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# **Tupac and Beyond: The Implications of the Tupac Hologram on Copyright and the Right of Publicity and What it May Mean for the Future of Music**

Michael Drecolias<sup>1</sup>

## I. INTRODUCTION

Over the last few decades, American society has developed a growing obsession with the public sphere of celebrity and entertainment gossip. What was once regarded as one's private and intimate information has become the focal point of countless news and media outlets. The pervasive nature of American media has allowed celebrity information and gossip to be shared at alarming speeds. Consequently, Americans have developed strong emotional ties to celebrities that society has deemed famous. These emotional ties are often so strong that fans feel as if they actually know the celebrity, and begin to think about them as if they were a close personal friend. Media outlets have taken it upon themselves to choose how they will portray certain celebrities, and they inundate society with messages and stories that are in line with their desired perception.

Due to this overwhelming obsession with celebrity life, the United States is home to various reality shows, such as *Keeping Up with the Kardashians*, which give the viewer a glimpse into the daily life of a celebrity.<sup>2</sup> There are "news" shows like *TMZ*, where obsessive paparazzi follow celebrities and document their every move, much like they were animals in the wild being documented by *National Geographic*.<sup>3</sup> These shows often develop cult-like followings of obsessed fans that will absorb any and all information they can find about their favorite celebrity. This music industry is comparable in the amount and the intensity of fans its

produces. While certain fans might be enthralled by the mere image an artist portrays, music allows people to identify with the artist on a deeper level. Regardless of the age of a listener, a carefully written song can make the listener feel as though the artist is speaking directly to them. They form an internal bond with the artist, and are more likely to support them by buying albums, concert tickets, merchandise, etc.

With the exponential increase in technology in recent years, it comes as no surprise that the traditional music industry is suffering. The introduction of digital music has caused a dramatic increase amount of pirating and illegal downloading that occurs in America. The sale of physical records has been declining since the early 2000's, which has prompted the industry to try new tactics to make up for the loss. A recent trend in the market has been to get both new and old musicians alike to sign what are known as Three Sixty (360) deals.<sup>4</sup> These deals inherently mean that the record company gets a percentage of everything that the artist touches, in order to recoup some of the losses that the record company endures for the artist's album.<sup>5</sup> These extra avenues of income can include anything from movies that were made to a clothing line.<sup>6</sup> With the advance of technology, new avenues of income are constantly being opened for the entertainment business. One particularly lucrative area of income for the artist and record company alike is live performance.

Just as society is obsessed with celebrities, there is an equally large obsession with musical artists as well. This societal obsession drives the market for live concert performance. Comparable to fans of reality t.v. and entertainment gossip, there are groups of fans who follow

artists around the country while they tour. The most famous example of these touring fans date back to the 60's and 70's with the up rise of self-proclaimed "Dead Heads" who followed the Grateful Dead.<sup>7</sup> Tragically, sometimes artists pass away well before their time, as was the case with the lead singer of the Grateful Dead, Jerry Garcia.<sup>8</sup> In true societal fashion, these premature deaths lead the record companies, estates of deceased artists and the entertainment business in general to get creative on how they exploit the persona of the deceased artists. This often occurs in ways that society might never have thought possible.

Despite his premature death in 1996, Tupac (2pac) Amaru Shakur remains one of the most influential figures in the music business of the last twenty years.<sup>9</sup> Tupac is known throughout much of the modern world for his heartfelt poetic lyrics, his self proclaimed "gangster rap" style, and even his acting career.<sup>10</sup> In 1996, his young life and rising career were cut short when he was shot and killed in a drive by shooting on one fateful night in Las Vegas.<sup>11</sup> After his death, 2pac's early fans seemed to develop a cult following of the artist. Many different conspiracy theories began to develop surrounding 2pac's death. Some believe that 2pac's death was orchestrated by members of the Crips, a violent nationwide gang.<sup>12</sup> The reason this belief is held is due to the fact that Tupac and his associates had an altercation with a member of the Crips the night of his death.<sup>13</sup> Perhaps his death was the result of a retaliation hit in response to his altercation hours earlier.<sup>14</sup> Others believe that his death may have been the end result of an East-Coast-West-Coast "feud" with the rapper Notorious B.I.G.<sup>15</sup> Still others believe that 2pac faked his death, moving to another country and recording albums "posthumously."<sup>16</sup>

In fact, Suge Knight, the man who was in the car with Tupac Shakur on the night he was shot, recently alluded to the fact in an interview on April 20<sup>th</sup>, 2012 that he believes Tupac faked his own death.<sup>17</sup> Those who hold the latter belief anxiously await 2pac's eventual return. Since his death, his estate has managed to release eight posthumous albums.<sup>18</sup> By the year 2010, Tupac had sold over seventy five million albums, making him one of the highest selling artists of all time.<sup>19</sup> Tupac has been a household name since the debut of his career as the solo artist "2pac" in 1991, and continues to make lifetime fans out of young and old alike.<sup>20</sup>

On April 15, 2012, the world was stunned again when 2pac, appeared as a hologram with rappers Dr. Dre and Snoop Dogg to perform a few songs at the music festival Coachella – namely "Hail Mary" and "2 of Amerikaz Most Wanted."<sup>21</sup> Considering his legendary status in the world of hip-hop, and the West Coast location of the Coachella Festival, Tupac was an obvious choice for a surprise performer. Tupac did not return in the physical form like many of his fans had anticipated, but instead took the stage in hologram form, shocking much of the world at the time.<sup>22</sup> Whether you were enthralled or appalled by his presence on stage, this performance has far reaching implications that raise many unanswered questions about the legal consequences of hologram performances.

