

# Extra Legal

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

*By Peter Colin, Jr.\**

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 arose has after the 2016 passing of Prince in Minnesota.<sup>1</sup> Soon after his death, Prince merchandise that appeared to be unlicensed was readily available for purchase.<sup>2</sup> The Minnesota State Legislature reacted with the PRINCE Act, though the Legislature retracted the bill<sup>3</sup> after it received criticism for entrenching on the First Amendment

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<sup>1</sup> Oliver Herzfeld, *Prince's Post-Mortem Publicity Rights*, FORBES (May 16, 2016), <http://www.forbes.com/sites/oliverherzfeld/2016/05/16/princes-post-mortem-publicity-rights/#6ab54c00d89d>.

<sup>2</sup> Kevin Burbach, *Prince death sparks Minnesota bill to clarify artist rights*, AP (May 10, 2016), <http://bigstory.ap.org/article/4d492e7b39054aaa8be26efeb845db/prince-death-sparks-minnesota-bill-clarify-artist-right>.

<sup>3</sup> Dan Weiss, *Minnesota's Proposed PRINCE Act Has Been Retracted*, SPIN (May 19,

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and exerting overbroad control of publicity rights that would really benefit professional sports entities looking for more control over publicity rights of athletes.<sup>4</sup>

Prince left no will, and his estate fell into the hands of the court.<sup>5</sup> 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.<sup>6</sup>

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.

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2016), <http://www.spin.com/2016/05/prince-act-minnesota-bill-nope/>.

<sup>4</sup> Bill Donahue, *'Prince Law' Raises Free-Speech Red Flags, Critics Say*, LAW360 (May 11, 2016), <http://www.law360.com/articles/794846/prince-law-raises-free-speech-red-flags-critics-say>; Michael G. Bennett, *Why We Need To Stop The PRINCE Act*, HUFFINGTON POST (May 16, 2016), [http://www.huffingtonpost.com/michael-g-bennett/why-we-need-to-stop-the-p\\_b\\_9981412.html](http://www.huffingtonpost.com/michael-g-bennett/why-we-need-to-stop-the-p_b_9981412.html).

<sup>5</sup> Joshua Berlinger, et. al., *Prince's estate: Still no will, but search continues*, CNN (May 2, 2016), <http://www.cnn.com/2016/05/02/entertainment/prince-estate/>; Dan Browning, *Judge calls complex Prince estate case 'uncharted water'*, MINNEAPOLIS STAR TRIBUNE (Jun. 27, 2016), <http://www.startribune.com/prince-heirship-protocols-subject-of-carver-county-court-hearing/384503191/#1>; *How will Prince's \$300M fortune be divided?*, CBS (Jun. 27, 2016), <http://www.cbsnews.com/news/prince-estate-case-second-hearing-in-minnesota-court/>.

<sup>6</sup> Maria Puente, *Prince Estate: Paisley Park to open for daily paid public tours in fall*, USA TODAY (Aug. 24, 2016), <http://www.usatoday.com/story/life/2016/08/24/prince-estate-paisley-park-open-daily-paid-public-tours-fall/89298540/>; Jeremiah Freed, *Money Does Matter 2Nite; Prince's Estate Legal Bills Reach Almost \$2 Million; Properties To Be Sold*, DRFUNKENBERRY.COM (Aug. 1, 2016), <http://www.drfunkenberry.com/2016/08/01/money-does-matter-2nite-princes-estate-legal-bills-reach-almost-2-million-properties-to-be-sold/>; Mary Lynn Smith, *List of potential Prince heirs is narrowed*, MINNEAPOLIS STAR TRIBUNE (July 30, 2016), <http://www.startribune.com/carver-county-judge-narrows-list-of-potential-prince-heirs/388696721/>.

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## I. Personality Rights: Commonplace in Law

Personality rights, also referred to 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.”<sup>7</sup> 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.<sup>8</sup> 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.”<sup>9</sup>

Personality rights are protected under state law, either within common law or by statute.<sup>10</sup> 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.<sup>11</sup> Provisions and protections vary widely, and domicile at death is significant when examining if and to what extent a state protects personality rights.<sup>12</sup> New York, California, and Tennessee (three of the states with the

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<sup>7</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (Am. Law Inst. 1995).

