



The Post-Mortem Right of Publicity: Defining it, Valuing it, Defending it, and Planning for it

Reviewing the statutory and case law related to post-mortem publicity.

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The right of publicity (ROP) is borne from the right of privacy, which as Judge Holmes explained in *Estate of Michael J. Jackson*,¹ is specifically a “right to be left alone.” But some celebrities do not want to be left alone; what they do want is the ability have a say in how their image is used and who uses it. The ROP is an individual’s right to control and profit from the commercial use of their name, image, or likeness, and to prevent others from exploiting their persona for commercial gain. The ROP is governed by state law, either through statute or common law. In 1977, in *Zacchini v. Scripps-Howard Broad.*

Co.,² the Supreme Court recognized the ROP as a separate property right, independent from the right of privacy. In a situation that implicated both a performer’s right of publicity and the First Amendment’s rights of free speech and expression, the court held that the First Amendment did not prevent a state from deciding that a television news show’s unauthorized broadcast of a film showing plaintiff’s entire act, a fifteen second human cannonball performance, infringed plaintiff’s right of publicity. Jurisdictions do typically recognize First Amendment limitations to the ability to bring a claim for breach of the ROP

(for example, usually excepted from protection is the use of a person’s name or likeness for news reporting or in an attempt to portray a person in mediums including a play, book, article, film, or radio if predominantly for public interest as opposed to commercial exploitation).

The post-mortem ROP extends the ROP beyond an individual’s lifetime, allowing an executor or heir to enforce the protections provided by law. As per the state survey compiled herein, in terms of what triggers the post-mortem right of publicity, several state statutes require individuals to have exploited their publicity rights during their lifetime, while

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some do not require prior commercialization. Other states require that the name, image, or likeness have commercial value either during lifetime or at death. Regarding effective dates, some statutes apply the post-mortem ROP from the statute's date of enactment whereas a few statutes apply retroactively. The number of years the post-mortem ROP protects an individual's persona varies widely among the states from ten years to 100 years, with some states having protection for an uncertain duration based on common law.

Which law governs?

The nexus for using a state statute is typically that a decedent was domiciled or resident in that state at the time of death. However, some states have broad statutes that provide protection as long as the exploitation occurs within the state, regardless if the individual was domiciled or a resident of the state. In other words, under state statutes such as Hawaii, Indiana, Nevada, and Washington, a decedent does not necessarily need to be domiciled in-state to garner the protection of that state's laws, if the exploitation is occurring in that state. For example, the company that controlled Marilyn Monroe's Estate attempted to use Indiana's broad statute, even though Marilyn died in California and her estate was probated in New York. The company sued a t-shirt manufacturer and a website operator selling t-shirts featuring Monroe's image, even though neither was based in Indiana. The alleged breach of the Indiana statute was predicated on the fact that the t-shirts were sold at a Target in Indiana and that the website was accessible within Indiana. The court³ did not have to opine on the constitutionality of Indiana's statute, rejecting the claims on the narrow basis that none of New York, California,

or Indiana had a postmortem ROP at the date of Monroe's death. After the California legislature amended its statute to apply retroactively, the company brought a second claim under California law for breach of Monroe's post-mortem ROP against a photographer who distributed photographs of Monroe in California.⁴ The Ninth Circuit ultimately dismissed the claim on the narrow grounds that Monroe's estate tax position was that she was a New York domiciliary.⁵

Note, however, that the broad-reaching statutes have come under attack. Indeed, in a case involving the estate of Jimi Hendrix, who was domiciled in New York, which did not then have a post-mortem ROP, a federal court in Washington State held that Washington's choice-of-law clause was unconstitutional under the Commerce Clause, encouraging forum shopping in violation of the Due Process and Full Faith and Credit Clauses, while producing inconsistent results across the states.⁶ According to the court "To select...the law of a state to which the individual...is a stranger constitutes no less a random act than blindly throwing darts at a map on the wall."⁷ That part of the decision was reversed on narrow grounds on appeal to the Ninth Circuit,⁸ which held that the commerce took place only within Washington State and so did not impermissibly burden interstate commerce. Washington was held to have sufficient contacts with the actual, non-spec-

ulative controversy at issue, which involved the sale in Washington of unofficial goods bearing Hendrix's likeness. Accordingly, it was not necessary for the court to strike down the Washington statute, although the Ninth Circuit recognized that the statute raised difficult questions regarding whether another state must recognize the broad personality rights that Washington provides.

Query whether it might be possible in some jurisdictions to assign a celebrity's rights to a corporation headquartered in that state in order to garner that state's protection for an individual domiciled outside the state.

What is its value?

Many state statutes specifically define the post-mortem ROP as a property right that is freely descendible and transferable by will, trust, or other testamentary instrument. While the ROP provides heirs with important rights to enable them to profit from an individual's persona and police unauthorized commercial exploitation, creating a specific post-mortem ROP has had estate tax consequences. The value of the gross estate includes "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."⁹ If image and likeness is an intangible right that transfers after death, it will be included in the gross estate, whether or not heirs are planning to exploit those publicity rights. Indeed, many argue that this in fact could lead to forced commercializa-

1 T.C. Memo 2021-48.

2 433 U.S. 562 (1977).

3 *Shaw Fam. Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007).

4 *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152 (C.D. Cal. 2008).

5 *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 692 F.3d 983 (9th Cir. 2012).

6 *Experience Hendrix, L.L.C. v. Hendrix Licensing.com, LTD*, 766 F. Supp. 2d 1122 (W.D. Wash. 2011).

7 *Id.*

8 *Experience Hendrix L.L.C. v. Hendrix Licensing.com, LTD*, 762 F.3d 829 (9th Cir. 2014).

9 I.R.C. Section 2031(a).

10 T.C. Memo 2021-48.

11 Cal. Civ. Code section 3344.1(g).

12 Cal. Civ. Code section 3344.1(b).

13 Estate Tax Regs. section 20.2031-1(b).

14 *Estate of Michael J. Jackson, Deceased, John G. Branca, Co-Executor and John McClain, Co-Executor*, T.C. Memo 2021-48.

15 *Id.*

16 *Id.*

17 *Id.*

tion on the part of heirs to raise the funds necessary to pay the estate taxes generated by these rights.

In the 271-page opinion rendered in the *Estate of Michael J. Jackson*,¹⁰ the United States Tax Court directly addressed the taxability of image and likeness. The Estate and the IRS disagreed regarding the fair market value of three estate assets: (1) Jackson's image and likeness; (2) his interest in New Horizon Trust II, through which he held an interest in Sony/ATV Music Publishing; and (3) his interest in New Horizon Trust III, which contained Mijac Music, a music-publishing catalog that owned the copyrights to compositions that Jackson wrote or co-wrote, as well as compositions by other songwriters.

California, where Jackson was domiciled, has a ROP statute for living individuals and a separate post-mortem ROP statute that protects a deceased personality's name and likeness for 70 years after a person's death.¹¹ The rights are property rights, freely descendible and transferable.¹² In the absence of an express testamentary transfer, these rights will pass under a residuary disposition.

