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Of Privacy and Publicity: Symbiotic Rights (Or Wellspring of Obfuscation)

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I. INTRODUCTION

Privacy and Publicity. Two seemingly contradictory individual rights. Few realize the modern right of publicity was created out of the legal concept of the right of privacy. Therefore, to fully appreciate how each right exists under the current laws of several states, one must understand the respective history of each of these rights. Whether publicity is a separate right from privacy remains subject to some debate. The right of publicity permits a person to market (and potentially profit) from the use of their name, image, and likeness ("NIL"). Recent disputes involving high-profile celebrity estates, like Michael Jackson and Prince, as well as the National Collegiate Athletic Association's ("NCAA") loosening of restrictions previously preventing amateur student-athletes from profiting from the use of their NIL, have brought the issue to the forefront of popular discussion.[1] In this article, we briefly address the respective legal histories of the rights of privacy and publicity before discussing the complicated state of the law and the attempts by courts and state legislatures to address the sometimes-competing interests of the rights of privacy and publicity. Then, we survey the various state transferability statutes applicable to the right of publicity and suggest a planning strategy which combines the right of publicity with Ten-

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1 Richard Rubin, *What is Prince's Legacy Worth? The Tax Man Wants to Know*, WALL ST. J. (Apr. 28, 2016, 4:26 PM), https://www.wsj.com/articles/what-is-princes-legacy-worth-the-tax-man-wants-to-know-1461784686 [https://perma.cc/7PZJ-VSMN]; David J. Herzig, *Could Prince Estate End Up Following Michael Jackson's Into Tax Court?*, FORBES (Apr. 26, 2016, 7:47 PM), https://www.forbes.com/sites/janetnovack/2016/04/25/could-prince-estate-end-up-following-michael-jacksons-into-tax-court/?sh=43e4430a2be9 [https://perma.cc/3B33-JF6L]; Dan Murphy, *NCAA Clears Student-Athletes to Pursue Name, Image and Likeness Deals*, ESPN (June 20, 2021), https://www.espn.com/college-sports/story/_/id/31737039/ncaa-clears-student-athletes-pursue-name-image-likeness-deals [https://perma.cc/48L7-EUVW].

nessee trust law to protect this often-overlooked intellectual property interest in decedent estates.

II. A Brief History of the Right of Privacy

The right of privacy is a relatively new concept in the law. One of the earliest academic examinations of the right occurred in 1890 when Boston attorney Samuel Warren and U.S. Supreme Court Justice Louis Brandeis published a review of cases, concluding, "the right to be let alone" was based upon the broader principle of the right of privacy.[2] In response to "[t]he press . . . overstepping in every direction the obvious bounds of propriety and of decency[,]" the authors sought to "consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is."[3]

The right to privacy began to mature in the early 20th century with several notable court cases and developments in state law.[4] In 1899, California's legislature criminalized the publication of a person's portrait without consent.[5] Four years later, responding to public outcry over a court decision in a case where a child's picture was used in advertising without permission,[6] New York passed a law that prohibited use of a living person's name, portrait, or picture without prior written consent "for advertising purposes, or for the purposes of trade."[7] Legal scholars at the time were concerned with "protect[ing] the privacy of the individual from invasion either by the too-enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."[8]

The next few years of the early 20th century saw substantial leaps forward in developing the right to privacy. In 1905, Georgia became the first state to recognize privacy as independent grounds for legal action.[9]

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2 *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193, 213 (1890).

3 *Id.* at 196-97; *see also* Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 Ariz. L. Rev. 1, 1 (1979) (analyzing the right to privacy as Warren & Brandeis may have conceptualized it).

4 In 1904, Virginia joined California and New York in recognizing some form of a statutory right to privacy. *See* Va. Code Ann. § 8.01-40 (2022). Utah adopted a similar statute in 1909. *See* Utah Code Ann. § 76-9-406 (West 2022); *see also* Utah Code Ann. § 45-3-3.

5 *See* Benjamin E. Bratman, *Brandeis and Warren's* The Right to Privacy *and the Birth of the Right to Privacy*, 69 Tenn. L. Rev. 623, 641 (2002).

6 *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442-43 (N.Y. 1902).

7 N.Y. Civ. Rights Law §§ 50–51 (McKinney 2022).

8 Warren & Brandeis, *supra* note 2, at 206.

9 *See* Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 69, 80-81 (Ga. 1905).

