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I See (Virtual) Dead People: Tupac Shakur and the Right of Publicity

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A surprise guest appeared onstage at the Coachella music festival this month: the late rapper Tupac Shakur, who died of gunshot wounds in 1996, alongside the very-much-alive Snoop Dogg.

Shakur's image appeared and performed thanks to technology that employs an angled piece of glass placed on the stage, reflecting a projected image onto a screen that looks invisible to the audience. Contrary to earlier reports that this was a "hologram," it apparently is not. Rumors followed that the virtual Tupac Shakur would be going on tour.

There has been considerable debate as to whether this stage trick is great entertainment or just plain creepy (or somewhere in between). Apart from the entertainment value, the use of Shakur's image raises a complicated issue that often arises once a celebrity passes away: whether the celebrity's right of publicity -- which enables the celebrity to limit the use of his or her name, image or likeness for commercial purposes -- survives after the celebrity's death.

A common example is a celebrity name or likeness being used to endorse a product or service. These laws were designed in part to allow a person to control the association of a product or service with their name or identity without their permission -- not everyone wants to endorse athlete's foot products, I guess.

The right of publicity is governed by each individual state's law and, generally speaking, it is the state law of the celebrity's home base at the time of death that controls. Currently, at least 19 states recognize the right of publicity via statute, and several more states recognize the right via the state's common law.

Yet not all of these states recognize a postmortem right of publicity -- in fact, only some 20 states do recognize such a right.

Thus, if a celebrity (or any other person) resided in, say, New York, at the time of his or her death (New York recognizes a right of publicity but only for the living), the right of publicity dies with him or her, and no license would be needed from the estate (or heirs or beneficiaries) to use name, image or likeness.

If, however, the celebrity lived in the celebrity-friendly state of California, which does recognize a postmortem right of publicity for 70 years after death, a license would still be required.

And just to ensure that nothing is easy (and to make sure you're still paying attention), even if the relevant state recognizes a right of publicity, one should take heed to inquire as to whether the state recognized such a right at the time of the celebrity's death.

If, for example, the celebrity died before the state statute was enacted, his or her heirs may not be able to stop anyone from using the deceased name, image or likeness, even when the statute recognizes the right postmortem.

This issue was front-and-center in the 2007 decision involving images of Marilyn Monroe. While the parties argued over which state's law governed, none of the states at issue recognized a postmortem publicity right at the time of Monroe's death in 1962. (California's statute was enacted in 1984).

In 2008, after the Monroe decision, and even though Monroe was deemed to be a New York resident at the time of her death, the California legislature amended its statute to apply retroactively to Californians who passed away prior to the enactment of the statute in 1984.

Given the attention that Tupac's virtual performance received at Coachella, undoubtedly others will seek to "invite" other deceased performers onstage in the future. Whether or not they need permission from the heirs can be a complicated question, but one that must be answered before the show begins.

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