

# Protecting image rights in the face of digitalization: A United States and European analysis

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## Abstract

The star of the movie “Rebel without a Cause,” James Dean, died in 1955. Yet the latest film he will officially be credited in, dates back to no sooner than 2020. Indeed, the movie “Finding Jack” will incorporate a hologram of James Dean, resurrected from the dead to play a character in this brand new performance under his name. This does not represent an exceptional singular case however. Technology is advancing at a drastic pace; which legislation sometimes struggles to keep up with. The novel ways of digitally reproducing human beings have brought along with them serious questions concerning Personality Rights protection. These rights diverge considerably from one jurisdiction to another, on a variety of topics such as the acknowledgement of posthumous protection or the scope of the right to privacy versus publicity rights, for example. This paper offers an evaluation of these rights, based on a comparative analysis across different civil and common law countries, which will hopefully provide an insight into how image rights are being safeguarded at present. The paper concludes proposing a potential future framework to ensure personality right protection in an increasingly digitized world.

## KEYWORDS

intellectual property, intellectual property rights, international

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## 1 | INTRODUCTION

*What can personality rights and their evolution across jurisdictions help us infer about the future of protection afforded to individuals facing increasingly realistic digital reproductions both pre- and post-mortem?*

An actor of 1950s, James Dean is credited as having said “if a man can bridge the gap between life and death, if he can live on after he's dead, then maybe he was a great man.” James Dean would then certainly qualify as a great man, since he is being resurrected this year in holographic form to costar in the movie “Finding Jack.” His hologram is but one among a series of celebrities brought back from the dead to perform in works enabled by a rapidly evolving technology. Modern mediums such as holograms, deepfakes or virtual reality (VR) will borrow individuals' traits to create increasingly realistic digital reproductions of them (S.F. Smith, 2013).

Technology's exponential progress is however causing the legislative framework to lag behind. Legal questions arise, pondering on the degree of personality rights protection afforded to individuals whose persona is being used in such life-like recreations and whether that degree varies if the person is deceased or alive. A comparison among the personality rights defenses granted across various legal jurisdictions in the United States and in Europe, reveals a disparity in the scope of protection afforded. Some offer limited personality right preservation, privileging instead freedom of speech and the public domain to postmortem image rights. Other jurisdictions, prevalently in continental Europe, restrict their protection to moral infringements harming a person's dignity, while others safeguard a larger scope covering both the personal and commercial interests of a person. As we learn from the concurrent application of personality rights, it becomes clear that digital reproduction is but one more medium added to the image rights' catalogue: the same way a century ago, cameras were controversial for their capacity to capture people on film without their consent, holograms, deepfakes and VR represent a new form of taking people's likeness, which legislation will have to cover.

We therefore pose the question of what can personality rights' evolution across jurisdictions help one infer about the way individuals' image rights will be protected in the future from increasingly realistic digital reproductions. To answer this matter, a comparative analysis is undertaken, involving an evaluation of the personality rights' legal literature and case law from both common and civil law jurisdictions. This paper first delves into the personality rights protection offered in the United States, a general overview of which highlights the lack of a Federal law in that domain. Thus, the paper proceeds with an independent evaluation of key States, namely the States of New York, Indiana and California. Second, a European perspective is provided, by examining image rights' protection in various of the Old Continent's jurisdictions, starting from Germany, progressing through France, Spain, and finally the UK. France was the first country on the European Continent to recognize personality rights through its Article 1382 of the *Code Napoléon*, promulgated in 1804, whose influence travelled to neighboring countries Germany and Spain (Resta, 2011). Germany expressly refers to it in its Civil Code.<sup>1</sup> These principal European players ultimately vary in their personality right protection, providing an interesting comparison, especially the UK, whose lack of a concrete legislation in the matter stands in stark contrast to its other European counterparts. Lastly, the paper analyses potential proposals to develop a possible framework and best protect individuals' personality rights in the future. Taking into consideration the knowledge acquired from the first two parts of the thesis, this third section endeavors to reach a balance between freedom of expression and image rights that is adapted to the increasingly life-like technological advancements being developed.

## 2 | PERSONALITY RIGHTS IN THE UNITED STATES

### 2.1 | Introduction to personality rights in the United States

Personality Rights in the United States are generally understood as being the amalgam of two different categories, namely Publicity Rights and The Right to Privacy. The first mention of the concept took place in 1890 in Brandeis

and Warren's ground-breaking "The Right to Privacy" (Warren & Louis, 1890) which discussed a person's "right to be left alone." It advocated to grant damages for the distress and anguish caused to a person whose dignity was harmed. From it, was later derived the Right of Publicity, which granted an individual control over the commercial exploitation of his personality (Post, 1990) and hence a right of action against misappropriation of their identity. It can be assigned, giving it the characteristics of a property right (Westfall & Landau, 2005). This acknowledgement of a Right of Publicity independent from a Right to Privacy, was first expressed during the landmark case of *Haelan Lab. V. Topps Chewing Gum, Inc.* Case in 1953, where a famous baseball player had sold his image rights to two competing chewing-gum contractors. The Right to Privacy being a personal right and nonassignable, would not have permitted any sort of claim. However, the Court recognized that celebrities had value in their image; thus their interests when endorsing products ought to be preserved. The Right of Publicity was born (Madow, 1993). It had been recognized that any pecuniary value of a property right was entitled to protection. One year later, in 1954, famed attorney Melville Nimmer wrote his seminal article "*The Right of Publicity*" following which the right, now recognised as a valuable economic right, has not ceased to expand, covering any aspect of personality a celebrity can sell (Nimmer, 1954).

There is no federal law on the Right of Publicity in America, but rather each State individually determines its scope of recognition, including post-mortem personality rights' recognition, leading to a wide variance within the country. To determine how Personality Rights will apply to holograms, one would have to evaluate the question separately from the lens of the Right to Privacy and the Right of Publicity.

Antecedent Right of Publicity cases give an idea as to how the unauthorized use of a person's name or likeness in a virtual context would be adjudicated by the US Courts given the First Amendment defence. Despite the lack of precedence in terms of holograms, one can safely look into the pre-existing case law for videogames, where individuals are digitally reproduced, to draw parallels and assume the legal risk of using a real-life person's image without authorisation in a hologram. Furthermore, the analysis of postmortem personality right protection would clarify the legal parameters behind holographic reproductions concerning decedents.

## 2.2 | Image Right Protection in video-games

The principal question that gets asked for videogames, and that will certainly be asked for holograms, is whether it constitutes an "artistic expression," in the same way a movie, painting or photograph does. This will then affect the extent of image right protection accorded to it. The answer to that is not consistent throughout the country. The most important case to mention in this matter, is the 2011 case of *Brown v. Entertainment Merchants Association*,<sup>2</sup> where it was for the first time recognised by the Supreme Court that videogames were indeed to be understood as comprehensive works of art. The Court justified its decision by explaining that video games' story plot, music, dialogue, or characters, were common literary devices, which helped the communication of ideas, much like movies, books or plays.<sup>3</sup> Consequently, the Court declared that since videogames shared messages and ideas through its various devices and distinctive features, it acted as an artistic expression and would be entitled to benefit from First Amendment protection.<sup>4</sup> Copyright Law equally considers that video games may be regarded as creative works (World Intellectual Property Organization, 1982) and are thus protected under Section 102 of the Copyright Act.<sup>5</sup> If the work is considered original, fixed on a tangible medium of expression and is deemed reproducible as well as perceivable, it would be eligible for copyright protection.<sup>6</sup>