In *Pavesich,* the Georgia Supreme Court considered "whether an individual has a right of privacy which he can enforce, and which the court will protect against invasion."[10] By answering in the affirmative, the Georgia Supreme Court became the first court in the United States to recognize the right to privacy. Within six years after the *Pavesich* decision, four other states - New Jersey (1907),[11] Indiana (1908),[12] Kentucky (1909),[13] and Missouri (1911)[14] - had recognized a right of privacy. Decades later, the U. S. Supreme Court settled the right to privacy in *Griswold v. Connecticut.*[15]

Out of these cases have grown several forms of what are generally classified as the interference with an individual person's ability to live a reasonably private life, including intrusion, misappropriation, unreasonable publicity and actions that may place another person in a false light in public. These doctrines create what is effectively a property right in an individual's right to privacy. Particularly given the proliferation of cellphones with cameras in every pocket, as well as the exponential growth of social media, legal understandings and applications of the right to privacy must continue to adapt to rapidly changing technology and behaviors.

III. A Brief History of the Right of Publicity

While celebrities are often the first place we look to understand the right of publicity, the fact of the matter is everyday citizens possess the same bundle of individual rights. In some jurisdictions this right applies only to commercial advertising;[16] in others, it applies to much broader applications and generally to any commercial exploitation.[17] Unlike the traditional class of intellectual property interests (copyrights, trademarks, and patents), the right of publicity does not have federal protection.[18] Instead, the right of publicity has developed as a patchwork of statutes and common law in 35 states.[19]

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10 *Id.* at 69.

11 Edison v. Edison Polyform Mfg. Co., 67 A. 392, 395 (N.J. Ch. 1907).

12 Pritchett v. Bd. Comm'rs, 85 N.E. 32, 35 (Ind. App. 1908).

13 Foster-Milburn Co. v. Chinn, 120 S.W. 364, 366 (Ky. 1909).

14 Munden v. Harris, 134 S.W. 1076, 1079 (Mo. Ct. App. 1911).

15 381 U.S. 479, 484-86 (1965).

16 *See, e.g.*, Hart v. Elec. Arts, Inc., 717 F.3d 141, 156 (3d Cir. 2013) (citing Matthews v. Wozencraft, 15 F.3d 432, 440 (1994)).

17 *See* Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 78 (Ga. 1905).

18 *See generally* Brittany Lee-Richardson, *Multiple Identifies: Why the Right of Publicity Should be a Federal Law*, 20 UCLA Ent. L. Rev. 189, 192 (2013) (arguing for the creation of a federal right of publicity statute).

19 *See Right of Publicity State of the Law Survey*, INTA (2019), https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_sur

Though formally acknowledged in United States common law in 1953,[20] the 1970s were formative years for the right of publicity. In 1972, California codified a statutory right of publicity,[21] and the U.S. Supreme Court recognized the right in 1977.[22] In addition to California, several other states — including Indiana (1994)[23] and Tennessee (1984)[24] — codified the right of publicity in subsequent years.

If a creative work is involved in a right of publicity dispute, often it is who is depicted and what part of their identity has been used that is in question - not the copyright. Accordingly, trademark law may hold more parallels to the right of publicity than copyright law, as evidenced by frequent comparison to the federal Lanham Act (governing trademarks, service marks, and unfair competition).[25] Like trademark law, the concepts of unfair competition and misappropriation are cornerstones of legal analysis related to the right of publicity, which functions as a "guarantee of origin"—especially if a celebrity, or the estate of the celebrity, exercises substantial management of control and exhibits discretion in licensing the right of publicity.[26] Similarly, both trademark and publicity rights holders may seek to stop others from reaping the unjust benefits of using or misappropriating the mark and publicity rights of a celebrity's fame.

The elements to establish a right of publicity and the protections afforded by a right of publicity vary by state. Typically, the right of publicity protects a personality's name, image, voice, signature, and likeness. A plaintiff must prove at least two elements to establish a cause of action for a right of publicity violation: (1) the validity of the plaintiff's right of publicity, and (2) that the right has been infringed.[27]

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vey.pdf. Twenty-five percent of the United States do not recognize a right of publicity. *See id.* Nonetheless, California protects the right of privacy in its constitution. *See generally* CAL. CONST. art. 1, § 1 (1879) ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

20 *See* Haelan Lab'ys Inc., v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

21 *See* CAL. CIV. CODE §§ 3344(a), 3344.1(a)(1) (West 2022); *see also* Steven Andreacola, *History: California Civil Code § 3344.1*, 12 J. CONTEMP. LEGAL ISSUES 592, 592 (2001) (stating that California Civil Code § 3344 was enacted in 1971).

