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POST-MORTEM RIGHT OF PUBLICITY IN ARKANSAS: PROTECTING AGAINST THE UNAUTHORIZED USE OF A PERSON'S IDENTITY FOR COMMERCIAL PURPOSES

*Rashauna A. Norment**

I. INTRODUCTION TO THE POST-MORTEM RIGHT OF PUBLICITY¹

The right of publicity protects against the use of a person's name, identity, likeness, or other personal characteristics (collectively, the "identity") for commercial purposes, without that person's consent.² A person's identity may arise from the "fruit of his labor" and is considered a type of property entitled to legal protection.³ Depending on the jurisdiction at issue, the right of publicity may apply to private individuals, celebrities, public figures, or public officials.⁴

The term "right of publicity" was first recognized in 1953.⁵ Since then, many states have adopted a statutory right of publicity⁶ or have recognized it

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1. The focus of this article is limited to adoption of a post-mortem right of publicity in Arkansas, and a preliminary look to other jurisdictions for guidance. Other considerations, such as first amendment rights, defamation, and contributory infringement should be considered separately.

2. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *Uhlaender v. Hendrickson*, 316 F. Supp. 1277, 1281 (D. Minn. 1970).

3. *Uhlaender*, 316 F. Supp. at 1282.

4. Melodee Henderson, *Publicity Rights in Michigan: A Set of Considerations for Moving Right of Publicity Legislation to the Front of the Bus*, 84 U. DET. MERCY L. REV. 211, 212 (2007).

5. See *Haelan Labs., Inc.*, 202 F.2d at 868.

6. 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:17 n.1 (4th ed. 2011) (listing California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wisconsin).

under common law.⁷ Most of these jurisdictions consider the right of publicity to be personal property.⁸ Some also allow the right of publicity to survive after the person's death,⁹ passing according to the person's will or trust, or under intestate succession.¹⁰ Three states that have a statutory or common law post-mortem right of publicity are Tennessee,¹¹ Georgia,¹² and California.¹³ Such rights may be invoked to prevent unjust enrichment by those who do not have consent to use a person's identity.¹⁴ The right of publicity also protects the value of contracts others may have for use of a person's identity.¹⁵ Remedies for one who prevails on a right of publicity claim include damages, injunctive relief, and impoundment or destruction of the materials in question.¹⁶ This article advocates that Arkansas adopt a post-mortem right of publicity for everyone, and discusses a few jurisdictions that have already done so. Consequently, considerations such as possible preemption of the right of publicity by the First Amendment or the Copyright Act will not be addressed here.¹⁷

A. Arkansas Does Not Recognize a Post-Mortem Right of Publicity

As of this writing, Arkansas does not provide statutory or common law protection for a right of publicity that is descendible. Therefore, a person in Arkansas, generally, must rely on other intellectual property rights in an attempt to protect his identity.¹⁸ Some have also relied on the right of privacy to protect his or her image.¹⁹ However, none of these can substitute for a post-mortem right of publicity. An Arkansas statute setting forth the pa-

7. *Id.* at § 28:16 (listing Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin).

8. *E.g.*, *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1541 (11th Cir. 1983).

9. Henderson, *supra* note 4, at 220.

10. *Id.* at 226.

11. *State ex rel. Elvis Presley Int'l. Mem'l. Found. v. Crowell*, 733 S.W.2d 89, 97-99 (Tenn. Ct. App. 1987).

12. *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods.*, 694 F.2d 674, 674 (11th Cir. 1983).

13. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001); *see also* CAL. CIV. CODE §§ 3344-3344.1 (Westlaw through ch. 4 of 2012 Reg. Sess.).

14. *Comedy III Prods., Inc.*, 21 P.3d at 805.

15. *See generally id.*

16. *E.g.*, TENN. CODE ANN. § 47-25-1106 (West, Westlaw through 2011 Reg. Sess.).

17. For an article discussing such considerations, see Henderson, *supra* note 4.

18. Intellectual property includes statutory and common law protection for trademarks, and statutory protection for copyrights.

19. *E.g.*, *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 497-498 (1962); *Stanley v. Gen. Media Commc'ns, Inc.*, 149 F. Supp. 2d 701, *706 (W.D. Ark. 2001).

rameters for a post-mortem right of publicity, a cause of action for violation of the same, and remedies would be greatly beneficial. Further, this would provide guidance to individuals and third parties as to what is an acceptable or unlawful use of a person's identity.²⁰

For some individuals, economic or commercial value in his or her identity may not be commercially valuable until after death. By Arkansas' adoption of a post-mortem right of publicity, people can rest assured that the value of his or her identity would be protectable after death, and beneficial to heirs. Arkansas should not wait until someone who has considerable fame or notoriety dies before it adopts a post-mortem right of publicity. Until statutory protection is available, Arkansas courts should adopt such a right.

An example of how this post-mortem right of publicity would have benefitted an Arkansas native and resident is the case of the late U.S. Army First Lieutenant Tyler Parten.²¹ Parten attended high school in Marianna, then graduated with high honors from the United States Military Academy in West Point; by all accounts, First Lieutenant Parten was a larger-than-life persona, endowed with the physical prowess, mental toughness and creative intelligence to exude the charismatic leadership he provided to his reconnaissance/combat platoon. While stationed in Afghanistan, Parten maintained journals and penned poems and musical compositions, some of which he recorded. Truly a warrior poet, he also kept in contact with his family and friends whenever possible, sending them copies of his works. On September 10, 2009, Parten was killed in action in Afghanistan.

