

Penn State Law

Penn State Law eLibrary

---

SJD Dissertations

---

4-10-2020

## Technology Immorality and Its Legal Issues

Pranav Menon

Follow this and additional works at: <https://elibrary.law.psu.edu/sjd>

---

## TECHNOLOGICAL IMMORTALITY AND ITS LEGAL ISSUES

*“[The dead] have no present desires because they are dead, and, more to the point, they have no interests now because, being dead, nothing that happens now can affect their final, immutable, and completed desires and prospects<sup>1</sup>.”*

### **1.1. Introduction & Scope of the Dissertation**

Immortality is a concept recognized in literature and human aspirations but not in the law. Human beings or “natural persons” under the law hold limited rights and are often transformed into “property” after death. As a result, rights and liabilities extinguish at death and are transferred to the next-of-kin through testamentary or intestate succession. The dead in most jurisdictions are not right holders and the legal protections natural persons enjoy are eliminated. It’s in this vacuum where technology drastically changes the playing field.

Hollywood and the entertainment industry have adopted different types of new-age technology to give us realistic postmortem performances by beloved actors and musicians who have now left the physical world but have left a lasting legacy behind them. Audiences were shocked and amazed to see the now deceased Carrie Fisher reprise her role as Princess Leia in the stand alone Star Wars movie Rogue One, in a much younger version of herself, superimposed onto a Norwegian actress to give audiences the feel of being in a time machine, transported back to the year 1977 of the New Hope<sup>2</sup>. Another example is that of deceased actor Paul Walker’s face superimposed onto his brother using 350 Computer-Generated Imagery (CGI) shots in order to complete the filming of Fast and the Furious 7 after his sudden tragic car accident<sup>3</sup>. While those renditions were limited to the big screen, but we now see holograms<sup>4</sup> also used to ‘resurrect’ dead musicians like Tupac<sup>5</sup> or Michael Jackson<sup>6</sup>, or even animated and fictional characters such as Homer Simpson.<sup>7</sup> And perhaps notably, across the globe in India, the current Prime Minister Narendra Modi made use of these

---

<sup>1</sup> Ernest Partridge, *Posthumous Interests and Posthumous Respect*, Ethics, Vol. 91, No. 2, 1981, pp. 243-264 at p. 249

<sup>2</sup> Matt Miller, “*Actress secretly played Princess Leia in Rogue One*” Esquire Magazine, March 14<sup>th</sup> 2017: (<https://www.esquire.com/entertainment/movies/news/a53856/rogue-one-princess-leia-actress/>).

<sup>3</sup> Julia Alexander, “*Furious 7 used 350 CGI shots of Paul Walker*” Polygon, October 20<sup>th</sup> 2015:

(<https://www.polygon.com/2015/10/20/9577863/furious-7-used-350-cgi-shots-of-paul-walker>)

<sup>4</sup> The term “hologram” is a misnomer as the technology improves on a 19<sup>th</sup> Century technique called “Pepper’s Ghost”. See Eriq Gardner, “*Hollywood Hologram Wars: Vicious Legal Feud Behind Virtual Mariah, Marilyn and Mick*” The Hollywood Reporter, 28<sup>th</sup> May 2015: (<https://www.hollywoodreporter.com/thr-esq/hollywood-hologram-wars-vicious-legal-798401>)

<sup>5</sup> Jana M. Moser, “*Tupac Lives! What Hologram Authors Should Know About Intellectual Property Law*” Business Law Today: ([https://www.americanbar.org/publications/blt/2012/09/02\\_moser.html](https://www.americanbar.org/publications/blt/2012/09/02_moser.html))

Eriq Gardner, “*Judge Rejects Lawsuit Over Alki David’s CNN Interview on Michael Jackson Hologram*” The Hollywood Reporter, September 18<sup>th</sup> 2014: (<https://www.hollywoodreporter.com/thr-esq/judge-rejects-lawsuit-alki-davids-734143>)

<sup>7</sup> Eriq Gardner, “*Homer Simpson Hologram at Comic-Con Draws Patent Lawsuit*” The Hollywood Reporter, August 15<sup>th</sup> 2014: (<https://www.hollywoodreporter.com/thr-esq/homer-simpson-hologram-at-comic-725830>)

holograms politically, by using the technology to deliver campaign speeches to voters across 90 rallies during an election season<sup>8</sup>. This is all possible through the use of CGI, special effects, and post production editing and holographic technologies.

While the entertainment industry has demonstrated its interest in postmortem technologies in the most prominent ways for the public to see, private research by corporations are showing more promising results in terms of true immortality. Postmortem ‘presence’ by a celebrity can be done by merely producing a realistic rendition through clever mediums like holograms or CGI for audiences to see. While these techniques raise their own set of unique legal issues, it is not true postmortem ‘existence’ as the digital copy has no sense of autonomy or sentience. The main hurdle is that the postmortem rendition has no ‘brain function’ and can be viewed merely as a performance in a new medium. However, nuanced aspects of the human mind can be recreated now with the use of Artificial Intelligence (“AI”) and *Personal Data*. Research around the world promises the growth of *virtual humans* who can speak, hear, touch and be touched, exhibit behavior and think just as we do<sup>9</sup>. Whole Brain Emulation (“WBE” or also colloquially known as a “*mind-uploading* or *mind-filing*”) offers an interesting avenue to postmortem existence by using large data-sets of personal information and a medium for communication with the living<sup>10</sup>.

The technological advances mentioned above shows us that the dead can establish a presence and existence in our modern physical world. The law unfortunately hasn’t caught up to this fact in many aspects. After death, a natural person is transformed into property<sup>11</sup> and loses a right to privacy, the right to contract, and the right to hold and alienate property themselves. Depending on the jurisdiction the dead can be the rights-holder or a mere conduit for the beneficiary estate<sup>12</sup>. Technologies like holograms or CGI present legal issues related to the talents, likeness, mannerisms, voice, image, and personality of a deceased performer by building on their previously established legacy *without* the celebrity’s presence or *artistic autonomy* in the choice of performance. This translates into issues related to copyright law, personality rights (or the “*Right of Publicity*” as known in the US), and possibly trademark law. While issues related to the talent and personality of an artist

---

<sup>8</sup>Dean Nelson, “‘*Magic*’ Modi uses hologram to address dozens of rallies at once”, The Telegraph, May 2<sup>nd</sup> 2014: (<http://www.telegraph.co.uk/news/worldnews/asia/india/10803961/Magic-Modi-uses-hologram-to-address-dozens-of-rallies-at-once.html>)

<sup>9</sup> An amalgamation of scientific sources have been discussed and wonderfully analysed in- Joseph. J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, Berkley Technology Law Journal, Vol.16, No.3 2001, p. 1165

<sup>10</sup> Also known as *Mind-filing* it involves the use of AI and personal data to effectively mimic the personality and behaviors of the person with a view of it being transposed into a *bionic entity* that can carry on as the person on their death. See: IdeaCity, “*Bruce Duncan- Talks with the World’s Most Sentient Robot*”, August 31<sup>st</sup> 2013: (<https://www.youtube.com/watch?v=mwOFWABbfW8>)

<sup>11</sup> The next-of-kin of the deceased have a *Quasi Property* right in a corpse for the purposes of burial. This is the prevailing view, though in the US the State-by-State treatment of a corpse can vary. See Peter F. Nemeth, *Legal Rights and Obligations to a Corpse*, Notre Dame Law Reviv, Vol. 19, 1943, p. 69.

<sup>12</sup> Within the US, States can follow an *Interest Theory* or *Wills Theory* regarding interests of the deceased. See Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstra Law Review, Vol. 37(3), 2009, p. 763-804.

will likely center around the entertainment industry, WBE and other technological means for postmortem existence will go into aspects of privacy, personal data and copyright law.

### **Purpose of the Study:**

The purpose of this dissertation is to explore the avenues for protecting postmortem presence and existence by examining the issues in the fields of law surrounding it. The dissertation aims to answer the following issues through its analysis of the respective legal fields-

1. Should a deceased celebrity or lay-man be considered as the “rights holder” after their death or merely a conduit for the presently living “estate” beneficiary? This determines the level of control a celebrity will have beyond the grave and the amount of deference given to their wishes.
2. Are the deceased entitled to a Right of Privacy? Following from that analysis, should there be a postmortem right of publicity or personal data right?
3. Should the right of publicity, personal data, reputational interests and moral rights be characterized as an intangible property right or privacy interest? Which model is best suited for a descendible scheme of rights in the long-term?
4. Discussions around the idiosyncratic issues and legal protections that arise within the fields of law relating to-
  - i. Personal data
  - ii. Right of publicity (and the broader concept of “personality”<sup>13</sup>)
  - iii. Copyright
  - iv. Trademark; and
  - v. Reputational actions<sup>14</sup>.
  - vi. Legal Instruments like licenses, wills and contract.
5. Legislative and Contractual measures that can be used to protect commercial and personal interests.

By the conclusion of the study, the dissertation aims to provide a holistic analysis of the issues that surround postmortem presence and existence in the background of the diverse technological society that exists today. By identifying these issues, the dissertation shall discuss *existing* and *future* protections that can be afforded to the deceased while keeping in mind the commercial interests of the entity creating the posthumous rendition. The dissertation attempts to answer *how* the law can be used to prevent possible misuse and loss of important rights in the future.

---

<sup>13</sup> See **Chapter 4, § 4.1.** onward

<sup>14</sup> Please *note* reputational actions like defamation will likely *not* be discussed in a separate chapter. The reason being that privacy/ reputation suits will be discussed throughout the various sections of the dissertation relating to Personal Data and Right of Publicity

## **Legal Regimes Examined:**

The ‘anchor’ jurisdiction for this dissertation shall be the law of the United States (“US”) with a consistent comparison and examination of other legal regimes like the European Union (“EU”), India and other relevant countries. An analysis of US law is crucial to this dissertation as it is by and far the most developed in terms of the technological innovation and is likely to be the ‘hot-bed’ of legal issues in the years to come. Additionally, Hollywood and the entertainment industry as a whole have contributed to the robust Copyright and Trademark protections under Federal Law backed by precedent from Federal Courts. However, right of publicity and personal data protection laws in the US are *inconsistent* as their strength is dependent on specific State laws. Many academics and professionals have called for a Federal Right to Publicity statute but very little action has been taken by Congress<sup>15</sup>. While this may be a disadvantage to the stake-holders of a publicity dispute, it provides a diverse palate of legal precedents to study for providing legislative solutions.

The study of US law is accompanied with a study of other large media markets and IP regimes from the rest of the world. Many comparisons will be made to India which is where the author is from along with the countries within the EU and greater Europe. Europe follows a unique school of thought to protect the interests of the dead by focusing on the reputational and privacy aspects of human personality. Meanwhile India, another large media market has a common law based system privacy and right of publicity which leads to many of the issues relating to postmortem technology being ignored by precedent. However, India’s strong system of *moral rights* may provide interesting lessons for maintaining artistic control<sup>16</sup>. By examining these different sources the dissertation aims to arrive at a set of *best practices* which can be adopted when drafting legislative recommendations. After an examination of the technology and its scope of application, the above fields of law seem like the strongest avenues for protecting postmortem interests. We shall discuss how each field will be allocated into the Chapters below.

## **Retaining & Reclaiming Interests of the Deceased:**

Boiled down in simple terms, this dissertation will tackle the questions surrounding the *protection, retention and reclamation* of one’s legal interests *after death* specifically when one’s ‘talents’ are *extended, modified and supplemented* by sophisticated technology. The very nature of the technology and its purpose in today’s society causes the discussion to gravitate towards the entertainment industry and the interests of celebrities. For example, a postmortem hologram or CGI recreation of a person usually finds a home in the music or movie industry. However, that does not mean that the interests of lay-people in society aren’t implicated in the larger

---

<sup>15</sup> See: Vicky Gerl Neumeyer, *The Right of Publicity and its Descendibility*, University of Miami Entertainment & Sports Law Review, Vol. 7, 1990, p. 287 onward; and Eliana Torres, *The Celebrity Behind the Brand International Protection of the Right of Publicity*, Pace Intellectual Property, Sports & Entertainment Law, Vol. 6, 2016 p.116 onward.

<sup>16</sup> See §6.5.

scheme of things. As the capabilities of the technology increase and the cost to purchase it lower, we're likely to see more postmortem interests implicated at a non-celebrity level.

### **Intangible Assets:**

Commercialization of posthumous identities has been a growing market in the past decade particularly in entertainment where celebrities dedicate their life to build a specific persona. The licensing of postmortem publicity rights are one of the *most* valuable sources of income for a celebrity's estate<sup>17</sup>. Through the use of specific technologies and smart planning, entertainers can create a renewable source of income after their death. Even more importantly, the entertainer's *legacy* is greatly affected by the use of their persona and copyright by the use of these technologies. This postmortem change in the legacy is linked to the intangibles the celebrity leaves behind, and this concern has gained more traction as postmortem technologies become more commonplace<sup>18</sup>. For the purposes of this dissertation, the discussion will center on the *intangible assets* and interests held by the deceased prior to death. Physical assets are not within the purview of this thesis unless relevant to the overall legal analysis. This is because these technologies lean heavily on intangible assets and intellectual property rights and likely don't cross over into any physical interests held by the deceased's estate. Additionally, intangible interests are heavily affected when these technologies are used, be it personal data or right of publicity, bringing in the need for stronger legislation and contractual measures to secure stronger protection for the dead.

## **1.2. Chapter Division**

The dissertation shall be divided<sup>19</sup> into the chapters and sub-sections enumerated below. Essentially shall look into the legal issues created in postmortem presence *and* existence through the implicated fields of law which have been identified. From a discussion and analysis of the issues, legislative and contractual solutions will be provided in the final Chapter.

---

<sup>17</sup> Nathan Koppel, *Blonde Ambitions: A Battle Erupts Over the Right to Market Marilyn*, Wall Street Journal, April 10<sup>th</sup>, 2006; Zack O'Malley Greenburg, "The Top-Earning Dead Celebrities Of 2019", *Forbes*, October 30<sup>th</sup> 2019:

(<https://www.forbes.com/sites/zackomalleygreenburg/2019/10/30/the-top-earning-dead-celebrities-of-2019/#6be23a914e5c>)

<sup>18</sup> See Jason Lipshutz, "Opinion: The Problem with the Tupac Hologram", *Billboard*, April 14<sup>th</sup> 2012:

(<https://www.billboard.com/articles/columns/the-juice/494288/opinion-the-problem-with-the-tupac-hologram>); and Rob Arcand, "Sheila E. Says Prince Hologram Won't Appear at Super Bowl Halftime Show", *Billboard*, February 4<sup>th</sup> 2018:

(<https://www.billboard.com/articles/news/8097978/sheila-e-prince-hologram-wont-appear-super-bowl-halftime-show-justin-timberlake-minneapolis>); and Laura M. Holson, "A C.G.I. James Dean? Some in Hollywood See 'an Awful Precedent'", *The New York Times*, November 7<sup>th</sup> 2019: (<https://www.nytimes.com/2019/11/07/arts/james-dean-cgi-movie.html>)

<sup>19</sup> Please note, the chapter division discussed below is *tentative* until the completion of the study.

## **Chapter 1: Conceptualizing Death under the Law and the Ethical Issues relating to Postmortem Technologies**

The dead hold a unique place in the law in that they are incapable of exercising their rights but are capable of dictating them to the living. Their wishes are to be respected but not to a degree which unreasonably burdens the living. They are property but are entitled to a burial as per their personal wishes. A deceased celebrity can spend a lifetime to build a legacy and a persona, but may not be able to control its future after they leave the physical world. **Chapter 1** will discuss death under the law and how the dead can exercise their wishes from beyond the grave. The second part of the chapter will examine the ethical issues created by the use of postmortem technologies and how it can impact the culture of entertainment as a whole.

### **§1.1. The Physical Corpse:**

As mentioned briefly above, death is accompanied by a rapid loss in legal status and the capability to avail legal protections<sup>20</sup>. At the same time, the next-of-kin or the estate of the deceased have a *right* and *obligation* relating to the disposal or burial of a corpse<sup>21</sup>. Though US Courts have consistently held that corpses are *not* an item of “*personal property*” the estate has a limited *quasi-property* right with respect to the burial wishes of the deceased<sup>22</sup>. However, there is considerable debate as to whether the estate has an absolute or qualified interest<sup>23</sup>. In the modern world human corpses can be transformed into artwork and a mode of expression after death<sup>24</sup>, and virtual ‘corpses’ of the dead are performing the same function. Whether an estate has an absolute or qualified property right in a corpse can provide insight into the level of control an estate can exert over a digitally reanimated clone of that corpse.

