3 Lindey on Entertainment, Publ. & the Arts § 14:60 (3d ed.)

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Chapter 14. The Rights of Privacy and Publicity

II. The Right of Publicity

§ 14:60. Holograms are Taking Over the World! An Analysis on Legal Implications Holograms Pose in Right of Publicity and Copyright Law

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INTRODUCTION

Technological advancement has led to an increase in hologram[1] concerts, from Tupac Shakur's hologram making an appearance at the 2012 Coachella Valley Music & Arts Festival to the digital avatar performances at the ABBA Voyage virtual concert

residency in London, England. The music industry has greatly changed now that famous performers no longer fade away—instead, their holograms can be enjoyed forever. In the spotlight, celebrities already possess a certain status in our society where they seem more available to us through the media we consume. Nevertheless, celebrities have various intellectual property rights that are protected by law.[2] This Note will discuss the right of publicity and copyright law.

Many states protect celebrities against the unauthorized commercial use of their name, likeness, image, voice, and signature during their lifetime, known as the "rights of publicity" or "personality rights."[3] Furthermore, the moment an artist fixes a work in a tangible medium of expression, they are also protected under federal copyright law, which includes the exclusive right to "reproduce the work, prepare derivative works, distribute copies of the work to the public, perform the work publicly, and display the work publicly."[4]

This Note focuses on the right of publicity and copyright implications stemming from the increase in holograms and digital avatar concerts, considering the rise of AI-generated music and performances. As AI-generated music becomes more standardized, how will music performances be affected? Generative AI makes it simpler to create holograms or digital avatars of notable figures. If a hologram of a celebrity is created, and that hologram has a live music performance that anyone can pay for and attend, can a concertgoer film the concert and post it online without infringing that celebrity's rights? If there is infringement, who is it against? Is it a violation of the original performer's right of publicity or performance rights? Or is it an infringement of the rights of the artist who created the hologram because the hologram is not a "live" performer? This area of the law remains murky,[5] and there is a need for a better understanding of it as we move into an increasingly digital and interconnected world.

Part I of this Note describes the rise of holograms by offering examples of notable hologram performances, briefly discussing how holograms are created, and how performers feel about this technology. Part II focuses on how hologram concerts implicate a person's right of publicity because they involve taking a person's image and likeness. First, this Part discusses how the right of publicity law developed in the United States and what the law looks like today. Then, it considers some key right of publicity cases and analyzes two well-developed state statutes. Lastly it describes the issues posed by not having a clear federal right of publicity law that can cover hologram technology. Part III shifts to the topic of hologram concerts asking what legal rights might be implicated by recording a video at a hologram concert and posting it online. Because artist performance rights touch on both copyright and right of publicity, Part III first briefly discusses current U.S. copyright law's stance on AI-generated work before shifting into an examination of copyright law protection for public performances today. As copyright and right of publicity infringement both center largely around commercial exploitation, Part III seeks to understand what constitutes a public performance that commercially exploits an artist.

Lastly, Part IV calls for clearer regulations, arguing that holograms and hologram concerts should be protected by the right of publicity and copyright law.[6] First, Part IV reiterates why there is a need for a clear federal right of publicity law, and then proposes a new balancing scheme between an artist's right of publicity and the First Amendment's freedom of expression. Second, Part IV proposes creating a provision on moral rights for performance artists within current copyright law, building off the Visual Artists Rights Act (VARA). This way, the artist who inspires the hologram is never fully removed from the use of their image. In tandem, these propositions can better protect artists who want to control their image beyond holograms.

I. Rise in Hologram Concerts

The past few years have shown a bombastic increase in hologram concerts. Nearly 15 years after his murder, Tupac Shakur's hologram made a surprise appearance at the 2012 Coachella festival.[7] The Tupac hologram was created by combining computer-generated imagery (CGI) with a body double and a 19 century theater trick known as "Pepper's Ghost."[8] Even though fans later learned that the Tupac image at the April 2012 concert was not actually a three-dimensional hologram, but a flat optical illusion technique, it did not change how lifelike the virtual clone appeared.[9] Tupac's digital resurrection led to other stunts involving

deceased musicians, such as Michael Jackson, whose hologram performed at the 2014 Billboard Music Awards, and Mexican popstar Juan Gabriel, whose hologram appeared at his memorial concert subsequent to his death.[10]

A hologram is a virtual three-dimensional[11] image that is created using beams of light.[12] The popularity of hologram technology led to the inception of hologram companies such as Base Hologram Productions, Pulse Evolution, Hologram USA.[13] These companies produce holograms of famous stars and debut them in shows across the United States and the world.[14] While watching a Frank Zappa hologram show, Mark Binelli of the *New York Times Magazine* expressed his amazement (and perhaps wariness and fear) at all the ways different corporate entities could exploit artists, noting that "with artificial intelligence (AI) and voice cloning, there would be no reason to limit the shows to recordings made when the artist was still alive."[15]

Although not technically considered a hologram, one recent example of a show with digital personas is the ABBA Voyage virtual concert.[16] George Lucas's visual effects company Industrial Light & Magic used motion-capture technology to create "ABBA-tars" (or avatars) of the band as they looked in their prime to perform a 90-minute set in London—while the real band members, who are in their seventies today, did not have to be physically present.[17] The band was edited to look real when displayed two-dimensionally on a high-definition screen, which allowed for a greater range of visual flair than actual holograms currently have.[18]

A digital persona is "a collection of information that the cognitive and sensory mechanics of a human being parses into an individual actor, a character."[19] There are two widely-used approaches to create a digital persona: the direct approach and the indirect approach.[20] In the direct approach, the recreator uses recording devices and a physical actor.[21] The re-creator can use three-dimensional motion capture technique by placing infrared cameras or lasers around an actor who is wearing sensors on their body.[22] When the actor performs in front of a blue or green screen, the cameras record light reflections that capture the motions and expressions of the artist.[23] In the indirect or two-dimensional approach, the recreator creates a new performance using previously recorded footage of an artist.[24] Recreators compile images and recordings taken during an artist's life to "resurrect" deceased celebrities and generate a new performance entirely through computer software.[25] These virtual clones can incorporate not only the performer's image, but also their mannerisms and style of movement.[26]

Artists of the past and present have conflicting feelings when it comes to the possibility of their image and persona being recreated as a hologram. Robin Williams considered the idea of a post-mortem revival, but prior to his death decided to pass his California-based rights to a foundation and banned commercial use of his image until 2039.[27] Joel Weinshanker, the managing partner of Graceland Holdings, has been adamant that Elvis Presley not be made into a hologram, because "the King" would never have wanted that and holograms could never truly capture the energy of Presley's live performances.[28] Dolly Parton shares a similar sentiment and has expressed her disinterest in artificial intelligence, specifically regarding having herself transformed into a hologram for a concert in the future.[29] Jimmy Page of Led Zeppelin said that the band has been approached to create a virtual tour like ABBA Voyage, but ultimately could not agree on how to execute it.[30] Notably, Mick Jagger, of the Rolling Stones, is open to the idea of a posthumous hologram tour.[31] His fellow band member Keith Richards echoed the possibility of such a tour actually happening, albeit less enthusiastically.[32] Given that celebrities today have significantly conflicting feelings about the idea of being turned into holograms, what happens if a hologram is created and then used at a performance without the original artist's consent? Do they have any sort of control about their image being used in this way?

II. Hologram Concerts Implicate a Person's Right of Publicity

Before discussing the protection of performers' rights in the context of hologram concerts, it is important to first understand the right of publicity in the United States. This Part examines the development of the right of publicity and identifies significant gaps existing in the current law.

A. Development of the Right of Publicity in the United States

The right of publicity in the United States was born out of the right of privacy,[33] and dates back to the 1890 seminal article "The Right to Privacy" written by Samuel Warren and Louis Brandeis.[34] Warren and Louis launched a legal movement in privacy law.[35] At the time, there were limited legal remedies available in America when a person's image or information was taken without their permission, as journalistic standards widely varied, and new technologies allowed for people's images to be freely captured and used.[36] The laws that already protected the publication of manuscripts and works of art without the author's consent were considered an enforcement of a right to one's property, but Warren and Brandeis argued that this type of protection was really an enforcement of an individual's right to be left alone.[37] Warren and Brandeis expressed concern over technology's invasion into human lives, calling for the right of privacy to have its place in the law and arguing that the law should not overly rely on precedent, but instead adjust to society's modern needs.[38]

In 1903, New York became the first state to enact a limited right-of-privacy statute, and in 1905, Georgia became the first state to recognize a common law right of privacy.[39] In *Pavesich v. New England Life Insurance Co.* the Georgia Supreme Court found that New England Life Insurance violated plaintiff Paolo Pavesich's rights of privacy when they used his photograph in an advertisement without his consent.[40] In the 1960s, Dean Prosser expanded the legal concept of the right of privacy by identifying four specific causes of action encompassed within this right: 1) intrusion upon one's private affairs; 2) public disclosure of embarrassing personal facts; 3) publicity that places the individual in a false light; and 4) appropriation of an individual's name or likeness.[41]

Traditionally, appropriation laws were geared toward protecting plaintiffs *not* already in the public eye whose personal facts had been disclosed without their consent.[42] Courts were wary to grant this type of protection to celebrities who willingly projected themselves publicly for their careers.[43] The focus thus shifted from preventing the unwanted projection of the likeness into the public eye toward compensating the individual for the use of the likeness.[44] This effectively created two prongs to the invasion of privacy by appropriation tort: "Traditional 'invasion of privacy by appropriation' now focuses on privacy rights and the 'mental suffering or humiliation from the exploitation of one's private affairs,' and newer 'rights of publicity' focus on property rights and the right to be compensated for the commercial use of one's identity."[45] The definition of privacy "encompass[es] the individual's control of information concerning his or her person,"[46] while the right of publicity is "the inherent right of every human being to control the commercial use of his or her identity."[47]

Doctrinally, the main distinction between privacy and publicity torts is how the right of publicity characterizes the commercial value of a person's identity as a property interest, which can be enforced and transferred, not just during the person's lifetime but also post-mortem.[48] The post-mortem right of publicity passes to a trustee, executor, and named beneficiary through a trust, will, or other estate planning instrument, allowing the person's heirs or beneficiaries to profit from the persona and blocking unauthorized commercial exploitation of the decedent.[49] In 1977, the Supreme Court officially recognized the right of publicity as a separate property right independent from the right of privacy in the landmark case.[50] In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court held that a television news show's unauthorized broadcast of a film showing a plaintiff's performance without his consent infringed on the plaintiff's right of publicity.[51]

Today, where the right of publicity is recognized, it 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."[52] To establish a prima facie case for infringement, a plaintiff would need to prove that they have (1) a valid interest in the right and (2) that the right was infringed upon.[53] In jurisdictions where the elements of infringement are based upon the tort of privacy appropriation, a plaintiff can show that their right of publicity was infringed upon by proving (1) the defendant used their identity or persona, (2) the appropriation was for the defendant's commercial advantage, (3) the plaintiff did not consent to the use, and (4) the use is likely to cause injury to the plaintiff.[54] The commercial exploitation requirement makes the right of publicity contingent on evidence that the public figure commercially exploited their image during their lifetime.[55]

