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INVESTING IN IDENTITY: THE ECONOMIC CASE FOR A FEDERAL RIGHT OF PUBLICITY IN THE DIGITAL AGE

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Abstract

Once confined to the realm of science fiction, holographic performances of deceased celebrities like Whitney Houston, Tupac Shakur, and Elvis Presley are striking features of today's entertainment industry, drawing live audiences and generating millions of dollars in revenue. Behind this spectacle lies a deeper issue: who has a right to profit from a person's identity, especially after their death?

This article argues that the current patchwork of inconsistent state right of publicity laws is insufficient to address the challenges posed by emerging digital technologies. It proposes the creation of a comprehensive federal right of publicity that explicitly protects against unauthorized digital replicas while also preserving strong postmortem rights. Drawing on economic theory, this paper contends that individuals who invest in cultivating their persona should be able to pass that economic value to their heirs, and that federal protections are needed to secure these rights consistently across jurisdictions. The paper analyzes the weaknesses of existing state frameworks, examines how the NO FAKES Act addresses some of these problems, and ultimately recommends stronger postmortem protections without unnecessary registration or use requirements. A federal right of publicity would not only honor the economic investments individuals make during their lives, but also provide clear, uniform standards for companies, creators, and courts navigating the modern digital era.

INTRODUCTION

In 2012, Tupac Shakur, sixteen years after his death, came out on stage at Coachella Music Festival to perform with Snoop Dogg and Dr. Dre.[1] Shakur was resurrected as a hologram, a virtual three-dimensional image generated by interfering beams of light that reflect real, physical objects.[2] Since then, holograms of other stars like Amy Winehouse, Whitney Houston, and Roy Orbinson have all been used to simulate live performances.[3] These performances stun their audiences and ignite discussions about posthumous performances and digital resurrection in the entertainment industry.[4] These digital reincarnations can blur the line between tribute and exploitation, implicating right of publicity laws.[5]

A right of publicity claim allows individuals to bring a cause of action against a third party for the unauthorized use of their name, image, or likeness for commercial gain.[6] The right of publicity as it stands today is recognized in most states through varying statutes or differing interpretations of common law.[7] Misappropriation of name, image, and likeness has taken a new and more complex form in the digital era.[8] Because there is no federal right of publicity setting uniform standards, anyone bringing a legal claim against an

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[1] *See* Jacob Ganz, *How That Tupac Hologram at Coachella Worked,* NPR (Apr. 17, 2012, 5:15 PM), https://www.npr.org/sections/therecord/2012/04/17/150820261/how-that-tupac-hologram-at-coachella-worked.

[2] Margarita Grubina, *Holograms in Real Life: How the Technology Works and Industry Use Cases*, REESPECHER (Feb. 3, 2021, 5:51 AM), https://www.respeecher.com/blog/holograms-real-lifetechnology-works-industry-use-cases.

[3] Juliet Helmke, *The Ethical Dilemma of Turning Our Heroes Into Holograms,* OBSERVER (May 21, 2019, 7:45 AM), https://observer.com/2019/05/whitney-houston-hologram-tour-amy-winehouse-ethical-questions/.

[4] *See* Ben Henry, *A Whitney Houston Hologram Tour Has Sparked a Huge Backlash From Fans,* BUZZFEED NEWS (Sept. 18, 2019), https://www.buzzfeed.com/benhenry/whitney-houston-hologram-tour-twitter-backlash (displaying comments on social media criticizing the plans for a Whitney Houston holographic performance).

[5] *See* U.S. COPYRIGHT OFFICE, *Part 1: Digital Replicas*, *in* COPYRIGHT AND THE REGULATION OF ARTIFICIAL INTELLIGENCE 6–7 (2024).

[6] Sharon L. Klein & Jenna M. Cohn, *The Post-Mortem Right of Publicity: Defining It, Valuing It, Defending It, and Planning for It,* 48 ACTEC L.J. 63 (2022).

[7] *Id.*

[8] *See* U.S. COPYRIGHT OFFICE, *supra* note 5, at 1.

unauthorized hologram must navigate a maze of state laws.[9] The patchwork nature of these laws results in inconsistent protections, particularly when it comes to posthumous rights, which vary widely from state to state.[10] For example, Indiana recognizes posthumous rights for 100 years after an individual's death while Wisconsin does not recognize postmortem rights at all.[11]

This legal uncertainty undermines the economic rationale behind the right of publicity.[12] When a public figure invests time and resources into cultivating their persona, they create a commercially valuable asset.[13] For example, Michael Jackson's estate has made over $1 billion by licensing his image and likeness since his death in 2009.[14] Accordingly, public figures should be entitled to the profits their persona generates and the authority to determine who may commercially exploit it.[15] This protection also motivates individuals to invest the time and resources necessary to develop personas that, in turn, produce socially valuable contributions to culture, entertainment, and public discourse.[16] The same rationale is applicable to postmortem rights as well. If celebrities cannot transfer their persona's value after death, their return on the investment is limited which could reduce incentives for future creators and public figures to invest in their brand. The fragmented nature of states' right of publicity laws make it difficult for individuals to predict whether their investments in developing their persona will be protected.[17] This uncertainty is heightened by new technologies, like holograms, which create unprecedented opportunities for unauthorized commercial exploitation of their likeness.[18] Without reliable safeguards, individuals may be discouraged from investing in

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[9] *See* Brittany Lee-Richardson, *Multiple Identities: Why the Right of Publicity Should Be a Federal Law*, 20 UCLA ENT. L. REV. 189, 195 (2013).

[10] *See* W. Woods Drinkwater, Note, *Personality Beyond Borders: The Case for a Federal Right of Publicity,* 3 MISS. SPORTS L. REV. 115, 126–27 (2013).

[11] *See* IND. CODE § 32-36-1-8 (2025); WIS. STAT. ANN. § 995.50 (West 2020).

[12] *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 206–07 (1993).

[13] *See id.* at 182.

[14] Charlie Douglas, *When Heirs Cry: Prince's Post-Mortem Right of Publicity,* WEALTH MGMT. (Apr. 26, 2016), https://www.wealthmanagement.com/estate-planning/when-heirs-cry-prince-s-post-mortem-right-of-publicity.

[15] Madow, *supra* note 12, at 206.

[16] *Id.*

[17] Lee-Richardson, *supra* note 9, at 195.

[18] *See* U.S. COPYRIGHT OFFICE, *supra* note 5, at 53 (noting the replication of artistic style with that generative AI).

the development of their personas, ultimately depriving society of the benefits that flow from their work.[19]

A similar economic rationale underlies other aspects of intellectual property law. In copyright, protection is only granted to original works of authorship that meet a minimum threshold of creativity, thereby reserving rights for those who contribute new expressive value through personal effort.[20] Patent law grants protection only to inventors who produce novel, non-obvious, and useful inventions, offering exclusive rights as a reward for innovation and intellectual investment.[21] Similarly, the secondary meaning doctrine of trademark law provides protection for marks that, because of the efforts and investment of the mark holder, have come to signify a particular source in the minds of consumers.[22] Providing uniform protections for the right of publicity would simply align it with the establishment economic principles underlying other areas of intellectual property law where rights are awarded to encourage and reward investment, innovation, and the creation of commercially valuable assets.

Many critics argue that the economic justification for the right of publicity is weak because individuals seek fame for reasons unrelated to wealth, such as creative expression, recognition, or personal fulfillment.[23] However, this critique mischaracterizes how and why fame is pursued in today's economy. While it's true that initial motivations may vary, those goals are increasingly intertwined with, and often dependent on, commercial gain. In the age of influencers, NIL deals, and personal branding, fame is a business model, not a byproduct of unrelated aspirations.[24] Achieving and sustaining fame today requires more than mere visibility, it demands deliberate, ongoing investment in content creation, marketing, appearance, and audience

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[19] *See* Madow, *supra* note 12, at 207.

[20] *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that copyright is intended to motivate the creative activity of authors by the provision of a special reward); Copyright Act of 1976, 17 U.S.C. § 102(a).

[21] *See* Graham v. John Deere Co., 383 U.S. 1, 14 (1966) ("Patentability is to depend, in addition to novelty and utility, upon the 'non-obvious' nature of the 'subject matter sought to be patented . . . .").

[22] *See* Robert C. Denicola, *Some Thoughts on the Dynamics of Federal Trademark Legislation and the Trademark Dilution Act of 1995*, 59 L. & CONTEMP. PROBS. 75, 80 (1996).

[23] *See* David Franklyn & Adam Khun, *Owning Oneself in a World of Others: Towards a Paid-For First Amendment*, 49 WAKE FOREST L. REV. 977, 991–93 (2014).

[24] *See* Elizabeth Porter, Note, *Are Influencers Making a Bad Impression?: Exploring the Consumer Harm of the Influencer Marketing Economy*, 5 CORP. & BUS. L.J. 246, 251 (2024).

engagement.[25] These efforts often involve substantial time, labor, and financial cost.[26] Without the realistic prospect of economic return, individuals would lack not only the incentive but also the means to justify and sustain this investment.[27] In this way, the pursuit of fame is increasingly conditioned on the legal and economic structures that allow individuals to benefit from the identity they construct.

This Note argues for the creation of a federal right of publicity with posthumous protections lasting seventy years after death and special safeguards against unauthorized digital recreations. Such legislation would ensure that celebrities and their estates retain the economic value of their persona and prevent unauthorized commercial exploitation of an artist's likeness through emerging digital technologies like holograms. As hologram performances become more sophisticated, a uniform federal law preempting all state law would help secure the economic returns on an individual's investment in their persona by closing gaps in the current law that weaken incentives to develop commercially valuable identities.

Part I of this Note describes the rise of holograms, how artists feel about these digital recreations, and states' concerns about the misappropriation of identity as technology develops. Part II discusses the history of the right of publicity, noting key cases in its development. Part III presents the current state laws surrounding the right of publicity, emphasizing differences in scope, protected attributes, and duration among the right of publicity statutes, and analyzing cases with similar facts but different outcomes. This part concludes by discussing the negative effects these differences have on not just individuals but intellectual property systems as a whole. Part IV calls for more standardized regulations, arguing that a federal right of publicity can provide stronger protections for artists in the digital era. This part addresses how to resolve the state discrepancies on the scope of the right. It also proposes strong posthumous rights that include special, explicit protections for digital recreations that use an individual's name, image, or likeness, as inspired by statutes in New York and California. Part V addresses criticisms of a Federal Right of Publicity and alternative solutions. This part addresses how the act would differ from

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[25] *See id.*

[26] *See id.*

[27] *See* Lucy Maguire & Madeleine Schulz, *Unpacking the Creator Economy Battleground*, VOGUE BUS. (Apr. 30, 2025), https://www.voguebusiness.com/story/technology/unpacking-the-creator-economy-battleground ("[T]he main barrier to launching a successful influencer brand is lack of expertise—and funding.").

a Lanham Act False Endorsement Claim and the ability of a modern Congress to act. Finally, Part V addresses the NO FAKES Act recently introduced into Congress and how this plays a role in the development of the federal right.