The Tyler Parten Foundation was established in his honor to carry on his legacy of "promoting peace, one child at a time." After Parten's passing, many people learned about his incredible story of service and sacrifice, and became acquainted with his songs and writings. Some people attempted to commercialize on his valiant identity by linking it with their products or commercial endeavors. Current Arkansas law provides no direct means for prohibiting or controlling other's use of Parten's name or persona. In particular, a claim for an invasion of Parten's privacy by appropriation would not be available because this right did not survive his death.

Indirect means were needed to provide some modicum of control. Under Arkansas law, Parten's parents inherited his personal property, including the copyrights in his literary and musical works, and the recordings of his performances; those copyrights were registered at the Library of Congress. Parten's family also established Tyler Parten Initiatives, LLP (TPI), in connection with charitable and memorial fundraising like the Tyler Parten

20. For an article discussing such considerations, see Henderson, *supra* note 4.

21. To learn more about First Lieutenant Tyler Parten or the Tyler Parten Foundation, see THE TYLER PARTEN FOUNDATION, <http://www.thetylerpartenfoundation.com> (last visited Feb. 10, 2012).

Foundation; TPI also manages Parten's intellectual property, such as the copyrights in his creative works. Since a photograph of Tyler Parten's face was used in connection with TPI's services and promotion, it was registered at the U.S. Patent & Trademark Office as a service mark of TPI.²² If Arkansas had recognized a post-mortem right of publicity, however, then TPI may have been able to more easily prevent unauthorized commercial use of Tyler's identity.

B. The Eighth Circuit's Approach to the Right of Publicity

Case law discussing a right of publicity or a post-mortem right of publicity is limited in the Eighth Circuit. In *Ventura v. Titan Sports, Inc.*,²³ the plaintiff, Jesse "The Body" Ventura, worked as a wrestler for Titan and later as a color commentator.²⁴ The defendant, Titan Sports, had licensed use of the league wrestler's identity for merchandise.²⁵ Ventura believed that he was entitled to royalties for the use of his likeness on videotapes produced by Titan.²⁶ He filed a complaint in a Minnesota state court against Titan, alleging misappropriation of publicity rights, fraud, and quantum meruit.²⁷ Titan Sports removed the case to federal court.²⁸ The quantum meruit claim was submitted to the jury, but the jury was only given a special verdict form concerning misrepresentation of publicity rights.²⁹ The jury determined that Titan exploited Ventura's name, voice or likeness in Titan's merchandise and that Titan had defrauded Ventura.³⁰ The jury awarded damages to Ventura to compensate for Titan's exploitation.³¹ The district court vacated the jury verdict, finding that Ventura was not entitled to a jury trial on his quantum meruit claim.³² The district court then entered findings of fact and conclusions of law that were consistent with the jury verdict; Titan Sports appealed to the Eighth Circuit.³³

On appeal, the Eighth Circuit distinguished the right of privacy from the right of publicity. The right of privacy protects "the privacy and solicitude of a private personae from the mental distress that accompanies unde-

22. U.S. Trademark Registration No. 4,080,743.

23. *Ventura v. Titan Sports, Inc.*, 65 F.3d 725 (8th Cir. 1995).

24. *Id.* at 728.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Ventura*, 65 F.3d at 728.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

sired publicity.”³⁴ In contrast, the right to publicity “protects the ability of a public personae to control the types of publicity that they receive.”³⁵ Thus, it “protects pecuniary, not emotional, interests.”³⁶ “As such, the policy underlying the right to publicity is . . . [similar] to the policy underlying the protection of trade names, which Minnesota recognize[d].”³⁷ The court held that although Minnesota had not adopted a right of publicity, or even one of the categories for an invasion of privacy, it was persuaded that if the issue were raised, the Minnesota Supreme Court would adopt such a right.³⁸ Consequently, the Eighth Circuit court determined that Titan Sports violated that right of publicity.³⁹

In *Sharp-Richardson v. Boyds Collection, Ltd.*,⁴⁰ an Iowa district court cited *Ventura* as an example of a court predicting that a state supreme court would recognize the right of publicity.⁴¹ Here, the plaintiff, Gae Sharp-Richardson, was a professional teddy bear artist who held copyright registrations for her animal “Hudson Bear” and other animal designs.⁴² The defendant, the Boyds Collection (“Boyds”), contacted Sharp-Richardson, expressing an interest in purchasing her designs.⁴³ Boyds signed a contract with Sharp-Richardson to license her designs in exchange for a royalty on sales on all products bearing her designs.⁴⁴ Unbeknownst to Sharp-Richardson, Boyds was already manufacturing and marketing knock offs bearing her designs.⁴⁵ Sharp-Richardson filed suit in Iowa state court for breach of contract, fraudulent misrepresentation, fraudulent nondisclosure, and invasion of privacy.⁴⁶ Boyds removed to federal court.⁴⁷ The district court denied Boyds’s motion to dismiss the fraudulent misrepresentation claim and the invasion of privacy claim.⁴⁸ Boyds then moved for partial summary judgment on the breach of contract claim, and for summary judgment on the fraud claims and the invasion of privacy claim.⁴⁹

34. *Id.* at 730.

