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PRATT'S
**PRIVACY &
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REPORT



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Editorial

Editorial Offices

630 Central Ave., New Providence, NJ 07974 (908) 464-6800

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Le Morte d'Elvis: The Birth of New Claims as New York Recognizes Post-Mortem Right of Publicity

*By James P. Flynn**

The author of this article explains the legal issues associated with whether post-mortem publicity rights are available in various jurisdictions.

Long before the birth of Elvis Presley in 1935, and even longer before his recent 86th birthday on January 8, 2021, King Arthur was the legendary king of choice, and his story was most completely told in *Le Morte d'Arthur* by Sir Thomas Malory.¹ Hence, we embrace the paraphrased allusion in the title above, to both Arthur and the King of Rock-n-Roll, who despite his absence from the public stage since 1977 remains a brand. Thus, Elvis is a good example of what a lay person would call post-mortem publicity rights, as his brand remains one today valued at over \$300 million.²

What also is interesting is the role Elvis and his estate can play in explaining the legal issues associated with whether post-mortem publicity rights are available in various jurisdictions.³

NEW YORK LAW

Let us start with New York, where on November 30, 2020, New York Governor Andrew Cuomo signed into law a bill⁴ amending New York's Civil Rights Law, Sections 50 and 51,

[t]o create a right of publicity for deceased individuals, including the ability of using technology to create digital replicas, and a registry to publicly post such interests upon thereby giving notice to people who may seek to use an individual's right of publicity in New York State for advertising purposes, or for the purposes of trade.

In a recently enacted statute that will become effective for and applicable to persons residing in New York who pass away on or after May 29, 2021 (the 180th day after the November 30, 2020 bill signing), New York said the right of publicity does extend

* James (Jim) P. Flynn is managing director and a member of the firm at Epstein Becker & Green, P.C., advising companies on intellectual property matters, employee terminations, and internal investigations. He may be reached at jflynn@ebglaw.com.

¹ https://en.wikipedia.org/wiki/Le_Morte_d%27Arthur.

² <https://www.projecthatch.co/net-worth/elvis-presley-net-worth-and-life-story/>.

³ <https://www.ilnipsinsider.com/2021/01/the-king-is-dead-long-live-the-king-elvis-sightings-taking-care-of-business-and-rights-of-post-mortem-publicity/>.

⁴ <https://www.nysenate.gov/legislation/bills/2019/s5959>.

post-mortem. The New York law protects both “deceased personalities” and “deceased performers,” which the act defines as:

1. For purposes of this section:

- A.) “DECEASED PERFORMER” means a deceased natural person domiciled in this state at the time of death who, for gain or livelihood, was regularly engaged in acting, singing, dancing, or playing a musical instrument.
- B.) “DECEASED PERSONALITY” means any deceased natural person domiciled in this state at the time of death whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, or because of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services.⁵

The act makes liable for damages any person who “uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from” the personality, or the personality’s estate or rightful heirs. Likewise, the act makes liable for damages any person who “uses a deceased performer’s digital replica in a scripted audiovisual work as a fictional character or for the live performance of a musical work shall be liable for any damages sustained by the person or persons injured as a result thereof if the use occurs without prior consent from” the performer, or performer’s estate or rightful heirs. Under Section 50-F.8,⁶ the New York act applies up to 40 years after the death of the deceased personality.

NEW JERSEY CASE

One of the early cases on a post-mortem right of publicity was actually an Elvis case brought in New Jersey. As I noted elsewhere about that case:

One of the early U.S. cases recognizing by name “the right of publicity” was in fact a New Jersey federal court case, *Estate of Presley v. Russen*.⁷ That case defined the right thus:

. . . The right of publicity is a concept which has evolved from the common law of privacy and its tort “of the appropriation, for the defendant’s benefit or advantages, of the plaintiff’s name or likeness.” The term “right of publicity”

⁵ NY Civil Rights Law § 50-F. RIGHT OF PUBLICITY, <https://www.nysenate.gov/legislation/bills/2019/s5959>.

⁶ <https://www.nysenate.gov/legislation/bills/2019/s5959>.

⁷ 513 F. Supp. 1339 (D.N.J. 1981).

has since come to signify the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit. . . .

Although the courts in New Jersey have not [before 1981] 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.”