### **§1.2. Postmortem “Rights”:**

Outside of the realm of corpse disposal, another legal debate exists as to whether the deceased is a rights-holder or a mere mouthpiece for the beneficiaries who have a ‘real’ interest in his dispositions<sup>25</sup>. The first school of thought is the *Will Theory*<sup>26</sup> which dictates that only the *sentient* and those *capable of making choices* can

---

<sup>20</sup> Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstra Law Review, Vol. 37(3), 2009, p. 763

<sup>21</sup> *Orr v. Dayton & Muncie Traction Co.* 1911, 178 Ind. 40; *Renihan et al. v. Wright et al.* 1890, 125 Ind. 536; See Peter F. Nemeth, *Legal Rights and Obligations to a Corpse*, Notre Dame Law Review, Vol. 19, 1943, p. 69.

<sup>22</sup> Peter F. Nemeth, *Legal Rights and Obligations to a Corpse*, Notre Dame Law Review, Vol. 19, 1943, p. 70

<sup>23</sup> Walter F. Kuzenski, *Property in Dead Bodies*, Marquette Law Review, Vol. 9, 1924, p. 17 Available at: <http://scholarship.law.marquette.edu/mulr/vol9/iss1/3>

<sup>24</sup> This has become so prevalent that many US States have made specific laws to cover the safe display of human bodies. See- *Body Art Procedures*, New Jersey State Sanitary Code, Chapter VIII, N.J.A.C. 8:27-1 et seq.; *Safe Body Art Act*, California Health and Safety Code, Division 104, Part 15, Chapter 17

<sup>25</sup> Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstra Law Review, Vol. 37(3), 2009, p. 768- 772 discussing the two theories in length.

<sup>26</sup> Also referred to as the “*Choice Theory*” as proposed by- Jeremy Waldron, *Theories Of Rights*, Oxford University Press, 1984, p. 9 (Jeremy Waldron ed.)

be rights holders<sup>27</sup>. Under this school of thought, the dead *cannot* be the rights holder as they lack agency, autonomy and are unable to make decisions<sup>28</sup>. Postmortem technology like WBE and highly sophisticated Ai will change these traditional assumptions. Conversely, the second school of thought- the *Interest Theory*<sup>29</sup>- recognize that the dead may have valid persisting *interests* which can be helped or be harmed by the actions of the living<sup>30</sup>. This theory posits that the dead can be the legal rights holder if they have valid interest in the right asserted even if they are *incapable of expressing their wishes*<sup>31</sup>. The interest theory based analysis may bolster a deceased celebrity's right to prohibit or restrict posthumous performances. The prevailing theory followed in a jurisdiction will determine whose wishes are *prioritized* in the case of a 'Wills Conflict'; the deceased's, or the estates'.

For example: A deceased composer requests that all of his unpublished musical pieces be destroyed after his death despite the fact that it vastly reduces the value of the estate and the possible income his family will receive. An interest theory State will likely honor's the composer's wishes over the estate, while a will theory State will prioritize the living family's wishes over the dead. Considering the rapid pace in development, an interest theory might be preferable as it gives greater deference to the testator's wishes. However, an interest theory conflicts with the idea that privacy- and by extension- the right of publicity is not an inheritable aspect of human personality (See §3.3. and §4.3.). By extension, the conflict between interest and will theory will determine the level of *control* exerted over the postmortem copy. The dissertation shall examine both theories and determine which theory best fits the larger scheme of postmortem technologies<sup>32</sup>.

### §1.3. Ethical Issues in Postmortem Technologies:

Many postmortem renditions of celebrities have been met with significant criticism as it wanders in a grey area of law and ethics. The technology now enables the dead to practice a realistic rendition of their craft before our very eyes through techniques like "peppers ghost" or CGI (see §2.1). On the surface, one can see that holograms or other technologies are nothing more than an *illusion* made by advanced techniques. But the realism of the rendition and the feeling of experiencing a postmortem performance "live" carries with it an

---

<sup>27</sup> Will Theorists tend to use this analysis with respect to whether animals should be afforded legal rights- See Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, Canadian Journal of Law and Jurisprudence, Vol. 14, 2001 p. 29

<sup>28</sup> Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstra Law Review, Vol. 37(3), 2009, p. 768

<sup>29</sup> Also referred to as the "*Benefit Theory*"- Jeremy Waldron, *Theories Of Rights*, Oxford University Press, 1984, p. 9 (Jeremy Waldron ed.)

<sup>30</sup> Joel Feinberg, *Harm and Self-Interest*, Rights, Justice, and the Bounds of Liberty: Essays In Social Philosophy Vol. 45, 1980, pp. 59-68 p. 65 to 67

<sup>31</sup> Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstra Law Review, Vol. 37(3), 2009, p. 769

<sup>32</sup> "*Clues as to who the right-holder is can be found in who is granted **standing to sue**, who the **remedy flows to**, and who the **court proclaims as the right-holder**". (Emphasis added). See- Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstra Law Review, Vol. 37(3), 2009, p. 774*

intangible *cache* which can attract the public's interest. When the illusion looks real, and realistically interacts with the physical world<sup>33</sup> the ethical issues surrounding it become real.

The debates surrounding postmortem digital copies entered popular culture as the music industry became enamored with holograms<sup>34</sup>. As a performance-based market, the music industry has embraced holograms both in business and by the public<sup>35</sup>. Many of the ethical issues that will be discussed in-length in **Chapter 1** arise from the music industry and spill into other nuanced fields like robotics. The dissertation aims to address the following issues for a clearer understanding of the legal issues examined in later Chapters-

1. **What's the point of death?** The life of a talent and the 'legacy' they create will erode in meaning as their performances re-enter the consumer market<sup>36</sup>.
2. **The death of "classical" music:** Music and other works of art are created for their own individual time-period but how will the genre translate through the test of time if the performers *never stop* performing? Though this is unlikely to translate into a legal argument, it's relevant to discuss how *over-exposure* of artistic works can erode the value of copyright or other forms of IP.
3. **Turning a valuable performer into a "parlor trick":** Over-exposure can also lead to a loss of *individualism* and *authenticity* in the performance. As holographic performances increase among the living and dead<sup>37</sup> the basic conceptual aspects of "*presence*" undergo a radical change<sup>38</sup>. This changes how we view 'concerts', the value of a 'live' performance and the *decorum* which accompanies it.
4. **The value of a "concert":** Will the use of a deceased holographic singer *increase* or *decrease* the value of a concert ticket? Postmortem technologies now allow musical groups to reconstitute the 'old band' *with* the deceased member as a participating member of the performance<sup>39</sup>. This saves them the hassle of finding a replacement but also deprives the audience of a truly authentic, *live* performance.

---

<sup>33</sup> Tom Metcalfe, "Futuristic 'hologram' tech promises ultra-realistic human telepresence", NBC News, May 4<sup>th</sup> 2018: (<https://www.nbcnews.com/mach/science/futuristic-hologram-tech-promises-ultra-realistic-human-telepresence-ncna871526>)

<sup>34</sup> Jason Lipshutz, "Opinion: The Problem with the Tupac Hologram", Billboard, April 14<sup>th</sup> 2012: (<https://www.billboard.com/articles/columns/the-juice/494288/opinion-the-problem-with-the-tupac-hologram>)

<sup>35</sup> Cory Grow "Bizarre World of Frank Zappa' Hologram Tour Not So Bizarre After All". The Rolling Stone, April 25<sup>th</sup> 2019: (<https://www.rollingstone.com/music/music-live-reviews/frank-zappa-hologram-tour-review-827195/>)

<sup>36</sup> Criag Jenkins "We Did Not Ask for a Biggie Hologram", Vice, April 13<sup>th</sup> 2016: ([https://www.vice.com/en\\_us/article/rnwgkz/we-did-not-ask-for-a-biggie-hologram](https://www.vice.com/en_us/article/rnwgkz/we-did-not-ask-for-a-biggie-hologram)); also see Jason Lipshutz, "Opinion: The Problem with the Tupac Hologram", Billboard, April 14<sup>th</sup> 2012:

(<https://www.billboard.com/articles/columns/the-juice/494288/opinion-the-problem-with-the-tupac-hologram>)

<sup>37</sup> Abdullah Saeed, "Why MIA and Janelle Monae's Hologram Collab Signals The Inevitable Future of Concerts", Vice, April 4<sup>th</sup> 2014: ([https://www.vice.com/en\\_us/article/wnpdpb/why-mia-and-janelle-monaes-hologram-collab-signals-the-inevitable-future-of-concerts-5899ce300835694ef25b51e4](https://www.vice.com/en_us/article/wnpdpb/why-mia-and-janelle-monaes-hologram-collab-signals-the-inevitable-future-of-concerts-5899ce300835694ef25b51e4))

<sup>38</sup> For example, in Spain, *holographic protests* were held to combat the anti-demonstration law passed by the State. See- Emiko Jozuka, "The Dystopian Future of Holographic Protests", Vice, May 7<sup>th</sup> 2015: ([https://www.vice.com/en\\_us/article/539aeq/the-dystopian-future-of-holographic-protests](https://www.vice.com/en_us/article/539aeq/the-dystopian-future-of-holographic-protests))

<sup>39</sup> Cory Grow, "Ronnie James Dio Hologram Plots World Tour", The Rolling Stone, July 26<sup>th</sup> 2017: (<https://www.rollingstone.com/music/music-news/ronnie-james-dio-hologram-plots-world-tour-202860/>)

5. **Replacement of the Performer:** As the technology grows, producers can decide to preferentially cast a *synthetic* performer in the place of a ‘real’ one<sup>40</sup> to save costs and the stress of dealing with agents or managers. Hollywood has already shown signs of this change by casting a CGI rendition of James Dean in place of a real actor for the upcoming movie *Finding Jack*<sup>41</sup>.
6. **Sponsorship:** Unlike the artistic trade of the celebrity, sponsorships carry more weight ethically owing to the clear profit-based motives in the act. After death, the celebrity’s *personal autonomy* in deciding whether to publically endorse a good is removed and left to the estate<sup>42</sup> which can lead to a change in their previously established preferences<sup>43</sup>.
7. **Postmortem Servitude:** Do technological beings *warrant* ethical treatment and at what point is that line drawn? If a rudimentary robotic being has the intelligence and ‘personality’ of a deceased relative, is it alright to kick the robot onto the floor with no consequences<sup>44</sup>? Is it ethical to make a deceased hologram perform *forever*? The study will address the nuanced issues relating to the ethical treatment of technological beings<sup>45</sup>.
8. **Ownership and Control:** Who will own this new generation of dead celebrities? Is it *ethical* to allow another entity (or estate) to exert posthumous control over the reputation and legacy of another? The dissertation will examine these questions as well in abstract and legal terms.
9. **Warehousing and Monopolization of Talents:** Notwithstanding the growing popularity of postmortem technologies, only a handful of corporations have the means of *accurately recreating* the celebrity for performances<sup>46</sup>. In order to create the digital copy, the entity will have to receive

---

<sup>40</sup> For example, a UK Opera has used holographic actors in place of a real-time play to represent its artistic message. The show titled “*Symphony to a Lost Generation*” used holographic actors in preference to just creating a real-time play in order to display its message by photo-shopping in “real-time” to augment features for dramatic effect. See- Emiko Jozuka, “*Live Theatre, Meet Holograms*” Vice, July 16<sup>th</sup> 2016: ([https://www.vice.com/en\\_us/article/d7ydyq/live-theatre-meet-holograms](https://www.vice.com/en_us/article/d7ydyq/live-theatre-meet-holograms))

<sup>41</sup> Laura M. Holson, “*A C.G.I. James Dean? Some in Hollywood See ‘an Anful Precedent’*”, The New York Times, November 7<sup>th</sup> 2019: (<https://www.nytimes.com/2019/11/07/arts/james-dean-cgi-movie.html>)

<sup>42</sup> For example, see- Ben Sisario, “*Whitney Houston’s Estate Plans a Hologram Tour and a New Album*”, The New York Times, May 20<sup>th</sup> 2019 :(<https://www.nytimes.com/2019/05/20/business/media/whitney-houston-hologram-album.html>)

<sup>43</sup> A good example of this is when Johnny Walker utilized deceased martial arts actor Bruce Lee’s persona in an advertisement. The advertisement was highly controversial because it showed the actor endorsing whiskey notwithstanding the fact that he was a tea-toddler who never drank in his lifetime. Furthermore, the original version of the advertisement which aired had Lee speaking in Putonghua and dubbed his speech for the Cantonese version; which was his native speaker. See- John Reynolds, “*Bruce Lee resurrected for Johnnie Walker whiskey ad*”, The Guardian, July 10<sup>th</sup> 2013: (<https://www.theguardian.com/media/2013/jul/10/bruce-lee-johnnie-walker-whisky-ad>); Jeremy Blum, “*Bruce Lee whiskey advert branded a disgrace*”, South China Morning Post, July 10<sup>th</sup> 2013: (<https://www.scmp.com/news/hong-kong/article/1279469/bruce-lee-returns-promote-alcohol>)

<sup>44</sup> A similar question was raised after the employees of Boston Dynamics kicked their robot dog “Spot” during testing. See- Phoebe Parke, “*Is it cruel to kick a robot dog?*” CNN, February 13<sup>th</sup> 2015: (<https://www.cnn.com/2015/02/13/tech/spot-robot-dog-google/index.html>)

<sup>45</sup> For a good overview of the discussion, see- Jim Torreson, *A Review of Future and Ethical Perspectives of Robotics and AI*, Frontiers in Robotics and AI, January 15<sup>th</sup> 2018: (<https://doi.org/10.3389/frobt.2017.00075>)

<sup>46</sup> This is considering the large costs and technological resources required to create a post-mortem copy. For example, the team involved in recreating the Tupac hologram stated the cost was between \$100,000 and \$400,000. See- Gil

*exhaustive* permissions from the estate. If the licenses granted are *exclusive*, there is a dangerous possibility that performer's images can be warehoused and held by a single legal entity which will have a dangerous effect on the future of the entertainment industry. After an exclusive ownership and monopoly is established it can lead to direct conflicts with the wishes of the deceased and possible *abuse* of the rights. For example, using the likeness of a celebrity for wonton sponsorships or pornographic purposes.

10. **Low Quality 'Clones':** If *too many licenses* to posthumous intangible rights are granted indiscriminately, we can expect an advent of *low quality* digital clones which reduce the value of the entertainer's legacy<sup>47</sup>. Quality control and 'staying true' to the image of the deceased will be crucial to maintaining a postmortem legacy.

The list above is illustrative of the amount of issues that surround the use of postmortem technologies<sup>48</sup>. The over-arching purpose of **Chapter 2** is to examine how these ethical dilemmas highlighted above can translate into the legal issues which will be discussed later-on in the dissertation.

## **Chapter 2: Postmortem Technologies**

The main purpose of **Chapter 2** is to help the reader understand the mechanics of the technology along with the present and future scope of application in postmortem existence. The Chapter will help simplify how the technology works and the impact it makes on the existing legal field. The law often plays 'catch-up' to the technology and the evidence of that can be seen from the damage caused by a poorly regulated personal data regime in the United States<sup>49</sup>. Postmortem technologies are no exception as the entertainment industry rapidly increases its capabilities in specific States which have liberal right of publicity regimes<sup>50</sup>.

### **§2.1. Postmortem 'Presence' Technologies:**

The entertainment industry has paved the way for postmortem 'performances' through the use of a synthetic or reanimated celebrity using technology. This is a form of postmortem 'presence' since the digital copies have *limited* capabilities in terms of independent thought. Though a holographic artist can sing new,

---

Kaufman, *Exclusive: Tupac Coachella Hologram Source Explains How Rapper Resurrected*, MTV, April 16<sup>th</sup> 2012: (<http://www.mtv.com/news/articles/1683173/tupac-hologram-coachella.jhtml>)

<sup>47</sup> Joseph J. Beard provides a brilliant analysis of low quality 'synthetic' performances. See- Joseph. J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, Berkley Technology Law Journal, Vol.16, No.3 2001, p. 1202, 1218, 1219

<sup>48</sup> Please note, at this stage the list is *tentative* as it will likely expand as the research proceeds.