The main defence argument a digital hologram or video-game creator would use to justify such representation would be the Freedom of Speech covered under the First Amendment (Drecolias, 2014). As an artistic work, any limitation of the freedom of expression in a videogame or hologram must be kept to a minimum. However, in the case where a videogame character closely resembles a particular celebrity, the level of artistic value behind the game will be evaluated to determine the legitimacy behind such image use. Courts have come up with different tests to determine how to balance this speech right with the one of publicity. Each test focuses on a different facet,

to evaluate the usage of the celebrity's persona versus the actual expressive work. However, these tests are limited and have already led to very different results in their past applications. One of the tests is the *Predominant Use Test*. In these situations, there is a similarity between the real-life person and his digital reproduction. The test's function is to determine whether the purpose of the work is primarily expressive or rather commercial.<sup>7</sup> Under that evaluation, used by the Supreme Court of Missouri in the case *John Doe v. TCI Cablevision*,<sup>8</sup> the Court must assert whether the use of the name of the celebrity was used for the simple purpose to exploitatively "attract attention" to the expressive work and thus obtain a commercial advantage, or whether it was chiefly for legitimate artistic purposes.<sup>9</sup> Another test is the one of *Relatedness*, also known as the "*Rodgers Test*," after the case *Rogers v. Grimaldi*.<sup>10</sup> Under it, the Court has to determine whether the use of a celebrity's name or image is "wholly unrelated" to the content of the work or whether it "explicitly misleads" consumers into thinking that the celebrity had endorsed the work, just like the Lanham Act does for Trademark protection.<sup>11</sup>

The most influential test used however; would be the *Transformative Use Test*, which evaluates the extent to which an image has been creatively transformed so as to become the artist's expression rather than just a mere depiction of a person's image for commercial profit.<sup>12</sup> Copyright Infringement cases also refer to this necessary transformation under the *Fair Use* doctrine, found in Section 107 of the Copyright Act (Office US). If the celebrity image is just one of the "raw materials" from which the artistic work is derived, then its reproduction, like in a hologram for instance, would be protected.<sup>13</sup> The Supreme Court used this test in the case of *Comedy III Productions, Inc. v. Gary Saderup, Inc.*<sup>14</sup> where it found that the use of the plaintiffs' image on t-shirts involved an infringement of their Right of Publicity, as there was not sufficient creative expression in the depiction to justify the use of their image under the First Amendment. In video-games, this test was notably used in *Lohan versus Take-Two Interactive Software, Inc.*, where the actress Lindsay Lohan accused the video-game publisher, before New York Courts, of violating her image rights for a character supposedly inspired by her.<sup>15</sup> Similarly, singer Kirby argued before California Courts this time, that a videogame figure violated her image rights due to its close resemblance to her, in the case *Kirby v. Sega of America, Inc.*<sup>16</sup> In both situations, the Courts found that the video-game characters presented enough originality to be viewed as transformed and thus protected under the First Amendment. Therefore, if a hologram is deemed original and transformed enough from its real-life inspiration, we can safely assume that it would be protected under the First Amendment. Notwithstanding, in both cases, the digital characters were found to bear little resemblance to their supposedly real-life inspirations and furthermore possessed different names. The outcome of the cases would have probably been different had the inverse occurred.

A notable example of that can be found in sport video-games, where the athletic characters in them are exact copies of their real-life eponyms, as by doing so, realism is added to the game. US Courts' conclusions on the matter have been starkly contrasted. In *Hart v. Electronic Arts, Inc.*<sup>17</sup> (in New Jersey), just like in *Keller v. Electronic Arts, Inc.*<sup>18</sup> (in California), the Courts applied the *Transformative Use Test*. They found the digital representations not to be protected by the First Amendment after comparing the athletes' real-life appearance with the game's avatars, which were not sufficiently transformed. The decisions drew criticism however, stating that the court should have focused on the transformative element of the whole game itself, rather than focusing on the transformative element of the character solely (Dimita et al., 2020). The game would have then been found to contain sufficient expressive transformation to merit First Amendment protection. In contrast, in the similar case of *Brown v. Electronic Arts, Inc.*,<sup>19</sup> the 9th Circuit Court applied the *Rogers Test* rather than the *Transformative Use Test*, and judged that because the utilization of the athlete's image was artistically relevant to the game, it was thus protected by Freedom of Expression (Vick & Jassy, 2011). The fate therefore of whether the unauthorized use of an individual's image in a hologram will be protected by the Freedom of Speech or not, may likewise depend on which test is used by the Court to answer the question. A lack of harmonization that generates uncertainty.

When it comes to Parody, it clearly refers to certain people and requesting their consent is usually not viable. Because it can be argued that the individuals being parodied lose control over their image in these cases, the scope of the right to parody varies a lot depending on the jurisdiction. The California Courts limited that right to parody, when they ruled the case of *Vanna White v. Samsung Electronics America* in favour of the plaintiff, stating that her

image rights had been violated<sup>20</sup> (but with a famous dissent submitted by Judge Kozinski). Conversely, in the *Manuel Noriega v. Activision Blizzard, Inc.* case,<sup>21</sup> the California Courts rejected the plaintiff's claim that the video-game's inclusion of a character with his name and traits violated his image rights, as they found the use legitimate and transformative enough. The Court weighs the artistic contribution of the video-game, the reputation of the person whose image was used and the proportionality of such usage to reach its final decision. These same criteria will likely be applied to determine the level of image right protection in holograms created for parodic purposes. The criteria are reminiscent of the ones used for copyright infringement accusations which commonly befall on parodies. A defence is based on the *Fair Use* exception, found in Section 107 of the Copyright Act. Four factors are evaluated to determine *Fair Use*, those being the purpose and character of the use, the nature of the original work, the amount and substantiality of the original work used, and the effect in the market value of the original work.<sup>22</sup>

### 2.3 | Postmortem protection

Despite the recent trend of viewing the misappropriation of a person's name or likeness as an economic injury with its befitting compensation of damages; its roots in privacy law cannot be ignored (Beverley, 2002). The Right of Publicity being seen as either a personal right or as a property right will affect the outcome on whether the Right of Publicity can be descendible post-mortem and hence enforceable by the decedent's family (Zapparoni, 2004). If it is viewed as a property right, then its transferability can be contended, but if it is viewed as a privacy right, it could be argued that the right should die along with the person it protects (Schwartz & Peifer, 2010). Traditionally in Common law, a deceased person does not possess any surviving rights. Accordingly, if the plaintiff were to bring a claim, he would have to prove that the defamatory statement published by the defendant affected the plaintiff himself (Keeton, 1984). As stated in the case of *Hughes v. new England Newspaper Publishing Co*: "One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his relatives."<sup>23</sup> The US Courts' notion of "the dead don't hear" makes it difficult to grant a remedy for defamation affecting a deceased person alone (Binder, 2002). Another example would be the *Tyne v. Time Warner* case,<sup>24</sup> where the plaintiffs recovered damages, after arguing that they themselves suffered humiliation from the portrayal of their dead family member in the film *The Perfect Storm*, which invaded the family's privacy rights.

The lack of recognition of the concept of "dignity" in the US jurisdiction is a challenge to the awarding of posthumous personality rights (Nolte, 2005), despite it forming part of the Preamble of the United Nations Universal Declaration of Human Rights of 1948.<sup>25</sup> In 1988, the Supreme Court in the case *Hustler Magazine v. Jerry Falwell*<sup>26</sup> unanimously agreed that a public figure, even alive, could not receive damages for the infliction of emotional distress touching upon their dignity. Yet, the acknowledgement of a US postmortem personality right based on dignity would help better protect an individual's Personality Rights. The defence of Freedom of Expression remains however powerful, especially if the usage of the image rights were done for matters of public interest. Hence, in the case of *Waters v. Fleetwood*,<sup>27</sup> the Georgia Supreme Court dismissed the claim that the publication of a photograph depicting a murdered 14-year-old girl constituted an infringement of privacy right because the subject was of public interest. To have free press, one needs to accept the potential unauthorized use of their image rights. Yet, heirs might wish to preserve the dignity of the deceased from being harmed by controlling the narrative being shared about him after his death or by preventing others from profiting off his celebrity. Concerning the latter, in the case of *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, the Court considered the Right of Publicity to be descendible as without it, "*the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair if not destroy, the value of the right of continued commercial use.*"<sup>28</sup> Therefore, Publicity Rights were found to be both transferable and inheritable too (Singer & Berger, 2014). It can be concluded that an unauthorized hologram might thus be found to infringe upon the Publicity Rights of the deceased celebrity on which it is based, as those rights are inheritable, but not on the decedent's Right to Privacy, as the posthumous protection of dignity is not admitted by US Courts.