35. *Ventura*, 65 F.3d at 730.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. No. C 96-0344 MJM, 1999 WL 33656875 (N.D. Iowa Sept. 30, 1999).

41. *Id.* at *16.

42. *Id.* at *1.

43. *Id.* at *2.

44. *Id.*

45. *Id.*

46. *Sharp-Richardson*, 1999 WL 33656875, at *2.

47. *Id.* at *1.

48. *Id.*

49. *Id.*

On her invasion of privacy claim, Sharp-Richardson argued that Boyds used her identity “to promote its products for which it never paid and/or were not derived from her designs.”⁵⁰ She further argued that Boyds’s appropriation of her image caused her “damage and that the publicity placed her in a false light.”⁵¹ To prevail on a right of publicity claim, a plaintiff must prove: (1) Defendant appropriated the Plaintiff’s name or likeness for the value associated with it, and not in an incidental manner or for a news-worthy purpose; (2) Plaintiff can be identified from the publication; and (3) there was some advantage or benefit to Defendant.⁵²

The *Sharp-Richardson* court noted that Iowa courts had not specifically recognized a right of publicity.⁵³ It further opined that Iowa already recognized a common law cause of action for invasion of privacy⁵⁴ and predicted that the Iowa Supreme Court would probably allow a claim for violation of a right of publicity to proceed.⁵⁵ The court then held that Sharp-Richardson had raised “genuine issues for trial on every element of the ‘right of publicity’ claim” and denied Boyds’s motion for summary judgment on this claim.⁵⁶

Neither of these cases address whether the right of publicity is descendible and inheritable in its respective states. If Arkansas seeks to adopt a post-mortem right of publicity, a look to other jurisdictions on their approach to the post-mortem right of publicity may be instructive. California, Tennessee, and Georgia are examples of such jurisdictions that have already adopted a post-mortem right of publicity.

II. OTHER JURISDICTIONS AND THE POST-MORTEM RIGHT OF PUBLICITY

A. Defining the Right of Publicity

*Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁵⁷ was one of the first cases to address the right of publicity. In *Haelan*, the plaintiff, a seller of chewing gum, entered into a contract with a baseball player, giving the plaintiff “the exclusive right to use the ball-player’s photograph in connection with the sales of plaintiff’s” products.⁵⁸ The defendant, one of the plaintiff’s competitors, deliberately induced the ball player to enter into a

50. *Id.* at *13

51. *Id.*

52. *Sharp-Richardson*, 1999 WL 33656875, at *15.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. 202 F.2d 866 (2d Cir. 1953).

58. *Id.* at 867.

separate agreement to use the player's photograph during the term of the plaintiff's contract.⁵⁹ The Second Circuit noted that the right of publicity is independent of the right of privacy.⁶⁰ A person has rights in the publicity value in his photograph, which may be transferred "in gross."⁶¹ The court opined that the right of publicity is not about a person's feelings being bruised but rather being deprived if he "no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."⁶² Thus, a right of publicity allows a person to make an exclusive grant to use his image.⁶³

B. Tennessee and the Post-Mortem Right of Publicity

Tennessee has adopted statutory and common law protection for the right of publicity.⁶⁴ This right is descendible and inheritable.⁶⁵ One of the most notable lines of cases concerning application of the post-mortem right of publicity is *State ex rel. Elvis Presley International Memorial Foundation v. Crowell*.⁶⁶

1. *Elvis Presley and Common Law Post-Mortem Right of Publicity*

The Presley estate owned the copyrights and trademarks relating to Elvis Presley's works.⁶⁷ The estate still sought to protect the entertainment icon's identity through his right of publicity, arguing that this right was descendible upon his death.⁶⁸

Elvis Presley capitalized on his identity during his lifetime.⁶⁹ He entered into various contracts granting exclusive commercial licenses to use his identity throughout the world in connection with the marketing and sale of merchandise and other memorabilia.⁷⁰ For example, his name and likeness were found on clothing, jewelry, and many other items, earning millions of dollars for himself, his licensees, and business associates.⁷¹ In 1981,

59. *Id.*

60. *Id.* at 868.

61. *Id.*

62. *Id.*

63. *Haelan Labs., Inc.*, 202 F.2d at 868.

64. Henderson, *supra* note 4, at 218, 225–26.

65. *Id.* at 225–26.

66. *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987).

67. *Id.* at 91.

68. *See id.* at 91–92.

69. *Id.* at 92.

70. *Id.*

71. *Id.*

the Presley estate formed Elvis Presley Enterprises, Inc. (EPE), as a corporation that licensed products bearing his name and likeness.⁷² EPE also owned and controlled trademark registrations and copyrights.⁷³

In 1980, a group of Elvis Presley fans, who called themselves the Elvis Presley International Memorial Foundation (IMF), sought a charter as a Tennessee not-for-profit corporation to support a new trauma center within the Memphis and Shelby County hospital system.⁷⁴ The Tennessee Secretary of State denied IMF's application stating that "[t]he name Elvis Presley cannot be used for this charter."⁷⁵ The Presley estate discussed IMF's use of Mr. Presley's name but declined to allow IMF an unrestricted right to use his name and likeness.⁷⁶ Instead the Presley estate offered IMF a royalty-free license to use Mr. Presley's identity under certain conditions.⁷⁷ IMF refused this offer.⁷⁸ In 1981, the Tennessee Secretary of State issued a corporate charter to IMF, and IMF began to raise funds to support the trauma center named after Mr. Presley.⁷⁹

