

**YOU CAN TAKE IT WITH YOU: AN ARGUMENT FOR
ESTABLISHING A NORTH CAROLINA POSTMORTEM RIGHT OF
PUBLICITY**

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The right of publicity and accompanying sense of security against one's likeness being taken advantage of for commercial gain while living is, in many states, a long-recognized matter of state statute. In other states, such as North Carolina, there exists no right of publicity but instead a common law right of privacy, which tends to afford similar protection and recovery to living persons. However, the emergent ability of advanced artificial intelligence systems to render lifelike audiovisual depictions of the dead creates sincere legal and ethical issues. This Article explores in detail the new capabilities of artificial intelligence and the respective abilities of the common law right of privacy and the recently enacted New York postmortem right of publicity to address privacy issues arising from technological advances. While not conclusive per se, this Article addresses public policy concerns and contemplates how to best afford the dead protection in their persons, maintaining that North Carolina should adopt legislation enshrining a postmortem right of publicity.

TABLE OF CONTENTS

I.	INTRODUCTION.....	2
II.	DISTINGUISHING THE NEW YORK RIGHT OF PUBLICITY FROM NORTH CAROLINA COMMON LAW	5

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III. PUBLIC POLICY CONSIDERATIONS FOR ADOPTING NEW YORK’S POSTMORTEM RIGHT OF PUBLICITY	7
<i>A. Public Policy Discussion Related to Personhood and Relationships.....</i>	<i>9</i>
<i>B. Public Policy Discussion Related to Proprietary Interests</i>	<i>11</i>
IV. EXPANDING TECHNOLOGY AND THE GROWING CAPACITY FOR “DEEFAKE” PORTRAYALS OF AUDIO AND VISUAL PERSONAS	12
V. HOW THE EMERGENCE OF “DEEFAKE” TECHNOLOGY IMPACTS AND THREATENS THE PROTECTIONS PROVIDED BY THE NEW YORK POSTMORTEM RIGHT OF PUBLICITY LAW	17
VI. GENERAL ISSUES WITH THE NEW YORK POSTMORTEM RIGHT OF PUBLICITY LAW AND POTENTIAL REMEDIES	21
<i>A. Issue of Commercial Value at the Time of Death</i>	<i>21</i>
<i>B. Issue of Estate Tax on the Assignment After Death</i>	<i>23</i>
<i>C. Issue of the Domicile Requirement for Decedents</i>	<i>24</i>
<i>D. Issue of Over-Expansive Postmortem Protection</i>	<i>25</i>
CONCLUSION	27

I. INTRODUCTION

In his foundational literary work “Meditations,” the Roman Emperor and Stoic philosopher Marcus Aurelius remarked:

Even if you’re going to live three thousand more years, or ten times that, remember . . . that the longest-lived and those who will die soonest lose the same thing. The present is all that they can give up, since that is all you have, and what you do not have, you cannot lose.¹

While erudite and perhaps insightful into the state of the human condition, Aurelius’ remark stands in stark contrast to the jurisprudence of several states. Specifically, Aurelius’ remark fails to capture the proprietary interest a decedent (or in another view their estate) has with regard to their likeness. As the law of

¹ MARCUS AURELIUS, MEDITATIONS 2.14 (George Long trans., 1910).

postmortem right of publicity asserts, one can lose far more than the present after their demise.²

While living, there generally exists either a right of publicity enacted by statute, or a common law right of privacy to prevent one's image or likeness from being exploited without consent for commercial gain.³ In practice, the postmortem right of publicity extends protection over one's image for a variable period of time after their death.⁴ This creates a private right of action mirroring the general right of publicity, but it is instead being held by a purported representative or an estate.⁵ Different states have different approaches to this,⁶ with nearly half of all states recognizing some form of the postmortem protection.⁷ Notably, North Carolina falls outside the category of states with a postmortem right of publicity⁸ and instead uses a common law right to privacy for which the living can derive benefit.⁹ In establishing a common law right to privacy, North Carolina has not specifically held against postmortem rights,¹⁰ although the state has established that no right of publicity can be achieved via the common law (as is the case with many other states).¹¹

² See Erik W. Kahn & Pou-I “Bonnie” Lee, “*Delebs*” and Postmortem Right of Publicity, 8 LANDSLIDE (2016), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2015-16/january-february/delebs_and_postmortem_right_publicity/ [<https://perma.cc/CJ7W-GFRZ>].

³ See *New York's New Post-Mortem Publicity Rights Law: What Does it Mean for Your Estate? What Does it Mean for Your Advertising Campaign?*, DENTONS (Dec. 9, 2020), <https://www.dentons.com/en/insights/articles/2020/december/8/new-yorks-new-post-mortem-publicity-rights-law-what-does-it-mean-for-your-estate> [<https://perma.cc/PP4K-KCCN>].

⁴ See *id.*

⁵ See *id.*

⁶ See Kahn & Lee, *supra* note 2.

⁷ See *id.*

⁸ See *id.*

⁹ See generally *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988) (discussing how the right of privacy will be construed to encompass only tortious invasions of personal privacy and not address matters of press or publicity).

¹⁰ See *id.*

¹¹ See Mark Atkinson, *The Right of Publicity for North Carolina: Focused on the Identity Holder, Privacy-Based and Limited Alienability*, 12 N.C. CENT. SCI. & INTELL. PROP. L. REV. 24, 25 (2019).

This Article argues that North Carolina should adopt a postmortem right of publicity for proprietary, social, and efficiency interests, proceeding in five parts. Part II compares perhaps the most expansive postmortem right of publicity enshrined in recent New York state legislation with the preclusive North Carolina common law right of privacy. Part II also looks to the legislation of other states which have adopted a postmortem right of publicity and distinguishes their laws from that of the New York legislation. Part III directly addresses the public policy considerations for adopting New York's approach, reflecting on psycho-social concerns that North Carolina common law does not address.

Part IV expands on the technology behind the public policy concerns addressed in Part III, specifically analyzing different forms of emerging algorithmic learning and how artificial intelligence is able to generate both audio and visual false depictions, which threaten the right of publicity generally. Part V further questions whether a postmortem right of publicity as expansive as that of New York can cover a rapidly evolving capacity to generate convincing, fake personas, and the potential boundaries of such coverage when considering fair use. Part VI then goes on to investigate the potential problems with the New York Law and whether some of the dictates may be either unjustifiably narrow or conversely overreaching.

The ultimate argument of this Article, that North Carolina should adopt a postmortem right of publicity, should be understood in the context of the modern era. As technology rapidly advances and artificial intelligence develops increased ability to render anything—including the deceased—into reality, the argument for adopting comprehensive legislation is rooted in a desire to preserve judicial economy and further afford proper reverence to the dead. Provided there is a difference between impersonation and personhood, the difference appears to be increasingly blurred with the advance of generative artificial intelligence.¹² When a representation of the decedent cannot be disentangled from robotic

¹² See Lutz Finger, *Overview of How to Create Deepfakes—It's Scarily Simple*, FORBES (Sept. 8, 2022), <https://www.forbes.com/sites/lutzfinger/2022/09/08/overview-of-how-to-create-deepfakesits-scarily-simple/?sh=2e591e522bf1> [https://perma.cc/7YSX-LD8H].

fiction, objective interpretations of past events become a matter of subjective identification.

