

THIS PROGRAM IS INTENDED FOR INFORMATIONAL PURPOSES ONLY. NOTHING SHOULD BE CONSTRUED OR TAKEN AS LEGAL ADVICE. 2024 ELI WRITING CONTEST ESSAY WRITTEN BY OLIVIA FORTUNATO:

POST-MORTEM RIGHT OF PUBLICITY AND TECHNOLOGICAL ADVANCEMENTS

Beyond an artist's musical work, they are celebrities commercially exploiting their name, image, and likeness (NIL) to have a successful and long-lasting career. The right(s) of publicity (ROP) allows artists to have agency over the use of their NIL and is a highly lucrative revenue stream. Unfortunately, the music industry is not immune to death, and there is a long history of the music industry's reverence for an artist, and public fascination, to catapult that artist's popularity when they pass away. A musician's identity can live on and gain value for many years following their death with the exploitation laws that grant a ROP after death (post-mortem ROP).

Value in post-mortem ROP can be found in existing NIL content as well as in new works that are made possible by advances in technology. The proliferation of artificial intelligence (AI) has made unauthorized uses of celebrity NIL widespread.¹ Additionally, while the posthumous replica of likeness in new works had previously been licensed with approval from the artist's estate for limited industry projects, it will likely become a normality in the entertainment industry.²

There is significant cause for concern on how to manage claims of unauthorized uses of celebrities' NIL in AI, but this essay will focus on how the existing legal infrastructure and the music industry is not prepared for the future commercial demand of the exploitation of deceased artists' NIL.

Even before AI, the estates of deceased musicians had the potential to generate substantial revenue after their death (i.e., Michael Jackson's music and ROP has generated over \$200 billion³; Elvis Presley's estate has generated over \$55 million⁴). The proliferation of new technology, including AI, has created ways for deceased celebrities' NIL to generate new revenue streams. For example, holographic performances have allowed musicians such as ABBA, Tupac Shakur, and Maria Callas to perform "live" again.⁵ Additionally, deceased celebrities like Elizabeth Taylor and Marilyn Monroe have appeared in successful advertising campaigns, illustrating the strength and resilience of their names and images in endorsements.⁶

¹ Sharoni S. Finkelstein & Alexandra L. Kolsky, *Artificial Intelligence Wants Your Name, Image and Likeness – Especially If You're a Celebrity*, VENABLE (May 17, 2023), <https://www.venable.com/insights/publications/2023/05/artificial-intelligence-wants-your-name-image>.

² Dani Di Placido, *James Dean and The Rise Of 'Deep Fake' Hollywood*, FORBES (Nov. 8, 2019), <https://www.forbes.com/sites/danidiplacido/2019/11/08/james-dean-and-the-rise-of-deep-fake-hollywood>.

³ Tanya Edwards, *What Is Michael Jackson's Estate Worth?*, REFINERY 29 (Mar. 3, 2019), <https://www.refinery29.com/en-us/2019/03/225875/michael-jackson-net-worth-estate-neverland-ranch>.

⁴ Dorothy Pomerantz, *Michael Jackson Tops Forbes' List of Top-Earning Dead Celebrities with \$140 Million Haul*, FORBES (Oct. 15, 2014), <https://www.forbes.com/sites/dorothy pomerantz/2014/10/15/michael-jackson-tops-forbes-list-of-top-earning-dead-celebrities>.

⁵ 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/>.

⁶ Erik W. Kahn & Pou-I "Bonnie" Lee, *'Delebs' and Postmortem Right of Publicity*, LANDSLIDE, (Winter 2016).

When planning an artist's legacy, either the artist themselves, their estate, or assignees of their ROP must consider the availability, variations, and exceptions of post-mortem rights across the states. Failure to properly plan or an unfortunate untimely death can result in lengthy litigation, expensive taxes, or the exploitation of an artists' NIL in a way they would not have approved.

This essay proposes the passage of a federal law for the ROP that includes post-mortem protection, in addition to an industry focus on proactive estate planning for artists to address musicians' concerns about the legacy of their NIL.