Some US States do recognize postmortem Right of Publicity under Common Law, although usually it is done through statute. As of yet, no overarching Supreme Court decision or Federal Act has been adopted concerning Personality Rights. The Right of Publicity protection granted therefore depends on which State one would be claiming in. Some States (such as Maryland, Delaware, Maine...) do not recognize the Right of Publicity at all, leaving claimants to rely instead on Trademark or Copyright suits instead. A copyright suit would be especially beneficial if the unauthorized hologram performance were an exact reproduction of a previously recorded performance. Naturally, if the performance is new, then there would be no copyright infringement claim. Trademark on the other hand, would protect a celebrity from a hologram using his or her name. However in certain jurisdictions, it is difficult to place a deceased celebrity's name under trademark protection.<sup>29</sup>

Other States such as Hawaii, Massachusetts and most notably New York (where many celebrities live), do grant a Right of Publicity to individuals but only during their lifetime. In these States, the Postmortem Right of Publicity is not recognised either, which leads to similar results as in those states that do not offer any Right of Publicity at all. During the person's lifetime however; the substantive law applied to determine an infringement would depend on the conflict-of law rules governing the forum's State and which State has the closest ties to the lawsuit at hand.

## 2.4 | New York

New York was the first State to recognize the need for a statute protecting an individual's name and likeness, giving birth to what are now Sections 50 and 51 of the New York Civil Rights Act (Weiler, 2002). Under these statutes, in addition to the existing case law, the name, picture, voice and likeness of an individual is protected against unauthorized use in advertisements or other trade purposes. Commercialization is not a requirement for the solicitude of a Publicity Right protection. The State of New York however, has of yet not included in its statute a Post-mortem Right of Publicity. To determine the substantive law protecting a plaintiff's right of publicity, New York Courts look into their property choice-of-law rules and apply the state law of where the individual was domiciled at the time of their death. In the particular case of holograms, the case of *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC* comes to mind, where the Court concluded that because the actress was domiciled in New York at the time of her death, her post-mortem publicity rights would not be protected, as per New York state regulations. The hologram production could thus take place.<sup>30</sup>

In another case involving the Marilyn Monroe estate, the descendants of celebrity photographer Sam Shaw were selling t-shirts containing Shaw's photographs of Marilyn Monroe.<sup>31</sup> The actress's estate claimed that this infringed upon her Postmortem Right of Publicity under Indiana Statute. The case got transferred to New York, as the starlet was domiciled there at her death, where the Court promptly dismissed the case. It stated that regardless of her domicile, Marilyn Monroe had no right of publicity since she could not have transferred by will a right she did not possess at her time of death, as none of the States recognised it at the time. Following the New York Court's logic, the same could be applied to James Dean, who died in 1955, 5 years before Marilyn Monroe: If anybody were to bring a Publicity Right claim for the unlicensed hologram of the actor, for example, it would be dismissed for lack of a property right will at the time of his passing (Burr, 2017).

Case law has shown that the First Amendment protection also covers the depiction of real-life people portrayed in fictional settings. In *Hicks v. Casablanca Records*, real-life but deceased author Agatha Christie was portrayed in a fictional biographical movie as an emotionally unstable woman, prompting the heir of the Agatha Christie estate to bring suit for violation of the author's Right of Publicity. The plaintiff lost the suit, as the federal court of New York held that a fictionalized account of a public figure's life in a movie or novel does not entail a Right of Publicity.<sup>32</sup> Any hologram of a real-life deceased person appearing in a fictional movie or setting would thus be authorised according to the New York state law.

## 2.5 | Indiana

Finally, there are States where the Right of Publicity's recognition extends beyond death. Most notably, Indiana, Tennessee, and California, the heart of the US entertainment industry. The utility of such a postmortem measure can be noted when we know that some celebrities earn more after their death than they have during their lifetime (Forbes, 2020). The States that do recognize postmortem Right of Publicity protection differ from each other in terms of duration, scope, requirements, limitations, and so on. Some states, for example, require that the decedent exploit his image rights during his lifetime for them to be protected after his death.<sup>33</sup> Notwithstanding, the majority rule in the United States, as written by Thomas McCarthy, remains that Rights of Publicity are recognised, descendible, and extended postmortem without a necessity for exploiting that right during one's lifetime (McCarthy, 2000). It turns out that most US courts that have legislated on the matter of a postmortem Right of Publicity issue have recognized it to be descendible,<sup>34</sup> which is beneficial for the heirs of deceased individuals, who wish to complain about the unconsented image use of the latter in holograms.

Indiana is known as the US State with the most expansive Publicity Right protection. Its Right of Publicity statute covers one's name, likeness, signature, gestures, appearance, voice, mannerisms<sup>35</sup>... The right extends 100 years past the death of the individual and can be applied retroactively, as it does for James Dean. The expansive scope of the right implies that even if the celebrity died in another state, the heirs could sue for Publicity Right infringement in Indiana, so long as the infringing material is being distributed there, which could pose a serious threat to the freedom of expression of content creators. Looking back at the aforementioned *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC* case, even though Monroe had died in New York, where postmortem Publicity Rights are not recognised, the hologram creators of the dead actress would still have the capacity to be sued for Publicity Right infringement under Indiana Statute.

The State of Washington followed suit, prompted by the case *Experience Hendrix LLC v. Hendrix Licensing LTD* which involved the heirs of guitarist Jimi Hendrix.<sup>36</sup> The State amended its Washington Personality Rights Act in 2008 to include a broad choice of law conditions and postmortem recognition akin to those in Indiana (W. K. Smith, 2013). According to the Act, the postmortem right of celebrities would be recognised regardless of their domicile at death. The Federal District Court ruled however; that the Washington amendment violated the US Constitution and could lead to forum shopping. The state of Indiana whose protection of the Right of Publicity is just as extensive, could possibly face similar attacks in the future.

## 2.6 | California

The state of California is the home to many celebrities, who have over the years pushed for the broadening of Publicity Right recognition, extending the scope to include assignable and descendible postmortem rights. Today, the right is protected through the State's Common Law Right of Publicity and Statutory Right of Publicity, enshrined in the California Civil Code §3344 for the living and §3344.1 for the deceased (Bartholomew, 2011). This post-mortem protection extends 70 years after the death of the individual,<sup>37</sup> but on the condition that the heirs of the deceased register their claim at the California Secretary of State, if they wish to possess exclusive exploitation over the celebrity's persona and recover damages in cases of infringement.<sup>38</sup> Thus, under California Law, consent of the celebrity or his estate is required for "any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable."<sup>39</sup> Contrary to other States, liability in California is only incurred if the unauthorised usage of the celebrity's name and likeness was done knowingly by the defendant.<sup>40</sup> While no commercialization of the name is needed in order for it to be protected postmortem, it is however requested that the right of publicity have commercial value at the time of death.<sup>41</sup>

Notwithstanding, there is an important exception to the protection of the Right of Publicity for “entertainment purposes,” enshrined under §3344.1(a)(2) of the California Civil Code, which functions similarly to the general “artistic expression” defence. Under that section, any musical composition, audio-visual, single or original works of art (or commercial announcement advertising such work) shall not be considered a merchandising product, good or service if it is fictional or nonfictional entertainment, a dramatic or musical work.<sup>42</sup> In the case of holograms, that would imply that if the California Courts deem an unauthorized hologram to be an audio-visual work of art, it would fall under the exception of Section 3344.1(a)(2), incapacitating the celebrity's heirs from blocking it. Hologram performances resemble 3D movies and are thus likely to be comprised under that exception (Hua, 2017). There is after all no doubt that the movie starring James Dean “*Finding Jack*” can be considered an audio-visual work.

