Elvis and Prince: Personality Rights Guidance for Dead Celebrities and the Lawyers and Legislatures Who Protect Them

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Law Student Writing Competition Winner

If you represent an entertainer or other public figure with a marketable likeness or their family/heirs, you should start including posthumous personality rights in your estate planning.

Most recently, this issue has arisen after the 2016 passing of Prince in Minnesota.[i] Soon after his death, merchandise with unlicensed use of Prince’s likeness was readily available for purchase.[ii] In response, the Minnesota State Legislature reacted with the PRINCE Act protecting Prince’s personality rights, though the bill was retracted after being criticized for entrenching on the First Amendment and overbroad control of personality rights that would actually benefit professional sports entities looking for more control over publicity rights of athletes.[iii]

If Prince left a will, it was not found in the immediate months after his death, and his estate fell in the hands of the court.[iv] With legal fees mounting and estate taxes to be paid, the family spent the months after his death selling off property and prepared opening his Paisley Park estate to tours to generate revenues for the estate and heirs-once the heirs are actually determined.[v]

All of this could have been and can be avoided, if artists, attorneys, estate planners and state legislatures learn from past instances in other states concerning other estates. As the digital world (and our increasingly celebrity-obsessed popular culture) increases the shelf life of an artist’s likeness, personality rights should become a standard part of every state’s posthumous protection for its high-profile citizens and the individual probate work prepared by the counsel of public figures.

Personality Rights: Commonplace in Law

Personality rights, also referred as the right of publicity, protect against anyone who “appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability.”[vi] Initially theorized by Samuel Warren and Louis Brandeis as a part of privacy protection, the Supreme Court has clarified that personality rights fall within the intellectual property family.[vii] Thus, though the Constitution “has been interpreted to imply a limited array of fundamental liberty interests, some of which involve elements of privacy, the right of publicity is not among them.”[viii]

Personality rights are protected under state law, either within common law or by statute.[ix] As of Prince’s death on April 14, 2016, thirty-eight states had some form of a common law personality rights precedent, while twenty-two states had enacted a version of a right of publicity statute.[x] Provisions and protections vary widely, and domicile at death is significant when examining if and to what extent a state protects personality rights.[xi] New York, California, and Tennessee (three of the states with the largest concentration of entertainment business in the country) each offer significant variances in their statutes.

New York’s personality rights statute is actually characterized as protecting “right of privacy” than “right of...
publicity," simply protecting against the unconsented use of a living person's "name, portrait or picture" in advertising or in trade." Thus, federal and state courts in New York have often (but not always) held that in New York, publicity rights adhere only to living persons; one's right of publicity is extinguished at death and the estate has no right to prevent unauthorized exploitation of the decedent's persona.  

Unlike New York's thin protection, California law has evolved since the 1970s to recognize the right of publicity as a property right which allows for expansive protections of a person's "name, voice, signature, photograph, or likeness, in any manner," in life and, in borrowing from copyright law, seventy years after death. However, California limits the succession of those dying intestate to the surviving spouse, children, grandchildren, or parents and not generally to any "heir."  

Tennessee, while only protecting a person's "name, photograph, or likeness," takes its protections a step further allowing "descendibility" of personality rights to pass to the "executors, assigns, heirs, or devisees" as opposed to the familial limitations imposed in California. These rights are only guaranteed in Tennessee for ten years, though protections can extend longer if those who inherit publicity rights make use of the name, photograph, or likeness at least every two years after the initial ten-year period. This allows for exclusive use of personality rights to continue in perpetuity, so long as the owners of those rights make use of the persona.  

Additionally, there is some federal protection under section 43(a) of the Lanham Act, allowing a civil action for "false affiliation, designation of origin, or endorsement in connection with goods or services used in interstate commerce." The Act allows a personality to recover damages when depicted without permission—falsely implying affiliation or endorsement of the goods or services promoted by virtue of their persona's use.  

This makes sense, since of the intellectual property types protected by federal statute, personality rights most resemble trademark. Both trademark and personality rights owners fight against misappropriation of the mark or celebrity's fame resulting in unjust enrichment. Like a trademark, personality rights can function as "quality assurance" for when the mark or likeness appear, not unlike Prince's own standards and discretion used when alive. Judges have even used trademark law to protect celebrity personas.  

In theory, personality rights are "of the same genus as unfair competition" and, more precisely, the doctrine of misappropriation (both trademark law hallmarks) as reflected in the Lanham Act. But personality rights are ultimately not trademarks; the right of publicity protects the commercial value of a person's own identity as opposed to the commercial value of symbols and words protected by trademark. Both reflect distinct differences in historical and policy rationales that have affected common law's shaping of these two types of intellectual property.  