<sup>49</sup> Peter M. Lefkowitz, "Why America Needs a Thoughtful Federal Privacy Law", The New York Times, June 25<sup>th</sup> 2019: (<https://www.nytimes.com/2019/06/25/opinion/congress-privacy-law.html>)

<sup>50</sup> The best example of this is Indiana which protects against the use of the celebrity features "for a commercial purpose" both during the celebrity's lifetime and 100 years after death. See *Ind. Code* §32-36-1-8

unreleased music and perform real-time interactions with the audience<sup>51</sup> he/she does not truly ‘exist’ in our world as they lack autonomy and the ability to make choices. Under this Section we shall discuss the following technologies-

1. **Holograms:** A widely publicized method of reanimating deceased performers, ‘holograms’ gained mainstream fame after it was used to resurrect deceased rapper Tupac in Coachella<sup>52</sup>. The term ‘hologram’ stems from a colloquial understanding of the technology as the recreated celebrity appears before the audience like the holographic images seen on the movie Star Wars. However, the real technology relies on an old *optical illusion* based on the use of light, smoke and receptors with modern technology to create a life-like *3-dimensional* copy commonly known as *Pepper’s Gho*<sup>53</sup>. Regardless of the methodology, the applications of holograms have a wide scope in areas like architectural designs<sup>54</sup>, political speeches<sup>55</sup>, fashion<sup>56</sup>, immersive media viewing<sup>57</sup>, science and virtual communications<sup>58</sup>, protests<sup>59</sup> etc.
2. **Computer Generated Imagery (“CGI”):** Compared to holograms which have a broad application, CGI is more limited to the arena of motion pictures and television. This is due to the large costs associated with making quality CGI<sup>60</sup> and the fact that creating a final CGI product- a postmortem

---

<sup>51</sup> Brittany Spanos, “*Selena Hologram to Release New Music, Tour*”, The Rolling Stone, 8<sup>th</sup> April 2015: (<https://www.rollingstone.com/music/music-news/selena-hologram-to-release-new-music-tour-158119/>); David Rowell, “*The Spectacular, Strange Rise of Music Holograms*”, The Washington Post October 30<sup>th</sup> 2019: (<https://www.washingtonpost.com/magazine/2019/10/30/dead-musicians-are-taking-stage-again-hologram-form-is-this-kind-encore-we-really-want/?arc404=true>)

<sup>52</sup> Jason Lipshultz, “*Opinion: The Problem with the Tupac Hologram*”, Billboard Magazine, 16<sup>th</sup> April 2012: (<https://www.billboard.com/articles/columns/the-juice/494288/opinion-the-problem-with-the-tupac-hologram>)

<sup>53</sup> Eriq Gardner, “*Hollywood Hologram Wars: Vicious Legal Fend Behind Virtual Mariab, Marilyn and Mick*” The Hollywood Reporter, 28<sup>th</sup> May 2015: (<https://www.hollywoodreporter.com/thr-esq/hollywood-hologram-wars-vicious-legal-798401>)

<sup>54</sup> Paula Dawson, “*Beyond Tupac: The Future of Hologram Technology*”, The Conversation 25<sup>th</sup> April, 2012: (<https://theconversation.com/beyond-tupac-the-future-of-hologram-technology-6644>)

<sup>55</sup> Dorian Geiger, “*The Dawn of Cyber Politicians*”, Al Jazeera, 27<sup>th</sup> February 2017: (<https://www.aljazeera.com/indepth/features/2017/02/dawn-cyber-politicians-170219104850684.html>)

<sup>56</sup> Graham Roberts, “*A Hologram Hits the Runway*”, The New York Times, September 5<sup>th</sup> 2018: (<https://www.nytimes.com/2018/09/05/insider/ashley-graham-hologram-augmented-reality-video.html?action=click&module=RelatedLinks&pgtype=Article>)

<sup>57</sup> See Microsoft’s *Illumiroom*, January 4<sup>th</sup> 2013: (<https://www.microsoft.com/en-us/research/project/illumiroom-peripheral-projected-illusions-for-interactive-experiences/?from=http%3A%2F%2Fresearch.microsoft.com%2Fen-us%2Fprojects%2Fillumiroom%2F>)

<sup>58</sup> See Alex Kipman, “*The Dawn of the Age of Holograms TED TALK*”, 18<sup>th</sup> April 2016: (<https://www.youtube.com/watch?v=1cQbMP315Sk> at 10 minutes 49 seconds onward)

<sup>59</sup> Zacharay Boren, “*Spain’s hologram protest: Thousands join virtual march in Madrid against new gag law*”, The Independent, 12<sup>th</sup> April 2015: (<https://www.independent.co.uk/news/world/europe/spains-hologram-protest-thousands-join-virtual-march-in-madrid-against-new-gag-law-10170650.html>)& Haeryun Kang, “*‘Ghost Protest’ In Seoul Uses Holograms, Not People*”, NPR, 24<sup>th</sup> February, 2016 (<https://www.npr.org/sections/parallels/2016/02/24/467957260/ghost-protest-in-seoul-uses-holograms-not-people>)

<sup>60</sup> For **example**, digitally recreating Paul Walker after his mid-shoot death on *Fast and the Furious 7* caused the entire budget to go over \$50 million leading to large insurance claims. See- Kim Masters, “*‘Fast & Furious 7’ Insurance Claim*

rendition of a celebrity- is done in *post-production* rather than a real-time performance in front of an audience. The most prominent examples are in the movie industry where CGI has been used to fill crucial vacancies in scenes after an actor dies mid-shoot<sup>61</sup>. However Hollywood's fascination with posthumous performances gradually transcended filling "vacancies" to actively staffing movies with CGI renditions of deceased actors<sup>62</sup>. The shift in preference toward CGI renditions of deceased actors raises interesting issues relating to performer contract negotiations, costs implicated and the overall *value* of a performance. These changes shall be explored in this Section.

3. **Virtual & Augmented Reality ("VR" or "AR", collectively referred to as "XR"):** Many in the technological sector, particularly in the fields of gaming and entertainment believe that the next "gold-rush" is in virtual and augmented reality. VR often envisages the creation of an *entirely new world* while AR *creates digital additions* to what we view in the physical world<sup>63</sup>. This is often carried out with the assistance of *lenses* or *goggles* which are worn over one's eyes, or through the utilization of a camera on a screen-based device<sup>64</sup>. XR technological devices have advanced to the level of communicating with one's senses<sup>65</sup> and can be implemented in the military to train soldiers to accustom themselves to the heat and pressures of war<sup>66</sup>. Smartphone applications and portable headsets have made XR easily accessible to the public<sup>67</sup> with virtual copies of celebrities superimposed into one's phone screen as a sort of "*Pocket Hologram*"<sup>68</sup> and models giving 360° interactive presentations of outfits in different locations and settings<sup>69</sup>. In addition to gaming and entertainment VR has a broad range of

---

Could Reach Record-Breaking \$50 Million", The Hollywood Reporter, May 21<sup>st</sup> 2014:

(<https://www.hollywoodreporter.com/news/fast-furious-7-insurance-claim-706037>)

<sup>61</sup> Julia Alexander, "Furious 7 used 350 CGI shots of Paul Walker" Polygon, October 20<sup>th</sup> 2015:

(<https://www.polygon.com/2015/10/20/9577863/furious-7-used-350-cgi-shots-of-paul-walker>); Benjamin Lee,

"Discretion, not CGI: how Philip Seymour Hoffman was kept in the Hunger Games", The Guardian, November 17<sup>th</sup> 2015:

(<https://www.theguardian.com/film/2015/nov/17/philip-seymour-hoffman-hunger-games-mockingjay-2-paul-walker>)

<sup>62</sup> Matt Miller, "Actress secretly played Princess Leia in Rogue One" Esquire Magazine, March 14<sup>th</sup> 2017:

(<https://www.esquire.com/entertainment/movies/news/a53856/rogue-one-princess-leia-actress/>); Laura M. Holson,

"A C.G.I. James Dean? Some in Hollywood See 'an Awful Precedent'", The New York Times, November 7<sup>th</sup> 2019:

(<https://www.nytimes.com/2019/11/07/arts/james-dean-cgi-movie.html>)

<sup>63</sup>The Franklin Institute, *What's the Difference between VR, AR & MR:* (<https://www.fi.edu/difference-between-ar-vr-and-mr>)

<sup>64</sup> The Franklin Institute, *What's the Difference between VR, AR & MR:* (<https://www.fi.edu/difference-between-ar-vr-and-mr>)

<sup>65</sup> Margi Murphy, "Virtual reality will soon be so advanced that humans will choose to live in computer simulations, tech firm claims",

The Sun, 13<sup>th</sup> April, 2017: (<https://www.thesun.co.uk/tech/3317538/tech-firm-amd-says-virtual-reality-will-soon-be-so-advanced-that-humans-will-choose-to-live-in-computer-simulations/>)

<sup>66</sup> See The Virtual Reality Society, "Virtual Reality in the Military": (<https://www.vrs.org.uk/virtual-reality-military/>); Jim

Baumann "Military Applications for Virtual Reality", The Encyclopaedia of Virtual Environments:

([http://www.hitl.washington.edu/research/knowledge\\_base/virtual-worlds/oldscivw/EVE/II.G.Military.html](http://www.hitl.washington.edu/research/knowledge_base/virtual-worlds/oldscivw/EVE/II.G.Military.html))

<sup>67</sup> For example, *Pokémon Go* was a revolutionary game which mixed the physical and digital realities by using AR in

smartphones. See- Nick Statt, "Pokémon Go never went away — 2019 was its most lucrative year ever", The Verge, January 10<sup>th</sup>

2020: (<https://www.theverge.com/2020/1/10/21060877/pokemon-go-record-revenue-2019-niantic-labs-ar-growth>)

<sup>68</sup> CNet, "Introducing Jon Hamm, The Hologram", 26<sup>th</sup> January 2017: (<https://www.youtube.com/watch?v=lvwI6C-uMJM>)

<sup>69</sup> Graham Roberts, "A Hologram Hits the Runway", The New York Times, September 5<sup>th</sup> 2018:

(<https://www.nytimes.com/2018/09/05/insider/ashley-graham-hologram-augmented-reality->

application in military, scientific study, communications<sup>70</sup>, immersive interactive journalism<sup>71</sup> and governance<sup>72</sup>.

Joseph J. Beard in his seminal paper on reanimated celebrities had famously highlighted the 2 *Approaches* of creating a digital clone<sup>73</sup>- the *direct* and *indirect* approach. The direct approach requires capturing a celebrity ‘in-person’ on a device which captures all relevant contours of the face to produce the digital copy<sup>74</sup>. The indirect approach creates the digital copy by using *reference material* like previous footage and photographic images<sup>75</sup>. Each method can change the degree and nature of legal protections afforded to the postmortem digital copy<sup>76</sup>. Beard’s approaches shall also be discussed in the context of this Section of the dissertation.

## §2.2. Postmortem ‘Existence’ Technologies; Robotics & Artificial Intelligence:

This last category has perhaps the least application to the entertainment industry and is more relevant in scientific and technological fields. However, as the most advanced category it is worth examining certain aspects of robotics and how it impacts the future of human existence. At present we live in a world of ‘smart’ homes, phones and devices which by the day become more sophisticated and ‘human-like’<sup>77</sup>. The rate of development and use of artificial intelligence (*Ai*) across different industries has skyrocketed and have found application in numerous professional fields like healthcare, finance, legal etc.<sup>78</sup> Furthermore, programs like

---

[video.html?action=click&module=RelatedLinks&pgtype=Article](#)); “*Ashley Graham, Unfiltered*”, The New York Times, September 5<sup>th</sup> 2018: (<https://www.nytimes.com/interactive/2018/09/04/style/ashley-graham-body-positive-movement-ar-ul.html>)

<sup>70</sup> Alex Kipman, “*The Dawn of the Age of Holograms TED TALK*”, April 18<sup>th</sup> 2016: (<https://www.youtube.com/watch?v=1cQbMP3I5Sk> at 11:13 onward)

<sup>71</sup> For *example*, see- John Branch, “*Augmented Reality: Four of the Best Olympians, as You’ve Never Seen Them*”, The New York Times, February 5<sup>th</sup> 2018: (<https://www.nytimes.com/interactive/2018/02/05/sports/olympics/ar-augmented-reality-olympic-athletes-ul.html?ref=collection%2Fspotlightcollection%2Faugmented-reality>); “*Ashley Graham, Unfiltered*”, The New York Times, September 5<sup>th</sup> 2018: (<https://www.nytimes.com/interactive/2018/09/04/style/ashley-graham-body-positive-movement-ar-ul.html>)

<sup>72</sup> For *example*, China uses *Google Glasses*, an AR technology to monitor people’s social credit scores. See Matthew Ingram, “*As China expands digital surveillance, Facebook and Google risk legitimizing regime*”, Columbia Journalism Review, 24<sup>th</sup> August 2018: ([https://www.cjr.org/the\\_new\\_gatekeepers/china-facebook-google.php](https://www.cjr.org/the_new_gatekeepers/china-facebook-google.php))

<sup>73</sup> Joseph. J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, Berkley Technology Law Journal, Vol.16, No.3, 2001, p. 1172 to 1189

<sup>74</sup> For *example* see- Erin Winick, “*Actors are digitally preserving themselves to continue their careers beyond the grave*”, MIT Technology Review, October 16<sup>th</sup> 2018: (<https://www.technologyreview.com/s/612291/actors-are-digitally-preserving-themselves-to-continue-their-careers-beyond-the-grave/>); Matt Miller, “*Actress secretly played Princess Leia in Rogue One*” Esquire Magazine, March 14<sup>th</sup> 2017: (<https://www.esquire.com/entertainment/movies/news/a53856/rogue-one-princess-leia-actress/>)

<sup>75</sup> For *example* see- Laura M. Holson, “*A C.G.I. James Dean? Some in Hollywood See ‘an Awful Precedent’*”, The New York Times, November 7<sup>th</sup> 2019: (<https://www.nytimes.com/2019/11/07/arts/james-dean-cgi-movie.html>)

<sup>76</sup> Joseph. J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, Berkley Technology Law Journal, Vol.16, No.3, 2001, p. 1171 onward

<sup>77</sup> Richard Nieva, “*Exclusive: Google’s Duplex could make Assistant the most lifelike AI yet*”, CNet.com, May 9<sup>th</sup> 2018: (<https://www.cnet.com/news/google-assistant-duplex-at-io-could-become-the-most-lifelike-ai-voice-assistant-yet/>)

<sup>78</sup> A good example of this is IBM’s “*Watson*” Ai, see- Conner Forrest, “*IBM Watson: What are companies using it for?*”, ZDNet, September 1<sup>st</sup> 2015: (<https://www.zdnet.com/article/ibm-watson-what-are-companies-using-it-for/>)

*CleverBot* can eventually be used to replicate the responses and mannerisms of a deceased person provided a suitable amount of data is provided<sup>79</sup>.

When discussing ‘robotics’ and its relationship to posthumous existence, it’s important to differentiate between the ‘*mind*’ and ‘*body*’ of the ‘robot’. While the ‘mind’ can be equated to the Ai or the programming *creating* the responses, the ‘body’ can be anything from a desktop screen or ‘voice-assistant’ to a full-fledged robot. For the purposes of this dissertation, the *medium* of presentation will not be the focal point of the analysis. This is because-

- i. The commercial resources to create an all-encompassing robotic entity of a deceased person do not presently exist and is unlikely to be turned into a business model anytime in the near future.
- ii. The Ai modelled around the “brain” of the deceased would be the main generator of legal issues.

Ordinarily robotics involves a combined effort of research, development and commercial investment. As a result, the end-result of the Ai is owned and held by a corporate entity through a variety of contractual arrangements. Ai is a valuable corporate asset which can be deployed for many purposes as opposed to a robot which has a set purpose. In terms of its application to one’s posthumous existence, the concept of Whole Mind Uploading or Whole Brain Emulation (*WBE* or also colloquially known as a “*mind-uploading* or *mind-filing*”) is presently being experimented for future application<sup>80</sup>. WBE is the concept of uploading all of one’s data (social media, blogs, any material written physically which can be digitized) into a sophisticated Ai based software which recreates the brain and thought process of a person<sup>81</sup>. This complex ‘brain’ is placed inside a physical robot/ desktop interface who communicates with others as the person would mimicking a person’s mannerisms, personality, recollections, attitudes, beliefs and values<sup>82</sup>. For example, the website ETER9<sup>83</sup> creates a virtual *counterpart* that would interact with the world as the human counterpart by learning through interactions with the network.

It goes without saying that this technology is yet to be perfected, but as time proceeds the applications and legal issues are enormous. The reason being that corporate Ai is being *supplemented* with an independent

---

<sup>79</sup> William Herkewitz, “*Esquire Fact-or-Fiction: Cleverbot and the Talking Holograms of the Future*”, Popular Mechanics, July 19<sup>th</sup> 2013: (<https://www.popularmechanics.com/culture/a9194/esquire-fact-or-fiction-cleverbot-and-the-talking-holograms-of-the-future-15712142/>)

<sup>80</sup> See- IdeaCity, “*Bruce Duncan- Talks with the World’s Most Sentient Robot*”, August 31<sup>st</sup> 2013: (<https://www.youtube.com/watch?v=mwOFWABbfW8>)

<sup>81</sup> Ibid; also see- William Herkewitz, “*Esquire Fact-or-Fiction: Cleverbot and the Talking Holograms of the Future*”, Popular Mechanics, July 19<sup>th</sup> 2013: (<https://www.popularmechanics.com/culture/a9194/esquire-fact-or-fiction-cleverbot-and-the-talking-holograms-of-the-future-15712142/>)

<sup>82</sup> See- IdeaCity, “*Bruce Duncan- Talks with the World’s Most Sentient Robot*”, August 31<sup>st</sup> 2013: (<https://www.youtube.com/watch?v=mwOFWABbfW8>)

<sup>83</sup> See the *ETER9 homepage* which promises an Ai fuelled “Counterpart” who will exist in “Cyber Eternity”- (<https://www.eter9.com>)

human *identity*. Some aspects of human identity are protectable by publicity or copyright; such as mannerisms, appearance, and voice. But aspects like a person's recollections, attitudes, beliefs and values are *not* protected by any intellectual property regime. One aspect of WBE is navigating *how* to capitalize or protect one's personality in a futuristic arrangement. The dissertation shall address how we can use *personal data* laws or contract to protect those aspects of a person's identity in a legal vacuum.