I. THE GROWING USE OF HOLOGRAM TECHNOLOGY

As technology advances, the use of holograms in performances continues to rise and provides a glimpse into how technology can redefine concerts. In 2014, a hologram of Michael Jackson performed at the Billboard Music Awards.[28] In 2019, a hologram of Frank Zappa hosted a world tour.[29] This emerging trend serves as a significant revenue stream, allowing artists' likeness to generate income long after death. For instance, the Roy Orbison hologram tour was projected to generate between $25 and 35 million in revenue.[30] As this technology continues to develop, hologram touring may shift from a novelty to mainstream practice, fundamentally altering the live entertainment industry forever.

Performers, both past and present, have adverse feelings about their images being created as a hologram. The estate of Elvis Presley expressed that they believed Elvis did not want to be made into a hologram, emphasizing that the late star thought such a performance was "kitschy."[31] Prince's former fiancée and longtime collaborator Sheila E. stated that Prince told her to make sure that no one ever created a hologram of him.[32] The star thought the idea was "demonic" and cut against his spiritual beliefs.[33] Even living stars, such as Dolly Parton, have expressed skepticism and concern about the use of

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[28] Phil Gallo, *Michael Jackson Hologram Rocks Billboard Music Awards: Watch & Go Behind the Scenes,* BILLBOARD (May 18, 2014), https://www.billboard.com/music/music-news/michael-jackson-hologram-billboard-music-awards-6092040/.

[29] Alex Biese, *Frank Zappa Hologram Tour Brings Bizarre World to NJ,* ASBURY PARK PRESS (Apr. 21, 2019, 10:02 AM), https://www.app.com/story/entertainment/music/2019/04/21/frank-zappa-hologram-tour-brings-bizarre-world-road/3482365002/.

[30] Roy Trakin, *Roy Orbison: A Hologram Star Is Born,* POLLSTAR (Oct. 10, 2018, 5:40 PM), https://news.pollstar.com/2018/10/10/roy-orbison-a-hologram-star-is-born/.

[31] George Simpson, *Elvis Presley Hologram Tour: Graceland on the King's View and If Such Shows Will Happen,* EXPRESS, https://www.express.co.uk/entertainment/music/1480318/Elvis-Presley-hologram-tour-Graceland-Blade-Runner-2049 (last updated Aug. 22, 2021).

[32] Phil Witmer, *Prince Thought Holograms Were "Demonic," Confirms Sheila E.,* VICE (Feb. 5, 2018, 4:29 PM), https://www.vice.com/en/article/sheila-e-justin-timberlake-halftime-show-prince-hologram-interview/.

[33] *Id.*

technology to recreate their likeness after death.[34] The decision to not monetize a persona for certain uses itself can even be economically valuable.[35] Limiting exposure or avoiding over-commercialization can preserve the strength, reputation, and long-term profitability of a celebrity's brand.[36] Given the substantial time, effort, and resources celebrities invest into building commercially valuable identities, uniform legal protections are necessary to ensure that the economic returns from an individual's persona remain under their control and can be passed to their chosen heirs.

As hologram technologies increasingly enable the unauthorized commercial exploitation of identity, lawmakers are beginning to recognize the need for stronger legal protections to preserve the economic value individuals create in their personas. In 2024, California Governor Gavin Newsom signed 17 artificial intelligence related bills, including several measures targeting digital impersonation.[37] The bills include a post-mortem digital replica ban that requires studios to obtain consent from the deceased's estate before using AI-generated holograms of late actors in films.[38] Illinois also enacted a similar law in August of 2024 that barred enforcement of contract terms that permit using an individual's AI-generated likeness without prior consent.[39] New York has enacted similar laws as well.[40]

At the federal level, the Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2025 ("NO FAKES Act") was reintroduced in Congress following initial efforts in 2023 to address the unauthorized

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[34] Mary Varvaris, *You Won't Be Seeing a Dolly Parton Hologram Tour After She Passes Away,* COUNTRYTOWN (July 4, 2023, 11:38 AM), https://countrytown.com/news/you-wont-be-seeing-a-dolly-parton-hologram-tour-after-she-passes-away/3fBj8fDz8vU/04-07-23.

[35] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977) (quoting Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 21 L. & CONTEMP. PROBS. 326, 331 (1966)) (emphasizing that no social purpose would be served by allowing a defendant to obtain for free an aspect of the plaintiff that would otherwise have market value).

[36] *See id.* at 575 (recognizing that unauthorized widespread exposure can reduce the economic value of a performance by diminishing public demand).

[37] Press Release, Office of the Governor of California, Governor Newsom Announces New Initiatives to Advance Safe and Responsible AI, Protect California (Sept. 29, 2024).

[38] *See* Press Release, Office of the Governor of California, Governor Newsom Signs Bills to Protect Digital Likeness of Performers (Sept. 17, 2024).

[39] Digital Voice and Likeness Protection Act, 815 ILL. COMP. STAT. ANN. 550/1–99, 11 (West 2024).

[40] *See, e.g.*, Digital Replica Contracts Act, N.Y. GEN. OBLIG. LAW § 5-302 (McKinney 2025).

commercial use of an individual's likeness and voice through new emerging technologies.[41] The proposed legislation would preempt state law and create a nationwide right that would allow individuals and their heirs to control the commercial use of their voice and likeness against unauthorized digital replicas.[42] The law calls for posthumous rights up to 70 years after death, provided there is ongoing commercial use and proper registration with the Copyright Office.[43] During a U.S. Senate Judiciary Subcommittee hearing on The NO FAKES Act, Ben Sheffner of the Motion Picture Association emphasized that the unauthorized replication of a performer's likeness can undermine an artist's ability to earn a living from their craft.[44] Sheffner noted that the NO FAKES Act aimed to establish guardrails against these abuses, ensuring creators maintain control over their identities and livelihoods.[45] Together, these legislative efforts reflect a growing consensus by elected officials that individuals who invest in their personas deserve to control and benefit economically from their use.[46]

II. THE HISTORY OF RIGHT OF PUBLICITY

In 1890, future Supreme Court Justice Louis Brandeis and Samuel Warren co-authored the seminal article *The Right to Privacy*.[47] The work was a response to the rise in tabloid journalism and the use of new technologies like photography and audio recording.[48] The article called for the law to recognize a right to privacy and impose liability for invasion of privacy, something not clearly recognized at the time.[49] The

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[41] *See* Samuel Cohen & Daniel E. Schnapp, *Congress Reintroduces the NO FAKES Act with Broader Industry Support,* NAT'L L. REV. (Apr. 14, 2025), https://natlawreview.com/article/congress-reintroduces-no-fakes-act-broader-industry-support.

[42] *See* NO FAKES Act of 2025, H.R. 2794, 119th Cong. § 2(f)(1) (2025).

[43] *See id.* at §§ 2(b)(2)(A)(iv)(II), 2(b)(2)(D).

[44] *See* Prithvi Iyer, *Transcript: US Senate Judiciary Subcommittee Hearing on "The NO FAKES ACT",* TECH. POL'Y PRESS (May 1, 2024), https://www.techpolicy.press/transcript-us-senate-judiciary-subcommittee-hearing-on-the-no-fakes-act/.

[45] *See id.*

[46] *See* Alex Ambrose, *Boom in State Digital Replica Laws Fuels Need for Federal Publicity Right,* INFO. TECH. & INNOVATION FOUND. (Oct. 7, 2024), https://itif.org/publications/2024/10/07/boom-in-state-digital-replica-legislation-fuels-need-for-federal-publicity-right/.

[47] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193–220 (1890).

[48] *See id.* at 196.

[49] *See id.* at 193.

authors claimed that the law they described was a common law right and allowed a person to decide if and when his thoughts, sentiments, and emotions would be communicated to others.[50] This seminal article signaled the beginning of a legal movement in the realm of privacy law.[51]

One of the first right of publicity cases later emerged in New York in 1902, in which Abigail Roberson's portrait was used, without her permission, by the Franklin Mills Company in an advertisement for flour.[52] The state had not yet formally recognized this right of privacy that would prevent the unwanted use of an individual's image and likeness.[53] The trial court held that there was a common law right of a living person to be free from unconsented exploitation and public display of their likeness, especially in commercial advertising.[54] The New York Court of Appeals later reversed this holding, emphasizing that there was no precedent on this right of privacy and the use of an individual's name or image in a way that was not malicious or libelous.[55] Although Roberson did not win her case, the case further pushed the concept of the right of privacy to the forefront and New York later codified the right as law.[56] These New York laws served to provide a remedy for the unauthorized commercial exploitation of an individual's name, picture, or voice.[57]

In 1905, the Supreme Court of Georgia became the first court to recognize a common law right of privacy,[58] marking a significant step in legal protection for protection of individual autonomy. In *Pavesich v. New England Life Insurance Co.*, a life insurance company published a photo of Paolo Pavesich in a newspaper advertisement without his consent.[59] The court held that Pavesich had a cause of action against the newspaper under tortious invasion of privacy, recognizing the violation

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[50] *See id.* at 198.

[51] *See* Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech,* 63 VAND. L. REV. 1295, 1296 (2010).

[52] Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902) [*Roberson III*]; *see also* Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined For New York?*, 36 CARDOZO ARTS & ENT. L.J. 573, 577 (2018).

[53] *See* Rothman, *supra* note 52, at 578.

[54] *See* Roberson v. Rochester Folding-Box Co., 65 N.Y.S. 1109, 1111 (Sup. Ct. Monroe Cnty. 1900) [*Roberson I*], *aff'd*, Roberson v. Rochester Folding-Box Co., 71 N.Y.S. 876 (N.Y. App. Div. 1901) [*Roberson II*].

[55] *See* Rothman, *supra* note 52, at 578 (referencing *Roberson III*, 64 N.E. at 442).

[56] *See* N.Y. CIV. RTS. LAW §§ 50, 51 (McKinney 2024).

[57] *See id.* at § 51.

[58] *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905).