Beyond the language of proprietary interests and judicial economy, an argument for a postmortem right of publicity is an argument for preserving and protecting history and those who made it. As we fly forwards into a future of representations, we would do well to remember the people of the past.

II. DISTINGUISHING THE NEW YORK RIGHT OF PUBLICITY FROM NORTH CAROLINA COMMON LAW

Before advocating for a postmortem right of publicity, it is important to establish how the right operates, and how it is distinct from the common law right of privacy. Under the New York Postmortem Right of Publicity Law (hereinafter the “New York Law”) enacted in 2021, deceased individuals are granted protection from having their “name, voice, signature, photograph, or likeness” be used for commercial gain.¹³ Further, the use of a “deceased performer’s digital replica” for commercial gain is prohibited specifically “if the use is likely to deceive the public into thinking it was authorized.”¹⁴ Notably, the broad scale prohibitions on the use of a decedent’s persona for unauthorized commercial gain are limited to what the law categorizes as “deceased personalities.”¹⁵

Under the New York Law, a “deceased personality” is limited to an individual who was at once “domiciled in [the] state at the time of death” and further “whose name, voice, signature, photograph, or likeness [had] commercial value at the time of his or her death.”¹⁶ This protection is not timeless but rather expires “forty years after the death of the deceased personality.”¹⁷ Further, the New York Law is novel in that it adds a criminal misdemeanor in addition to a civil remedy in the case of infringement.¹⁸

¹³ N.Y. CIV. RIGHTS. LAW § 50-f(2)(a).

¹⁴ *Id.* § 50-f(2)(b).

¹⁵ *Id.* § 50-f(1)(b).

¹⁶ *Id.*

¹⁷ *Id.* § 50-f(2)(e)(8).

¹⁸ *See id.* § 50-f(2)(b).

In contrast to the New York Law, other states with postmortem right of publicity laws have both less and more exacting standards when it comes to qualifying for protection. For instance, Massachusetts grants right of publicity protection to “any person,” presumably living or dead.¹⁹ Additionally, Nevada grants a postmortem right of publicity protection “regardless of domicile,”²⁰ which contravenes the New York requirement for the decedent to be “domiciled in [the] state at the time of death.”²¹ Other idiosyncrasies remain at the discretion of individual states, such as Illinois, which extended protection to all those born in the state after January 1, 1999.²²

What the foregoing states do not share in specifics with regard to criteria (i.e., domicile or “commercial value”),²³ they do share in legislative intention to proffer protection to the personas of deceased individuals insofar as they are exploited for commercial gain.²⁴ Such is not the case for North Carolina, which possesses only common law protections for individual privacy and no statutory protection for the personas of the deceased.²⁵ Notably, in quasi-divergence from the New York Law, North Carolina common law has never required that there be “commercial value” associated with an individual’s “name or likeness”²⁶ in order to qualify for invasion of privacy protection.²⁷ Granted, the North Carolina courts have considered the question only in the context of the living.²⁸

¹⁹ MASS. GEN. LAWS ch. 214, § 3A.

²⁰ NEV. REV. STAT. § 597.780.

²¹ N.Y. CIV. RIGHTS. LAW § 50-f(1)(b).

²² See 765 ILL. COMP. STAT. 1075/1, /35(a).

²³ CIV. RIGHTS. LAW § 50-f(2)(b).

²⁴ See Kahn & Lee, *supra* note 2.

²⁵ See *Hall*, 372 S.E.2d at 714 (beyond the tortious invasion of privacy, no North Carolina court has ever considered the question of the right extending to deceased individuals).

²⁶ CIV. RIGHTS. LAW § 50-f(2)(b).

²⁷ See Atkinson, *supra* note 11, at 26.

²⁸ See *Flake v. Greensboro News Co.*, 212 N.C. 780, 793 (1938) (“If it be conceded that the name of a person is a valuable asset in connection with an advertising enterprise, then it must likewise be conceded that his face or features are likewise of value. Neither can be used for such a purpose without the consent of the owner without giving rise to a cause of action.”).

The invasion of privacy tort under North Carolina common law is best summarized as requiring a person to show “that there was an unauthorized use or prying or intruding in the private affairs or seclusion of a person that would be objectionable to a reasonable person.”²⁹ Insofar as it concerns what would normally be the domain of the right of publicity, the “unauthorized use” of one’s name or likeness would serve as a functional equivalent for a living individual to achieve legal redress.³⁰ Standing in contrast to the right of publicity, the common law invasion of privacy tort provides redress to actions such as “[a]ccessing a person’s mobile phone or computer without authorization”³¹ and as such, is seemingly more expansive and less narrowly tailored towards the issue of one’s likeness being used without approval for commercial gain.

It is important to note that, as the question of a postmortem invasion of privacy relating to the exploitation of a decedent’s persona has not been brought before a North Carolina court, it is conceivable that a court might attempt to bend the common law to establish a similar protection for the postmortem right of publicity if given the opportunity. However, for the sake of the following argument, this Article will carry a presumption of *nihil sub sole novum*³² as it concerns the state of the North Carolina common law invasion of privacy.

III. PUBLIC POLICY CONSIDERATIONS FOR ADOPTING NEW YORK’S POSTMORTEM RIGHT OF PUBLICITY

As the New York Law appears to contemplate, the advent of enhanced software, digital imaging, and artificial intelligence creates an ethical quandary as to the extent a decedent’s personal image may be protected.³³ In particular, the law considers fictional

²⁹ *Invasion of Privacy*, PARKER BRYAN, <https://www.parkerbryanfamilylaw.com/practice-areas/invasion-of-privacy/> [https://perma.cc/3D4L-6M7K] (last visited Sept. 16, 2022).

³⁰ *Id.*

³¹ *Id.*

³² *Ecclesiastes* 1:9-10 (King James) (standing for the proposition that there is nothing new under the sun and so, in context, there have been no new developments in North Carolina legislation or case law).

³³ See N.Y. CIV. RIGHTS. LAW § 50-f(2)(b).

digital replication of individuals and the use of “deepfakes,” acknowledging technology which lends itself to reproducing decedents via a digital lens.³⁴ As this Section will discuss, there are strong public policy considerations rooted in concern both for the proprietary interests of an estate and the simple dignity of a decedent which lend themselves to enacting legislation that expands decedent publicity rights in an era of emergent technology.

Although New York famously ruled against the descendible nature of publicity rights prior to its adoption of a postmortem right of publicity,³⁵ the cultural and technological grounds have shifted significantly. In *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, the question presented was whether images of Marilyn Monroe could be used in a film without the consent of her estate.³⁶ Ruling as a matter of Indiana law, the district court held against the Monroe estate and further stated that there were no grounds for redress under New York law,³⁷ as at the time New York had yet to legislate a postmortem right of publicity.