B. Right of Publicity is Governed by State Law and Varies Across Jurisdictions

The right of publicity is governed by state common law or statute,[56] and varies across jurisdictions in the scope of protection.[57] Case law on this subject is fairly limited.[58] *Zacchini v. Scripps-Howard Broad. Co.* established the right of publicity as a separate property right in the United States,[59] and *Presley's Est. v. Russen* held that this right extended to Elvis Presley's estate after his death, recognizing his post-mortem right of publicity.[60]

Another pivotal case concerning the right of publicity case law was *Midler v. Ford Motor Company*.[61] After singer Bette Midler expressed disinterest in appearing in a commercial for the car company, Ford Motors hired one of her backup singers to sing her song "sound[ing] as much as possible like the Bette Midler record."[62] Although Ford did not technically use Midler's name or a likeness, many people thought Midler was the person singing.[63] Midler brought forth claims, and the Ninth Circuit held that Ford Motors had violated Bette Midler's right of publicity as "[a] voice is as distinctive and personal as a face," and voice is "one of the most palpable ways identity is manifested."[64]

In another notable Ninth Circuit case, Vanna White sued Samsung Electronics America for running an advertising campaign featuring a robot intentionally designed to look like her.[65] In the ad, the robot, adorned in a wig, gown, and pearls, posed next to a game board instantly recognizable as the Wheel of Fortune game show set, iconically associated with Vanna White.[66] The court found in favor of White, stating that even though "[v]iewed separately, the individual aspects of the advertisement in the present case [said] little, [v]iewed together, they leave little doubt about the celebrity the ad is meant to depict."[67] This decision further expanded the scope of California's common law right of privacy.[68] The Court created a cause of action for the mere evocation of a celebrity's image in the viewer's mind, rather than requiring a concrete appropriation of the celebrity's actual image.[69]

C. Examples of Right of Publicity Statutes

California and New York—the two primary entertainment law jurisdictions—have detailed right of publicity laws.[70] The question remains whether these laws stretch far enough to protect artists' rights of publicity related to unauthorized holograms which commercially exploit artists' images during and after their life. Further, there is a question as to whether the right of publicity is inclusive enough to cover holograms made by generative AI technology.

1. California Right of Publicity

In California, the right of publicity is governed by common law and two separate statutes: a living persons statute and a post-mortem statute.[71] Common law protection in California was established by the 1974 case *Motschenbacher v. R. J. Reynolds Tobacco Company*, in which the court held that a defendant tobacco company had misappropriated a famous race car driver's name, likeness, and personality by using the distinctive decorations of his race car in their advertisement without his

permission.[72] The court chose to rule under a right of publicity theory instead of an invasion of privacy tort, giving common law legal protection for the first time to "an individual's proprietary interest in his own identity."[73] While this case marked a victory for many celebrities, the California common law right of publicity does not extend past the individual's life span.[74] The post-mortem right did not arise until later enacted in statutory law.[75]

California Civil Code Section 3344 protects a natural living person's right of publicity, including their name, voice, signature, photograph (including still or moving photographic reproduction, video, and live television), and their likeness.[76] However, a notable caveat under Section 3344 stands in subsection (e):

> The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) *solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising* as to constitute a use for which consent is required under subdivision (a).[77]*Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising* as to constitute a use for which consent is required under subdivision (a).[78]

This provision adds a limitation to California's right of publicity protection: it is not enough for someone to use another person's image in a commercial manner—infringement depends on whether the image use was so directly connected with the commercial sponsorship or paid advertising to require consent.[79]

California Civil Code section 3344.1, also known as the Astaire Celebrity Image Protection Act, protects post-mortem rights of publicity.[80] Despite its name, the act is not restricted to celebrities and does not require that the infringer exploited their rights during their lifetime.[81] However, the act is limited to people who have a protected aspect of identity with commercial value.[82] The right lasts 70 years after death and applies retroactively to those who have died within the 70-year period before January 1, 1985.[83]

It is unclear how far California's right of publicity law extends to protect people against unauthorized holograms. As California's common law right of publicity for natural persons is meant to include anything that evokes a person's identity.[84] A holographic image of a living person is likely included within that scope, however a holographic image of a deceased person is likely not.[85] Therefore, a descendent or heir would not have recourse under common law against the use of a hologram showing a deceased celebrity.[86] An heir may turn to Section 3344.1 for protection, but that statute only protects owners against post-mortem uses "on or in products, merchandise, or goods" and against uses made "for purposes of advertising and selling … products, merchandise, goods or services."[87] Furthermore, since a hologram would probably constitute a "audiovisual work" or "nonfictional entertainment" under Section 3344.1, it would be exempt from protection unless the alleged infringing use was "so directly connected with a product, article of merchandise, article of merchandise, good or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article or merchandise, good, or service by the deceased personality."[88] This is similar to the limitation provided in Section 3344, and does not seem to account for the types of holograms and concerts that exist today.

As Lydia B. Yerrick points out in her call to amend California's post-mortem right of publicity statute:

> A claimant would only be able to succeed under the statute as written if the hologram was made to endorse a particular product on stage (verbally or through its attire) or if the entire event was sponsored by a product and depicted only the deceased celebrity, and no other persons, living or dead.[89]

Thus, California's current right of publicity statute does not stretch far enough to address the rise of hologram concerts.

2. New York Right of Publicity

New York has the longest standing statutory right of publicity law originally passed in 1903.[90] In 1984, the Court of Appeals held that the only publicity rights in New York were covered under statute, and found New York had never recognized a common law right of publicity.[91] Lower courts in New York State later clarified that these statutory rights did not survive after death.[92] Subsequently, the statute was amended to include post-mortem rights of publicity in New York for the first time after former Governor Cuomo signed a bill that went into effect on May 29, 2021, codified as Section 50-f in the New York Civil Rights Law.[93] Broadly speaking, the statute forbids using the name, signature, voice, photograph, or likeness of any deceased natural person on goods or merchandise or in advertising, without the permission of the relevant successor-in-interest.[94] The rights last for 40 years after death and are freely transferable or descendible.[95]

New York's right of publicity statute differentiates between two types of deceased individuals: "deceased performers" and "deceased personalities."[96] A "deceased performer" is defined as "a deceased natural person domiciled in [New York] at the time of death who, for gain or livelihood, was regularly engaged in acting, singing, dancing, or playing a musical instrument."[97] A "deceased personality" includes any deceased natural person domiciled in New York at the time of death whose image or likeness has commercial value at the time of their death or because of their death.[98] This is true whether or not during their lifetime they used their image or likeness for any commercial value.[99]

The law also defines "digital replicas," which appears to address holograms with the definition:

> [A] "digital replica" means a newly created, original, *computer-generated*, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, *that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual*.[100]

However, the definition of a "digital replica" does not include the electronic reproduction, computer generated, or other digital remastering of an expressive audiovisual work or sound recording that consists of an individual's original or recorded performance, "nor the making or duplication of another recording that consists entirely of the independent fixation of other sounds, even if such sounds imitate or simulate the voice of the individual."[101]

Under New York law, successors in interest of "deceased personalities" can sue for the unauthorized commercial use of the personality's likeness.[102] However, the rights of "deceased performers" are more limited, and a lawsuit can only be brought on behalf of deceased performers for the non-consensual use of their digital replica.[103]

Section 50-f (2)(b) addresses using a deceased performer's digital replica for a live music performance, imposing liability on "[a]ny person who uses a deceased performer's digital replica in a scripted audiovisual work as a fictional character or for the

live performance of a musical work" if the public could likely be deceived into thinking that the person authorized this use.[104] According to Robert D. Balin, Jesse Feitel, James Rosenfelt, and Lance Koonce, creating a new performance—such as in a television show, movie, or concert—by using a deceased performer's hologram without proper authorization to do so would likely originate a cause of action under this field of law.[105]

Additionally, there are a few exceptions to the law, such as commercial sponsorship, commercial or advertisement, or distributor immunity.[106] New York shares similar standards to California, whereby use of the deceased personality's name, voice, or likeness must be used in a way "directly connected" to sponsorship or advertising.[107] Additionally, owners and employees of "newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit advertisements," retain immunity from lawsuits for unauthorized commercial uses of a deceased personality's likeness unless they have "actual knowledge by prior notification of the unauthorized use."[108]

D. The Lack of a Standard Right of Publicity Law Presents Issues in Protecting Celebrities Against Unauthorized Holograms

The right of publicity law in the United States varies greatly across jurisdictions.[109] Despite certain common law holdings and statutory provisions, right of publicity statutes do not provide a clear cause of action for someone seeking to protect themselves against unauthorized holograms. These laws also fail to answer the question of infringement issues that AI-generated holograms can create. Not having a federal right of publicity statute in the United States presents several key issues for a plaintiff interested in pursuing a right of publicity claim.[110]

1. Choice of Law Issue

First, because the right of publicity varies from state to state, the court must decide the choice of law as a threshold matter in litigation.[111] This can be difficult in situations when the plaintiff lives in one state, the defendant in another, and the violation occurred elsewhere.[112] Currently, only 35 states recognize the right of publicity, 22 of which recognize the right by common law, 24 via statute, and 13 by a combination of the two.[113] Only 22 of the 35 states (7 by common law, 18 by statute) recognize the right of publicity as freely transferable and descendible.[114] However, there is variation as to which persons the right can extend.[115] With the development of hologram technology capable of depicting extremely accurate likenesses, a detailed right of publicity law that addresses this kind of technological development is critical.

2. Which Rights Are Protected?

Second, it is unclear across jurisdictions exactly which rights are protected under the right of publicity. Historically, courts may give plaintiffs flexibility to proceed where a defendant has used characteristics reminiscent of a certain celebrity.[116] For example, the Ninth Circuit held that an ad showing a robot in a dress and pearls standing near a Wheel of Fortune game set was enough to depict Vanna White.[117] Thus, the ad infringed on White's right of publicity by appropriating her identity.[118] Similarly, the court found that hiring a singer who sounded like Bette Midler infringed upon the actress' right of publicity, even though no actual mention or photograph of Bette Midler was used.[119] The question is, which characteristics are sufficient to identify a person in one's mind? Although some state statutes protect certain elements under the right of publicity, the levels of protection across state lines are highly confusing in a world where technology keeps us so connected.

3. The Definition of "Directly Connected" is Unclear

Although the California and New York right of publicity statutes are relatively well-developed, they require that the unauthorized use be made in direct connection with commercial sponsorship or paid advertising.[120] Nonetheless, they fail to define what constitutes being "directly connected."[121] This unclear standard makes it difficult for an individual to assert a violation of their right of publicity. Particularly, when the technology itself is also still evolving. Deciding whether the allegedly infringing use is directly connected to the figure as a question of fact in litigation is highly subjective.[122]

4. Unclear Analysis Against First Amendment Defenses

Fourth, the primary defense raised against a right of publicity case currently centers around the First Amendment's freedom of artistic expression.[123] It is unclear how to reconcile these two rights,[124] especially where holograms come into the mix. In the United States Constitution, the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[125] Artistic expression is protected under the First Amendment, and thus federal, state, and local governments generally cannot restrict artistic expression based on its subject matter, message, ideas, or content.[126] Yet, these institutions may place limitations when appropriate.[127] To do so, the government must have a compelling interest in limiting the expression of free speech.[128]

The absence of a standardized national law on the right of publicity means that various federal courts must navigate and implement divergent state statutes, leading to inconsistent outcomes.[129] The Second Circuit follows the test outlined in *Rogers v. Grimaldi*, which permits a right of publicity action only if the use of the individual's identity is wholly unrelated to the work.[130] Meanwhile, the Third Circuit has followed a "transformative use" test that balances publicity rights with the First Amendment.[131] In *Hart v. Electronic Arts, Inc.*, for instance, the Court stated that the transformative use test turned on "whether a work containing a celebrity's license was sufficiently transformed to constitute an entirely new work, and not the celebrity's likeness."[132] In contrast, the Sixth Circuit takes a broad approach,[133] using a combination of the transformative use test and an ad-hoc balancing test.[134] The absence of a universal standard or test makes the right of publicity law even more confusing.