[59] *Id.* at 68.

as a standalone tort.[60] The court reasoned that the right of privacy was derived from natural law, stemming from the rights of personal security and personal liberty and thus no person shall be deprived of the right except by due process of law.[61] The origins of this tort-based right of privacy claim are what we recognize today as a right of publicity.[62]

Although the right of publicity had origins in privacy law, it later evolved into a fully transferable property right separate from the right of privacy.[63] Publicity rights were recognized as property in *Zacchini v. Scripps-Howard Broadcasting Company,* the only United States Supreme Court case on the right of publicity.[64] In *Zacchini,* Hugo Zacchini performed his human cannonball act at the Geagau County Fair.[65] A reporter for Scripps-Howard Broadcasting Company filmed Zacchini's entire act despite Zacchini requesting that he not film.[66] The film clip was later shown on the local news.[67] The Supreme Court accepted the lower court's conclusion that under Ohio state law, Zacchini had a right to the publicity value of his performance and this right was violated by the recording and broadcasting of his act.[68] However, the Court disagreed with the lower court's application of precedent cases discussing defamation and false light claims, both of which are privacy based.[69] The Court distinguished those cases, asserting that the right of publicity protected a different interest, which was the economic value of a performance.[70] The Court described this as a proprietary interest, and protecting that interest was analogous to the goals of patent and copyright law.[71] By emphasizing this distinction and drawing parallels to established intellectual property regimes, the Court signaled a shift towards viewing the right of publicity not merely as a personal right tied to reputation, but as a distinct form of property.[72]

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[60] *See id.* at 73.
[61] *See id.* at 71.
[62] *See* Rothman, *supra* note 52, at 579.
[63] *See* Dustin Marlan, *Unmasking the Right of Publicity,* 71 HASTINGS L.J. 419, 435 (2020).
[64] *See* 433 U.S. at 562.
[65] *Id.* at 563.
[66] *Id.* at 564.
[67] *Id.*
[68] *See id.* at 566.
[69] *See id.* at 571-73.
[70] *See id.* at 573.
[71] *See id.*
[72] *See id.* at 562-63.

This solidified the right of publicity as a valuable and transferable asset, forging it into a new independent intellectual property right.[73]

III. CURRENT RIGHT OF PUBLICITY LAW

A. Differences in Protected Aspects

Today, right of publicity is defined as "an individual's right to control and profit from the commercial use of their name, image or likeness, and to prevent others from exploiting their persona for commercial gain."[74] The right is governed by state common law, statute, or by a combination of both.[75] Across jurisdictions, there is significant variation not only in statutes but also in common law interpretations.[76] This results in a lack of consistency regarding the scope and substance of the rights granted. Professor Thomas McCarthy, an international authority in the field of intellectual property, stated that "[i]t is difficult to group the [state right of publicity] statutes into any sort of coherent 'types' or subspecies . . . . Each statute is really 'one of a kind' in that it is largely a product of its time and place."[77]

In Indiana, the right of publicity is recognized under common law and by statute.[78] Indiana's statute is extremely expansive. According to Indiana's statute, personality covers a wide array of attributes including not just name and likeness but also voice, signature, photograph, image, appearance, gesture, and mannerisms.[79] The Indiana right of publicity statute also applies very broadly to any infringing act or event that occurs within Indiana regardless of a person's domicile, residence, or citizenship.[80] Defendants can be subject to Indiana's jurisdiction if they cause infringing materials to be transported or published, exhibited, or disseminated within Indiana.[81]

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[73] *See* Marlan, *supra* note 63, at 436.

[74] Klein & Cohn, *supra* note 6, at 63.

[75] *Id.*

[76] *See id.* at 71.

[77] KEVIN L. VICK & JEAN-PAUL JASSY, WHY A FEDERAL RIGHT OF PUBLICITY STATUTE IS NECESSARY 15 (quoting J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:6 (2d ed. 2011)) (internal quotation marks omitted).

[78] *See* IND. CODE § 32-36-1-1.

[79] *See id.* at §§ 32-36-1-6, 32-36-1-7.

[80] *See* IND. CODE § 32-36-1-1(a); *but see* Shaw Family Archives Ltd. V. CMG Worldwide, Inc., 589 F. Supp. 2d 331, 333 (S.D.N.Y. 2008) (referencing some exceptions to IND. CODE § 32-36-1-8).

[81] *See* IND. CODE §§ 32-36-1-9.

In California, the right of publicity is similarly broad. The state recognizes a common law right of publicity and a statutory right of publicity.[82] Through a series of Ninth Circuit decisions, the state's common law right of publicity has expanded the meaning of "personality" to include not only literal likenesses but broader evocations of identity. In *Motschenbacher v. R. J. Reynolds Tobacco*, a tobacco company used racecar driver Motschenbacher's distinctive racecar to advertise their cigarettes.[83] Motschenbacher's face, name, or image was not shown in the advertisement.[84] Despite this, the Ninth Circuit ruled that the distinctive racecar was so closely associated with Motschenbacher that viewers could infer he was connected to the advertisement, violating his common law right of publicity.[85] In *White v. Samsung Electronics America, Inc.,* the Ninth Circuit upheld a common law right of publicity claim for Vanna White, a game show host, after Samsung Electronics aired a commercial in which a robot was dressed in a manner that evoked her image.[86] Although White's actual likeness was not used, the court held that the evocation of her identity was sufficient to support a common law right of publicity claim.[87] These rulings illustrate the broad interpretation of what personality means under California's common law right of publicity.

In contrast to these states that recognize broad rights, some states limit protections to name and likeness. In Wisconsin, the state's right of publicity statute covers only the use of a person's name, portrait, or picture for advertising or trade purposes.[88] Similarly, in Massachusetts, the states right of publicity statute covers only name, portrait, and picture.[89] Neither state extends protection to voice, mannerisms, or persona.[90] In Florida, the state's right of publicity statute enumerates name, portrait, photograph, or other likeness.[91] No

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[82] *See* Lugosi v. Universal Pictures, 603 P.2d 425 (1979); CAL. CIV. CODE § 3344 (West 2024).
[83] 498 F.2d 821 (9th Cir. 1974).
[84] *Id.* at 822.
[85] *See id.* at 822, 827.
[86] 971 F.2d 1395, 1399 (9th Cir. 1992).
[87] *See id.* at 1396.
[88] *See* WIS. STAT. ANN. § 995.50; *see also* Habush v. Cannon, 828 N.W.2d 876, 881 (Wis. Ct. App. 2013) (emphasizing that use of a name under the statute is narrowly construed and must involve public, visible association).
[89] *See* MASS. GEN. LAWS ANN. ch. 214, § 3a (West 2025).
[90] *See id.*; WIS. STAT. ANN. § 995.50.
[91] FLA. STAT. ANN. § 540.08(1) (West 2022).

case seems to have addressed the question of whether other indica of identity could form the basis of a claim.

These narrow statutes create significant uncertainty for emerging technologies like holograms because they are ambiguous in their application to holograms. For example, under Wisconsin's narrow statute, one court has interpreted "portrait" and "picture" to require a recognizable visual likeness based on the plaintiff's physical appearance.[92] In *Walkowicz v. American Girl Brands*, Lucianne Walkowicz was a well-known astronomer recognized for their outspoken interest in the colonization of Mars.[93] They are also known for their distinctive style, which includes purple-streaked brown hair, holographic shoes, and spaced themed clothing.[94] Walkowicz alleged American Girl Brands misappropriated elements of their identity in the creation of the brand's "Luciana Vega" doll, violating their right of publicity under the state's statute.[95] The doll had a purple streak in its hair, wore holographic shoes and a space patterned dress, and was marketed as an aspiring Mars explorer.[96] The court noted that, because Wisconsin's statute was modeled after New York's, the persuasive likeness standard articulated in New York cases would guide its interpretation.[97] The key question of this test was whether the challenged image is a recognizable likeness of the plaintiff identifiable solely from the image itself.[98] If a jury could not reasonably make that connection, the claim must be dismissed.[99] Moreover, the court noted that "'[m]erely suggesting certain characteristics of the plaintiff, without literally using his or her name, portrait, or picture, is not actionable' under New York's privacy statute."[100] Thus, clothing, mannerisms, or thematic similarities, even if strongly associated with a celebrity, are considered suggestive characteristics, not protected portraits or pictures.[101] The court concluded that the Luciana Vega doll shared only thematic traits like holographic shoes, space clothing, and an interest in

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[92] *See* Walkowicz v. Am. Girl Brands, LLC, No. 19-cv-447-jdp, 2021 WL 510729, at *6 (W.D. Wis. Feb. 11, 2021).
[93] *Id.* at *1, n.1 (noting that Walkowicz uses they and them pronouns).
[94] *See id.* at *2.
[95] *Id.* at *1.
[96] *Id.* at *2.
[97] *Id.* at *5.
[98] *Id.* at *6.
[99] *See id.*
[100] *Id.* at *17 (quoting Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 621 (S.D.N.Y. 1985)).
[101] *See id.*

Mars.[102] Because the doll did not present a recognizable physical likeness beyond a purple hair streak, the statutory right of publicity claim could not proceed.[103]

This narrow interpretation signals potential ambiguity in how courts might apply existing right of publicity laws to holographic recreations. Although unpublished, this case still provides useful insight into how courts may interpret Wisconsin's privacy statute.[104] Following the reasoning under *Walkowicz,* a hologram that imitates a celebrity's signature dance moves, costumes, and stage mannerisms without depicting their facial or physical likeness might not qualify as a "portrait" or "picture."[105] For example, if a hologram replicated the elaborate costumes, energetic splits, and dramatic stage collapses associated with singer James Brown but omitted any depiction of his face or body, a court could likely find that such a depiction does not constitute a recognizable likeness under Wisconsin's narrow statute. Narrow statutes like Wisconsin's, if interpreted similarly to *Walkowicz,* can leave a gap in right of publicity claims for those defending the unauthorized use of their likeness for commercial gain through technology like holograms in these states.[106] The court in *White* even noted that "[t]he identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice."[107]

B. Commercial Use Requirement

Some states limit right of publicity actions to commercial uses, often requiring "advertising" or "trade purposes," while others extend the right to any use for a defendant's advantage, regardless of profit.[108] States with a commercial use requirement often interpret commercial

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[102] *Id.*

[103] *See id.* at *7.

[104] *See* WIS. STAT. ANN. § 995.50(3) (directing courts to interpret the statute in line with the developing common law of privacy); *Walkowicz*, 2021 WL 510729, at *5 (emphasizing that because Wisconsin's statute was modeled on New York's privacy statute, the analysis of Wisconsin's statute includes consideration of persuasive authority from New York).