One may argue that holograms are not specifically mentioned under the list of works benefiting from the exemption, however, past case law has shown that not to be an issue. In *Astaire v. Best Film & Video Corp.*,<sup>43</sup> the descendants of Fred Astaire claimed certain videotapes featuring the actor infringed upon his publicity rights, but the California Courts held that despite videotapes not being explicitly mentioned as exempted under §3344.1(a)(2), they were to be considered as film, otherwise the result of the Statute would be absurd (Hall, 2016). Therefore, the postmortem protection offered in California for Publicity Rights mainly involves any unauthorised usage in either a product or an advertisement. A performance involving the hologram of a deceased celebrity should normally be considered as exempt from Publicity Right infringement, so long as the hologram is not the product being sold itself. Naturally, the unauthorized hologram performance of a living person would be under much tighter regulations and would certainly constitute a Publicity Right infringement. Also exempt from Publicity Right protection is the unauthorised use of a deceased person's likeness in matters of public interest, such as sports and the news.<sup>44</sup>

We previously discussed the case of Publicity Rights in video games using the image of sports athletes. In *Electronic Arts v. Davis*, the Supreme Court was asked to give a writ of certiorari to determine which between the Right of Publicity protection and the First Amendment should take precedence in an expressive work realistically portraying a person (Volokh, 2019). The Supreme Court denied the petition, leaving the matter still uncertain.

Despite this lack of a Supreme Court ruling, existing case law does help shed some light on the question. In the case *No Doubt v. Activision Publishing Inc.*,<sup>45</sup> the plaintiffs sued for infringement of publicity rights and won the case because the avatars in the game were acting in a similar way to what the real people did for a career, which was singing. Likewise, in the *Keller* athlete video game case, the Courts ruled in favour of the plaintiff, because they assessed that the avatars in the game were simple recreations of what the athletes were famous for doing in real life and hence did not merit the *Transformative Use* defence. Therefore, in California, if a realistic hologram of a celebrity performance is produced or inserted in a VR video-game, where it merely reproduces what the person is famous for doing in real-life, then it is likely that the Right of Personality would take priority over the Freedom of Speech defence. This goes in line with the reasoning adopted by the United States Supreme Court in its only Right of Publicity case *Zacchini v. Scripps-Howard*.<sup>46</sup> The Court had decided that by broadcasting the entire performance of the plaintiff, Scripps-Howard had deprived him from the exclusivity of his act, threatening the economic value of his performance and thus entitling him to recover damages. The Supreme Court had therefore recognised the duty to protect the proprietary interest of an individual (the Right of Publicity), but not the personal one where damages are recoverable for any mental anguish caused (the Right to Privacy).

The 2018 case *Havilland v. FX Networks*<sup>47</sup> illustrates a more recent example of the battle of priority between the Right of Publicity and Freedom of Speech. Actress Olivia de Havilland brought suit against FX Networks for their negative and inaccurate portrayal of her in the series *Feud*, claiming it infringed upon her Right of Publicity for unauthorised use of her name and likeness, ultimately undermining her professional reputation. The Court initially concluded that the First Amendment did not offer protection to FX Networks since the series intended to portray de Havilland realistically and was not sufficiently transformative. Upon Appeal to the California State Supreme Court however, the decision was reversed, as the Court found that *Feud*, while inspired by the real actress, transformed it into an expressive work of art, thus deserving First Amendment protection. The US Supreme Court later denied de Havilland's petition for a certiorari. The tendency seems to indicate that in editorial, expressive

works, the First Amendment would take precedence. The contrary applies to commercial speech, where cases involving product advertisement tend to favour the plaintiff.<sup>48</sup> The Havilland case illustrated the First Amendment protection in a nonfictional setting, but other cases also reflects its scope of protection in fictional accounts. For instance, in *Guglielmi v. Spelling-Goldberg Prods*, the California Supreme Court dismissed the postmortem claim of Publicity Right infringement in a fictionalized film of actor Rudolph Valentino's life, stating that works of fiction are constitutionally protected as the exposition of ideas.<sup>49</sup> Thus, the Right of Publicity does not necessarily outweigh the value behind Freedom of Speech. The holographic portrayal of a deceased or alive person in a fictional or nonfictional account might benefit from First Amendment protection as an expressive work of art if the performance is deemed sufficiently transformed. James Dean's hologram in "*Finding Jack*" is performing in a brand new entertainment production. His portrayal in the movie is likely to be deemed transformative enough and as such, the fictional movie will be protected under the First Amendment.

In addition, it has been held by the California Courts that media companies were allowed to use celebrity images related to their program, to promote their expressive work content but also their companies in general.<sup>50</sup> This exception applies, as long as the advertisement does not give the false impression of celebrity endorsement of the program or media company.<sup>51</sup> As the Court explained in *Cher v. Forum international, Ltd.* "advertising to promote a news medium is not actionable under an appropriation of Publicity theory so long as the advertising does not falsely claim that the public figure endorses the news medium." Therefore, an unauthorized hologram of a celebrity may be used to promote an expressive work like a movie, as long as it is related to the content and does not give the false impression of endorsement.

### 3 | PERSONALITY RIGHTS IN EUROPEAN JURISDICTIONS

#### 3.1 | Introduction to Personality Rights in Europe

In Europe, Personality Right regulation is decided upon by the State itself, leading to a diverse variation of its protection across the continent (Ondreasova, 2018). Notwithstanding, a certain harmonisation is obtained for members of the European Union who are required to respect the European Convention of Human Rights (ECHR) (Council of Europe, & Council of Europe, 1952), as well as the Charter of Fundamental Rights of the EU (CFREU) (European Parliament & Official Publications of the European Communities, 2000). Much like in the United States, it is a balancing act finding the right equilibrium between an individual's Freedom of Expression in Europe, notably covered in Articles 10 ECHR and 11 CFREU, and Right to Privacy, found in Articles 8 ECHR and 7 CFREU. The European Court of Human Rights does not mention in its cases the Right of Publicity directly, but safeguards a person's image rights within the Right of Privacy (Moskalenko, 2015). In the case of *Von Hannover v. Germany*,<sup>52</sup> Princess Caroline of Monaco sued publishing company Burda before German courts for distributing candid photos of her on holidays in France. When the German courts refused to put an injunction against the photos' publication, the case was brought before the European Court of Human Rights, who acknowledged a violation of the Princess' Right to Privacy according to Article 8 ECHR. Thus, while European nations have discretion in defining their country's Personality Right protection, the regulation enshrined in the ECHR and CFREU ultimately have to be respected by the EU Member States. The UK, despite not being an EU Member State anymore, remains at moment a participant in the ECHR, committed to adhering with the Human Rights treaties and conventions (Edwards, 2021).

#### 3.2 | Germany

The Right of Personality in Germany was developed by the German Federal Supreme Court, based on the German Constitution's Articles 1 and 2 (*Grundgesetz*-GG), Article 8(1) of the European Convention on Human Rights, as well

as Section 823 of the German Civil Code (*Bürgerliches Gesetzbuch-BGB*), which enshrine the duty to protect individuals' life, body and health. The Right of Personality protecting one's image and name in German Law remains very broad, leaving Courts to determine its scope on a case by case basis (Cantero et al., 2010). Court practice has shown that protection is afforded to different aspects of an individual's personality such as his likeness, image and other personal characteristics (Welser, 2014). Nonetheless, a person may agree to license it for a fee, making it marketable (Welser, 2014).

Similar to in the United States, the Personality Right in Germany also has to be weighed against the legitimate interest of Freedom of Speech, which has to be limited to a certain extent to protect the former (Rösler, 2008). The German Federal Constitutional Court (*Bundesverfassungsgericht-BVerfG*), considers the freedom of expression as a basic human right.

