

Edwards Wildman Palmer LLP

Maybe you can take it with you: post-mortem rights of publicity in the United States

Right of publicity law is a developing and uncertain area of law in the United States. A federal statute in this area would increase predictability of results and decrease legal costs

Rap icon Tupac Shakur was murdered in 1996, but hologram technology allowed him to perform onstage with Snoop Dogg and Dr Dre at Coachella Valley Music and Arts Festival in April 2012. The use of holograph technology raises new issues in the already uncertain area of right of publicity law. These holographic images do not merely replicate the original work of celebrities; they expand on and create new works by those celebrities. The holographic image of Shakur took months to create and was realistic down to his clothing, tattoos, jewellery and movements.

Even if the holographic images created in this manner are new, they are based – at least in part – on previously existing images. This technology has the potential to become a source of revenue for these personalities – and a source of lawsuits. Such lawsuits may not be in the distant future. Events featuring holographic images of other deceased celebrities – including Marilyn Monroe, Elvis, Jim Morrison, Jimi Hendrix and The Doors – are being planned. Digicon Media, the company planning the Monroe event, holds a copyright on ‘Virtual Marilyn’ and claims that it does not need to work with Monroe’s estate to obtain any additional rights. Monroe’s estate does not appear to agree with Digicon Media’s position. The estate reportedly sent a cease and desist letter, threatening to sue. Given the potential issues, it is a good time to examine the current landscape of the post-mortem right of publicity in the United States.

Right of publicity outlined

The right of publicity is a property right, which in some circumstances allows an individual to protect the economic value of his or her name, voice, picture, portrait, likeness or image. The purpose of the right of

publicity is to prevent a third party from taking some aspect of a person that has market value for which the third party would normally have to pay to use. The right of publicity is generally invoked in the context of commercial speech, when a company has used a celebrity’s name, likeness or voice in connection with a product, thereby creating an impression that the celebrity is endorsing the product. In the United States, rights of publicity are constrained by the First Amendment right to free speech and courts typically allow some uses of celebrity personas in art and journalism.

The existence of rights of publicity is not uniform throughout the United States. Despite discussion of federal legislation, there is no US federal right of publicity law. A number of states have not adopted a legal framework to protect the right of publicity at all. Nineteen states have enacted statutes to protect rights of publicity, including Florida, Illinois, New York and California. In other states, including some that have enacted statutes, there are common law rights of publicity instead of, or in addition to, statutory protection.

Even among states that recognise a right of publicity, there are differences as to whether the right of publicity survives death and, if so, for how long. In some states, the right of publicity survives death because it is a property right that can be assigned during an individual’s life to another person or after death to the individual’s estate. The duration of the right of publicity after death varies from state to state. For example, Florida recognises the right for 40 years after death, Illinois for 50 years, California for 70 years and Indiana for 100 years. There are other states – most notably New York – where the right of publicity does not survive death. The New York courts have held that the New York

statute does not provide for a transferable right that lasts beyond an individual’s death.

Two issues are central to every post-mortem right of publicity case:

- whether a state recognises a right of publicity that continues after an individual’s death; and
- which state’s law applies to a particular deceased individual.

As each state deals with the right of publicity differently, results will vary greatly depending on which state’s law applies.

Is there a right of publicity? Does it expire on an individual’s death?

The New York and California statutes came into play in a notable case concerning Marilyn Monroe’s right of publicity. In *Shaw Family Archives Ltd v CMG Worldwide, Inc*, 486 F Supp 2d 309 (SDNY 2007) family members of the late photographer Sam Shaw – who took some famous images of Marilyn Monroe including the iconic image of her standing above a subway grate with her white skirt billowing in the wind – contended that they could sell Shaw’s images of Monroe for commercial use without paying a licence fee to Monroe’s estate. The US District Court for the Southern District of New York held that because Marilyn Monroe died before the passage of California’s Celebrity Rights Act in 1985 and because New York does not recognise a post-mortem right of publicity, her name, image and voice were in the public domain in California and New York. The court noted that no matter which state’s law applied, Monroe’s heirs could not have inherited a property right that Monroe did not own at the time of her death. Therefore, the court reasoned that “any publicity rights she enjoyed during her lifetime were extinguished at her death by operation of

law". The court added that the later enactment of a statute granting post-mortem publicity rights would not alter the situation because a testator cannot devise property that he or she did not own at the time of death. The implication is that Monroe's name, image and voice are in the public domain in any state that did not recognise a post-mortem right of publicity at the time of her death in 1962.