Billboard Magazine announced that immediately following the concert at Coachella, Tupac had gained a substantial amount of record sales. According to Billboard, Tupac's "Greatest Hits" album returned to the Billboard Top 200 for the first time in over a decade (Caulfield 2012). A plethora of his other posthumous albums received increased sales, as well as

the two songs that he performed at the festival with Snoop Dogg. In addition, Snoop Dogg gained more notoriety, because the video of the performance at Coachella was viewed 3 million times in the first week after the event occurred.<sup>23</sup>

The music industry is a business, and one that enjoys substantial profit from the notoriety of its performers. However, it is somewhat perplexing to read about the boost in sales, and not wonder if Tupac's memory, but more importantly his image and likeness have been overly exploited. Slightly more disturbing is the notion that the buzz around the 2pac hologram, has spawned plans to send this hologram on a national tour. To think that crowds of people will pay to see a show of a man who is no longer alive, dance to his music, and cheer his name is somewhat conflicting. It is almost as if he never passed away. The idea of this hologram going on tour, performing and making money for people who had no real input on Tupac's genius seems to go against what Tupac stood for during his lifetime.

Perhaps the most important question to be asked is: Who owns the rights to the Tupac hologram? Tupac's mother, Afeni Shakur created Amaru Entertainment in early 1997<sup>24</sup> in order to fiercely protect all of her rights to her son's image, likeness, voice, copyrights, etc.,. After the death of Tupac Shakur the label inherited the rights to *2Pacalypse Now*, *Strictly 4 My N.I.G.G.A.Z*, *Thug Life Vol. 1*, and *Me Against the World*.<sup>25</sup> Amaru Entertainment has also released eight posthumous albums by Tupac Shakur and one documentary, *Tupac: Resurrection*.<sup>26</sup> While Afeni Shakur may have authorized the use of all of the above for purposes of this concert appearance, what does this mean going forward? The image of Tupac

and the technology used to create the hologram were co-produced by Hollywood effects house Digital Domain in conjunction with a Hollywood CGI company named AV Concepts.<sup>27</sup> So, while Digital Domain and AV concepts may not necessarily own the rights to Tupac's image, what rights do they have to use the hologram that they have now created? What does this new technology mean for deceased artists in general? Will we live in a world where we can go and watch our favorite deceased artists in hologram form? Will there eventually be an Elvis comeback tour or a Beatles reunion? Further, will the relatives of these deceased entertainers have any ability to control or object to these new performances?

Amidst the confusion surrounding the ownership of the Tupac hologram, there remains a question of performance rights. If the hologram of Tupac were to go on tour, who would be paid royalties for the performance of his music? Would the scenario be akin to one where a living artist goes on tour, and the record company reaps the benefits, or will it follow a traditional model where venues or artists pay statutory fees to performing rights societies like ASCAP (The American Society of Composers, Authors and Publishers), BMI (Broadcast Music Inc.) and SESAC (The Society of European Stage Authors & Composers)?<sup>28</sup> While this issue has never specifically been litigated, as time goes on, the progress of holographic technology will bring these issues and others to the forefront of intellectual property law.

If companies like AV Concepts or Digital Domain decide that the holograms are now their intellectual property, they may begin using them without permission from the interested parties that hold property rights in the likeness, image or voice of these dead celebrities. While

most of these issues can be addressed through careful contract drafting, the estates of these deceased celebrities may still have certain causes of action against these potential infringers. It is important that anyone who may own rights related to any deceased celebrity understand what claims they may have against infringers and what claims they may be estopped from asserting generally.

This paper will discuss the legal issues that may arise with authorized and unauthorized use of the copyrighted material performed by a deceased celebrity, assuming these issues were not already decided through a durable and legally binding contract.<sup>29</sup> It will analyze some of the more controversial elements of potential copyright infringement, as well as the fundamental copyright issues raised by these performances. This paper will also explore the potential impact of state Right of Publicity laws on a company's ability to profit off the holographic likenesses of various performers. While there has been no specific case law on the use or misuse of a hologram of a deceased celebrity, this paper will draw parallels from similar cases and will make suggestions, recommendations and assumptions on how certain problems can be solved.

Section II begins with a brief overview of State Publicity and Privacy rights. The Right of Publicity for a celebrity is defined by their likeness, image, voice, etc.<sup>30</sup> They have a fundamental right to preclude a third party from exploiting this right for commercial gain when the third party has not obtained permission from the celebrity to use it. A celebrity's likeness, image and persona are something that they spend countless hours shaping and molding. Their "persona" is what defines them as an artist. It is what makes them different from any other

celebrity. It is their main good and source of income, and as such should be fiercely guarded.

This paper will discuss case law from various jurisdictions, specifically focusing on New York and California. The high concentration of entertainment business in these two states, particularly in Los Angeles and New York City make them excellent case studies for the issues of this paper. While these two states share equality in their importance, they differ dramatically in their case law regarding survivorship for rights of publicity. The jurisdiction in which a deceased celebrity was domiciled in at their time of death plays an important role in determining rights and royalties for their intellectual property and persona.<sup>31</sup>

Section III will examine copyright issues that pertain to performance and copyright of the holographic image. To perform or display a work “publicly” means **(1)** to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or **(2)** to transmit or otherwise communicate a performance or display of the work to a place specified by clause or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>32</sup> This instance of a hologram of a deceased celebrity is highly unusual, because normally deceased people are not able to perform in public. However, when dealing with performance rights, each contributor has a right to the royalties and exploitation of their interests in copyright.

Section IV will conclude by summarizing the copyright and publicity rights invoked in the case of a hologram, who may allege or assert an ownership interest, and who deserves to profit from manipulation of the hologram. While this section will be based in opinion, it will draw on existing case law in order to help inform a deeper understanding of where the future of this technology may be heading. Even though to date there has been no conflict in relation to the Tupac hologram, if this is to become a trend in the entertainment business, there may eventually be infringement of copyright and right of publicity laws.