In valuing Jackson's image and likeness, the court pointed out that the default value of a right is its fair market value,¹³ and, as per the general valuation rule, found that it must include the value of Jackson's image and likeness at its highest and best use. The crux of the court's decision was the focus on valuing Jackson's property as of the date of death: "Because property is valued precisely at the moment of death, it is inappropriate, as a general matter, to ascribe value based upon postdeath evidence... The prohibition is not absolute, however, so a court may for instance consider subsequent events 'to the extent that they were reasonably foreseeable' at the decedent's death."¹⁴

To value unique assets like the right of publicity, courts and appraisers

have typically used three approaches: income, market, and cost. The income approach values an asset by calculating how much revenue it will produce in the future and discounting that revenue back to its present value. The market approach values an asset by comparing it to the prices at which similar assets have changed hands in arm's-length transactions close in

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time to the date of death. The cost approach values an asset by computing the cost of recreating it. The income approach was used by all experts in the Jackson Estate, both for the estate and the IRS. The Estate used different experts for different assets. "The Commissioner faced this chorus of experts with a soloist."¹⁵

Originally, the Estate valued Jackson's image and likeness at \$2,105 on Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, and the IRS' initial valuation on audit was \$434,261,895. The Commissioner also determined that some of the valuations were so understated that he assessed penalties of nearly \$200 million.

Regarding the original \$2,105 appraisal, although the court pointed out that such a low value might seem absurd given Jackson's fame, the

appraiser found that, before Jackson died and when he was in dire need of income, he had earned close to nothing from his image and likeness. According to the court: "This cannot be a surprise—allegations that a celebrity molested little boys might reasonably be thought to repel potential licensees in any society that has not become completely decadent."¹⁶ Those allegations had a dramatic effect on Jackson's ability to win sponsorships and merchandising deals once they became public. "The fact that he earned not a penny from his image and likeness in 2006, 2007, or 2008 shows the effect those allegations had, and continued to have, until his death."¹⁷ Looking at an index that measured a celebrity's reputation, the appraiser found that Jackson was one of the most recognized celebrities in the world but one who ranked among the lowest in trustworthiness as well as other important characteristics that corporations consider when looking to use someone's image and likeness to promote their products. Taking all this information into account, the original appraiser, using a discounted cash flow analysis, determined the value of Jackson's image and likeness was \$2,105.

In the course of preparing for trial, the Estate brought in two more experts to value Jackson's image and likeness, increasing the value to \$3,078,000.

The Estate's expert report used at trial provided image-and-likeness revenue projections for 10 years following Jackson's death, as well as other background information. It considered three main factors in determining a 10-year projection of revenue: pre-death revenue, post-death rights, and growth and decline rates using pre-death marketability and a potential post-death boom. Using these factors to determine Jackson's posthumous marketability, the appraiser balanced Jackson's gifts as an entertainer against the stigma he bore as an

accused child molester and concluded that the effect of the abuse allegations outweighed reputational rehabilitation during Jackson's life. Indeed, Jackson's image was so bad that, despite many sold-out shows from the This Is It tour, Jackson generated only \$24 worth of image-and-likeness revenue during the last six months of his life. A different Estate expert then used these revenue projections to estimate future cashflows, discounted to present value, and determined a higher value for this asset than the Estate reported on its return—about \$3 million instead of \$2,105.

The Commissioner's expert took "a wildly different approach," disagreeing with the Estate's experts on both the discount rate and the projected future revenue stream.

To value Jackson's image and likeness, the IRS expert considered five "opportunities" that he believed a hypothetical buyer could reasonably foresee at Jackson's death: themed attractions and products, branded merchandise, a Cirque du Soleil show, a film, and a Broadway musical.

Employing the income approach, the IRS expert determined the value of Jackson's image and likeness to be \$161,307,045. As the Commissioner's only expert witness, his credibility was an especially important part of the case. And...since he perjured himself...it suffered greatly at trial. When asked whether he or his firm had previously been retained by the Commissioner to write an intellectual-property valuation report in Whitney Houston's estate tax case, he replied: "No. Absolutely not." That was a lie. Approximately two years before he testified, the Commissioner had retained him to write a valuation report. It was only after a recess and advice from the Commissioner's counsel that he admitted to this. He also testified that neither he nor his firm ever advertised to promote business. That was also a lie.

The court rejected the analysis of the IRS expert as "fantasy," finding that he:

- valued the wrong asset (he included assets other than image and likeness in his valuation, for example copyrights, trademarks, patents, existing intellectual property licenses, endorsement rights, franchising rights, and royalty pools, which are separate assets);
- included revenue streams that were unforeseeable at the time of Jackson's death because he simply glossed over Jackson's having been accused multiple times of the most heinous acts (regarding the belief of the IRS expert that Neverland could be used for a theme park, the court found: "To any reasonable observer, however, Neverland was more of a recent crime scene than a future wonderland because of the stigma associated with the child-abuse allegations. Common sense suggests that a home owned by an alleged child molester where the alleged molestation took place would be less than an ideal spot for a theme park for children."¹⁸); and
- miscalculated the assets' value, including by failing to incorporate any expenses associated with the management of Jackson's image and likeness, failing to take a more holistic approach when he was determining the discount rate, and using celebrities who were anything but comparable when calculating foreseeable revenue from branded merchandise (five of the six celebrities were still alive).

The court concluded that it had to look for the value of each of Jackson's assets as if "in the decedent's hands at the time of its transfer by death" acknowledging that the value as of the day he died was much less than their value much later under the

Estate's management. The court concluded that Jackson's name and image should be valued at \$4,153,912, and that no penalties were payable because the Estate's original low valuation "wasn't that farfetched." While the court disagreed with the \$2,105 appraisal, it did find that it was reasonable, and that the Estate reasonably relied on it in good faith once it discovered how little revenue Jackson had been earning from use of his name and likeness.

A "pair of problems." In the course of its decision, the court discussed what it framed as a "pair of problems."

Distinguishing between the value of an asset and the value of its management. The court pointed out that, after the assets were no longer under Jackson's control, they had been managed "with stunningly greater competence" than they had been in Jackson's own hands. From the Estate's perspective, looking at what actually happened was just hindsight, "not even 20/20 hindsight but more like that of an eagle or a spy satellite." The court noted that the first in the pair of problems is how to value any asset that requires active management, because it is so difficult to distinguish between the value of that asset and the value of its management.

How to measure "synergies." According to the court, a second and distinct problem is how to measure the effect that separate assets can have on each other's value. The court acknowledged that it would be entirely

¹⁸ *Id.*

¹⁹ *Estate of Aaron U. Jones, Donor, Deceased, Rebecca L. Jones and Dale A. Riddle, Personal Representatives*, T.C. Memo 2019-101.

²⁰ Ellis-Petersen, "Robin Williams Went Above and Beyond to Stop His Image Being Used," *The Guardian* (Mar. 31, 2015), <https://www.theguardian.com/film/2015/mar/31/robin-williams-restricted-use-of-his-image-for-25-years-after-his-death> (last visited May 18, 2021) as cited by the Tax Court in the *Estate of Michael Jackson*.