RIGHT OF PUBLICITY

Using an individual's identity for commercial purposes is called the right of publicity and in addition to their image and name, their voice or other recognizable attributes can be part of that identity.⁷ This uniquely effects the music and entertainment industry because an artist's identity in advertisements and performances is a key revenue source. For musicians, "[a] voice is as distinctive and personal as a face," and a "distinctive" and "widely known" voice can be protected by ROP.⁸ The ROP is "a right inherent to everyone to control the commercial use of identity and persona,"⁹ and therefore permits noncelebrity musicians to have a claim in addition to celebrity musicians that are typically associated with ROP claims.

Initially introduced as a privacy right, the right of publicity has evolved to be more akin to a property right.¹⁰ Following advancements in technology, the right of privacy was first introduced in an 1890 Harvard Law Review¹¹ article to protect the invasion of an individual in a manner that was offensive, distressing, or inappropriate. It was later expanded to be categorized as intrusion upon the seclusion, public disclosure of private facts, false light claims, and "appropriation, for the defendant's advantage of the plaintiff's name or likeness"¹² (the latter becoming what is known as ROP). It was thought that an individual should have "exclusive use" of their identity as they see fit which could be licensed¹³ but it is not labeled as a property right even though it has similar attributes.

*Haelan Labs. v. Topps Chewing Gum*¹⁴ was one of the first major cases to deal with the ROP and involved a baseball player's license of their photograph for commercial use. The court stated that "in addition to and independent from that right of privacy...a man has a right in the publicity value

⁷ Right of Publicity, INTA, <https://www.inta.org/topics/right-of-publicity/> (last visited Jan. 2, 2024).

⁸ *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

⁹ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2011).

¹⁰ Kristin Bria Hopkins, *When I Die Put My Money in the Grave: Creating a Federally Protected Post-Mortem Right of Publicity*, A.B.A. (Apr. 28, 2023), https://www.americanbar.org/groups/entertainment_sports/publications/entertainment-sports-lawyer/esl-39-01-spring-23/when-i-die-put-my-money-the-grave-creating-federally-protected-postmortem-right-publicity/.

¹¹ Samuel D. Warren & Louis D. Brandies, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹² RESTATEMENT (SECOND) OF TORTS §§ 652A - 652I (AM. L. INST. 1965).

¹³ William L. Prosser, *Privacy*, 48 CAL L. REV. 383, 389 (1960).

¹⁴ *Haelan Labs., Inc. v. Topps v. Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

of his photograph....”¹⁵ The court declined to call this “a ‘property’ right” but distinguished it from the right of privacy which is an unassignable and “personal” right.¹⁶

*Factors Etc. v. Pro Arts*¹⁷ found that after Elvis Presley’s death, his company Boxcar Enterprises held a valid assignment to the rights of his NIL. The court found the ROP was a right that could be assigned and survive the death of the person, notably, because Presley exploited his ROP during his life.¹⁸ The court concluded that this right was more akin to intellectual property rather than privacy stating, “the interest protected: is closely analogous to the goals of patent and copyright law, focusing on the right of individual to reap the reward of his endeavors and having little to do with protecting feeling or reputation.”¹⁹

The ROP is not specifically categorized as an intellectual property right, however, it is frequently referred to as such by judges.²⁰ For example, in *White v. Samsung Electronics*,²¹ relating to a Samsung ad with a Vanna White look-a-like robot, the district court and the appellate court’s dissenting opinion referred to her persona as intellectual property and the dissent argued Samsung should be protected by fair use.²² Notably, this dissent criticized the lack of uniformity between the states because “it gives each state far too much control over artists on other states.”²³ As technology has advanced, the ROP has clearly become more like intellectual property requiring federal protection to make the law consistent.