However, a more recent example which sparked controversy—not in formal civil action but rather in the court of public opinion—concerned a decidedly more complex issue: the use of artificial intelligence in the documentary “Roadrunner: A Film About Anthony Bourdain.”³⁸ Specifically, the filmmaker “created an A.I. model of [Bourdain’s] voice” to deliver quotes which “there were no recordings of.”³⁹ Notably, the quotes amounted to less than sixty

³⁴ See DENTONS, *supra* note 3; see also discussion *infra* Part IV (generally defining a “deepfake” as false visual and audio depictions generated by “deep learning algorithms”).

³⁵ See *Shaw Fam. Archives, Ltd. v. CMG Worldwide, Inc.*, 434 F. Supp. 2d 203, 207 (S.D.N.Y. 2006) (deciding against Marilyn Monroe’s estate and its ability to achieve descendible rights of publicity).

³⁶ *Id.* at 206.

³⁷ See *id.* at 207.

³⁸ See Jazz Tangcay, *Anthony Bourdain’s AI-Faked Voice in New Documentary Sparks Backlash*, VARIETY (July 15, 2021), <https://variety.com/2021/artisans/news/anthony-bourdain-fake-voice-roadrunner-documentary-backlash-1235020878/> [https://perma.cc/D526-5M4C].

³⁹ Helen Rosner, *A Haunting New Documentary About Anthony Bourdain*, NEW YORKER (July 15, 2021), <https://www.newyorker.com/culture/annals-of->

seconds of material, but were, in the context of the interview, indistinguishable from other quotes spoken by a living Bourdain.⁴⁰

Although the filmmaker later made clear that he had contacted and received permission from Bourdain's estate prior to using artificial intelligence to generate the spoken lines,⁴¹ the controversy that ensued included Bourdain's widow remarking that she would have never approved of such an act by the filmmaker.⁴² While no legal action was initiated, the issue of a voice speaking from beyond the grave—and moreover speaking in such a way to be initially indistinguishable from words spoken while living⁴³—raises sincere ethical questions.

A. Public Policy Discussion Related to Personhood and Relationships

For instance, the “hybridization of reality and unreality,” such that the two become “muddled” and consumers of digital media cannot determine whether a real person or a program is delivering a message, can threaten “parasocial relationship[s].”⁴⁴ A “parasocial relationship,” as defined by ethicist Karen Hao, is a term for the “close connection” felt between a media consumer and a public personality.⁴⁵ Additionally, the advent of increasingly accessible forms of media has likely grown the number of individuals subject to fandom and the number of consumers who form parasocial

gastronomy/the-haunting-afterlife-of-anthony-bourdain
[<https://perma.cc/W6YA-CFTR>].

⁴⁰ See *id.*

⁴¹ See Helen Rosner, *The Ethics of a Deepfake Anthony Bourdain Voice*, NEW YORKER (July 17, 2021), <https://www.newyorker.com/culture/annals-of-gastronomy/the-ethics-of-a-deepfake-anthony-bourdain-voice> [https://perma.cc/8WDM-4TZE].

⁴² See *id.* Notably, the second piece Helen Rosner wrote was published just two days after the initial interview; the outcry from both Bourdain's widow and members of the public immediately followed the publication of the first piece.

⁴³ See *id.*

⁴⁴ *Id.* (quoting ethicist Karen Hao and her interview discussion on the impact of “deepfake” media on consumers, specifically Hao's discussion on the relationship between consumers of media and celebrity figures).

⁴⁵ See *id.*

relationships, with the growth of podcasts as a pertinent example.⁴⁶ Further, there is a growing trend of influencers—using more accessible platforms such as YouTube—who “actively cultivate that faux-intimacy with their followers” so as to achieve commercial gain.⁴⁷ Such trends of increasingly accessible forms of media and influencers who actively seek to create relationships with their followers thus generate personhood concerns as the line between reality and fiction becomes seriously blurred.⁴⁸

Personhood concerns are closely connected to the issue of postmortem publicity and should be considered when adopting policies on the issue. While the dead—insofar as the living are concerned—can neither feel the effect of being rendered alive via technology nor suffer the psychosocial consequences, the living can, and on some occasions do experience the latter consequences as demonstrated by public outcry.⁴⁹ While there may be emotional damage to a family or an estate in the case of a photograph of a decedent being used by a third party for commercial gain,⁵⁰ the damage very well may extend beyond the estate or those who personally knew the decedent to those in the public who feel connected to a decedent when the decedent is, speaking in a figurative context, brought back from the dead via artificial intelligence.⁵¹

Further, under a Lockean theory of labor, the personal dignity of the decedent and the work they had to accomplish to build an identity of “commercial value”⁵² would be jeopardized if they were

⁴⁶ Otegha Uwagba, *Too Close for Comfort: the Pitfalls of Parasocial Relationships*, GUARDIAN (Feb. 13, 2020), <https://www.theguardian.com/media/2022/feb/13/too-close-for-comfort-the-pitfalls-of-parasocial-relationships> [https://perma.cc/MA5J-8V9F].

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See Tangay, *supra* note 38 (discussing the large-scale backlash on Twitter, including commenters remarking that they would have reviewed the film differently had they known of the use of artificial intelligence to generate quotes by the filmmaker).

⁵⁰ See *Shaw Fam. Archives, Ltd. v. CMG Worldwide, Inc.*, 434 F. Supp. 2d 203, 204 (S.D.N.Y. 2006).

⁵¹ See Rosner, *supra* note 41.

⁵² N.Y. CIV. RIGHTS. LAW § 50-f(2)(b).

not granted a degree of posthumous protection.⁵³ Per the Lockean theory, “everyone has a property right to his own person, and the right to exclude others from possessing his body and controlling the output of his labor.”⁵⁴ The theory, enumerated first and foremost around one’s “own person,” reads as an almost premature right of publicity insofar as it operates to preclude others from “possessing [one’s] body.”⁵⁵

Extending from Locke, there is also an argument based in “autonomy” that “the persona has the right to be free of interference from others” for the purpose of both individual dignity and dignifying the work rendered to create a persona.⁵⁶ Under an autonomy approach, the question becomes one of dignity rather than sheer possessory interest.⁵⁷ Legislation, while not establishing a concrete barrier against postmortem digital representations, at least puts the issue in the hands of the decedent’s estate.⁵⁸

B. Public Policy Discussion Related to Proprietary Interests

In addition to the foregoing public policy concerns relating to personhood and relationships, estates possess a sincere proprietary interest in maintaining the right of publicity of an individual after their death.⁵⁹ During life, the laws of several states establish a right of publicity⁶⁰ which, in the case of Michigan, is treated as “a property right.”⁶¹ Accordingly, the Sixth Circuit cited reasoning that a right of publicity “can be possessed and used . . . can be assigned, and . . . can be the subject of a contract. Thus, there is ample basis

⁵³ Michael Decker, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity’s Transformation at Death*, 27 CARDOZO ARTS & ENT. L.J. 243, 257 (2009) (assessing the congruity between the Lockean theory of labor and granting postmortem protection).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See id.* at 265.