### §2.3. Technological Intelligence; Crossing the line between “Presence” to “Existence”:

2 years ago Sophia a robot created by David Hanson of Hanson Robotics became the first technological being to attain citizenship in the world<sup>84</sup>. The EU Parliament in 2017 debated granting legal personality rights to self-learning robots similar to that of corporations by having them be insured individually and be held liable for damages if they malfunction and start hurting people or damaging property<sup>85</sup>. It's becoming clear that legal authorities are gradually recognizing that 'intelligent' technological beings are crossing the grey line between 'object' and 'person' and may be held accountable for their actions independently. But this opens a Pandora's Box of legal issues as it drastically changes how we look at man-made 'objects' moving forward.

The dissertation will *not* critically examine the legal issues around assigning rights and duties to technological super-intelligence as it would go beyond the necessary scope for the analysis. However the paper will *categorize* the levels of artificial intelligence by looking at the relevant definitions in existing law and writings on the subject<sup>86</sup>. The paper will classify the degrees of artificial intelligence by creating a *Tiered System* based on the range of functions and capabilities of the technological copy-

1. **Tier 1: A Sentient Copy-** A technological being capable of independent thought and improvement of their intelligence with a degree of self-actualization<sup>87</sup>. This tier of intelligence is most susceptible to future legal recognition and the assignment of rights and liabilities. At the same time, many believe that a 'sentient' level of intelligence warrants *ethical treatment* of the technological being similar to the

---

<sup>84</sup> Emily Reynolds, “*The agony of Sophia, the world's first robot citizen condemned to a lifeless career in marketing*”, Wired, 1<sup>st</sup> June 2018: (<https://www.wired.co.uk/article/sophia-robot-citizen-womens-rights-detroit-become-human-hanson-robotics>)

<sup>85</sup> Janosch Delcker, “*Europe divided over robot 'personhood'*”, Politico, April 11<sup>th</sup> 2018:

(<https://www.politico.eu/article/europe-divided-over-robot-ai-artificial-intelligence-personhood/>)

<sup>86</sup>See Chetan Kumar GN, “*Artificial Intelligence: Definition, Types, Examples, Technologies*”, Medium, August 31<sup>st</sup> 2018:

(<https://medium.com/@chethankumargn/artificial-intelligence-definition-types-examples-technologies-962ea75c7b9b>);

Naveen Joshi, “*7 Types of Artificial Intelligence*”, Forbes, June 19<sup>th</sup> 2019:

(<https://www.forbes.com/sites/cognitiveworld/2019/06/19/7-types-of-artificial-intelligence/#2a19605c233e>)

<sup>87</sup> Andrea Morris, “*We need to talk about Sentient Robots*”, Forbes, March 13<sup>th</sup> 2018,

(<https://www.forbes.com/sites/andreamorris/2018/03/13/we-need-to-talk-about-sentient-robots/#3d9fbb981b2c>)

level of decency we afford animals or other human beings<sup>88</sup>. Sentient copies create the most legal issues moving forward and will likely center around the robotics industry rather than entertainment.

2. **Tier 2: A Reactive Copy-** Capable of real-time “thinking” and “learning” on the job, these technological beings fall short of sentience by lacking the *diversity* of thought on matters beyond their scope of use, often maintaining a *Limited Memory* of past events to better predict the future<sup>89</sup>. A good example of this is the hologram of deceased pop-star Selena who will release *new songs* and interact with the audience during her performance<sup>90</sup>. The company creating it, Acrovit LLC names it “*Digitized Human Essence*,” creating a hologram that will “*autonomously learn and react on behalf of its human counterpart*”<sup>91</sup>.
3. **Tier 3: A Pre-Programmed Copy-** The most prevalent form of postmortem existence in today’s modern world, these copies lack *independent intelligence* and are not bolstered by Ai capable of learning new information. A common example of this would be the existing forms of “pepper’s ghost” holograms which are incapable of real-time adjustments in their repertoire but are capable of *pre-set* performance instructions<sup>92</sup>. These copies are likely protected by existing rules of law and contract and can be viewed as a traditional performance in a *new* medium.

The dissertation will examine each category above and provide the key indicators for determining which tier of intelligence the technological copy falls under along with the *consequences* for such a classification. The largest portion of the discussion in the dissertation will surround Tiers 2 and 3 since that is the most prevalent in today’s world. This helps draw the line between postmortem *presence* and *existence* along with determining when an *object* can become a *person*.

#### §2.4. The Purpose of the Postmortem Technology:

The purpose of the postmortem technology will materially change how the dissertation analyzes a possible infringement of the rights implicated. For example, holograms and CGI in the entertainment industry will be centered around commercial legal principles like contract and monetary consideration while ‘*Social Robots*’ like those produced in WBE will go towards the legacy and privacy interests of the deceased. The dissertation will

---

<sup>88</sup> David Levy, *The Ethical Treatment of Artificially Conscious Robots*, International Journal of Social Robotics Vol. 1, 2009 p. 209–216 (2009); also see Phoebe Parke, “Is it cruel to kick a robot dog?” CNN, February 13<sup>th</sup> 2015:

(<https://www.cnn.com/2015/02/13/tech/spot-robot-dog-google/index.html>)

<sup>89</sup> Arend Hintze, “Understanding the 4 types of Ai”, The Conversation, 13<sup>th</sup> November 2016:

(<http://theconversation.com/understanding-the-four-types-of-ai-from-reactive-robots-to-self-aware-beings-67616>)

<sup>90</sup> Spencer Kornhaber, “The Miracle of CGI Selena” The Atlantic, 10<sup>th</sup> April 2015,

(<https://www.theatlantic.com/entertainment/archive/2015/04/the-inevitability-of-hologram-selena/390186/>)

<sup>91</sup> Brittany Spanos, “Selena Hologram to Release New Music, Tour”, The Rolling Stone, 8<sup>th</sup> April 2015:

(<https://www.rollingstone.com/music/music-news/selena-hologram-to-release-new-music-tour-158119/>)

<sup>92</sup> Eriq Gardner, “Hollywood Hologram Wars: Vicious Legal Feud Behind Virtual Mariah, Marilyn and Mick” The Hollywood Reporter, 28<sup>th</sup> May 2015: (<https://www.hollywoodreporter.com/thr-esq/hollywood-hologram-wars-vicious-legal-798401>)

attempt to delineate and analyze how the purpose plays a role in the technological copy of the deceased and their interests. In terms of legal analysis, the intangible property interests of celebrities tend to be much stronger than those held by lay-persons. Celebrities are usually given augmented protections over their Right of Publicity and Trademark under the law because they make a career of *commercializing* their face, look, name and voice. As a result, the law extends stronger protections to those individuals who made their persona into a commercial product. This difference requires us to separate the legal principles we apply to the prospective legislation that needs to be created around this technology. For example, an unauthorized hologram of a deceased local radio host won't attract as much damages as one of a popular rapper. Similar rules relating to damages exist when calculating the damages under Copyright laws. Resultantly the dissertation will gravitate toward the entertainment industry and celebrity interests.

### **Chapter 3: Personal Data**

After examining the conceptual and technical aspects of a postmortem copy, **Chapter 3** will dive into the first level of protection that exists for deceased individuals. When creating a digital clone of an individual, effectively mimicking their mannerisms would involve information on or provided by the person which is subsequently *transposed* into personal data. 'Personal Data' in a legal sense means *any* information, or an *amalgamation of information* which may be provided to a data collection entity often for performing a service<sup>93</sup>. In a world dominated by technology which acts as an extension of us, the data provided to these entities is a valuable commodity both for increasing efficacy of service and for commercial gain.

#### **§3.1. The Imperfect US Personal Data Regime:**

The United States notoriously does not have a harmonized Federal personal data law. Instead the current landscape relies on a mixture of sector-specific Federal regulations and State laws. This has led to a variety of complications in the last decade which culminated in the Cambridge Analytica scandal which affected the 2016 Presidential elections<sup>94</sup>. Since then the call for a stronger data protection regime has grown stronger due to the visible vulnerabilities caused by private companies and foreign actors during the entire ordeal. In the

---

<sup>93</sup> This is based off the definition of 'Personal Data' as provided by The EU- *General Data Protection Regulation (GDPR)*, Article 4.1: *personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.* (Emphasis added) We use this definition as the barometer as the GDPR, which recently came into for in May 2018 is considered as the most comprehensive and robust trans-boundary data protection regulation. Also see- *California Consumer Privacy Act*, 2018 §1798.140 (o)1 defining "Personal Information"

<sup>94</sup> See Alexandra Ma & Ben Gilbert, "Facebook understood how dangerous the Trump-linked data firm Cambridge Analytica could be much earlier than it previously said. Here's everything that's happened up until now.", Business Insider, August 23<sup>rd</sup> 2019: (<https://www.businessinsider.com/cambridge-analytica-a-guide-to-the-trump-linked-data-firm-that-harvested-50-million-facebook-profiles-2018-3>)

US, privacy actions are commonly executed through *Tort Law*<sup>95</sup> and State-level personal data suits<sup>96</sup>. At the Federal level, legislations relating to personal data like the *Privacy Act*<sup>97</sup>, the *Gramm-Leach-Bliley Act*<sup>98</sup>, the *Fair Credit Reporting Act*<sup>99</sup>, and the *Children's Online Privacy Protection Act*<sup>100</sup> are enforced through Federal Trade Commission (“FTC”) actions aimed at enforcing privacy promises in the marketplace<sup>101</sup>. While the focus of this dissertation is not around ‘informational’ privacy in the hands of data Controllers and protecting data from 3<sup>rd</sup> party intrusion, it will *identify vulnerabilities* in the data protection regimes both in the US and other jurisdictions insofar that it relates to *postmortem interests*.

### §3.2. The Unique Nature of Celebrity Data:

As mentioned earlier, the gradual focus of this dissertation will be on celebrity interests and how postmortem technologies affect them. ‘Celebrity data’ is unique and doesn’t fall under the traditional constructs of personal ‘information’. Data protection regulations are made to ensure accountability in *informational privacy* relating to data provided to entities which process it<sup>102</sup>. The entities intended to be regulated are social media websites, e-Commerce services, healthcare providers and other companies which require and use personal data for their regular functioning. This is where postmortem technologies cut-against the grain owing to the unique nature of the data they require. Unlike social media or e-Commerce services, a postmortem hologram or CGI rendition of a celebrity does not require basic informational data like name, location, email address, phone number etc. Rather the focus tends to be on minute things like<sup>103</sup>-

- i. Facial expressions
- ii. Skin tone
- iii. Voice connotations
- iv. Body language/ mannerisms etc.

---

<sup>95</sup> For example, see- *Restatement (Second) of Torts*, 1977 §§ 652A-652E

<sup>96</sup> See *California Consumer Privacy Act*, 2018 §1798.105- 125 which encompasses the consumers rights.

<sup>97</sup> 5 U.S.C. § 552a

<sup>98</sup> 15 U.S.C. §§ 6801-6809

<sup>99</sup> 15 U.S.C. § 1681 et seq

<sup>100</sup> 15 U.S.C. §§ 6501-6506

<sup>101</sup> The FTC draws this power from the *Federal Trade Commission Act*, 15 U.S.C. § 45; read with Federal Trade Commission, *Privacy & Data Security Update: 2018*, January 2018- December 2018:

(<https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2018/2018-privacy-data-security-report-508.pdf>)

<sup>102</sup> See *California Consumer Privacy Act*, 2018 §1798.100 §2 which lists the objectives for enactment.

<sup>103</sup> See Graham Roberts, “*A Hologram Hits the Runway*”, *The New York Times*, September 5<sup>th</sup> 2018:

(<https://www.nytimes.com/2018/09/05/insider/ashley-graham-hologram-augmented-reality-video.html?action=click&module=RelatedLinks&pgtype=Article>);

and see Matt Miller, “*Actress secretly played Princess Leia in Rogue One*” *Esquire Magazine*, March 14<sup>th</sup> 2017:

(<https://www.esquire.com/entertainment/movies/news/a53856/rogue-one-princess-leia-actress/>)

Ordinary individuals don't have such an exhaustive and specialized record of their *appearance* logged into data which can be recreated with precision with simple hand-held devices<sup>104</sup>. The unique nature of this data falls under the broad definitions of 'personal data' under the law but may not operate under the same set of rules because it is likely *proprietary* and the result of a contractual arrangement. In this case we may see a conflict between right of publicity and personal data claims. Existing literature on celebrity data privacy surrounds how to define and retain their privacy in a modern public cyberspace based on freedom of speech and information concerns<sup>105</sup>. Academic material on the protection of their unique personal data by corporate entities is lacking and this dissertation aims to define and address those issues. We will also address how specialized data for entertainment purposes should be protected and which provisions of law are best used to support a personal data claim by an estate of a celebrity.

### §3.3. The Dead have No Privacy:

'Death' in the context of privacy holds a peculiar position in the law as it effects multiple interests at once like human rights, property, succession, personality rights, intellectual property, etc. with each area having a different legal attitude toward death<sup>106</sup>. Privacy is consistently recognized as a *Human Right* through constitutional recognition<sup>107</sup> and personal data protections is considered as a subset of privacy<sup>108</sup>. However, data protection legislations commonly *do not apply to the dead*<sup>109</sup>. This is due to a deeper issue that the deceased have *no privacy interest*<sup>110</sup>. This position has been adopted in US common law<sup>111</sup> with respect to privacy related

---

<sup>104</sup> David Rowell, "The Spectacular, Strange Rise of Music Holograms", The Washington Post October 30<sup>th</sup> 2019:

(<https://www.washingtonpost.com/magazine/2019/10/30/dead-musicians-are-taking-stage-again-hologram-form-is-this-kind-encore-we-really-want/?arc404=true>)

<sup>105</sup> See Shlomit Yanisky-Ravid, Ben Zion Lahav, *Public Interest Vs. Private Lives—Affording Public Figures Privacy In The Digital Era: The Three Principle Filtering Model*, Journal of Constitutional Law, Vol. 19, No. 4, p. 975-1013; Also see Robin Callender Smith, *Private Fire from the Gods: The Protection of Personal Data - The Data Protection Act 1998 as a Celebrity Privacy Remedy*, 2015: (<https://ssrn.com/abstract=2596029>) for a view on the UK law of celebrity data privacy which has been heavily influenced by case law; Lior Jacob Strahilevitz, *Toward A Positive Theory Of Privacy Law*, Harvard Law Review, Vol. 126, No. 7, 2013, p. 2010-2042; for a very good overview discussion on 'Postmortem' data protection see- Edina Harbinja, *Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be The Potential Alternatives?*, (2013) 10:1 SCRIPTed 19: (<http://script-ed.org/?p=843>)

<sup>106</sup> Edina Harbinja, *Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be The Potential Alternatives?*, (2013) 10:1 SCRIPTed 19: (<http://script-ed.org/?p=843>)

<sup>107</sup> For example people are assured privacy from unwanted State intrusion- *United States Constitution*, 4<sup>th</sup> Amendment; Personal privacy has also been established in Europe under the *European Convention on Human Rights*, Article 8.

<sup>108</sup> Article 8 of the *EU Charter of Fundamental Rights*; read with Recital 1 and Article 1 of the *EU General Data Protection Regulation*.

<sup>109</sup> For example, the EU GDPR *expressly* excludes the data of deceased persons and leaves that to Member States to legislate on. The regulation exclusively applies to *natural persons* and excludes legal persons as well. See- *EU General Data Protection Regulation*, Recital 27; Also see *California Consumer Privacy Act*, 2018 §1798.140 (g) which defines a "Consumer" for the purposes of the Act as a *natural person*.

<sup>110</sup> For a good overview on post-mortem privacy in Europe see- Edina Harbinja, *Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be The Potential Alternatives?*, (2013) 10:1 SCRIPTed 19: (<http://script-ed.org/?p=843>); For the US see- J.C. Buitelaar, *Post-mortem privacy and informational self-determination*, *Ethics & Information Technology*, Vol. 19 No. 2, 2017 p. 129-142: (<https://doi.org/10.1007/s10676-017-9421-9>)

tort actions like defamation or invasion of privacy<sup>112</sup>. A similar position has been adopted by the ECHR<sup>113</sup> with 12 Member States recognizing the deceased have independent data rights and 4 expressly excluding the deceased<sup>114</sup>. This is because of the personal nature of privacy claims like defamation<sup>115</sup> and the fact that the deceased are *incapable* of being ‘directly’ harmed by any violation of the right.