5. This is Not a Hypothetical Issue and Will Become More Prevalent as Technology Keeps Improving.

As technology continues to develop and the use of generative AI increases, the implications of the right of publicity may be extensive. Across different fields of law, courts have already been struggling with the regulation of images.[135] Rebecca Tushnet writes how the right of publicity can be metaphorically short-handed as a right to control one's "image," and how an "image" is much more than visual information, a person's "image" is not just what they look like, but also facts or other people's beliefs about them.[136]

Generative AI raises unique questions.[137] For example, Paul McCartney utilized artificial intelligence to generate a new Beatles song in November 2023 which he did by extracting John Lennon vocals, recovered from a cassette tape.[138] The song was built from the 1978 Lennon composition called "Now And Then."[139] The original recording of the song had technical issues as a result of buzzing from electricity circuits in Lennon's apartment, but this "newer" version more clearly extricated John Lennon's vocals.[140] The AI-generated song "Heart on My Sleeve," used voices designed to sound like Drake and The Weeknd.[141] It amassed millions of streams on Spotify and Apple Music before the artists' label, Universal Music Group (UMG), had the track taken down for copyright infringement.[142]

There have already been multiple calls to more clearly regulate AI-generated music.[143] The advancement of AI-generated music led to a hearing of the Senate Judiciary Committee's subcommittee on intellectual property on July 12, 2023, where UMG called

on Congress to enact laws protecting artists against infringement by AI users and developers.[144] More specifically, UMG called for nationwide right of publicity protection to provide transparency to copyright holders on the training of AI models, and the labeling of AI-generated content.[145] UMG is one of many music industry organizations that are part of the Human Artistry Campaign, a group formed earlier in 2023 that advocates for creators' rights amidst the development of AI policy.[146]

On October 12, 2023, four U.S. senators proposed a discussion draft bill called the Nurture Originals, Foster Art, and Keep Entertainment Safe Act, or NO FAKES Act, aimed at protecting singers, actors, and other performers from replication of their voice and likeness by AI without consent.[147] Similarly to New York's right of publicity law,[148] the NO FAKES Act defined a digital replica as a "newly-created, computer-generated, electronic representation of the image, voice, or visual likeness of an individual … [nearly indistinguishable] from the actual image, voice, or visual likeness of that individual; and … fixed in a sound recording or audiovisual work in which that individual did not actually perform or appear."[149] Notably, the proposed bill prohibited the "production of a digital replica without consent of the applicable individual or rights holder" unless part of a public affairs, sports broadcast, news, documentary, or biographical work, and providing an exception for the use of digital duplicates for satire, parody, and criticism.[150] These rights would apply during a person's lifetime and expire 70 years after their death.[151]

On January 10, 2024, U.S. House lawmakers announced a new bill called the No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act (No AI FRAUD Act).[152] The goal of this bill is "to provide for individual property rights in likeness and voice,"[153] and it is based on the NO FAKES Act discussion draft bill that had been proposed in October 2023.[154] Section 2 of the bill (Findings) notes the increased prevalence of artificial technology and deepfake software in today's society, which makes it even more difficult for individuals to protect their likenesses from unauthorized use.[155] It cites examples such as the AI generated song "Heart on My Sleeve," as well as more sinister examples in which nonconsensual, intimate images were made of women using AI.[156] In the definitions section of the bill, "likeness" is defined as an individual's actual or simulated image or likeness, no matter how it was created, which can identify the individual by a distinguishing characteristic or other information that is connected to the individual's likeness.[157] In her press release about the bill, Rep. Maria Elvira Salazar claims that state law is not enough to protect Americans and that a federal solution will help by (1) reaffirming that everyone's likeness and voice is protected, giving individuals the right to control the use of their identifying characteristics; (2) empowering individuals to enforce this right against those who facilitate, create, and spread AI frauds without their permission; and (3) balancing the rights against First Amendment protections to safeguard speech and innovation.[158] Although the AI Fraud Act intends to standardize protection, people who live in states with stronger right of publicity laws will still be able to rely on state protection against infringement.[159]

As the definition of "likeness" within the bill includes actual or simulated images, perhaps the proposed bill comes a bit closer to regulating unauthorized holograms created by artificial intelligence. The bill, however, does not clearly define nor speak about holograms.[160] It also does not take the additional step of addressing the potential right of publicity infringement after AI has been used without authorization to make a hologram, and then the hologram is used in performance without the original individual's consent. The Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) strike, which approached a deal with the Alliance of Motion Picture and Television Producers as of November 8, 2023, fought to allow actors and celebrities to control their image and their performance rights.[161] This deal is discussed more in the following section that focuses more specifically on artists' performance rights.[162]

Public figures currently lack clarity around controlling their image because it is difficult to say what rights, if any, they have to block unauthorized recordings of holograms that are generated by AI.

III. Hologram Concerts Implicate Artists' Performance Rights under Copyright Law

Not only do hologram concerts implicate artists' rights of publicity regarding their image and likeness, but they also raise issues around artists' performance rights under copyright law. With the advent of AI-created concerts and the ease of recording on one's cell phone, how can artists protect the public performances of their works?

A. United States Copyright Law and Public Performance

A work is afforded copyright protection upon its creation as long as it is original and fixed in a tangible medium of expression.[163] For the purposes of this Note, the scope of protected works includes but is not limited to musical works, motion pictures, other audiovisual works, and sound recordings. An artist who records music generally creates two types of works protected by copyright: a musical work and a sound recording.[164] A musical work is the underlying composition of the song along with any accompanying lyrics, usually created by a composer and/or songwriter, while a sound recording is a series of spoken, musical, or other sounds that are fixed in a recording medium like a digital file or CD, usually created by the recording's performer, producer, or others.[165] Both the definitions of "work" and "audiovisual" are sufficiently broad as to allow for "holograms" to be included within the definition of "audiovisual work."[166] The word "audiovisual" has an inclusive definition under the Copyright Act: audiovisual works generally consist of related images that are intrinsically intended to be shown using machines or devices like electronic equipment, with any accompanying sounds.[167] Regardless of the nature of the material objects in which the works are embodied, including holograms or holographic images, the Act applies.[168]

Public performance of a work is defined as performing the copyrighted work "at a place open to the public or at any place where a substantial number of persons outside [ ]is gathered," or to transmit the performance or display the work to the public.[169] Public performances include live performances in concert halls, arenas, nightclubs, and other venues, the playing of recordings over loudspeakers in places such as zoos and amusement parks, the playing of recordings over broadcast, radio, cable, and satellite television, and streaming over the internet.[170] Notably, there is no public display right for sound recordings, as the language of the Copyright Act limits a sound recording's public performance right to "digital audio transmission," such as digital streaming.[171]

A further complication with what constitutes a public performance is determining who counts as a "public performer?" This can be difficult to ascertain with the increase in AI-generated holograms. United States copyright law currently holds that AI-generated works cannot gain copyright protection.[172] Under the Copyright Act, fixing the original work of authorship in a tangible medium of expression must be done "by or under the authority of the author."[173] Thus, to be protected under copyright, a work must have an "author"—a word which is *not* defined in the Copyright Act.[174] Judge Beryl A. Howell discussed this very issue in *Thaler v. Perlmutter*, the August 2023 landmark case that decided that AI-generated do not receive copyright protection.[175] By looking at the dictionary definition of "author," the plain text of the Copyright Act, and the historical understanding of what it means to be an author, the Court concluded that "authorship" is synonymous with human creation, and thus, protected under the Act, the originator must be a human.[176] This requirement has been recognized even as copyright law has evolved and has been affirmed in case law across the United States.[177] However, Judge Howell added that "the accessibility of generative AI will 'prompt challenging questions' for the future about what degree of human involvement is needed to qualify a work made with AI for copyright protection."[178]

It seems safe to say (for now) that an AI-generated hologram would not itself constitute an author and thus would not count as a public performer. Instead, the creator of the hologram would be considered the author of the work, even if they are not the one performing it. What is still unclear is whether someone who attends an AI-generated hologram concert, records it, and then posts it online has infringed the performance's copyright, and if so, who is affected and to what extent.

B. Potential Ways to Regulate Creation and Use of Holograms?

There have been attempts to regulate unauthorized recordings of artists, as well as protect the digital personas of artists. This section will briefly discuss U.S. anti-bootlegging statutes, and then lead into the recent SAG-AFTRA strikes and discussions for performers in the film and entertainment industry.

1. United States Anti-Bootlegging Statutes

Congress attempted to alleviate the issue of unauthorized recordings of artists to some extent by enacting civil and criminal anti-bootlegging statutes in 1994,[179] which both prohibits the unauthorized recording, copying, and distribution of live musical performances and creates penalties against people who do so without consent.[180] A bootleg recording is an "unauthorized recording of a live performance," usually a sound recording of a concert made or filmed by a concertgoer.[181] Bootleg recordings are considered notoriously difficult to control, given how easy it is to film a video and then distribute it across a social media platform.[182]

In 1994, Congress enacted the Uruguay Round Agreements Act (URAA), an act that implemented the multilateral trade agreements negotiated between the United States and approximately 110 other nations, known as the Uruguay Round Agreements (URA).[183] The URAA incorporated the agreements into the Copyright Act.[184] Article 14 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), an agreement within the URA, protects performers from the "unauthorized recording or broadcasting of their musical performances."[185]

As part of the URAA, Congress enacted Sections 1101 (a civil anti-bootlegging statute) and 2319 (a criminal anti-bootlegging statute) into the Copyright Act.[186] The language of Section 1101 distinguishes between a bootlegger and a copyright infringer, but imposes the same copyright infringement remedies on them both.[187] Since the anti-bootlegging statutes were passed into law, few cases have actually been brought under them, and the cases that have been brought assert the same primary legal challenges, namely that they are unconstitutional.[188] This argument is premised upon the fact that these statutes appear to provide perpetual protection, violating the "limited Times" copyright clause in the Constitution, which requires a limitation duration, and the "fixation" requirement in the Copyright Act.[189] Needless to say, current anti-bootlegging statutes do not provide clear answers about what to do about unauthorized recording and dissemination of hologram concerts.