<sup>8</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (involving a human cannonball who objected to his entire performance being broadcast as an attack on his “economic value.” The Court recognized his “right of publicity [to] provide[] an economic incentive for him to make the investment required to produce a performance of interest to the public.” The Court's language and rationale is reminiscent of the policies supporting copyright and patent laws); Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last updated July 31, 2015); cf. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>9</sup> Reid Kress Weisbord, *A Copyright Right of Publicity*, 84 FORDHAM L. REV. 2803, 2811 (2016).

<sup>10</sup> Jonathan Faber, *Statutes & Interactive Map*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Aug. 12, 2016) (comparing statutory protections available in each state); Jennifer E. Rothman, *The Law*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <http://www.rightofpublicityroadmap.com/law> (last visited Aug. 13, 2016) (archive of each state's statutory and common law personality rights protections).

<sup>11</sup> Faber, *supra* note 10.

<sup>12</sup> See Barbara Wahl, *Don't Forget About Publicity Rights In Estate Planning*, LAW360

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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" rather than "right of publicity," simply protecting against the unconsented use of a living person's "name, portrait or picture" in advertising or in trade.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> However, California limits the succession of those dying intestate to the surviving spouse, children, grandchildren, or parents and not generally to any "heir."<sup>16</sup>

Tennessee, while only protecting a person's "name, photograph, or likeness," takes its protections a step further.<sup>17</sup> Tennessee allows "descendibility" of personality rights to pass to the "executors, assigns, heirs, or devisees" as opposed to the familial limitations imposed in California.<sup>18</sup> 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

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(Feb. 24, 2015), <http://www.law360.com/articles/623021/don-t-forget-about-publicity-rights-in-estate-planning>.

<sup>13</sup> N.Y. CIV. RIGHTS LAW § 50-51 (McKinney 2016).

<sup>14</sup> *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 2008 WL 4127830, \*1-3 (S.D.N.Y. Sept. 2, 2008); *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586 (2d Cir. 1990); *Stephano v. News Group Publ'ns, Inc.*, 474 N.E.2d 580, 583-84 (N.Y. 1984).

<sup>15</sup> CAL. CIV. CODE § 3344.1(a), (b), (g) (2010).

<sup>16</sup> CAL. CIV. CODE § 3344.1(d) (2010).

<sup>17</sup> TENN. CODE ANN. § 47-25-1103 to -1104 (2012).

<sup>18</sup> TENN. CODE ANN. § 47-25-1103 to -1104 (2012); *cf.* CAL. CIV. CODE § 3344.1(d) (2010).

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the initial ten-year period.<sup>19</sup> 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.<sup>20</sup>

Additionally, section 43(a) of the Lanham Act affords some federal protection, allowing a civil action for false affiliation, designation of origin, or endorsement in connection with goods or services used in interstate commerce.<sup>21</sup> 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.<sup>22</sup>

This makes sense, since of the intellectual property types protected by federal statute, personality rights most resemble trademark.<sup>23</sup> Both trademark and personality rights owners fight against misappropriation of the mark or celebrity's fame resulting in unjust enrichment.<sup>24</sup> 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.<sup>25</sup> Some commenters even opine that trademark law may protect celebrity personas.<sup>26</sup>

In theory, personality rights are “of the same genus as unfair competition” and, more precisely, the doctrine of misappropriation —

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<sup>19</sup> TENN. CODE ANN. § 47-25-1104(b)(2) (2012).

<sup>20</sup> Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 516 (2010).

<sup>21</sup> Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2016).

<sup>22</sup> Reid Kress Weisbord, *A Copyright Right of Publicity*, 84 FORDHAM L. REV. 2803, 2811 (2016).

<sup>23</sup> Faber, *supra* note 8. For analysis in favor of judicial recognitions of personality rights under trademark law, see Matt Whibley, *Celebrity and Trademarks, Why Courts Should Recognize a Celebrity-Likeness Mark*, 43 SW. L. REV. 121 (2013).