## II. The Right of Publicity and the 2pac Hologram

### a. State Publicity and Privacy Rights

The idea of a right in the intangible aspects of one's person originated in an 1890 Harvard Law Review article written by Samuel Warren and Louis Brandeis. In the article, the authors assert that each man has a right to prevent “invasions upon his privacy,” not only from journalists but from other branches of commerce as well.<sup>33</sup> From this “right of privacy,” some courts began to recognize a right to prevent the use of one's image for commercial exploitation without one's consent.<sup>34</sup> It was not until 1953 that Judge Jerome Frank coined the term “right of publicity” in an attempt to shift the focus of the law from privacy to publicity.<sup>35</sup>

Traditionally, the right of publicity is both a statutory and common-law right controlling the commercial use of one's “name, voice, signature, photograph, or likeness.”<sup>36</sup> The right of publicity is typically invoked in the context of commercial speech, when a company has used a

celebrity's "name, voice, signature, photograph or likeness" in connection with a commercial product, which may create a likelihood of confusion that the celebrity is in fact endorsing a particular good, product, service, etc.<sup>37</sup> California Civil Code Section 3344, authorizes a cause of action by any living person whose name, photograph or likeness have been used for commercial purposes without his or her consent.<sup>38</sup> New York Civil Rights Law Sections 50 and 51 create a private right of action against the nonconsensual use of a persons name, portrait or picture "for advertising purposes or for purposes of trade..."<sup>39</sup>

Generally, in order to establish a publicity rights claim under the common law, a plaintiff must plead and prove that a defendant "(1) used the plaintiff's identity; (2) appropriated plaintiff's name and likeness to defendant's advantage, commercial or otherwise; (3) lack of consent; and (4) resulting injury."<sup>40</sup> To establish the statutory cause of action in California, the plaintiff must also show knowing use of the plaintiff's name, photograph or likeness for commercial purposes, and a direct connection between the use and the commercial purpose.<sup>41</sup> Section 51 of New York's Civil Rights Law, however, states that a violation of the Right of Publicity "consists of only two elements: the commercial use of a person's name or photography and the failure to procure the person's written consent for such use."<sup>42</sup> Generally, this makes New York a somewhat easier venue to establish a Right of Publicity claim. This is because an individual only needs commercial use of their persona without permission, whereas in California there is a need for knowledge. This knowledge requirement adds an additional hurdle that the plaintiff in a Right of Publicity claim must prove.

While the right of publicity has typically been used to apply only to a person's likeness, the unusual nature of the entertainment business has forced the right of publicity to expand throughout time to encompass a number of different things that were originally not considered. Currently, the right can be used to protect key things that identify a given celebrity, such as look-alikes, (Woody Allen look alike in a commercial)<sup>43</sup>; sound-alikes, (use of gravel-voiced singer in a commercial)<sup>44</sup>; (Bette Midler soundalike in a commercial)<sup>45</sup>; a nick name (drawing of a nude black man labeled "The Greatest")<sup>46</sup>; a phrase associated with a celebrity (use of the phrase "Here's Johnny" by company marketing "Here's Johnny Portable Toilets")<sup>47</sup>, and even a robot dressed like a celebrity, (VCR Samsung advertisement robot dressed like the TV show hostess Vanna White, turning letters on set similar to as that of the "Wheel of Fortune")<sup>48</sup>.

The most important distinction to be made between California and New York is that the statutes and case law completely oppose each-other concerning the right of survivorship in relation to the right of publicity. Cal Civil Code Section 990, now Section 3344.1, states that the right of publicity automatically transfers to a deceased celebrity's rightful heirs. Plays, books, films, and radio shows using a deceased's likeness, name or voice as part of a review or artistic endeavor are permitted.<sup>49</sup> Under New York Civil Rights Law Section 50, a publicity right inures only to living persons; one's right of publicity is extinguished at death.<sup>50</sup> Right of privacy is limited to the living and cause of action may not be asserted by others after decedent's death.<sup>51</sup>

## b. First Amendment Considerations

This right of publicity must be weighed against the First Amendment. The First Amendment most notably protects the Freedom of Speech. While the First Amendment is a topic that can be discussed in depth, in relation to the Right of Publicity it hinges on an analysis of commercial speech. Noncommercial speech is afforded much greater protection under the First Amendment than commercial speech because the essence of noncommercial speech falls within these purposes.<sup>52</sup> However, when commercial speech and other forms of speech are mixed, a classification as to the form of speech must be made before any evaluation as to how the First Amendment applies can take place.<sup>53</sup> As is the case with any category of speech, the court must weigh the interests of both areas of law.<sup>54</sup> No area of law automatically will prevail over another. Each case needs to be looked at on an individual basis to balance the conflicting policies to find the least restrictive result.<sup>55</sup> Essentially, if the speech in question is commercial in nature, and violates the Right of Publicity, the court will tend to side with the celebrity.<sup>56</sup> However, when an advertisement contains some "newsworthy" information, the entire product will be seen as commercial speech because it is still an advertisement.<sup>57</sup>

## c. Jurisdictional Differences

In addition to the two entertainment Mecca's, there are two other jurisdictions where the Right of Publicity is of particular interest: Tennessee and Indiana. Tennessee is and was the

domicile of Elvis Presley at the time of his death.<sup>58</sup> As such, the Right of Publicity statutes help the estate of Elvis Presley ensure that they own the persona of Elvis until it may no longer be profitable.<sup>59</sup> The Personal Rights Protection Act (PRPA) is one particularly beneficial statute for the Presley Estate. In fact, the PRPA is affectionately known as the “Elvis Law” and was sponsored by Elvis’ estate.<sup>60</sup>