2. Discussion of SAG-AFTRA—AMPTP Agreement and Subsequent Updates

The historic SAG-AFTRA—AMPTP agreement arising out of the Hollywood strikes of 2023 comes closer to answering the question of how to regulate recordings of AI-generated holograms. However, it seemingly does not go far enough. The Writers Guild of America (WGA) went on strike on May 2, 2023, against the Alliance of Motion Picture and Television Producers (AMPTP) and were joined by members of SAG-AFTRA in July.[190] WGA's main concern was the increased use of AI in the entertainment world.[191] The writers wanted to protect themselves against tools like ChatGPT, and advocated for limiting the use of generative AI to research or facilitation of script ideas.[192] While WGA and AMPTP came to an agreement in late September 2023,[193] SAG-AFTRA remained on strike until they reached a tentative deal with AMPTP in early November 2023.[194] Like WGA, SAG-AFTRA was extremely concerned with AI usage.[195] One key negotiation point concerned who would own an actor's likeness if it was reproduced by AI.[196] SAG-AFTRA called for a new standard contract that included terms stipulating when AI could be used, how much money could be involved, and the necessary protections against misuse.[197]

The draft memorandum of the SAG-AFTRA agreement contains an extensive section on AI, including provisions on the digital replication and alteration of performers.[198] Specifically, the memorandum creates and defines two types of digital replicas of performers: "Employment-Based Digital Replicas" and "Independently-Created Digital Replicas."[199] Generally, the use of both an Employment Created Digital Replica and an Independently Created Digital Replica requires clear and conspicuous consent from the actual performer, and continues after death unless, expressly limited otherwise.[200] If the performer is already deceased, consent may be granted by their authorized representative, or by the union if a representative cannot be found.[201] The memorandum also addresses some exceptions for uses of Independently Created Digital Replicas, but it does not address Employment-Created Digital Replicas.[202]

The memorandum further addressed generative artificial intelligence, establishing a broad, protective definition for this term, as well as terms for the use of "Synthetic Performers" that were created through generative AI.[203] The agreement emphasizes the importance of human performance in motion pictures, and outlines the potential impact of Synthetic Performers on employment. It also arranges for notice to the union with an opportunity for good faith bargaining over appropriate consideration should a Synthetic Performer be used in place of a human.[204] The memorandum includes limitations on using actor digital replicas in the background of motion pictures, and requires clear and conspicuous consent of actors in these replicas.[205]

The SAG-AFTRA-AMPTP agreement as proposed at the end of 2023 provides increased protections for actors who want to regulate their image and performance rights.[206] It instills stronger consent requirements as well as limitations for how digital and synthetic performers can be used. Members of SAG-AFTRA ratified the agreement in national voting that concluded on December 5, 2023.[207] The agreement is effective retroactive from November 9, 2023 and running through June 30, 2026.[208] However, this agreement is only pertinent to actors in the union and therefore does not cover all types of performers.[209]

In July of 2024, SAG-AFTRA went on strike again—this time, against major video game companies, after trying to renegotiate its Interactive Media Agreement for two years.[210] A major driving force behind the strike was the abuse of generative artificial intelligence, similar to the actors' strike just a few months earlier.[211] The strike proposal included a chart comparing union and employer proposals on artificial intelligence, similarly focusing on employers' abilities to use digital replicas, specifics about informed consent, and compensation requirements.[212] Speaking on the strike, SAG-AFTRA's national Executive Director and Chief Negotiator Duncan Crabtree-Ireland pointed out that the SAG-AFTRA members who create the games we know and love today "deserve and demand the same fundamental protections as performers in film, television, steaming, and music: fair compensation and the right of informed consent for the A.I. use of their faces, voices, and bodies."[213] The strike is still ongoing today.[214] SAG-AFTRA has also recently been making deals with AI companies to better protect their performers' rights.[215] In October 2024, SAG-AFTRA reached an agreement with Ethovox, which is an AI company owned and managed by voice actors.[216] The union has also backed several AI bills at the state and federal level, that aim to create guardrails around the use of AI with laypeople in addition to performers. SAG-AFTRA's recent engagement with artificial intelligence in the entertainment world shows how important it is to stay updated as technology evolves, and how the issue of protecting performance rights continues to be prevalent.

C. The Commercial Exploitation Requirement

A large part of intellectual property infringement focuses on commercial exploitation: using someone's intellectual property for one's own financial gain. Loren Cheri Shokes references Brandeis and Warren's article on privacy, emphasizing their warnings about the use of technology when used for misrepresentation or re-engineering without viewers knowing, "[i]t both belittles and perverts" the voice of the original creator.[217] This premise stays true with respect to computer programmers making avatars to fit their creative vision, even if that is not what the actual artists may have wanted.[218] Stokes writes about Michael Jackson's

estate experiencing a "commercial rebirth" after his death, largely due to its partnership with performance company Cirque du Soleil.[219] There, a hologram of Michael Jackson was used, similar to the hologram of Tupac used at Coachella.[220] Shokes emphasizes how Tupac's friends Dr. Dre and Snoop Dogg only began pursuing the idea of "bringing him back" *after* they received permission from his mother.[221]

While the laws discussed above provide some protection against the fixation, communication, and distribution of recorded live music performances, they do not clarify whether an artist can protect themselves against someone recording an AI-generated hologram performance. They also do not address the potential issue of flash infringement, the "instantaneous and unauthorized uploading and dissemination of performances by live event audiences."[222] Right now, flash infringement applies more to performances like stand-up comedy than live music.[223] One reason why live streaming has not been detrimental to musical performers is that their most sought-after performances are actually rehearsed studio recordings.[224] Another reason is that flash infringement can actually aid the artist by increasing demand for their music, and driving ticket sales up.[225] Perhaps this is a result of the increased accessibility of the internet and social media, allowing more people to learn about up-and-coming artists and get closer to the artists they already know and love.[226] Marshall Heins II writes about how "[i]n contrast to recorded music, live performances are 'not threatened by digital technology's erosion of copyright protections' and ultimately adds to the already growing internet fan community by 'build[ing] up a loyal grass-roots fan base.'"[227]Artists who achieve viral fame can then leverage their celebrity status to "book shows, tour, and continue growing their fan base" to reap the financial benefits of selling tickets to live shows.[228]

However, with the advent of concerts featuring holograms and other digital avatars, viral videos may not necessarily help sell more tickets to a hologram show. In this type of situation, an unauthorized recording can potentially hurt the creators of the show when the intrigue about the performance concerns how realistic the hologram is compared to the artist. Once the mystery is revealed online, fewer people may want to actually see the show, and ticket sales could decline. Public performances that depend on holograms face different risks or methods of infringement than live performances and would not benefit from viral fame. Thus, there is a need for clarifying and broadening the existing law.

IV. Call to Action

The problem of increased AI-generated hologram performances should be addressed in a couple ways. First, there needs to be a clear right of publicity law across the United States that coherently protects artists across all jurisdictions, rather than a piecemeal state-by-state solution. This should also include a consistent balancing scheme between the right of publicity and First Amendment protections. Second, the federal Copyright Act should be amended to provide public performers with clear moral rights, similar to the rights provided to visual artists under the Visual Artists Rights Act.[229]

A. The Need for a Federal Right of Publicity Law

Authors and scholars have been calling for a federal right of publicity law for years.[230] As Brandeis and Warren write in "The Right to Privacy," "[t]hat the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection."[231] In 1998, the American Bar Association drafted a federal right of publicity bill at the request of International Trademark Association, which stated that "the current state of right of publicity laws were a 'patchwork' of inconsistency."[232] Krista Correa called for a federal right of publicity law when discussing the many lawsuits brought in recent years in the context of video games using celebrity imagery.[233] She pointed out that while traditional tort law may have been sufficient during the era of print media, they are not adequate today, and "[a]ny attempt to fit a federal right of publicity into an existing scheme will serve only to muddy the laws further."[234] Mary LaFrance expands on the complexity of bringing a right of publicity case in the United States, listing the

following as some differences among state regimes: (1) whether the right is protected in the state, (2) what aspects of a person's identity are protected, (3) whether commercial and/or non-commercial activities are actionable, (4) exceptions and limitations to the law, (5), alienability, (6) dependability, (7) remedies, and (8) statute of limitations.[235]

Many right of publicity laws that do exist in state legislatures depend on where a celebrity was domiciled during their life or at the time of their death.[236] The celebrity's domicile also affects the choice of a law conflict which may arise in litigation.[237] However, the state right of publicity claim no longer makes sense or is feasible in an increasingly interconnected world. Furthermore, the right of publicity should protect an artist whether they are alive or deceased, and not all states currently have right of publicity laws that address or allow post-mortem rights.

A federal right of publicity law should clearly define the scope of the artist's right. Robert C. Post and Jennifer E. Rothman identify four types of right of publicity claims, each concerning a distinct interest that a plaintiff may want to vindicate in a legal action.[238] These four claims can be separated as the right of performance, the right of commercial value, the right of control, and the right of dignity.[239] Post and Rothman argue that these four interests, when taken together, cover the vast majority of cases that are brought to remedy the unauthorized use of one's image.[240]

The right of performance is the right of a creator to protect their performances from misappropriation.[241] This right is violated when a defendant uses a performance without consent.[242] The right of commercial value protects the "market value of a person's identity separate and apart from any particular performance" that they produced.[243] For example, celebrities often bring right of commercial value claims when the misappropriation of their identities leads to injuries such as lost endorsements and job opportunities, loss of revenue from merchandising and licensing contracts, and diminishment of goodwill among the public.[244] Post and Rothman do not suggest grounding the right of commercial value in a general property right but rather insist on isolating that interest into a separate tort, the right of control.[245] Generally, the right of control can be viewed through the lens of property: people own their identity, and they should be able to control how it is used by other people.[246] This right protects one's autonomy rather than any market damages they may suffer from their image being appropriated.[247] Lastly, Post and Rothman discuss the right of dignity as "an ideal tort designed to protect the integrity of personality from … mental anguish."[248] In other words, we follow certain rules of civility in society, and violation of those rules can be offensive, humiliating, and/or demeaning.[249] In sum, these four distinct rights encompass the types of protections people enjoy in life and should give rise to a right of publicity claim.

Using the four rights above, a federal right of publicity law should outline a clear balancing scheme that a court can apply when analyzing a claim that will not infringe on a party's First Amendment rights to express themselves. As mentioned earlier, the First Amendment protects a person's right to artistic expression, which a governmental body generally cannot restrict unless there is a compelling interest at stake.[250]

In his own note discussing a theory for applying right of publicity claims specifically pertaining to facial recognition systems, Jason M. Schultz argues that most right of publicity claims could be distilled to the following elements: "(1) the defendant's use of the plaintiff's identity[,] (2) the appropriation of that identity to the defendant's advantage, (3) lack of consent[,] and (4) resulting injury."[251] This is the best and clearest balancing scheme for all right of publicity claims.

A more general framework is necessary to account for the types of image appropriations that can change over time, and the four types of torts discussed above can help a court differentiate between claims. Furthermore, there is no commercial exploitation requirement as a separate inquiry, element two of "appropriation" is enough.[252] An artist's identity that is appropriated would still likely be used for the purpose of commercial exploitation (i.e., a hologram concert), but what happens in a situation where a creator makes a free-to-attend concert? What if a museum or non-profit organization decides to use hologram technology

to create some sort of hologram performance without charging attendees? If the organization does not use any of the artist's copyrighted materials, the creator would still be profiting off the original artist's identity through advertising or gaining visitors. There is, however, an argument to be made that there is no commercial exploitation because the services are for free or for educational purposes. Using a standard framework for a right of publicity claim gives courts more flexibility, which is helpful as this type of technology advances further.