⁵⁷ *See id.*

⁵⁸ *See* N.Y. CIV. RIGHTS. LAW § 50-f(2)(b).

⁵⁹ *See* *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 324 (6th Cir. 2001) (discussing how, if treated like a property right under Michigan common law, estates possessed a pecuniary interest in rights of publicity).

⁶⁰ *See* Kahn & Lee, *supra* note 2.

⁶¹ *See* *Miller, Inc.*, 270 F.3d at 324.

for this Court to conclude that it is a species of intangible personal property.”⁶² As “intangible personal property,” in the eyes of the Court the right of publicity functions like intellectual property.⁶³

Considering the subject detached from personhood interests but rather as an estate’s interest in “intangible personal property,”⁶⁴ an estate’s proprietary interest in a postmortem right of publicity could be likened to an interest in any other descendible property.⁶⁵ As the government has a de jure interest in protecting property rights,⁶⁶ the right of publicity, and more specifically, the postmortem right of publicity, are backed by a strong policy incentive for the recognition and protection of living persons and decedents.

In sum, a psychosocial interest as it concerns the general public⁶⁷ and a proprietary interest as it concerns the estate of a decedent both lend themselves to the adoption of a postmortem right of publicity. If a postmortem right of publicity does not exist, these interests could theoretically be jeopardized.

IV. EXPANDING TECHNOLOGY AND THE GROWING CAPACITY FOR “DEEFAKE” PORTRAYALS OF AUDIO AND VISUAL PERSONAS

As the use of an artificially produced decedent’s voice in the Roadrunner documentary indicates,⁶⁸ there is an emerging technological capacity to use artificial intelligence to create fake audio and visual depictions of deceased celebrities.⁶⁹ The term “deepfake,” which describes such depictions, in fact comes from the

⁶² State *ex rel.* Elvis Presley Int’l Mem’l Found. v. Crowell, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987).

⁶³ See *id.*

⁶⁴ *Id.*

⁶⁵ See *id.* (discussing in more depth the parallels between the right of publicity and intangible rights considered to be intellectual property).

⁶⁶ See U.S. CONST. amend. V.

⁶⁷ See Rosner, *supra* note 41.

⁶⁸ *Id.*

⁶⁹ See Lutz Finger, *Deepfakes—The Danger Of Artificial Intelligence That We Will Learn To Manage Better*, FORBES (Sept. 8, 2022), <https://www.forbes.com/sites/lutzfinger/2022/09/08/deepfakesthe-danger-of-artificial-intelligence-that-we-will-learn-to-manage-better/?sh=2e24c3e9163a> [https://perma.cc/M7WY-4WSF].

term “deep learning algorithms” where artificial intelligence systems, when given a large set of data, develop the means to learn and solve problems.⁷⁰ In the visual context, for example, an artificial intelligence system can use “video clips to understand what [a] person looks like from a variety of angles and environmental conditions, and then map[s] that person onto the individual in [a] target video by finding common features.”⁷¹

Once the mapping process is complete, a visual representation is produced which amounts to a false depiction of an individual with the “realistic” nature being a simple matter of technological sophistication.⁷² In some studies, depictions can undergo re-editing when issues are detected with notice of, for instance, a lack of blinking or inconsistent lighting.⁷³ Once the work of re-editing is completed, either under the gaze of human eyes or an algorithm, there is an open question as to how recognizable a “deepfake” will be as fake.

Moving from the visual to the audio context, which was the immediate issue in the Roadrunner documentary controversy,⁷⁴ a similar algorithmic process applies.⁷⁵ After an artificial intelligence system receives audio clips of an individual, it can produce a “model of a voice” which—once more depending on the level of sophistication—can sound convincingly like the person being subject to false depiction.⁷⁶ Notably, the technology is rapidly expanding in its ability to produce realistic false depictions with minimal actual audio input, with Microsoft promoting a program

⁷⁰ Dave Johnson, *What is a Deepfake? Everything You Need to Know About the AI-Powered Fake Media*, BUS. INSIDER (Aug. 10, 2022), <https://www.businessinsider.com/guides/tech/what-is-deepfake> [https://perma.cc/7ZA9-8X5Z].

⁷¹ *Id.*

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See* Rosner, *supra* note 41.

⁷⁵ *See* Johnson, *supra* note 70.

⁷⁶ *See id.*

that can produce a realistic voice depiction using just a “three-second clip” of audio.⁷⁷

Not only are the audio depictions “almost impossible to distinguish from the original speakers in the three second source clips,” but the depictions can also adjust the emotional “warm” tone of the voice as well as account for acoustic environmental factors.⁷⁸ As opposed to a visual “deepfake” being identifiable by the environment in which it is portrayed—noting specifically inconsistent lighting⁷⁹—the work to create false audio depictions appears to be moving beyond the concern of being identified as a fake.⁸⁰ Notably, there are researchers who, as the technology develops, are themselves developing means to identify audio “deepfakes.”⁸¹ The researchers are using human “anatomical limitations humans have” to detect perfections (as opposed to imperfections!) that an algorithmically produced voice possesses that a human voice would not.⁸² Specifically, researchers are able to analyze the structure of the interior of the human head, understand slight audio changes brought on by echoes and reverberations when a real human is speaking, and then contrast that against algorithmically generated audio of the human voice devoid of any flaws.⁸³

While some artificial intelligence generates voices which, when analyzed in a scientific setting, are “comically incorrect,” it is worth

⁷⁷ Andrew Liszewski, *Microsoft’s New AI Tool Just Needs to Hear Three Seconds of Your Voice to Mimic You*, GIZMODO (Jan. 10, 2023), <https://gizmodo.com/microsoft-ai-voice-mimic-deepfake-natural-copy-audio-1849969596> [<https://perma.cc/E86A-DBLF>] (“[T]he tool was trained using Meta’s Libri-light dataset, which contains 60,000 hours of recorded English language speech from over 7,000 unique speakers, ‘extracted and processed from LibriVox audiobooks,’ which are all public domain.”).

⁷⁸ *Id.*

⁷⁹ See Johnson, *supra* note 70.

⁸⁰ See Liszewski, *supra* note 77.

⁸¹ Logan Blue & Patrick Traynor, *Deepfake Audio Has a Tell—Researchers Use Fluid Dynamics to Spot Artificial Imposter Voices*, CONVERSATION (Sept. 20, 2022), <https://theconversation.com/deepfake-audio-has-a-tell-researchers-use-fluid-dynamics-to-spot-artificial-imposter-voices-189104> [<https://perma.cc/77WH-ABLN>].