The Personal Rights Protection Act recognizes that an individual has property right in use of his name, photograph, or likeness and providing that such right is descendible and exclusive in individual or his heirs and assigns until it is terminated should not be construed to limit vested rights of publicity that were in existence prior to effective date of the Act.<sup>61</sup> Following the initial ten years of unconditional protection, non-use for a period of two years will result in termination of the exclusive right.<sup>62</sup> The statute does not actually limit its protection to ten years, however; so long as the assignee of the rights continues to use the individual's name, likeness, or image for commercial purposes, the rights exist in perpetuity.<sup>63</sup>

The Personal Rights Protection Act is beneficial to Tennessee, and is particularly important for Memphis, the home of Graceland.<sup>64</sup> Tennessee has a lot at stake in the fact that if the estate of Elvis were to lose the ownership over Elvis’ right of publicity, it could mean a dilution of Elvis’ legacy and a loss in the monopoly over Elvis that Tennessee currently enjoys. What might this mean for the future of an Elvis hologram? Interestingly enough, an Elvis hologram actually appeared on the hit TV show *American Idol* back in 2007.<sup>65</sup> The buzz

surrounding the 2pac hologram found the owners of Elvis' likeness already communicating with the makers of the 2pac hologram to have an Elvis hologram created. <sup>66</sup>

Indiana is another state in which the Right of Publicity is of particular interest. Under the Right of Publicity Statute of Indiana, a person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the date of the personality's death without having obtained previous written consent from a person specified in section 17 of this chapter. <sup>67</sup> The written consent required by Section 8 of this chapter and the rights and remedies set forth in this chapter may be exercised and enforced by a personality; or a person to whom the recognized rights of a personality have been transferred. <sup>68</sup> The contrast between this statute and the other ones that have been crafted, is that the Indiana Statute "applies to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship."<sup>69</sup> Those subject to the court's jurisdiction include: (1) anyone engaging in prohibited conduct under the statute within the state; (2) anyone who "creates or causes to be created within Indiana" infringing items; (3) anyone who "transports or causes to be transported" into the state infringing items; and (4) anyone who "knowingly causes [infringing] advertising or promotional material ... to be published, distributed, exhibited, or disseminated within Indiana."<sup>70</sup> The broad choice of law and jurisdictional reach of the Indiana statute, combined with its expansive scope of protection and purported applicability to non-domiciliaries and deceased individuals, opens up Indiana courts for suits against many individuals who might not have a cause of action in their home states.<sup>71</sup>

#### d. Interested Celebrities

Two deceased celebrities that are directly affected by the statutes of New York and California are Marilyn Monroe and Michael Jackson. In *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, the US Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment holding that Marilyn Monroe LLC was estopped from changing Marilyn Monroe's domicile at time of death from New York to California.<sup>72</sup> As a result, Marilyn Monroe LLC was precluded from asserting Marilyn Monroe's publicity rights under California's posthumous right of publicity.<sup>73</sup> As such, there is currently a Marilyn Monroe hologram in the works.<sup>74</sup> Known as Virtual Marilyn, a copyright is held by Digicon Media over a holographic image of the deceased celebrity.<sup>75</sup> The estate of Mrs. Monroe, however, is asserting a claim under a Trademark theory in order to prevent Digicon Media from using the image of Marilyn without their permission.<sup>76</sup> Her estate “indicates that a lawsuit likely would be premised on alleged trademark violations for causing consumer confusion and implying an endorsement or association with Marilyn Monroe.”<sup>77</sup> It will be interesting to see how this lawsuit pans out.

Domiciled in Los Angeles, California at the time of his death, Michael Jackson's right of publicity is descendible to his estate.<sup>78</sup> The issue in Michael Jackson's scenario is that while his publicity rights are descendible, his Estate's executors are not his family and are instead two men: John Branca and John McClain.<sup>79</sup> As a result of Michael Jackson's estate being so far into debt, and near bankruptcy – these two men have been selling off assets of Jacksons in order to ensure that Jackson's three children will be able to live off of his estate.<sup>80</sup> In fact, Michael

Jackson's siblings have petitioned to have the two men removed as executors.<sup>81</sup> It seems extremely likely that we will see a Michael Jackson hologram on tour, because these two men have the final say over his Right of Publicity.

e. Uniform Right of Publicity Act

The variance in the protection offered by the different jurisdictions has a direct effect on the legacy of a deceased celebrity. Unfortunately, the extent, and in some cases the existence, of such rights greatly depends upon the state in which one attempts to assert those rights and, often, the state in which a person attempting to assert such rights is domiciled.<sup>82</sup> Typically, "the law of the domicile of the testator at his or her death applies to all questions of a will's construction."<sup>83</sup> If a claim were asserted by Afeni Shakur against a potential infringer in California, she would have a right to limit the use of Tupac's image in conjunction with any hologram and/or performance.

However, hypothetically if Tupac had been domiciled in New York at the time of his death and the same action were taken against a potential infringer, she would likely have a hard time limiting the use of his image in conjunction with a hologram and/or performance. Technology companies may eventually realize this legal inconsistency among jurisdictions. This realization could result in a tendency for committing infringements in New York, where the more opportune law would apply. These companies would choose to have hologram concerts for

celebrities that had been domiciled in New York at their time of death, and could feel free from injunction or possible damages.

It will be interesting to see if the record companies start including the right of publicity into their initial agreements. Perhaps this would be part of the aforementioned 360 deals that are being negotiated.<sup>84</sup> The record companies want a piece of everything the artist does during the time an artist is under contract with them.<sup>85</sup> That even goes so far as to include things that are out of the scope of being a musician.<sup>86</sup> This could include anything up to clothing lines, fragrances, movies or even books.<sup>87</sup> If the Right of Publicity comes to be a hotly debated issue, or one that the entertainment business deems particularly lucrative, perhaps the record company will want to include that right as being something that they control for the artist. Instead of this right being transferred to an estate or an heir, it would be something that the record company fiercely guards. Not only will they own the artist during the time they are alive, but could possibly own everything they do even in death.