B. Public Performers Should Have Clear Moral Rights

Public performers should also have moral rights protected under the Copyright Act. European copyright law currently provides creators with the "moral rights" (1) to receive (or deny) attribution for their work, (2) to prevent unauthorized alteration of their work, and (3) to withdraw or correct their work.[253] France's Code de la Pro-priété Intellectuelle Arts provides the most extensive protection, as it protects not just traditional artists such as authors and painters, but also performers in general by providing them with inalienable rights to their creations and the ability to protect their reputations.[254]

In contrast, the United States has generally declined to have a specific "moral right" for artists.[255] While the United States was a signatory to the 1988 Berne Convention for the Protection of Literary and Artistic Works, which does include a moral rights clause, it did not apply the moral rights clause to United States law.[256] The 1990 Visual Artists Rights Act was enacted into the Copyright Act to provide protection akin to moral rights for visual artists.[257] Under VARA, authors maintain certain rights in their work, regardless of whether they still physically own their artwork or who holds the copyright.[258] Authors included in VARA have the right to claim authorship of their work and to prevent the use of their name as the author of any work of visual art that they did not create.[259] However, VARA is a limited provision in that it only protects living artists, and its scope of protection only extends to the original work of art itself, and not any subsequent reproductions.[260]

While VARA is a solid starting point for protecting moral rights, it is incomplete. Non-visual artists, such as musicians who create artistic works through public performance, should also have their moral rights protected. Therefore, in addition to a federal right of publicity law that clarifies a person's right to protect and control their image, the Copyright Act should be amended to include a moral rights provision that covers public performances. Similar to the protections under VARA, moral rights for public performers should include a performer's right to prevent their name from being used on a work that has been distorted, mutilated, or modified in a way that could prejudice the performer's reputation. In other words, a federal right of publicity law would protect the *image* used to make a hologram, and a moral rights law would protect against the unauthorized distortion or mutilation of the author's *music, voice,* or *words*.

When a person records an AI-generated hologram without authorization, a moral rights provision specifically curated toward public performers would help control and protect what the hologram can be made to do or say. For example, prevent it from saying offensive things or portraying the performer with views to which they do not resonate. A person who records an AI-generated hologram and posts it on the Internet might not be blocked from making the post itself, but a moral rights provision can potentially prevent this third-party recorder from distorting or mutilating the video content in a manner that could harm the original artist. Having a moral rights provision in the Copyright Act that only protects visual artists is incomplete, as performers should have their moral rights protected as well.

V. Conclusion

There should be a federal right of publicity law that follows a standardized balancing scheme in litigation. A federal law will help provide clear protections for artists and expectations of liability for people who want to use their images without authorization. The Copyright Law should also be amended to include a moral rights provision for public performers in addition to visual artists, to prevent a performer's image from being manipulated and distorted in a way which harms their reputation. It is difficult

to say how the law and the world will keep changing and how that would affect an artist's intellectual property rights. However, these three propositions provide artists with more protection around their image and artistic creations.

Footnotes

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1 For the purposes of this Note, holograms are defined as virtual "three-dimensional images generated by interfering beams of light that reflect real, physical objects." *See* Margarita Grubina, *Holograms in Real Life: How the Technology Works and Industry Use Cases*, Respeecher (Feb. 3, 2021), https://www.respeecher.com/blog/holograms-real-life-technology-works-industry-use-cases [https://perma.cc/NP43-C9AZ]. Although there are many types of holograms and various forms of digital imaging technology, when this Note discusses holograms, it is referring to three-dimensional virtual images that a person can see with their naked eye, without having to rely on any other technology to do so.

2 Jana M. Moser, Tupac Lives! *What Hologram Authors Should Know About Intellectual Property Law*, 2012 Bus. L. Today 1, 1–2.

3 *Id.* at 2.

4 *Id.*

5 *See infra* Part II.

6 This Note is in no way against technological development. Rather, this Note calls for a clearer standard within existing law to protect the individuals behind the hologram, so that artists can maintain control over their image and know that it will live on after their deaths in a way they feel more comfortable with.

7 *See* Mark Binelli, *Old Musicians Never Die. They Just Become Holograms*, N.Y. Times (Jan. 7, 2020), https://www.nytimes.com/2020/01/07/magazine/hologram-musicians.html [https://perma.cc/NCK7-4ADP].

8 *See id.* John Henry Pepper popularized this trick in his Christmas Eve 1862 production of Charles Dickens's The Haunted Man at the Royal Polytechnic Institution in London. Id. "To call up his ghosts, Pepper projected a bright light onto an actor in a hidden, cutout space beneath the stage, something like an orchestra pit, casting a reflection onto an angled pane of glass." *Id.* The glass stood onstage, invisible to the audience, but the spectral image appeared slightly behind it which presented an illusion of moving with the actors and scenery. *Id.*

9 *See* Shannon F. Smith, *If It Looks Like Tupac, Walks Like Tupac, and Raps Like Tupac, It's Probably Tupac: Virtual Cloning and Post-Mortem Right-of-Publicity Implications*, 2013 Mich. St. L. Rev. 1719, 1723.

10 *See* Binelli, *supra* note 7; *see also* Kory Grow, *Live After Death: Inside Music's Booming New Hologram Touring Industry*, Rolling Stone (Sept. 10, 2019), https://www.rollingstone.com/music/music-features/hologram-tours-roy-orbison-frank-zappa-whitney-houston-873399/ [https://perma.cc/CXW6-CMR9]; David Rowell, *The Spectacular, Strange Rise of Music Holograms*, Wash. Post (Oct. 30, 2019), https://www.washingtonpost.com/magazine/2019/10/30/dead-musicians-are-taking-stage-again-hologram-form-is-this-kind-encore-we-really-want/[https://perma.cc/DX6R-LN7L].

11 A three-dimensional image appears to be "deep or solid rather than flat" and has height, width, and length measurements. *Three-dimensional*, Collins Dictionary.Com, https://www.collinsdictionary.com/dictionary/english/three-dimensional [https://perma.cc/4GVP-8KDM] (last visited Nov. 4, 2024).

12 *See* Margarita Grubina, *Holograms in Real Life: How the Technology Works and Industry Use Cases*, Respeecher (Feb. 3, 2021, 5:51 AM), https://www.respeecher.com/blog/holograms-real-life-technology-works-industry-use-cases [https://perma.cc/3SKE-8RZ7].

13 This is not an exhaustive list, and some of these companies are no longer in business. Some other examples of holograms/hologram tours include but are not limited to Eyellusion's Frank Zappa tour, and Base Hologram's Maria Callas, Roy Orbison, and Whitney Houston hologram. *See* sources cited *supra* note 10.

14 *See* Binelli, *supra* note 7.

15 *See* Binelli, *supra* note 7 ("An Aretha Franklin hologram could shush a noisy audience member, banter with her drummer and cover 'Shallow.' Chris Stapleton and Sturgill Simpson could form a supergroup with holograms of Merle Haggard and Waylon Jennings. Kurt Cobain, sporting the same faded green cardigan he wore on 'MTV Unplugged,' might turn up at a surprise appearance with Billie Eilish at the Grammys. A one-off Beatles reunion in Hyde Park, live Paul and Ringo, hologram John and George. Hologram Biggie takes the Thomas Jefferson role in 'Hamilton.' Bob Marley interrupts his performance of 'Exodus' to plug the new season of 'Curb Your Enthusiasm.'").

16 *See* Jem Aswad, *ABBA's "Voyage" Virtual Concert to Go on Tour "Around the World,"*Variety (Mar. 2, 2023, 11:56 AM), https://variety.com/2023/music/news/abba-voyage-virtual-concert-tour-1235541368/ [https://perma.cc/SAN9-C6Y5]. Even though this show does not technically have holograms, I list it as an example because I attended this show in-person in January 2023, and it inspired this Note. The digital personas were also so lifelike and realistic that my aunt, friend, and I were briefly confused that they were not actual performers on the stage.

17 *See id.*

18 *See* Ben Beaumont-Thomas, *Keith Richards: Rolling Stones Hologram Performance is "Bound to Happen,"*Guardian (Oct. 25, 2023, 5:53 AM), https://www.theguardian.com/music/2023/oct/25/keith-richards-rolling-stones-hologram-performance-is-bound-to-happen [https://perma.cc/2JEC-HGWY].

19 *Understanding Our Digital Existence: Digital Identity Versus Digital Persona*, Agrello (Jan. 28, 2021), https://www.agrello.io/post/understanding-our-digital-existence-digital-identity-versus-digital-persona [https://perma.cc/T5YJ-K4QF].

20 *See* Smith, *supra* note 9, at 1724.

21 *See* Smith, *supra* note 9, at 1724.

22 *See* Smith, *supra* note 9, at 1724–25.

23 *See* Smith, *supra* note 9, at 1724–25.

24 *See* Smith, *supra* note 9, at 1725.

25 *See* Smith, *supra* note 9, at 1725.

26 *See* Smith, *supra* note 9, at 1725.

27 *See* Riddhi Setty, *John Lennon AI Revival Adds to Debate Over IP Rights of the Dead*, Bloomberg L. (June 15, 2023, 5:10 AM), https://news.bloomberglaw.com/ip-law/john-lennon-ai-revival-adds-to-debate-over-ip-rights-of-the-dead# [https://perma.cc/L5L3-QZCC].

28 *See* Clayton Edwards, *Elvis Presley's Estate Explains Why They Would Never Do Hologram Tours of the King*, Outsider (Aug. 23, 2021), https://outsider.com/entertainment/elvis-presley-estate-explains-why-they-would-never-do-hologram-tours-king/ [https://perma.cc/F9B6-FMHM] ("I can tell you I chase people off with a stick who want to make a hologram of Elvis … it's obvious that [Elvis] didn't like them, never wanted to be one, thought it was kitschy, didn't think it was real.").

29 *See* Ivan Korrs, *Dolly Parton Expresses Real Emotions Toward AI, Says ABBA Hologram Won't Work for Her*, Music Times (July 2, 2023, 8:10 PM), https://www.musictimes.com/articles/94027/20230702/dolly-parton-expresses-real-emotions-toward-ai-abba-hologram-wont.htm [https://perma.cc/M9CP-7CSE] ("I think I've left a great body of work behind. I have to decide how much of that high-tech stuff I want to be involved [with] because I don't want to leave my soul here on this earth."); *see also* Jack Irvin, *Dolly Parton Doesn't Want to Become an AI Hologram After She Dies: "I've Left a Great Body of Work Behind*,"People (July 3, 2023, 5:25 PM), https://people.com/dolly-parton-doesnt-want-to-become-ai-hologram-after-death-7555915 [https://perma.cc/TA94-RR2Q].

30 *See* Beaumont-Thomas, *supra* note 18.

31 *See* Neil Shah, *How Mick Jagger Has Kept the Rolling Stones in Business for Six Decades,*Wall St. J. (Sept. 26, 2023, 8:00 AM), https://www.wsj.com/style/mick-jagger-rolling-stones-hackney-diamonds-7d4f193b [https://perma.cc/JT66-F6H2].

32 *See* Beaumont-Thomas, *supra* note 18 ("In an interview with Matt Wilkinson on Apple Music 1, Richards remarked, 'I'm pretty sure that [it] is bound to happen. Do I want it? Now, that's another thing. I don't know if I want to hang around that long, man. But at the same time, it won't be up to me, will it?'").