<sup>24</sup> Faber, *supra* note 8.

<sup>25</sup> *Id.*; Rob Cox, *More Than an Artist, Prince Sought Control Over His Image and Product*, N.Y. TIMES (Apr. 22, 2016), <http://www.nytimes.com/2016/04/23/business/dealbook/more-than-an-artist-prince-sought-control-over-his-image-and-product.html>.

<sup>26</sup> *Motown Record Corp. v. Hormel & Co.*, 657 F. Supp. 1236, 1241 (C.D. Cal. 1987) (stating trademark laws may be used to protect the “persona” of the Supremes).

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trademark law hallmarks — as reflected in the Lanham Act.<sup>27</sup> 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.<sup>28</sup> Both reflect distinct differences in historical and policy rationales that have affected common law's shaping of these two types of intellectual property.<sup>29</sup>

Despite the Lanham Act's applicability, personality rights are (for now) the prerogative of the states.<sup>30</sup> 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.<sup>31</sup>

## II. 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.<sup>32</sup> Justin Timberlake, Al Green, Dolly Parton, and Little Richard are all current Tennessee residents,<sup>33</sup> and Johnny Cash, Patsy Cline, Isaac Hayes, and Chet

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<sup>27</sup> Faber, *supra* note 8.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Whibley, *supra* note 23, at 121, 122-24.

<sup>31</sup> Jennifer E. Rothman, *Tennessee*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <http://www.rightofpublicityroadmap.com/law/tennessee> (last visited Aug. 13, 2016).

<sup>32</sup> See *Famous People Born in Tennessee*, BIOGRAPHY, <http://www.biography.com/people/groups/born-in-tennessee> (last visited Sept. 12, 2016); John M. Cunningham, *Miley Cyrus*, ENCYCLOPEDIA BRITANNICA (Aug. 23, 2016), <https://www.britannica.com/biography/Miley-Cyrus>.

<sup>33</sup> Michelle Pollino, *Dolly Parton Puts Together Fundraiser for Tennessee Fire Victims*, FOX NEWS (Dec. 8, 2016), <http://radio.foxnews.com/2016/12/08/dolly-parton-puts-together-fundraiser-for-tennessee-fire-victims/>; Bob Mehr, *Al Green: 40 Years at Full Gospel Tabernacle*, COMMERCIAL APPEAL (Dec. 16, 2016), <http://www.commercialappeal.com/story/entertainment/music/2016/12/16/soul-call-al-green-marks-40-years-church-pastor/95146078/>; Peter Sblendorio, *Justin Timberlake 'had no idea' he couldn't take a selfie while voting in Tennessee*, N.Y. DAILY NEWS (Oct. 27, 2016), <http://www.nydailynews.com/entertainment/music/justin-timberlake-illegal-voting-selfie-no-idea-article-1.2847264>; Christopher Merchant, *Little Richard, others unhurt in two-car Tenn. accident*, USA TODAY (Aug. 28, 2014), <http://www.usatoday.com/story/life/music/2014/08/28/little-richard-car-accident/14755463/>.

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Atkins all died in Tennessee.<sup>34</sup> However, Tennessee's personality rights doctrine exists as a result of Elvis Presley's 1977 death in Memphis,<sup>35</sup> where he had moved from Mississippi while a teenager.<sup>36</sup> The factual similarities to the current state of Prince's estate and the circumstances surrounding Elvis's estate after his death,<sup>37</sup> and the Minnesota legislature's attempted PRINCE Act response, make comparison to Tennessee's personality rights especially applicable since Tennessee's right of publicity developed not just because of Elvis, but for Elvis.<sup>38</sup>

From 1977 to 1981, without Elvis to continue generating revenues, the Presley estate was unable to pay federal taxes.<sup>39</sup> The estate was also fending off claims against it and fighting unauthorized use of the Elvis name and likeness.<sup>40</sup> Litigation in the ten years after Presley's death fleshed out the personality rights standard eventually found in statute and common law.<sup>41</sup>

