

# ***Digital Replica Rights and Postmortem Policy Levers***

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For at least the second time, Congress is considering the NO FAKES Act, which would expand IP rights to include a federal digital replica right. One key provision of the Act introduces a novel mechanism for regulating federal IP rights: a 10-year postmortem term, which can be renewed by heirs or other successors every five years upon a showing of commercial exploitation during the two preceding years. While the intention to regulate the creation and distribution of unauthorized digital replicas is understandable and advisable, the portion of the proposed legislation that focuses on post-death exploitation of the right created remains problematic. This essay evaluates the postmortem provisions of the NO FAKES Act and situates its approach within a broader examination of how IP laws use postmortem rights, estate planning, and the freedom of disposition as regulatory levers.

In particular, the NO FAKES Act likely increases the value of decedents' estates by guaranteeing everyone a 10-year postmortem term, but it does not provide any clear mechanisms for opting out of the regime if that is the decedent's (or their successors') preference. Such an approach disregards the pre-death preference of individuals—for example Robin Williams—not to commercialize their “voice or visual likeness” post-death. Other issues abound, too, such as who may control these rights in the event of a disagreement among a decedent's successors; the role of the Copyright Office in administering this regime; and whether or not this regime, with its analogous provisions to Copyright Law, is properly characterized or even codified as a Copyright statute. Drawing upon our expertise on the intersection of IP and succession laws, we seek to address these questions and others, and we make several recommendations to improve the bill itself, or if enacted as is in the interim, on ways that the law will ideally be implemented by the Copyright Office and the courts. We welcome Congress's innovative attempt at engaging with the nexus of IP and succession laws, and this essay examines how different approaches to postmortem IP can be calibrated to address the wide range of economic, psychological, and cultural issues raised by digital replica technologies.