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Protecting Your Name, Image, and Likeness for Long-Term Wealth Preservation

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MATTHEW G. PERLOW
ST. LOUIS:
314.345.6442
MATTHEW.PERLOW@
HUSCHBLACKWELL.COM

The monetization individuals derive from their name, image, and likeness is no new phenomenon, but with our media-driven culture and college athletes' ability to benefit from the NCAA's recent change in policy, publicity rights are critical considerations for estate and financial planning. Without understanding the rights of publicity and properly planning, unaffiliated companies or individuals may instead profit from a celebrity, public figure, or athlete's name, image, and likeness.

For years, people have long advocated for student athletes to benefit from the profits the NCAA, colleges, and universities generated from an athlete's name, image, and likeness. Following years of litigation and legislative hearings, the Board of Governors for the NCAA in April 2020 announced that beginning in 2021, student athletes would be entitled to receive money from the use of their right of publicity. Following these changes in the rules, student athletes have received thousands – even millions – of dollars off of their name, image, and likeness.

Aside from the legal safeguards in place against the usage of one's rights of publicity, the value of these rights can have a significant impact when determining the value of a decedent's estate for federal estate tax purposes. In one of the most recent disputes surrounding the value of the right of publicity, the Internal Revenue Service valued the name, image, and likeness for the musician Prince at $6.2 million – almost double the figure claimed by the late musician's estate. Prince's estate ultimately settled with the IRS prior to going to court.

As a result of the recent rise in disputes concerning the utilization and worth of the right of publicity, coupled with the growing prospects of profiting from this

intangible asset, preserving and protecting one's right of publicity is an important consideration when it comes to estate and financial planning.

Understanding the right of publicity

The right of publicity is essentially the right to control the commercial use of an individual's name, image, likeness, or other identifiable characteristics, e.g., in an advertisement or promotion of a product or service. In recent years, the right of publicity has become a contentious issue in the age of social media and online influencers. The rise of student athletes and influencers has led to a proliferation of brands using an individual's right of publicity to promote their products or services which has led for calls of stronger laws to protect these important rights.

The right of publicity is not protected by federal law – rather, it is a matter of state law. Most states currently recognize the right of publicity, either through statutes or common law rights, but even where granted, the right of publicity is not absolute. Due to the development of each state's laws independently, there are often significant differences in the application of the right among states. While the majority of the states at a minimum protect an individual's name and likeness or picture, the scope of protection varies widely, with states like California extending protection to an individual's name, voice, signature, photograph, or likeness. After death, states vary even more, with a majority not extending rights of publicity after death.

The right of publicity was first recognized as a distinct right in the U.S. in the 1953 case *Haelan Laboratories Inc. v. Topps Chewing Gum*[1], in which the term "right of publicity" was coined by Judge Jerome Frank. The more famous cases regarding the right of publicity involve the actress Marilyn Monroe. When Monroe passed away in 1962, she left the majority of her estate to her acting coach, Lee Strasberg, who died 20 years later. Upon Strasberg's death, he left a significant portion of his estate to his third wife, Anna Strasberg, who subsequently began asserting her exclusive right over Marilyn Monroe's publicity rights and initiated lawsuits against companies who were profiting from Monroe's name, image, and likeness. Ultimately, courts in both New York and California determined that Ms. Strasberg did not own Marilyn Monroe's name, voice, image, or likeness[2]. The outcome in these cases prompted California to further extend its laws relating to postmortem publicity rights.