The first case to arise after Elvis's passing, *Memphis Development Foundation v. Factors, Etc., Inc.*, involved a Memphis nonprofit selling

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<sup>34</sup> See *Famous People Born in Tennessee*, BIOGRAPHY, <http://www.biography.com/people/groups/born-in-tennessee> (last visited Sept. 12, 2016); Stephen Holden, *Johnny Cash, Country Music Bedrock, Dies at 71*, N.Y. TIMES (Sept. 13, 2003), <http://www.nytimes.com/2003/09/13/arts/johnny-cash-country-music-bedrock-dies-at-71.html?pagewanted=all>; Laura Cantrell, *A Chill Lingers at the Patsy Cline Crash Site*, VANITY FAIR (Mar. 5, 2009), <http://www.vanityfair.com/culture/2009/03/a-chill-lingers-at-the-patsy-cline-crash-site>; Chet Flippo, *Nashville Music Legend Chet Atkins Dead at 77*, CMT (July 2, 2001), <http://www.cmt.com/news/1444898/nashville-music-legend-chet-atkins-dead-at-77/>.

<sup>35</sup> Rothman, *supra* note 31; Amy O. Williams, *Elvis' Legacy Echoes in Legal Field*, MEMPHIS DAILY NEWS (Aug. 16, 2007), <https://www.memphisdailynews.com/news/2007/aug/16/elvis-legacy-echoes-in-legal-field/>; *Elvis Presley Bio*, ROLLING STONE, <http://www.rollingstone.com/music/artists/elvis-presley/biography> (last visited Sept. 12, 2016).

<sup>36</sup> Rothman, *supra* note 31; *Elvis Presley Bio*, *supra* note 33.

<sup>37</sup> Chris Morris, *Inside Prince's Mysterious Estate, the Next Graceland*, FORTUNE (Apr. 26, 2016), <http://fortune.com/2016/04/26/prince-paisley-park-museum-graceland/>.

<sup>38</sup> Annie T. Christoff, *Long Live the King: The Influence of Elvis Presley on the Right of Publicity in Tennessee*, 41 U. MEM. L. REV. 667, 669 (2011).

<sup>39</sup> Williams, *supra* note 35.

<sup>40</sup> *Id.*

<sup>41</sup> Rothman, *supra* note 31; see cases cited *infra* notes 40-49, 51.

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unlicensed statuettes of Elvis Presley to finance a larger Presley statue.<sup>42</sup> Factors Etc., Inc., a licensing operation primarily owned by Elvis's longtime manager "Colonel" Tom Parker, was sued by the nonprofit claiming Factors' production of Elvis statues interfered with the nonprofit's ability to make similar statutes as a method to raise funds for a larger Elvis statue; Factors claimed it held the rights to Elvis' image.<sup>43</sup> In its opinion, the District Court for the Western District of Tennessee recognized Elvis's independent right of publicity and held that it had descended to the Presley estate under Tennessee law.<sup>44</sup> The Sixth Circuit reversed the District Court on appeal, holding that Tennessee courts and public policy considerations at that time would find that the right of publicity would not survive a celebrity's death.<sup>45</sup> This decision would become widely criticized, and ultimately called into question after subsequent Presley litigation.<sup>46</sup>

Pro Arts, Inc. purchase of the copyright in a newspaper photograph of Elvis, and its use the picture to create Elvis posters to sell, generated separate and contemporaneous litigation.<sup>47</sup> Factors sought a preliminary injunction in the Southern District of New York and the controversy was adjudicated under New York law.<sup>48</sup> 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.<sup>49</sup> In doing so, the Court

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<sup>42</sup> *Memphis Dev. Found. v. Factors, Etc., Inc.*, 441 F. Supp. 1323, 1324 (W.D. Tenn. 1977).

<sup>43</sup> *Id.* at 1324-25.

<sup>44</sup> *Id.* at 1330.

<sup>45</sup> *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956, 958-60 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

<sup>46</sup> *Tennessee ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 95-97 (Tenn. Ct. App. 1987).

