductor Chip Protection Act,[91] filling a void for a field[92] left inadequately protected by existing intellectual property law.

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[84] *Id.* (finding that the WPRA violated the Full Faith and Credit Clause, codified in Article 4, Section 1 of the U.S. Constitution, because the state Hendrix was domiciled, which was not Washington, had a greater interest in regulating whether he had a post-mortem right of publicity).

[85] *Id.* at 1140–43 (observing that because the WPRA attempted to govern transactions that occurred entirely outside the State of Washington's borders, it violated the Commerce Clause's restraint on "states from engaging in extraterritorial regulation.").

[86] Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd., 762 F.3d 829 (9th Cir. 2014).

[87] *See id.* at 836–37.

[88] *Id.* at 837.

[89] 692 F.3d at 1000.

[90] *See* 762 F.3d at 836.

[91] 17 U.S.C. § 901–14 (2012).

[92] The Semiconductor Chip Protection Act legally protects integrated circuits' layouts upon registration, making it illegal to copy without permission. *See Federal Statutory Protection for Mask Works*, U.S. COPYRIGHT OFFICE 100, 1–2 (Sept. 2012), https://www.copyright.gov/circs/circ100.pdf; Steven P. Kasch, *The Semiconductor Chip Protection Act: Past, Present, and Future*, 7 Berkeley Tech. L.J. 71, 73–74 (1992),

This sui generis law[93] was adopted after Congress recognized the pressing need for such regulation and tailored it with specific safeguards and provisions so as not to infringe on other areas of intellectual property law.[94] The right of publicity is analogous to the need to protect semiconductor chips—both are generally outside intellectual property and privacy laws protection—and, as it did with the Semiconductor Chip Protection Act, Congress has the authority to affirmatively protect this field.

"So Tell Me What You Want, What You Really Really Want"[95]

Immanent in the inexorable evolution of technology are boundless possibilities for third parties to manipulate artists' legacies. In addition to "boilerplate" estate planning considerations for entertainers and musicians, such as future royalty earnings as well as posthumously released albums and singles, celebrities must plan for their "digital afterlife." An opt-in federalized right of publicity scheme does just this—it protects artists' autonomy to assiduously set and buttress the contours of their post-mortem legacy. If artists opt-in, they would be able to prescribe the exact amount of liberty, if any, re-animators would be allotted, ensuring that it is the artist's creative vision, and not their estate's or re-animator's, being espoused.

There are manifold mechanisms artists may avail themselves of to secure their eternalized post-mortem reputation in the manner that they want well after their death. For instance, just as artists sign the rights to their master recordings to their record labels, the right to create post-mortem concerts could also be incorporated in their label deals. Moreover, artists domiciled in a state that recognizes a post-mortem right of publicity at the time of their death could propound in their will[96] or through a trust the

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http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1100&context=btlj.

[93] U.S. COPYRIGHT OFFICE, *supra* note 92 ("The legal requirements for [semiconductor chips] protection differ from those for copyright protection in terms of eligibility for protection, ownership rights, registration procedures, term of protection, and remedies for rights violations.").

[94] While the Semiconductor Chip Protection Act covers certain types of memory chip topographies, the protection does not extend to the information stored on those chips as that information is explicitly within copyright's auspices. *See id.* The Semiconductor Chip Protection Act purposefully does not protect the functional aspect of chip designs, as that is specifically reserved for patent law. *See* H.R. REP. 98–781, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5752.

[95] SPICE GIRLS, *Wannabe, on* SPICE (Virgin Records 1996).

[96] A person's assets are categorized as either probate or non-probate and a will can only govern the distribution of probate assets. While each individual state de-

person(s) or entity they want to serve as executor of their estate upon their death.

A will is a bastion of the fundamental tenant in U.S. law of the freedom of disposition. Any adult of sound mind has the right to execute a will apportioning who shall receive their assets upon death, which includes their publicity rights in states that regard the right of publicity as a descendible property right.[97] Either in a residuary clause or an explicit provision of their will, artists can appoint a person or entity the rights over their right of publicity, dictate the terms under which such a person or entity may expropriate their image for commercial gain, and create any other restrictions they desire. So long as such conditions are neither illegal nor run afoul of public policy, the testator's intent will control the disposition of their assets. If a person dies without a will, the distribution of their estate falls under the aegis of the pre-determined intestacy laws of the state in which the decedent is domiciled at death and passes to the heirs of the deceased according to the degree of relationship they have with the decedent.[98] A mere oral statement about how one wants their assets distributed upon death is insufficient; to be valid a will must be in writing.[99] This means that if an artist simply avers how they want their assets managed after their death but fails to reduce their intent to writing, a court will not honor their request and their assets will pass via intestacy, even if that results in the appanage of their