This reality is something that the artist may want to seriously consider before negotiating and contracting away. A new artist has less bargaining power than an established artist, and therefore will want to in essence “sell their soul to the devil” in order to achieve their dreams of signing themselves to a major label. The record company will promise the artist whatever they need to in order to secure as many rights and royalties that they can in order to help offset the costs of fostering a new artists career. In this scenario, the artists posthumous Right of Publicity

is the soul of the artist and the dream of becoming a famous musician is the bargaining chip that the record company holds.

The inconsistencies among the states in recognizing the Right of Publicity, most notably what to do in the scenario of posthumous rights cries out for legislation that would make the law uniform among every state.<sup>88</sup> As shown through analysis of the statutory and common law rights in New York, California, Tennessee, and Indiana, the lack of uniform rights creates confusion both for the individuals asserting their rights and for the entertainment field to differentiate their goods from one another.<sup>89</sup> This confusion, in turn, leads to wasted assets and time in court, with no uniform outcomes in the law.<sup>90</sup> A lot of times, the outcome is solely dependent on the jurisdiction and its choice of law.<sup>91</sup> For example, in the case of Marilyn Monroe, her estate could not receive the right of publicity protection that it would have enjoyed in the jurisdictions of California, Tennessee or Indiana.<sup>92</sup> Even in these three jurisdictions, the Right of Publicity rules are not consistent.<sup>93</sup> They change in relation to durability of the right, the remedies available when the right is violated and other subtle nuances that each individual statute gives.<sup>94</sup>

In order to eliminate these erratic outcomes and facilitate simpler interstate commerce and business planning, the National Conference of Commissioners on Uniform State Laws (NCCUSL) should develop, and states should adopt, a Uniform Right of Publicity Act.<sup>95</sup> This will not be like federal legislation, because it will account for the ever changing technology that continues to mold the Right of Publicity.<sup>96</sup> If it were federal legislation, it would be more rigid and less able to change.<sup>97</sup> Most importantly, the Act should treat the Right of Publicity as a

property right, much like that of a copyright or a trademark. If this is the case, the Right of Publicity will be assignable and descendible.<sup>98</sup> This right should continue for no more than seventy years after death, provided that, after the first ten years following death, the successors in interest to the rights continue to exploit the persona at least every two years.<sup>99</sup>

The Uniform Act should also recognize an expansive scope of protected rights, provided there are sufficient First Amendment safeguards for newsworthy and public interest events.<sup>100</sup> Additionally, the Act should specify monetary remedies and injunctive relief, require registration of post-mortem rights, allow common law expansion when necessary, and include political campaigns in those activities for which consent is required.<sup>101</sup> If we can create an Act that takes these issues into account, this will help to ensure protection of the Right of Publicity in a way that we can continue to mold the right with the change of technology.<sup>102</sup> In addition, a Uniform Act would make sure that simply because a celebrity was domiciled in a given jurisdiction, that their Right of Publicity is no less valuable or valid than any other celebrities Right of Publicity.<sup>103</sup>

### III. Performance Rights and the Copyright Act of 1976

#### A. Copyright of the Hologram

Copyright issues are extremely pervasive in the use of Tupacs' image as a hologram. In order to fully analyze the many difficult questions that arise, a brief look at copyright law is necessary. According to the Copyright Act of 1976, in order for a work to be protected it must

be an “original work of authorship fixed in a tangible medium of expression.”<sup>104</sup> These rights can include everything from reproduction of an original work, derivative works based upon an original work, distribution of the work to the public through transferring ownership or by licensing the work to be distributed, performance of the same work, display of the work and digital transmission of the work.<sup>105</sup>

The image of the rapper is not, in fact, a hologram.<sup>106</sup> The 2D-image is an updated version of a stage trick that dates to the 1800s called Pepper’s Ghost.<sup>107</sup> In the old version, an actor would hide in a recess below the stage as stagehands used mirrors to project the image of a ghost.<sup>108</sup> The trick used by the company AV Concepts employs an angled piece of glass placed on the stage to reflect a projector image onto a screen that looks invisible to the audience.<sup>109</sup> Regardless of semantics, the trick certainly came at a price. Although the company won’t release the exact cost to create the illusion they claim that a comparable one would range between \$100,000 and \$400,000.<sup>110</sup> The team pulled together Tupac’s performance by looking at old footage and creating an animation that incorporated characteristics of the late singer’s movements.<sup>111</sup>

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.<sup>112</sup> A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its

transmission.<sup>113</sup> A person's appearance is not static. Therefore, infringements on a person's name, picture, likeness, and voice are not typically protected by copyright law.<sup>114</sup> Copyright law focuses on the protection of recorded creative expression, not the persona or identity of a human being.<sup>115</sup>

## B. Public Performance

Normally, a copyright is held by the original author(s) of the underlying work; however copyright holders can also be persons who receive legal rights by a transfer in writing, license or inheritance.<sup>116</sup> Copyright laws provide copyright owners with the exclusive right over public performance, which gives the owner discretion over who can exhibit their work in public.<sup>117</sup> Many different aspects of the hologram are copyrightable. First, the music that was performed by the hologram at *Coachella* is copyrighted. Even though artists have an absolute monopoly over their copyrighted work, compulsory licenses come into play when dealing with the performance of music.<sup>118</sup> Compulsory licenses mean that a musical artist may issue a license to someone who wants to use their work in exchange for royalties that are set at a statutory rate.<sup>119</sup> However, each user needs permission, to play the song on the radio, on television, in nightclubs, in amusement parks, at live concerts, etc.<sup>120</sup>