[105] *See Walkowicz*, 2021 WL 510729, at *16–17 (explaining that similarities in dress or biography without identifiable facial or bodily likeness are insufficient to constitute a "portrait" or "picture" under Wisconsin's right of publicity statute).

[106] *See id.*

[107] *White*, 971 F.2d at 1399.

[108] *See* JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 3 (2018).

use differently, with some applying it narrowly and others more broadly. In Florida, the state's right of publicity statute declares that a person's name, photograph, or likeness cannot be used for trade, commercial, or advertising purposes without consent.[109] However, Florida's law is more restrictive than other statutes because it requires a direct promotion of a product or service to trigger a violation.[110] In *Tyne v. Time Warner Entertainment, Co.*, the Florida Supreme Court ruled that the state's right of publicity statute did not reach expressive works, such as motion pictures, unless a name or likeness is used to directly promote a product or service.[111] The court stated that published works do not necessarily serve a "commercial purpose" just because they are sold for profit.[112] They must include the direct promotion of a product or service which would include the use of someone's name or likeness specifically to advertise or sell a distinct product or service, not merely include them in an expressive work.[113] Thus, the use of a Florida boat captains name and likeness to tell a fictional story in the film *The Perfect Storm* did not violate Florida's right of publicity statute.[114]

In Michigan, the right of publicity is governed by common law rather than statute.[115] Michigan common law describes the right of publicity as the misappropriation of a plaintiff's name or likeness for the defendant's advantage in a commercial context.[116] In *Ruffin-Steinback v. dePasse,* family members of the late David Ruffin, a former member of the band The Temptations, sued the producers of a mini-series on the group's story.[117] The family members alleged that the mini-series used the name and likeness of the band without consent.[118] The court rejected these claims, holding that expressive works such as biographies, docudramas, and motion pictures are not commercial uses

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[109] *See* FLA. STAT. ANN. § 540.08(1).

[110] Tyne v. Time Warner Ent. Co., 901 So. 2d 802, 808 (Fla. 2005) (citing Loft v. Fuller, 408 So.2d 619, 622 (Fla. 4th DCA 1981)).

[111] *See id.* at 809–10.

[112] *Id.* at 808–09, 810.

[113] *See id.* at 809–11.

[114] *Id.*

[115] *See* Pallas v. Crowley, Milner & Co., 33 N.W.2d 911, 913 (Mich. 1948) (recognizing a cause of action for invasion of privacy based on an unauthorized use of a person's likeness); Beaumont v. Brown, 257 N.W.2d 522, 527 (Mich. 1977) (reaffirming Michigan's common law recognition of privacy rights).

[116] *See* Carson v. Here's Johnny Portable Toilets, Inc., 498 F. Supp. 71, 77 (E.D. Mich. 1980).

[117] 82 F. Supp. 2d 723, 726 (E.D. Mich. 2000) [*Ruffin-Steinback I*].

[118] *Id.*

under the right of publicity, even when they are sold for profit.[119] The court found that the genre of the work, whether fictional, nonfictional, or dramatized, had no bearing on the analysis.[120] Thus, using an individual's persona in an expressive work does not give rise to liability because such works are protected by the First Amendment, and their value stems from the creator's original expression rather than from the commercial exploitation of the individual's identity.[121] To constitute a commercial use, an individual's name or likeness would have to be used in advertising goods or services, placed on merchandise, or otherwise used to promote a commercial product or service.[122] The Sixth Circuit later affirmed this decision and adopted the district court's reasoning that the mini-series qualified as a protected expressive work.[123]

In *Seale v. Gramercy Pictures*, Bobby Seale, founding member of the Black Panther Party, brought a common law right of publicity claim in a Pennsylvania court, challenging the unauthorized use of his name and likeness in a fictional motion picture.[124] Under Pennsylvania common law, a person's name or likeness cannot be used for commercial purposes without consent.[125] The court ruled that the use of Seale's name and likeness in a fictional motion picture did not constitute a commercial purpose.[126] The court noted that this use took some artistic license, and was not commercial merely because the film made a profit.[127] The focus is instead on whether the name or likeness is used in a traditional advertising sense, as opposed to plain incorporation into the expressive content of the work itself.[128] The court held that, because Seale's identity was used as part of a motion picture, that the use was protected and did not constitute a commercial use under Pennsylvania's common law.[129]

The consistent judicial trend of narrowly interpreting commercial use leaves a gap in legal protections for the right of publicity that directly undercuts the economic theory behind the right

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[119] *See id.* at 730.
[120] *See id.*
[121] *See id.* at 729.
[122] *See id.* at 729–30.
[123] Ruffin-Steinback v. dePasse, 267 F.3d 457, 462 (6th Cir. 2001) [*Ruffin-Steinback II*].
[124] 964 F. Supp. 918, 920 (E.D. Pa. 1997).
[125] *Id.* at 929.
[126] *Id.* at 930.
[127] *See id.* at 923, 930.
[128] *See id.*
[129] *See id.* at 930.

by failing to protect the economic value of a public figure's identity.[130] Under these rulings, a filmmaker could digitally insert a hologram of actor George Clooney into a motion picture about a real event and benefit from the drawing power of their identity while avoiding liability even if Clooney never consented to the use. Because the likeness of Clooney appears within the expressive content of a film rather than in traditional advertisement, the use would fall outside Florida, Pennsylvania, and Michigan court's interpretation of "commercial purpose."[131] This undermines the fundamental principle that individuals are entitled to the economic value derived from their persona.[132] By treating expressive works like motion pictures as categorically exempt, these rulings create a loophole that permits uncompensated exploitation of identity.

In contrast to Florida's narrow interpretation of "commercial purpose" in *Tyne*, where expressive works like movies are exempt unless they directly promoted a product or service, other states have adopted broader standards, capturing more uses under their right of publicity statutes. For example, in *Estate of Presley v. Russen,* Elvis Presley's estate sued Elvis impersonator Rob Russen under the New Jersey common law right of publicity for producing a live stage show on which he performed Presley's songs and imitated his likeness, mannerisms, and performing style.[133] The court held that even expressive performances could infringe on the right of publicity when the predominant overall function of the activity was commercial exploitation rather than artistic expression alone.[134] The court ruled in favor of Elvis Presley's estate, granting an injunction against the impersonator, recognizing such imitation as primarily commercial exploitation rather than protected expression.[135]

These divergent state approaches illustrate how varying interpretations of "commercial use" can generate significant uncertainty, especially when applied to emerging technologies like holograms where the line between expressive content and commercial exploitation can become increasingly blurred. For example, whether an unauthorized hologram infringes the right of publicity might depend on

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[130] *See id.*; *Tyne*, 901 So. 2d at 810; *Ruffin-Steinback II*, 267 F.3d at 462.
[131] *See Seale*, 964 F. Supp. at 929; *Tyne*, 901 So. 2d at 810; *Ruffin-Steinback II*, 267 F.3d at 462.
[132] *See* Madow, *supra* note 12, at 205–06.
[133] 513 F. Supp. 1339, 1348 (D.N.J. 1981).
[134] *See id.* at 1356.
[135] *See id.* at 1339.

jurisdiction.[136] Under Florida, Pennsylvania, and Michigan's more narrow standards, such a performance could possibly be protected as expressive, provided it does not directly advertise a product or service.[137] Conversely, New Jersey's broader standard might treat the same exact performance as primarily commercial and subject to a right of publicity claim.[138] This inconsistency complicates the enforcement of publicity rights and creates legal uncertainty, leaving estates and performers unclear about what types of uses are actionable and how to safeguard the economic value of their identity. Public figures cannot reliably predict if the use of their persona as a hologram will be considered misappropriation or protected expression. This lack of clarity weakens the economic rationale for the right of publicity, which is premised on the idea that individuals can invest in and commercialize their persona with the expectation of legal protection against unauthorized exploitation.

C. Differences in Posthumous Rights

State laws also differ regarding the scope and duration of posthumous rights of publicity. The posthumous, or postmortem, right of publicity "extends the [right of publicity] beyond an individual's lifetime, allowing an executor or heir to enforce the protections provided by law."[139] Duration of posthumous rights also ranges dramatically by state. In states like Indiana and Oklahoma, posthumous rights of publicity extend for 100 years after an individual's death.[140] In Tennessee, the right extends indefinitely, so long as the deceased's persona is exploited commercially, similar to how trademark rights persist through continued commercial use.[141] In contrast, Wisconsin does not extend rights of publicity after death at all, and the rights terminate once a person dies.[142] In some states like Iowa, posthumous rights are entirely unclear. The state of Iowa not addressed postmortem

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[136] *See id.* at 1356; *Tyne*, 901 So. 2d at 810 (discussing the right of publicity as applied to a motion picture).

[137] *See Tyne*, 901 So. 2d at 810; *Seale*, 964 F. Supp. at 930; *Ruffin-Steinback II*, 267 F.3d at 462.

[138] *See Estate of Presley*, 513 F. Supp. at 1356.

[139] Klein & Cohn, *supra* note 6, at 63.

[140] *See* IND. CODE § 32-36-1-8(a); OKLA. STAT. ANN. tit. 12, § 1448(G) (West 2025).

[141] *See* TENN. CODE. ANN. § 47-25-1103(b) (West 2024); 15 U.S.C. § 1127 (2024).

[142] *See* Heinz v. Frank Lloyd Wright Found., No. 85-c-482-c, 1986 WL 5996 (W.D. Wis. Feb. 24, 1986) (holding that Wisconsin's statutory right of privacy, which encompasses right of publicity, does not survive the individual's death).

rights based on a misappropriation claim, but "[a]t least one federal district court has suggested that the state would recognize a postmortem right of publicity without a durational limit."[143] Some states, like Washington, even confer their posthumous publicity rights to persons domiciled outside of their borders.[144]

Posthumous rights of publicity are crucial because a celebrity's persona retains significant commercial value after death. "In 2024, Prince's estate earned an estimated $35 million," in part from licensing deals connected to the use of his name, image, and likeness.[145] Recognizing these rights ensures that the economic benefits derived from a deceased celebrity's identity are directed to their heirs and designated representatives, rather than unauthorized third parties. These rights also incentivize public figures to invest in the development of their persona during their lifetime, knowing that their efforts can create a lasting asset that benefits their designated beneficiaries after death.[146]

Admittedly, when a persona is inherited through intestacy, it may suggest that the celebrity did not intentionally plan to transfer or monetize their posthumous identity. This might seem to undercut the claim that economic incentive drives behavior. However, the broader incentive structure does not rely on every individual exercising precise control. Instead, it depends on a general legal and cultural understanding that publicity rights have value and are inheritable. Even if some celebrities do not make explicit plans, many do, and the existence of transferable rights informs how individuals invest in and manage their identity during life.[147] A federal framework ensures that this value is recognized and preserved consistently, regardless of the decedent's specific intent.