In 1985, "[t]he Presley estate and [EPE] incorporated the Elvis Presley Memorial Foundation, Inc. (Foundation) as a Tennessee not-for-profit corporation."⁸⁰ The Foundation raised funds to build a fountain in a shopping center across from Mr. Presley's home.⁸¹ After the Foundation was formed, any amicable relationship IMF had with the Presley estate and EPE deteriorated.⁸² On July 17, 1985, IMF filed suit against the Foundation to dissolve the Foundation and to enjoin it from using a deceptively similar name.⁸³ The trial court allowed EPE to intervene as a defendant on the defendant Foundation's behalf.⁸⁴

The chancery court granted the Foundation's summary judgment motion and dismissed the complaint; IMF appealed.⁸⁵ On appeal, the court acknowledged the confusion between the right of privacy and the right of publicity.⁸⁶ The issue at hand was whether an individual's right of publicity

72. *Crowell*, 733 S.W.2d at 92.

73. *Id.*

74. *Id.*

75. *Id.* at 92.

76. *Id.*

77. *Id.*

78. *Crowell*, 733 S.W.2d at 93.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Crowell*, 733 S.W.2d at 93.

85. *Id.* at 91.

86. *Id.* at 93.

was descendible at death under Tennessee law.⁸⁷ The court briefly discussed the origin of the right of privacy and each individual's "right to be left alone."⁸⁸ The court noted that this privacy interest is "far different from a celebrity's interest in controlling and exploiting the economic value of his name and likeness."⁸⁹ It distinguished the right of publicity as a right separate and independent from the right of privacy.⁹⁰

The court then transitioned to a discussion of the right of property in land and in chattel.⁹¹ Chattel includes intangible personal property such as "a person's 'business,' a corporate name, a trade name and the good will of a business."⁹² A person's right of publicity is a form of intangible personal property because it has economic value that can be possessed, used, assigned, and the subject of a contract.⁹³

"[R]ecognizing that the right of publicity is descendible promotes . . . [at least six] important policies . . ."⁹⁴ First, an individual has the right of testamentary distribution.⁹⁵ If a person's right of publicity is considered intangible personal property in life, it remains property at death.⁹⁶ Second, a claim for unjust enrichment exists "against granting a windfall to an advertiser who has no colorable claim" to use a person's identity for commercial use, without that person's consent.⁹⁷ Third, a person has an "expectation that he is creating a valuable capital asset that will benefit his heirs and assigns after his death."⁹⁸ This further recognizes a person's effort and financial commitment to establishing his identity.⁹⁹ Fourth, the right of publicity "recognizes the value of the contract rights of persons who have acquired the right to use" someone else's name and likeness.¹⁰⁰ The value of any existing contract made while the person was alive would be greatly diminished if a person's name and likeness were to enter the public domain at death.¹⁰¹ Fifth, it "will further the public's interest in being free from deception with

87. *Id.* at 97.

88. *Id.* at 94.

89. *Id.*

90. *Crowell*, 733 S.W.2d at 94–97

91. *Id.* at 97.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Crowell*, 733 S.W.2d at 97–98.

97. *Id.* at 98.

98. *Id.* (citing Roberta Rosenthal Kwall, *Independence Day Dawning for the Right of Publicity?*, 17 U. C. DAVIS L. REV. 191, 212–13 (1983); Michael J. McLane, *The Right of Publicity: Dispelling Survivability, Preemption, and First Amendment Myths Threatening to Eviscerate a Recognized State Right*, 20 CAL. W. L. REV. 415, 421 (1983)).

99. *Id.*

100. *Id.*

101. *Id.*

regard to the sponsorship, approval or certification of goods and services.”¹⁰² Finally, it “is consistent with the policy against unfair competition through the use of deceptively similar corporate names.”¹⁰³ After this examination, the court held that “Elvis Presley’s right of publicity survived his death and remain[ed] enforceable by his estate and those holding licenses from the estate.”¹⁰⁴

2. *Tennessee Statutory Post-Mortem Right of Publicity*

The Tennessee General Assembly added a cause of action for violation of a person’s right of publicity.¹⁰⁵ The purpose of The Personal Rights Protection Act of 1984 (TPRPA) is to protect individuals who use their names for “endorsement purposes.”¹⁰⁶ Tennessee Code Annotated § 47-25-1103 states:

(a) Every individual has a property right in the use of that person’s name, photograph, or likeness in any medium in any manner.

(b) The individual rights provided for in subsection (a) constitute property rights and are freely assignable and licensable, and do not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual’s lifetime, but shall be descendible to the executors, assigns, heirs, or devisees of the individual so protected by this part.¹⁰⁷

Section 1105(a) states:

Any person who knowingly uses or infringes upon the use of another individual’s name, photograph, or likeness in any medium, in any manner directed to any person other than such individual, as an item of commerce for purposes of advertising products, merchandise, goods, or services, or for purposes of fund raising, solicitation of donations, purchases of products, merchandise, goods, or services, without such individual’s prior consent . . . or in the case of a deceased individual, the consent of

102. *Crowell*, 733 S.W.2d at 99.