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fines what encompasses probate and non-probate property in its jurisdictional code, most states adhere to the Uniform Probate Code's ("UPC") definitions. Under the UPC, non-probate property includes will substitutes (e.g., life insurance policies), employee benefit plans, annuities, mortgages, bonds, promissory notes, and pension plans. *See* Unif. Probate Code § 6-101 (UNIF. LAW COMM'N amended 2010). Probate assets, on the other hand, include assets solely owned by the decedent during life and title was vested in their name. *See also* Frederick M. Sembler and Michael J. Feinfeld, What Is Subject To Probate?, Planning an Estate: A Guidebook of Prin. & Tech. § 6:2 (4th ed. 2016). Accordingly, unless a person has contractually granted another entity the rights to any copyright or trademark in their name, likeness, image, and/or persona, such items constitute probate assets and thus can validly be given to a person's heirs and assigns through a will.

[97] Unif. Probate Code § 2-501 (UNIF. LAW COMM'N amended 2010).

[98] *See e.g.*, Unif. Probate Code § 2-103 (UNIF. LAW COMM'N amended 2010) (explaining how a person who dies without having validly executed a will during their lifetime first has their assets distributed to their living descendants, to their parents if they are not survived by descendants, to their siblings that survive them if they have no living descendants or parents, to their grandparents heirs if they have no descendants, parents, or siblings, and, in the event that there is not a legitimate living taker the decedent's assets, escheat to the state).

[99] Unif. Probate Code § 2-502 (UNIF. LAW COMM'N amended 2010).

estate to those the artist orally declared should not take from or exercise control over their estate.

Despite the sapient advantages of creating a valid will, the vast majority of Americans, including some of the most venerated and illustrious public figures,[100] die intestate.[101] Abraham Lincoln, lawyer and sixteenth president of the United States, died without executing a will, leaving his widow and young children racing in the immediate aftermath of the national tragedy to entreat an Illinois County Court judge to appoint a trusted family friend as administrator of his estate.[102] Civil rights leader Martin Luther King Jr. died without a will and his surviving children have remained embroiled in a series of acrid disputes over how to best manage his estate, including his Nobel Peace Prize and Bible, nearly fifty years after his death.[103] In the absence of a will, billionaire entrepreneur Howard Hughes' estate was not settled until 2010, more than thirty-four years after his death, after an egregiously expensive succession of court battles.[104] Famed Spanish artist Pablo Picasso's billion dollar estate passed via intestacy and was initially ordered by a French court to be overseen by his illegitimate son who elected to not exhibit hundreds of his late father's works because it does not "befit[ ] his discreet style of living."[105] Only after six years of browbeat

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[100] Some of the most well-known people who died without a will are guitar legend Jimi Hendrix, Jamaican musician Bob Marley, Nirvanna frontman Kurt Cobain, rapper Tupac Shakur, entertainer-turned-Congressman Salvatore Phillip "Sonny" Bono, soul singer Barry White, former NFL quarterback Steve McNair, rapper Nate Dogg, and British soul singer Amy Winehouse. *See* Kelly Phillips Erb, *17 Famous People Who Died Without a Will*, FORBES (Apr. 27, 2016), https://perma.cc/KA9G-D42L.

[101] *Digital Limbo: Rocket Lawyer Uncovers How Americans Are (or Aren't) Protecting Their Digital Legacies*, ROCKET LAWYER (Apr. 21, 2015), https://perma.cc/N6FG-VJXW (finding that sixty-four percent of all Americans do not have a will, seventy percent of Americans between the ages of 45 and 54 do not have a will, and fifty-four percent of Americans between the ages 55 and 64 do not have a will).

[102] Danielle Mayoras & Andy Mayoras, *Are You Better Prepared Than Abraham Lincoln Was?*, FORBES (Dec. 4, 2012), https://perma.cc/P9F6-R4F6.

[103] *See* Jenny Jarvie, *Legal Battles of Martin Luther King Jr.'s Children Threaten His Legacy*, L.A. TIMES (Jan. 19, 2015), https://perma.cc/3QUG-VEZX (describing how Martin Luther King Jr.'s children have been embattled in a bitter dispute over possession of the civil rights leader's Bible and Nobel Peace Prize award); *10 Famous People Who Died Without A Will - and the Problems It Caused*, THE TELEGRAPH (May 25, 2016), https://perma.cc/CL7M-C52D.

[104] Kris Hudson, *GGP, Howard Hughes Heirs Settle Las Vegas Payment*, WALL ST. J. (Sept. 20, 2010), https://perma.cc/XZ7A-Z8GF.