While this paper will refer to the Right of Publicity and Right to Privacy in Germany, the country uses the term Right of Personality to formally recognise them both. The Personality Right in Germany can be seen from a commercial and from a noncommercial perspective. The commercial one functions in a similar fashion to America's Right of Publicity, where the intention is to preserve the interest of one's image. The noncommercial aspect in Germany is founded on the concept of dignity. Every individual be they a celebrity or not is entitled to their dignity. In America however, celebrities are public figures, who once they leave the house are not entitled to a right of privacy, since they are of public interest (Barnes, 2010). Their dignity is thus forfeited in some way.

Personality Rights are posthumously protected in Germany, through the justification of human dignity, as illustrated in the landmark 1971 case of *Mephisto*.<sup>53</sup> *Mephisto* is the name of a book, in which one of the characters is modelled after Gustaf Gründgens, a real person but named differently in the novel. The sole heir of Gründgens claimed for infringement of the latter's personality right, as Gründgens himself had died a few years before the novel's publication. The BVerfG held that the human dignity of the deceased was a constitutional value that overrode the publisher's freedom of expression in a creative work. The book was as a result prohibited from publication. In America, since human dignity is not taken into account, artistic freedom would likely have superseded. The Court considered Freedom of Art to require limits, since an artistic portrayal can have effects on the way certain individuals are seen, ultimately affecting their social esteem and value (Zacharias, 2001). Therefore, a hologram that harms an individual's human dignity in Germany would likely be found to infringe upon his Personality Rights, even after death.<sup>54</sup>

Personality Rights are not per se superior to Freedom of Art, but when employing the latter, care must be taken not to disregard others' rights. That is why the amount of creative transformation or artistic alteration of the personage from the real figure will be evaluated and decisive in the outcome.<sup>55</sup> Consequently, the protection of the decedent's personality rights will depend on how apparent his portrayal is and on how seriously damaging the falsification is to his postmortem personality rights. It is interesting to note that while there is no fixed expiration date, the importance of protecting a deceased person's personality rights fades as time passes.<sup>56</sup> As the public memory of the individual dwindles, his human dignity would be less affected by image falsifications.<sup>57</sup>

The answer to whether an unauthorised hologram would be permitted if it did not degrade or humiliate the individual's character, harming his human dignity, can be found in the 2003 case of *Kahn v. Electronic Arts. GmbH*.<sup>58</sup> The case reflects the scope of personality right protection in a video game. The football player Kahn had filed a lawsuit against video game developer Electronic Arts (EA) for using his likeness and name in a FIFA game without his consent. The German Courts considered this a monopolization of Kahn's personality and rejected EA's expression of art defence. Had the case occurred in the United States, the Supreme Court would have certainly considered the video game an expressive work and hence afforded it protection under the First Amendment, as seen in the *Brown v. Entertainment Association* case. In Germany however, a hologram and any other lifelike digital reproduction would likely necessitate the consent of the real person, otherwise it could be considered as an unfair monopolization of that person's character, damaging his personality rights.

Traditionally, in Germany, one's image rights are protected through copyright law's Section 22 of the Copyright in Works of Art and Photography Act (*Kunsturhebergesetz-KUG*). German Law protects both the patrimonial and

nonpatrimonial aspects of an individual's right of personality.<sup>59</sup> This unitary approach to protection of personality rights, was perfectly illustrated in the 1999 *Marlene Dietrich* case.<sup>60</sup> The actress' image was used to promote a musical of her life and her daughter sued for damages for personality right infringement caused by the illegal image use (Welkowitz & Ochoa, 2010). The German Federal Supreme Court had to decide whether in addition to the protection of nonmaterial interests, the economic interests were protected as well by Personality Rights. Moreover, it had to evaluate whether the latter interest was transferable and inheritable after the person's death. The Court eventually ruled in favour of the plaintiff, confirming that posthumous protection of personality rights were recognised and that self-determination with the right to control the commercial exploitation of one's identity was to be considered as an essential protected value (Helling, 2005). This protection of the financial aspect only lasts for 10 years after the death of the individual, during which consent to commercially utilise his picture or other characteristics is required from the heirs.<sup>61</sup> Therefore, the case confirmed that Articles 1 and 2 GG protect both material and nonmaterial aspects of personality rights.<sup>62</sup> A holographic reproduction of a deceased person's image would for the first 10 years following their death, require their heirs' consent. Past those 10 years, the hologram will not be protected from Publicity Right infringement anymore. If the hologram or deepfake qualifies as a parody, it would be protected under Article 24 of the German Copyright Act (*Urheberrechtsgesetz*), provided it were created by free use of the original work.<sup>63</sup> As an EU Member State, Germany is also bound to the definition of parody provided by EU Law, whereby it has to "evoke an existing work while being noticeably different from it" and "constitute an expression of humour or mockery."<sup>64</sup>

Every natural person is entitled to Publicity Right protection, although that right is slightly more limited for celebrities: They can have their images published without their authorisation for noncommercial reasons if it is deemed to be in the public interest, according to Section 23 of the *Kunsturhebergesetz*.<sup>65</sup> If the purpose is commercial however, for instance for an advertisement, approval of the person involved is required (Coors, 2014). While it is not necessary to register an individual's right of publicity, it is recommended for public figures to register their names as trademarks.<sup>66</sup> Furthermore, commercialisation of one's identity is not a requirement for Publicity Right protection.<sup>67</sup>

While the Right of Publicity can be licensed to third parties, the Right to Privacy cannot be detached from its owner. If an infringement of the Right of Privacy occurred after the individual has passed away, then it is not necessarily his heirs but his nearest surviving relatives that can bring a claim. Since the Right to Privacy is so closely tied to the human dignity of the deceased (Fischer, 2004), a financial compensation is reserved only for exceptionally serious infringements of the right.<sup>68</sup> Nonmaterial remedies, such as an injunctive relief are more standard.<sup>69</sup> A Court that finds a deceased artist's hologram to damage his dignity, would likely order it to be removed from the market rather than order financial compensation to the heirs. Contrarily to the US where "the dead don't hear" policy is mainstream, Germany protects the personality rights of the deceased, considering that in the increasingly digitalized world we live in, the risks of personality exploitation where the dignity, reputation and privacy of the individual can be infringed, have increased (Post, 1986).

### 3.3 | France

Personality Rights, known as *Droit à L'Image* in France, is a dualist system where the personal Right To One's Image and the commercial Right On One's Image coexist. The former finds its origins in the Right to Privacy and gives exclusivity to an individual to use his own image. The latter is a property interest and permits an individual to commercially exploit his image.<sup>70</sup>

The Personality Rights in France are described as consisting of "the moral rights of authors: the right to privacy, the right to protect one's honour and reputation, and the right to control the use of one's image." It is protected under Article 1382 of the French Civil Code, where both moral and economic damages are covered (Gordley, 2006). The Right to Privacy specifically is covered under Article 9 of the French Civil Code, whereby everyone is entitled to

the respect of their private life, regardless of their celebrity status. To have their image utilised, consent of the individual must be clearly given, regardless of the medium used to reproduce their image (Logeais & Schroeder, 1997). Hence, in France, a hologram of a person would necessitate his or her consent.

Similar to other jurisdictions, cases involving holograms are rare due to the modernity of the medium, but analogies can be done by looking into cases of video-games. The landmark case in France concerning image rights is the one of *Philippe Le Gallou v. Fodé Sylla*. Fodé Sylla was the president of the association SOS Racisme who appeared as a character to be defeated in a video-game. Fodé Sylla complained that the game violated his image rights. Additionally, the game was created by the political French far-right party, which blocked their freedom of expression defence, as the court esteemed that the game was created for political rather than parodying purposes. To have a parodying purpose, the work must be humorous, informative and inoffensive. It then does not require the depicted person's consent, unless the parody harms a trademark, where it then risks incurring trademark infringement.<sup>71</sup> The game however, was found to violate the plaintiff's image rights under Article 9 of the French Civil Code and was thus to be removed from the market. The purposely degrading use of the plaintiff's image was sufficient to justify the Court's measures. An unauthorised hologram or deepfake of a person would hence have to be inoffensive, lest it incur the same fate as the video-game above.