103. *Id.*

104. *Id.*

105. The Personal Rights Protection Act of 1984, 1983–1984 Tenn. Pub. Acts ch. 945 (codified at TENN. CODE ANN. §§ 47-25-1101 to -1108 (West, Westlaw through 2011 Reg. Sess.)).

106. *E.g.*, *McKee v. Meltech, Inc.*, No. 10-2730, 2011 WL 1770461, at *12 (W.D. Tenn. May 9, 2011) (quoting *Reed v. Lifeweaver, LLC*, No. 2:08-CV-116, 2010 WL 1798704, at *11 (E.D. Tenn. May 5, 2010)).

107. TENN. CODE ANN. §§ 47-25-1103 (a)–(b) (West, Westlaw through 2011 Reg. Sess.).

the executor or administrator, heirs, or devisees of such deceased individual, shall be liable to a civil action.¹⁰⁸

Remedies include “damages, injunctive relief, and impoundment or destruction of the materials.”¹⁰⁹ Unauthorized use may detract from the value of a person’s identity which that person alone has the right to commercially exploit.¹¹⁰ An injunction may be appropriate and “reasonable to prevent or restrain the unauthorized use of an individual’s name, photograph, or likeness.”¹¹¹ Furthermore, “enjoining the . . . [violator’s] activities would serve the public interest by protecting this right.”¹¹²

C. Georgia and the Post-Mortem Right of Publicity

The right of publicity is also recognized in Georgia, distinct from the right of privacy,¹¹³ as a common law post-mortem right of publicity.¹¹⁴ These rights extend to private citizens to prevent their identity from being “used for the financial gain of the user without their consent.”¹¹⁵

1. *Martin Luther King, Jr.’s Estate and Common Law Post-Mortem Right of Publicity*

In this case, the plaintiffs were the Martin Luther King, Jr. Center for Social Change (the “Center”), Coretta Scott King, as administratrix of Dr. King’s estate, and Motown Record Corporation, as assignee of the rights to several of Dr. King’s copyrighted speeches.¹¹⁶ The defendants owned a business that sold plastic busts of Dr. King.¹¹⁷ At least one of the defendants sought endorsement and participation from the Center to market the bust but the plaintiffs refused.¹¹⁸ This defendant continued with marketing the bust despite the plaintiffs’ refusal.¹¹⁹ The plaintiffs filed suit after demanding that defendants stop further advertisements and bust sales.¹²⁰ During a hearing, the district court granted in part the plaintiffs’ motion to enjoin the defend-

108. *Id.* at § 47-25-1105(a).

109. Henderson, *supra* note 4, at 226–27.

110. *Id.*

111. TENN. CODE ANN. § 47-25-1106 (West, Westlaw through 2011 Reg. Sess.).

112. *E.g.*, Apple Corps Ltd. v. A.D.P.R., Inc., 843 F. Supp. 342, 349 (M.D. Tenn. 1993).

113. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 694 F.2d 674, 674 (11th Cir. 1983).

114. *Id.*

115. *Id.* at 680.

116. *Id.* at 675.

117. *Id.*

118. *Id.*

119. *Am. Heritage Prods., Inc.*, 694 F.2d at 675.

120. *Id.*

ants from using the Center's name in promotion of the defendants' products.¹²¹ The district court also held "that the defendants had infringed . . . [Dr.] Kingl's] copyrights."¹²² The plaintiffs appealed the partial denial of the preliminary judgment to the Eleventh Circuit Court of Appeals, which certified four questions:

(1) Is the "right of publicity" recognized in Georgia as a right distinct from the right of privacy? (2) If the answer to question (1) is affirmative, does the "right of publicity" survive the death of its owner? . . . [I]s the right inheritable and devisable? (3) If the answer to question (2) is also affirmative, must the owner have commercially exploited the right before it can survive his death? (4) Assuming the affirmative answers to questions (1), (2)[,] and (3), what is the guideline to be followed in defining commercial exploitation . . . ?"¹²³

For the first issue, the Eleventh Circuit quoted *Pavesich v. New England Life Insurance*:¹²⁴

It is not necessary in this case to hold . . . that the mere fact that a man has become what is called a public character, either by aspiring to public office, or by holding public office, or by exercising a profession which places him before the public, or by engaging in a business which has necessarily a public nature, gives to every one the right to print and circulate his picture.¹²⁵

Furthermore, it acknowledged that Georgia recognizes the rights of private citizens "not to have their names and photographs used for the financial gain of the user without their consent, where such use is not authorized as an exercise of freedom of the press."¹²⁶ The court held "that appropriation of another's name and likeness . . . without consent and for financial gain . . . [was] a tort in Georgia" and applied to a private citizen, entertainer, public official, or public figure.¹²⁷

The second issue the court addressed was whether the right of publicity survives the death of its owner, and whether that right is inheritable and devisable.¹²⁸ The court indicated that a right of publicity that survives the owner's death encourages effort and creativity because the economic value

121. *Id.* at 676.

122. *Id.*

123. *Id.*

124. 50 S.E. 68 (Ga. 1905).

125. *Am. Heritage Prods., Inc.*, 694 F.2d at. at 677-78 (internal quotation marks omitted).

126. *Id.* at 680.