⁸² See *id.*

⁸³ See *id.*

noting that with every recognition of a “glitch” or “error”⁸⁴ so too arises an opportunity for a competent programmer to adjust and edit to increase the realness of the audio generated and decrease its detectability.⁸⁵ The issue of visual depictions containing inconsistent blinking, as noted earlier,⁸⁶ was in fact resolved such that it took “only a few months for new deepfakes to emerge that had corrected for [that] particular imperfection.”⁸⁷ Although there are studies and programs developing to better understand and detect “deepfakes,” there is a non-negligible concern that, as algorithmic learning and content generation improves, there will be “an attainable point in which deepfakes can be entirely indistinguishable from authentic content.”⁸⁸

Equally as important as addressing the serious potential harms which the use of such artificial technology might inflict on the publicity rights of decedents, it is also important to note the several benefits of this emerging technology. One potential benefit is the possibility of a medical application for artificial intelligence which generates false visual depictions in the form of “generat[ing] open-source, high-quality medical video data sets” of certain diseases which further “deidentify subjects.”⁸⁹ By removing subject identity from a visual representation of an individual afflicted with a disease, doctors can readily access information to aid in their own disease assessments without any risk of breaching patient confidentiality.⁹⁰ There is further medical application for audio false

⁸⁴ *Id.*

⁸⁵ Alex Engler, *Fighting Deepfakes When Detection Fails*, BROOKINGS (Nov. 14, 2019), <https://www.brookings.edu/research/fighting-deepfakes-when-detection-fails/> [<https://perma.cc/XW2U-UZ6X>].

⁸⁶ See Johnson, *supra* note 70.

⁸⁷ Engler, *supra* note 85.

⁸⁸ *Id.* (referring to sophisticated “deepfake” algorithms and the programs designed to catch them as a “cat-and-cat game;” further predicting that “deepfake supremacy will come within the next decade, if not just sooner” such that both individuals and detection programs will be unable to detect “deepfakes”).

⁸⁹ Zhu Bingquan et al., *Deepfakes for Medical Video De-Identification: Privacy Protection and Diagnostic Information Preservation*, AIES ‘20: AAAI/ACM Conference on AI, Ethics, and Society, February 7–9, 2020; New York, New York, USA, 414–20 (2020).

⁹⁰ See *id.*

depiction in the “form of voice replacement,”⁹¹ while other studies suggest that, when used in a deidentified way, it can assist doctors in developing a strategic empathy when dealing with patients in certain emotional states.⁹²

While some other, perhaps more lighthearted uses exist, such as using audio and visual “deepfakes” to generate parody or create more immersive “computer game design,”⁹³ serious threats of harm are also present.⁹⁴ Notably, false visual depictions of various actors such that a face is superimposed onto the body of an individual engaged in sexual acts in a pornographic film is not an emergent phenomenon,⁹⁵ but it is one which is becoming increasingly sophisticated and accessible to the public.⁹⁶

Because “deep learning algorithms” are able to model faces and subsequently cast them onto the bodies of others,⁹⁷ there are now “browser-based applications” that enable producers of pornographic content to “upload a photo’ of [an] intended victim” and then receive an algorithmically sourced “most comparable adult performer.”⁹⁸ A near-seamless visual “deepfake” can then be generated and further edited to minimize the visibility of its false nature.⁹⁹ Aside from the pornographic, there are further deeply troubling implications for the use of similar “deepfake” methods in political campaigns and advertisements, although such use seems yet to be realized such that it can generate actual political

⁹¹ Johnson, *supra* note 70.

⁹² Hsuan-Chia Yang et al., *How Can Research on Artificial Empathy Be Enhanced by Applying Deepfakes?*, J. MED. INTERNET RSCH. 11–2 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8933806/?report=reader> [<https://perma.cc/7ZWR-QRGM>].

⁹³ Johnson, *supra* note 70.

⁹⁴ *Id.*

⁹⁵ See Samantha Cole, *AI-Assisted Fake Porn Is Here and We’re All Fucked*, VICE (Dec. 11, 2017), <https://www.vice.com/en/article/gydydm/gal-gadot-fake-ai-porn> [<https://perma.cc/5EBF-AEN2>].

⁹⁶ See Anne Pechenik Gieseke, “*The New Weapon of Choice: Law’s Current Inability to Properly Address Deepfake Pornography*,” 73 VANDERBILT L. REV. 1479, 1485–86 (2020).

⁹⁷ Johnson, *supra* note 70.

⁹⁸ Gieseke, *supra* note 96, at 1488.

⁹⁹ See *id.*

ramifications.¹⁰⁰ Regardless, as technology advances, it is incumbent on the law to both account for the advances already made and anticipate advances to come.

V. HOW THE EMERGENCE OF “DEEPPFAKE” TECHNOLOGY IMPACTS AND THREATENS THE PROTECTIONS PROVIDED BY THE NEW YORK POSTMORTEM RIGHT OF PUBLICITY LAW

To begin, it is readily apparent that the dead cannot advocate for themselves in the same way that the living can, and accordingly, any action under the New York Law must be brought by the estate or person purporting to be a representative of the decedent.¹⁰¹ Notably, “[p]ersons claiming to represent the rights of a deceased personality are required to register with the New York Secretary of State before any claim can be made.”¹⁰² Apart from the need for representation and the logistical barrier imposed by registration,¹⁰³ on its face the New York Law appears to protect decedents against many of the troubling advances in “deepfake” technology.¹⁰⁴ However, there are some attention-worthy caveats in the law that make it possible to use a decedent’s likeness—which artificial intelligence could render with the necessary audio and/or visual samples¹⁰⁵—where it would be otherwise prohibited (or rather, liability-inducing) to use the likeness of a living celebrity.¹⁰⁶

Concerning the issue of audio false depictions, the New York Law states that the use of the several likeness interests of a decedent will be liable to civil remedy if the use “is likely to deceive the public into thinking it was authorized.”¹⁰⁷ However, if it is the case that “there is a conspicuous disclaimer provided in the credits of the

¹⁰⁰ See Johnson, *supra* note 70.

¹⁰¹ N.Y. CIV. RIGHTS. LAW § 50-f(2)(b).

¹⁰² Judith B. Bass, *New York’s New Right of Publicity Law: Protecting Performers and Producers*, N.Y. STATE BAR ASS’N (Mar. 17, 2021), <https://nysba.org/new-yorks-new-right-of-publicity-law-protecting-performers-and-producers/> [https://perma.cc/J46B-87DA].

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See Johnson, *supra* note 70.

¹⁰⁶ CIV. RIGHTS. § 50.

¹⁰⁷ *Id.* § 50-f(2)(b).

scripted audiovisual work and any related advertisement saying it has not been authorized,”¹⁰⁸ then the use will not be considered “likely to deceive” per the statute.¹⁰⁹ Considering the ability of artificial intelligence to replicate voices—potentially with a minimal amount of actual captured audio¹¹⁰—it appears that the publicity rights of the deceased could be easily circumvented via the simple use of a disclaimer or similar statement indicating lack of authorization.

Additionally, when a “digital replica” of a decedent’s voice is generated—which the New York Law specifically contemplates—protection is limited to the type of decedent who “for gain or livelihood was regularly engaged in acting, singing, dancing, or playing a musical instrument.”¹¹¹ As such, any decedents who were performers outside of the lines of the statute would not be entitled to protection and, further, there would not have to be any disclaimer or other statement of lack of authority incorporated into the replicating use.¹¹² In addition, if there were not a “commercial value” at the time of death which was associated with the decedent,¹¹³ then even if said individual engaged in one of the acts which is afforded protection by the statute, there would be no legal remedy available.¹¹⁴

As it concerns visual false depictions and specifically the prospect of decedents being subject to “deepfake” pornographic depiction, the New York Law creates a private right of action which, once more, specifically contemplates the issue of false depictions in a pornographic context.¹¹⁵ With a right of action established if there is “unlawful dissemination or publication of a sexually explicit depiction of an individual,” the individual subject to depiction is further defined as “an individual who appears, as a result of digitization, to be giving a performance they did not actually

¹⁰⁸ Bass, *supra* note 102.