Whether privacy extends past death will ultimately affect how their personal data is protected when implemented into a postmortem technology. Should the dead be entitled to postmortem data privacy rights? Observing this from the lens of celebrity data- as discussed above in §3.2. - the valuable nature of the data collected warrants a greater protection from potential abuse as opposed to leaving it completely unprotected under the law. This issue will also bring in aspects of the *Will* and *Interest Theories* relating to death discussed in **Chapter 1**. The dissertation will examine postmortem privacy regimes and identify how the conflicts in the law can be resolved so that a person can preserve and control what becomes of his reputation, dignity, integrity, secrets or memory after death<sup>116</sup>.

### §3.4. Legal Characterizations of Personal Data:

Privacy is *inseparable* from ‘personhood’ and as a *Human Right*, privacy and data protection rights cannot be waived or transferred<sup>117</sup>. As discussed above, it is the consistent view that personal data protection stems from the human right of privacy. But does this rigid interpretation of data privacy fit the modern world where personal data is created, sold and transferred like a fluid commodity in the cyber economy? The World

---

<sup>111</sup> In *Hendrickson v. Cal. Newspapers, Inc.*, 48 Cal.App.3d 59, 62 (Cal. Ct. App. 1975) it was held that- “It is **well settled** that the right of privacy is **purely a personal one**; it **cannot** be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that his privacy has been invaded. Further, **the right does not survive but dies with the person**.” (Emphasis added).

<sup>112</sup> J.C. Buitelaar, *Post-mortem privacy and informational self-determination*, Ethics & Information Technology, Vol. 19 No. 2, 2017 p. 129: (<https://doi.org/10.1007/s10676-017-9421-9>)

<sup>113</sup> *Jaggi v. Switzerland*, no. 58757/00, ECHR 2006-X; *Estate of Kresten Filtenborg Mortensen v. Denmark* (dec.), no. 1338/03, ECHR 2006-V; *Koch v. Germany* no. 497/09, ECHR 19/07/2012

<sup>114</sup> The 12 States are Bulgaria, Czech Republic, Denmark, Estonia, France, Italy, Latvia, Lithuania, Portugal, Slovakia, Slovenia and Spain. 10 States require the deceased’s data have a *connection* with a natural person (Czech Republic, Denmark, France, Italy (both natural and legal person), Latvia, Lithuania, Portugal, Slovakia, Slovenia and Spain). Four states expressly *exclude* the deceased (Cyprus, Ireland, Sweden and the former Member State UK). Estonia places a 30 year limit on deceased data claims based on consent. See- D. McCallig, *Data Protection and the Deceased in the EU*, paper presented at the Computers Privacy Data Protection, Brussels; accessed through J.C. Buitelaar, *Post-mortem privacy and informational self-determination*, Ethics & Information Technology, Vol. 19 No. 2, 2017 **footnote 27**: (<https://doi.org/10.1007/s10676-017-9421-9>)

<sup>115</sup> “The right [of privacy] is a **personal one**, and it does **not** extend to the plaintiff’s dog. The action cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity... The cause of action **does not survive the individual**, and cannot exist after death.” See- Dean Prosser, *Prosser on Torts*, 2<sup>nd</sup> ed. 641, § 97 (emphasis supplied); the view was supported in *Kelly v. Johnson Publishing Co.*, 160 Cal.App.2d 718, 721 (Cal. Ct. App. 1958)

<sup>116</sup> This is the view of postmortem privacy adopted in- L. Edwards, & Edina Harbinja, *Protecting post-mortem privacy: Reconsidering the privacy interests of the deceased in a digital world*, Cardozo Arts & Entertainment Law Journal, Vol. 32 No. 1, 2013, p. 101–147.

<sup>117</sup> Nadezhda Purtova, *Private Law Solutions in European Data Protection: Relationship to Privacy, and Waiver of Data Protection Rights*, Netherlands Quarterly of Human Rights Vol. 28, No.2, 2010, p. 179-198

Economic Forum (“WEF”) in a 2011 report recognized personal data as a *currency* and *new asset class* which will dominate the coming century<sup>118</sup>. Meanwhile, governments like Germany and Japan have actively been taking steps towards fully converting data as an intangible property<sup>119</sup>. Many prominent academics have also posited that treating personal data as property will provide solutions to current and future issues in the digital landscape<sup>120</sup>. Personal data, like the right of publicity (or ‘*personality rights*’ in Europe) does not have an agreed upon legal characterization. At present there is *no* uniformity or expression of ‘ownership’ rights or ‘descendability’ over personal data in the US and the EU<sup>121</sup>; two of the more advanced digital markets in the digital economy.

“Who owns the data” and “What rights does ownership imply” are two of the most complex issues related to personal data<sup>122</sup>. It seems natural that data ownership lies with the creator, but online service agreements and the nature of the digital economy dilute that concept of ownership. The fact that personal information is linked to a non-descendible characterization of privacy makes the issue even more complicated. Furthermore, personal data has been characterized in other forms like a form of speech<sup>123</sup>, a copyrighted work fixed on a tangible medium<sup>124</sup>, an independent form of IP<sup>125</sup> and the subject of a misappropriation of contract claim<sup>126</sup>. The numerous characterizations of personal data will consistently create issues in the field of postmortem technologies particularly due to the overlap with the right of publicity. The dissertation aims to-

1. Examine the relevant characterizations of personal data along with the pros and cons of each system.

---

<sup>118</sup> World Economic Forum, *Personal Data: The Emergence of a New Asset Class*, January 2011, p. 5 onward:

([http://www3.weforum.org/docs/WEF\\_ITTC\\_PersonalDataNewAsset\\_Report\\_2011.pdf](http://www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf))

<sup>119</sup> Jeffrey Ritter, Anna Maye, *Regulating Data as Property: A New Construct for Moving Forward*, Duke Law & Technology Review, Vol. 16, p. 220-277, at p. 226 onward

<sup>120</sup> See generally- Paul M Schwartz, *Property, privacy, and personal data*, Harvard Law Review Vol. 117, 2003, p. 2056-2128; Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, Berkeley Technology Law Journal, Vol. 11, 1996, p. 1-79; T Z Zarsky, *Desperately seeking solutions: using implementation-based solutions for the troubles of information privacy in the age of data mining and the internet society*, Maine Law Review, Vol. 56, 2004, p. 13-59.

<sup>121</sup> Jeffrey Ritter, Anna Maye, *Regulating Data as Property: A New Construct for Moving Forward*, Duke Law & Technology Review, Vol. 16, p. 220-277, at p. 246; Edina Harbinja, *Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be The Potential Alternatives?*, (2013) 10:1 SCRIPTed 19: (<http://script-ed.org/?p=843>)

<sup>122</sup> World Economic Forum, *Personal Data: The Emergence of a New Asset Class*, January 2011, p. 16:

([http://www3.weforum.org/docs/WEF\\_ITTC\\_PersonalDataNewAsset\\_Report\\_2011.pdf](http://www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf))

<sup>123</sup> Lothar Determann, *Determann’s Field Guide to Data Privacy Law*, 3<sup>rd</sup> Ed. p. 158; He postulates that data is considered as an extension of *Free Speech & Expression* rights. **If** property rights exist, it belongs to the Data **Controller** who generates the data and owns the database (emphasis added).

<sup>124</sup> For **example**, in India information contained on computer databases are protected under the *Copyright Act* if there is a *modicum of creativity* in the format the data is presented. See- *Diljeet Titus v. Alfred A. Adebare*, 130 (2006) DLT 330, 2006 (32) PTC 609 Del; A similar view has been adopted in the US as well. See- *Feist Publ’ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 363 (1991); also see *Assessment Techs. v. Wiredata*, 350 F.3d 640, 644 (7th Cir. 2003)

<sup>125</sup> Pamela Samuelson, *Privacy as intellectual property*, Stanford Law Review Vol. 52, 1999, p. 1125-1167

<sup>126</sup> The 7<sup>th</sup> Circuit of the United States held that a database holder may bring an action for misappropriation against any 3<sup>rd</sup> party who uses that data may have an action based on breach of contract against the infringer but **does not hold a right in rem** against any subsequent infringers. Thus, data can be the subject matter of a contract giving rise for an action of that nature, even though it isn’t recognized as an intangible property. See- *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7<sup>th</sup> Cir. 1996)

2. Determine which characterization fits well in the scheme of rights implicated in postmortem technologies.

### §3.5. Digital Inheritances:

Regardless of the characterization of personal data assigned, it's an unavoidable fact that this generation of digital natives will leave large amounts of personal data in the cyberspace after they pass away. If personal data is an 'asset' it follows that the digital assets go to the estate after death. Conversely, if the deceased are unprotected by personal data legislations, their information falls into the public domain with no control over its ultimate disposition. Notwithstanding the intimate link with privacy rights, Courts have recognized that next-of-kin are entitled to access to the *digital assets* of the deceased without expressly defining the term<sup>127</sup>. Additionally certain jurisdictions like Delaware extend personal data protections to the deceased by recognizing that the estate has an interest in their digital accounts and information<sup>128</sup>. As the law catches up with the technology, we can expect more structured schemes of digital inheritances in the future.

Existing case law relating to digital assets relates to the family's access to private online accounts rather than the personal data provided for purely commercial purposes<sup>129</sup>. Similarly, legislations relating to digital inheritances often relate to *digital accounts* rather than commercial assets which have been stored digitally<sup>130</sup>. The limitation of legislative protection to digital accounts alone only provides *partial* protection to the interests of a celebrity and doesn't fully envisage the true capabilities of postmortem data. The dissertation aims to provide legislative solutions to protecting digital inheritances and the personal data of the dead. Rather than focusing on access to *personal information* of the deceased, the dissertation will focus on how specialized 'appearance' data can be controlled by the celebrity's estate through contractual arrangements or legislative protections.

---

<sup>127</sup> Courts interpret "digital asset" as *nontangible content* such as digital photos, software, videos, and online accounts but have avoided explicitly defining the term. See- *Cenveo Corp. v. CelumSolutions Software GmbH & Co.*, 504 F. Supp. 2d 574, at 576 (D. Minn. 2007); *Perloff v. Stein*, No. 10-1758, 2011 WL 666167, at 1 (E.D. Penn. 2011)

<sup>128</sup> There is no formal recognition that privacy itself extends beyond death, only certain aspects of it, like personal data rights and in some jurisdictions the right of publicity. See- Delaware *Fiduciary Access to Digital Assets and Digital Accounts Act*, 79 Del. Laws, c. 416, §1

<sup>129</sup> *Estate of Kresten Filtenborg Mortensen v. Denmark*, No. 1338/03, ECHR 2006; *In re Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005); *In re Request for order requiring Facebook, inc. to produce documents and things*, Case No: C 12-80171 LHK (PSG), 9/20/201; Also see- Jim Hu, *Yahoo Denies Family Access to Dead Marine's E-Mail*, CNET, December 21st 2004: ([http://news.cnet.com/Yahoo-denies-family-access-to-dead-marines-e-mail/2100-1038\\_3-5500057.html](http://news.cnet.com/Yahoo-denies-family-access-to-dead-marines-e-mail/2100-1038_3-5500057.html))

<sup>130</sup> For *example*, in July 2014, the Uniform Law Commission (ULC) proposed the *Uniform Fiduciary Access to Digital Assets Act (UFADAA)* to provide fiduciaries easy access to the *digital accounts* of their deceased clients. However, that legislation failed in all but one state in the US. See- Alberto B. Lopez, *Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets*, *George Mason Law Review*, Vol. 24 No. 1, 2016 p. 183

### §3.6. Existing Personal Data Rights:

Despite the existing lacunae in the data protection scheme, many existing rights could be used to control postmortem copies. In the EU, the GDPR gives data subjects the right to request data controllers to *erase* certain inaccurate or irrelevant personal data from their records<sup>131</sup> and from anyone else they may have transferred that data to<sup>132</sup>. Similarly personal data should be portable between different services providers<sup>133</sup> and should be rectifiable at the request of the data subject<sup>134</sup>. Applying rights such as these to the subject matter of the dissertation may help in arriving at an alternative *remedy* to using the postmortem data of the celebrity. For example, if a CGI rendition of a deceased actor isn't well-done, the estate can request the re-animators to fix the issues by a *rectification* request. If the estate gets a new offer from another production company, the CGI data can be *transferred* to another service provider to save time and resources. Utilizing personal data rights will be crucial to control alterations to one's posthumous digital copy (see §4.6).

### §3.7. Overlap of different Legal Protections:

The discussions above regarding descendability and legal characterization becomes relevant to our analysis when we consider the following deviations from the normal use of personal data-

- i. The data subject celebrity is *deceased*.
- ii. The data will be used to *completely* or *partially recreate* the image of the celebrity, creating right of *publicity* issues.
- iii. The digital copy will be performing *copyrighted material*.
- iv. The digital copy will be carrying the 'name' and 'reputation' of the celebrity, implicating possible trademark or defamation claims.

The dissertation will discuss data protection in the larger scheme of the rights implicated and the *purpose* of the postmortem technology used. The study will not dive heavily into the aspects of celebrity *informational privacy* which has already been discussed in previous academic literature.

### §3.8. Interests of Non-Celebrities:

Though celebrity interests are at the fore-front of postmortem existence, technologies like WBE which rely heavily on personal data also implicate the rights of ordinary individuals. After settling issues of characterization and postmortem enforcement of personal data rights, the dissertation will also discuss the

---

<sup>131</sup> *Google Spain v. Costeja*, CJEU [2013] C-131/12; EU *General Data Protection Regulation*, Article 17; For an analogous US right, see- *California Consumer Privacy Act*, 2018 §1798.105

<sup>132</sup> EU *General Data Protection Regulation*, Article 17(2); *California Consumer Privacy Act*, 2018 §1798.105(c)

<sup>133</sup> EU *General Data Protection Regulation*, Article 20

<sup>134</sup> EU *General Data Protection Regulation*, Article 16

unique issues that surround those individuals who volunteer massive amounts of data to such technological services.

## **Chapter 4: The Right of Publicity**

The Right of Publicity (or “*publicity right*” for the purposes of this section) is possibly the strongest legal protection available for postmortem ‘presence’ technologies. This is because holograms, CGI and XR will overtly rely on the display of one’s person for the use to be effective. Securing a strong publicity regime will be the surest way to protect performers in the course of their postmortem careers. Similar to personal data regimes, the right of publicity is far from unified and has many inconsistencies across different countries. **Chapter 4** will examine this right in detail insofar that it relates to postmortem technologies. While **Chapter 3** focuses on the information provided for creating the digital copy, this Chapter will focus on the protections afforded to the *final product*.

### **§4.1. Scope of the Right:**

In the US, States recognize publicity rights through common law or legislation, giving protection to the “*name, photograph or likenesses have been used for commercial purposes without his or her consent*<sup>135</sup>”. The core of publicity rights involves prohibiting the unauthorized use of the one’s “likeness” for commercial gain. In Europe, publicity rights- an interest in one’s image- is bundled with the larger Human Right of *Personality*<sup>136</sup>. EU personality rights among other things protects image, reputation and *personal data* under the larger umbrella of privacy laid down under Article 8 of the European Convention on Human Rights (“*ECHR*”). In India, another large media market, publicity rights have not been codified but exist as a common law remedy available for an ‘*identifiable*’ claimant<sup>137</sup>. Despite its importance in the entertainment industry, publicity rights are not unified and depend on idiosyncratic jurisdictional protections afforded. This Section will define the right and find commonalities in the different regimes to help identify the strongest avenues for protecting the deceased.

### **§4.2. Legal Characterizations of Publicity Rights:**

Similar to personal data, it is unclear whether the right of publicity is a *property right* or a subset of *privacy*. The fact that a celebrity dedicates his/her life to developing a carefully created image for their audience complicates the characterization issues further. As mentioned above, it is well settled in Europe that image

---

<sup>135</sup> *California Civil Code*, § 3344

<sup>136</sup> *European Convention on Human Rights*, Article 8; For a commentary and expansion of the text, see- The European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights*, p. 34 August 31<sup>st</sup> 2019: ([https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf))

<sup>137</sup> *ICC Development International v. Arvee Enterprises*, 2003 (26) PTC 245 Del, 2004 (1) RAJ 10

interests are part of ‘personality’ which is a species of privacy interests<sup>138</sup>. In the US, the right of publicity was created as an *extension* of privacy and was developed with intent to protect individuals whose name or persona has commercial value<sup>139</sup>. But as ‘public’ figures started commercializing their identities *at the cost* of their own personal privacy, the link between publicity rights and ‘privacy’ seemed counterintuitive; leaving the legal characterization ambiguous. The seminal US Second Circuit Court case of *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.* had laid the groundwork for divorcing publicity from privacy<sup>140</sup> and the Supreme Court subsequently gave the right express recognition<sup>141</sup>. Gradually a split has occurred within the US as to whether publicity is a privacy or property right.