VARIATIONS IN STATE LAW

Although each state defines the ROP differently, a plaintiff generally must show they own an enforceable right in the identity and that a defendant infringed by using an aspect of the identity without permission in such a way that identifies the plaintiff and likely causes damage to the commercial value of that identity.²⁴

In the United States, thirty-five states have either a common law or statutory ROP that protects an individual’s identity during their life.²⁵ However, statutes that grant a post-mortem ROP are enacted in only about half of the states.²⁶ The variations between the ROP in each state, including their duration and scope, results in a lack of uniformity in post-mortem rights across the country. Further, inconsistency in the treatment among the states on whether ROP is classified as a property or privacy right, is important because if viewed as privacy, then there is no post-mortem right.²⁷

¹⁵ *Id.* at 868.

¹⁶ *Id.*

¹⁷ *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978).

¹⁸ *Id.* at 222.

¹⁹ *Id.* at 220 (quoting *Zacchini v. Howard Broadcasting*, 97 S. Ct. 2849, 2856 (1977)).

²⁰ Hopkins, *supra* note 10.

²¹ *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992).

²² *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512 (9th Cir.1993).

²³ *Id.* at 1519.

²⁴ Hopkins, *supra* note 10.

²⁵ Congressional Research Service. *Artificial Intelligence Prompts Renewed Consideration of a Federal Right of Publicity* (CRS Report No. LSB11052), Prepared by Christopher T. Zirpoli, September 29, 2023.

<https://crsreports.congress.gov/product/pdf/LSB/LSB11052>.

²⁶ Hopkins, *supra* note 10.

²⁷ *Id.*

The state in which an individual is domiciled at the time of death determines the laws that will govern the estate, including the availability of post-mortem ROP and the length, scope, and registration requirements of such rights. Therefore, where an artist is domiciled can be critically important. If an artist is unable to strategize in this way, differences among state ROP laws can create confusion, disagreements, and disparity for artists and their estates.

The deaths of musicians have been at the forefront of cases concerning conflicting post-mortem ROP state laws. Lawmakers have attempted to support artists and celebrities domiciled in their state at death but have instead run afoul of Constitutional rights, exemplifying the need for federal intervention.

In *Experience Hendrix, LLC v. Hendrixlicensing.com*,²⁸ the estate of Jimi Hendrix attempted to apply a Washington state law that contained a choice-of-law provision which would allow Washington law to apply despite that Hendrix was domiciled in New York at death (at the time, New York did not recognize post-mortem ROP).²⁹ The court found the law violated the Dormant Commerce Clause, because it granted the state the ability to regulate commerce occurring in other states.³⁰

In response to Prince's death in 2016, Minnesota lawmakers presented the Personal Right In Names Can Endure Act (PRINCE Act) which would grant a fifty-year post-mortem term that could become a perpetual right to publicity if the rights were still exploited fifty years after death. The proposed perpetual right raised concerns that the law would violate the First Amendment³¹ and the bill never passed, leaving Minnesota without a post-mortem ROP.³²

These variations in state laws also encourage heirs and assignees of publicity rights to engage in forum shopping to maximize their benefits. For example, Marilyn Monroe was domiciled in New York when she died in 1962. In 2005, her estate filed a ROP infringement lawsuit in Indiana, a state with a broad ROP, and transferred the case to California, another state with broad post-mortem ROP. The court would only recognize the state domiciled at death.³³

These cases exemplify the states' struggle to create post-mortem ROP laws that are not too expansive and the rightsholders' attempts to get the broadest and longest post-mortem rights.

FEDERAL FRAMEWORK

²⁸ *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122 (W. D. Wash. 2011).

²⁹ *Id.* at 1127.

³⁰ Hopkins, *supra* note 10.

³¹ Bill Donahue, 'Prince Act' Raises Free Speech Red Flags, Critics Say, LAW 360 (May 11, 2016), https://plus.lexis.com/document/?pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5JRV-SDS1-FGJR-202G-00000-00&pddocid=urn%3AcontentItem%3A5JRV-SDS1-FGJR-202G-00000-00&pdcontentcomponentid=122080&pdteaserkey=sr0&pdtab=allpods&ecomp=Ly_fk&earg=sr0&cbc=0&pdmfid=1530671&crid=fe2f62d3-9116-4c96-8dc9-43b99b1d28a3.