[105] Pamela Andriotakis, *The Son Picasso Shut Out of His Life Helps Mount a Giant New York Tribute to His Father*, PEOPLE (May 26, 1980), https://perma.cc/F58Q-K3WV.

negotiations, and a cost of $30 million, was Picasso's estate finally divided amongst his sundry legitimate and illegitimate children.[106] In the acrimonious saga appropriately coined "The Girl in the £20 Million Inheritance Battle," Swedish author Stieg Larsson, best known for writing the internationally acclaimed Girl with the Dragon Tattoo crime trilogy, died with an invalid will.[107] As a result, rather than have his estate go to his intended charities and devoted partner of thirty-two years, whom he never married, his entire estate, including all future royalties to his novels and profits from all feature films, solely went to his father and brother, his closest living blood relatives. When asked how the late author would surmise the way his estate was meted out, Larsson's partner lamented, "[i]t would have been beyond Stieg's worst nightmares to know that someone other than me was handling the rights to his books and to know that the money we planned to invest is gone."[108]

Perhaps the most unexpected artist who died without having executed a valid will is Prince Rogers Nelson, the artist most commonly known as Prince. During his life, Prince amassed a reputation of being a shrewd businessman who was fiercely protective of the rights to his music. In his pursuit of universal ascendancy over his body of work, Prince filed a $22 million copyright infringement suit against twenty-two of his fans who posted links to footage of his concerts on social media websites, severely curtailed access to videos of his music and performances on YouTube, removed his entire body of work from all music streaming services except Jay-Z's notoriously artists friendly platform Tidal, and infamously cut all ties

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[106] Milton Esterow, *The Battle for Picasso's Multi-Billion-Dollar Empire*, VANITY FAIR (Mar. 7, 2016), https://perma.cc/A96Q-QGZW.

[107] To be valid, a will must satisfy all of the attestation requirements of the jurisdiction, which typically entails that the will is in writing, signed by the testator, and either signed by two disinterested witnesses or a notary public within a reasonable time after witnessing the testator sign. *See* Unif. Probate Code § 2-502 (UNIF. LAW COMM'N amended 2010). Alternatively, if the jurisdiction recognizes holographic wills, to be valid a will must simply be signed by the testator and the will's contents must be in the testator's handwriting. *See id.* A will that fails to meet all of the requirements for attested or holographic wills cannot be probated and the testator's property will pass as though they never created a will. With respect to author Stieg Larsson, although he created a will in 1977 before his passing that stated that he wanted the proceeds from his Girl with the Dragon Tattoo series to go to anti-fascist and domestic violence charities, because it was not witnessed and the jurisdiction did not recognize holographic wills, his estate passed to his father and brother. *See* Esther Addley, *The Girl in the £20m Inheritance Battle – Partner of Late Novelist Stieg Larsson Fights for Share of Fortune*, THE GUARDIAN (Nov. 2, 2009), https://perma.cc/4NYR-LXMQ.

[108] *See* Addley, *supra* note 107.

with his record label Warner Bros. and changed his name to an unpronounceable symbol until Warner Bros. granted him ownership over his music catalogue.[109] Notwithstanding the ubiquitous control he exerted over his intellectual property during his life, without a will or trust naming a particular individual or entity to continue the vigilant policing of his collection of works, the entirety of Prince's $300 million estate passed via Minnesota intestacy laws to his sister,[110] a former crack cocaine addict and prostitute,[111] and five half-siblings.[112] The implications of his failure to postulate a management scheme for his posthumous estate created a host of pertinent and yet unanswered questions: how did he want the alleged vault of his unreleased songs handled?; did he want any of his works sampled by other artists for a licensing fee?; did he want independent computer animators to re-envision him as a hologram for commercial purposes without any restraint on what they could have the holographic image say or do? Even if Prince orally avouched the answers to these and other questions during his lifetime, that alone is exiguous. Prince's failure to exercise the same percipient judgment over the management of his posthumous estate that he did during his life resulted in the forfeiture of his right to actively provide for the future governance of his assets. Without a written will or other estate plan in place at the time of his death, the entirety of everything Prince stood for in life could fall into disarray.

Either as an alternative to or in conjunction with a will, a trust is another commonly used tool of succession that artists can contrive during their lifetime to plan for the handling of their estate upon their death. A trust is a fiduciary arrangement[113] whereby the trust creator ("settlor") appoints a trustee to hold assets on behalf of a beneficiary or manifold beneficiaries selected by the settlor.[114] Trusts can be organized in numerous ways depending on the settlor's needs and may specify precisely when and how

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[109] Ryan Faughnder, *Prince Took a Protective Stance on Music Copyrights*, L.A. Times (Apr. 21, 2016), https://perma.cc/B2XN-JBNP.

[110] Jethro Nededog, *Inside the Potentially "Messy" Future of Prince's $300 Million Estate*, Business Insider (Apr. 23, 2016), https://perma.cc/5JU9-3JZ3.

[111] Rose Minutaglio, *Prince and Sister Tyka Made "Pact Not to Bother Each Other When it Came Their Careers," Publicist Says*, People Magazine (Apr. 26, 2016), https://perma.cc/LXC7-5RXD.