Despite the Lanham Act's applicability, personality rights are (for now) the prerogative of the states. As Minnesota looks to reform the proposed tenants of the PRINCE Act, Tennessee's standard is instructive since it was also developed in response to the death of a resident iconic artist, Elvis Presley.  

### The Tennessee Standard: Elvis Presley  

Tennessee is home to many American music celebrities. Usher, Miley Cyrus, Aretha Franklin and Tina Turner were born in Tennessee, Justin Timberlake, Al Green, Dolly Parton and Little Richard are all current Tennessee residents, and Johnny Cash, Patsy Cline, Isaac Hayes and Chet Atkins all died in Tennessee. However, Tennessee's personality rights doctrine exists as a result of Elvis Presley's 1977 death in Memphis, where he had moved from Mississippi while a teenager. The factual similarities to the current state of Prince's estate and the circumstances surrounding Elvis's estate after his death and the Minnesota legislature's attempted PRINCE Act response, make comparison to Tennessee's personality rights especially applicable since Tennessee's right of publicity was developed not just because of Elvis, it was developed for Elvis.  

From 1977 to 1981, without Elvis to continue generating revenues, the Presley estate was unable to pay federal taxes. The estate was also facing claims against it and fighting unauthorized use of the Elvis name and likeness. Litigation in the ten years after Presley's death fleshed out the personality rights standard eventually adopted by statute and subsequent common law.  

The first case to arise after Elvis's passing, *Memphis Development Foundation v. Factors, Etc., Inc.*, involved a Memphis nonprofit selling unlicensed statuettes of Elvis Presley to finance a larger Presley statue. Factors Etc., Inc. (a company primarily owned by Elvis's longtime manager “Colonel” Tom Parker) sued claiming it held the...
rights to Elvis’ image. In its opinion, the District Court for the Western District of Tennessee recognized Elvis’ independent right of publicity and held that it had descended to the Presley estate under Tennessee law. When appealed to the Sixth Circuit, the District Court opinion was actually reversed, finding that Tennessee courts and existing law at that time would find that the right of publicity would not survive a celebrity’s death. This decision would become widely criticized, and ultimately called into question after subsequent Presley litigation.

Separate and contemporaneous litigation was brought when Pro Arts, Inc. purchased the copyright in a newspaper photograph of Elvis and used the picture to create Elvis posters to sell. Factors sought a preliminary injunction in the Southern District of New York and the controversy was adjudicated under New York law. Despite New York’s characterization of personality rights within a privacy context, the court recognized Elvis had exercised his right of publicity while alive and held that it descended at death like any other intangible property right. In doing so, the Court departed from New York’s statutory characterization of personality rights, relying on the prior (and since abrogated) Southern District ruling in Price v. Hal Roach Studios, Inc. that made a distinction between the “right to privacy” extinguishable at death and the “right to publicity” as a property right for the estates of comics Stan Laurel and Oliver Hardy.

Pro Arts appealed to the Second Circuit, who remanded the case after applying New York law and relying on both Price and the District Court’s holding in Memphis Development Foundation, agreed that Elvis Presley's right of publicity survived his death. It should be noted that while this line of cases may have been an attempt to reframe New York’s right of publicity, subsequent decisions for cases concerning other public figures negated these decisions and have remained consistent with New York’s statutory construction of personality rights.

On remand, Pro Arts was enjoined from making any commercial use of Elvis Presley's name and likeness. Granting the preliminary injunction did not conclusively determine all factual issues or legal questions raised, and Pro Arts again appealed to the United States Court of Appeals for the Second Circuit. This time Pro Arts insisted Tennessee law governed the controversy and the Sixth Circuit's reticence to recognize personality rights in its opinion in Memphis Development Foundation should control. On this appeal, the Second Circuit agreed that Tennessee law controlled the case. While it expressly disagreed with the Sixth Circuit's holding in Memphis Development Foundation v. Factors, Etc., Inc. it concluded that it was required to accept the Sixth Circuit's decision as controlling authority.

In the aftermath of, and in response to, this litigation flurry, the Tennessee General Assembly enacted the Personal Rights Protection Act of 1984, providing clear statutory language ensuring personality rights are not extinguished at death and their descendibility to others. Additionally, the Tennessee Court of Appeals confirmed the descendibility of personality rights under common law in another case brought by the Elvis Presley estate against the “Elvis Presley International Memorial Foundation” for their unlicensed use of Elvis’s name. The foundation argued there was “no descendible right of publicity in Tennessee and that Elvis Presley's name and image entered into the public domain when he died.” The court made a clear distinction between the right to privacy and right to publicity, highlighting the economic value of a celebrity's image, and in reviewing the Sixth Circuit's previous opinion on the matter, found their prior decision was made “without considering Tennessee law.”