³² Mark Wolski, *Minnesota Lawmaker Pulls Prince Right of Publicity Bill*, BNA (May 20, 2016), <https://www.bna.com/minnesota-lawmaker-pulls-n57982072729/>.

³³ Tamlin H. Bason, *9th Circuit: Marilyn Monroe Not Protected By California's Post-Mortem Publicity Statute*, BNA (Sept. 7, 2012), <https://www.bna.com/9th-circuit-marilyn-n17179869601/>.

Celebrities do have some federal protection in the Lanham Act, which provides relief for false endorsement including expressly for postmortem.³⁴ Courts have held that “a celebrity persona or identity is a kind of ‘trademark’ which is infringed by an advertisement involving false endorsement.”³⁵ While claims under state ROP laws are similar to federal false endorsement claims, the Lanham Act additionally requires the burden of proving that the use of the identity is “likely to confuse” as sponsorship of “defendant’s goods”.³⁶ Courts’ support for celebrities have varied under the Lanham Act. For example, when the estate of broadcaster John Facenda sued NFL Films,³⁷ for using his voice in promoting a video game, the court found that his voice was “distinctive and protectable as an unregistered trademark” and “a reasonable jury could conclude that there was likelihood of confusion.”³⁸ On the other hand, trademark infringement cases for the unauthorized use of photographs of celebrities have resulted in the courts finding that the image needs to be inherently distinctive to indicate the source.³⁹

Federal intellectual property laws for copyright or trademark can protect musicians’ works and brands; however, it does not provide strong protection of their identity which they have cultivated to have some commercial value.⁴⁰ ROP close this gap and explicitly provide protection for an identity, and by including post-mortem ROP, acknowledges a celebrity’s time and energy of the careful curation of their image throughout their career.

The First Amendment and federal copyright law is entwined with the ROP, therefore, states with post-mortem ROP typically have either a statutory or common law exemption for expressive works like “a play, book, or television program, and the incidental advertisement.”⁴¹ ROP laws will always be weighed against First Amendment concerns, which makes it more logical for ROP to be governed by a federal statute.⁴²

PLANNING FOR ESTATE TAX VALUATION

The need for predictability and consistency of post-mortem ROP is owed to musicians and their estate because of the serious federal estate tax implications. In 1994, the case *Estate of Andrews v. United States*⁴³ established that there is serious value to the ROP. The author V.C. Andrews died with a legacy of novels that continued to be ghostwritten under her name, to great commercial success. However, neither the author’s name, nor any value in the name was listed as an asset on estate tax documents. Therefore, the IRS issued a notice of deficiency of hundreds of thousands of

³⁴ 15 U.S.C. § 1125(a).

³⁵ Kahn & Lee, *supra* note 6 (quoting J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:15 (4th ed. 2011)).

³⁶ Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1011 (3d Cir. 2008).

³⁷ *Id.*

³⁸ Kahn & Lee, *supra* note 6.

³⁹ Kahn & Lee, *supra* note 6 (referencing *Pirone v. MacMillan Inc.*, 894 F.2d 579 (2d Cir. 1990) and *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981)).

⁴⁰ Congressional Research Service, *supra* note 25.

⁴¹ *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1357 (D.N.J. 1981).

⁴² Hopkins, *supra* note 10.

⁴³ *Estate of Andrews v. United States*, 850 F. Supp. 1279 (E.D. Va. 1994).

dollars for undervaluing the estate by omitting name, image, and likeness rights.⁴⁴ It is now accepted that the ROP falls under the Internal Revenue Code's definition of the value of the gross estate as intangible property.⁴⁵

Complications can arise if the ROP—which is speculative, illiquid, and inconsistent—is the estate's primary asset, even if the artist and/or their estate does not wish to monetize and exploit the right after death. If this occurs, other assets may be deficient to pay the estate tax and the estate may be forced to sell or license the post-mortem ROP just to pay the tax.⁴⁶ These circumstances take away the artist's ability to have any influence in if and how the legacy of their NIL can be used. In the case of an artist who dies unexpectedly in a state that presently does not recognize a post-mortem ROP, this situation would be more likely.