[112] Daniel Kreps, *Prince Estate: Sister, Five Half-Siblings Named Heirs*, Rolling Stone (May 19, 2017), https://perma.cc/US57-QLXY.

[113] Regardless of the type of trust the settlor creates, trustees are legally obligated to administer the trust in good faith, in accordance with the trust's terms for the beneficiaries' interest, impartially, and prudently. *See* Unif. Trust Code §§ 801–804 (Unif. Law Comm'n 2000).

[114] *What is a Trust?*, Fidelity, https://perma.cc/8PBR-AJT2.

the trust's assets pass to which beneficiaries.[115] For a myriad of reasons, individuals with large, wealthy estates may prefer to have the disposition of their worldly possessions and other descendible assets controlled by a trust rather than a will. For instance, unlike a will, the terms of a trust can remain private indefinitely, trusts typically do not have to go through the probate process so the beneficiaries may gain assets to the trust's assets prior to the settlor's death, and trusts also provide multitudinous income, gift, and estate tax saving benefits.[116]

Robin Williams' trust, created two years before the actor and comedian's death, has been widely praised for its exemplary prudent and innovative craftsmanship. While many entertainers who create a trust or will conventionally provide that a certain brand or company cannot use their image for a time period after they pass away, Williams' trust with respect to his publicity rights was all-encompassing. Specifically, it bequeathed his publicity rights to the charitable Windfall Foundation and established an outright ban on the use of the Academy Award winner's name, signature, photograph, likeness, three-dimensional or holographic impressions, and digital imprints into various media forms for the first twenty-five years after his death. The astute assignment of Williams' publicity rights to a charitable organization as well as the inclusion of a quarter century long interdict on postmortem usage of his image were in part prompted in reaction to the vitriolic dispute between Michael Jackson's estate and the Internal Revenue Service ("IRS") regarding the monetary value of the late pop-superstar's name and image for estate tax purposes.[117] By enjoining the commercial use of his persona, Williams' trust renders the value of the his publicity rights nil and ipso facto untaxable.[118] Additionally, Williams ensured that his publicity rights would be left to a charitable organization as defined by the

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[115] *Id*.

[116] *See* Robert S. Barnett & Elizabeth Forspan, *Avoiding the Squeeze: Trusts, Estates, and the New ATRA Tax Regime*, JOURNAL OF ACCOUNTANCY (Mar. 31, 2014), https://perma.cc/73K9-3XZ3.

[117] As previously explained, Michael Jackson's estate experienced a flush of income in the years succeeding his death, particularly due to the successful documentary This Is It that grossed approximately $261 million, a profitable Cirque du Soleil tribute show, as well as posthumous albums, video games, and other commercial exploitations. As a result, the IRS claimed that Jackson's name and image at the time of his death was valued at over $430 million while Jackson's estate valued his legacy at a meager $2,105. Eriq Gardner, *Michael Jackson Estate Faces Billion-Dollar Tax Court Battle*, THE HOLLYWOOD REPORTER (Apr. 20, 2016), https://perma.cc/QN3T-LDKS.

[118] Eriq Gardner, *Michael Jackson Estate Faces Billion-Dollar Tax Court Battle*, THE HOLLYWOOD REPORTER (Apr. 20, 2016), https://perma.cc/QN3T-LDKS.

Internal Revenue Code so that his family would be able to apply the one hundred percent charitable deduction with respect to his publicity rights against any estate tax.[119] Cognizant that federal tax laws are subject to dramatic changes depending on the political climate, Williams' trust contained a "catch-all" provision mandating that, in the event that the initially appointed Windfall Foundation loses its status as a charitable organization for tax purposes,[120] his publicity rights would be given to another organization with a focus on humanitarian efforts[121] that qualified for the IRS's charitable deductions.[122] Granting the rights to Williams' image to a charitable foundation and placing restrictions on when and under what circumstances his image may be used in the future not only obviated a costly and lengthy tax dispute concerning the exact value of Williams' public image, but also proved to be an exceptionally adroit and felicitous legal maneuver that preserved Williams' ability to retain control over his personal reputation from beyond the grave.[123]

Notwithstanding the tremendous salutary consequences of having a valid will or trust that provide for how an artist's estate will be governed after their death, the versatility of such devices is limited. Although the

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[119] *See* Allyson Versprille, *Michael Jackson Estate-Tax Woes Provide Lesson for Celebrities*, BLOOMBERG BNA (Feb. 28, 2017), https://perma.cc/N64S-RQS3.

[120] *See* IRC § 501(e) (defining what qualifies as a charity for purposes of the Internal Revenue Code).

[121] Eric Gardner, *Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, THE HOLLYWOOD REPORTER (Mar. 30, 2015), https://perma.cc/4FUY-AGNS.