The dissertation shall examine the characterization of image interests in relevant jurisdictions to determine what the prevailing view is and which characterization is best suited for postmortem technologies. The characterization of publicity rights has a determinative outcome as to whether those rights can be *inherited* by one’s estate (discussed in the next Section).

#### §4.3. Postmortem Right of Publicity:

If publicity is characterized as a personal privacy right, and if privacy is *not* descendible, then *no postmortem right of publicity exists*.<sup>142</sup> However, if publicity is characterized as a property interest<sup>143</sup>, it *is* descendible and subject to the same rules of transfer and alienation similar to that of real property or IP<sup>144</sup>. Outside of the US, media markets like India haven’t even *considered* the issue of postmortem publicity, leaving quite an exposed vulnerability. Therefore, from looking at the above, it’s evident that legal characterizations *determine* descendability and ultimately *who* gets control of the postmortem digital copy. This Section of the dissertation can be seen as an extension on the debates around the descendability of privacy highlighted in §3.3. This

---

<sup>138</sup> The European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights*, p. 33 to 53, August 31<sup>st</sup> 2019: ([https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf))

<sup>139</sup> Michael Decker, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity's Transformation at Death*, *Cardozo Arts & Entertainment Law Journal*, Vol. 27 No. 1, 2009, p. 244-271 at p.249

<sup>140</sup> Stating that “*We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made “in gross,” i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled [sic] a “property” right is immaterial; for here, as often elsewhere, the tag “property” simply symbolizes the fact that courts enforce a claim which has pecuniary worth.*” (Emphasis added). See- *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, at 868 (2d Cir. 1953)

<sup>141</sup> Holding that “*The protection of petitioner's right of publicity provides an economic incentive for him to make the investment required to produce a performance of interest to the public*” *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (SCOTUS, 1977)

<sup>142</sup> For example, Illinois (through the 7<sup>th</sup> Circuit Court) and Ohio have held that publicity is a *personal* privacy right which terminates at death. See- *Maritote v. Desilu Productions*, 345 F.2d 418 (7th Cir. 1965), 382 U.S. 883 (Illinois); *Reeves v. United Artists*, 572 F. Supp. 1231 (N.D. Ohio 1983), 765 F.2d 79 (1985).

<sup>143</sup> For example, Georgia and New Jersey have held publicity to be a property right *fully* assignable and devisable at death. See- *Martin Luther King, Jr., Center for Social Change v. American Heritage Prods.* 296 S.E.2d 697 (GA, 1982); *Ehls Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

<sup>144</sup> Keenan C. Fennimore, *Reconciling California's Pre, Post, and Per Mortem Rights of Publicity*, *Indiana International & Comparative Law Review* Vol. 22 No.2, 2012, p. 377-409

Section of the thesis will discuss the relevant schemes of postmortem publicity in the context of the relevant characterizations given by the jurisdictions.

#### §4.4. Domicile:

A complete solution to the issues caused by characterizations is a clear legislative mandate that post-mortem publicity protections exist<sup>145</sup>. In the US the future of a celebrity's image interests depends completely on whether they are *domiciled* in a State where post-mortem publicity is recognized. For example, California prominently allows publicity actions to be carried forward by the celebrity's assignees/ successors in interest for 70 years past their death<sup>146</sup>. Meanwhile, New York extinguishes this Right at death<sup>147</sup>. This lack of consistency in protection could result in exploitation of the loopholes of the law. A notorious case on this subject related to the estate of Marilyn Monroe who was unable to claim an interest in her right to publicity posthumously as it was determined that she was *domiciled* in New York at the time of her death<sup>148</sup>. The dissertation shall examine-

- i. The various regimes of post-mortem publicity protection (or the lack thereof) along with their idiosyncratic rules and duration of protection.
- ii. The rules for establishing domicile.

An analysis of the above will help determine which scheme of protection best fits the new generation of technology and strategic recommendations to protect posthumous interests.

#### §4.5. Combined Digital Inheritances:

Any future involving post-mortem presence *or* existence requires *some legal acknowledgement* of posthumous data protection and publicity rights. Otherwise celebrities and lay individuals are left completely unprotected and unscrupulous actors can take advantage of the vacuum in the law. One innovative solution would be to *utilize* the principles of property law and *extend* the right of publicity to one's *digital assets*<sup>149</sup>. Such a measure would possibly provide an estate a bundle of crucial rights required to control post-mortem interests of the deceased. The dissertation shall discuss this option with reference to the discussion in §3.5. above along with the aspects of characterization in §3.4 and §4.2.

---

<sup>145</sup> For example, Indiana, Florida, Kentucky, Nebraska, Nevada, Oklahoma, Tennessee, Texas and Virginia have recognized a post-mortem publicity right (among others).

<sup>146</sup> California *Civil Code*, §3344

<sup>147</sup> New York *Civil Rights Law*, §50, 51

<sup>148</sup> *Milton H Greene Archives Inc. v. Marilyn Monroe LLC et al.* 692 F.3d 983 (9<sup>th</sup> Circuit, 2012)

<sup>149</sup> This is convincingly postulated by- Natasha Chu, *Protecting Privacy after Death*, *Northwestern Journal of Technology & Intellectual Property*, Vol. 13, 2015 p. 255- 275 at p. 268.

<https://scholarlycommons.law.northwestern.edu/njtip/vol13/iss2/8>

#### §4.6. Postmortem Control over Alterations or Destruction:

All of the issues highlighted above tie into the amount of *control* an estate can exert over a post-mortem digital copy. Holographic musicians and completely synthetic CGI actors present new difficulties as we can see the rise of unauthorized and altered copies of celebrities<sup>150</sup> through these post-mortem technologies. Conversely there can be situations where a hologram is *decommissioned* or ‘erased’ due to underperformance or replacement, *despite* the wishes of a deceased performer and their estate<sup>151</sup>. Enforcing the wishes of the deceased and control over unauthorized or altered post-mortem copy can be carried out through right of publicity, copyright, trademark, defamation<sup>152</sup> and personal data claims. The rights to the post-mortem copy can be bolstered by strong estate planning and licensing arrangements. This Section of the dissertation shall explore the existing avenues in right of publicity regimes to prohibit unauthorized creation, alteration and removal of a digital copy. We shall examine the legal protection available while keeping in mind the technology’s ability to *transfer unique components* of one’s personality like- voice, humor, mannerisms, recollections and image<sup>153</sup>. Additionally the discussion will also bring in the discussions relating to personal data claims to restrict alteration discussed above in §3.6.

#### §4.7. The European ‘Personality Rights’ & the *Dignity Tie-Breaker*.

In stark contrast to the idea of commoditizing one’s personal data and publicity rights, the European view on ‘personality rights<sup>154</sup>’ provides an alternate school of thought to image interests by connecting it closely to one’s *reputation*<sup>155</sup>. The best-case study on this subject comes from the ECHR Judgment in the *Princess Caroline von Hannover* case in 2012<sup>156</sup>. The case was filed in German and French Courts based on the frequent intrusions into her personal life by the news media, stating she had a right to protect the use of her image, personality and access to her private life. The ECHR in its landmark judgment held-

“*[A] person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one’s image is thus one of the essential components of personal development. It mainly presupposes the*

---

<sup>150</sup> Joseph. J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, Berkley Technology Law Journal, Vol.16, No.3 2001, p.1209 onward

<sup>151</sup> Joseph. J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, Berkley Technology Law Journal, Vol.16, No.3 2001, p.1224

<sup>152</sup> For an excellent discussion on the protections surrounding ‘synthetic’ actors, see- Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property Law*, Berkeley Technology Law Journal, Vol. 8, 1993, p. 101

<sup>153</sup> For example see- Ki Mae Heussner, “*Experimental Tech Restores Roger Ebert’s Voice*”, ABC News, March 2<sup>nd</sup> 2010: (<https://abcnews.go.com/Technology/roger-eberts-voice-restored-experimental-technology/story?id=9987141>)

<sup>154</sup> Discussed above in §4.1.

<sup>155</sup> *European Convention on Human Rights*, Article 8; *Guide on Article 8 of the European Convention on Human Rights*, p. 33 to 38, August 31<sup>st</sup> 2019: ([https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf))

<sup>156</sup> *Caroline von Hannover v. Germany (no. 2)*, ECHR, Grand Chamber, Judgment of 7 February 2012

*individual's right to control the use of that image, including the right to refuse publication thereof...<sup>157</sup>*" (emphasis added)

The judgment aptly points to the fact that 'Personality' is a larger concept than 'Publicity' and finds its roots in *Privacy* and human *Reputation/Dignity*. A reputation-centric publicity rights system would strongly support the interests of a performer by giving greater weight to any claims against unauthorized or altered copies of them. Some postulate that a *dignity tie-breaker* be implemented in cases where an image interest is in conflict with expression<sup>158</sup>. A dignity 'tie-breaker' can be considered as a serious option for cases surrounding the alteration of a celebrity's image. However, it's important to remember that German Courts consider human dignity to be the 'backbone' of their constitution allowing it to trump artistic expression in cases of conflict<sup>159</sup>. This attitude may not translate into other legal cultures, particularly in the US where commercial interests are prioritized over an artist's *moral rights*<sup>160</sup>, which is an aspect of the reputation-based system of the EU.

The European 'holy trinity' of personality rights- *privacy, image & reputation*- at first glance seems to be ideal to protect posthumous celebrity interests. However, it's important to remember that a reputation based model is rooted in privacy which is generally not descendible (see §3.3.), and may not fit a competitive media market. The dissertation shall explore whether the EU model is preferable to a commoditized model and which will be best suited for protection against posthumous infringement.

#### §4.8. Freedom of Speech in Postmortem Copies:

Posthumous performances, alterations and renditions of a deceased celebrity are a form of *speech* and will likely attract free speech and expression defenses to infringement<sup>161</sup>. This will be particularly so in the case of alterations and changes to the celebrity after death using different mediums. In the US the *transformative use* test for copyright-based First Amendment claims has been implemented in right of publicity cases<sup>162</sup>. The mere fact that a performance may 'look' realistic doesn't immunize it from First Amendment claims, and

---

<sup>157</sup> *Caroline von Hannover v. Germany (no. 2)*, ECHR, Grand Chamber, Judgment of 7 February 2012, §96

<sup>158</sup> See- Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, European Journal of International Law, Vol. 19, 2008, p. 656-63

<sup>159</sup> *Mephisto Case*, BVerfGE 30, 173, Federal Constitutional Court, Feb. 24, 1971, German Law Archive (translated by Tony Weir, Trinity College, Cambridge), (<https://germanlawarchive.iuscomp.org/>); Similar to Germany, the *droit a l' image* follows a similar route with *moral rights* implicated with privacy and reputational interests in controlling the use of one's image. See- Elisabeth Logeais & Jean-Baptiste Schroeder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona*, Loyola Entertainment Law Review, Vol. 18, 1998, p. 511, at p. 519

<sup>160</sup> See- *Gilliam v. ABC*, 538 F.2d 14, 24 (2d Circuit 1976); see also *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997) noting that "accepted wisdom that the United States d[oes] not enforce any claim of moral rights".

<sup>161</sup> United States *Constitution*, First Amendment; Also see- *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001)

<sup>162</sup> Matthew D. Bunker, *Free Speech Meets the Publicity Tort: Transformative Use Analysis in Right of Publicity Law*, Communication Law & Policy, Vol. 13, 2008, p. 301, 305; Expressly adopted in- *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001)

some have suggested applying the *transformative use* test to holographic performances as well<sup>163</sup>. The dissertation shall discuss postmortem publicity rights in the context of free speech concerns in this Section.

## **Chapter 5: Sponsorships, Endorsements & Trademarks**

Advertising is a prime commercial avenue for using postmortem celebrity copies<sup>164</sup>. During the lifetime of a celebrity, sponsorships and endorsements are carefully chosen based on the *personal* preference toward the good or service sponsored. After death, endorsements and the choice thereof lie in the hands of others, be it the estate or the entity holding the relevant licenses. But unlike motion pictures or musical performances, advertising requires a greater deal of restraint as a poor rendition can be seen as tasteless<sup>165</sup> or a blemish on a person's ante-mortem legacy<sup>166</sup>. Trademark law is heavily entrenched on the commercial side of IP protection as a *source identifier* for goods and services. However, legislations like the US Lanham Act safeguard against *false endorsement* by providing 2 types of claims for protection- *false advertising*<sup>167</sup> and *trademark infringement*<sup>168</sup>- which can be crucial tools to prevent any dilution or tarnishment of the celebrity's 'brand'.

### **§5.1. False Advertising through Endorsements:**

A claim for false advertising exists where one can show a *personal identification* of oneself and the use of it in a manner which is *likely to confuse* the *sponsorship or approval* of the product or service<sup>169</sup>. False endorsement claims are not formally classified as a 'trademark' infringement because they stem from *unfair competitive practices* which results in *actual or potential* deception<sup>170</sup>. Consumer confusion in celebrity sponsorships equates a trade "mark" as the *celebrity's persona*<sup>171</sup>. Celebrity persona as a source identifier for the purposes of the Lanham Act has been argued successfully in cases involving confusion in advertising<sup>172</sup> and from *look-alike performers*<sup>173</sup>. But most

---

<sup>163</sup> For a strong First Amendment analysis on the Tupac Shakur hologram, see- Shannon Flynn Smith, *Virtual Cloning: Transformation or Imitation? Reforming the Saderup Court's Transformative Use Test for Rights of Publicity*, California Legal History Journal, Vol. 9, 2014, p. 339-380

<sup>164</sup> For example, the newly commissioned hologram of Whitney Houston is planned to appear in a few endorsements in the future. See- Ben Sisario, "Whitney Houston's Estate Plans a Hologram Tour and a New Album", The New York Times, May 20<sup>th</sup> 2019 :(<https://www.nytimes.com/2019/05/20/business/media/whitney-houston-hologram-album.html>)

<sup>165</sup> For example, Film director David Fincher has once already received criticism in 2007 for using the then deceased Orville Redenbacher's image in a commercial by recreating it with a 3-D clay animation.

<sup>166</sup> For example, Bruce Lee's Johnny Walker advertisement was considered a 'disgrace' because he did not drink in real life and was made to speak a language which was not his original native tongue. See- Jeremy Blum, "Bruce Lee whiskey advert branded a disgrace", South China Morning Post, July 10<sup>th</sup> 2013: (<https://www.scmp.com/news/hong-kong/article/1279469/bruce-lee-returns-promote-alcohol>)

<sup>167</sup>US Lanham Act, § 43(a) (15 U.S.C. § 1125)

<sup>168</sup>US Lanham Act, § 32 (15 U.S.C. § 1114)

<sup>169</sup> US Lanham Act, § 43(a) (15 U.S.C. § 1125)

<sup>170</sup> *Allen v. National Video*, 610 F. Supp. 612, 625 (S.D.N.Y. 1985)

<sup>171</sup> *White v. Samsung Electronics America*, 971 F.2d 1395, 1400 (9th Cir. 1992)

<sup>172</sup> For example, see *Motschenbacher v. R. J. Reynolds Tobacco, Co.*, 498 F.2d 821 (9th Cir. 1974).

<sup>173</sup> *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981)

importantly, Courts have *expressly recognized* a postmortem right under the Lanham Act<sup>174</sup>. The dissertation shall study false advertising claims under the Lanham Act and analogous legislations to delineate the nature and level of protection afforded to a deceased celebrity.

## §5.2. Trademark in a Celebrity Name:

Many celebrities have the prudence to give additional protection to their name as their brand, by registering them as Trademarks. Some notable examples are Donald Trump, Jay Z & Beyonce (along with their child's name; Blue Ivy Carter, which was later withdrawn)<sup>175</sup> and controversially, Bollywood actor Shahrukh Khan's initials *SRK*<sup>176</sup>. In the US, celebrities can freely trademark and monetize their names for the use in trade and protection of it from being misused by others. The protection is so well established that celebrities are now using it as an additional protection to the right of publicity. A notable example is the estate of Marilyn Monroe suing Digicon Media under a theory of trademark to prevent the use of her hologram in New York<sup>177</sup> (which does not recognize posthumous publicity claims). Ms. Monroe's Estate cites *consumer confusion* and *implying an endorsement or association with Marilyn Monroe* under their trademark action<sup>178</sup>. Trademarks are *not* a separate item of property but are rather treated as an appurtenant to the ongoing business run by the celebrity. Similarly, Indian trademark law, neither allows nor prohibits the trademarking of one's name, but requires that it *must* be used in connection to a good or service<sup>179</sup>. Regardless of the business-oriented aspects of trademark law, the connection between the celebrity name and the business provides a layer of protection in cases where other viable remedies don't exist. This Section of the dissertation will examine the contours of celebrity trademarks as an alternative level of protection for unauthorized use or a poor quality rendition using postmortem technologies.