<sup>47</sup> *Factors Etc., Inc. v. Pro Arts, Inc.*, 444 F. Supp. 288, 289-90 (S.D.N.Y. 1977). The appellate opinion notes Pro Arts did legally purchase the copyright in the Presley picture. *See Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 217 (2d Cir. 1978).

<sup>48</sup> *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279, 280, 285 (S.D.N.Y. 1977). Judge Tenney noted the Pro Arts case was a companion action to the Creative Card case. *See Factors Etc.*, 444 F. Supp. at 289-90.

<sup>49</sup> *Creative Card Co.*, 444 F. Supp. at 284; *Pro Arts, Inc.*, 444 F. Supp. at 290.

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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.<sup>50</sup>

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.<sup>51</sup> 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.<sup>52</sup>

On remand, the District Court enjoined Pro Arts was 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

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<sup>50</sup> *Creative Card Co.*, 444 F. Supp. at 284 (citing *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975)).

<sup>51</sup> *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

<sup>52</sup> *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990) (concerning trademark of "Babe Ruth"); *Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc.*, 867 F. Supp. 175 (S.D.N.Y. 1994) (concerning trademark rights to the Muppet characters); *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007) (concerning Marilyn Monroe's personality rights, stating New York recognizes no right of publicity).

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decision as controlling authority.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> 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.”<sup>56</sup> 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.”<sup>57</sup>

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.<sup>58</sup> 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.”<sup>59</sup> Thus, the court held “Elvis Presley's right of publicity survived his death and remains

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<sup>53</sup> *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 282-83 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

<sup>54</sup> TENN. CODE ANN. §§ 47-25-1101, 1103(a) (2012).

<sup>55</sup> *Tennessee ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 91-93 (Tenn. Ct. App. 1987).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 94-95, 97.

<sup>58</sup> *Id.* at 96-97.

<sup>59</sup> Christoff, *supra* note 36, at 695.

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enforceable by his estate and those holding licenses from the estate.”<sup>60</sup>

### III. How to Avoid the Prince Problem

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,<sup>61</sup> 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.<sup>62</sup>

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 derived their statute after and for the Elvis Presley estate.<sup>63</sup> Since the Personal Rights Protection Act has lasted decades in Tennessee, the First Amendment concerns raised against the PRINCE

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<sup>60</sup> *Crowell*, 733 S.W.2d at 99.

<sup>61</sup> *See Michaels v. Internet Entm't Grp.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) (Bret Michaels and Pamela Anderson's personality rights were violated by a website providing users access to their sex tape); *Hilton v. Persa*, No. 07-cv-00667 (C.D. Cal. Feb. 20, 2007) (restraining order against a website operator from violating Paris Hilton's right of publicity by selling access to her private content); *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014) (Hulk Hogan claimed his personality rights were violated by the publishing of a sex tape without his consent).

<sup>62</sup> *See note 59 supra*. As the Internet continues to create new ways to invade and infringe personality rights for celebrities (living or dead) even regional or online personalities should consider their protections. This can even extend to noncelebrities exploited without their consent or after their death. Drawing such inferences to an example could include exploiting for future financial gain nude pictures or videos sent via text messages obtained after a person’s death, though copyright law and state revenge porn laws may control based on the nature of the usage and the level of personality rights infringement for noncelebrities, though addressed in some states, is even murkier than celebrity personality rights protections. *See Using the Name or Likeness of Another*, DIG. MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/using-name-or-likeness-another> (last visited Sept. 13, 2016).

<sup>63</sup> Rothman, *supra* note 31.

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Act would be answered by adopting existing legal standards that have not been found to entrench on the Constitution.<sup>64</sup> 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.<sup>65</sup> Since Tennessee enacted the statute, an NBA and NFL franchise relocated to Tennessee and the NHL granted the state an expansion franchise.<sup>66</sup> 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.<sup>67</sup>

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. Prince fiercely protected his image and his intellectual property.<sup>68</sup> 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.<sup>69</sup> Such a Tennessee/California combination would protect in death what Prince strove to control in life: each meticulous detail of how

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<sup>64</sup> *Id.* (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").