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[143] *Rothman's Roadmap to the Right of Publicity*, U. PA. L. SCH., https://rightofpublicityroadmap.com/state_page/iowa/ (last visited Nov. 18, 2025); *see generally*, Estate of Bisignano *ex rel.* Huntsman v. Exile Brewing Co., 694 F. Supp. 3d 1088 (S.D. Iowa 2023).

[144] *See* WASH. REV. CODE ANN. § 63.60.010 (West 2008).

[145] *Prince's $400 Million Estate in 2025: How New Music & Royalties Fuel His Legacy*, FIN. MONTHLY, https://www.finance-monthly.com/princes-net-worth-2025-music-legends-fortune-revealed/ (last updated July 14, 2025).

[146] *See* Michael J. McLane, *The Right of Publicity: Dispelling Survivability, Preemption and First Amendment Myths Threatening to Eviscerate a Recognized State Right*, 20 CAL. W.L. REV. 415, 421 (1983).

[147] *See* Sara Zerehi, *Valuating a Celebrity's Right of Publicity for Estate Tax Purposes*, 8 HARV. J. SPORTS & ENT. L. 125, 130 (2017) (discussing Robin Williams' decision to restrict his estate from exploiting his right of publicity for twenty-five years after his death).

Differing state laws concerning postmortem rights of publicity can lead to significant uncertainty and gaps in protection that distort the economic incentives the right of publicity is supposed to promote. If a celebrity dies domiciled in a state that does not recognize posthumous rights, their estate may lack sufficient legal protections against unauthorized hologram uses in many jurisdictions. As a result, third parties can commercially exploit the economic value of a celebrity's persona without consent or compensation. This not only deprives the individual of control over their legacy but also denies their heirs the ability to inherit and benefit from an asset that their loved one wished for them to profit from. Such outcomes erode the economic incentive behind the development of commercially valuable personas and weaken the right of publicity's justification as a reward for labor and investment.

The tension between differing state postmortem rights is illustrated in *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*[148] Marilyn Monroe died in 1962 and was domiciled in New York, which at the time did not recognize a postmortem right of publicity.[149] Decades later, Monroe's estate attempted to bring a right of publicity claim for the unauthorized use of Monroe's image to sell merchandise.[150] Her estate claimed California as Monroe's state of domicile, considering her significant connections to the state, including property ownership and career activities.[151] At the time the suit was brought, California offered broad posthumous rights, extending posthumous rights for 70 years after death.[152] However, the court concluded that Monroe was legally domiciled in New York at her death.[153] Thus, New York law controlled and Monroe's estate did not possess any posthumous rights of publicity to prevent the unauthorized commercial use of her name or likeness.[154] Despite Monroe's enduring brand value, her heirs could not capture its benefits.[155] This outcome cleared the way for others to use and profit off of Monroe's image on

[148] 692 F.3d 983 (9th Cir. 2012).
[149] *Id.* at 986.
[150] *See id.* at 990.
[151] *See id.* at 988-90.
[152] *See* CAL. CIV. CODE § 3344.1.
[153] *Milton H. Greene Archives*, 692 F.3d at 1000.
[154] *Id.*
[155] *See id.*

posters, t-shirts, and in the media without needing her estates consent.[156]

In *Heinz v. Frank Lloyd Wright Foundation*, architect Frank Lloyd Wright designed custom china for the Imperial Hotel in Tokyo, Japan as part of his overall design for the building.[157] After Wright's death, Thomas Heinz began selling reproductions of the china in the United States and used Wright's name in advertising his products.[158] The Frank Lloyd Wright Foundation, to whom Wright assigned his postmortem rights of publicity, brought a right of publicity claim against Heinz for the unauthorized use of Wright's name.[159] The court ruled against the Wright Foundation, holding that under Wisconsin law the right of publicity only protects living individuals and does not survive death.[160] Because Wright was deceased and Wisconsin had no statute extending publicity rights postmortem, the foundation could not enforce its claim.[161] Thus, Heinz could continue advertising and selling the china using Wright's name without needing permission from or making payments to the Wright Foundation.[162]

Taken together, these cases underscore how inconsistent state laws can leave valuable personas vulnerable to unauthorized commercial exploitation after death, undermining the economic incentives behind the right of publicity and leaving deceased celebrities vulnerable to new forms of misuse like unauthorized hologram recreations.

D. Call to Action

Variations in state laws regarding which aspects of identity are protected, the length of posthumous rights, and the importance of a commercial use requirement have created significant legal uncertainty for those wishing to bring right of publicity claims, leaving public figures vulnerable to unauthorized commercial exploitation through new technologies like holograms. Without reliable and uniform protections, individuals may be discouraged from developing their personas, ultimately depriving society of the cultural, artistic, and

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[156] *See id.* at 992.
[157] 1986 WL 5996, at *2.
[158] *Id.* at *1.
[159] *Id.* at *7.
[160] *See id.*
[161] *See id.*
[162] *See id.*

economic contributions that such investment produces. A federal right of publicity would provide the consistency necessary to safeguard these investments, aligning the right of publicity with the broader intellectual property framework that rewards innovation and investment by securing economic rights.[163]

IV. SETTING THE STAGE: DESIGNING THE FEDERAL RIGHT OF PUBLICITY

A. Scope of the Right

This statute must seek to resolve many of the issues that exist between various state rights. Most importantly, "[a] federal statute must define all aspects of a right of publicity, . . . [especially] the protection[s] offered."[164] A straightforward solution to using a federal statute to protect against holographic reproductions might be to prohibit only the unauthorized simulation of an individual's exact likeness, such as a realistic depiction of their face or voice. However, this approach would be insufficient in the digital era, where emerging technologies make it easy to evoke a celebrity's identity through a variety of distinctive traits such as choreography, mannerisms, or costume design without replicating their exact image. Cases such as *White* and *Motschenbacher* illustrate the concern that celebrity identities are often the easiest to evoke without direct use of name or likeness, making broad protections essential.[165] This concern is even more pressing in the digital era, where the internet and social media have made celebrity identities more widely recognized and easily imitated.[166] With digital holograms and AI-generated voices, it has become effortless to recreate and evoke a celebrity's persona in ways that traditional publicity laws never contemplated.[167] For example, an

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[163] *See* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 190–93 (2012).

[164] Drinkwater, *supra* note 10, at 137.

[165] *See* 971 F.2d at 1396; 498 F.2d at 827.

[166] *See* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law,* 58 STAN. L. REV. 1161, 1162 (2006) (discussing how the right of publicity has expanded to cover indirect evocations of identity, and the internet and social media accelerate this issue by making it easier than ever to imitate and monetize celebrity personas).

[167] *See* Alexandra Fernandez, *Beyond Hollywood: The Case for a Federal Right of Publicity in the Age of AI,* AM. U.J. GENDER, SOC. POL'Y & L.: BLOG (Oct. 28, 2024), https://jgspl.org/beyond-hollywood-the-case-for-a-federal-right-of-publicity-in-the-age-of-ai/ (noting that AI has made it extremely easy to imitate individuals without

AI-generated dancer mimicking Michael Jacksons' iconic dance moves, vocal style, and clothing without showing his face can still commercially exploit his identity. Therefore, this federal statute must be broad enough to cover evocation of identity through distinctive traits like voice, style, or signature elements to avoid evasion of liability through clever imitation, as attempted in *White* and *Motschenbacher*.[168] This federal right of publicity can take inspiration from pre-existing statutes that are similarly broad, like that of Indiana's, which defines personality as "a living or deceased natural person whose . . . name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, or mannerisms has commercial value . . . ."[169]

B. Commercial Use Requirement

In designing a federal right of publicity, it is crucial to establish a clear commercial use requirement that addresses gaps exposed by the current inconsistencies while also balancing First Amendment freedoms. Some jurisdictions, such as Florida, Michigan, and Pennsylvania, interpret commercial use narrowly, requiring direct advertising of a product or service.[170] As a result, there is a gap in the law that can allow for the unauthorized commercial exploitation of identity through expressive works such as motion pictures. Under these standards, a hologram of a public figure can be digitally inserted into a movie without consent and without legal recourse through the right of publicity.

To effectively modernize the right of publicity, a federal statute must separately address two distinct categories of uses: traditional uses of identity and realistic digital replicas. Traditional unauthorized uses such as the use of an individual's name, likeness, voice, or signature traits in movies should require a carefully defined commercial use requirement to balance the protection of identity against legitimate First Amendment interests. To address these issues in traditional unauthorized uses, het federal statute should adopt the commercial use test articulated in *Estate of Elvis Presley*.[171] The court's "predominant

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their consent due to the threat of cheap, accessible, and unregulated processes to create videos and images).

[168] *See* 971 F.2d at 1399; 498 F.2d at 827.

[169] IND. CODE § 32-36-1-6.

[170] *See Tyne*, 901 So. 2d at 809-11; *Ruffin-Steinback*, 267 F.3d at 267; *Seale*, 949 F. Supp. at 929-30.

[171] *See* 513 F. Supp. at 1340.

purpose" test[172] can help in determining whether the use of a celebrity's identity within an expressive work was primarily intended to commercially exploit that identity rather than to convey independent expressive content. Under this approach, liability attaches if the dominant purpose of the use is to capitalize on the individual's fame for commercial gain, rather than to contribute meaningful artistic, journalistic, or cultural expression.[173] This test strikes an appropriate balance between protecting right of publicity and safeguarding free expression. By focusing on whether the primary intent of the work is commercial exploitation rather than independent creative expression, the test ensures that genuine artistic, journalistic, and cultural works remain protected under the First Amendment. At the same time, it provides a clear standard for courts to identify and remedy uses that unfairly capitalize on a person's identity without meaningful transformation or commentary.

In applying the predominant purpose test, which is used to assess whether the primary purpose of the work is commercial exploitation of another's identity rather than genuine artistic expression,[174] courts should consider several key factors. These factors include whether the persona is prominently featured in the marketing or promotion of the work, whether the work primarily capitalizes on the celebrity's fame without adding significant new expression, and whether the use creative transformation beyond mere exploitation. The court should balance these factors in determining the predominant purpose of the work. This test ensures that genuine expressive works remain protected, while unauthorized commercial appropriations of identity can be properly remedied under the right of publicity.