[122] A contingent gift from one charity to another is not subject to the Rule Against Perpetuities. Robert G. Wolfe, Rules Against Perpetuities and Gifts to Charity, 17 INDIANA L.J. 205, 214 (1942), https://perma.cc/LN77-Y8MR (citing *Christ's Hospital* v. *Grainger,* 1 Macn. & G. 460 (1848)).

[123] Heeding the precautionary tale of Michael Jackson's estate tax woes and Williams' gainful tax avoidance techniques, in his will, the late Beastie Boy member Adam Yauch provided that "in no event may my image or name *or any music or any artistic property created by me* be used for advertising purposes." *See* Deborah L. Jacobs, *Part Of Beastie Boy Adam Yauch's Will, Banning Use Of Music In Ads, May Not Be Valid*, FORBES (Aug. 13, 2012), (emphasis added) https://perma.cc/FF73-9ZMV. Unfortunately for Yauch, this provision does not have the same forceful effect on his intellectual property as Williams' trust prohibition. The issue is that part of Yauch's artistic property was created when he was a member of the Beastie Boys and is owned by all members of the band. Yauch can only dispose of what he owned in his will. This means that if all band members jointly own the Beastie Boy's copyrights, each member can do what they want with the music with the only restriction being that they would have to pay Yauch's estate a portion of the profits. *See* Deborah L. Jacobs, *Part Of Beastie Boy Adam Yauch's Will, Banning Use Of Music In Ads, May Not Be Valid*, FORBES (Aug. 13, 2012), https://perma.cc/FF73-9ZMV.

growing trend is to recognize the right of publicity as a property right descendible upon death, if an artist is domiciled in a state that lacks either a statutory or common law right of publicity or only views the right of publicity as a privacy right, any provision in an artist's will or trust for how their image, name, or likeness would be governed after their death would be rendered void and entirely disregarded. However, in the event that states or the federal government enact a right of publicity that contains a post-mortem provision, the legislature has the ability to retroactively apply such a law to artists who predeceased its passage. This means that any provision in an artist's valid will, trust, or other testamentary document providing for the governance of their right of publicity after death would be binding. The concept of a retrospective right of publicity is not novel; California and Indiana's[124] post-mortem right of publicity statutes already provide the two most sweeping retroactive clauses. Regardless of whether the deceased died before the statute's enactment, California's Civil Code permits a cause of action within seventy years after the deceased's death[125] while Indiana's Code, in addition to containing an unparalleled extra-territorial effect,[126]

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[124] *See Indiana*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://perma.cc/7XKR-EFDH (explaining how Indiana's right of publicity statute was amended eighteen years after it was initially passed to apply retroactively to persons who died before the statute's enactment. Furthermore, although courts have yet to directly decide the issue, Indiana's common law tort of misappropriation may also survive death).

[125] "An action shall not be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality." Cal. Civ. Code § 3344.1(g) (2012) (West 2012).

[126] It has been argued that extending one state's post-mortem right of publicity statute to those not domiciled in a particular state at their time of death is unconstitutional as it does not satisfy the Supreme Court's "aggregation of contacts" test as set forth in *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 308 (1981). In *Allstate Insurance*, the Supreme Court clarified that although multiple jurisdictions' laws may be applied in a single case, each jurisdiction must have sufficient contact or a sufficient aggregation of contacts to create a legitimate state interest with the parties and the transaction or occurrence at hand in order for its laws to be validly applied. In the event that a state does not satisfy this test, it has insufficient contacts with the parties and/or transaction or occurrence and application of its laws to the matter would be unconstitutional. Expatiating on what amounts to sufficient contact and aggregation of sufficient contact, the Court elaborated on its past rulings in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) and *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), explaining that, standing alone, neither nominal residence nor a post-occurrence residence change would be adequate to amount to sufficient contacts. With respect to Indiana's post-mortem right of publicity statute, the issue is that the plain language of the statute disregards the *Allstate Insurance* aggregation of

grants an artist's estate the right to bring a cause of action for a violation of the deceased's right of publicity for up to a century after death.[127]

If a federal right of publicity were enacted, Congress would have discretion to determine if it wanted to follow California and Indiana's lead and extend the law to artists who died prior to its passage[128] and how long after artists' death their estate could enforce their right of publicity.[129] This type

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contacts analysis and readily grants non-Indiana domiciliaries the right to use its broad, sweeping post-mortem right of publicity statute. As of the publication of this Article, very few plaintiffs domiciled outside Indiana have attempted to use this clause and the Supreme Court has yet to directly rule on the constitutionality of this provision.

[127] Indiana Code § 32–36–1–1 (2012) states that, regardless of one's domicile, residency, or citizenship at death, so long as the use of the person's identity occurs within Indiana, that person and/or their estate is entitled to bring a cause of action under Indiana law.

[128] "[I]t is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect." Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289, 316 (2001)).