¹⁰⁹ CIV. RIGHTS. § 50-f(2)(b).

¹¹⁰ See Liszewski, *supra* note 77.

¹¹¹ See Bass, *supra* note 102.

¹¹² See *id.*

¹¹³ CIV. RIGHTS. § 50-f(1)(b).

¹¹⁴ See Bass, *supra* note 102.

¹¹⁵ CIV. RIGHTS. § 52(c).

perform or to be performing in a performance that was actually performed by the depicted individual but was subsequently altered.”¹¹⁶

Notably, the foregoing language appears to contemplate a multiplicity of ways in which a “deepfake” may be generated, with “digitization” defined by the statute as to “realistically depict the nude body parts of the depicted individual, computer-generated nude body parts as the nude body parts of the depicted individual, or the depicted individual engaging in sexual conduct . . . in which the depicted individual did not engage.”¹¹⁷ Accordingly, the statute appears to at once contemplate the creation of a “deepfake” that is wholly based on algorithmic generation of the original individual, while also contemplating the “deepfake” where a superimposition of a head onto another’s body is achieved.¹¹⁸ On its face, the statutory private right of action in the context of pornographic material further does not appear to relegate the definition of “individual” to a living person, thus providing decedents with protection and their estates with a means of recovery.¹¹⁹

The narrow protection the statute affords with regard to audio recovery¹²⁰ could perhaps be explained by a desire on the part of the New York legislature to protect the genre of parody and fair use more generally. If, for instance, a parodist desired to use or artificially generate the voice of a famous deceased orator or politician—a class that is not afforded protection under the statute¹²¹—it could be reasoned that there is a public policy interest weighing against decedents. To hear a deceased individual of importance, via artificially generated audio, subject themselves to mockery and scorn could be an excellent exercise in societal self-reflection. On the other hand, however, there is a sincere risk of damaging “parasocial relationships”¹²² through the use of false audio depictions, where public faith and camaraderie with a decedent

¹¹⁶ *Id.*; see also Bass, *supra* note 102.

¹¹⁷ *Id.*

¹¹⁸ See Gieseke, *supra* note 96, at 1488.

¹¹⁹ See *id.*

¹²⁰ See Bass, *supra* note 102.

¹²¹ See *id.*

¹²² See Rosner, *supra* note 41.

could potentially be eroded by the decedent seemingly giving statements entirely outside their personality or ideology that was known to the public in their life.

With regard to maintaining “parasocial relationships”¹²³ with deceased orators, and more specifically, deceased politicians, the previously noted issue arises of whether “deepfake” technology will be used for a political end.¹²⁴ While not seen as a risk which has yet materialized per se, there have been notable past political “deepfake” audiovisual depictions—however crude—used to attack living politicians, such as a 2019 video which falsely depicted then- US House Speaker Nancy Pelosi acting uncoordinated and slurring her words.¹²⁵ As individuals “have a general tendency to suspend effortful cognitive processes and to rely on associative processes and intuitions” in everyday thinking, the “spotting [of] falsified audiovisual content” is often weakened at the individual level in the digital realm.¹²⁶ As recent studies suggest, while lacking in sophistication, crude and ill-made “deepfakes” may be still be ascribed accuracy by a non-negligible share of viewers.¹²⁷

As it concerns the deceased, the political question seems to move away from contemporary political attacks, such as those on Nancy Pelosi and further on the likes of Barack Obama and Donald Trump,¹²⁸ and more towards the sanctity of political movements themselves. While, per the domicile and time provisions of the statute, several notable deceased orators are well away from the protection of New York’s law,¹²⁹ suppose that a readily available voice recording was used to generate a false audio depiction that had a decedent endorsing ideas and beliefs entirely foreign to them.

¹²³ *Id.*

¹²⁴ See Johnson, *supra* note 70.

¹²⁵ Markus Appel & Fabian Prietzel, *The Detection of Political Deepfakes*, 27 J. COMPUTER-MEDIATED COMM’N 1, 1 (2022). This research, in addition to studying aggregate perceptions of “deepfake” media, also referenced studies which drew conclusions on how humans tend to process sensory data.

¹²⁶ *Id.* at 2.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See generally N.Y. CIV. RIGHTS. LAW § 50 (making a more general statement that there are requirements for protection that include being domiciled in the state at death and there is further a time period for protection).

From Elvis Presley endorsing a new brand of toothpaste to Maya Angelou becoming the spokesperson for the British Petroleum Company, the possibilities are as comical as they are endless. It appears as though there would be no remedy for such an act, as a given decedent would not fall within any statutory nor common law protection. Should the law therefore allow words to be put into the mouths of the dead?

VI. GENERAL ISSUES WITH THE NEW YORK POSTMORTEM RIGHT OF PUBLICITY LAW AND POTENTIAL REMEDIES

Although the New York legislation established a postmortem right of publicity similar in strength to the rights granted by several other states,¹³⁰ there are issues with the law in that it purports to protect the dignity of decedents and the proprietary interests of estates. To begin, the law only protects the right of publicity of an individual “whose name, voice, signature, photograph, or likeness [had] commercial value at the time of his or her death.”¹³¹ While it may well be the case that only those of celebrity status have their “name, voice, signature, photograph, or likeness”¹³² used in such an unauthorized way as to merit litigation, there are potential situations where the infringement could occur, provide substantial commercial gain to the infringer, and further spiral into a dilemma in which there is no available legal redress to the decedent’s estate.

A. Issue of Commercial Value at the Time of Death

Perhaps the most obvious case is where an individual of no commercial consequence dies and is then represented by a third party for profit. In the given hypothetical, the estate of the decedent would have no legal redress because, “at the time of his or her death,” the decedent’s “name, voice, signature, photograph, or likeness” did not possess “commercial value.”¹³³ A perhaps less obvious, but more pressing, hypothetical is if there were a modern-day Franz Kafka who lived and died in New York.

¹³⁰ See Kahn & Lee, *supra* note 2.

¹³¹ CIV. RIGHTS. § 50-f(1)(b).