²¹ Gans (Hofstra), *Publicity Rights and the Estate Tax*, 42 Colum. J.L. & Art 399 (2018).

reasonable to think that a collection of related intellectual-property rights, such as copyrights in music, recordings, and images, might be more valuable if they could be packaged and sold together. The IRS expert called these synergies.

Jackson's will did not divide his valuable intellectual property; it kept it together. Because keeping it together made deal-making much easier—all those valuable rights could be bundled, as they in fact were in the years after Jackson's death—the court queried whether they should be valued together, like a controlling block of stock. In determining whether to value several assets individually or as a block, the court noted that it looks to how the parties prepared the case. The Estate listed several intangible assets on Form 706, Schedule F, Other Miscellaneous Property, including image and likeness; Jackson's interests in New Horizon Trusts II and III were listed on Schedule G, Transfers During Decedent's Life; and an interest in another venture was listed on Schedule B, Stocks and Bonds.

The Commissioner in his notice of deficiency described his disagreements with the values that the Estate reported, but he did not object to this list of what those assets were. The parties spent years in discovery and other pretrial preparation, at the end of which they reached stipulations about some of these assets. According to the court, the Commissioner could have chosen to object to the description of the assets to be valued, or he could have refused to stipulate the values of all these assets rather than agree to some and not agree to others. What the court said it would not allow the Commissioner to do was to renege on his stipulation to cram the value of assets whose value he stipulated into the value of assets whose value he did not stipulate. That would undermine the stipulation. Accordingly, the result of the way this case came to trial meant that the

court valued only those three assets about whose values the parties could not agree. The court assumed that the Estate's assets could be used together to generate value but refused to add the value of other assets to the value of the assets at issue.

Tax affecting. Each of the Estate's experts reduced the cashflows produced by the assets to reflect the tax implications to a hypothetical buyer—a process known as tax affecting. Each asset in dispute was held by a pass-through entity. This is in contrast to income from C corporations, which have a two-layer tax.

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Because pass-throughs do not pay tax at the entity level, projected cashflows used in a discounted cash flow analysis will not account for any tax consequences. The court noted that almost always, including in the case at hand, the rate used to discount projected cashflows to present value is derived from after-tax, publicly available C-corporation information. Proponents of tax affecting argue that this mismatch between pretax cashflows and after-tax discount rates must be corrected, or tax affected. However, the court found, as it had done consistently in the past (apart from one case where tax affecting was allowed in valuation¹⁹) that by a preponderance of the evidence tax affecting was not appropriate here because the Estate failed to persuade the court that a C corporation would

be the hypothetical buyer of any of the three contested assets. Although the court did not hold that tax affecting could never be called for, it noted that the cases show how difficult a factual issue it is to demonstrate even a reasonable approximation of what that effect would be.

How to plan for it?

It will be prudent for practitioners to consider the post-mortem ROP in planning. Restricting the ROP after death could potentially reduce its estate tax value (at the cost of reducing its value to heirs), although it is unclear what impact those restrictions actually will have on the valuation of post-mortem publicity rights. Robin Williams, who was also domiciled in California, took extensive measures to stop his image from being exploited after death by transferring his rights to a trust that allegedly prevented his name, voice, signature, photograph, or likeness from being exploited for 25 years following his death. Presumably to shield his heirs from having to paying tax on the valuation of his image and likeness, Robin Williams reportedly donated his post-mortem ROP after the 25-year restriction to a foundation he created.²⁰ If challenged, whether this approach actually can reduce the value of a ROP to zero for estate tax purposes is questionable. The gross estate ordinarily is determined without regard to restrictions imposed by a decedent's will, yet the charitable deduction is computed to take those restrictions into account. Accordingly, there might be a mismatch between the full value of a ROP included in a gross estate and an offsetting charitable deduction for less than the full value.²¹ An unrestricted transfer of a ROP to a charity would garner a charitable deductible of its full value, but would enable (or perhaps given fiduciary

obligations of those managing the charity, mandate) its exploitation.²²

Transferring the ROP to a trust if a celebrity is early in their career and the value low may be one solution; others may involve investigating different ownership structures to minimize estate tax value, including dividing interests among multiple structures. For example, selling or gifting publicity rights to irrevocable grantor trusts can potentially remove value from a celebrity's estate, with the added benefit of further reducing the grantor's estate by the ongoing income tax liability, also allowing the trusts effectively to grow tax-free.²³ Query, however, whether the rights might be pulled back into the estate under Section 2036 (a)(2) if a celebrity's continued control over the publicity rights is considered a right to determine who may possess or enjoy the income from the property. To reduce the risk of Section 2036 inclusion, it will be prudent to appoint an independent trustee and to sell rather than gift the publicity rights, since a bona fide sale (for legitimate and significant nontax reasons) for adequate and full consideration will not be subject to Section 2036. Interestingly as noted, California creates a post-mortem ROP that is separate from the lifetime ROP that terminates on death. Accordingly, it may be possible to avoid Section 2036 by transferring only the post-mortem rights to a grantor trust and retaining the lifetime rights, which should not be includible in an estate since those rights terminate on death.

Considering insurance to offset the increased value of the estate may merit consideration. In terms of managing post-mortem publicity rights, just as individuals are increasingly naming specialty advisors in their dispositive documents to manage business assets, digital property, or artwork, it may be prudent to name a publicity rights advisor with particular expertise in this arena to max-

imize value to heirs and reduce potential conflict among beneficiaries. In the marital context, the ROP should be considered an asset and reflected in marital agreements.

Practitioners in states with no statute or common law post-mortem ROP protection may have to look to other jurisdictions for guidance, or to relief under federal law. For example, a false endorsement claim can potentially be brought under the Lanham Act²⁴ as a form of unfair competition likely to cause consumer confusion, although those claims have not been consistently successful. For example, in the *Estate of Elvis Presley v. Russen*,²⁵ the New Jersey court found one image of Elvis was a protectable trademark, rejecting the argument that all images of Elvis were so protected. Other states have been propelled to action in response to a celebrity death: in Tennessee, for example, a statute was enacted to protect a deceased individual's name, photograph or likeness following litigation by the estate of Elvis Presley over the unauthorized use of Presley's name and likeness.

Even in the absence of a state statute that explicitly accords a post-mortem ROP, most courts have agreed that the ROP survives death and is enforceable by a decedent's estate.²⁶ According to the court in *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*,²⁷ recognizing that the ROP is descendible promotes

the following important policies: (1) acknowledging that an individual's right of testamentary distribution is an essential right; (2) the basic principle that "one may not reap where another has sown nor gather where another has strewn;" (3) a celebrity's expectation that he is creating a valuable capital asset that will benefit his heirs and assigns after his death; (4) the value of the contract rights of persons who have acquired the right to use a celebrity's name and likeness; (5) the public's interest in being free from deception with regard to the sponsorship, approval, or certification of goods and services; and (6) the policy against unfair competition through the use of deceptively similar corporate names.²⁸

Post-mortem right of publicity: State-by-state review

Below is a summary of state law in those jurisdictions that do recognize a post-mortem ROP (also summarized in Exhibit 1):

Alabama. This state has a ROP statute,²⁹ which includes post-mortem rights, effective as of August 1, 2015. The statute protects a person's attributes, including their name, signature, photograph, image, likeness, voice, or a substantially similar imitation of one or more of those attributes. The ROP applies for the life of the person and for 55 years after death, irrespective of whether the person

²² *Id.*

²³ A proposal included in the Build Better Act, released on September 13, 2021 by the House Ways and Means Committee, includes provisions that would make drastic changes to the grantor trust rules for grantor trusts created or funded on or after the Act's date of enactment, including causing the assets of a grantor trust to be included in the deemed owner's gross estate on death. While at the time of publication of this article it is unclear whether Congress will pass these provisions, if changes to the grantor trust rules are enacted, whether now or in the future, planning with non-grantor trusts will likely become key.