Copyright laws provide copyright owners with the exclusive right over public performance, which gives the owner discretion over who can perform their music in public.<sup>121</sup> The public performance rights to songs performed in concert are actually licensed out from the

composers and record companies that comprise the American Society of Composers, Authors and Publishers (ASCAP) in the case of Tupac Shakur.<sup>122</sup> Performance rights organizations (PROs) like ASCAP provide intermediary functions, particularly royalty collection, between copyright holders and parties who wish to use copyrighted works *publicly* in locations such as shopping and dining venues.<sup>123</sup> ASCAP collects licensing fees from users of music created by ASCAP members, and then distributes them back to its members as royalties.<sup>124</sup> In effect, the arrangement is the product of a compromise: when a song is played, the user does not have to pay the copyright holder directly, nor does the music creator have to bill a radio station for use of a song.<sup>125</sup>

It seems likely that whoever owns the copyright in “Hail Mary” and “2 of Amerikaz Most Wanted” licensed the songs to AV Concepts to create the new Tupac performance. Since the hologram was based on a 2-D image and includes sound, AV Concepts likely owns the rights to the hologram. The 2-D performance they created was “stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>126</sup> Additionally, it was a work consisting of sounds, images, or both, that were being transmitted, and the fixation of the work was made simultaneously with its transmission.<sup>127</sup> This “hologram” therefore falls under the Copyright Act as being a copyrightable work. However, the creation of the hologram, was an original recreation of Tupac’s movement.

In translation, the teams of AV Concepts and Digital Domain watched old footage of Tupac performances and created their own original performance with the older performances in

mind. Even if the analysis hinged on the idea that they would owe some type of copyright royalties to the copyright holders of these original performances, there is an argument that the performance they created is a derivative work and still receives independent copyright protection. This hologram performance would be a copyright owned by AV Concepts, but use of the image and persona would be controlled by Tupacs' estate.

However, a question remains about who owns the holographic performance. Moreover, who would own the rights to a public performance of a hologram Tupac rapping an entirely new song? It seems as though ASCAP would follow the performances by the Hologram Tupac and would distribute the proceeds to those who have a stake in the rights to his music. This is where the issue of ownership becomes extremely convoluted. First, there is the likeness of 2pac, which is owned by Afeni Shakur via Tupac Shakur's estate; second, is the hologram which is owned by AV Concepts; and lastly, the music which is likely owned by the record company that Tupac worked for during the time of his recording. They all have some type of stake in this venture. It would seem that if anyone were to get paid, the person with the best lawyer might prevail. However, if the interested parties wanted to create the smoothest situation, they might want to split any proceeds from a hypothetical tour evenly.

#### IV. Conclusion

The unprecedented holographic performance of Tupac in 2012 sparked the interest of music lovers, entertainment enthusiasts, and lawyers alike. As holographic technology continues to progress, it will not be long before other deceased artists start performing again. What would prevent living musicians from hosting a concert in one location and broadcasting holograms of the performance all over the world? The ability to see world famous artists such as Michael Jackson or the Beatles perform a reunion tour creates the opportunity for tremendous economic profit. While these revolutionary ideas seem exciting and inviting to general society, the rights of these celebrities need to be guarded in a way that doesn't dramatically alter existing copyright case law and statutes.

Essentially, there is no case law on this specific issue at the time. It is an issue of first impression, and although a great deal of case law deals with a similar premise, it has never touched on holograms of deceased musicians and performance of said holograms specifically. Until copyright infringement occurs, one can merely speculate on how a federal court might handle a potential disagreement. Theoretically, the record company, assignees and/or producers (or anyone who contributed to the underlying composition of the specific music) would own an interest in the music that would be performed. AV Concepts in turn would likely own the rights to the Tupac Hologram, because they were the ones that fixed this work into a tangible medium. As far as the performance of the hologram goes, Afeni Shakur would likely hold copyright interest in any performance of Tupac.

However, in regards to the right of publicity for the deceased Tupac Shakur's image, it is clear that unauthorized use of his image by a company that developed a hologram would be a violation of his right of publicity. As a result of the favorable Right of Publicity statute in California, Tupac's heirs or assignees (Afeni Shakur) would have a claim against any potential violators. This favorable treatment, however, does not extend to those who were domiciled in New York at the time of their death. The heirs of any estate of a deceased celebrity would have a hard time asserting a claim against somebody who created a hologram and used it for commercial gain. It will be interesting to see where the future of this new phenomenon will lead.

On Tupac's second posthumous album entitled R U Still Down? (Remember Me), Tupac was quoted as saying that his "Only fear of death is comin' back reincarnated."<sup>128</sup> This speaks volumes to the issue of the posthumous Right of Publicity that Afeni Shakur controls through the estate of Tupac Shakur. Would Tupac appreciate that a hologram was made in his image? Would he want this hologram to perform and go on tour? This hologram is potentially validating Tupac's worst fear. It is almost as if this man was some type of clairvoyant.

The personality, likeness, image, notoriety, persona of a celebrity is something that they spend their whole life creating, promoting and carefully crafting it in a way that they can benefit from it. Why should a third party be able to profit off of these things without either receiving authorization from the estate of the deceased celebrity or paying some type of royalty? Perhaps, in order to ensure a smoother transition into the future, and to help create consistency among outcomes, the legal system will adopt a uniform set of rules for the Right of Publicity. If this is

done, it will help to eliminate forum shopping and will give deceased celebrities the right to will this property right out to a determinative heir or assignee at the time they create their will.

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<sup>1</sup> J.D. Candidate, January 2014, Seton Hall University School of Law.