Realistic digital replicas, like holograms, present fundamentally different risks than traditional unauthorized uses. Holograms are capable of recreating an individual's persona in a way that can substitute their real-world presence, causing direct economic harm. Unlike an actor's mere portrayal of a celebrity likeness, a hologram replaces a performer's own face, voice, and mannerisms, allowing the work to market itself as if the real celebrity were present. That substitution can divert the very licensing revenue the right of publicity seeks to protect and can be reproduced indefinitely once a digital model

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[172] *See id.* at 1356 ("[T]he purpose of the portrayal in question must be examined to determine if it predominantly serves a social function valued by the protection of free speech.").
[173] *See id.*
[174] *See id.*

is built. For those reasons, the statute should impose a bright-line consent requirement: no creation, display, performance, or distribution of a highly realistic digital replica may occur without the individual or estate's permission. This narrow, but absolute, rule targets the unique economic and dignitary harms posed by hologram technology.

This section of the proposed federal right of publicity statute may be structured as follows:

> **(a)** "Identity" is defined as any attribute that a reasonable observer would recognize as pointing to a particular person, including—
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> **(1)** name or nickname;
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> **(2)** image, likeness, or other visual depiction;
>
> **(3)** voice or vocal style;
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> **(4)** signature or other distinctive written mark; or
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> **(5)** distinctive appearance, gesture, or mannerism.
>
> **(b) Regulation of Traditional Identity Uses.**
>
> **(1)** Liability arises only if the individual's identity is used to advertise, market, endorse, or sell a product, service, event, or merchandise other than the expressive work in which the identity appears. The mere inclusion of identity within a film, book, song, or other expressive work, even if that work is sold or licensed, is not a commercial purpose under this Act.
>
> **(2)** For uses inside expressive works, liability attaches if the predominant purpose of the use of the individual's persona is commercial exploitation rather than independent expression. Courts should consider—
>
> **(A)** whether the persona is prominently featured in the marketing or promotion of the work;

(B) whether the work primarily capitalizes on the celebrity's fame without adding significant new expression; and

(C) whether the use provides creative transformation beyond mere exploitation.

(c) Regulations of Digital Replica Uses.

(1) A digital replica is defined as a computer-generated, highly realistic electronic reproduction readily identifiable as the individual.

(2) No digital replica may be displayed, distributed, performed, sold, or otherwise used without prior written consent, even if incorporated within an expressive work.

(3) For digital replicas, it is unnecessary to prove commercial use. Unauthorized creation or distribution alone constitutes a violation.

(4) These prohibitions operate subject to the exemptions in subsection (d).

C. First Amendment Protections

The federal right of publicity must also include carefully tailored First Amendment carveouts in order to avoid chilling legitimate expression. In order to avoid infringing on these rights, the right should exempt from liability the uses of an individual's identity that occur as part of news reporting, public affairs coverage, commentary, criticism, scholarship, satire, or parody. In addition, uses of an individual's identity within legitimate documentaries or historical or biographical works should be exempted, provided that the use does not falsely imply that the individual personally endorsed, participated in, or authorized the work. These carveouts ensure that the right of publicity does not suppress the public's interest in receiving news, historical information, or critical commentary, while still preserving strong protections against unauthorized commercial exploitation.

This section of the proposed federal right of publicity statute may be structured as follows:

(d) Exemptions for Protected Expression.

(1) No liability shall arise under this act for the use of an individual's name, image, likeness, voice, signature, or persona when such use occurs as part of—

(A) news reporting or public affairs coverage, provided the use is materially relevant to the subject matter;

(B) in documentary, historical or biographical works, subject to the rules in subsection (e)(1); or

(C) a work of commentary, criticism, satire, or parody, so long as a reasonable viewer would perceive the use primarily as conveying new expression, meaning, or message rather than as a substitute for the individual's own performance or an advertisement for unrelated goods or services.

(e) Exemptions for Documentaries and Historical or Biographical Works.

(1) Use of an individual's identity within a documentary, historical work, or biographical work shall also be exempt provided that—

(A) the use does not falsely imply that the individual personally endorsed the work; and

(B) the individual is portrayed as themselves rather than a fictional or fabricated character.

Under this draft statute, there is still ample room for creative and critical expression. For example, a ten-second photorealistic hologram of Elvis Presley that includes the on-screen label "digital reconstruction for historical context" in a documentary initially triggers the digital replica ban in subsection (c) because it is a computer generated, highly realistic depiction readily identifiable as Presley. However, subsection (c) expressly yields to the First Amendment exemptions in subsection

(d), which include bona fide documentaries. The film consequently falls within subsection (d)(1)(B)–(C) and must satisfy the documentary safeguards in subsection (e). It clearly does so as the on-screen label prevents any false impression of endorsement and the hologram presents Elvis as himself rather than a fictionalized character. Because the replica is materially relevant to the historical narrative and used only within the documentary (not in advertising or merchandise), the subsection (e) exemption applies, overriding the consent requirement. This is a concrete example of how this statute would preserve historically valuable digital uses while still protecting individuals from unauthorized commercial exploitation.

D. Posthumous Rights

In establishing posthumous rights, inspiration can be gained from existing statues that adequately address problems of the digital era. In 2020, New York's right of publicity statute was amended to establish a postmortem right of publicity in the state and offers a valuable blueprint for crafting a federal right of publicity in the digital era.[175] Specifically, the amendment provides a cause of action when a digital replica of a deceased performer is used without consent in a scripted audiovisual work as a fictional character or in a live musical performance.[176] The statute defines deceased performer as a natural person who was regularly engaged in acting, singing, dancing or playing a musical instrument for gain or livelihood.[177] The statute also defines digital replica as an "original, computer-generated, electronic performance" in which the deceased performer did not actually participate but is "so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual."[178] A claim under this law can be brought any time before the posthumous right of publicity expires, which is forty years after death in New York.[179]

The state of California later followed suit, addressing digital creations in the context of its right of publicity statute with an amendment that took effect in January of 2025.[180] California's

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[175] *See* N.Y. CIV. RTS. LAW § 50-f (McKinney 2022).
[176] *See id.* at § 50-f(2)(b).
[177] *See id.* at § 50-f(1)(a).
[178] *Id.* at § 50-f(1)(c).
[179] *See id.* at § 50-f(8).
[180] *See* CAL. CIV. CODE § 3344.1(a)(2)(A)(i).

amendment regarding digital recreation prohibits the production, distribution, or other use of a digital replica of a deceased personalities voice or likeness without prior consent from the individual's estate.[181] The amendment also defines digital replica similarly as a computer-generated, highly realistic electronic representation that is readily identifiable as the voice or visual likeness of an individual.[182]

In modeling a federal right of publicity statute, incorporating a provision that explicitly addresses digital replicas like holograms, as states like California and New York have done, would help ensure comprehensive protection of identity in the digital era. This can help address the challenges faced by individuals with valid claims who are forced to navigate outdated and narrowly defined statute language that was never designed to regulate modern digital misappropriation. In taking inspiration from these statutes, it is important to carefully analyze the differences between these state statutes to identify potential gaps in protection, anticipate avenues for infringement, and ensure that a federal right of publicity closes loopholes that might otherwise allow unauthorized use of a deceased individual's identity to avoid liability.

Under New York law, if someone uses a digital replica of a deceased performer in a scripted audiovisual work or live musical performance and it is not likely to deceive the public into thinking it was authorized, or they include a conspicuous disclaimer, they are not liable under the statute.[183] This allows parties to commercially exploit a deceased individual's identity so long as they avoid creating confusion as to whether the use was authorized and include basic disclaimers. At its core, the right of publicity is not primarily concerned with preventing consumer deception.[184] Rather, it exists to recognize and protect the economic value individuals create through the development of their persona.[185] Allowing unauthorized uses based solely on the absence of public confusion undermines the core purpose of the right by enabling others to profit from the identity investments made by the individual during their lifetime. By contrast, California's right of publicity statute imposes a stricter consent-based regime for digital

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[181] *See id.*

[182] *See id.* at § 3344.1(a)(2)(B)(ii)(I).

[183] *See* N.Y. CIV. RTS. LAW § 50-f(2)(b).

[184] *Cf.* Dogan & Lemley, *supra* note 166, at 1195 (internal citations omitted) ("[C]ourts in right of publicity cases generally do not ask whether consumers are in fact confused.").

[185] *See Zacchini*, 433 U.S. at 573 (emphasizing that the appropriation of an individual's performance without consent threatens the economic incentive to produce creative works).

replicas, requiring authorization regardless of whether the use misleads the public.[186] To provide meaningful postmortem protections in the digital era, a federal right of publicity should follow California's model, ensuring that unauthorized uses of a deceased individual's persona are prohibited outright, without allowing disclaimers to excuse infringement.

The length of posthumous publicity rights varies significantly across states. Indiana offers protection for 100 years after death.[187] Tennessee provides rights that do not expire as long as they are continuously used, effectively offering perpetual protection.[188] On the shorter end, Florida grants postmortem rights of publicity for 40 years after death.[189] In designing a federal right of publicity, it is critical to establish a clear and uniform duration for posthumous rights. A term that extends for the life of the individual plus seventy years after death would provide the most logical and effective framework, aligning the right of publicity with other areas of intellectual property law, particularly copyright. Under the Copyright Act, the standard term of protection for original works of authorship is the life of the author plus 70 years.[190] Extending posthumous publicity rights for the same period would promote consistency across other intellectual property protections.

This term is economically justified by the principle that individuals should reap the full value of the investments they make in building commercially valuable personas, and that this economic value should extend to benefit their heirs after death. Like copyright law, which protects the creator's economic interests for seventy years beyond life, the right of publicity incentivizes individuals to invest in the development of their persona by guaranteeing that the economic rewards of that investment will not be available to their heirs after death. Strong postmortem protection prevents a situation where third parties free ride on the commercial value created by the individual, ensuring that control over licensing opportunities, endorsements, and commercial exploitation remains with the estate. Moreover, the seventy-year term, mirroring copyright law, allows two generations of the deceased individual's family, typically children and grandchildren, to benefit from the financial legacy associated with the individual's

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[186] *See* CAL. CIV. CODE § 3344.1(a)(2)(A)(i).
[187] *See* IND. CODE § 32-36-1-8(a).
[188] *See* TENN. CODE ANN. § 47-25-1104.
[189] FLA. STAT. ANN. § 540.08.
[190] *See* 17 U.S.C. § 302(a).

marketable identity. In a Senate Judiciary Committee's report on the Copyright Term Extension Act legislators expressed concerns that the existing life-plus-fifty standard no longer adequately protected two generations of heirs.[191] This concern prompted the adoption of the seventy-year term to preserve financial support across multiple generations.[192] Ensuring financial security for two generations was seen as essential to honoring the enduring value of an individual's creative and economic contributions beyond their lifetime.[193] Thus, the right of publicity should adopt a parallel postmortem term to similarly protect the economic value that public figures create in their persona and preserve incentives for investment into valuable identities.