[129] Just as Robin Williams's trust explicitly stated that any ban on the use of his name, image, or likeness was only enforceable for a specified number of years, a federal post-mortem right of publicity ought to place a time constraint on any moratorium period restricting the use of a person's name, image, likeness, and persona. Even though a fundamental policy of trusts and estates law is to ensure that the settlor or testator's intent is carried out, the decedent's freedom to exercise "dead-hand" control over their assets is not unfettered—courts will not enforce a condition that is illegal or contrary to public policy. Inherent in the public policy limitation on the ability of the decedent to curtail their heirs "quick hand" control over their property is the notion that restrictions the decedent places on their property are disfavored. In the event that a challenge is brought regarding a restriction the decedent placed on how their property may be used and technical rules of construction cannot nullify the limitation in question, courts will use a four-part balancing test to determine if such a limit is reasonable. The four factors are: (i) the nature of the property; (ii) the type of use restriction imposed; (iii) the testator's purpose in imposing the restriction; and (iv) the likely impact of the restriction on the heirs and society in general. However, when reasonable time periods are placed on the usage of the decedent's property, courts are more likely to uphold and honor such provisions.

Enforcing a statute of limitations period for how long a person's estate may bring a cause of action to enforce their right of publicity is akin to the Copyright and Patent Acts limitation on the moratorium period for which the holder of a copyright or patent can bring a cause of action to enforce their rights. The statute of limitations period for copyrights has been greatly extended in the past decades and is currently set at the life of the author plus seventy years for any copyrighted works published after 1977 and between 95 and 120 years depending on the publication date if the work was done for hire or published under a pseudonym or anonymously. After the copyright term expires, the copyrighted work "falls into" the

of statute would constitute an ex post facto law because it would have the retroactive effect of enabling the estates of artists who passed away prior to the law's enactment to actively and affirmatively use the law to underpin the deceased artists' right of publicity. Based upon the maxim *nulla poena sine lege*, meaning "there can be no punishment without law,"[130] an ex post facto law is a law that alters the legal consequences of acts committed prior to the law's enactment, such as criminally punishing conduct that was lawful when done or increasing punishment for crimes after they were committed.[131] The Founding Fathers of the U.S. Constitution were prodigiously wary of usurping a person's right to due process of law and viewed ex post facto laws as an assault on the natural process of justice by law and trial.[132] Accordingly, they invoked a federal prohibition on ex post facto laws in the federal Constitution. Nevertheless, in 1798 the Supreme Court in *Calder v. Bull*[133] held that the proscription of ex post facto laws is not universal; rather, it

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public domain. *Copyright Basic FAQ*, STANFORD UNIVERSITY LIBRARIES, https://perma.cc/7396-QX2W (last accessed Aug. 15, 2017). Like copyrights, the holder of a patent can only enforce it for the statutorily defined limitations period in 15 US.C. § 154(a)(2), which currently states that patents are only enforceable from the date the patent is issued to twenty years after the date the patent application was filed.

Lastly, with respect to imposing a time restriction as to how long such rights ought to be enforceable, the right of publicity is more akin to copyrights and patents than trademarks. Unlike copyrights and patents, the mark's holder can renew their registration for an indefinite number of successive ten-year periods (15 U.S.C. §1059). To take advantage of this ability, the trademark holder must show that the trademark is being used in commerce or that it qualifies for special circumstances excusing non-use (15 U.S.C. § 1058). On the other hand, copyrights and patents do not have to be used in commerce for the holder of the copyright or patent to enforce their intellectual property rights during the statute of limitations period. If a person prohibits or severely curtails how their name, image, persona, or likeness can be used, they are effectively removing their publicity rights from commerce and yet courts will enforce such restrictions for the time period set forth by law or in the artist's will, trust, or other testamentary document in a state recognizing a descendible right of publicity. Under this rationale, the right of publicity is more like copyrights and patents than trademarks and thus a statue of limitations for how long use of such right can be restricted should be imposed.

[130] Daniel Troy, *Ex Post Facto*, THE HERITAGE GUIDE TO THE CONSTITUTION, https://perma.cc/RP5Q-76WL (last accessed Aug. 9, 2017).

[131] *See* United States v. VanHoose, 437 F.3d 497 (6th Cir. 2006); Castellini v. Lappin, 365 F. Supp. 2d 197 (D. Mass. 2005).

[132] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[133] 3 U.S. 386 (1798).

only applies to criminal,[134] not civil,[135] cases. Justice Chase's ruling in *Calder* has withstood numerous constitutional challenges over the last two centuries and the Supreme Court has upheld both state and federal laws with retroactive effects as constitutional.[136] Although ex post facto laws are still generally disfavored,[137] statutes with retrospective force have been lauded when enacted in apposite circumstances.[138] A post-mortem right of public-

[134] Article 1, Section 9, Clause 3 and Article 1, Section 10, Clause 1 of the U.S. Constitution prohibit federal and state criminal ex post facto laws, respectively. U.S. CONST. art. 1, §9, cl. 3, §10, cl. 1.