33 *See* 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, 63 (2022), https://scholarlycommons.law.hofstra.edu/acteclj/vol48/iss1/8 [https://perma.cc/VD27-FRSQ].

34 *See* Cayce Myers, *Warren, Samuel & Louis Brandeis. The Right to Privacy*, *4 Harv. L. Rev. 193 (1890),*25 Comm. L. & Pol'y 519, 520 (2020).

35 *See id.*

36 *Id.; see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890) ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'").

37 *See* Warren & Brandeis, *supra* note 36, at 205 ("The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.").

38 *See* Smith, *supra* note 9, at 1723.

39 *See* Smith, *supra* note 9, at 1723; Pavesich v. New England Life Ins. Co., 122 Ga. 190, 193, 50 S.E. 68 (1905) ("The absence, for a long period of time of a precedent for an asserted right is not conclusive evidence that the right does not exist A right of privacy is derived from natural law …. The right of privacy is embraced within the absolute rights of personal security and personal liberty.").

40 *See generally Pavesich*, 122 Ga. 190.

41 *See* Smith, *supra* note 9, at 1723.

42 *See* Smith, *supra* note 9, at 1723.

43 *See* Smith, *supra* note 9, at 1723.

44 *See* Smith, *supra* note 9, at 1723.

45 Smith, *supra* note 9, at 1723.

46 U.S. Dept. of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749, 763, 109 S. Ct. 1468, 103 L. Ed. 2d 774, 16 Media L. Rep. (BNA) 1545 (1989).

47 J. Thomas Mccarthy & Roger E. Schechter, 1 Rights of Publicity and Privacy § 1:3 (2d ed. 2023).

48 *See* Thomas F. Cotter, *Damages for Noneconomic Harm in Intellectual Property Law*, 72 Hastings L.J. 1055, 1085 (2021); *see also*Restatement Third, Unfair Competition § 46 cmts. a to b, g, h. (Am. L. Inst. 1995); Jennifer Kenedy & Jordan Rutledge, *Death By A Thousand Cuts: Right of Publicity in the Age of AI*, JD Supra (May 31, 2023), https://www.jdsupra.com/legalnews/death-by-a-thousand-cuts-right-of-8578503/ [https://perma.cc/3D4T-7T4P] ("The right of publicity can be viewed as the doctrinal cousin to the right to privacy; while the right to privacy protects one's right to individual privacy that starts at birth … the right of publicity is an earned right that redresses potential damage caused to the commercial value of one's identity.").

49 *See What Is Post-Mortem Right of Publicity?* L. Off. Patricia E. Tichenor, P.L.L.C. (Mar. 20, 2022), https://www.novaestatelawyers.com/post-mortem-right-of-publicity/ [https://perma.cc/FEY2-NJDC].

50 *See generally*Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965, 2 Media L. Rep. (BNA) 2089, 205 U.S.P.Q. 741 (1977).

51 *See id.*; *see also* Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, 13 Landslide, Sept.–Oct. 2020, at 20, 21.

52 Klein & Cohn, *supra* note 33, at 63–64; *see also* Jonathan L. Faber, *Recent Right of Publicity Revelations: Perspective from the Trenches*, 3 Savannah L. Rev. no. 1, at 1, 4 (2016).

53 Thomas P. Boggess V, *Cause of Action for an Infringement of the Right of Publicity*, 31 Causes of Action Second Series§ 5 (2d ed. 2023).

54 *Id.* Furthermore, I did not refer to the Restatement of Unfair Competition in this Note, but jurisdictions that look to the Restatement require that the plaintiff must show that 1) the defendant, without permission, used some aspect of identity or persona in such a way that the plaintiff is identifiable from the defendant's use; and 2) the defendant's use is likely to cause damage to the commercial value of that persona. Restatement Third, Unfair Competition § 46 (Am. L. Inst. 1995).

55 *See An Assessment of the Commercial Exploitation Requirement as a Limit on the Right to Publicity*, 96 Harv. L. Rev. 1703, 1704 (1983).

56 *See* Klein & Cohn, *supra* note 33, at 63–64.

57 *See* Sammataro, Film and Multimedia and the Law§ 7:6 (2024).

58 This Note only discusses a few landmark right of publicity cases. While this section breaks down the right of publicity law in preparation to discuss implications for holograms, I do not claim to analyze all of the various angles and nuances across jurisdictions. My research focused on New York and California, but there is plenty of other case law from other jurisdictions. *See generally*No Doubt v. Activision Publishing, Inc., 192 Cal. App. 4th 1018, 122 Cal. Rptr. 3d 397, 98 U.S.P.Q.2d 1728 (2d Dist. 2011); Trannel v. Prairie Ridge Media, Inc., 2013 IL App (2d) 120725, 370 Ill. Dec. 157, 987 N.E.2d 923 (App. Ct. 2d Dist. 2013); Harvey v. Systems Effect, LLC, 2020-Ohio-1642, 154 N.E.3d 293 (Ohio Ct. App. 2d Dist. Montgomery County 2020) (abrogated by, Weidman v. Hildebrant, 178 Ohio St. 3d 3, 2024-Ohio-2931, 254 N.E.3d 2 (2024));

Comerica Bank & Trust, N.A. v. Habib, 433 F. Supp. 3d 79 (D. Mass. 2020), subsequent determination, 2020 WL 759359 (D. Mass. 2020).

59 *See generally*433 U.S. 562 (1977).

60 *See*513 F. Supp. 1339, 1339–82 (D.N.J. 1981). Not all jurisdictions that have right of publicity laws recognize post-mortem rights. *See* Boggess, *supra* note 53, § 28.

61 *See generally*Midler v. Ford Motor Co., 849 F.2d 460, 460–64, 15 Media L. Rep. (BNA) 1620, 7 U.S.P.Q.2d 1398 (9th Cir. 1988).

62 *See id.* at 461.

63 *See id.* at 461–62.

64 *See id.* at 463; *see also* Kenedy & Rutledge, *supra* note 48.

65 *See*White v. Samsung Electronics America, Inc., 971 F.2d 1395, 1395–1408, 20 Media L. Rep. (BNA) 1457, 23 U.S.P.Q.2d 1583 (9th Cir. 1992), as amended, (Aug. 19, 1992). For another analysis of *White*, *see generally* John R. Braatz, *White v. Samsung Electronics America: The Ninth Circuit Turns a New Letter in California Right of Publicity Law*, 15 Pace L. Rev. 161 (1994).

66 *White*, 971 F.2d at 1396.

67 *Id.* at 1399.

68 *See* Kenedy & Rutledge, *supra* note 48.

69 Braatz, *supra* note 65, at 163.

70 I focus on the right of publicity statutes from these states because there are many performers who live and work in California and New York.

71 *See*Cal. Civ. Code § 3344 (West 2024) (outlining the right of publicity for a living person); *see also id.* § 3344.1 (outlining the right of publicity for a deceased person); Lydia B. Yerrick, *Live! For One Life Only?: The Need to Amend California's Post-Mortem Right of Publicity Statute to Better Protect the Dead and Their Heirs From Holographic Exploitation*, 43 Sw. L. Rev. 349, 352 (2013).

72 *See*498 F.2d 821, 825–27 (9th Cir. 1974); Yerrick, *supra* note 71, at 352.

73 Yerrick, *supra* note 71, at 352.

74 *See* Carlianna Dengel, Do You Have a Right of Publicity in California?, Romano L. (July 26, 2022), https://www.romanolaw.com/do-you-have-a-right-of-publicity-in-california/#:~:text=Is%20There%20a%20Right%20of,and%20live%20TV)%20and%20li keness [https://perma.cc/ZCL8-9U9X].

75 Yurrick, *supra* note 71, at 353.

76 *See*Cal. Civ. Code § 3344; *see also* Dengel, *supra* note 74 (describing whether a person has a right of publicity in California).

77 *See*Cal. Civ. Code § 3344 (emphasis added).

78 *See*Cal. Civ. Code § 3344.

79 *See*Cal. Civ. Code § 3344.

80 *See*Cal. Civ. Code § 3344; Dengel, *supra* note 74.

81 Dengel, *supra* note 74.

82 Dengel, *supra* note 74.

83 Dengel, *supra* note 74.

84 *See* Dengel, *supra* note 74.

85 *See* Dengel, *supra* note 74.

86 Yerrick, *supra* note 71, at 354.

87 *See* Yerrick, *supra* note 71, at 354; *see also*Cal. Civ. Code § 3344.1 (West 2024).

88 *See* Yerrick, *supra* note 71, at 354; *see generally*Cal. Civ. Code § 3344.1.

89 *See* Yerrick, *supra* note 71, at 355.

90 *See* Smith, *supra* note 9, at 1731; *see also* Sarah Robertson, *New York Post-Mortem Statutory Right of Publicity Set to Take Effect*, JD Supra (Apr. 26, 2021), https://www.jdsupra.com/legalnews/new-york-post-mortem-statutory-right-of-8632490/ [https://perma.cc/Z3E3-8PTL].

91 *See generally*Stephano v. News Group Publications, Inc., 64 N.Y.2d 174, 485 N.Y.S.2d 220, 474 N.E.2d 580, 11 Media L. Rep. (BNA) 1303 (1984); *see also*Mccarthy & Schechter, *supra* note 47, § 6:105.

92 *See*Mccarthy & Schechter, *supra* note 47, § 6:105.

93 *See*N.Y. Civ. Rights Law § 50-f (McKinney 2024); *see also* Robertson, *supra* note 90; Mccarthy & Schechter, *supra* note 47, § 6:105; *Changes to New York's Right of Publicity Law*, Romano L. (Feb. 22, 2021), https://www.romanolaw.com/right-of-publicity-law/#:~:text=The%20amended%20law%20permits%20the,date%20the%20law%20took%20effect. [https://perma.cc/34VE-43PC] [hereinafter *Changes to New York's Right of Publicity*].

94 *See*N.Y. Civ. Rights Law § 50-f; *see also*Mccarthy & Schechter, *supra* note 47, § 6:105.

95 *See*N.Y. Civ. Rights Law § 50-f(8); Mccarthy & Schechter, *supra* note 47, § 6:105.

96 *See*N.Y. Civ. Rights Law § 50-f; *see also* Rob Balin et. al., *Dead Celebrities and Digital Doppelgangers: New York Expands Its Right of Publicity Statute and Tackles Sexually Explicit Deepfakes*, 41 Licensing J. 8, 9 (2021).

97 *See*N.Y. Civ. Rights Law § 50-f(1)(a).

98 *Id.* at (1)(b).

99 *See id.*

100 *See id.* at (1)(c) (emphasis added).

101 *See id*.

102 *See Changes to New York's Right of Publicity*, *supra* note 93.

103 *See Changes to New York's Right of Publicity*, *supra* note 93.

104 N.Y. Civ. Rights Law § 50-f(2)(b) (emphasis added); *see also* Robertson, *supra* note 90 ("Deceased performers are protected against the unauthorized use of their digital replica in a scripted audiovisual work as a fictional character (such as a movie), or in live musical performances (such as a concert), without consent, if the public is likely to be misled into thinking it was … authorized").

105 *See* Balin et al., *supra* note 96, at 10.

106 *See*N.Y. Civ. Rights Law § 50-f(2)(d)(iv), (9).

107 *See id.* at § (2)(d)(iv), (e).