Celebrities who are lucky enough to afford estate planning in advance of their death can have much more authority over their legacy. For example, Robin Williams placed a 25-year restriction on his NIL and further assigned the ROP to his foundation to administer the rights as he wished.⁴⁷ It would be unjust for a musician's NIL to be exploited following their death either against their wishes or brazenly (especially if they were prudent with endorsements during their life) only because they died in a state without a post-mortem ROP. This exemplifies the need for an industry focus on proactive estate planning for artists to anticipate how their NIL will be used in new forms of technology when they can no longer provide express direction and consent.

ARTIFICIAL INTELLIGENCE

This essay has set forth the existing problems related to post-mortem ROP; however, the proliferation of AI has made it vastly easier to create digital replicas of an artist's NIL. "Digital replicas are a newly created, original, computer-generated electronic performance by an individual in a newly created, original, expressive sound recording or audiovisual work in which the individual did not perform."⁴⁸ The music industry has been affected by voice imitations in AI-generated songs like "Heart on My Sleeve" which sounded like Drake and The Weeknd⁴⁹ and many more are released daily.⁵⁰

There is an industry-wide debate on whether AI is a positive new revenue source, or career damaging. However, there is agreement that consent is needed for digital replicas, exemplified by

⁴⁴ T.J. Hope & Scott Weingust, *The Right of Publicity: An Often Overlooked Asset in Estate Planning and Tax Compliance*, STOUT (Jan. 24, 2022), <https://www.stout.com/en/insights/article/right-publicity-often-overlooked-asset-estate-planning>.

⁴⁵ IRC Sec. 2031(a) ("the value at the time of... death of all property, real or personal, tangible or intangible, whatever situated").

⁴⁶ Hope & Weingust, *supra* note 44.

⁴⁷ Hannah Ellis-Petersen, *Robin Williams went above and beyond to stop his image being used*, GUARDIAN (Mar. 31, 2015), <https://www.theguardian.com/film/2015/mar/31/robin-williams-restricted-use-image-despite-existing-us-laws>.

⁴⁸ Brandon Vogel, *Who Owns You When You Die? What Can be Learned from Prince, Michael Jackson and Robin Williams' Estates*, NYSBA (Mar. 2, 2021), <https://nysba.org/who-owns-you-when-you-die-what-can-be-learned-from-prince-michael-jackson-and-robin-williams-estates/>.

⁴⁹ Congressional Research Service, *supra* note 25.

⁵⁰ Sarah Morland, *Rapper Bad Bunny Lashes Out Over Viral AI Copycat Hits*, REUTERS (Dec. 5, 2023) <https://www.reuters.com/world/rapper-bad-bunny-lashes-out-over-viral-ai-copycat-hits-2023-12-05/>.

the bi-partisan proposal of the Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act.⁵¹ Despite this proposal, digital replicas are arguably permitted if an artist died in a state without post-mortem ROP. A deceased artist who can no longer consent should be able to have those they trust consent to digital replicas on their behalf.

Companies like Worldwide XR (XR) are pioneering the licensing of NIL rights of deceased celebrities for commercial use. XR owns the rights to musicians like Aaliyah and Chuck Berry and is working on a new James Dean film created by AI.⁵² Additionally, the talent agency WME launched a Legends division to be the estate and brand manager for musicians like David Bowie and Whitney Houston.⁵³

The creation of these endeavors clearly shows an industry prediction that the potential for more projects using deceased celebrities' NIL will increase exponentially with advancements in AI technology, the availability of estate representation, and a public fascination with celebrity icons⁵⁴. The artists and their estates who can make these licensing agreements maintain ownership of the NIL which emphasizes the importance of the artist having predictability over who owns their NIL when they pass away which can be aided through the adoption of a federal ROP.