[135] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 72 S. Ct. 512 (1952) (stating that the ex post facto provision of this clause forbids penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment, but does not apply to legislation imposing civil disabilities.); United States v. Johnson, 845 F. Supp. 864 (M.D. Fla. 1994) (saying that the ex post facto clause of United States Constitution applies only to criminal laws; however, ex post facto prohibition cannot simply be circumvented by Congress with enactment of a civil law that is primarily criminal in nature).

[136] *See e.g.*, Smith v. Doe, 538 U.S. 84 (2003); Kan. v. Hendricks, 521 U.S. 346 (1997).

[137] Troy, *supra* note 130, at 21. ("In The Federalist No. 78, Alexander Hamilton noted that 'the subjecting of men to punishment for things which, when they were done, were breaches of no law' is among 'the favorite and most formidable instruments of tyranny.' Thomas Jefferson noted in an 1813 letter to Isaac McPherson 'the sentiment that ex post facto laws are against natural right.'").

[138] As explained by the Supreme Court in *Republic of Austria v. Altmann*, 541 U.S. 677, 692–93 (2004), "the antiretroactivity presumption is just that—a presumption, rather than a constitutional command." Furthermore, the Court articulated that the Constitution's prohibition on ex post facto laws (see *infra* note 130), both at the state and federal level, is limited in scope. Landgraf v. Usi Film Prods., 511 U.S. 244, 267 (1994). As long as the proposed legislation does not violate a specific provision in the Federal Constitution concerning ex post facto laws, the potential unfairness of retroactive civil legislation does not amount to a manifest miscarriage of justice and thus in an insufficient ground for courts to not give the statute its full and intended scope. *See* Landgraf v. Usi Film Prods., 511 U.S. 244, 267 (1994). In fact, the courts have acknowledged that there are a multitude of public policy reasons to favor the passage of retroactive legislation. The first, and arguably least controversial, justification for passing legislation with retroactive effects was advocated by Chief Justice Oliver Wendell Holmes in *Danforth v. Groton Water Co.*, 178 Mass. 472, 477 (1901). In that case he explained that Congress has the inherent power and authority "to make small repairs which a Legislature naturally would possess," meaning that Congress has the right to "repair" patent drafting errors that were initially undiscovered or arose after the statute's enactment. Retroactive legislation that has curative effects typically is more controversial but courts are more inclined to honor and uphold its provisions if intended "to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a

ity statute that grandfathers in predeceased celebrities is akin to the type of statutes with retroactive effects that have withstood Constitutional scrutiny.[139]

Although ex post facto laws with civil effects are not unconstitutional per se,[140] they are not presumed to be valid; rather, to pass constitutional muster, they must meet certain requirements. First, Congress has to explicitly provide, as an unambiguous directive or express command within the language of the statute itself,[141] that the estates of artists who predeceased the statute's enactment would be able to take advantage of the new law.[142] Such candidness is necessary because a post-mortem right of publicity statute constitutes a substantive, rather that merely remedial, law.[143] Second,

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new law Congress considers salutary." Landgraf v. Usi Film Prods., 511 U.S. 244, 268 (1994).

[139] In *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942), the court stated that "if [a] statute is a bona fide regulation of conduct which the legislature has power to regulate, it is not bad as an ex post facto law even though the right to engage in the conduct is made to depend upon past behaviour, even behaviour before the passage of the regulatory act." As explained *supra*, through the Commerce Clause, Congress irrefutably has the authority to govern interstate commerce and all instrumentalities that affect interstate commerce, including the right of publicity. Therefore, a retrospective post-mortem right of publicity law is not automatically bad as an ex post facto law.

[140] *See e.g.*, Smith v. Doe, 538 U.S. 84 (2003); Kan. v. Hendricks, 521 U.S. 346 (1997); Norfolk, Baltimore & Carolina Lines, Inc. v. Dir., Office of Workers' Comp. Programs, U. S. Dep't of Labor, 539 F.2d 378, 380 (4th Cir. 1976); U.S. v. Oakwood Downriver Med. Ctr., 687 F. Supp. 302, 308 (E.D. Mich. 1988) (stating that retroactively applying a law that was amended to increase civil damages did not violate the Federal Constitution's ex post factor clause).

[141] *See* Martin v. Hadix, 527 U.S. 343, 354 (1999).

[142] *See* Rivers v. Roadway Express, Inc. 511 U.S. 298, 310 (1994) (noting that the Supreme Court's prior decisions concerning retroactive statutes and legislation do not support the proposition that the Court has espoused a "presumption" in favor of retroactive application of restorative statutes); *U.S. v. Ettrick Wood Prods., Inc.*, 774 F. Supp. 544, 553 (W.D. Wis. 1988) (explaining how a cornerstone, venerable rule of statutory interpretation is that statutes affecting a person's substantive rights and/or liabilities are presumed to only have a prospective effect absent definite and explicit statements by Congress to the contrary) (citing *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985); *United States v. Kairys*, 782 F.2d 1374, 1381 (7th Cir. 1986)).