---

<sup>174</sup> *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1072 (9th Cir. 2015)

<sup>175</sup> Danny Paez, *Celebrity Trademarks: from Donald Trump to Jay-Z*, CNBC, October 29<sup>th</sup> 2015:

(<https://www.cnbc.com/2015/10/29/celebrity-trademarks-from-donald-trump-to-jay-z.html>)

<sup>176</sup> Shahrukh Khan's use of his initials SRK, which was controversially applied for, and was claimed for all 45 Categories of Indian Trademarks with much criticism. See- Selvam & Selvam, *Celebrity Rights in India: SRK and his trademark move!* Trademark Blog October 29<sup>th</sup> 2014: (<https://selvams.com/blog/celebrity-rights-in-india-srk-and-his-trademark-move/>)

<sup>177</sup> Eriq Gardner, *Marilyn Monroe Estate Threatens Legal Action Over Hologram*, The Hollywood Reporter, June 6<sup>th</sup>, 2012:

(<http://www.hollywoodreporter.com/thr-esq/marilyn-monroe-estate-hologram-legal-334817>)

<sup>178</sup> *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152 (C.D. Cal. 2008) aff'd sub nom. *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012)

<sup>179</sup> *Indian Trademarks Act*, §2(zb); This is similar to the position in the US however more restrained in its application as catch-phrases and children's names are rarely up for consideration in the Indian trademark culture. See- Kaitlyn Tiffany, "Why celebrities try to trademark their catchphrases and baby names", Vox, April 19<sup>th</sup> 2019: (<https://www.vox.com/the-goods/2019/4/19/18507920/celebrity-trademark-history-baby-names-taylor-swift>)

### §5.3. Trade Dress Infringement:

Another feature of §43(a) of the Lanham Act is the protection of *trade dresses* as part of false advertising<sup>180</sup>. A trade dress is the *overall appearance* and *total image* of a good or service and can include features like size, shape, color (and combinations thereof), textures, graphics and even certain sales techniques<sup>181</sup>. In cases of celebrities who are *intertwined* with their brand and appearance (like the rapper “Flava Flav” the eccentric hip-hop artist who is known for wearing a “wall clock” around his neck) a distinctive trade dress claim can be an effective tool to protect his/her postmortem interests. Trade dress claims can also be useful tools to prevent blatant copying by infringers.

Consider for example that VR LLC creates a hologram of deceased wrestler ‘the umpire’ *playing* his singular iconic role from his time in WWE for the purposes of a VR wrestling game. Assume for the purposes of this example that the umpire passed away in a jurisdiction which does *not* recognize postmortem publicity, which permitted VR LLC to validly use his image without permission. VAR LLP is a company which (through corporate espionage) blatantly use and copy the VR version of the umpire for their VR game relating to baseball. VR LLC can arguably file a claim against VAR LLP for their use of the umpire’s trade dress through copying of his overall appearance in a virtual format. The dissertation shall examine the viability of trade dress claims keeping in mind the tests of *distinctiveness*<sup>182</sup>, *non-functionality*<sup>183</sup>, the *registration standards*<sup>184</sup>, and *overall appearance*<sup>185</sup>.

### §5.4. Dilution of a Legacy:

A celebrity’s legacy and reputation is linked with his name and persona built over a lifetime to make him/her *famous*. Picture the year is 2040 and the ability to make postmortem VR copies is simple and can be done with some data and an app, which leads to rampant ‘cloning’ of a celebrity across different corners of the world. The increase in postmortem copies leads to an overall *dilution* of the celebrity’s brand value in the public eye<sup>186</sup>. ‘Famous’ marks are well-known source identifiers in the consuming public’s eye<sup>187</sup> and the Lanham

---

<sup>180</sup> The act protects “any word, term, name, symbol, or device, or any combination thereof” used “on or in connection with any goods or services, or any container for goods.” See- US *Lanham Act*, § 43(a) (15 U.S.C. § 1125)

<sup>181</sup> *John H. Harland Co. v. Clarke Checks, Inc.*, 771 F.2d 966, 980 (11th Cir. 1983); this view was upheld by the US Supreme Court in- *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S.Ct. 2753 (1992).

<sup>182</sup> See- *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S.Ct. 2753 (1992)

<sup>183</sup> See- *Warner Brothers, Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 331 (2d Cir. 1983).

<sup>184</sup> Trade dresses are subject to the same standards of registration as trademarks. See- US *Lanham Act*, 15 U.S.C. §§ 1052 and 1091

<sup>185</sup> *Paddington Corp. v. Attiki Importers & Distrib.*, 996 F.2d 577, 584 (2d Cir. 1993)

<sup>186</sup> See- US *Lanham Act*, § 43(c) (15 U.S.C. § 1125)

<sup>187</sup> US *Lanham Act*, § 43(c) (2) (15 U.S.C. § 1125)

Act permits the holder of the mark to file *dilution* claims against infringers. Trademark dilution claims can take 2 forms<sup>188</sup>-

- i. Dilution by *blurring*- a misleading association of the famous mark with low quality goods. For example: Having a postmortem hologram of Frank Sinatra performing at a ‘dive’ bar.
- ii. Dilution by *tarnishment*- a misleading association of the famous mark which harms the *reputation* of the brand. This is commonly claimed in cases where famous mark is associates with offensive goods in an unwholesome or degrading context<sup>189</sup>. For example, using a postmortem CGI copy of an actress for a pornographic film<sup>190</sup>.

J. Beard in his renowned 1993 paper convincingly argues that a postmortem claim can be made by an actor against the re-animators of a synthetic copy of himself has a strong claim for tarnishment if the portrayal is uncharacteristic, unsympathetic or repugnant to the memory of the deceased<sup>191</sup>. The dissertation shall examine his views along with the feasibility for protection that dilution claims may have in postmortem renditions of a celebrity.

### §5.5. Common Law Remedies:

Outside of Lanham Act claims relating to false endorsement and trademark infringement, the deceased celebrity also has possible common law remedies<sup>192</sup> to prevent misappropriation of their goodwill and unjust enrichment of another. These include unfair competition based claims where goods and services are *misrepresented* to the public as having an association with another’s business resulting in unjust enrichment<sup>193</sup>. These include remedies like (express or implied) *passing off*, *palming off*, *reverse palming off* etc.<sup>194</sup> Common law remedies like passing off are born from principles of unfair competition and are aimed at preventing the misappropriation of *goodwill* developed during the course of trade<sup>195</sup>. This Section of the dissertation will

---

<sup>188</sup> US *Lanham Act*, § 43(c) (2) (B) & (C) (15 U.S.C. § 1125)

<sup>189</sup> J. Thomas McCarthy, *Trademarks and Unfair Competition*, 1992, §24.16, at p. 24-131

<sup>190</sup> Association with pornographic goods has been recognized as a form of tarnishment. See- *Dallas Cowboy Cheerleaders v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366(S.D.N.Y.), affd, 604 F.2d 200 (2d Cir. 1979))

<sup>191</sup> Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property Law*, Berkeley Technology Law Journal, Vol. 8, 1993, p. 178 to 180

<sup>192</sup> For example, Indian law recognizes the existence of alternative remedies under Tort/ Common Law. See- Indian *Trademarks Act*, §27; Also see- Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property Law*, Berkeley Technology Law Journal, Vol. 8, 1993, p. 173 to 177

<sup>193</sup> One bearing a name made famous by another is permitted to enjoy the unearned benefit which necessarily flows from such use, even though the use proves harmful to him who gave the name value. See- *Brown Chemical Co. v. Meyer*, [1891] USSC 123; 139 U.S. 540, 544[1891] USSC 123

<sup>194</sup> J. Beard provides a good overview on the various common law remedies available to post-mortem reanimations of actors, particularly with regard to assigning appropriate *credits* in motion pictures. See- Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property Law*, Berkeley Technology Law Journal, Vol. 8, 1993, p. 173 to 177

<sup>195</sup> *International News Service v Associated Press* [1918] USSC 191; 248 U.S. 215

address the possible common law remedies like those mentioned above to determine alternative avenues for protecting celebrity brands absent formal registration under a trademark statute.

### §5.6. Enforcing Artistic Discretion beyond the Grave:

What's the difference between a posthumous use of image in an endorsement as opposed to a *complete* recreation for a concert or a role? At the outset, consider the philosophical and moral ramifications; endorsements are works which are *detached* from the true talents the artists possess. When a member of their 'fan-base' sees an endorsement, they are fairly aware that the celebrity is giving his approval in exchange for a pretty penny. However, when it comes to new works created such as a holographic musical performance, or a CGI portrayal of their previous characters, the issue of *artistic discretion, taste* and matters of simply making an *informed choice* are not possible. This is not to say that it's impossible to maintain endorsement credibility from beyond the grave. This Section of the dissertation will look into the various ways a celebrity can do so by will, contract or simply an *artistic preference guide* given to the administrator of the estate<sup>196</sup>.

## Chapter 6: Copyright Issues

Celebrity interests in their trade naturally gravitate toward copyright law. That is because copyright protects their artistic creations during their lifetime and long after their death. Postmortem technologies both inside and outside of the entertainment industry implicate copyright interests on some level, be it in the database, the digital code required to create the copy or in the performance itself. Unlike publicity or personal data rights, the survival of the copyright interest after the death of the performer is often *assured* as copyright terms extend past death<sup>197</sup>. Therefore it's not a question as to whether the artist's estate will be *entitled* to copyright claims; it's a question of the *scope* of the right and enforcing it. **Chapter 6** of the dissertation will dive into the protections available under copyright statutes along with the possible issues ahead.

### §6.1. Copyright in the Creation of the Postmortem Copy:

The digital 'revival' of the postmortem celebrity involves copyright on many levels. Firstly, copyrighted material may be required for an *indirect* reanimation of the celebrity by looking at stock footage, photographs; past movies etc.<sup>198</sup> Secondly, the creators of the digital copy may have a copyright interest in the *database*

---

<sup>196</sup> For example, a celebrity can put an *express* list of objectionable goods and services which should *not* be part of his post-mortem endorsements.

<sup>197</sup> For example, the US Copyright Act recognizes the duration of a copyright as the life of the author plus 70 years. See- US *Statute of Anne*, (17 U.S.C. §302(a)); Indian *Copyright Act*, 1957, §22- recognizing a 60 year validity after death

<sup>198</sup> The indirect approach can be done in **4 ways**- "(1) create a bust from a life mask impression of the subject; (2) create a bust of the individual from reference photographs or motion picture frames; 109 (3) create a digital three-dimensional model using photogrammetry; 110 or (4) scan a look-alike and then "tweak" the data to improve the comparison to the individual being simulated, a body double providing realistic scan data for the rest of the simulated human." See- Joseph. J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, Berkley Technology Law Journal, Vol.16, No.3, 2001, p. 1186 to 1189

*itself*<sup>199</sup> provided it has a degree of originality<sup>200</sup>. Lastly, the creators can claim a copyright in the final product of the digital deceased celebrity by virtue of holding the rights in the performance or rights in the reproduction of the clone. If the creators have a valid copyright interest in the clone, they can *prevent* unauthorized performances by clever infringers. Similarly, if they hold a copyright interest in the final product/ performances for the audiences, they can prevent *altered* copies or cheap ‘knock-offs’ of their copyrighted material. It is evident that the creators- likely a corporation holding the collective rights for the postmortem copy- wield a large amount of power to maintain *quality* of the copyright. This Section will discuss where copyright interests are triggered in the course of creating the postmortem copy and how best to protect them.

## §6.2. Copyright in the Performance- Transferrable ‘Talents’:

A postmortem copy can be made of copyrighted elements *and* can perform copyrighted materials. A celebrity’s ‘talent’ is an amalgamation of different factors which makes them a unique performer for the public. This could be their overall appearance, distinctive aspects of their look, voice, demeanor, mannerisms etc. Talents are *transformed* into copyright or royalties over the course of the celebrity’s lifetime which leads to the natural contribution of the culture. Before post-mortem technologies, separating copyright from the right of publicity aspects was easier, but the rapid pace of growth has led to a difficult fusion of the two regimes. The physiognomy and physical attributes of a celebrity are not protected by copyright<sup>201</sup> wither is one’s voice<sup>202</sup> but what if those aspects are *intertwined* with the overall performance? For example, consider a stand-up comedian who heavily uses a *unique* set of physical movements, tone of voice and timing of the joke into their act. If a post-mortem hologram *minutely* alters all the unique features of the performance above with an altered set of jokes, how would the performer protect his interests in that case? This Section shall examine the full scope of what can be copyrighted in performance arts.

Legislations and case laws often delineate the rules surrounding the death of the artist and the disposition of his copyright interests with his/her estate or licensees. However, legal systems are yet to face issues surrounding *talent development* after death. A relevant example in today’s world is the hologram of the deceased pop-star Selena who is set to go on-tour with classic hits *and* new/ unreleased songs as well<sup>203</sup>. How do the legal rules surrounding copyright interplay with one and other when some of the talent is made prior to death

---

<sup>199</sup> Data alone is not copyrightable; it is the *compilation and arrangement* of the data which makes it copyrightable. US *Statute of Anne*, (17 U.S.C. §101)

<sup>200</sup> The standard for ‘originality’ in databases is far from settled. See- US Copyright Office, *Report on Legal Protection for Databases*, 1997, p. 12 to 17: (<https://www.copyright.gov/reports/db4.pdf>)

<sup>201</sup> Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property Law*, Berkeley Technology Law Journal, Vol. 8, 1993, p. 117

<sup>202</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460,462 (9th Cir. 1988), cert. denied, 112 S.Ct. 1513 (1992).

<sup>203</sup> Spencer Kornhaber, “*The Miracle of CGI Selena*” The Atlantic, 10<sup>th</sup> April 2015, (<https://www.theatlantic.com/entertainment/archive/2015/04/the-inevitability-of-hologram-selena/390186/>)

while some of it is *developed* postmortem? This brings up issues of joint authorship and work-for-hire<sup>204</sup>. This Section shall also discuss talent development in copyright after death along with the ownership issues it presents. Finally, this Section shall also discuss the idiosyncratic copyright issues that exist in the copyright holder exerting his/ her *exclusive rights*<sup>205</sup> of reproduction, distribution, performance<sup>206</sup>, display, and the right to create derivative works.

### §6.3. Character & Performer as One:

Recently in testifying in an *Intrusion upon Seclusion* suit filed against Gawker Media for releasing his ‘sex-tapes’ on the internet, Hulk Hogan, the world-renowned wrestler tried to separate his *persona* from his *real-life personality* stating that the two live harmoniously in the public eye, but not privately<sup>207</sup>. This was an interesting proposition given in the middle of salacious details in a trial. A *WWE character* is fully embodied in *one man*, namely, Hulk Hogan *played by* Terry Bollea. This is a classic example of an *interwoven* artist where the copyright & publicity interests are closely connected. Determining how to separate the two interests would become a relevant point to our analysis as the public often unconsciously associates *character* with its *actor*. Therefore, when a CGI/ hologram recreation of a deceased celebrity takes place, *balancing the interests* of the estate and the copyright holder would be a necessity for weighing royalties and compensation. This Section will help determine who would have the stronger claim when a performer and character are considered as one personality to the public.

### §6.4. Copyright in Postmortem *Existence* Technologies- Unprotected Features:

Sentient and knowing existence after death is still an abstract concept and enters a largely unlegislated portion of the law. Technologies like WBE (discussed in §2.2. above) are not particularly impactful to the entertainment industry and serve a more scientific and therapeutic purpose. Conceptually, a person uploads as much personal data and information into the system with the objective that a robotic version of themselves exists indefinitely past their death<sup>208</sup>. The final interface is expected to imitate the deceased’s *responses*,

---

<sup>204</sup> US *Statute of Anne*, (17 U.S.C. §201)

<sup>205</sup> US *Statute of Anne*, (17 U.S.C. §106)

<sup>206</sup> §6.2. will also discuss how the very *nature* of ‘concerts’ have changed with the advent of *bi-coastal* and *partially posthumous* band performances and the impact it will have in rights of the copyright holder. See- Abdullah Saeed, “*Why MIA and Janelle Monae’s Hologram Collab Signals The Inevitable Future of Concerts*”, *Vice*, April 4<sup>th</sup> 2014: ([https://www.vice.com/en\\_us/article/wnpdpb/why-mia-and-janelle-monaes-hologram-collab-signals-the-inevitable-future-of-concerts-5899ce300835694ef25b51e4](https://www.vice.com/en_us/article/wnpdpb/why-mia-and-janelle-monaes-hologram-collab-signals-the-inevitable-future-of-concerts-5899ce300835694ef25b51e4)); Cory Grow “*‘Bizarre World of Frank Zappa’ Hologram Tour Not So Bizarre After All?*”. *The Rolling Stone*, April 25<sup>th</sup> 2019: (<https://www.rollingstone.com/music/music-live-reviews/frank-zappa-hologram-tour-review-827195/>); Cory Grow, “*Ronnie James Dio Hologram Plots World Tour?*”, *The Rolling Stone*, July 26<sup>th</sup> 2017: (<https://www.rollingstone.com/music/music-news/ronnie-james-dio-hologram-plots-world-tour-202860/>)

<sup>207</sup> Associated Press, *Hulk Hogan separates persona from person in sex tape trial*, March 8<sup>th</sup> 2016, *Chicago Tribune*, (<http://www.chicagotribune.com/entertainment/ct-hulk-hogan-gawker-sex-video-lawsuit-20160308-story.html>)

<sup>208</sup> See: IdeaCity, “*Bruce Duncan- Talks with the World’s Most Sentient Robot?*”, August 31<sup>st</sup> 2013: (<https://www.youtube.com/watch?v=mwOFWABbfW8>)

*mannerisms, thought-process and recollections* as they would have as if the person were alive<sup>209</sup>. However, those aspects of an individual's personality are sparsely protected if at all. A person's mannerisms may be protected by a right of publicity claim but how can we protect a unique thought process or memories of an individual? For example, consider that WBE is used on Stephen Hawking to recreate his renowned intelligence and ability to theorize beyond the grave. If the facts of his life are not copyrightable<sup>210</sup> it follows that his memories and recollections are not either. If the 'thought process' is recreated with Ai owned privately by a corporation, he no longer *owns* or *controls* that unique aspect which made him a prominent figure in the world.