Instead, the court recognized Tennessee has an “expansive view of property” and concluded a celebrity's right of publicity is a “species of intangible personal property” protected in Tennessee. Specifically, the court found descendibility of personality rights promotes “an expectation that the investment in valuable capital assets will benefit one's heirs after death, the protection of contract rights, the discouragement of consumer deception, and the policy against unfair competition.” Thus, the court held “Elvis Presley's right of publicity survived his death and remains enforceable by his estate and those holding licenses from the estate.”

**How to Avoid the Prince Problem**

Celebrities can have significant earning power long after they take their final bow. Upon the death of a beloved celebrity, personality rights could be infringed by all manners of uses. For attorneys preparing estates for celebrity clients, the amount of protections granted by a given state affect what can and cannot be actionable in a claim brought by an estate. Tennessee does not extend its protections to a person’s voice or signature like California, but California has stronger limitations than Tennessee on descendibility. Several states have not officially recognized personality rights. If musician B.B. King had passed in his native Mississippi, instead of Nevada where he took up residence in the 1980s, his personality rights would have no statutory protections.
In the almost thirty years since Tennessee solidified its legal protections of personality rights, attorneys and advisers to public figures should heed the litigious fight that embroiled the Presley estate in the ten years immediately following Elvis’s death juxtaposed against the rush to protect Prince in Minnesota. The technological explosion of the 21st Century makes it even easier for personality rights to be exploited, and it is conceivable public figures such as radio broadcasters, television journalists, and Internet personalities are susceptible to their name, likeness, photograph, or other identifying characteristics being easily poached for another’s gain.

As Minnesota looks to protect Prince’s estate, adopting the current Tennessee Personal Rights Protection Act standard for its own statute is a better option than the original PRINCE Act draft. Like Minnesota after Prince’s death, Tennessee’s statute was derived after and for the Elvis Presley estate. Since the Personal Rights Protection Act has lasted decades in Tennessee, the First Amendment concerns raised against the PRINCE Act would be answered by adopting existing legal standards that have not been found to entrench on the Constitution. Critics of the PRINCE Act not only pointed to First Amendment concerns, but to its overbroad control of publicity rights that would actually benefit professional sports entities looking for more control over publicity rights of athletes. Since Tennessee enacted the statute, an NBA and NFL franchise relocated to Tennessee and the NHL granted the state an expansion franchise. Additionally, the Personal Rights Protection Act has withstood challenges by athletes that should mitigate sports business concerns held by Minnesota legislators and franchises without unduly restricting the individual rights of athletes.

If Elvis’s example continues to hold true, a well-managed estate carefully cultivating Prince’s future uses can ensure reliable revenue streams for his heirs. Almost forty years after his death (over halfway through the postmortem protections of copyright law), his likeness as well as his music and Graceland estate continues to generate economic value for his heirs. With Graceland Holdings, the company that oversees the Presley estate, named as the manager of Prince’s Paisley Park estate, the factual parallels continue to persist.

However, if the Minnesota legislature wants to follow suit to Tennessee’s General Assembly, the provisions they draft should consider the reason prompting the discussion and additional protection beyond Tennessee’s statutory provisions. Prince fiercely protected his image and his intellectual property. Thus, extending any retooled PRINCE Act’s provisions to mirror California’s protections of a person's "name, voice, signature, photograph, or likeness, in any manner," while incorporating Tennessee’s broader protections for descendibility and process for extending protections in perpetuity would likely better reflect the artist’s actual wishes. Such a Tennessee/California combination would protect in death what Prince strove to control in life: each meticulous detail of how others perceived and experienced him. Incorporating Tennessee’s descendibility then gives Prince’s heirs the ability to maintain these protections for as long as Prince remains commercially viable. An amended PRINCE Act that mirrors so much of Tennessee’s Personal Rights Protection Act makes sense; if Minnesota is applying the law to facts, the factual similarities between the Prince and Elvis estates and the personality rights concerns at issue justify adopting Tennessee’s legal framework created for this exact problem.

Like any retiree, the location where a public figure chooses to spend their final days affects their probate decisions. For those in the public’s eye with personality rights to pass on, state law framework should inform their attorney’s preparations. No public figure’s probate documents should go without language clarifying their intentions on their own personality rights after death.

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[x] Faber, supra note 9.


[xiv] CAL. CIV. CODE § 3344.1(b), (g). (2010).


[xxiii] Faber, supra note 22.


[xxv] Faber, supra note 22.

[xxvi] Id.

[xxvii] Id.


[xxv] Id. at 1330.


[l] Id. at 95.

Faber, *supra* note 9 (comparing statutory protections available in each state).

See note 17 *supra*.


Rothman, *supra* note 30 (Tennessee, by virtue of Sixth Circuit jurisprudence, recognizes the test from *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), where “the use of a celebrity’s name in a work’s title is protected by the First Amendment unless the title is wholly unrelated to the work or is simply a disguised commercial advertisement for the sale of goods or services”).


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