[143] As the court in *State ex rel. Holdridge v. Indus. Com.*, 11 Ohio St. 2d 175, 178 (1967) explained, "[i]t is doubtful if a perfect definition of 'substantive law' or 'procedural or remedial law' could be formulated. However, the authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress." Despite the lack of a definitive definition, for a statute

any party with appropriate standing[144] that opposed the new law would bear the burden to show that the new law is not rationally related to a legitimate government interest.[145] Any such challenger will likely fail in their quest[146]—"as an empirical matter, the [Supreme] Court has consistently upheld retroactive legislation against claims by those it affects that it violates the rule of law."[147] Regardless of whether the law is being challenged under

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to be regarded as simply remedial and not substantive, it can neither enhance nor diminish a person's substantive rights; rather it must only pertain to the procedures for enforcing those rights. *United States v. Kairys*, 782 F.2d 1374, 1381 (7th Cir. 1986). A retroactive federalized postmortem right of publicity law would exceed the scope of what may constitute a simple remedial law and thus is a substantive law.

[144] A precondition for a court to have the power to render a binding decision on the merits in a case or controversy, the plaintiff must have met the requirements of Article III of the federal Constitution to have standing. *United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992). The burden is on the plaintiff to establish the three minimum and irreducible constitutional elements of standing. The first requirement is that the plaintiff has suffered, or is at risk of imminently suffering, an injury. The second requirement is that there is a causal connection between the injury and the alleged actions or omissions by the defendant. The third and final requirement is that the injury suffered can be redressed by a decision in the plaintiff's favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

[145] 2 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: Substance and Procedure § 15.9(a)(iv) (Mar. 2017) (explaining that "[t]he Supreme Court, in a series of cases that spanned two-thirds of the twentieth century, established the principle that retroactive legislation will violate due process only if the legislation does not have a rational relationship to a legitimate government interest.").

[146] Challengers would also be unsuccessful in bringing a cause of action against a federal post-mortem right of publicity with retroactive effects under the Contracts Clause or the Takings Clause of the federal Constitution. The Contracts Clause (U.S. Const. Art. 1, § 10) provides a prohibition on any law that impairs contractual obligations but only applies to state, not federal, laws. 1 William J. Rich, MODERN CONSTITUTIONAL LAW § 17:26 (3rd ed.) (Dec. 2016).

The Fifth Amendment's Takings Clause prevents the legislature from depriving private people of their vested property rights unless they have been paid just compensation and the taking is for public use. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994). Although Justice Chase in *Calder v. Bull* suggested that the Fifth Amendment's Takings Clause provided a similar safeguard as the ex post facto clause against retrospective legislation with respect to property rights (*see E. Enterprises v. Apfel*, 524 U.S. 498, 534 (1998) (citing *Calder v. Bull*, 3 U.S. 386, 394 (1798)), the Takings Clause only applies to "redistribution of property from private individuals to the government," (1 William J. Rich, MODERN CONSTITUTIONAL LAW § 17:26 (3rd ed.) (Dec. 2016)) not from a private individual to another private individual or corporation.

[147] Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549, 1571 (2011).

the Due Process Clause of the Fifth or Fourteenth Amendment,[148] the rational basis review is the test utilized "even when the legislation 'upsets otherwise settled expectations . . . [or] impose[s] a new duty or liability based on past acts.'"[149]

The Next Episode[150]

Shouting "come with me" during the historic and mind-blowing performance at 2012's Coachella,[151] the digital Tupac was not simply calling out to the thousands of bellowing festivalgoers, but seemingly to other artists to follow. The popularization of this new entertainment frontier is inevitable—as the architects that engineered the lifelike Tupac image explained, "[we] think we've scratched the surface."[152] Digital Domain's Chief Creative Officer also cautioned that, "a whole new universe of legal questions" is opened as technology progresses to give artists life after death.[153] Thus, it is quintessential that the law is equipped to handle the resulting onslaught of legal questions. A federalized right of publicity statute would resolve the inconsistent rulings both between and within individual circuits and explicitly delineate the precise contours of such a right.

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[148] The Fifth Amendment applies to the federal government and the Fourteenth Amendment's Due Process Clause applies the to states.

[149] Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549, 1571 (2011) (quoting Usery v. Turner Elhorn Mining Co., 428 U.S. 1, 16 (1976)).

[150] DR. DRE, SNOOP DOGG, KURUPT, AND NATE DOGG, *The Next Episode, on* 2001 (Interscope Records 1999).

[151] Westfesttv, *supra* note 1.

[152] McCartney, *supra* note 5.

[153] *Id.*