²⁴ 15 U.S.C. section 1125(a)(1).

²⁵ 513 F. Supp. 1339 (D.N.J. 1981).

²⁶ See *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987), citing to *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983); *Martin Luther King, Jr. Center for Social Change Inc. v. American Heritage Products, Inc.*, 694 F.2d 674 (11th Cir. 1983); and *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 296 S.E.2d 697 (Ga. 1982).

²⁷ *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

²⁸ *Id.*

²⁹ Ala. Code section 6-5-771.

EXHIBIT 1

Comparative Chart of Post-Mortem Publicity Rights Across the U.S.

State	Authority	Statutory Effective Date	Application	Years of Protection After Death	Scope of Protection
Alabama	Ala. Code section 6-5-771	August 1, 2015	Commercial exploitation not necessary during lifetime	55 years	Name, signature, photograph, image, likeness, voice
Arizona	Common law; see <i>In re Estate of Reynolds</i> , 235 Ariz. 80, 327 P.3d 213 (Ct. App. 2014); Ariz. Rev. Stat. Ann. section 12-761	May 24, 2007	Commercial exploitation not necessary during lifetime for common law protection; Statute applies only to soldiers	Uncertain duration	Name and/or likeness
Arkansas	Ark. Code Ann. sections 4-75-1103 & 4-75-1107	August 22, 2016	Commercial exploitation not necessary during lifetime	50 years	Name, voice, signature, photograph, or likeness
California	Cal. Civ. Code section 3344.1	January 1, 1985 (Retroactive to January 1, 1915)	Requires commercial value at death or because of death	70 years	Name, voice, signature, photograph, or likeness
Connecticut	Common law (unclear); see <i>Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc.</i> , 867 F. Supp. 175, 190 (S.D.N.Y. 1994)				
Florida	Fla. Stat. Ann. section 540.08	As amended in 2007	Commercial exploitation not necessary during lifetime	40 years	Name, portrait, photograph, or other likeness
Georgia	Common law; see <i>Martin Luther King, Jr., Ctr. For Soc. Change, Inc. v. Am. Heritage Prod., Inc.</i> , 250 Ga. 135, 296 S.E.2d 697 (1982)		Commercial exploitation not necessary during lifetime	Uncertain duration	Name and likeness
Hawaii	Hawaii Rev. Stat. sections 482P-1 & 482P-4	July 15, 2009 (Retroactive to those who predeceased enactment)	Commercial exploitation not necessary during lifetime	70 years	Name, voice, signature, or likeness
Illinois	765 Ill. Comp. Stat. 1075/5 & 1075/30	January 1, 1999	Commercial exploitation not necessary during lifetime	50 years	Name, signature, photograph, image, likeness, or voice
Indiana	Ind. Code sections 32-36-1-6 & 32-36-1-8	July 1, 1994 (Retroactive to on, before or after July 1, 1994)	Commercial exploitation not necessary during lifetime	100 years	Name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms
Kentucky	Ky. Rev. Stat. Ann. section 391.170	July 13, 1984	Applies to public figures	50 years	Name or likeness of a person who is a public figure
Louisiana	La. Stat. Ann. section 14:102.21	August 15, 2006	Applies only to soldiers	Uncertain duration	Name, portrait, or picture
Maryland	Md. Code Ann., Bus. Reg. section 19-503	October 1, 2008	Applies only to soldiers	50 years	Name, portrait, picture, or image
Michigan	Common law; see <i>Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.</i> , 270 F.3d 298 (6th Cir. 2001)			Uncertain duration	
Minnesota	Common law; see <i>Paisley Park Enterprises, Inc. v. Boxill</i> , 299 F. Supp. 3d 1074 (D. Minn. 2017)			Uncertain duration	

EXHIBIT 1 (continued)

Comparative Chart of Post-Mortem Publicity Rights Across the U.S.

State	Authority	Statutory Effective Date	Application	Years of Protection After Death	Scope of Protection
Nebraska	Neb. Rev. St. section 20-208	1979		Uncertain duration	Name or likeness
Nevada	Nev. Rev. Stat. section 597.790	1989	Commercial exploitation not necessary during lifetime	50 years	Name, voice, signature, photograph, or likeness
New Jersey	Common law; see Estate of Elvis Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981)			Uncertain duration	Name, likeness, or performance characteristics
New York	N.Y. Civ. Rights Law section 50-f	May 29, 2021	Requires commercial value at or because of death	40 years	Name, voice, signature, photograph, or likeness
Ohio	Ohio Rev. Code Ann. sections 2741.01 & 2741.02	November 22, 1999	Requires commercial value at death	60 years	Name, voice, signature, photograph, image, likeness, or distinctive appearance
Oklahoma	Okla. Stat. tit. 12, section 1448	January 1, 1986 (Retroactive to January 1, 1936)	Requires commercial value at death	100 years	Name, voice, signature, photograph, or likeness
Pennsylvania	42 Pa. C.S.A. section 8316	February 7, 2003	Requires commercial value at death	30 years	Name, signature, photograph, image, likeness, voice, or a substantially similar imitation
South Carolina	Common law; see Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 684 S.E.2d 756 (2009)			Uncertain duration	Name, likeness, or identity
South Dakota	S.D. Codified Laws sections 21-64-1 & 21-64-2	July 1, 2015	Requires commercial value at death	70 years	Name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, or mannerism
Tennessee	Tenn. Code Ann. sections 47-25-1103 & 47-25-1104	1984	Commercial exploitation not necessary during lifetime	10 years; can extend longer if publicity rights used at least every two years after initial 10-year period	Name, photograph, or likeness
Texas	Tex. Prop. Code Ann. sections 26.002 & 26.012	September 1, 1987 (Retroactive to January 1, 1937)	Requires commercial value at death or thereafter	50 years	Name, voice, signature, photograph, or likeness
Utah	Common law; see Nature's Way Prod., Inc. v. Nature-Pharma, Inc., 736 F. Supp. 245 (D. Utah 1990)		Requires transfer or other commercial exploitation during lifetime	Uncertain duration	
Virginia	Va. Code Ann. section 8.01-40	July 1, 2015		20 years	Name, portrait, or picture
Washington	Wash. Rev. Code sections 63.60.020 & 63.60.040	June 11, 1998 (Retroactive to January 1, 1988 [individual] and January 1, 1948 personality [celebrity])	Does not require commercial value at death, except to qualify as a personality	Individual: 10 years Personality (celebrity): 75 years	Name, voice, signature, photograph, or likeness

commercially exploits the right during their lifetime. The right is freely transferable and descendible, in whole or in part, and is considered property of the estate of the decedent unless otherwise transferred.