V. COUNTER ARGUMENTS: WHY SOME BELIEVE A FEDERAL RIGHT OF PUBLICITY WILL NOT WORK

A. The Lanham Act False Endorsement Claim

A counter to the creation of a federal right of publicity is that existing legal frameworks, such as the Lanham Act's false endorsement claim, already provide sufficient protection for individuals against unauthorized commercial use of their identity.[194] Under the Lanham Act, a plaintiff can bring a claim for false endorsement if the unauthorized use of their name, likeness, or other identifying characteristics causes consumer confusion about their association or service.[195] Courts have interpreted this claim to require the plaintiff to prove that the unauthorized use is likely to cause consumers to mistakenly believe that the plaintiff endorsed or is affiliated with the product or service.[196] Proponents of this view argue that the Lanham Act offers a functional and well-established remedy for individuals seeking to prevent misleading commercial exploitation of their identity,

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[191] *See* S. REP. NO. 104-315, at 10–11 (1996).

[192] *See id.*

[193] *See id.*

[194] *See* ETW Corp. v. Jireh Publ'g, Inc., 322 F.3d 915, 924 (6th Cir. 2003) (citing Bruce P. Keller, *The Right of Publicity: Past, Present, and Future*, 1207 P.L.I. CORP. L. & PRAC. HANDBOOK 159, 170 (2000)) (noting that a Lanham Act false endorsement claim is the federal equivalent of the right of publicity).

[195] *See* Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2018).

[196] *See* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110 (9th Cir. 1992) (noting that a false endorsement claim requires a plaintiff to show that the unauthorized use of their identity is likely to cause consumer confusion about their endorsement or affiliation with the product).

making additional federal legislation unnecessary.[197] While a false endorsement claim under the Lanham Act and the right of publicity can be applicable to similar situations, a right of publicity is much more broad than the Lanham Act. For instance, a false endorsement claim necessitates some degree of falsity, deception, or consumer confusion regarding whether the plaintiff has endorsed or is linked to the defendant's product.[198] In contrast, most right of publicity statutes do not impose such a requirement and focuses solely on unauthorized use of a person's identity, regardless of whether it misleads consumers or not.[199] Therefore, if only a Lanham Act false endorsement claim were available to those seeking to bring a claim for the unauthorized use of their likeness, they might have difficulty asserting their rights in cases where no consumer confusion exists.

In two separate Ninth Circuit cases, individuals challenging the unauthorized commercial use of their identities in video games.[200] In *Keller v. Electronic Arts, Inc.*, the Ninth Circuit allowed a right of publicity claim to proceed, emphasizing that the right of publicity protects an individual's economic interest in their identity even without consumer confusion.[201] In contrast, in *Brown v. Electronic Arts, Inc.*, the court ultimately dismissed former professional athlete Jim Brown's false endorsement claim after application of the *Rogers* test, which states that expressive works are shielded by the First Amendment unless the use has no artistic relevance or is explicitly misleading about an endorsement.[202] Since the use of Brown's persona in the video game had artistic relevance and was not explicitly misleading, the use was permissible.[203]

The Supreme Court has since narrowed *Rogers*' scope in *Jack Daniel's Props. v. VIP Prods. LLC*, holding the carveout inapplicable when a defendant uses a name or mark as a designation of source for

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[197] *See ETW Corp.*, 322 F.3d at 924.

[198] *See* Lanham Act § 43(a).

[199] *See* CAL. CIV. CODE § 3344 (1984) (prohibiting use of name, image, signature without consent, without necessitating proof of consumer confusion), *amended by* S.B. 683, 2025 Leg., Reg. Sess. (Cal. 2025); *see also* IND. CODE § 32-36-1-8 (focusing on unauthorized use without addressing evidence of consumer confusion); *see also* FLA. STAT. ANN. § 540.08 (prohibiting unauthorized use of likeness without addressing consumer confusion).

[200] *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 12811271 (9th Cir. 2013); Brown v. Elec. Arts, Inc., 724 F.3d 1235, 1238 (9th Cir. 2013).

[201] *In re NCAA*, 724 F.3d at 1281.

[202] *Brown*, 724 F.3d at 1243, 1248.

[203] *See id.* at 1243, 1245.

the infringer's own goods.[204] Despite this, Brown's argument in *Brown* would still fail under the Lanham Act theory today if a court could not find evidence of consumer confusion.[205] Together, these cases show that the Lanham Act does not fully guard against unauthorized commercial exploitation of identity, underscoring the need for a distinct federal right of publicity.

While critics may contend that the Lanham Act properly limits protection to uses likely to confuse consumers about endorsement and that the right of publicity overprotects, *Brown* shows why that extra reach is necessary.[206] EA's game profited from Jim Brown's on-field persona but never suggested that he endorsed it—conduct that allowed them to avoid Lanham liability.[207] The harm, however, is not confusion; it is the uncompensated capture of the economic value Brown created by investing in his identity. A federal right of publicity fully curbs that free riding by guaranteeing creators, not copyists, capture the financial returns on the personas they cultivate.

B. What if Congress Is Not Motivated to Act?

In the absence of federal action, state legislatures offer the most practical path forward. The House is very closely split,[208] which can increase the chance of stalemate or gridlock and make it even more difficult for Congress to unite to pass a Federal Right of Publicity.[209] However, this narrow division also presents an opportunity for representatives to work together to craft bipartisan legislation that protects individuals' rights while appealing to both sides of the aisle. Given the growing concerns over the use of unauthorized use of an individual's likeness, particularly through emerging technologies such

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[204] 599 U.S. 140, 145 (2023) (holding that *Rogers* is not the appropriate test when an accused infringer has used a trademark to designate the source of its own goods or, in other words, used a trademark as a trademark).

[205] *See id.* at 147.

[206] *See* Dogan & Lemley, *supra* note 165, at 1166.

[207] *Brown*, 724 F.3d at 1246 (acknowledging that statements made by EA did not show any attempt to mislead consumers).

[208] *See Navigating the Balance of Power in the U.S. House and Senate to Drive Policy Wins,* BLOOMBERG GOV'T (June 5, 2025) https://about.bgov.com/insights/congress/balance-of-power-in-the-u-s-house-and-senate/#which-party-currently-controls-congress/ (noting that the Republican Party retains control of the House of Representatives with 218 seats while Democrats have 215).

[209] *See id.* (discussing that because of this slim margin coalition building and bipartisan cooperation will be crucial for passing legislation).

as deepfake AI and holograms, a Federal Right of Publicity would not only be timely but would likely garner wide support by the public.

Several states, including California, New York, and Illinois, have already taken steps to protect individuals against unauthorized use of hologram representations, demonstrating a significant increased demand for federal action.[210] The fragmentation of state laws of this issue underscores the need for a uniform national standard that provides clear guidelines for companies, creators, and individuals alike.[211] This legislation can help reduce transaction costs and make it less costly for companies and creators to navigate the legal landscape, something that may appeal to constituents in a time of economic strain and increases costs of living as it signals a commitment to reducing unnecessary legal barriers and fostering a more predictable business environment that can support job growth and innovation.[212]

However, if despite these benefits Congress is still not motivated to act, an alternative solution would be for state legislatures to continue expanding and attempt in harmonizing their right of publicity laws to create a more uniform legal framework across jurisdictions, thereby reducing inconsistencies and legal uncertainty for individuals and businesses alike. By adopting comprehensive legislation that have explicit protections for misappropriation of identity through digital use, similar to those enacted in states like California and New York, state governments can fill in the legislative gap and provide the necessary safeguards for protecting likeness in the digital era.

C. Is Right of Publicity Better Left to the States?

Those who oppose a federal right of publicity also argue that state control over rights of publicity allows jurisdictions to tailor laws to their unique legal landscapes.[213] Scholars argue that this state-level flexibility fosters competition among jurisdictions, allowing them to develop publicity rights that reflect the specific economic and cultural priorities of their residents.[214] For example, California has crafted broad

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[210] *See* Press Release, Office of the Governor of California, *supra* note 38; 815 ILL. COMP. STAT. ANN. 550/1; N.Y. GEN. OBLIG. LAW § 5-302.

[211] *See* VICK & JASSY, *supra* note 77, at 1.

[212] *See* Brandon J. Anand, *It is Time for a Precise, Narrowly Tailored Federal Right of Publicity,* 27 CHAP. L. REV. 317, at 319 (noting that in the current patchwork right of publicity system litigation and transaction costs are increased).

[213] *See* Krishan Thakker, *The Federalism Case Against a Federal Right to Publicity,* 10 U. DENV. SPORTS & ENT. L.J. 1, 26 (2011).

[214] *See id.* at 27-28.

right of publicity protections due to its strong entertainment industry, whereas other states, such as New York, have taken a more limited approach to balance commercial rights with First Amendment concerns.[215] This diversity, they argue, allows states to act as laboratories of democracy, testing different approaches to publicity protections, duration, and limitations without imposing a one-size-fits-all federal mandate.[216]

However, this fragmented state-based system creates unnecessary legal uncertainty and inefficiencies for individuals and their estates. The lack of uniformity results in inconsistent protections, making it harder for individuals to enforce their rights and secure the economic benefits they have earned. Celebrities and public figures may find that their ability to control and profit from their persona depends heavily on where they live or where the unauthorized use occurs, leading to unfair and unpredictable outcomes that undermine the basic economic principle of rewarding individuals for the value they create.

Some might also see the passing of explicit digital use amendments, such as those in New York and California, as providing sufficient protection against the use of unauthorized holograms given that most high-profile celebrities reside in New York and California.[217] However, the entertainment industry is not confined to these two states, and neither are the individuals affected by digital misappropriation. A federal right of publicity is necessary to ensure uniform protection, particularly in an era where fame is no longer geographically confined. The rise of social media has fundamentally altered the landscape of celebrity and personal branding.[218] Platforms like TikTok and Instagram have enabled individuals from all over the world to cultivate significant public personas without traditional industry backing.[219] Unlike past decades, when celebrities were primarily associated with Hollywood or the music industry, today's influencers, content creators, and internet personalities can achieve widespread recognition without ever stepping foot in New York or

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[215] *See id.* at 2, 24.

[216] *See id.* at 29 (referencing Judge Brandeis's view that states act as laboratories that experiment to discover the best national solution).

[217] *See* Thakker, *supra* note 213, at 3.