SOLUTIONS

The music industry should be lobbying for the enactment of a federal ROP law which includes a post-mortem ROP. The ROP should be accepted as a property right, akin to intellectual property that celebrities can benefit from in recognition of the curation of their NIL. Congress should be responsible for drafting federal ROP laws because it has the inherent interest in balancing these rights with the Constitution. Having a separate post-mortem ROP would allow for more predictability for musicians planning their legacy and would decrease litigation by heirs and assignees.⁵⁵

Further, the industry should be encouraging artists to proactively conduct estate planning that clearly sets forth how they want their NIL exploited after death. One option is to sell or license their NIL rights similarly to the recent sales of music catalogs of Bruce Springsteen, Phil Collins, and Stevie Nicks. Companies like Primary Wave who exploit catalogs as publishers also have the infrastructure to exploit NIL through merchandizing and digital promotions.⁵⁶ However, the

⁵¹ Isaiah Poritz, *AI Deepfakes Bill Pushes Publicity Rights, Spurs Speech Concerns*, BLOOMBERG LAW (Oct. 17, 2023), <https://news.bloomberglaw.com/ip-law/ai-deepfakes-bill-pushes-publicity-rights-spurs-speech-concerns>.

⁵² Alex Lee, *The Messy Legal Fight to Bring Celebrities Back From the Dead*, WIRED UK (Nov. 19, 2019), <https://www.wired.com/story/messy-legal-fight-to-bring-celebrities-back-from-the-dead/>.

⁵³ Etan Vlessing, *WME Launches Legends Group to Manage Celebrity Estates*, HOLLYWOOD REP. (Mar. 21, 2021), <https://www.hollywoodreporter.com/business/business-news/wme-launches-legends-group-to-manage-celebrity-estates-4150465/>.

⁵⁴ Inkoo Kang, *Hollywood's Slo-Mo Self-Sabotage*, NEW YORKER (July 30, 2023), <https://www.newyorker.com/culture/cultural-comment/hollywood-self-sabotage-writer-strike> (citing a National Research Group study that found the twenty actors most likely to get audiences to theatres, the average age was fifty-eight).

⁵⁵ Hopkins, *supra* note 10.

⁵⁶ Jim Aswad, *Primary Wave Music Founder Larry Mestel on the Booming Song-Catalog Market, and How He Plans to Spend \$2 Billion*, VARIETY (Oct. 19, 2022), <https://variety.com/2022/music/news/primary-wave-larry-mestel-song-catalog-billion-strictly-business-1235408490/>.

existence of these companies is still niche throughout the entertainment industry and there needs to be a drastic increase in those who can educate artists, estates, and managers on the implications of licensing post-mortem rights to AI and other technology.

Robin Williams' innovative approach to protecting his ROP sets a good example for artists that should be followed throughout the industry. Restricting the ROP for a term makes it clear to the IRS how to value the ROP for the estate tax which can avoid disputes like those of the Michael Jackson estate. Additionally, by bequeathing the ROP to a charitable organization as restricted funds, the foundation is bound by a duty to follow his specifications, giving the artist control over their NIL legacy. Williams specified he did not want his image used for holographic standup or as a digital replica in films, but it is also common to restrict specific brands. Further, a tax-exempt charitable organization could limit tax liabilities for his family.⁵⁷

CONCLUSION

With technological advancements including the proliferation of AI, and the music industry's focus on iconic celebrity personas, it will become even more difficult to control post-mortem ROP if drastic variations in state law persist. Courts have repeatedly held the ROP as akin to intellectual property and as such, should be governed federally. When dealing with something as important as the legacy of an artist, it is paramount that they have clear notice of laws which will dictate how their NIL could be exploited after death. It is now possible for an artist's career to generate new work after death, making the precipitous adoption of federal regulation imperative.

⁵⁷ Eriq Gardner, *Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, HOLLYWOOD REP. (Mar. 30, 2015), <https://www.hollywoodreporter.com/business/business-news/robin-williams-restricted-exploitation-his-785292/>.