22 *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 564–66 (1977).

23 *See* IND. CODE § 32-36-1-7 (2022).

24 TENN. CODE ANN. § 47-25-1103(a) (2022).

25 *See A Concise History of the Right of Publicity*, RIGHT OF PUBLICITY, https://rightofpublicity.com/brief-history-of-rop [https://perma.cc/DMS7-NSGB].

26 *Id.*

27 Thomas Phillip Boggess V, *Causes of Action for an Infringement of the Right of Publicity*, 31 CAUSES OF ACTION 121, § 5 (2006) (citing Prima v. Darden Rests., Inc., 78 F.

Courts generally apply one of two tests to determine whether the defendant has infringed upon the plaintiff's right of publicity.[28] The streamlined modern approach follows the Third Restatement of Unfair Competition, which holds a person liable for violating another's right of publicity when that person "appropriates the commercial value of a person's identity by using without consent the person's, name, likeness, or other indicia of identity" in "advertising the user's goods or services, or . . . [placing them] on merchandise marketed by the user, or [using them] in connection with services rendered by the user."[29]

In jurisdictions where the right of publicity arises from the common law, the plaintiff typically must also show that the use of the plaintiff's identity was for the defendant's advantage (in addition to the elements required by the modern approach).[30] In California — which has perhaps one of the most expansive privacy and publicity laws - *Hill v. National Collegiate Athletic Association*[31] established a tripartite test for determining whether a right of privacy was violated: (1) was there a legally protected privacy interest; (2) was there a reasonable expectation of privacy, given the circumstances; and (3) was there conduct constituting a serious invasion of privacy?

Because legal action for a violation of an individual's right of publicity will be at the state level, the first step in a right of publicity action is to determine which state law applies. Usually, this is the state where the individual is domiciled (or, if deceased, the domicile at death), though the appropriate jurisdiction may also be where the violation occurred. Because the type of individuals who qualify for protected rights of publicity varies by state, the court must determine whether the individual is part of a protected class.[32] For the deceased or their estate representatives, one must also consider whether the jurisdiction recognizes a postmortem right of publicity - and if so, for how long. Some states, such as California (70 years),[33] Florida (40 years),[34] New York

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Supp. 2d 337 (D. N.J. 2000)); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995).

28 *See* Boggess V, *supra* note 27, §§ 5–13.

29 RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-47.

30 Boggess V, *supra* note 27, § 13 (citing Eastwood v. Superior Ct., 198 Cal. Rptr. 342 (Ct. App. 1983)).

31 *See* Hill v. NCAA, 865 P.2d 633, 657 (Cal. 1994).

32 *See, e.g.*, KY. REV. STAT. ANN. § 391.170(2) (West 2022) (extending right of publicity protection only to public figures); *see also* ARIZ. REV. STAT. ANN. § 12-761(A) (2022) (extending right of publicity protection only to members of the armed services).

33 CAL. CIV. CODE § 3344.1(g) (West 2022).

34 FLA. STAT. § 540.08(5) (2022).

(40 years),[35] and Indiana (100 years),[36] protect an individual's right of publicity for a fixed period after death. Tennessee allows a right of publicity for a specific period of time that may be renewed, potentially in perpetuity, depending on the commercial use of the right.[37]

IV. Planning at the Intersection of Privacy and Publicity

Twenty-two U.S. states recognize the right of publicity as freely transferable and descendible, which includes planning for a person's right of publicity after death.[38] However, to which persons the right will be extended varies by jurisdiction.