Arizona. Arizona's right of publicity, which extends to protecting a deceased individual's name and/or likeness, is rooted in common law. In *In re Estate of Reynolds*,³⁰ the Court of Appeals of Arizona held a ROP that protects an individual's name and likeness from appropriation for commercial or trade purposes exists under Arizona law, the right is descendible, and a claim for violation of the right survives the death of the holder. The court noted that the ROP is more akin to a property right, the breach of which is measured by resulting pecuniary loss, [rather] than a personal right [like the right to privacy] whose violation results in emotional injury. As a property right, it is "freely assignable," and an assignment "transfers ownership to the assignee, who has standing to assert the right against others." According to the court, the ROP in Arizona is not limited to celebrities and it need not be exploited during life to be asserted in death. The court did not address the time period for which post-mortem ROP survives after an individual's death.

Arizona also has a limited statutory ROP for soldiers that protects the right to control and to choose whether and how a soldier's name, portrait, or picture is used for commercial purposes. The right is a prop-

erty right that survives a soldier's death for an uncertain duration.³¹

Arkansas. This state has a ROP statute, which includes post-mortem rights, titled the Frank Broyles Publicity Rights Protection Act of 2016, effective as of August 22, 2016.³² The statute protects the names, voices, signatures, photographs, and likeness of its citizens from exploitation and unauthorized commercial use without the consent of the citizen.³³ The protection applies to commercial use for advertising, selling, or soliciting purchases of products, merchandise, goods, or services; or on or in connection with such.³⁴ These property rights are exclusive to an individual during lifetime and the executors, administrators, heirs, devisees, and assignees of the individual according to the terms of a trust, testamentary, or other instrument, or if no testamentary instrument, pursuant to Arkansas' governing laws of intestate succession to personalty.³⁵ The post-mortem ROP applies for 50 years after an individual's death. The statutory protections apply only to an individual who was domiciled or resident in Arkansas on or after August 22, 2016.³⁶ In order to enforce the post-mortem right of publicity, a successor in interest must register a claim of property rights with Arkansas' Secretary of State.³⁷

California. California has both statutory and common law recognition for the ROP.³⁸ California has a separate post-mortem ROP statute, effective as of January 1, 1985. The statute protects a "deceased personality," defined as

any deceased person whose name, voice, signature, photograph, or likeness has commercial value at the time of death or because of death, whether or not the person used those attributes for commercial purposes during lifetime. The post-mortem ROP applies for 70 years after a person's death.³⁹ The statute is explicitly made retroactive, including to deceased personalities who died within 70 years prior to January 1, 1985 (in other words, on or after January 1, 1915).⁴⁰ The rights are property rights, freely descendible or transferable by the deceased or any subsequent owner, including by contract, trust, or any other testamentary instrument.⁴¹ In the absence of an express testamentary transfer, these rights will pass under a residuary disposition or, if there is no testamentary disposition, pursuant to an intestate succession set forth in the statute. In order to enforce the post-mortem ROP, a successor in interest must register a claim of the rights with California's Secretary of State.⁴²

Regarding the common law ROP, in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,⁴³ the court noted that, because the common law right was derived from the law of privacy, a cause of action did not survive the death of the person whose identity was exploited and was not descendible to his or her heirs or assignees. The court in the *Estate of Michael Jackson* did not consider California's common law ROP, noting that, since the common-law right does not survive death, it had little effect on the case.⁴⁴

Connecticut. With no statutory ROP, it is unclear whether a common law ROP exists under Connecticut law and if so whether it includes posthumous protection. In *Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc.*,⁴⁵ a district court judge opined that the Supreme Court of Connecticut, like the vast majority of courts that have considered the

³⁰ *In re Estate of Reynolds*, 327 P.3d 213 (Ariz. Ct. App. 2014).

³¹ Ariz. Rev. Stat. Ann. section 12-761.

³² Ark. Code Ann. section 4-75-1101.

³³ Ark. Code Ann. section 4-75-1102.

³⁴ Ark. Code Ann. section 4-75-1103.

³⁵ Ark. Code Ann. section 4-75-1104.

³⁶ Ark. Code Ann. sections 4-75-1107 & 4-75-1113.

³⁷ Ark. Code Ann. section 4-75-1106.

³⁸ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 4th 2001).

³⁹ Cal. Civ. Code section 3344.1(g).

⁴⁰ Cal. Civ. Code section 3344.1(h).

⁴¹ Cal. Civ. Code section 3344.1(b).

⁴² Cal. Civ. Code section 3344.1(f)(1).

⁴³ 21 P.3d 797 (Cal. 4th 2001).

⁴⁴ See *Id.*

⁴⁵ 867 F. Supp. 175 (S.D.N.Y. 1994).

issue, would find a ROP and that Connecticut would interpret the ROP as descendible.

Florida. This state's a ROP statute,⁴⁶ most recently amended in 2007, includes post-mortem rights. The statute protects a person's name, portrait, photograph, or other likeness from being commercially exploited without express written or oral consent. If the person is living, consent must be given either by that person or another person, firm, or corporation that person authorized. If the person is deceased, consent must be given by a person, firm, or corporation authorized in writing to license such use. If no person, firm, or corporation is authorized, consent can be given by any one from among a class composed of that person's surviving spouse, irrespective of whether the spouse later remarried, and children, which includes immediate offspring and children legally adopted. An individual's name or likeness in any publication, printing, display, or other public use is protected for 40 years from and after the individual's death.

Georgia. Georgia's right of publicity, which includes post-mortem rights, is rooted in common law. The right protects against unauthorized use of an individual's name and likeness for financial gain. In *The Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc.*,⁴⁷ the Supreme Court of Georgia held that the appropriation of another's name and likeness, whether the person is a private citizen, entertainer, or a public figure who is not a public official, without consent and for the financial gain of the appropriator is a tort in Georgia. In recognizing that the ROP encourages effort and creativity, the court determined that the ROP survives the death of its owner and is inheritable and devisable. If the ROP did not survive

death, the worth of the ROP while alive would diminish because a celebrity's death would seriously impair the value created by continued commercial use. Additionally, a celebrity's beneficiaries would not be able to establish their claim to profit from a celebrity's fame after their demise if the ROP was not inheritable and devisable. The court found that the post-mortem ROP exists whether an individual exploited that right during lifetime or not, finding no reason to limit ROP protection after death to those who took commercial advantage of their fame while alive. The court did not address the time period for which post-mortem ROP survives after an individual's death.