¹³² *Id.*

¹³³ *Id.*

In life, the now noted novelist Kafka¹³⁴ was scarcely published and kept most of his material in a drawer.¹³⁵ Upon dying of tuberculosis, his last will and testament stipulated that nearly all of his material “[was] to be burned” and the few works exempted were given no instruction, with Kafka writing “should they disappear altogether that would please me best.”¹³⁶ As is self-evident, those tasked with burning his works instead submitted them for publication, and Kafka’s literature has been widely disseminated and influential.¹³⁷

Now, had Kafka lived in New York at the time of his death, it is quite possible—if not probable—his “name, voice, signature, photograph, or likeness”¹³⁸ could have been used without any estate consent, as it was only after death that his life and works obtained “commercial value.”¹³⁹ For the collection of artists, from Kafka to figures such as Van Gogh, who achieved true fame and value only after their passing, is it fair to preclude them from obtaining the same postmortem protection that artists who are successful during their lifetime enjoy? A solution to the dilemma posed by the Kafka hypothetical is to simply legislate that all individuals should enjoy a postmortem right of publicity. However, granting such a sweeping right may hasten another problematic aspect of the legislation—namely, how a postmortem right of publicity would affect taxes on estates.¹⁴⁰

¹³⁴ See *Franz Kafka*, ENCYC. BRITANNICA ONLINE (Aug. 22, 2022), <https://www.britannica.com/biography/Franz-Kafka> [https://perma.cc/QT2Y-5SXV] Kafka was a novelist and short-story writer, rising to prominence following his death in 1924. *Id.* He is regarded as a foundational twentieth century literary figure, particularly influencing the literary and artistic schools of modernism and surrealism. *Id.* While alive he worked at an insurance company and saw little commercial success. *Id.*

¹³⁵ See *id.*

¹³⁶ *Famous Last Will and Testament Author Franz Kafka*, TRIVIA-LIBRARY <https://www.trivia-library.com/b/famous-last-will-and-testament-author-franz-kafka.htm> [https://perma.cc/VQF7-4ZYA].

¹³⁷ See ENCYC. BRITANNICA ONLINE, *supra* note 134.

¹³⁸ N.Y. CIV. RIGHTS. LAW § 50-f(1)(b).

¹³⁹ *Id.*

¹⁴⁰ See Mitchell M. Gans et al., *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203, 104 (2008), <https://www.yalelawjournal.org/forum/>

B. Issue of Estate Tax on the Assignment After Death

Put simply, “[t]he estate tax inclusion of a decedent’s postmortem publicity rights could result in an estate tax liquidity problem common in estates consisting of assets that are difficult to sell or convert to cash.”¹⁴¹ In the event that the postmortem right of publicity was successfully calculated and included in the estate tax, the taxed “value of rights of publicity easily could exceed the estate’s liquid assets available to pay taxes.”¹⁴²

Under the circumstances of immense fame, it would likely already be difficult to render an individual’s persona fungible such that it could be, upon death and assignment, taxed as other property.¹⁴³ Consider, then, the difficulty that would accompany quantifying instances of minor celebrity or even decedents with no “commercial value” behind their “name, voice, signature, photograph, or likeness.”¹⁴⁴ An enigma is further created for the government when the “commercial value,”¹⁴⁵ if small to non-existent at death, greatly increases after death as with Kafka. An assignment has been made by an estate which has fluctuated wildly in value; how can said assignment be taxed?

In principle, New York could simply not treat the postmortem right of publicity as a taxable assignment and so forego the estate tax dilemma. However, in doing so, the legislature would be implicitly marking the right of publicity as something other than taxable property, seemingly delegitimizing the protectable nature of the right. As discussed in the foregoing,¹⁴⁶ by likening the right to intellectual property, the right gains assumptions concerning the ability for it to be assigned and made descendible.¹⁴⁷

postmortem-rights-of-publicity-the-federal-estate-tax-consequences-of-new-state-law-property-rights [<https://perma.cc/Q6ZP-P99S>].

¹⁴¹ *Id.*

¹⁴² *Id.* at 100.

¹⁴³ *See id.* at 104.

¹⁴⁴ N.Y. CIV. RIGHTS. LAW § 50-f(1)(b).

¹⁴⁵ *Id.*

¹⁴⁶ *See* discussion *supra* Part III.B.

¹⁴⁷ *See State ex rel. Elvis Presley Int’l Mem’l Found. v. Crowell*, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987).

One proposed solution is to simply alter the way the right is transferred such that “the postmortem rights of publicity pass automatically to a decedent’s surviving spouse and descendants[,]” which would accordingly mean that “the value of those rights [would] not be subject to federal estate taxation.”¹⁴⁸ However, even under the foregoing scheme, the right would still be treated as different than other taxable and descendible property. Another solution, seemingly far less likely to be adopted and tantamount to a reversion away from the postmortem right of publicity, would be:

to give the decedent the ability to extinguish the postmortem rights without causing estate tax inclusion. As a policy matter, the estate tax is designed to tax transfers by a decedent to others. If a decedent himself or herself destroys an asset immediately prior to death, the value of the asset cannot be included in the gross estate.¹⁴⁹

Such a solution, while workable on a case-by-case basis, would need to be augmented in the event that a postmortem right of publicity was not extinguished. Further, any application not conditioned on the agency of the decedent or the estate would defeat the purpose (and perhaps existence) of the right.

C. Issue of the Domicile Requirement for Decedents

Another potential issue with the New York postmortem right of publicity is the seemingly harsh provision that to qualify for protection, the individual in question must have been “domiciled in [the] state at the time of death.”¹⁵⁰ While perhaps justified by expediency or in promoting that those who seek to have a protected right of publicity establish domicile in a particular state, there is an ethical incongruity when an individual of celebrity status not domiciled per the statute is not granted protection while another *domiciled* individual is. If the postmortem right of publicity is valuable such that it should be treated as a property right, then why have it exist conditionally vis-à-vis domicile?

To answer the question of why there is a condition for domicile, the facts of *Shaw Family Archives Ltd.*, which deals with the infringement of Marilyn Monroe’s postmortem right of publicity,

¹⁴⁸ See Mitchell M. Gans et al., *supra* note 140, at 105.

¹⁴⁹ *Id.* at 106.

¹⁵⁰ N.Y. CIV. RIGHTS. LAW § 50-f(1)(b).

becomes particularly relevant.¹⁵¹ In that case, her status as being domiciled in either New York or California but not Indiana (where the infringement action arose) forced the court to consider issues relating to conflict of laws.¹⁵² The court ultimately held that Monroe was not protected under Indiana law but further noted that (at the time) Monroe would not have fared any better under New York law.¹⁵³

Accordingly, the judiciary could have an interest in preserving judicial economy and avoiding a conflict of laws as to where the infringement took place and the role of domicile in such an action. Instead of having to complicate infringement proceedings and further expose incongruities in who benefits from the postmortem right of publicity, the statute instead draws a bright line between those domiciled in New York at death and those domiciled elsewhere.¹⁵⁴ Perhaps the hope is, absent federal legislation, that the individual in question will have been domiciled in another state, which grants a protection similar in scope to the one offered by New York.

D. Issue of Over-Expansive Postmortem Protection

Another potential issue with the New York statute is that in several conceivable circumstances a decedent may be entitled to more protection than a living person who has “commercial value”¹⁵⁵ and operates in the same manner as the hypothetical decedent. According to the Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”), the use of a “digital replica” of a musical performer would be a violation of said individual’s right of publicity.¹⁵⁶ However, per a plain reading of the

¹⁵¹ See *Shaw Fam. Archives, Ltd. v. CMG Worldwide, Inc.*, 434 F. Supp. 2d 203, 203 (S.D.N.Y. 2006).