California's statute regarding the right of publicity was first established in 1971.[3] In its original form, the statute only granted rights of publicity to celebrities during their lifetime. However, in 1979, the California Supreme Court overturned a ruling by a lower court which favored the heirs of Bela Lugosi.[4] The trial court had awarded the Lugosi's heirs compensation for the profits made by Universal Pictures for the use of Lugosi's likeness. The higher court ordered the lower court to rule in favor of Universal Pictures. In response, the California legislature enacted new laws to expand the right of publicity beyond death and allowed celebrities' heirs to inherit and assign their right to beneficiaries.[5] In 1999, the postmortem right of publicity was extended to last for 70 years following

a celebrity's death.[6] As a result of the Marilyn Monroe estate litigation, California's laws were further amended to explicitly grant the postmortem right of publicity to those celebrities who died before January 1, 1985, and to permit the transfer of the postmortem right of publicity in contracts, trusts, or other forms of legal instrument created before such date.[7]

Estate tax controversy

Prior to the landmark case in 1994 known as *Estate of Andrews v. United States*[8], the common impression among estate planning advisors was that an individual's right of publicity was of no value for the purpose of calculating federal estate taxes following their death. Thus, it was not necessary to include this information on an estate tax return. However, the outcome of the Andrews case considerably altered this belief.

V.C. Andrews was a bestselling author of paperback novels in the 1970s and 80s. Following her passing in 1986, V.C. Andrews' estate and publisher aimed to take advantage of the high demand for her work by continuing to release books under her name. A ghostwriter was employed to write several additional novels, which were released under Andrews' name and achieved great commercial success. Due to the common impression regarding a decedent's right of publicity, Andrews' estate did not list her name as an asset on the estate tax return. The IRS disagreed with this position and believed the name "V.C. Andrews" and her likeness were an asset valued at more than $1 million. After considering aspects of both the IRS' and the estate's valuations, the U.S. District Court for the Eastern District of Virginia held that Andrews' name was an asset of the estate valued at approximately $700,000 on the date of her death.

Planning considerations

Given the complexity and expanding scope of publicity rights during life and after death, thoughtful business and tax planning should be considered. For any celebrity, athlete, or public figure, his or her right of publicity should be included in their gross estate for federal estate tax purposes. Including publicity rights – a illiquid asset – in a decedent's estate may present complications if its value exceeds the liquid assets available to pay the estate taxes. This could result in a difficult situation, where the estate has to use all of its liquid assets to pay taxes, or even worse, be forced to sell or license the right to generate funds to pay the tax. Proper planning techniques could avoid this problem.

Individuals may also want to dictate how their right of publicity is used after they pass away and whether they would want their family or a charitable organization to have such rights. Robin Williams utilized a distinctive approach regarding his posthumous right of publicity. Prior to his passing, Williams established a limitation on the use of his image or any representation of it, for a period of 25 years following his death. Specifically, he recorded a legal document stating that his image must not

be used in any form of media or promotion until the year 2039. Additionally, Williams bequeathed the ownership of his name, signature, photograph, and likeness to the Windfall Foundation, which was established in his honor.

What this means to you

Protecting your name, image, and likeness through proper planning is an essential aspect of long-term wealth preservation. Taking proactive steps to establish a comprehensive estate plan can ensure your rights remain protected for your family and your wishes are effectively carried out long after you're gone. It's important to meet with an experienced professional who can implement an estate planning strategy to properly protect your right of publicity while taking into consideration the post-death federal estate tax.

Contact us

If you have any questions about these issues, contact Matthew Perlow, Justin Hilton, or your Husch Blackwell attorney.

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[1] *Haelan Laboratories Inc. v. Topps Chewing Gum*, 202 F.2d 866 (2nd Cir. 1953).

[2] *See Milton H. Green Archives, Inc. v. Marilyn Monroe, LLC*, 692 F.3d 983 (9th Cir. 2012), aff'g 568 F.Supp.2d 1152 (C.D. Cal. 2008).

[3] Cal. Civ. Code § 3344 (1971).

[4] *Lugosi v. Universal Pictures*, 25 Cal.3d 813 (1979).

[5] Cal. Civ. Code § 3344 (1984).

[6] *Id.* § 3344 (1999).

[7] *Id.* § 3344 (2007).

[8] *Estate of Andrews v. United States*, 8500 F.Supp. 1279 (E.D. Va. 1994).