127. *Id.*

128. *Id.* at 681.

of that right could continue after death.¹²⁹ It also held that the right of publicity is assignable and inheritable.¹³⁰

The third issue the court addressed was whether one must commercially exploit his right of publicity before it can survive after his death.¹³¹ The court opined that this was not a requirement in order for the right of publicity to survive after death because “a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life.”¹³² As a minister and civil rights activist, Dr. King did not commercially exploit his name and likeness during his lifetime.¹³³ Even so, after his death, his family (through his estate) remained in control of his right of publicity in his identity to preserve and extend his legacy and ideals and to prevent unauthorized exploitation of the same by others.¹³⁴ Because Dr. King was not required to have commercially exploited his right of publicity during his lifetime for it to survive his death, the court had no need to address the last question concerning the guideline for determining “commercial exploitation.”¹³⁵

D. California Statutory and Common Law Post-Mortem Right of Publicity

In California, “the right of publicity is both a statutory and a common law right.”¹³⁶ The statutory right of publicity complements the common law right of publicity, which arises from the tort of invasion of privacy.¹³⁷ “The common law and statutory claims are similar but not identical”¹³⁸ In California, the right of publicity has been deemed to have some social utility and is considered a protected form of intellectual property.¹³⁹ Some considerations suggesting that the right of publicity may have value include the time, money, and energy expended to develop one’s image, reputation, and

129. *Id.* at 682.

130. *Id.*

131. *Am. Heritage Prods., Inc.*, 694 F.2d at 682.

132. *Id.* at 683.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001); *see* CAL. CIV. CODE §§ 3344–3344.1 (Westlaw through ch. 4 of 2012 Reg. Sess.).

137. *Comedy III Prods., Inc.*, 21 P.3d at 799.

138. *E.g., Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 612 (Cal. Ct. App. 2006).

139. *Comedy III Prods., Inc.*, 21 P.3d at 804.

skill.¹⁴⁰ California cases have also employed the term “likeness” concerning replication of a person’s features.¹⁴¹

1. *California Common Law Post-Mortem Right of Publicity*

To state a claim under California’s common law right of publicity, a plaintiff must show “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”¹⁴²

2. *California Statutory Post-Mortem Right of Publicity.*

In California:

Any person who knowingly uses another’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 such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.¹⁴³

California also provides protection under a post-mortem right of publicity:

(a)(1) 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 person or persons . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.

(b) The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument, executed before or after January 1, 1985.¹⁴⁴

An example of the right of publicity protecting the use of a person’s likeness on products is *Comedy III Productions, Inc. v. Gary Saderup*,

140. *Id.*

141. *E.g.*, *Nurmi v. Peterson*, CV 88-5436-WMB, 1989 WL 407484, at *1-2 (C.D. Cal. Mar. 31, 1989).

142. *E.g.*, *Browne v. McCain*, 611 F. Supp. 2d 1062, 1069 (C.D. Cal. 2009); *Keller v. Electronics Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at *3 (N.D. Cal. Feb. 8, 2010).

143. CAL. CIV. CODE §§ 3344(a) (Westlaw through ch. 4 of 2012 Reg. Sess.); *see also Kirby*, 50 Cal.Rptr.3d at 612.

144. CAL. CIV. CODE § 3344.1 (Westlaw through ch. 4 of 2012 Reg. Sess.).

*Inc.*¹⁴⁵ In *Comedy III*, the plaintiff, Comedy III, was the registered owner of all rights to the comedy act *The Three Stooges*.¹⁴⁶ The defendant, Gary Saderup, was an artist who made a living making charcoal drawings of celebrities in the form of lithographs, which were used on T-shirts.¹⁴⁷ Saderup sold T-shirts bearing a likeness of *The Three Stooges*, without Comedy III's consent.¹⁴⁸ The Superior Court entered judgment awarding damages and permanent injunctive relief to Comedy III.¹⁴⁹ Saderup appealed, and the Court of Appeals modified the judgment, striking the injunction while maintaining the award of damages, attorneys' fees and costs.¹⁵⁰ Saderup appealed to the California Supreme Court, arguing that the lithographs and T-shirts did not constitute an advertisement, endorsement, or sponsorship of any product.¹⁵¹ The California Supreme Court disagreed, noting that Saderup's lithographic prints and T-shirts of *The Three Stooges* were tangible personal property.¹⁵² It held that "[b]y producing and selling such lithographs and T-shirts, Saderup thus used the likeness of the Three Stooges 'on . . . products, merchandise, or goods' within the meaning of the statute."¹⁵³

III. ALTERNATIVES TO THE RIGHT OF PUBLICITY

Alternatives to protection under a right of publicity include (1) an invasion of a right of privacy, (2) trademark infringement, and (3) copyright infringement. Each of these protects different interests, yet cannot substitute for the protection afforded by a post-mortem right of publicity.

A. Arkansas and the Right of Privacy

The right of privacy is the expectation of a person to be left alone.¹⁵⁴ Unless provided otherwise by statute, common law tort claims are not assignable,¹⁵⁵ do not survive after death of the victim, and would not be descendible to one's heirs.¹⁵⁶ "[A]n invasion of privacy claim 'exists only if the defendant's conduct was such that he should have realized that it would

145. 21 P.3d 797, 799 (Cal. 2001).

146. *Id.* at 800.