108 *See Changes to New York's Right of Publicity*, *supra* note 93 ("Owners or employees of any medium used for advertising, including 'newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit advertisements,' are immune from lawsuits for unauthorized commercial uses of a deceased personality's likeness unless they have 'actual knowledge by prior notification of the unauthorized use.'" (internal citations omitted)).

109 *See supra* Part II.C.

110 *See infra* Sections II.D.1–5.

111 *See* Michael Landau, *Choice of Law in Right of Publicity Cases*, Lindey on Entertainment, Publishing and the Arts § 3:22 (3d ed. 2023).

112 *Id.*

113 *See* Roesler & Hutchinson, *supra* note 51, at 26.

114 *See* Roesler & Hutchinson, *supra* note 51, at 26.

115 *See* Roesler & Hutchinson, *supra* note 51, at 26.

116 *See* Emily Alexandra Poler, *What's Real, What's Fake: The Right of Publicity and Generative AI*, A.B.A.: Bus. L. Today (Aug. 7, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-august/whats-real-whats-fake-the-right-of-publicity/ [https://perma.cc/C59L-HBNH] (last visited Apr. 3, 2024).

117 *Id.*; *White,* 971 F.2d at 1399.

118 *See White,* 971 F.2d at 1399.

119 *See*Midler v. Ford Motor Co., 849 F.2d 460, 461, 15 Media L. Rep. (BNA) 1620, 7 U.S.P.Q.2d 1398 (9th Cir. 1988); *see also* Nick Breen & Josh Love, *Attack of the Clones: AI Soundalike Tools Spin Complex Web of Legal Questions for Music*, Billboard (May 19, 2023), https://www.billboard.com/pro/ai-music-tools-copy-artists-voices-legal-questions/ [https://perma.cc/2C7Y-GTU5].

120 *See*Cal. Civ. Code § 3344(e) (West 2024); *id.*§ 3344.1(k); N.Y. Civ. Rights Law § 50-f(2)(d)(iv) (McKinney 2024).

121 *See id.*

122 *See infra* Section II.D.4.

123 *See generally* Andreas N. Andrews, *Stop Copying Me: Rethinking Rights of Publicity Verses the First Amendment*, 32 Temp. J. Sci., Tech. & Env't L. 127 (2013); *see also*U.S. Const. Amend. I.

124 *See* Rebecca Tushnet, *A Mask That Eats into the Face: Images and the Right of Publicity*, 38 Colum. J.L. & Arts 157, 162 (2015) ("Over time, the conflict between the right of publicity and the First Amendment should have become more sharply framed.").

125 U.S. Const. Amend. I (emphasis added); *see also* Abby Placik & the Center for Art Law Team, *Leaving a Mark: Artistic Expression, New Media in Protest and Law*, Ctr. for Art L. (June 18, 2018), https://itsartlaw.org/2018/06/18/leaving-a-mark-artistic-expression-new-media-in-protest-and-law/ [https://perma.cc/7ZNF-N26Z].

126 *See* Placik & the Center for Art Law Team, *supra* note 125.

127 *See* Placik & the Center for Art Law Team, *supra* note 125.

128 *See* Placik & the Center for Art Law Team, *supra* note 125.

129 *See* Meaghan Fontein, *Digital Resurrections Necessitate Federal Post-Mortem Publicity Rights*, 99 J. Pat. & Trademark Off. Soc'y 481, 490 (2017).

130 *See*Rogers v. Grimaldi, 875 F.2d 994, 1005, 16 Media L. Rep. (BNA) 1648, 10 U.S.P.Q.2d 1825 (2d Cir. 1989).

131 *See*Hart v. Electronic Arts, Inc., 717 F.3d 141, 158, 41 Media L. Rep. (BNA) 1985, 107 U.S.P.Q.2d 1001 (3d Cir. 2013).

132 717 F.3d at 160 (describing the development of the transformative use test); *see generally*Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 106 Cal. Rptr. 2d 126, 21 P.3d 797, 29 Media L. Rep. (BNA) 1897, 58 U.S.P.Q.2d 1823 (2001) (articulating the transformative use test for the first time).

133 *See* Fontein, *supra* note 129, at 491.

134 *See generally*ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 67 U.S.P.Q.2d 1065, 2003 Fed. App. 0207P (6th Cir. 2003); *See* Dora Georgescu, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 Fordham L. Rev. 907, 910 (2014) (describing different right of publicity tests that have emerged throughout the years and proposing another test to make analysis more standard).

135 *See* Tushnet, *supra* note 124, at 158.

136 Tushnet, *supra* note 124, at 158.

137 *See* Poler, *supra* note 116 ("Since the release of ChatGPT in November 2022, there has been a seemingly endless onslaught of coverage about the chatbot and generative AI software like it.").

138 *See* Mark Savage, *Sir Paul McCartney Says Artificial Intelligence Has Enabled a "Final" Beatles Song*, BBC News (June 13, 2023), https://www.bbc.com/news/entertainment-arts-65881813# [https://perma.cc/6T7B-3AWG]; *see also* Michael Sun, *Paul McCartney Says There's Nothing Artificial in New Beatles Song Made Using AI*, The Guardian (June 23, 2023, 1:35 PM), https://www.theguardian.com/music/2023/jun/23/paul-mccartney-says-theres-nothing-artificial-in-new-beatles-song-made-using-ai [https://perma.cc/QN9C-XR9U].

139 *See* Savage, *supra* note 138.

140 *See* Savage, *supra* note 138.

141 *See* Marc D. Ostrow, *The Wild West of AI-Generated Music: What Rules Rule?*, Romano L. (July 26, 2023), https://www.romanolaw.com/the-wild-west-of-ai-generated-music-what-rules-rule/ [https://perma.cc/K9P9-UB36].

142 In addition to AI-generated original songs, there are now AI-generated covers of popular hits such as "Perfect" by Ed Sheeran, performed by "Elvis Presley," and "Cuff It" by Beyoncé, performed by "Rihanna." *See id.*

143 *See infra* Part III (discussing artist performance rights and the copyright implications posted by AI-generated holograms).

144 *See* Daniel Tencer, *Universal Music Group Calls on US Congress to Pass New Rules Regulating AI,*Music Bus. Worldwide (July 13, 2023), https://www.musicbusinessworldwide.com/regions/north-america/usa/ [https://perma.cc/85TF-EWUR].

145 *See id.*; *see also* Chris Cooke, *Universal Music Calls for Federal Publicity Right and More Transparency in Latest AI Hearing in U.S. Congress*, CMU (July 13, 2023), https://archive.completemusicupdate.com/article/universal-music-calls-for-federal-publicity-right-and-more-transparency-in-latest-ai-hearing-in-us-congress/ [https://perma.cc/5CWN-HXAT].

146 *See* Daniel Tencer, *supra* note 144; *see generally*Hum. Artistry Campaign, https://www.humanartistrycampaign.com/ [https://perma.cc/C3E7-4S86] (last visited Sept. 24, 2023).

147 *See* NO FAKES Act of 2024, H.R. 95511, 118th Cong. (2023); *see also* Emilia David, *No Fakes Act Wants to Protect Actors and Singers from Unauthorized AI Replicas*, The Verge (Oct. 12, 2023, 5:12 PM), https://www.theverge.com/2023/10/12/23914915/ai-replicas-likeness-law-no-fakes-copyright [https://perma.cc/GA28-P27U].

148 *See*N.Y. Civ. Rights Law § 50-f(1)(c) (McKinney 2024).

149 H.R. 95511 § 2(a)(1).

150 *Id.* §§ 2(c)(2)(A)–(c)(3).

151 *Id.* § 2(b)(2)(A)(iii).

152 NO AI FRAUD Act of 2024, H.R. 6943, 118th Cong. (2024); *see also* Kristin Robinson, House Lawmakers Unveil No AI FRAUD Act in Push for Federal Protections for Voice, Likeness, Billboard (Jan. 10, 2024), https://www.billboard.com/business/legal/no-ai-fraud-act-congress-federal-law-explained-1235578930/ [https://perma.cc/2BRM-RDUE]; *see also* H.R. 6943, 118th Cong. (2024); Press Release, Congresswoman Maria Elvira Salazar Florida's 27th District, Salazar Introduces the No AI Fraud Act (Jan. 10, 2024) (on file with author).

153 *See* H.R. 6943.

154 *See* Robinson, *supra* note 152.

155 *See* H.R. 6943 § 2.

156 *See id.*

157 *See* H.R. 6943 § 3.

158 *See* Press Release, Congresswoman Maria Elvira Salazar, *supra* note 152.

159 *See* Robinson, *supra* note 152.

160 *See* H.R. 6943 § 3(a).

161 *SeeActors' Strike Ends: The SAG-AFTRA Deal, What Happened and What's Next*, L.A. Times (Nov. 10, 2023, 9:14 AM), https://www.latimes.com/entertainment-arts/business/story/2023-06-29/what-to-know-sag-aftra-strike-actors-hollywood [https://perma.cc/2N3E-CE56].

162 *See infra* Part III.A.

163 *See*17 U.S.C. § 102(a); *see also What Musicians Should Know About Copyright*, U.S. Copyright Off., https://www.copyright.gov/engage/musicians/ [https://perma.cc/2BLB-76JA] (last visited Sept. 24, 2023).

164 *See*17 U.S.C. § 102(a)(5)–(a)(6); *see also* U.S. Copyright Off., *supra* note 163; *see also* Marc D. Ostrow, *Rights for Public Performances of Music*, Romano L. (Oct. 14, 2022), https://www.romanolaw.com/rights-for-public-performances-of-music/ [https://perma.cc/Z6P6-8QGZ].

165 *See* U.S. Copyright Off., *supra* note 163.

166 *See* Hannah Skopicki, Note, *Pixelated Poltergeists: Synchronization Rights and the Audiovisual Nature of "Dead Celebrity" Holograms*, 70 Am. U.L. Rev. 1, 23 (2020).

167 *See*17 U.S.C. § 101.

168 *See id.*; *see also* Skopicki, *supra* note 166, at 23.

169 17 U.S.C. § 101.

170 *See* Ostrow, *supra* note 164.

171 17 U.S.C. § 106(6) ("[I]n the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."); *see also* U.S. Copyright Off., *supra* note 163.

172 *See generally* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (Mar. 16, 2023) (codified at 37 C.F.R. Pt. 202); *see generally*Thaler v. Perlmutter, 687 F. Supp. 3d 140 (D.D.C. 2023), aff'd, 130 F.4th 1039 (D.C. Cir. 2025); Tessa Solomon, *US Judge Rules AI-Generated Art Not Protected by Copyright Law*, Artnews (Aug. 21, 2023, 3:12 PM), https://www.artnews.com/art-news/news/us-judge-rules-ai-generated-art-is-not-protected-by-copyright-law-1234677410/ [https://perma.cc/KM3N-54KV] ("A federal judge in Washington, D.C., ruled Friday that artwork generated by artificial intelligence is not eligible for copyright protection because it lacks 'human involvement,' reaffirming a March decision of the United States copyright office.").

173 17 U.S.C. at § 101.

174 *See Thaler,* 687 F.Supp.3d, at 147.

175 *See id.*

176 *See id.* ("The act of human creation—and how to best encourage human individuals to engage in that creation, and thereby promote science and the useful arts—was thus central to American copyright from its very inception.").