<sup>65</sup> Bennett, *supra* note 4.

<sup>66</sup> *Professional Sports in Tennessee Since 1975*, TENNESSEE4ME, [http://www.tn4me.org/tpsapage.cfm/sa\\_id/27/era\\_id/9](http://www.tn4me.org/tpsapage.cfm/sa_id/27/era_id/9) (last visited Sept. 12, 2016); *History*, NASHVILLE PREDATORS, <http://predators.ice.nhl.com/club/page.htm?id=37093> (last visited Dec. 4, 2016).

<sup>67</sup> See *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815, 831 (M.D. Tenn. 2015), *aff'd sub nom.* *Marshall v. ESPN*, 15-5753, 2016 WL 4400358 (6th Cir. Aug. 17, 2016).

<sup>68</sup> Cox, *supra* note 25.

<sup>69</sup> See Steve Gorman, *Will Prince's control of his music extend from the grave?*, REUTERS (Apr. 22, 2016), <http://www.reuters.com/article/people-prince-estate-idUSL2N17O221>.

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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.

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.<sup>70</sup> 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 generate economic value for his heirs.<sup>71</sup> 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.<sup>72</sup> An amended PRINCE Act that mirrors 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 immediately after death and personality rights concerns justify adopting Tennessee's legal framework created for this exact issue.

Celebrities can have significant earning power long after they take their final bow.<sup>73</sup> 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.<sup>74</sup> Tennessee does not extend its protections to a person's voice or signature like California, but California has stronger limitations than Tennessee on

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<sup>70</sup> *700,000 Graceland Visitors A Year Can't Be Wrong*, L.A. TIMES (Aug. 3, 1997), <http://articles.latimes.com/1997/aug/03/entertainment/ca-18849>.

<sup>71</sup> *Id.*; Williams, *supra* note 37; Adrian Sainz, *How Priscilla Presley Turned Elvis' Graceland Into Big Business 30 Years Ago*, BILLBOARD (June 13, 2012), <http://www.billboard.com/biz/articles/news/branding/1093632/how-priscilla-presley-turned-elvis-graceland-into-big-business-30>.

<sup>72</sup> Morris, *supra* note 35; *Prince's Paisley Park to open for tours and be managed by Graceland*, WREG (Aug. 25, 2016), <http://wreg.com/2016/08/25/princes-paisley-park-to-open-for-tours-and-be-managed-by-graceland/>.

<sup>73</sup> See Zack O'Malley Greenburg, *The 13 Top-Earning Dead Celebrities of 2015*, FORBES (Oct. 27, 2015), <http://www.forbes.com/sites/zackomalleygreenburg/2015/10/27/the-13-top-earning-dead-celebrities-of-2015/#1c71186a44f6/>.

<sup>74</sup> See, e.g., Faber, *supra* note 10 (comparing statutory protections available in each state).

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descendibility.<sup>75</sup>

Several states have not recognized personality rights.<sup>76</sup> If 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.<sup>77</sup> Like any retiree, the location where a client 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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<sup>75</sup> TENN. CODE ANN. § 47-25-1103 to -1104 (2012); *cf.* CAL. CIV. CODE § 3344.1(d) (2010).

<sup>76</sup> Faber, *supra* note 10.

<sup>77</sup> *Id.*; Tim Weiner, *B.B. King, Defining Bluesman for Generations, Dies at 89*, N.Y. TIMES (May 15, 2015), [http://www.nytimes.com/2015/05/16/arts/music/b-b-king-blues-singer-dies-at-89.html?\\_r=0](http://www.nytimes.com/2015/05/16/arts/music/b-b-king-blues-singer-dies-at-89.html?_r=0). The B.B. King estate is facing other legal woes that may or may not include personality rights in the course of proceedings. *See* Justin Wm. Moyer, *B.B. King: 15 children and potentially a big legal mess*, WASHINGTON POST (May 22, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/05/22/b-b-king-15-children-and-potentially-a-big-legal-mess/>.

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