¹⁵² See Decker, *supra* note 53, at 248.

¹⁵³ See *id.*; see also *Shaw Fam. Archives, Ltd.*, 434 F. Supp. 2d at 207.

¹⁵⁴ CIV. RIGHTS. § 50-f(1)(b).

¹⁵⁵ *Id.*

¹⁵⁶ *Digital Image Rights and Right of Publicity*, SAG-AFTRA, <https://www.sagaftra.org/get-involved/government-affairs-public-policy/digital-image-rights-right-publicity> [<https://perma.cc/L6XR-7RM8>] (last visited Mar. 30, 2023).

statute, this rule only applies to “deceased performers,”¹⁵⁷ and there is no indication that the “digital replicas” of the living are protected.¹⁵⁸ Accordingly, there is an argument that holographic representations of living persons, especially those outside of the narrow protections afforded for some categories such as audio, might be entirely susceptible to “deepfake” replication without any civil remedy.¹⁵⁹

The most straightforward answer to the dilemma of unequal protection between the living and the dead seems to be legislation which clarifies the issue and grants blanket protection against the use of “digital replicas,” regardless of whether the performer is deceased.¹⁶⁰ However, there is perhaps a concern that drawing even more lines and further restricting the ability of algorithms to generate audio or visual representations of individuals, living or dead, may diminish the capacity for such representations to be used in good faith for good causes. Aside from the potential medical applications previously noted,¹⁶¹ unauthorized use to the effect of tributes, education, or simple parody may be reason to approach the subject of regulation with an attitude of caution.

The New York Law has provisions which raise potential issues ranging from the grounds of an individual’s “commercial value” at death to why an individual must be “domiciled” at death to gain protection.¹⁶² The law’s recognition of the potentially infringing nature of a “deceased performer’s digital replica”¹⁶³ creates a specific protection against the phenomenon of “deepfakes”¹⁶⁴ and other subversive uses of programming.¹⁶⁵ Regardless of enumerated issues, the law is responsive to the time in which it is being enacted. Accordingly, it is far better suited to address contemporary issues,

¹⁵⁷ N.Y. CIV. RIGHTS. LAW § 50-f(2).

¹⁵⁸ See Bass, *supra* note 102 (“[A] digital replica of a living actor’s voice in an audiobook narration would likely not run afoul of the law, nor would the digital replica of a sports broadcaster announcing a game.”).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See Johnson, *supra* note 70.

¹⁶² CIV. RIGHTS. § 50-f(2).

¹⁶³ *Id.* § 50-f(2)(b).

¹⁶⁴ See DENTONS, *supra* note 3.

¹⁶⁵ See Johnson, *supra* note 70.

as opposed to common law, which has not yet received guidance from the state legislature regarding how to address this area of the law.

CONCLUSION

This Article has explored the postmortem right of publicity, beginning its analysis with recent codification in New York legislation.¹⁶⁶ While there are issues with the New York Law, which have been enumerated above, it indubitably grants more protection than a common law invasion of privacy tort system (under which no postmortem protection is granted).¹⁶⁷ The question of a postmortem right of publicity brings up several interests ranging from those rooted in personal dignity, autonomy, and control over work product¹⁶⁸ to those which concern the proprietary interests of an estate. There are also sincere questions about how the law can contemplate a rapid advancement of artificial intelligence, given its quickly evolving capacity to create false representations.¹⁶⁹ At the core of considerations, however, there should also be a fundamental respect for the dead.

Even if the right of publicity exists in a far more limited form, North Carolina will be signaling a reverence of sorts by legislating a postmortem right of publicity similar to that of New York. The state will be signaling that, amidst changing times and rapid technological advancement which makes identity replication via the use of artificial intelligence possible, there is a backstop to prevent the close to literal raising of the dead for commercial gain. Notably, the backstop is not absolute but is instead, using the New York Law as an example, vested with the estate or the individual to whom the postmortem right of publicity is assigned.¹⁷⁰ As such, the psycho-social concerns raised with regard to the effect on consumers of

¹⁶⁶ See N.Y. CIV. RIGHTS. LAW § 50-f(2).

¹⁶⁷ See Atkinson, *supra* note 11, at 25.

¹⁶⁸ See Decker, *supra* note 53, at 257-65.

¹⁶⁹ See Finger, *supra* note 12.

¹⁷⁰ See CIV. RIGHTS. § 50-f(2).

media¹⁷¹ when a dead personality is rendered are not solved. In contrast, they are subject to the discretion of the rights holder.¹⁷²

Additionally, it is increasingly important that North Carolina follow New York's example given the advent of artificial intelligence and "deepfake" programs with the capacity to falsely depict audio and visual appearances.¹⁷³ Critically, the matter is not just a concern for decedents who, per the North Carolina common law, are afforded no right of publicity, but is also a concern for the judicial economy. Specifically, there is a concern that the North Carolina courts, operating with no legislative guidance, will have to develop, and likely rapidly so, a body of law that stretches the unwieldy right of privacy to encompass the emergence of "deepfakes" of both the living and the dead.

As noted, the New York Law contemplates several issues that arise with emergent technology—such as the use of "deepfake" pornographic material and audio generation¹⁷⁴—which are the de facto issues that North Carolina common law does not contemplate. As technology capable of false audiovisual renditions of individuals becomes more pervasive, sophisticated, and accessible to the general public,¹⁷⁵ the courts will effectively have to do the work of the New York legislature in determining the lines where individuals and the specific subclass of decedents can be afforded protection.

Although celebrities may die simply losing "the present"¹⁷⁶ and not taking anything with them, their memories can be safeguarded, and their descendants should have the ability to confine their likeness to memory rather than replication. Especially with the

¹⁷¹ See Rosner, *supra* note 41.

¹⁷² CIV. RIGHTS. § 50-f(1); *see also* Bass, *supra* note 102 (specifically noting that a representative of the decedent must bring a claim and said representative must further be registered with the New York Secretary of State).

¹⁷³ See Johnson, *supra* note 70.

¹⁷⁴ CIV. RIGHTS. §§ 50-f(1)(b), 52(c) (referencing how the act specifically contemplates the creation of pornographic material and further the creation of audio depictions as they concern the audio generated by a narrow category of decedents).

¹⁷⁵ See Gieseke, *supra* note 96, at 1488 (discussing how there are low-charge websites which superimpose images available to producers of "deepfake" content, specifically for content which is pornographic in nature).

¹⁷⁶ AURELIUS, *supra* note 1.

advent of artificial intelligence, the threat of a celebrity and their likeness becoming a “digital replica” and thus a representation of the celebrity carrying on well after their death is serious.¹⁷⁷ Should North Carolina proceed in adopting more expansive protections for the right of publicity, key questions will emerge such as whether all people, or just celebrities, will be entitled to having their “name, voice, signature, photograph, or likeness” protected.¹⁷⁸

¹⁷⁷ See Engler, *supra* note 85.

¹⁷⁸ N.Y. CIV. RIGHTS. LAW § 50-f(1)(b).