Postmortem existence brings in a new challenge of unsanctioned copies of a deceased person's *psyche* which has not been considered under the law. If the person were living, they would perhaps have remedies under personal data legislations, but a deceased may not have that same right. Similarly, right of publicity is not implicated if there is no visual representation of the person. Copyright in the *code* favors the holder of the database over the deceased person. The strongest measures will likely be contractual with a postmortem beneficiary given the enforcement rights in the agreement. Perhaps one avenue to consider is a variation of *Life Story* agreements consisting of several waivers and licenses bundled into one<sup>211</sup>. The dissertation shall examine what avenues of protection are available for postmortem existence technologies

### §6.5. Economic v. Moral Rights of the Artist:

Moral rights are intended on protecting the *honor* and *reputation* of the author of a copyrighted work and as such are seen as a *personal right* rather than a property interest<sup>212</sup>. As mentioned in §4.7 the US in-line with its capitalistic economic policy does not follow an expansive moral rights regime and prioritizes commercial interests. The federal copyright statute does narrowly recognize moral rights for works of *visual art*<sup>213</sup> and several states have also followed in suit<sup>214</sup>. However, these protections are often limited to works of fine, visual art and are attached directly to the *author* of the works<sup>215</sup> which means performers who do not hold the copyright interest cannot avail the right. Contrast the US with India who gives *full* recognition to the moral

---

<sup>209</sup> William Herkewitz, "Esquire Fact-or-Fiction: Cleverbot and the Talking Holograms of the Future", Popular Mechanics, July 19<sup>th</sup> 2013: (<https://www.popularmechanics.com/culture/a9194/esquire-fact-or-fiction-cleverbot-and-the-talking-holograms-of-the-future-15712142/>)

<sup>210</sup> The US Copyright Office states this in plain terms in their FAQ page reflecting the clear mandate in the legal regime. See US Copyright Office Website, *What Does Copyright Protect?* (<https://www.copyright.gov/help/faq/faq-protect.html>)

<sup>211</sup> Stephen Rodner, "Life story rights: What's possible and what's not", The Hollywood Reporter, January 24<sup>th</sup> 2008: (<https://www.hollywoodreporter.com/news/life-story-rights-whats-whats-103334>)

<sup>212</sup> Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property Law*, Berkeley Technology Law Journal, Vol. 8, 1993, p. 182

<sup>213</sup> US Statute of Anne, (17 U.S.C. §106A)

<sup>214</sup> For example, Massachusetts and New Mexico have quite a liberal moral rights regime, extending protections beyond fine art to *film mediums* and giving rights up to *50 years after the death* of the author. See- *Mass. Gen. Laws* Ch. 110 § 231-85(S) (1993); *N.M. Stat. Ann.* § 13-4B-2 (1987)

<sup>215</sup> Author here means the *creator*, and some States like California and Connecticut recognize a *post-mortem* interest with the estate. See- *Cal. Civ. Code* § 987(g)(1) (1979); *Conn. Gen. Stat.* § 42-116(s) (t) (1988).

rights of the artist against distortion mutilation and modification<sup>216</sup>. The EU as discussed before follows a reputation-based system of rights where moral rights are deeply linked with postmortem privacy, both commercial aspects like publicity and non-commercial aspects like a person's dignity/ reputation<sup>217</sup>. In a similar line of thought, France follows a *dualistic conception* of copyright and grants perpetual moral rights to the creator<sup>218</sup>. Additionally, France uniquely recognizes a *right of repentance* to demand the return of their art if given away and the power to *vitiare* a contract in exchange for paying minimal compensatory damages<sup>219</sup>.

Implementing a strong moral rights regime might provide a strong solution to preventing postmortem portrayal of the performer which is low quality or harms the reputation of the deceased celebrity<sup>220</sup>. However, this again points towards a privacy and reputation based model of postmortem rights similar to that of the EU which may not be compatible with the US's commercial culture (see §3.3. and §4.7.). This Section of the dissertation shall study moral rights with regard to its scope, descendability, and strength in preventing postmortem copies of a celebrity. We shall also discuss the viability of *moral right "stand-ins"* like libel, privacy actions, contract and unfair competition claims<sup>221</sup>.

#### §6.6. Term of Copyright v. Publicity:

If a jurisdiction does not recognize publicity as an inheritable right, a conflict in the *durational term* with copyright is not an issue. However, with the US following a state-by-state regime of publicity rights a conflict between the terms of protection is inevitable. For example, Indiana grants a postmortem publicity right for 100 years after the death of the performer<sup>222</sup> while copyright protections only last for 70 years after death<sup>223</sup>. It's very likely the overlap between the terms can lead to conflict, and in cases where the rights holders are different entities it'll be difficult to discern which claimant has the stronger postmortem interest. Here the dissertation will examine issues of *federal pre-emption*<sup>224</sup> and suggest measures for harmonizing the existing

---

<sup>216</sup> This includes the Right "to restrain or claim damages in respect of any **distortion, mutilation, modification** or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his **honor or reputation...**" (Emphasis added); See- Indian Copyright Act 1957, §57; this language mimics Berne Convention for the Protection of Literary and Artistic Works, Article 6.

<sup>217</sup> Edina Harbinja, *Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be The Potential Alternatives?*, (2013) 10:1 SCRIPTed 19: (<http://script-ed.org/?p=843>)

<sup>218</sup> Edina Harbinja, *Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be The Potential Alternatives?*, (2013) 10:1 SCRIPTed 19: (<http://script-ed.org/?p=843>)

<sup>219</sup> See generally- Alexandra Giannopoulou, *The Creative Commons licences through moral rights provisions in French law*, International Review of Law, Computers and Technology, Taylor & Francis (Routledge), Vol. 28, No. 1, 2014, pp.60-80.

<sup>220</sup> Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property Law*, Berkeley Technology Law Journal, Vol. 8, 1993, p. 182

<sup>221</sup> Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property Law*, Berkeley Technology Law Journal, Vol. 8, 1993, p. 186 onward

<sup>222</sup> See- *Indiana Statute* 32-36- §1-8

<sup>223</sup> *US Statute of Anne*, (17 U.S.C. §302)

<sup>224</sup> *US Statute of Anne*, (17 U.S.C. §301)

postmortem durational terms of protection. Resolving this issue would be important in cases where the artist and their talents are *interwoven* like stand-up comedy.

## **Chapter 7: Postmortem Legacy Management**

After death, the only mode of communication with the deceased testator is by their ante-mortem expressions of interests through the *documents* they create; wills, contractual arrangements, licenses etc. However, the interests of the dead don't always align with that of their living beneficiaries. The initial discussion in §1.2 gives us insight into whose interests are *prioritized* in the eyes of the law after the death of an individual. An interest or will theory analysis<sup>225</sup> will give us an idea of who the rights holder is, and characterizing the interests into a *property* or *privacy based* model will decide issues like inheritability, ownership, and postmortem control over the digital copy. **Chapter 7** discusses the manner in which these rights can be managed, controlled and enforced through the various legal instruments that exist under the law.

### **§7.1. Identifying the Stakeholders:**

Depending on the *domicile* at the time of death, the intangible assets possessed by an individual *may* or *may not* be property which can be handed down to their heirs. Testamentary disputes under ordinary circumstances can be complicated and as the monetary value of the estate increases the number of claimants and beneficiaries also increase. Celebrity estates often comprise of numerous tangible and intangible assets which have been built with the help of corporate entities like a record label. Postmortem presence technologies stretch the longevity and overall use of intangible properties created by celebrities. At the time of probate, the stakeholders to the celebrity's estate can be-

1. Their Estate- comprising of family, friends, attorneys, agents etc. The operating document for the estate would be the *Will*.
2. Their Corporate Entertainment Partners- such as record labels, production houses, talent agencies etc. These entities often hold the rights to the copyright, image, name and other aspects of the celebrity's intangible assets through *Assignments* and *Licenses*.
3. Other Beneficiaries- comprising of individuals or entities who may not be listed in the document but still can be benefited or harmed by the disposition of the assets. Beneficiaries are not a contracting party to the original agreement<sup>226</sup> (like the will or contract) and can be named or unnamed.

---

<sup>225</sup> See §1.2. for more detail.

<sup>226</sup> Under contract law there are three classes of third-party beneficiaries- (a) a *donee beneficiary* who benefits from the promise or the performance of the contract, (b) a *creditor beneficiary* who is owed something from the agreement or from the promisor and (c) an *incidental beneficiary* who doesn't fit into either of the two situations above. See- *Restatement (First) of Contracts* § 133 (1932)

4. Creditors- who are owed something from the deceased and ordinarily managed at the time of probate. The creditor's rights are ordinarily secured by contract, entered into before the death of the celebrity.

### §7.2. Priority of Interests and Claimants:

When a celebrity dies in the peak of their fame with poor estate planning, managing the numerous claimants can be a time-consuming effort. After identifying the stakeholders to the estate, the next step would be to identify whose wishes prevail in the case of a dispute or conflict. Here, the analysis of who the rights holder is (see §1.2.) and the nature of the jurisdiction- will theory or interest theory state- will come into play. This Section of the dissertation will look into who which stakeholder's interests will prevail in the case of-

1. Ownership of the intangible assets like copyright and trademark.
2. Enforcing reputation and privacy based wishes of the deceased, like personal data and publicity rights.
3. Enforcing artistic preferences and wishes of the deceased.

Additionally §7.2 will discuss the *limitations* on the interests of the deceased expressed through a will or document. As a matter of policy, courts will go to great lengths to honor the wishes of the deceased unless it results in a great *hardship* to the living or is *wasteful*<sup>227</sup>. This includes a testator's ability to destroy valuable pieces of art, manuscripts and property upon his death<sup>228</sup>. We shall examine whether these limitations can be extended to the intangible assets implicated in postmortem technologies. Sifting through the stakeholders, their claims, their arrangements and pending obligations due is a massive undertaking and requires *separation* of the process into two integral parts; the *estate* and the *contracts*.

### §7.3. Estate Management:

Once a celebrity passes away, their estate would be an extension of them on earth, left to represent their legal interests and uphold the reputation of the work they have left for the public. If an estate is poorly managed, the IP rights of a deceased celebrity can be left to possible abuse and sold to the first buyer. Determining domicile would have potentially dispositive effects on post- death use of a celebrity's image<sup>229</sup>. Estate law is a vast field, with many considerations and nuances unrelated to IP Rights. Once issues such as ownership and the disposition of the assets are settled, the important role of the estate is *legacy management* through quality control of the IP. This includes-

---

<sup>227</sup> Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstra Law Review, Vol. 37(3), 2009, p. 793

<sup>228</sup> For a discussion of the testator's *right to destroy property* see- Lior Jacob Strahilevitz, *The Right to Destroy*, Yale Law Journal Vol. 114, 2005, p. 783- 852

<sup>229</sup> *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152 (C.D. Cal. 2008) *aff'd sub nom. Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012)

1. Appointing an appropriate *estate administrator* who can make ‘stand-in’ decisions regarding the artistic preferences of the deceased. This can be an individual or entity who the deceased entrusts with the valuable decision making ability on their behalf; like beneficiaries or close family members<sup>230</sup>.
2. Clear *artistic directives* put into a written form which the estate administrator can follow. For example, lists of “do’s-and-don’ts” with regard to their image or instructions on how to accurately complete an unfinished screenplay.
3. Placing *limitations* on the disposition of their IP through the will itself like placing a 25 year prohibition on the use of their image in postmortem technologies<sup>231</sup>.

This Section of the dissertation will discuss how a deceased can best protect his estate- and by extension- his postmortem interests by planning and management before death. This shall be accompanied by drafting suggestions on how to best secure and capitalize one’s interests before it leaves their control.

#### **§7.4. Licenses and Contractual Arrangements:**

While a will and testament will control the disposition of the celebrity’s assets after death, contracts are often the real operating documents over the IP created during their lifetime. Many celebrities cultivate their fame by partnering with entities like production houses and in doing so license or assign their IP as part of the agreement between the two parties. Some contractual obligations survive death, while others do not. This is dependent on the specific jurisdiction rules and drafting language of the agreement. Contracts in the entertainment industry are the lifeblood of avoiding potential legal issues and provide a first line of defense when a vacuum in the law exists. In the entertainment industry, contractual provisions have become nuanced enough to prevent a star from even getting a haircut<sup>232</sup> to prevent interruption of the overall project. Contracts are separate from the Estate as they are *individual arrangements* made by the celebrity (or their agent/manager) *prior* to death as part of a commercial deal for entertainment. §7.4 shall discuss-

1. Privity and formation in contracts that implicate postmortem intangible interests.
2. Limitations on licenses and assignment clauses insofar that it relates to the IP of the deceased.
3. Drafting suggestions as to how best secure IP interests both before death (through the celebrity) and after death (through the estate) through licensing and assignment clauses.
4. Infringement and enforcement of postmortem wishes through contract claims.

---

<sup>230</sup> Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstra Law Review, Vol. 37(3), 2009, p. 799

<sup>231</sup> Robbin Williams employed this exact same measure by filing a deed prohibiting the use of his image until 2039. See- Hannah Ellis-Peterson, “Robin Williams went above and beyond to stop his image being used”, The Guardian, March 31<sup>st</sup> 2015: (<https://www.theguardian.com/film/2015/mar/31/robin-williams-restricted-use-image-despite-existing-us-laws>)

<sup>232</sup> *Kit Harington’s Hair Has Its Own Contract on Game of Thrones* by Sharon Tanenbaum, US Magazine, June 11 2014: (<https://www.usmagazine.com/stylish/news/kit-haringtons-hair-contract-game-of-thrones-video-2014116/>)

The dissertation will lay down strategic measures attorneys can use to best protect their clients interest at a contractual level and its possible pitfalls. Considering legislatures rarely keep pace with the growth of technology, contracts will be a crucial instrument to ensure that there are no loss of valuable rights after death.

### 1.3. Summary

The dissertation intends on being a comprehensive manual on the rights of the dead in this modern era of technology. We shall discuss the scope of the present technology along with future capabilities to identify and anticipate legal issues that face legislators and those in the industry. A good amount of the discussion centers around the entertainment industry and the rights of celebrities owing as the impact will be most prevalent with celebrities and their corporate counterparts. With the changing landscape effecting the reputation, income and talent of celebrities after their death, the dissertation will suggest legislative and contractual measures to be implemented both before and after death.

1. The dissertation will discuss who the *right holder* should be in light of the new technology and which legal theory should be preferred. **(Chapter 1)**.
2. The dissertation will analyze how the new technology brings in changes to our traditional assumptions of death. **(Chapter 2)**.
3. The dissertation will determine which *legal characterization* of privacy, personal data and right of publicity best suits interests of the estate, the deceased and other stakeholders. **(Chapter 3 & 4)**.
4. The dissertation will examine the possible protections that exist in trademark and unfair competition law and its link with the previously discussed rights. **(Chapter 5)**.
5. The dissertation will identify how postmortem technologies complicate copyright interests after death and whether moral rights can be used to maintain quality of postmortem work in light of the characterization conflicts discussed. **(Chapter 6)**.
6. The dissertation shall suggest how legal instruments and estate management can be used to effectively control a postmortem persona. **(Chapter 7)**.
7. All issues identified and analyzed will include *legislative suggestions* for securing interests.

In addressing the matters above, the dissertation hopes to guide stakeholders and legislators on how to deal with the issues which face the future of mankind's *continued* existence in the world.