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# The King of Pop's 2014 Hologram Performance Was Legal – But This Wasn't a Green Light for All Postmortem Hologram Concerts: A Glimpse into the Various Intellectual Property Concerns Surrounding Hologram Performances

BY [PAIGE FRANKEL](#)/ ON JANUARY 25, 2021



*Photo by The Damage Report on YouTube*

The 2014 *Billboard* Music Awards featured a Michael Jackson performance like no other: a holographic Jackson moonwalked once again as he sang "Slave to the Rhythm," a song from the new, posthumously released Jackson album "Xscape."<sup>1</sup>

The legality surrounding holographic performances is rooted across many areas within the increasingly broad subject of intellectual property law. Michael Jackson's name, his voice, his songs, his dance moves, his music videos, and his image are all legally protected conceptually as items of property. And while ordinary people only get postmortem income through life-insurance, the so-called "'deleb' phenomenon" shows that deceased celebrities continue earning money—and a lot of it.<sup>2</sup>

In fact, there's even an annual Forbes list specifically dedicated to "Top-Earning Dead Celebrities," wherein our beloved King of Pop has taken up residence at the top of the

list.<sup>3</sup> Remarkably, Jackson's 2016 earnings of \$825 million made him the highest-earning entertainer, dead or alive,<sup>4</sup> and he has already earned more in just the 11.5 years post-death—over \$2.5 billion—than he made during his entire career alive, bringing his total earnings to an astonishing \$4.5 billion.<sup>5</sup>

In addition to the complex rights attached to Jackson's personal identification<sup>6</sup> and creative works, another substantial property interest is involved, which was the focus of the legal dispute that arose in connection with the 2014 *Billboard* Music Awards' Michael Jackson performance: the hologram technology. Hologram USA Inc. and Musion Das Hologram Ltd. brought this 2014 injunctive action claiming Pulse Evolution was using their patented technology without permission to create a depiction of a Jackson performance.<sup>7</sup> Ultimately, plaintiffs' injunction was denied, and thus the show would go on, because plaintiffs failed to provide sufficient evidence showing the planned 3D image would infringe patents.<sup>8</sup> Therefore, although holographic performances—and even tours—have become increasingly common since the earlier, awe-inspiring performances by Jackson in 2014 and Tupac in 2012,<sup>9</sup> the producers or promoters behind the shows will have to carefully choose their technology providers, or they may face roadblocks from competing companies claiming infringement. Ultimately, "the technological race is tight."<sup>10</sup>

The most obvious intellectual property issue at play in holographic performances is copyright, as it is widely understood that songs are copyrightable.<sup>11</sup> This effectually means that if you want to host a holographic concert, you will need to pay to use the artist's music.<sup>12</sup> This is done through licensing: you will seek licenses from whoever owns the copyrights—of both the musical composition and the master recording—for any song that will be performed, which usually involves obtaining multiple permissions from multiple copyright co-owners, such as the applicable artist or estate of deceased artist, publisher, producer, and/or record label.<sup>13</sup> The same goes for any choreography, photographs, music videos, or other creative content that will be featured in the holographic concert, but, of course, different types of copyright owners will need to sign off depending on the type of creative work at issue (e.g., choreographers, photographers, etc.).

Notably, copyright licenses will eventually become unnecessary for any one artist's holographic performance, as copyright protection expires seventy years after the death of the artist or creator, for works published in or after 1978, and ninety-five years after publication for works published after 1923 but before 1978.<sup>14</sup> Thus, Jackson's fourth solo album, "Forever, Michael," released in 1975, is protected through 2070, but his many subsequent post-1978 albums, such as his sixth album, "Thriller," will stay protected through 2079.<sup>15</sup> Furthermore, a photograph of Michael Jackson owned by a still-alive photographer will remain protected longer than Jackson's music.

Finally, what about the other aspects of the deceased artist's personal identification? At first glance, celebrities' names appear to fall under trademark law, as trademarks are meant to

protect names, words, phrases, symbols, and designs that identify and distinguish parties.<sup>16</sup> In fact, many celebrities do obtain trademarks on their names, with some even going as far as trademarking their kids' names.<sup>17</sup> After all, celebrities are individuals who essentially brand themselves, so it seems apt to protect their names as one would protect their brand name. However, in the United States, there's an overlapping type of intellectual property that offers a much better fit for protecting an artist's name and other identifiers: the right of publicity,<sup>18</sup> "which gives someone an exclusive right to profit off their"<sup>19</sup> personal identification—that is, their "name, voice, signature, photographs, or likeness."<sup>20</sup> The right of publicity is especially distinguishable from trademark rights because rather than aiming to protect consumers from confusion,<sup>21</sup> it emphasizes the importance of identity, as it is the "inherent right of every human being to control the commercial use of his or her identity."<sup>22</sup>

"The 'deleb' phenomenon" presents postmortem right of publicity issues not only for outside parties wishing to commercially use the "deleb's" personal identification, but also for the estate of a "deleb" wishing to protect and fiscally exploit the "deleb's" personal identification.<sup>23</sup> The applicability and scope of postmortem publicity rights can be determined by evaluating three key questions:

"(1) is a postmortem right recognized in the relevant state? (2) if the right is recognized, how long does the right survive after the death of the celebrity? and (3) does the First Amendment provide protection against the prosecution of a claim based on the manner and content of the use as protected speech?"<sup>24</sup>

As indicated by questions one and two, publicity rights of dead celebrities are not guaranteed in the United States. Rather, "it's a state-by-state situation," with some statutes offering postmortem rights but containing unclear boundaries regarding who they apply to, or others limiting their application to only those who die residents of the state,<sup>25</sup> which explains how Michael Jackson's personal identification remained protected since he died a California citizen. States also offer varying durations on the right, such that some states may provide no postmortem protection at all, whereas others may establish a post-death expiration date,<sup>26</sup> which is why Marilyn Monroe's New York residency caused her right of publicity to die with her, whereas she would not have immediately gone into the public domain if she had died a California citizen.

Question three highlights a crucial exception included in many states' publicity right statutes: the First Amendment as a defense may enable defendants to escape liability, particularly protecting expressive works—such as plays, books, or television programs—that incorporate a celeb's personal identification, and protecting those works' incidental advertisement, when "the defendant's activity has consisted of the dissemination of such information as thoughts, ideas, newsworthy events, . . . [and] matters of public interest."<sup>27</sup>

In sum, although the 2014 holographic Michael Jackson performance sparked only a claim of patent infringement that was ultimately unsuccessful, holographic performances remain

subject to similar patent infringement suits that could come out differently, and that is only the beginning of the intellectual property issues that could surface if producers or promoters fail to assess the right of publicity or fail to obtain the proper licenses, permissions, or consents.

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25. Neal Conan & Ray Madoff, *'Rights Of Publicity' Extended Beyond The Grave*, NPR (Sep. 4, 2012, 1:00 PM), <https://www.npr.org/2012/09/04/160551338/rights-of-publicity-extended-beyond-the-grave> (“[S]ometimes it’s difficult to tell which state law applies, because some states purport to apply to people who die, residents of their states. Other

states purport to apply their rules much more broadly. So it's a real patchwork, and it's difficult to tell where one path begins and the other patch ends.").

26. Donoghue, *supra* note 7 (explaining that the right to publicity extends 50 years after death in California, but ends at death in New York).
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