[218] *See* Dogli Wilberforce, *Social Media: Revolutionizing Celebrity Culture in 2024*, MEDIUM, (Nov. 5, 2024), https://medium.com/the-orange-journal/social-media-revolutionizing-celebrity-culture-in-2024-5cab2b8968a7.

[219] *See id.*

California.[220] This democratization of fame means that digital misappropriation, such as unauthorized holograms, can affect anyone with a recognizable online presence, not just legacy celebrities with estates capable of navigating complex state laws. A federal right of publicity would close these gaps by ensuring that protections apply consistently, regardless of where an individual lives, where their content is consumed, or where an unauthorized digital replica is produced. As social media continues to expand the definition of public figures, legal protections must evolve to safeguard all individuals from digital exploitation.

D. Dead-Hand Control

Some critics may argue that this proposal preserves a form of dead hand control, such protection is economically justified.[221] Dead hand control refers to the ability of deceased individuals to control how their identity or creative works are used after death.[222]

Scholars argue that such control can constrain creativity, stifle cultural development, and limit the ability of future generations to engage with their creative contributions.[223] However, the economic benefits of recognizing postmortem publicity rights outweigh these concerns. Individuals invest significant time and effort into building their public image, and it is fair that their families benefit from that investment after death. Recognizing postmortem rights also provides important economic incentives for individuals to invest in their personas during life, knowing that their heirs can continue to benefit financially. This helps promote the continued development of commercially valuable personas. Additionally, the seventy-year limitation on postmortem rights, commercial use requirement, and First strong Amendment exceptions will safeguard the public domain and prevent undue restrictions on cultural development.

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[220] *See* Shelley Walsh, *Top Social Media Influencers to Follow in 2024*, SEARCH ENGINE J., https://www.searchenginejournal.com/top-social-media-influencers/475776/ (last updated Jan. 21, 2025).

[221] *See* Eva E. Subotnik, *Artistic Control After Death,* 92 WASH. L. REV. 253, 257 (2017) (defining dead hand control as the "decline of the Rule Against Perpetuities and rise of incentive trusts").

[222] *See id.* at 257-58.

[223] *See id.*

VI. THE NO FAKES ACT

The NO FAKES Act is a proposed federal law aiming at protecting individuals voice and visual likeness rights from unauthorized digital replication.[224] In 2025, the NO FAKES Act was introduced in the U.S. Senate, effectively operating as a federal right of publicity, and imposing federal laws on digital replicas.[225] The Act prohibits the creation, distribution, or public display of "digital replicas" without authorization and establishes civil remedies for violations.[226] It covers both living and deceased individuals and allows heirs to inherit these rights.[227]

The Act includes several important aspects that help align rights of publicity with the economic principle that individuals should be able to benefit from the value they create. By establishing a federal property right in voice and likeness, the Act recognizes that people invest significant time, effort, and resources into building their public identity, and it protects that investment by allowing individuals and their families to control the commercial use of their persona.[228] Requiring consent before creating or distributing realistic digital replicas ensures that others cannot exploit the economic value tied to an individual's identity without permission. The Act also allows postmortem rights to be extended for up to seventy years after death, which further acknowledges that a person's investment in their identity should continue to provide financial benefits to their heirs after death.[229] In addition, violations are tied to commercial exploitation.[230] There is no liability for non-commercial uses that do not seek to profit from the individual's likeness.[231] This is important because it ensures that the right of publicity is used to protect the economic value individuals create.

However, to fully align with the economic justifications underlying publicity rights, the NO FAKES Act could be improved in its evaluation of posthumous rights. The Act protects a deceased individual's voice and likeness for an initial period of 10 years after

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[224] S. 1367, 119th Cong. (2025).
[225] *See id.*
[226] *See id.* at 6, 15.
[227] *See id.* at 7.
[228] *See id.* at 1.
[229] *See id.* at 9.
[230] *See id.* at 20.
[231] *See id.*

death, with the option for heirs to renew the rights in five-year increments if the persona is registered and continues to be commercially exploited.[232] These rights can last up to a maximum of 70 years after death.[233] This approach risks prematurely extinguishing valuable economic assets simply because heirs fail to file paperwork or cannot demonstrate frequent exploitation. From an economic standpoint, individuals invest substantial time, labor, and resources into cultivating their personas with the expectation that their families will inherit the financial benefits. Conditioning the continuation of these rights on bureaucratic renewal requirements, or punishing temporary gaps in commercial use, discourages full investment in persona development and weakens the incentive structure that publicity rights are designed to promote.

A better solution would be to grant postmortem publicity rights for a fixed term, such as seventy years after death, without requiring ongoing registration or continuous commercial use. This model, consistent with copyright law's protection of original works for life plus seventy years, better reflects the economic value generated by an individual's investment in their public identity. It would also preserve financial security for heirs without imposing unnecessary administrative burdens that risk forfeiting valuable right.

Some scholars favor a periodic renewal regime, arguing that it acts as a market filter, pushing low-value personas into the public domain sooner.[234] Yet economic evidence shows that the same filtering happens naturally.[235] Once a celebrity's persona loses value and yields only modest returns, the cost of enforcing the right outweighs any likely payoff, so owners simply stop litigating and the right effectively goes dormant.[236] The market, in effect, prices out low-value identities without any bureaucratic renewal window.[237] Adding formalities would therefore layer on fees, paperwork, and deadline traps without delivering extra public-access benefits, whereas a single automatic term

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[232] *Id*. at 8-9.
[233] *Id* at 9.
[234] *See* Richard A. Posner & William M. Landes, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 482 (2003).
[235] *See* Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 126 (1994) ("When the value of someone's publicity has been reduced to very low . . . levels, the transaction costs of acquiring permission outweigh the social value of further management of the publicity against dissipation.").
[236] *See id.*
[237] *See id.*

lets valuable personas remain protected and allows low-value ones to fade naturally into common use.

Additionally, while the NO FAKES Act is a promising foundation for a federal right of publicity, it should be carefully tailored to avoid undermining the very economic ecosystem it should seek to protect. The Act permits individuals or their representatives to issue takedown demands for unauthorized digital replicas, but it lacks a robust procedural mechanism, such as a counter-notice process, that would protect against mistaken or overly broad enforcement.[238] From an economic perspective, excessive takedown power can create uncertainty for platforms, developers, and creators, discouraging investment in transformative or expressive uses of identity that often contribute value to the market.[239] Strong publicity rights must be balanced with predictable, fair procedures that foster both primary and derivative markets. Just as copyright law includes safe harbors and counter-notice rules to maintain a vibrant creative economy, a federal right of publicity should include analogous protections. This would ensure that legitimate enforcement does not unintentionally chill innovation or limit secondary uses that complement rather than compete with a persona's core economic value.

Finally, the Act's preemption clause falls short of the uniformity its sponsors promise. Section 2(g)(1) proclaims that the new federal right "shall preempt any cause of action under State law . . . in connection with a digital replica . . . ."[240] However, section 2(g)(2) immediately exempts every state statute or common-law action that existed on or before January 2, 2025, state laws targeting sexually-explicit or election-related deepfakes, and rules regulating the tools that generate replicas.[241] Because these carve-outs preserve dozens of pre-2025 publicity and deep-fake statutes, each with different remedies, defenses, and limitations, the bill would still require creators, platforms, and right-holders to navigate a patchwork of overlapping regimes.[242]

Because the bill's renewal hurdles, blunt takedown power, and patchwork preemption all undermine the economic-incentive rationale

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[238] *See* S. 1367, 119th Cong. §§ 2(d)(1)(B)(ii)(3), 2(d)(3)(A) (2025).

[239] *See* Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act,* 22 Santa Clara High Tech. L.J. 621, 687 (2006).

[240] S. 1367, 119th Cong. § 2(g)(1) (2025).

[241] *Id.* § 2(g)(2).

[242] *See* Rothman, *supra* note 163 (noting that, if passed, the Act would add yet another layer to the "identity thicket," in which multiple laws and entitlements conflict over who has control over a person's persona, including digital replicas).

that justifies any right of publicity, by making it harder, riskier, and less predictable to monetize a persona, it fails to satisfy either creators' or innovators' interests. Lacking that core policy coherence, the NO FAKES Act is unlikely to gain the consensus needed for passage.

The growing traction behind the NO FAKES Act confirms that a federal solution to AI-driven misappropriation is both needed and politically salient.[243] Yet a federal right will achieve its goal only if it truly supports the economic incentives underlying the right of publicity. A revised federal act, one that drops burdensome renewal formalities and fully preempts conflicting state rules, would protect personal identity in the digital era while giving businesses, artists, and platforms the certainty they need to keep investing in talent and brand-building.

CONCLUSION

The evolving digital landscape has brought about unprecedented challenges to the right of publicity, particularly in the posthumous protection of an individual's name, likeness, and identity. With the rise of AI-generated holograms and other digital recreations, the existing patchwork of state laws fails to provide clear, consistent protections. The absence of a federal right of publicity forces courts to navigate complex issues, leaving estates, heirs, and living public figures uncertain about their ability to profit off of and control the use of their persona. This inconsistency undermines the fundamental principle behind publicity rights which is to safeguard economic value derived from investment in persona.

A federal right of publicity would establish uniform standards that address the deficiencies of the current system, making it easier for victims of unauthorized use of their identity through modern technology to assert their rights and earn profits rightfully entitled to them. By defining key aspects such as scope, duration, and digital misappropriation, federal legislation would provide clear guidance on what constitutes a violation and eliminate the unpredictability created by varying state laws. A national standard would reduce these inefficiencies by creating a predictable and enforceable legal framework.

Additionally, the rise of holograms and digital entertainment necessitates stronger posthumous protections. As seen in recent legislative efforts in New York and California, there is growing

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[243] *See* Sarah Parvini, *Industry Leaders Urge Senate to Protect Against AI Deepfakes with No Fakes Act*, AP NEWS, https://apnews.com/article/no-fakes-act-ai-artificial-intelligence-ec07483bac26818116b9b5a1713fe250 (last updated May 21, 2025).

recognition of the need to regulate unauthorized digital replicas. However, a state-by-state approach is insufficient to address the broader national implications of this issue. In the absence of federal action, the inconsistencies in state laws will continue to create legal uncertainty, leaving individuals vulnerable to economic exploitation and eroding incentives in investing in valuable personas.

The rapid advancements in AI and digital media make this issue more urgent than ever. A federal right of publicity would offer the necessary protections to safeguard personal identity in the modern era while providing a clear legal framework for businesses, artists, and content creators. By ensuring that publicity rights evolve alongside technological innovations, federal legislation can strengthen economic value associated with personal identity and encourage investment in the development of talent and brand-building.