Unlike other states with a definite time period for acknowledging a post-mortem right of publicity, Tennessee has a 10-year term that resets after commercialization of the right.[39] Under the Personal Rights Protection Act of 1984, Tennessee provides a statutory right of publicity, deeming the use of a person's "name, photograph, or likeness"[40] that person's property during life and for ten years after death.[41] The post mortem right of publicity terminates if there has been no "commercial" exploitation of the individual's identity for two subsequent years.[42] Though untested in the marketplace (to the authors' knowledge), in theory it appears post mortem rights in Tennessee could last in perpetuity (continuing to reset) if some instance of commercial exploitation occurs at least once every ten years. Further, the rights in Tennessee are freely assignable and transferable.[43] As the only state with a potentially perpetual right of publicity, Tennessee could serve as a unique estate planning situs, particularly whenever the publicity rights are transferred to a Tennessee trust structure permitting a settlor the opportunity to take advantage of the 360-year term for irrevocable trusts in the state.[44]

As a descendible property right with potential economic value, the right of publicity should always be an asset considered for planning pur-

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35 *See* N.Y. Civ. Rights Law § 50-f(8) (McKinney 2022). New York prevents the unauthorized use of a person's "name, portrait, picture, or voice" during life and 40 years after death. *See id.*

36 Ind. Code § 32-36-1-8 (2022).

37 For further discussion, see Tenn. Code Ann. § 47-25-1104(b)(2) (2022); *see also infra* Part V.

38 Jennifer E. Rothman, *Rothman's Roadmap to the Right of Publicity: The Law*, Univ. Pa. Carey L. Sch., https://rightofpublicityroadmap.com/law/ [https://perma.cc/35DZ-ML2M].

39 *See* Tenn. Code Ann. § 47-25-1104(b)(2).

40 *See id.* § 47-25-1103(a).

41 *Id.* §§ 47-25-1103(b) to -1104(a).

42 *Id.* § 47-25-1104(b)(2).

43 *See id.* § 47-25-1103(b).

44 *See id.* § 66-1-202(f).

poses by the estate planning practitioner. Social media has made it possible for a person, famous or not, to have their name, image and likeness known and recognized in every corner of the world. Without a right to control the commercial use of personal images, items with a person's name or likeness can be sold at any time, by any person, anywhere in the world without the permission of the individual or their estate. Further, without careful consideration and planning by advisors, heirs may be severely restricted or perhaps even prohibited from realizing the economic potential of this asset.

V. CONCLUSION

Through its relatively short history the development of publicity, as a concept and right, has been intertwined with the development of privacy rights. While publicity has at times been treated as a substantive area of the law entitled to protection, in the authors' opinions, however, the right of publicity has not received the respect and academic study that its economic worth demands. In some states, the owner of the publicity right has limited power to exercise the right or to prohibit its unauthorized use by others.[45] In other states, the owner has a right to publicity, but the right is regarded as personal and therefore not descendible to the individual's estate.[46] While much of the attention has been on high-profile celebrity estates, the fact is everyone has NIL interests based upon the fundamental rights of privacy and publicity. Of course, a non-celebrity right of publicity likely has less commercial value than that of a bona fide celebrity; however, one's opportunity to profit from these rights has increased with the advent of social media and the rise of YouTube, Tik-Tok, and Instagram-famous personalities of late. Several states, either by statute or by common law, have recognized that the right of publicity exists, that it is property, and that it is subject to the same rules of transfer and descent as other property. A few other states severely limit the right of publicity, holding it to be little more than a part of the privacy right and therefore a personal right which terminates at death.[47]

A patchwork of state laws governs the contemporary right of publicity. Despite the need, there has been little impetus for a federal statute. So long as the right of publicity continues to be governed by a patchwork of state laws, significant estate planning opportunities may be found in states that have both favorable trust laws and robust public-

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45 N.Y. CIV. RIGHTS LAW § 50-f(8)(McKinney 2022).

46 *See* KY. REV. STAT. ANN. § 391.170(2) (West 2022) (implying that only public figures have the right postmortem, and this right is not descendible).

47 *See, e.g.*, Frigon v. Universal Pictures, Inc., 255 So. 3d 591, 599 (La. Ct. App. 2018).

ity rights. We see a significant estate planning opportunity by employing Tennessee trust law to protect an individual's right of publicity by placing an individual's publicity rights in a Tennessee trust to take advantage of the potentially perpetual protection of these rights for future generations. Moreover, because the individual does not have to be domiciled in the state where the trust has its situs, it is possible for a resident of any state to take advantage of Tennessee's favorable trust and publicity laws. As the number of individuals with commercially valuable publicity rights increases, so too will demand for knowledgeable legal practitioners to assist clients in planning and protecting these rights.