Hawaii. This state has a ROP statute, which includes post-mortem rights, titled Hawaii Publicity Rights Act, effective as of July 15, 2009. The statute protects a person's name, voice, signature, or likeness that had commercial value at the time of the individual's death, regardless of their place of domicile, residence, or citizenship at the time of death.⁴⁸ The post-mortem ROP applies for 70 years after the individual's death.⁴⁹ The right is a property right, freely transferable, assignable, and licensable by any form of inter vivos or testamentary transfer, including a will or other testamentary instrument, trust, contract, community property agreement, or co-tenancy with survivorship provisions or payable-on-death provisions.⁵⁰ If there is no inter vivos or testamentary transfer, the owner of the rights is determined by the intestate succession laws applicable to interests

in intangible personal property. The post-mortem ROP exists irrespective of whether an individual commercially exploited the right during their lifetime. On June 7, 2021, Hawaii enacted legislation to clarify that the 2009 Hawaii Publicity Rights Act applies to all persons, living and dead, including retroactively to those who predeceased its enactment.⁵¹

Illinois. Illinois has a ROP statute, which includes post-mortem rights, titled Right of Publicity Act, effective as of January 1, 1999.⁵² The statute protects an individual's attributes that identify that person to an ordinary, reasonable viewer or listener, including (i) name, meaning actual name or other name by which an individual is known, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice.⁵³ The post-mortem ROP applies to protect an individual's identity from commercial exploitation for 50 years after the date of death, applicable to those whose death occurs after the effective date of the Act.⁵⁴ The right is a property right, freely transferable to any person either by written transfer, including wills and trusts, or by intestate succession only to an individual's spouse, parents, children, and grandchildren.⁵⁵

Indiana. This state has a ROP statute, which includes post-mortem rights, effective as of July 1, 1994. The statute protects the ROP of a personality, meaning a living or deceased individual whose name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms has commercial

⁴⁶ Fla. Stat. Ann. section 540.08.

⁴⁷ 296 S.E.2d 697 (Ga. 1982).

⁴⁸ Hawaii Rev. Stat. section 482P-1.

⁴⁹ Hawaii Rev. Stat. section 482P-4.

⁵⁰ Hawaii Rev. Stat. section 482P-2.

⁵¹ 2021 Hawaii Senate Bill No. 714.

⁵² 765 Ill. Comp. Stat. 1075/1.

⁵³ 765 Ill. Comp. Stat. 1075/5.

⁵⁴ 765 Ill. Comp. Stat. 1075/30.

⁵⁵ 765 Ill. Comp. Stat. 1075/15.

⁵⁶ Ind. Code section 32-36-1-6.

⁵⁷ Ind. Code section 32-36-1-8.

⁵⁸ Ind. Code section 32-36-1-16.

⁵⁹ Ind. Code section 32-36-1-1.

⁶⁰ Ky. Rev. Stat. Ann. section 391.170.

⁶¹ La. Stat. Ann. section 14:102.21.

⁶² Md. Code Ann., Bus. Reg. section 19-503.

⁶³ 270 F.3d 298 (6th Cir. 2001).

value, irrespective of whether the individual uses or authorizes the use of these rights for a commercial purpose while alive.⁵⁶ The post-mortem ROP applies for 100 years after death, whether the personality died before, on, or after July 1, 1994.⁵⁷ The right is a property right, freely transferable and descendible by contract, license, gift, trust, testamentary document, and operation of intestate succession laws of the state administering the estate and property of an intestate deceased personality, regardless of whether that state recognizes these property rights.⁵⁸ Indiana's post-mortem ROP statute applies to an act or event of violation that occurs within the state, regardless of a personality's domicile, residence, or citizenship.⁵⁹

Kentucky. Kentucky has a ROP statute, which includes post-mortem rights, effective July 13, 1984. The statute protects against the commercial exploitation of a public figure's name and likeness for 50 years from the date of death.⁶⁰

Louisiana. This state has a limited statutory post-mortem ROP that protects a deceased soldier's name, portrait, or picture from being used in advertising for the sale of any goods, wares, or merchandise, or for the solicitation of patronage by any business without having obtaining prior consent from the soldier or the deceased soldier's closest living relative, by blood or marriage.⁶¹

Maryland. Maryland has a limited statutory post-mortem ROP that protects the name, portrait, picture, or image of a soldier killed in the line of duty for 50 years from being used in advertising for the sale of a product, good, ware, merchandise, or service, for the purpose of gaining a commercial advantage, without obtaining prior consent from the soldier or the surviving spouse, the personal

representative, or the majority of the heirs of the deceased soldier.⁶²

Michigan. With no statutory ROP, the question whether a post-mortem ROP exists under Michigan law was addressed by the U.S. Court of Appeals for the Sixth Circuit in *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*⁶³ The Sixth Circuit found that the ROP is a right that protects the pecuniary right and interest in the commercial exploitation of a celebrity's death. When this case was heard at the district court, that court recognized a post-mortem ROP under Michigan common law. While acknowledging that Michigan state courts had not addressed the ROP or the post-mortem ROP, the district court concluded that Michigan courts would recognize such rights. Acknowledging that Michigan courts have yet to address the ROP, the Sixth Circuit observed that no common law decision, other than in Ohio, had rejected the concept of the ROP as a property right and noted that Ohio had since enacted a ROP statute, including post-mortem protection. The court determined that the weight of authority indicates that the ROP is more properly analyzed as a property right and therefore is descendible, finding that the district court did not err in recognizing a post-mortem ROP under Michigan common law. The court did not address the time period for which the post-mortem ROP survives after an individual's death.

Minnesota. After the death in April 2016 of the internationally renowned recording artist Prince, who was domiciled in Minnesota, unlicensed merchandise with Prince's likeness sprung up. The legislature responded by introducing the Prince Act, which would have retroactively protected Prince's post-mortem publicity rights, but it failed to pass.

With no statutory ROP, the question whether a post-mortem ROP exists under Minnesota law was addressed by the United States District Court of Minnesota in *Paisley Park Enterprises, Inc. v. Boxill*.⁶⁴ The lawsuit pertained to previously unreleased recordings of Prince. The personal representatives of Prince's estate alleged that the defendants unlawfully possessed and attempted to commercially exploit several sound recordings of Prince. The personal representatives asserted numerous breaches, including breach of contract, conversion, misappropriating trade secrets, copyright infringement, trademark infringement, deceptive trade practices, and violation of Prince's common law ROP. The district court acknowledged that the Minnesota Supreme Court had not addressed whether the right of publicity survives a person's death. In a case that invokes the court's diversity jurisdiction, the court noted that a federal court addresses an unresolved question of state law by predicting how the state supreme court would resolve the issue if addressing it. To formulate this prediction, the federal court considers "relevant state precedent, analogous decisions, considered dicta, scholarly works and any other reliable data." The court noted that the Eighth Circuit had opined that the Minnesota Supreme Court likely would recognize the right of publicity because the right of publicity protects a person's commercial interest in his or her identity rather than the "privacy and solitudine of private personae" protected by invasion of privacy.⁶⁵

According to the district court, the clear weight of authority from jurisdictions that have addressed this issue supports a conclusion that the right of publicity is a property right that is enforceable by a decedent's estate. Ultimately, the court was persuaded that this majority approach is a viable doctrine subject to adoption by the Minnesota Supreme Court, and war-

ranting recognition of the right of publicity under Minnesota law as a property interest that is enforceable by the decedent's estate. The court did not address the time period for which the post-mortem ROP survives after an individual's death.