Image Rights have been recognised in France since the 1858 notorious *Rachel* case.<sup>72</sup> The deceased famous French actress Rachel was drawn on her death-bed, an image which then circulated in commercial newspapers. The family filed suit and the Court recognised the harmed dignity of the family, due to the infringement of their Right of Privacy. The Court ruled that the moral right of image was passed on to the family whose duty was to protect the memory of the deceased and thus their explicit consent was needed if such images were to be exploited or sold (Brügge-meier, 2010). Posthumous personality rights were therefore recognised in France from very early on and an unconsented postmortem hologram of a person will equally be forbidden by the French Court if it is found to infringe on the Right to Privacy.

Conversely, the patrimonial aspect of Image Rights in France was deemed at first to terminate upon the person's death.<sup>73</sup> Notwithstanding, case law has increasingly recognised the inheritability of the commercial side to Personality Rights. In the 1988 *Raimu* case, the widow of the actor brought suit against a company who used her deceased husband's image in an advertisement campaign.<sup>74</sup> The Court granted her compensatory damages, confirming that the patrimonial aspect of Image Rights is descendible if the descendant's image had acquired economic value during his lifetime.<sup>75</sup> Consequently, the unconsented hologram of a deceased celebrity would likely incur the need to compensate his or her heirs for what can be referred to as a postmortem Publicity Right infringement.

In the question of Freedom of Expression versus Personality Rights, the French Courts seem to rely on how visually recognisable the individual being portrayed is, to determine the existence of an image right infringement. In the *Papillon* Case, the image of a notorious criminal was published on the cover of a book on his life. This unauthorised image use was found to infringe upon his Personality Rights, while the contents of the book did not.<sup>76</sup> This view is further developed in the more recent case of *Scarlett Johansson vs. Grégoire Delacourt*. The latter was a French author who had published a novel wherein the fictional character was described as looking like the Hollywood actress. The actress filed suit against the writer, stating that he exploited her name and image to sell his books and thus her Right of Publicity has been infringed. The French Court dismissed her claims under the defence of Freedom of Speech in an artistic work, but the outcome may have been different had the representation been more visual. If the novel were adapted into a movie or if a hologram of the character were to be created, the consent of Scarlett Johansson would likely have been required, just like in the *Papillon* case. As mentioned above, according to Article 9, consent is necessary to use a person's image regardless of the medium it appears in, and digital holograms are merely a new form of media. Naturally, the more recognizable a person is, the more necessary it becomes to obtain that person's consent for a realistic hologram production. In the *Scarlett Johansson* case, if the hologram is realistic, then the actress would be recognizable and consent to use her image is required.

This requirement for consent under the French jurisdiction has the benefit of being able to survive the developing media technology. Consent must be in writing, clearly detailing the duration and use of the image, and it

must be obtained before the actual utilization of the person's image. In a holographic case, the person's consent must be obtained before the creation or publication of the hologram.

### 3.4 | Spain

In Spain, the equivalent of the American "Right of Publicity" would be the right to one's own image, governed by The Organic Law of 5 May 1982. The word "Image" represents not just a person's visual reproduction, but any characteristic that makes him or her clearly recognizable.<sup>77</sup> It guarantees the "fundamental right to honour, personal and family privacy and one's own image" as enshrined under Article 18 of the Spanish Constitution of 1978. Therefore, according to Article 7.5, any taking, publication or reproduction of a person's image in a private setting or outside of it, via any medium such as photography or film, for example, would be considered illegitimate. Moreover, under Article 7.6 of the Organic Law, the unauthorised usage of a person's name, voice, picture or other personal characteristic for commercial or advertising purposes is considered illegal in Spain (Barnett, 1999), even if the use is merely incidental.<sup>78</sup> Therefore, patrimonial just like nonpatrimonial interests are covered, with Article 7.5 the equivalent of the American Right to Privacy and Article 7.6 comparable to the Right of Publicity in the United States. Parodies on the other hand are regulated in Spain by Article 38 of the Intellectual Property Law. To qualify as a parody, the composition, such as a deepfake, would have to be divulged and must not be confused with, nor harm, the original work and its author.<sup>79</sup> In such cases, consent of the person being depicted or his descendants is not required (Pérez-Cabrero, 2021).

The Spanish interpretation of the word "commercial" under Article 7.6 is very broad, as it can refer to anything where the end result is profit (Llari, 1992). A movie or magazine using an unauthorized photograph of a person will be considered commercial, thus within the scope of Article 7.6 and an infringement of one's right of publicity. Likewise, would a holographic reproduction of a celebrity. Article 7.6's word "advertising" also has an interpretation that extends further than in the United States. In the 1996 Spanish Supreme Court case "Respect for Seniors,"<sup>80</sup> individuals that appeared against their will in a Madrid brochure promoting respect for the elderly, brought suit against the city. The Court ruled in the plaintiffs' favour, stating that their right of image had been infringed under Article 7.6 of the Organic Law. Even though the brochure was not commercial, it was of an advertising purpose and hence constituted an infringement.

Article 8 of the Organic Law states the exceptions to this rule, whereby historical, scientific or cultural interests are excluded from being considered as illegitimate interferences, just like caricatures of public figures. Also exempted are images taken within a public context, although this never applies for uses of advertising purpose.<sup>81</sup> In case of infringement, a presumption of harm exists and compensation is granted including for any moral damages inflicted upon the plaintiff, as per Article 9.3. In the "Respect for Seniors" claim, the defendants argued that the brochure had cultural interest and thus was exempted from the Image Right protection. The Court nonetheless dismissed that argument, as the cultural interest was not relevant enough in this case to overcome the claimants' fundamental right of image (Arregui, 1991). In the United States, the brochure would not have been considered as an infringement of the plaintiffs' Personality Rights as they weren't commercial and were taken in a public place with no disclosure of truly private facts.

In the United States, it is also permitted to use the unconsented image or likeness of an individual in an advertisement if it is to promote a work where that individual appears.<sup>82</sup> European jurisdictions such as the German and French ones use a similar reasoning and so does Spain generally. Notwithstanding, Spain has shown itself to be much more protective of Personality Rights than elsewhere. In the 1994 *Zarzuela* case,<sup>83</sup> the image of a now-deceased actress was used to promote the renewal of a Spanish Opera in which she had played decades ago. Her daughter brought suit for infringement of her mother's posthumous Image Rights. The Supreme Court in the end dismissed her claim, but not because it assumed that by agreeing to lend her image to the opera production years ago, the actress had indirectly consented to lend it to the opera's renewal, as it consisted in the same work. Instead,

the Court considered that the use of the image was less for advertisement purposes than it was for cultural purposes (as it tried to revive the Zarzuela genre) and hence was protected under Article 8.1 of the Organic Law. Following the Spanish Court's reasoning, one can assume that a hologram of a deceased actor's performance advertising a related work could potentially be seen as an infringement of his Image Rights under Article 7.6 of the Organic Law.

Celebrities under the Spanish jurisdiction benefit from the special Personality Rights protection of *ius se poenitendi*, granted under Article 2.3 the Spanish Organic Law (Gosálbez, 1983). The rule permits the individual to revoke his consent at any time, if it protects his moral rights to privacy and dignity. This unilateral termination can occur provided it is objective. Evidence of reasonable and "serious moral reason" to terminate must be given and indemnity to the publisher is to be granted. Some Courts have even extended this rule to the commercial aspect of personality rights. Therefore, in the case of a permitted hologram or deepfake, if the individual later considers it is harming his dignity, he may pull out of the project at any moment under the *ius se poenitendi* rule granted under Spanish legislation, provided he gives adequate justification and indemnity.