<sup>2</sup> Keeping Up with the Kardashians. <http://www.eonline.com/shows/kardashians>. (last visited December 5, 2012).

<sup>3</sup> TMZ's Website. <http://www.tMZ.com/> (last visited December 5, 2012).

<sup>4</sup> Donald S. Passman, All You Need to Know About the Music Business, 95 (7<sup>th</sup> ed. 2009).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> The Grateful Dead. [http://en.wikipedia.org/wiki/Grateful\\_Dead](http://en.wikipedia.org/wiki/Grateful_Dead) (last visited December 5, 2012).

<sup>8</sup> *Id.*

<sup>9</sup> Tupac Shakur Biography, <http://www.biography.com/people/tupac-shakur-206528>, (last visited December 5, 2012).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Tupac Shakur., [http://en.wikipedia.org/wiki/Tupac\\_Shakur](http://en.wikipedia.org/wiki/Tupac_Shakur), (last visited December, 5, 2012).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Suge Knight: I'm Not Really Convinced 2pac is Dead, <http://www.tMZ.com/2012/04/20/suge-knight-tupac-death-fakes/>, (April, 20, 2012) (last visited December 5, 2012).

<sup>17</sup> *Id.*

<sup>18</sup> Tupac Shakur, Posthumous Albums, [http://en.wikipedia.org/wiki/Tupac\\_Shakur#Posthumous\\_solo\\_albums](http://en.wikipedia.org/wiki/Tupac_Shakur#Posthumous_solo_albums), (last visited December 5, 2012).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

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<sup>21</sup> Mayoras, Danielle, What Does Tupac's Hologram Mean for Other Celebrity Estates, (April, 23 2012) <http://www.forbes.com/sites/trialandheirs/2012/04/23/what-does-tupacs-hologram-mean-for-other-celebrity-estates/>.

<sup>22</sup> *Id.*

<sup>23</sup> Caulfield, Keith. "Tupac's Virtual Coachella Appearance Spurs Huge Sales Bump." *Billboard Biz.* 27 Apr. 2012. Web. 28 Apr. 2012. <<http://www.billboard.biz/bbbiz/industry/record-labels/tupac-s-virtual-coachella-appearance-spurs-1006893752.story>>.

<sup>24</sup> Amaru Entertainment, [http://en.wikipedia.org/wiki/Amaru\\_Entertainment](http://en.wikipedia.org/wiki/Amaru_Entertainment), (last visited December, 5 2012)

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Kaufman, Gil. "Exclusive: Tupac Coachella Hologram Source Explains How Rapper Resurrected." *MTV*. 16 Apr. 2012. Web. 27 Apr. 2012., <http://www.mtv.com/news/articles/1683173/tupac-hologram-coachella.jhtml>

<sup>28</sup> Donald S. Passman, All You Need to Know About the Music Business, 234 (7<sup>th</sup> ed. 2009).

<sup>29</sup> Without knowing what was specifically bargained for in the contract for Afeni Shakur to license out the likeness of Tupac to AV Concepts, it is hard to say what the agreement actually is/was. However, most issues with licensing and copyright can be pre-determined before use, in order to preclude any legal action taken by either party after use occurs.

<sup>30</sup> Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4<sup>th</sup> 387 (2001).

<sup>31</sup> Brittany A. Adkins, Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through A Uniform Right of Publicity Act, 40 *Cumb. L. Rev.* 499, 500 (2010).

<sup>32</sup> 17 U.S.C.A. § 101 (2010).

<sup>33</sup> Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 *Harv. L. Rev.* 193, 196 (1890).

<sup>34</sup> Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905).

<sup>35</sup> Haelean Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

<sup>36</sup> Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4<sup>th</sup> 387 (2001).

<sup>37</sup> Downing v. Abercrombie & Fitch, 265 F.3d 994 (9<sup>th</sup> Cir. 2001).

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- <sup>38</sup> Cal. Civ. Code § 3344 (2012).
- <sup>39</sup> N.Y. CLS Civ. R. § 50, 51 (2009).
- <sup>40</sup> Midler v. Ford Motor Co., 849 F.2d 460 (9<sup>th</sup> Cir. 1988).
- <sup>41</sup> Cal. Civ. Code § 3344 (2012).
- <sup>42</sup> N.Y. CLS Civ. R. § 50, 51 (2012).
- <sup>43</sup> Allen v. National Video, Inc., 610 F. Supp 2d 612, 630 (S.D.N.Y. 1985).
- <sup>44</sup> Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9<sup>th</sup> Cir. 1992).
- <sup>45</sup> Midler v. Ford Motor Co., 849 F. 2d 460 (9<sup>th</sup> Cir. 1988).
- <sup>46</sup> Ali v. Playgirl, Inc., 477 F. Supp. 723, 728 (S.D.N.Y. 1978).
- <sup>47</sup> Carson v. Here's Johnny Portable Toilets, Inc., 698 F. 2d 831, 837 (6<sup>th</sup> Cir. 1983).
- <sup>48</sup> Vanna White v. Samsung Elecs. Am., Inc., 971 F. 2d 1395 (9<sup>th</sup> Cir. 1992), cert. denied., 508 U.S. 951 (1993).
- <sup>49</sup> Cal. Civ. Code § 3344.1(2012).
- <sup>50</sup> Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., 434 F.Supp.2d 203 (2006).
- <sup>51</sup> Rome Sentinel Co. v. Boustedt, 1964, 43 Misc.2d 598, 252 N.Y.S.2d 10. (1964).
- <sup>52</sup> Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983).
- <sup>53</sup> McCarthy, The Rights of Publicity and Privacy 2d §§ 8:19 to 8:20.
- <sup>54</sup> *Id.*
- <sup>55</sup> *Id.*
- <sup>56</sup> Abdul-Jabbar v. General Motors Corp., 75 F.3d 1391, 37 U.S.P.Q.2d (BNA) 1694 (9th Cir. 1996), opinion amended and superseded on denial of reh'g, 85 F.3d 407 (9th Cir. 1996).
- <sup>57</sup> *Id.*
- <sup>58</sup> Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 191 (5th Cir. 1998) (“Over 700,000 visitors per year come from all fifty states and from around the world to visit Graceland.”).
- <sup>59</sup> Elvis Presley Intern. Memorial Foundation v. Crowell, 733 S.W.2d at 92 (“Graceland, Elvis Presley's home in Memphis, is now a museum that attracts approximately 500,000 paying visitors a year.”).