Nebraska. This state's Rights of Privacy legislation was enacted in 1979.⁶⁶ With the single exception of an action arising out of exploitation of a person's name or likeness, actions for invasion of privacy are not deemed to survive death. The statute does not state the duration for which the post-mortem right survives after a person's death.

Nevada. Nevada's ROP statute, which includes post-mortem rights, was enacted in 1989. The statute protects against any commercial use of a person's name, voice, photograph, or likeness within the state regardless of the person's domicile.⁶⁷ The post-mortem ROP applies for 50 years after death, irrespective of whether the person commercially exploited the right during their lifetime.⁶⁸ The right is freely transferable by contract, license, gift, conveyance, assignment, devise, or testamentary trust by a person or their successor in interest.⁶⁹ In order to enforce the post-mortem ROP, a successor in interest must file a verified application to register his or her claim with the Office of the Secretary of State of Nevada.⁷⁰

New Jersey. This state's right of publicity, which extends to protecting a deceased individual's name, likeness, and performance characteristics, is rooted in common law. In the *Estate of Elvis Presley v. Russen*,⁷¹ Presley's estate sought a preliminary injunction to restrain the defendant, Rob Russen d/b/a The Big El Show from using the image, likeness, or persona of Elvis Presley in a show featuring an individual who impersonated Presley. The U.S. District

Court for New Jersey noted that, although the New Jersey courts have not explicitly used the term "right of publicity," they have recognized and supported an individual's right to prevent the unauthorized, commercial appropriation of his name or likeness.⁷² The court found that the Estate of Presley's claim based on the appropriation of likeness and name for defendant's commercial benefit was an action for invasion of their "property" rights and not one for "injury to the person." The court was persuaded by the reasoning from other jurisdictions that a right exercised during the individual's life and thus having attained a concrete form, should descend at the death of the individual "like any other intangible property right." Therefore, the court determined that Elvis Presley's ROP survived his death and became part of Presley's estate.⁷³ Since Presley had clearly exploited his ROP during lifetime, the court noted that it was not necessary to determine whether the ROP survived the death of an individual who had not exploited the right during lifetime.

The court also declined to opine on the durational limit of the ROP after it is inherited, since that issue was not directly before it. The court suggested that a length of time should be set by the New Jersey State legislature. Interestingly, unlike the Marilyn Monroe case, which focused

on Monroe's domicile on her date of death to determine whether she had a post-mortem ROP, the New Jersey court did not discuss the fact that Presley was domiciled in Tennessee when he died, or consider whether Tennessee recognized a ROP.

In confronting the question of whether the use of the likeness of a famous deceased entertainer in a performance mainly designed to imitate that famous entertainer's own past stage performances was to be considered primarily as a commercial appropriation imitator (and hence not protected by the First Amendment) or as a valuable contribution of information or culture (garnering such protection), the court decided that the show served primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society.

New York. New York has a ROP statute, which includes post-mortem rights, effective for celebrities who die domiciled in New York after the May 29, 2021 effective date. The statute protects two categories of deceased persons: deceased personalities and deceased performers. A "deceased personality," is defined as a person whose name, voice, signature, photograph, or likeness has commercial value at the time of, or because of, their death.⁷⁴ The statute prohibits the unauthorized use of

⁶⁴ 299 F. Supp. 3d 1074 (D. Minn. 2017).

⁶⁵ *Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir. 1995).

⁶⁶ Neb. Rev. St. section 20-208.

⁶⁷ Nev. Rev. Stat. section 597.780.

⁶⁸ Nev. Rev. Stat. section 597.790.

⁶⁹ Nev. Rev. Stat. section 597.800(1).

⁷⁰ Nev. Rev. Stat. section 597.800(4).

⁷¹ 513 F. Supp. 1339 (D.N.J. 1981).

⁷² *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392 (N.J. Ch. 1907).

⁷³ See also *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994).

⁷⁴ N.Y. Civ. Rights Law section 50-f(1)(b).

⁷⁵ N.Y. Civ. Rights Law section 50-f(8).

⁷⁶ N.Y. Civ. Rights Law section 50-f(1)(a).

⁷⁷ N.Y. Civ. Rights Law section 50-f(2)(b).

⁷⁸ N.Y. Civ. Rights Law section 50-f(3).

⁷⁹ N.Y. Civ. Rights Law section 50-f(7a).

⁸⁰ *Smith v. Long Island Jewish-Hillside Med. Ctr.*, 118 A.D.2d 553 (N.Y.S. 1986).

⁸¹ Ohio Rev. Code Ann. section 2741.01.

⁸² Ohio Rev. Code Ann. section 2741.02.

⁸³ Ohio Rev. Code Ann. section 2741.04.

⁸⁴ Ohio Rev. Code Ann. section 2741.03.

⁸⁵ Okla. Stat. tit. 12, section 1448(H).

⁸⁶ Okla. Stat. tit. 12, section 1448(G).

⁸⁷ Okla. Stat. tit. 12, section 1448(H).

⁸⁸ Okla. Stat. tit. 12, section 1448(B).

⁸⁹ Okla. Stat. tit. 12, section 1448(F1).

⁹⁰ 42 Pa. C.S.A. section 8316.

⁹¹ 684 S.E.2d 756 (S.C. 2009).

⁹² S.D. Codified Laws section 21-64-1.

⁹³ S.D. Codified Laws section 21-64-3.

⁹⁴ S.D. Codified Laws section 21-64-2.

their likeness for commercial purposes for 40 years after death.⁷⁵ A “deceased performer” is more narrowly defined as someone who regularly acted, sang, danced, or played a musical instrument for their livelihood.⁷⁶ The statute protects performers against the use of an unauthorized “digital replica” (a computer-generated electronic performance) that is so realistic it would deceive a reasonable observer into believing that it was a performance by the performer.⁷⁷ The use will not be considered “likely to deceive” if there is a conspicuous disclaimer that the work has not been authorized. The rights recognized by the statute are property rights, freely descendible and transferable by the deceased or any subsequent owner, including by contract, license, gift, trust, or any other testamentary instrument.⁷⁸ In the absence of an express testamentary transfer, these rights will pass under a residuary disposition. In order to enforce a deceased personality’s post-mortem ROP, a successor in interest must register a claim of the rights with New York’s Secretary of State.⁷⁹ Prior to passage of New York’s statute, this state specifically declined to recognize a post-mortem right of publicity.⁸⁰

Ohio. This state has a ROP statute, which includes post-mortem rights, effective as of November 22, 1999. The statute protects an individual’s name, voice, signature, photograph, image, likeness, or distinctive appearance with commercial value.⁸¹ The post-mortem ROP applies for 60 years after the date of an individual’s death.⁸² The right is freely transferable and descendible by contract, license, gift, trust, will, and operation of intestate succession laws applicable to the state administering the majority of an individual’s real and personal property who died intestate regardless if that state recognizes the right of publicity as

a property right.⁸³ The statute applies to individuals who died on or after January 1, 1998 domiciled or resident in Ohio.⁸⁴

In terms of managing post-mortem publicity rights, just as individuals are increasingly naming specialty advisors in their dispositive documents to manage business assets, digital property, or artwork, it may be prudent to name a publicity rights advisor with particular expertise in this arena to maximize value to heirs and reduce potential conflict among beneficiaries.