The Inheritability of Image Rights is recognised in Spain. The Organic Law allows the relatives who were present during the decedent's lifetime to enforce his posthumous rights. If no heirs are alive, then the Spanish Ministry of Justice is qualified to enforce the postmortem image rights for 80 years after the passing of the celebrity (Savare, 2013). We can conclusively say that Spain is one of the most protective States concerning Personality Rights. The expansive scope of its Article 7.6 of the Organic Law leaves little room for the existence of an unconsented hologram. As a result, whether the individual being reproduced is dead or alive, the unconsented hologram would likely be considered an Image Right infringement. Movies with such holograms would be labelled as "commercial" and sanctioned, unless it can be proven that they fit under the Article 8 exception of the Organic Law.

### 3.5 | The United Kingdom

The UK does not have a specific legal protection covering Personality Rights. To safeguard an individual's image, both from a dignity and commercial point of view, the UK frames the protection in the context of tort law, namely the torts of Breach of Confidence and Passing Off.<sup>84</sup> This lack of concrete Image Right protection is to not threaten the UK's Freedom of Expression and consequently the divulgation of truth expressed via those images.<sup>85</sup> Despite this refusal to recognise a Right to Privacy, the 1998 Human Rights Acts increased the UK's level of protection granted to an individual's dignity and personal information, leading to an expanded application of the Tort of Breach of Confidence. The current interpretation of the tort has widened to now cover not only confidential information but also private information, based on Article 8 of the European Convention of Human Rights (Synodinou, 2014).

A good example of this expansion is the *Campbell Case*,<sup>86</sup> where unauthorised photographs of the British supermodel leaving a Narcotics Anonymous meeting were published in a newspaper. The Court ruled in her favour, because the information was deemed to be of private nature. To reach this ruling, the information had to undergo the "reasonable expectation of privacy" test, where all circumstances of the case were evaluated. The UK's approach to posthumous Personality Rights is narrow, as they follow the rule of "action personalis mortar cum persona" (personal action dies with the person) (Fleming, & Ackbe, 1998). According to this rule, the dead have no surviving Privacy Rights that could be infringed. The estate, relatives, or heirs of the deceased would only be capable of bringing an action if the infringement affects them directly. Hence, a movie using a deceased celebrity's hologram harming the decedent's dignity would not be sufficient ground to bring a claim before British Courts. Meanwhile, caricatures or parodies in the UK are protected under Section 30A of the *Copyright, Designs and Patents Act 1988*, according to the "Fair Dealing" clause.<sup>87</sup> "Fair Dealing" permits the limited use of another's work, provided it is moderate and proportionate, an evaluation conducted by the UK Courts on a case by case basis (Intellectual Property Office, 2014). Deepfakes that fall under the parody description would thus be exempted.

The popular English method to prevent the unauthorised exploitation of an individual's commercial interests in his image is through the tort of Passing Off (Carty, 2004). The tort of Passing Off could serve as an English substitute to the US Right of Publicity. It gives a plaintiff action if an unauthorised reproduction of his persona seems to evoke a false endorsement on his behalf, thus remedying against false representation with the objective of deceiving customers. A resulting confusion (in the customer's mind) or dilution (of the individual's name) is necessary to prove the utilisation of the tort. An unauthorized holographic reproduction or deepfake of a celebrity that either dilutes the celebrity's name or misleads the customer into believing that they endorsed a certain product would be considered as a tort of Passing Off. This right can be posthumously applied by the individual's successors (Stokes, 2012). Despite the aforementioned patchwork of personality right protection, the UK continues to adamantly reject an "Image right" per se that would allow individuals to control the reproduction of their image (Beverley-Smith & Barrow, 2014). An unauthorized hologram performance of a deceased or living celebrity could assuredly take place, benefitting from Freedom of Expression protection, unless the celebrity trademarked their image under English law. To conclude, the UK has a dualist approach to the protection of Personality Rights. The country has expanded its Tort of Breach of Confidence to cover the noncommercial aspect of personality rights, protecting one's dignity and privacy from invasion. The patrimonial aspect however, does not benefit from such protection against unauthorised appropriation of an individual's image, even though the Tort of Passing Off offers limited coverage. This falls in line with the UK's reticence to grant Personality Right protection to its celebrities, although it may become necessary for the country to adapt its legislation in the future to better suit evolving technology and the publicity right infringements that will come along with it.

## 4 | PERSONALITY RIGHTS APPLICATION IN THE FUTURE

### 4.1 | Technological advancements: Holograms and VR

As technology continues to evolve, new hyper realistic ways of digitally reproducing people have developed, such as holograms. This evolution is expected to expand, with new mediums becoming mainstream like deepfakes or VR (Silbey, 2012). The use of image in recent technology is more intimate and obtrusive that it used to be. Holograms are exact replicas of living or deceased people and VR will give birth to avatars so exact that fiction will be hard to distinguish from reality.<sup>88</sup> These avatars could plausibly be created with the physical appearance and name of real-life human beings. The increasing hyperrealism of technology will lead to more serious infringements of individuals' image rights. Therefore, it can reasonably be believed that legislation will adapt by reinforcing the protection of people's personality rights in expressive works. Video-games were indeed recognised as an artistic expression by the Supreme Court in the case of *Brown v. Entertainment Merchants Association*,<sup>89</sup> and as they continue to evolve, it is likely that the Court carries on considering them as works of art. New York State, which to this day does not recognize postmortem personality rights, has in October of this year proposed a bill whose purpose is to create a right of publicity for deceased individuals.<sup>90</sup> This bill is written in anticipation of the creation of digital avatars. Additionally, the only US Supreme Court right of publicity case was ruled in favour of the plaintiff.

Scholars have in the past pondered on the best way to keep up with future technology by protecting individuals' rights, while respecting creators' freedom of expression. At present, US Courts apply three main tests to determine publicity right infringement, namely the Rogers test, the Predominant Use test and especially, the Transformative Use test. The vast diaspora of personality rights in the United States has led to inconsistent application of the principles with similar cases leading to very divergent outcomes depending on the State Court the claim was brought in (Blanke, 2013). This inconsistency will become increasingly problematic as it will leave gaps in the country's legislation for personality right infringements to occur. Content creators also suffer from this lack of uniformity, as a "race to the bottom" ensues. Certain States provide an ever increasing scope to publicity rights, causing forum shopping to take place, as content creators have to tailor their productions based on the most

plaintiff friendly regulations, ultimately undermining Freedom of Expression.<sup>91</sup> Therefore, necessary measures must be adopted to protect in a fair manner personality rights and freedom of expression equally.

## 4.2 | A federal right of personality

To remedy this problem of irregularity, the implementation of a Federal Right of Personality is desirable, where the level of protection is standardized nationwide (Wyman, 2013). This would facilitate interstate business operations, simplify compliance with the law and regulations, reduce administrative costs for the businesses and reduce the threat of forum shopping.<sup>92</sup> Celebrities, just like hologram or VR creators alike will benefit from the certainty a uniform Right of Personality would bring. In the end, by better protecting personality rights, freedom of expression also benefits.<sup>93</sup> Uniformity becomes all the more vital, considering the internationalization of digital forms of media via the distribution of holograms or video games, for example.