In fact, in so holding, the Russen Court relied on a 1907 case⁸ involving Thomas Edison, *Edison v. Edison Polyform Mfg. Co.* As Professor McCarthy has noted, the law thus recognizes “the inherent right of every human being to control the commercial use of his or her identity.”⁹

So, New Jersey and, now, New York have important roles in the development of the law in this area.

OTHER STATES

Successful litigation is rarely about pulling a rabbit out of hat, or a sword out of stone (to return to the Arthurian opening and title), and much more about planning in detail how each step of your plan will work so as to be invisible to the court and client yet produce the result sought. That may require that one understand the law and options beyond jurisdictions like New York and New Jersey, whether those be in other states or in other countries.

According to a recent International Trademark Association (“INTA”) survey,¹⁰ there are some states that recognize the right of publicity but have not considered whether such right exists post-mortem (such as Minnesota, Missouri, New Hampshire, New Mexico, Rhode Island, Utah, and West Virginia) or have seemingly rejected it, such as Massachusetts and Wisconsin.

According to the survey,¹¹ 15 states – Alaska, Colorado, Delaware, Idaho, Iowa, Kansas, Maine, Maryland, Mississippi (Tupelo’s pride notwithstanding¹²), Montana, North Carolina, North Dakota, Oregon, Vermont, and Wyoming – do not recognize even a living person’s right of publicity.

⁸ 73 N.J.Eq. 136, 67 A. 392 (1907).

⁹ Flynn, *WORLD FAMOUS (By, Say, New Jersey Standards): Expanding The Right Of Publicity Nationally And Internationally*, *ILN IP Insider*, July 2019, <https://www.ilnipinsider.com/2019/07/world-famous-by-say-new-jersey-standards-expanding-the-right-of-publicity-nationally-and-internationally/>.

¹⁰ https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf.

¹¹ *Id.*

¹² <https://livability.com/ms/tupelo/experiences-adventures/tupelo-mss-tribute-to-elvis-presley>.

Even among states recognizing post-mortem rights of publicity, the laws of such states vary on both the duration and domicile criteria, with duration ranges from 10 (Tennessee¹³) to 70 (California¹⁴) to 100 years (Indiana¹⁵) and with the states of Indiana and Washington¹⁶ not limiting the rights to those domiciled in such states at the time of death.

Here are just a few more such variations:

- While many states have not expressly considered the questions of domicile, Alabama (resided there “at any time”), South Dakota (requiring citizenship and domiciliary)[, and now New York¹⁷] limit the right to those domiciled there while Indiana and Washington, as noted above, have no domicile requirements.
- While many states have not determined whether they protect post-mortem publicity rights or for how long, these states have determined that the rights are protected for stated period:
 - Oklahoma (100 years each, like Indiana);
 - Washington (75 years);
 - Hawaii and South Dakota (70 years each, like California);
 - Ohio (60 years);
 - Alabama (55 years);
 - Arkansas, Illinois Kentucky, Nevada, and Texas (50 years each);
 - Florida (40 years);
 - Pennsylvania (30 years);
 - Puerto Rico (25 years); and
 - Virginia (20 years, 10 years more than Tennessee).¹⁸

¹³ <https://law.justia.com/codes/tennessee/2019/title-47/chapter-25/part-11/section-47-25-1104/>.

¹⁴ https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=3344.1.&lawCode=CIV.

¹⁵ <http://iga.in.gov/legislative/laws/2017/ic/titles/032#32-36>.

¹⁶ <https://apps.leg.wa.gov/rcw/default.aspx?cite=63.60.010>.

¹⁷ <https://www.nysenate.gov/legislation/bills/2019/s5959>.

¹⁸ INTA, *Right of Publicity State of the Law Survey* (2019), https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf.

As explained in that same INTA survey,¹⁹ and elsewhere,²⁰ there is even greater variety among international jurisdictions. These state and national differences underscore the notion that one must understand how to frame claims, and where to bring them, so that they have the greatest impact.

¹⁹ https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf, *See, also*, <https://www.ilnipinsider.com/2021/01/the-king-is-dead-long-live-the-king-elvis-sightings-taking-care-of-business-and-rights-of-post-mortem-publicity/>.

²⁰ <https://www.ilnipinsider.com/2021/01/the-king-is-dead-long-live-the-king-elvis-sightings-taking-care-of-business-and-rights-of-post-mortem-publicity/>.