147. *Id.*

148. *Id.* at 800-01.

149. *Id.* at 801.

150. *Id.*

151. *Comedy III Prods., Inc.*, 21 P.3d at 801-02.

152. *Id.* at 802.

153. *Id.*

154. *E.g.*, *Tureen v. Equifax, Inc.*, 571 F.2d 411, 415 (8th Cir. 1978).

155. *E.g.*, *Mallory v. Hartsfield, Almand & Grisham, LLP*, 350 Ark. 304, 309, 86 S.W.3d 863, 866 (2002).

156. *E.g.*, *Westridge v. Byrd*, 37 Ark. App. 72, 73, 823 S.W.2d 930, 930 (1992).

be offensive to persons of ordinary sensibilities.”¹⁵⁷ With a right of publicity analysis, an expectation of privacy is not a requirement.

The Arkansas Supreme Court has adopted the Restatement position on the invasion of the right of privacy.¹⁵⁸ Other jurisdictions within the Eighth Circuit have also adopted, or at least acknowledged, a cause of action for an invasion of the right of privacy.¹⁵⁹ An invasion of the right of privacy is divided into four categories: “(a) [u]nreasonable intrusion upon the seclusion of another . . . ; (b) appropriation of the other's name or likeness . . . ; (c) unreasonable publicity given to the other's private life . . . ; or (d) publicity that unreasonably places the other in a false light before the public”¹⁶⁰ Appropriation of one's name or likeness is the closest option of the four categories, under an invasion of privacy, to protect one's name, image or likeness.¹⁶¹

The Restatement provides that “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy.”¹⁶² The Restatement further instructs that appropriation applies whenever one uses another's name, likeness or reputation “for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one.”¹⁶³ As an intentional act, invasion of one's right of privacy is an intentional tort; therefore, an incidental use of someone else's name or likeness is not an appropriation and not actionable.¹⁶⁴ For example, mere publication of the person's likeness in a commercial newspaper or magazine does not create a cause of action for misappropriation.¹⁶⁵

Only a few reported cases in Arkansas discuss appropriation as a cause of action for an invasion of privacy.¹⁶⁶ In *Stanley v. General Media Communications*, two young women voluntarily participated in a contest where

157. *E.g.*, *McKee v. Meltech, Inc.*, No. 10-2730, 2011 WL 1770461 at *11 (W.D. Tenn. 2011) (quoting *West Media Gen. Convergence, Inc.*, 52 S.W.3d 640, 643 (Tenn. 2001)).

158. *See* *Dodrill v. Ark. Democrat Co.*, 265 Ark. 628, 637, 590 S.W.2d 840, 844–45 (1979); *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 497–98, 353 S.W.2d 22, 23 (1962).

159. *Bremmer v. Journal-Tribune Publ'g Co.*, 76 N.W.2d 762, 764 (Iowa 1956); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998); *Sofka v. Thal*, 662 S.W.2d 502, 509 (Mo. 1983); *Sabrina W. v. Willman*, 540 N.W.2d 364, 369 (Neb. Ct. App. 1995); *Hougum v. Valley Mem'l Homes*, 574 N.W.2d 812, 816 (N.D. 1998); *Montgomery Ward v. Shope*, 286 N.W.2d 806, 808 (S.D. 1979).

160. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

161. *See, e.g.*, *Faegre & Benson, LLP v. Purdy*, 367 F. Supp. 2d 1238, 1247 (D. Minn. 2005).

162. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

163. *Id.* at cmt. b.

164. *E.g.*, *Kovatovich v. K-Mart Corp.*, 88 F. Supp.2d 975, 987 (D. Minn. 1999).

165. *Stanley v. Gen. Media Commc'ns, Inc.*, 149 F. Supp. 2d 701, 706 (W.D. Ark. 2001).

166. *Id.*; *LasikPlus Murphy, M.D., P.A. v. LCA-Vision, Inc.*, 776 F. Supp. 2d 886, 899 (E.D. Ark. 2011); *Olan Mills, Inc. of Tex.*, 234 Ark. at 499, 353 S.W.2d at 24.

their photographs were taken.¹⁶⁷ The contest was held in a public place; therefore, the women did not have any expectation of privacy while participating.¹⁶⁸ One of the photographs featuring the two women was published in *Penthouse* magazine, with a caption noting the activity in which they participated.¹⁶⁹ The women filed suit against the defendant publisher alleging invasion of privacy by appropriation, along with false light invasion of privacy, libel, and intentional infliction of emotional distress.¹⁷⁰ The plaintiffs were concerned that nationwide publication of their photographs in the magazine would damage their reputation.¹⁷¹

The Eastern District of Arkansas noted that, although the plaintiffs were identified by name and hometown in the publication, there was no evidence that the plaintiffs were easily identifiable to the general public.¹⁷² Further, courts have distinguished between the use of a professional athlete's names and facts (fair use) and use of such information for commercial purposes (right of publicity infringement).¹⁷³ After finding that no reasonable jury could conclude that the publication intended or expected that customers would buy the magazine on the basis of the photo at issue, the court dismissed plaintiffs' claim for invasion of privacy by appropriation.¹⁷⁴

B. Arkansas and Trademark Law

Both the Lanham Act and Arkansas law define a trademark as "any word, name, symbol, or device, or any combination thereof used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown."¹⁷⁵ This definition applies to a trademark (or service mark) regardless of whether the mark is registered with the United States Patent and Trademark Office, secretary of state, or even unregistered.¹⁷⁶ Developing trademark rights in association with particular goods or services requires consumer recognition of the mark

167. "The contest rules required each participant to place a blindfold over her eyes, un-wrap a condom, and place the condom on a 'demonstrator,' which was a white plastic phal-lus." *Stanley*, 149 F. Supp. 2d at 704.