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<sup>60</sup> Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DePAUL-LCA J. Art & Ent. L. & Pol'y, 239 (1999).

<sup>61</sup> Tenn. Code Ann. § 47-25-1101 (1984). et seq. State ex rel. Elvis Presley Intern. Memorial Foundation v. Crowell, 733 S.W.2d 89, 2 U.S.P.Q.2d 1663 (1987).

<sup>62</sup> Tenn. Code Ann. § 47-25-1104(b)(2) (1984).

<sup>63</sup> Tenn. Code Ann. § 47-25-1104(b)(1) (1984).

<sup>64</sup> United States v. Mari, 47 F.3d 782, 783 (6th Cir. 1995) (describing Graceland as “the main tourist attraction in Memphis”).

<sup>65</sup> Hater, Hilton. “Elvis Hologram: Going on Tour!” June 7, 2012 at 10:28 A.M.(<http://www.thehollywoodgossip.com/2012/06/elvis-hologram-going-on-tour/>)

<sup>66</sup> *Id.*

<sup>67</sup> Ind. Code Ann. § 32-36-1-8 (2012).

<sup>68</sup> Ind. Code Ann. § 32-36-1-17 (2012).

<sup>69</sup> Ind. Code Ann. § 32-36-1-1 (2012).

<sup>70</sup> Ind. Code Ann. § 32-36-1-9 (2012).

<sup>71</sup> Brittany A. Adkins, Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through A Uniform Right of Publicity Act, 40 Cumb. L. Rev. 499, 524 (2010).

<sup>72</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>73</sup> *Id.*

<sup>74</sup> Eriq Gardner. Marilyn Monroe Estate Threatens Legal Action Over Hologram, (June 6, 2012) <http://www.hollywoodreporter.com/thr-esq/marilyn-monroe-estate-hologram-legal-334817> (last visited (December 5, 2012)

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

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<sup>78</sup> Mayoras, Danielle, What Does Tupac’s Hologram Mean for Other Celebrity Estates, (April, 23 2012) <http://www.forbes.com/sites/trilandheirs/2012/04/23/what-does-tupacs-hologram-mean-for-other-celebrity-estates/>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Brittany A. Adkins, Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through A Uniform Right of Publicity Act, 40 Cumb. L. Rev. 499, 500 (2010)

<sup>83</sup> Shaw Family Archives Ltd v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (citing White v. United States, 511 F. Supp. 570 (S.D. Ind. 1981)).

<sup>84</sup> Donald S. Passman, All You Need to Know About the Music Business, 95 (7<sup>th</sup> ed. 2009).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Brittany A. Adkins, Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through A Uniform Right of Publicity Act, 40 Cumb. L. Rev. 499, 545 (2010).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> 17 U.S.C. § 101 (2010).

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<sup>105</sup> *Id.*

<sup>106</sup> Hayley Tsukayama, How the Tupac “Hologram” Works, April 15, 2012  
[http://www.washingtonpost.com/business/technology/how-the-tupac-hologram-works/2012/04/18/gIQA1ZVyQT\\_story.html](http://www.washingtonpost.com/business/technology/how-the-tupac-hologram-works/2012/04/18/gIQA1ZVyQT_story.html) (last visited December 5, 2012)

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Kaufman, Gil. "Exclusive: Tupac Coachella Hologram Source Explains How Rapper Resurrected." *MTV*. 16 Apr. 2012. Web. 27 Apr. 2012.,  
<http://www.mtv.com/news/articles/1683173/tupac-hologram-coachella.jhtml>

<sup>111</sup> *Id.*

<sup>112</sup> 17 U.S.C. § 102, subd. (a). (1990).

<sup>113</sup> 17 U.S.C. § 101. (2010).

<sup>114</sup> Stanford v. Caesars Entm't, Inc., 430 F. Supp. 2d 749, 755 (W.D. Tenn. 2006).

<sup>115</sup> McCarthy, The Rights of Publicity and Privacy 2d §§ 5:5, 5:38 to 5:46. (2012).

<sup>116</sup> 17 U.S.C. § 201 (1978).

<sup>117</sup> 17 U.S.C. § 106 (2002).

<sup>118</sup> Donald S. Passman, All You Need to Know About the Music Business, 208 (7<sup>th</sup> ed. 2009).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> In Re Application of MobiTV, Inc. United States District Court, S.D.N.Y., 712 F. Supp. 2d 206 (for description of ASCAP and how it works).

<sup>122</sup> *Id.*

<sup>123</sup> American Society of Composers, Authors and Publishers,  
[http://en.wikipedia.org/wiki/American\\_Society\\_of\\_Composers,\\_Authors\\_and\\_Publishers](http://en.wikipedia.org/wiki/American_Society_of_Composers,_Authors_and_Publishers), (last visited December 5, 2012).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 17 U.S.C. § 101 (2010).

<sup>127</sup> 17 U.S.C. § 411(b). (2008).

<sup>128</sup> 2pac – Only Fear of Death Lyrics, <http://www.azlyrics.com/lyrics/2pac/onlyfearofdeath.html>, (last visited December 5, 2012).