## 4.3 | Protection of dignity

The United States has until now been reluctant to acknowledge a protection of personality rights based on dignity. However, because of the increasing malleability and hyperrealism of digital image reproduction, future personality rights protection should take into account the dignity (Rothman, 2018) of the individuals as a basic human right, inspiring itself from Continental European jurisdictions. A basis on dignity would also protect common noncelebrity individuals, who do not possess commercial value to their image but whose dignity may still be harmed by digital reproductions.<sup>94</sup> For postmortem rights, the principle of “the dead don't hear” fails to acknowledge that individuals are still entitled to a certain dignity after death.<sup>95</sup> The upside behind such policy adherence however, is the increase in public domain, which greatly benefits from the absence of postmortem restrictions (Boyle, 2008). This promotes namely new expressive content, data and innovation.<sup>96</sup> Subsequently, a reliance on dignity could be risky for freedom of speech since an individual could bring charges against any unconsented use of his image under pretext that it besmirches his integrity. To avoid this problem, a clear definition of the word dignity should thus be established, one that specifically safeguards the reputation and worth of the individual, even after death.<sup>97</sup> Courts would then have to decide on a case-by-case basis whether an unconsented digital reproduction of a person in an expressive work of art is an infringement of their personality rights. This will be done based on how damaging the holographic or VR portrayal is to the person's reputation, knowing that a living individual's reputation and worth is more sensitive to being harmed than a decedent's.<sup>98</sup> Such a definition would protect people from emotional and dignitary harm, without overly restricting digital creators. The unconsented hologram of a living actor playing a movie role would likely constitute a personality right infringement, as the impersonation harms his reputation and worth. On the other hand, video games like *Keller* or *Hart* would under these conditions be permitted, as the digital recreation of the athletes in a sport game in no manner harms their reputation. Under these conditions, the verdict in the *No Doubt*<sup>99</sup> case would be overturned, as a video-game of the singing band performing does not harm their dignity. The general public also benefits from this measure as they will be able to enjoy the realistic content of such artworks.

Upon dying, the image rights of the person would be descendible to his heirs with a post-mortem duration that would arguably last for one generation,<sup>100</sup> following the German logic that as time passes, the public memory of the individual fades<sup>101</sup> and thus his dignity would be less affected by images falsifications.<sup>102</sup> A longer or indeterminate timespan would be excessive on its restriction of freedom of speech. In case of breach of the decedent's personality right, just like in Germany, it makes sense not to give financial reward to the heirs but rather injunctive relief. This would prevent unnecessary litigations from gold-digging relatives and estates.<sup>103</sup>

#### 4.4 | Publicity right protection

Individuals generally file suit with regard to an infringement of their publicity right, as they wish to safeguard the patrimonial interest of their image by controlling its commercial exploitation.<sup>104</sup> The Labour Theory elaborated by John Locke, stipulates that individuals are entitled to enjoy the fruits of their labour (Locke & Macpherson, 1980). In the case of Publicity Rights, those “fruits” would be the public image celebrities have cultivated for themselves over the years and that thus carries commercial value worthy of protection.<sup>105</sup> Its utilization therefore ought to be compensated. This naturally makes complete sense in a commercial context involving the advertisement of a product or service. The question becomes more debatable when speaking about an expressive artwork, like a movie, hologram, or video-game. In artistic works using digital image reproduction, the publicity right exception from the California Civil Code §3344.1(a)(2) should be applied federally across the United States, to preserve freedom of expression.<sup>106</sup> This acknowledgement of artistic freedom alongside the aforementioned personality rights’ respect of dignity should provide an adequate balance between the two oft conflicting rights. Under these conditions, had James Dean died less than a generation ago, the unauthorised VR avatar of the actor or the usage of his hologram in the movie “Finding Jack” would be permitted under postmortem personality right regulations, unless his heirs can successfully argue that the movie performance harms his reputation.

In the end, the best way for individuals to protect their postmortem personality rights is by clearly stating in their wills what is to happen to their image once they pass away. Comedian Robin Williams’s deed specifies a restriction on the use of his image for the next 25 years following his passing. This way, he ensured himself not be incorporated digitally in any movie or advertisements in the near future (Robin, 2017). In the case such a contract is not possible due to the premature death of the artist or for actors of yesteryear who could not have envisaged the technological advancements currently taking place, one can only speculate based on the current case law, how Courts will handle future personality rights cases involving more advanced technology such as holograms or VR. In the meantime, the above suggestions humbly propose ideas to tackle the increasingly convoluted field of digital image reproduction were a future legal framework on the subject to be drafted.

## 5 | CONCLUSION

In this paper, jurisdictions from both sides of the Atlantic were analyzed with regard to their approach towards Personality Rights. The comparison of their legislation and relevant case law provided a unique insight into the way they protect Image Rights and view it vis-à-vis Freedom of Expression. Of the jurisdictions observed, it can be concluded that on one side of the spectrum we find the UK, whose legislation clearly favors freedom of speech, while the antipode position would be occupied by Spain whose regulation clearly promotes Personality Rights. The United States, France, and Germany lie between, thus showcasing all together a broad range of the diverse reasoning given by jurisdictions in justifying their adopted positions on the subject. Philosopher Voltaire once wrote that “one man’s loss is another man’s gain” and the duality of Personality Rights with Freedom of Expression seems to prove him right.

Nevertheless, the expansive overview of solutions from different jurisdictions, has enabled the suggestions proposed in the third part of this paper. This part assesses different proposals that would adequately balance the two basic rights in the future. Indeed, the future is rife with technological advancement. Digital reproductions in the form of holograms, deepfakes or VR avatars have been developing, presenting not only an increase in hyper-realistic representation but a possible increase in personality right infringements as well. Notwithstanding, holograms, deepfakes and VR ultimately represent just one more technological step in the long evolution of personality rights throughout history, an analysis of which can help determine how to best tackle future challenges in the matter.

Part three suggests a future framework for image rights that endorses the protection of a person's dignity both when alive and posthumously. The suggestion and reasoning behind is particularly applied to the US context, which is used as the primary example in the end, but could very well be transcribed to other jurisdictions likewise. By applying such a dignity standard, the suggestion wishes to strike a fair compromise between Personality Rights and Artistic Freedom. This entails much work in the future for Courts, who to attain this balance, will have to identify the benchmarks and lines delimiting what constitutes the infringement of one's dignity. A reasonable estimation would be that traditional limitations to freedom of speech, such as obscenity and pornography for example, will be applied. An individual's unconsented portrayal in a deepfake, holographic form or in VR alongside these elements would see their reputation and worth inevitably harmed. Such a case (e.g., a pornographic or otherwise obscene unauthorized use) would hence be considered as having crossed the dignity threshold and would consequently be regarded as Personality Right infringement. However, the topic is rich and complex, deserving of an entire paper to itself and it would therefore be very interesting to read what ensuing research will write on the subject in the times ahead.

### DATA AVAILABILITY STATEMENT

Data sharing not applicable to this article as no data sets were generated or analyzed during the current study.

### ENDNOTES

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- <sup>5</sup>US Code, Title 17 §102.
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- <sup>29</sup>Elvis Presley Enterprises v. Sid Shaw Elvisly Yours (1997) CH 1996 E No 1337.
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- <sup>47</sup>Havilland v. FX Networks, U.S., No. 18-453, 1/7/19.
- <sup>48</sup>White, *supra* note 20.
- <sup>49</sup>Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 456 (Cal. 1979).
- <sup>50</sup>Page v. Something Weird Video, 960 F. Supp. 1438 (C.D. Cal. 1996).
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- <sup>53</sup>BVerfGE 30, 173.
- <sup>54</sup>BVerfGE 30, 173, 194.
- <sup>55</sup>BVerfGE 30, 173, 195.
- <sup>56</sup>OLG München, NJW-RR 1994, 925.
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- <sup>62</sup>BGHZ 143, 214.
- <sup>63</sup>Urheberrechtsgesetz, s 4(3)(24).
- <sup>64</sup>Judgement of 3 September 2014, *Deckmyn v. Vandersteen*, C-201/13, EU:C:2014:2132, paragraphs 20 and 33.
- <sup>65</sup>BGH, 20-02-1968, VI ZR 200/66.

- <sup>66</sup>Welser, *supra* note 61
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- <sup>73</sup>Logeais, *supra* note 71, p. 535.
- <sup>74</sup>T.G.I. Paris, Ord. Ref., Feb. 27, 1970, *Jcp* 1970, li, 16293.
- <sup>75</sup>Logeais, *supra* note 71, p. 537.
- <sup>76</sup>T.G.I. Paris, Ord. Ref., *supra* note 74.
- <sup>77</sup>Decision of Supreme Court of 30 January 1998 (RJ 1998/358).
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