Oklahoma. Oklahoma has a ROP statute, which includes post-mortem rights, effective as of January 1, 1986. The statute protects a “deceased personality,” meaning a person whose name, voice, signature, photograph, or likeness has commercial value at the time of death, irrespective of whether commercially exploited during lifetime.⁸⁵ The post-mortem ROP protection applies for 100 years from the date of death.⁸⁶ It is explicitly made retroactive, including to deceased personalities who died within 50 years prior to January 1, 1986 (in other words, on or after January 1, 1936).⁸⁷ The rights are property rights, freely transferable by contract, trust, or testamentary documents.⁸⁸ In order to enforce the post-mortem

ROP, a successor in interest must register a claim to the rights of a deceased personality with Oklahoma’s Secretary of State.⁸⁹

Pennsylvania. This state has a ROP statute, which includes post-mortem rights, effective as of February 7, 2003. The statute protects a person whose name or likewise has commercial value. Name or likeness is defined to mean any attribute that identifies that person to an ordinary, reasonable viewer or listener, including name, signature, photograph, image, likeness, voice, or a substantially similar imitation of one or more thereof. The post-mortem ROP applies to individuals who were domiciled in Pennsylvania at death, for 30 years after death.⁹⁰

South Carolina. South Carolina’s right of publicity, which protects against the intentional, unconsented use of an individual’s name, likeness, or identity is rooted in common law. In *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*,⁹¹ the Supreme Court of South Carolina held that South Carolina does recognize the tort of infringement on the right of publicity. The court determined that the right to control the use of one’s identity is a property right that is transferable, assignable, and survives the death of the named individual. The court did not address the time period for which the post-mortem ROP survives after an individual’s death.

South Dakota. This state has a ROP statute, which includes post-mortem rights, effective as of July 1, 2015. The statute protects a person’s name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, or mannerism that identifies a specific person and has commercial value.⁹² The post-mortem ROP applies to those who died domiciled in South Dakota, including retroactively for those who died before the

statute's effective date,⁹³ for 70 years after the person's death.⁹⁴ In order to enforce the post-mortem right of publicity, a successor in interest must register a claim of ROP with the Secretary of State.⁹⁵

Tennessee. Tennessee has a ROP statute, which includes post-mortem rights, titled Personal Rights Protection Act.⁹⁶ It was enacted in 1984 following extensive litigation after the death of Elvis Presley. The statute protects an individual's name, photograph, or likeness in any medium in any manner.⁹⁷ The rights are property rights, freely assignable and licensable, regardless if an individual commercially exploited the rights during lifetime, and are descendible to an individual's executors, assigns, heirs, or devisees.⁹⁸ The post-mortem ROP applies for ten years and may continue if an executor, assignee, heir, or devisee uses the name, likeness, or image for commercial purposes at least every two years subsequent to the initial ten year period following the individual's death.⁹⁹

Texas. This state's ROP statute, which includes post-mortem rights, applies to individuals alive on or after September 1, 1987, or who died before September 1, 1987, but on or after January 1, 1937. The statute protects an individual's name, voice, signature, photograph, or likeness that has commercial value at the time of death or comes to have commercial value after that time.¹⁰⁰ The post-mortem ROP applies for 50 years after death.¹⁰¹ The right is a property right, freely transferable by contract

or by means of trust or testamentary documents.¹⁰² If the property right has not been transferred at or before death, it vests as follows: (1) entire interest vests in a surviving spouse if there are no surviving children or grandchildren; (2) if there is a surviving spouse and surviving children or grandchildren, one-half interest vests in the surviving spouse and one-half interest vests in the surviving children or grandchildren, per stirpes; (3) if there is no surviving spouse, the entire interest vests in the surviving children of the deceased individual, per stirpes; or (4) if there is no surviving spouse, children, or grandchildren, entire interest vests in the surviving parents of the deceased individual.¹⁰³

Utah. Utah's post-mortem ROP is rooted in common law. In *Nature's Way Prod., Inc. v. Nature-Pharma, Inc.*,¹⁰⁴ the district court acknowledged that Utah courts had not addressed the issue of whether the common law ROP survives death. The issue before the court in *Nature's Way* was whether an inter vivos assignment of the ROP was valid after the death of the transferor. The United States District Court of Utah was persuaded that the Utah Supreme Court would follow what appears to be the majority and modern rule that the common law ROP survives the death of the subject person in cases where he or she transferred or otherwise exploited such rights while alive. The court concluded the rights the plaintiffs purchased to the publicity of the transferor's name did not abate at the transferor's death. The court

did not address the time period for which the post-mortem ROP survives after an individual's death.

Virginia. This state's current ROP statute has been effective since July 1, 2015, and includes post-mortem rights. The statute protects a person's name, portrait, or picture from being used for commercial purposes without first obtaining the written consent of that person, or if dead, of the "surviving consort" and if none, of the next of kin.¹⁰⁵ The post-mortem ROP applies for 20 years after a person's death.¹⁰⁶

Washington. Washington has a ROP statute, which includes post-mortem rights, effective as of June 11, 1998. The statute protects a deceased person's name, voice, signature, photograph, and likeness, regardless of whether exploited during lifetime and regardless of place of domicile, residence, or citizenship at time of death.¹⁰⁷ For an individual who died on or after January 1, 1988, the post-mortem ROP protection applies for ten years after death. For a personality who died on or after January 1, 1948, defined as an individual whose name, voice, signature, photograph, or likeness had commercial value at the time of death, the post-mortem ROP statute protection for 75 years after death.¹⁰⁸ The right is a property right, freely transferable, assignable, and licensable by inter vivos or testamentary transfer, including a will or other testamentary instrument, trust, contract, community property agreement, or co-tenancy with survivorship provisions or payable-on-death provisions.¹⁰⁹ In the absence of a transfer before death or a testamentary transfer, these rights will pass under the intestate succession laws applicable to intangible personal property in the state of domicile, regardless of whether the domiciliary state recognizes these property rights. ■

⁹⁵ S.D. Codified Laws section 21-64-10.

⁹⁶ Tenn. Code Ann. section 47-25-1101.

⁹⁷ Tenn. Code Ann. section 47-25-1103(a).

⁹⁸ Tenn. Code Ann. section 47-25-1103(b).

⁹⁹ Tenn. Code Ann. section 47-25-1104.

¹⁰⁰ Tex. Prop. Code Ann. section 26.003.

¹⁰¹ Tex. Prop. Code Ann. section 26.012.

¹⁰² Tex. Prop. Code Ann. section 26.004.

¹⁰³ Tex. Prop. Code Ann. section 26.005.

¹⁰⁴ 736 F. Supp. 245 (D. Utah 1990).

¹⁰⁵ Va. Code Ann. section 8.01-40(A).

¹⁰⁶ Va. Code Ann. section 8.01-40(B).

¹⁰⁷ Wash. Rev. Code section 63.60.020.

¹⁰⁸ Wash. Rev. Code section 63.60.040.

¹⁰⁹ Wash. Rev. Code section 63.60.010.