177 *See id.* at *4–5; *see also* Solomon, *supra* note 172 ("Howell wrote in her motion that 'courts have uniformly declined to recognize copyright in works created absent any human involvement.'").

178 *See* Solomon, *supra* note 172.

179 *See*17 U.S.C. § 1101; 18 U.S.C. § 2319.

180 *See* Craig W. Dallon, *The Anti-Bootlegging Provisions: Congressional Power and Constitutional Limitations*, 13 Vand. J. Ent. & Tech. L. 255, 257–59 (2011).

181 *Id.* at 262.

182 *Id.*

183 *Id.* at 257–58.

184 *See generally* Uruguay Round Trade Agreements, 19 U.S.C. §§ 3501 to 3624.

185 *See* Dallon, *supra* note 180, at 258.

186 *See* Michael Landau, 1 Lindey on Entertainment, Publishing & The Arts§ 1:42.70 (3d ed. 2023). This Note does not address the criminal anti-bootlegging provision.

187 *See*17 U.S.C. § 1101(a); Dallon, *supra* note 180, at 279.

188 *See generally* Dallon, *supra* note 180 (providing a detailed description of three cases challenging the civil anti-bootlegging statute for being unconstitutional).

189 *See* Dallon, *supra* note 180, at 269–82; *see also*U.S. Const. Art. I, § 8, cl. 8; 18 U.S.C. § 102(a); 17 U.S.C. § 101.

190 *See* L.A. Times, *Actors' Strike Ends*, *supra* note 161.

191 *See* Clara Strunck, *The Hollywood Strikes: Everything You Need to Know*, Harper's Bazaar (Nov. 9, 2023), https://www.harpersbazaar.com/uk/culture/culture-news/a44687421/hollywood-strikes-explainer/ [https://perma.cc/VTY3-KJ8U].

192 *See id.*

193 Alissa Wilkinson & Emily Stewart, *The Hollywood Writers' Strike is Over—And They Won Big*, Vox (Sept. 28, 2023), https://www.vox.com/culture/2023/9/24/23888673/wga-strike-end-sag-aftra-contract [https://perma.cc/9E7H-89UN].

194 *See* Strunck, *supra* note 191.

195 *See* Strunck, *supra* note 191.

196 *See* Strunck, *supra* note 191.

197 *See* Brian Contreras, *On the Brink of a Possible SAG-AFTRA Strike, Some Actors Are Wary of AI. Here's Why*, L.A. Times (July 7, 2023, 11:53 AM), https://www.latimes.com/entertainment-arts/business/story/2023-07-07/hollywood-actors-strike-sag-aftra-artificial-intelligence [https://perma.cc/84ED-9YLW] ("SAG-AFTRA isn't trying to ban AI from Hollywood but … 'acquiring rights to train an AI system with a performer's voice and likeness, or using an AI system to create new performances using a performer's voice and likeness, must be bargained with the union.'").

198 Draft Memorandum of Agreement from the Screen Actors Guild-American Federation of Television and Radio Artists and the Alliance of Motion Picture and Television Producers (Nov. 10, 2023).

199 *Id.* § XX(A)(1–3) (Defining "Employment-Based Digital Replica" as "a replica of the voice or likeness of the performer that is created: (i) in connection with employment on a motion picture under this Agreement; (ii) using digital technology; (iii) with the performer's physical participation; and (iv) is for the purpose of portraying the performer in photography or sound track in which the performer did not actually perform" and an "Independently-Created Replica" as "a digitally-created asset that is: (i) intended to create, and does

create, the clear impression that the asset is a natural performer whose voice and/or likeness is recognizable as the voice and/or likeness of an identifiable natural performer; (ii) performing in the role of a character (and not as the natural performer himself/herself); and (iii) no employment arrangement for the motion picture in which the Independently Created Digital Replica will be used exists with the natural performer in the role being portrayed by the asset.").

200 *See generally id.*

201 *See id.* § XX.2(B)(2) and (3).

202 The exceptions for uses of Independently Created Digital Replicas are if they would be protected by the First Amendment, such as satire or parody, criticism, comment, scholarship, use in a docudrama, or biographical or historical work, to the extent protected by the First Amendment. *See id.* § XX.2(B)(3).

203 *See id.* § XX.1(A) (Defining "Synthetic Performer" as "a digitally-created asset that:

> (1) is intended to create, and does create, the clear impression that the asset is a natural performer who is not recognizable as any identifiable natural performer; (2) *is not voiced by a natural person*; (3) is not a Digital Replica (as defined in Section [XX] above); and
>
> (4) no employment arrangement for the motion picture exists with a natural performer in the role being portrayed by the asset." (emphasis added)).

204 *See generally id.*

205 *Id.*

206 *See id.*

207 *See id.*

208 *See id.*

209 *See* Press Release, *SAG-AFTRA Members Approve 2023 TV/Theatrical Contracts Tentative Agreement,* SAG-AFTRA (Dec. 5, 2023) (https://www.sagaftra.org/sag-aftra-members-approve-2023-tvtheatrical-contracts-tentative-agreement) [https://perma.cc/8LG8-QSB4]; *see also Summary of Tentative Agreement*, SAG-AFTRA https://www.sagaftra.org/sites/default/files/sa_documents/TV-Theatrical_23_Summary_Agreement_Final.pdf [https://perma.cc/D34H-6DCR].

210 *See* Katie Campione and Dominic Patten, SAG-AFTRA Calls Strike Against Major Video Game Companies After Nearly 2 Years of Contract Talks, Deadline (July 25, 2024, 12:21 pm), https://deadline.com/2024/07/sag-aftra-strike-video-game-companies-1236020355/ [https://perma.cc/65S9-A9AL].

211 *See id.*

212 IMA Comparison Chart, SAG-AFRA https://www.sagaftra.org/sites/default/files/sa_documents/ima_comparison_chart_7.pdf [https://perma.cc/BBV6-H86Q] (last visited Nov. 4, 2024).

213 *See* Campione & Patten *supra* note 210.

214 *See* Jennifer Maas, Video Game Actors Trike Continues as SAG-AFTRA Extends Contract Negotiations (Oct. 26, 2024, 8:26 AM), https://variety.com/2024/gaming/news/video-game-actors-strike-continues-sag-aftra-extends-contract-negotiations-1236191631/ [https://perma.cc/B3GX-L9GQ].

215 *See* Katie Campione, *SAG-AFTRA Inks Deal with AI Company Ethovox to Build Foundational Voice Model for Digital Replicas,* (Oct. 28, 2024, 1:25 PM) https://deadline.com/2024/10/sag-aftra-ai-deal-ethovox-voice-replicas-1236160257/ [https://perma.cc/ZZ25-ADW8]; *see also* Katie Campione, *SAG-AFTRA Announces Agreement with AI Company Narrativ Allowing Actors to License Digital Voice Replicas for Ads*, (Aug. 14, 2024, 8:26 AM) https://deadline.com/2024/08/sag-aftra-agreement-narrativ-ai-voice-ads-1236040192/ [https://perma.cc/LY4F-G8PC].

216 *See* Campione, *SAG-AFTRA Inks Deal with AI Company, supra* note 215.

217 *See* Loren C. Shokes, *Life After Death: How to Protect Artists' Post-Mortem Rights*, 9 Harv. J. Sports & Ent. L., 27, 35 (2018) ("By manipulating, injecting, and omitting specific aspects of artists' physical and personal traits, programmers beget a fictitious reality, where they re-introduce artists that, unbeknownst to the public, are imbued with new, hand-picked 'genetics.'").

218 *Id.*

219 *Id.* at 35–36.

220 *Id.* at 35–36.

221 *Id.* at 36.

222 *See* Michael M. Epstein, *Flash Infringement 2.0: Protecting "Unique Performance" From Live Social Media Distribution as a Right of Publicity*, 41 Loy. L.a. Ent. L. Rev. 151, 151 (2021).

223 *See id.* at 155.

224 *See id.*

225 *See id*.

226 *See id.* ("Bootleg clips of performances can also bring exposure and enthusiasm to potential fans for emerging artists … Established or not, online bootleg distribution is akin to offering a 'free sample' of a performance that fans want to experience again and again.").

227 *See* Marshall Heins II, *Going Viral: How Popular Musicians Have Adapted to the Delayed Benefits of Copyright Protection*, 55 Hous. L. Rev. 821, 839 (2018).

228 *Id.*

229 *See*17 U.S.C.A. § 106(A). The Visual Artists Rights protects visual artists by allowing them to claim authorship in their work and protect their work from the unwanted certain mutilations or distortions of others. *Id.*

230 *See* Krista Correa, Comment, *All Your Face Are Belong to Us: Protecting Celebrity Images in Hyper-Realistic Video Games*, 34 Hastings Comm. & Ent. L.J. 93, 123 (2011).

231 Warren & Brandeis, *supra* note 36, at 193.

232 *See* Roesler & Hutchinson, *supra* note 51, at 23.

233 Correa, *supra* note 230, at 104–05.

234 Correa, *supra* note 230, at 124.

235 Mary LaFrance, *Choice of Law and the Right of Publicity: Rethinking the Domicile Rule*, 37 Cardozo Arts & Ent. L.J. 1, 2 (2019).

236 *See id.*

237 *See* Stephen Anson, *Hologram Images and the Entertainment Industry: New Legal Territory?* 10 Wash. J.L. Tech. & Arts 109, 116 (2014) ("The court may apply the law of its own state, or the law of the state where the alleged infringement occurred (if infringement occurred outside of the forum state), or the law of the rights owner's domicile (if different from the forum state and the infringement state.") (internal quotations omitted)).

238 Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86, 92 (2020).

239 *See id.*

240 *Id.* at 93.

241 *See id.* at 96.

242 *See id*.

243 *Id.* at 107.

244 *Id.* at 108.

245 *Id.* at 116.

246 *See id.*

247 *See id.*

248 *Id.* at 122.

249 *See id.*

250 *See*U.S. Const. Amend. I; *see also* Placik & the Center for Art Law Team, *supra* note 125.

251 Jason M. Schultz, *The Right of Publicity: A New Framework for Regulating Facial Recognition*, 88 Brook. L. Rev. 1039, 1050 (2023).

252 *See id.*

253 Correa, *supra* note 230, at 117–18.

254 *See* Correa, *supra* note 230, at 117.

255 *See* Correa, *supra* note 230, at 118.

256 *See* Correa, *supra* note 230, at 118.

257 17 U.S.C. § 106A.

258 *See id.*

259 *See id.* § (a)(1)(A)–(B). Artists also have the right to prevent their name from being used on any work that has been distorted, mutilated, or modified in a way that would prejudice the author's honor or reputation, and the right to prevent any destruction of a work of recognized stature. *Id.* § (a)(2)–(3).

260 *See* Marie A. Kessel, *Case Review: Distorted Image, Secret Dealings, and New York Artists Authorship Act (2020–2021)*, Ctr. for Art L. (May 26, 2021), https://itsartlaw.org/2021/05/26/case-review-distorted-image-

secret-dealings-and-new-york-artists-authorship-act-2020-2021/ [https://perma.cc/SJ94-SU3L]. I wrote this article as an intern for the Center for Art Law. In part of the article, I compare and contrast VARA with the New York Artists Authorship Act. Although my discussion in the article is beyond the scope of this Note, it gives more clarity to some of the moral rights protections visual artists hold in the United States.

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