In response to *Shaw*, California passed legislation creating a right of publicity that lasts 70 years after death (Cal Civ Code §3344.1). Similarly, Washington passed legislation (which was later struck down in part) strengthening deceased celebrity publicity rights after the Ninth Circuit Court of Appeals held that no right of publicity survived the death of Jimi Hendrix (Wash Rev Code Section 63.60.010).

Domicile

As an individual's right of publicity is governed by state law, most courts have found that the state of domicile at the individual's death may determine the existence of his or her post-mortem rights. While an individual may have several states of residence, an individual can have only one domicile. The determination of which state's law applies to a certain celebrity (likely his or her state of domicile at death) is often the decisive factor in protecting post-mortem publicity rights.

The issue of domicile came into play in the *Shaw* case discussed above. There was much debate about whether Monroe's domicile was New York or California at the time of her death. As California grants a post-mortem right of publicity and New York does not, the case was thought to hinge on Monroe's domicile. The determination of an individual's domicile is a fact-intensive inquiry and calls into play state domicile rules that are unrelated to IP law. Typically, these factors include:

- length of residence;
- place of worship;
- voting registration;
- automobile registration;
- club memberships;
- locations of children's schools;
- location of bank accounts;
- location of business dealings; and
- where tax returns are filed.

In Monroe's case, both sides had persuasive arguments. Factors in favour of New York included the fact that Monroe's legal residence at the time of her death was New York – an apartment owned by Monroe on the East Side of Manhattan where she

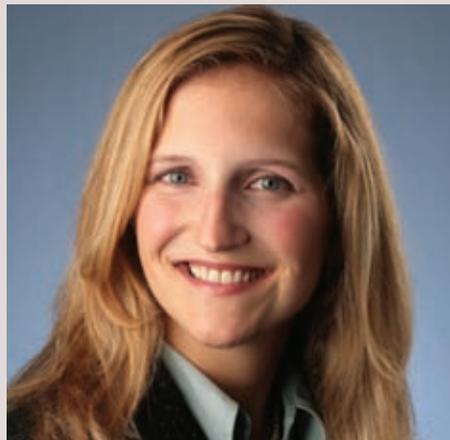


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lived with Arthur Miller until their 1961 divorce – and that her estate was probated in New York. One factor in favour of California was a stone at Monroe's California home inscribed with: "Here my journey ends." In the end the distinction was meaningless. The court held that because neither state had a right of publicity law at the time of Monroe's death, Monroe did not have a right of publicity to pass on to her heirs or beneficiaries on her death.

In *Hebrew University of Jerusalem v General Motors LLC*, No CV10-03790 (CD Cal, March 16 2012), the issue of domicile (New Jersey) was not in dispute, but the application of New Jersey law caused the court to reach a different result from the *Shaw* court. The university that owns the copyrights and publication rights to Albert Einstein's works brought suit after General Motors ran an advertisement in *People Magazine* for its 2010 terrain vehicle featuring Albert Einstein's head superimposed onto a lingerie model's body. The complaint asserted an action under California's right of publicity statute. However, that statute requires that the claim be construed using the laws of the testator's domicile at death – in this case, New Jersey (Ca Civ Code § 946). New Jersey does not have a right of publicity statute and no New Jersey court had recognised a right of publicity. In denying General Motor's motion for summary judgment, the court rejected the argument that Einstein had no post-mortem publicity rights to grant to the university because such a right did not exist at the time of his death. This result, different from the result in the *Shaw* case discussed above, can largely be attributed to the application of the laws of different states.

Conclusion

Right of publicity law is a developing and uncertain area of law in the United States, and whether and for how long a right of publicity exists after an individual's death is even less certain. As many have advocated, a federal statute in this area would increase predictability of results and decrease legal costs. Until then, due to lack of consistency, each state's law must be reviewed closely, and the issue of domicile and how it impacts on statutory interpretation should never be far from the practitioner's mind. [WTR](#)