168. *Id.*

169. *Id.* at 704–05.

170. *Id.* at 704.

171. *See id.* at 706.

172. *Id.*

173. *E.g.*, *Hillerich & Bradsby Co. v. Christian Bros., Inc.*, 943 F. Supp. 1136, 1141 (D. Minn. 1996).

174. *Stanley*, 149 F. Supp. 2d at 706.

175. 15 U.S.C. § 1127 (2006); *accord* ARK. CODE ANN. § 4-71-201(10) (Repl. 2011).

176. *See Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 626 (8th Cir. 1987).

as an identifier of the source of such goods or services.¹⁷⁷ Goodwill and reputation, derived from the perceived economic value obtained, also accompany trademarks.¹⁷⁸

The Lanham Act prohibits use of a trademark by one that:

is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.¹⁷⁹

Trademark rights generally do not extend to a person's name, unless that person has used it to function as a trademark for particular goods or services.¹⁸⁰ In certain circumstances, a person's name or image may be used as a trademark (or service mark).¹⁸¹ In this situation, the person would not necessarily have *carte blanche* rights to any and all uses of the words forming his name.¹⁸² Any right to use his name as a trademark would depend upon whether he is the first (or "senior") user of the trademark used in connection with those particular goods or services.¹⁸³

C. Arkansas and Copyright Law

Another avenue for protecting one's life work is to protect works of art under copyright law. Subject matter eligible for copyright protection includes:

literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pic-

177. *Id.* at 625–26.

178. *See, e.g., id.* at 625; 1 MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:15 (4th ed. 2011).

179. 15 U.S.C. § 1125(a)(1) (2006).

180. *See In re Carson*, 197 U.S.P.Q. 554, 555 (T.T.A.B. 1977); *Holiday Inns, Inc. v. Trump*, 617 F. Supp. 1443, 1465 (D. N.J. 1985); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 13:2 (4th ed. 2011).

181. *See In re Carson*, 197 U.S.P.Q. at 555; *Holiday Inns, Inc.*, 617 F. Supp. at 1465; 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 13:2 (4th ed. 2011).

182. *See* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 13:2 (4th ed. 2011).

183. *See Holiday Inns, Inc.*, 617 F. Supp. at 1464.

tures and other audiovisual works; sound recordings; and architectural works.¹⁸⁴

These works of art must be fixed into a tangible medium of expression, such as in writing or a recording.¹⁸⁵ Subject matter that is *not* eligible for copyright protection includes an idea, procedure, process, system, method of operation, concept, principle, or discovery.¹⁸⁶

Copyright protection lasts the life of the author plus seventy years after the author's death.¹⁸⁷ As personal property, it may be assigned and is descendible.¹⁸⁸ The owner of copyrights has the exclusive right to reproduce the copyrighted work, to prepare derivative works, to distribute copies of the work to the public, to perform the work publicly, and to display the work publicly.¹⁸⁹ Copyright infringement does not generally extend to unauthorized use of a person's identity because a cause of action for copyright infringement requires ownership of a valid copyright and copying of the copyrighted work.¹⁹⁰

"As described by the Eighth Circuit, the right of publicity protects 'the right of an individual to reap the rewards of his or her endeavors.'"¹⁹¹ Copyright, on the other hand, protects the author's exclusive right to reproduce, distribute, perform, or display expressive works.¹⁹² Thus, the right of publicity protects very different rights than copyright.¹⁹³

IV. CONCLUSION

Adopting a post-mortem right of publicity in Arkansas would protect Arkansans from use of their name, image, or likeness for commercial purposes, without their consent. This adoption should expressly provide that the right of publicity survives the owner's death, wherein this right is descendible and inheritable as personal property. Furthermore, it should be available for private individuals as well as celebrities, public figures, and public officials. Exploitation or commercialization during a person's lifetime should not be a prerequisite before the right of publicity can descend to that per-

184. 17 U.S.C. § 102(a) (2006).

185. *Id.*

186. *Id.* at § 102(b).

187. *Id.* at § 302(a).

188. *Id.* at § 201(d).

189. *Id.* at § 106.

190. *E.g.*, *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 941 (8th Cir. 1992).

191. *Dryer v. Nat'l Football League*, 689 F. Supp. 2d 1113, 1121 (D. Minn. 2010) (quoting *C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007)).

192. 17 U.S.C. § 106 (2006).

193. *Dryer*, 689 F. Supp. at 1121.

son's heirs. This post-mortem right of publicity should be held to be a right that is distinct and independent from the tort invasion of privacy by appropriation. Arkansas has already adopted the four categories for the right of privacy. According to the courts within the Eighth Circuit, this supports a prediction that the Arkansas Supreme Court would also adopt a right of publicity. It is in Arkansas's best interest to protect its residents and the public by joining the jurisdictions that have codified and adopted a post-mortem right of publicity.