



Right of Publicity 2011

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United States

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Sources of law

1 Is the right of publicity recognised?

There is no federal right of publicity. Instead, the right of publicity is a matter of state law. The right is recognised by 31 states; the remaining 19 states (specifically, their courts and legislatures) have not yet considered the issue. Only two states' courts have considered and expressly rejected the right, but in both cases the states' legislatures subsequently enacted right of publicity statutes.

A chart listing those states that recognise the right of publicity appears at the end of this chapter.

As each state's laws have developed independently from one another, there are often significant differences in the various states' implementation of the right. The key states for the right of publicity are New York and California, as these states are the domiciles of most American celebrities, and consequently their laws receive the greatest attention and scrutiny. This chapter focuses on the laws of these two states, while pointing out important areas in which other states' laws differ.

2 What are the principal legal sources for the right of publicity?

The right of publicity is established through civil statutes enacted by the state legislatures or common law created by the courts. A few states have both: after their courts created a common law right, their legislatures enacted statutes in order to broaden or narrow the common law right. In those states that established the right by statute, the right has been subject to interpretation by the courts in the context of infringement litigation. The chart at the end of this chapter shows the principal legal source or sources for each state's right of publicity.

Three states (Arizona, Louisiana and Oklahoma) also have criminal right of publicity statutes, making it a misdemeanour to infringe the right of publicity of current or former members of the armed services.

3 How is the right enforced? Which courts have jurisdiction?

The right of publicity is generally enforced through civil lawsuits in state courts, or in United States federal courts if the parties meet the jurisdictional requirements of such courts (see question 27).

4 Is the right recognised per se, or by reference to other laws?

In those states that recognise the right of publicity, it is a unique proprietary right distinct from other personal and proprietary rights. However, a celebrity – who is in the business of commercially exploiting his or her name and likeness – may conceivably assert that his or her name or likeness also constitutes a trademark. The celebrity may even seek to register his or her name or a standard image of his or her likeness as trademarks in the United States Patent and Trademark Office. If a celebrity is genuinely using his or her name or likeness as a trademark for products or services, then the unauthorised use of such name or likeness may constitute both an infringement of the right of publicity and an infringement of such trademark.

Existence of right

5 Who has or is entitled to the right of publicity?

Of those states that recognise the right, the vast majority hold that only natural, human persons possess it (ie, non-human persons such as corporations and other institutions are excluded.) For example, New York's statute limits the right to 'any living person' and California's statute defines infringement as 'any person who uses another's [ie, another *person's*] name, voice, signature, photograph, or likeness' (emphasis added). A small minority of cases have expanded the right of publicity to include musical groups. Additionally, as noted in question 2, several states (ie, Arizona, Louisiana and Oklahoma) give members of the armed services additional protection through criminal penalties against the unauthorised use of their identities.

6 Do individuals need to commercialise their identity to have a protectable right of publicity?

Of those states that recognise the right, the vast majority do not require commercialisation as a prerequisite to a protectable right of publicity. This means that non-celebrities (ie, individuals who have never marketed their names, likenesses, etc, for profit) possess an enforceable right of publicity. Neither New York nor California require the commercialisation of identity for an individual to possess a protectable right of publicity; as the California Court of Appeals has observed, 'California's appropriation statute is not limited to celebrity plaintiffs.' In the case of the post-mortem right of publicity (see question 14), Utah requires the deceased individual's name or likeness to be 'of commercial value' at the time of death for protection to exist, and Tennessee requires continuous exploitation of the right for protection to be maintained (after an initial 10-year post-mortem period, during which exploitation is not required).

7 Can a foreign citizen have a protectable right of publicity?

American courts are divided on whether a foreign resident can take advantage of a state's right of publicity laws. No state statute expressly refuses to protect a foreign domiciliary, and a few statutes, such as those in Indiana and Washington, expressly apply to any individual regardless of domicile. This issue has arisen at least twice with respect to residents of the United Kingdom, which does not expressly recognise a right of publicity. In one case a federal appellate court, applying Massachusetts law, held that the British resident possessed an enforceable right of publicity through ordinary conflict of laws principles. The court held that even though the United Kingdom did not formally recognise the right, protection in this instance would be limited to the US and would therefore not interfere with British public policy goals. However, in another case, a Californian court held that Princess Diana, who died a domiciliary of Great Britain, did not pass along the right to her estate upon death. The court stated that, because the United Kingdom did not provide a post-mortem right, there was nothing for her to pass on, and hence her successors could not enforce the right against third parties in the US.

8 What is protected under the right of publicity?

There is a broad range of protection among the laws of the different states. However, every state that recognises the right of publicity protects at least an individual's name and either his or her 'likeness' or 'picture'. The New York statute protects 'name, portrait, picture, or voice'; the California statute protects 'name, voice, signature, photograph, or likeness'; and California common law protects any aspect or combination of aspects of an individual's persona that serves to identify him or her. The state with the broadest statutory coverage is Indiana, whose statute protects 'name; voice; signature; photograph; image; likeness; distinctive appearance; gestures; or mannerisms'.

9 Is registration required for protection of the right? If so, what is the procedure and what are the fees for registration?

No state requires a living individual to register his or her right of publicity in order to obtain or maintain protection for it. A few states (California, Oklahoma, Texas and Nevada) require registration in order for the owners of a post-mortem right (typically the decedent's heirs) to fully exercise and enforce it.

Registration usually involves filing a form with the state's secretary of state and paying a nominal filing fee (eg, \$10 in California.) Nevada's statute requires the successor-in-interest of a decedent's post-mortem right of publicity to register his or her ownership claim within six months of reasonably becoming aware of an unauthorised use of such right. California's and Oklahoma's statutes require the successor-in-interest to register his or her ownership claim in order to obtain monetary damages against an infringer, and such damages are not recoverable for any violation that occurs before registration (registration is not required, however, as a prerequisite to injunctive relief). Texas's statute only requires registration if the owner of the right elects to exercise it in the first year following the individual's death. Absent such registration, the executor of the estate can exercise the right – notwithstanding the decedent's intent to have passed the right on to another party – and the true owner must wait until a year after death.

Ownership of right**10** Can the right be transferred? In what circumstances?

The right of publicity is a form of property that is freely alienable and can be assigned in gross. It is recommended that all assignments be memorialised in writing. The right is fully divisible, meaning that an assignment can be limited to specific components of the right. For example, an individual could theoretically assign the publicity right in his or her name to one party, and the publicity right in his or her likeness to another party.

In a similar vein, an individual could theoretically assign his or her entire publicity right to one party for exploitation in one state, and to another party for exploitation in another state. However, assigning the right of publicity to different parties on a geographic basis may be inconsistent with commercial realities, in that many commercial uses of the right involve exploitation on a nationwide basis. Moreover, to the extent that an individual considers his or her name, likeness and so forth to constitute trademarks, such multiple assignments may violate the 'single source' rule of trademark law.

11 Can the right be licensed? In what circumstances?

As with assignments, ownership of the right may be freely licensed, either exclusively or non-exclusively, and under any circumstances or commercial conditions that the parties agree upon. It is recommended that all licences be memorialised in writing. Licensing different aspects of the right to different parties on a geographic basis raises the same issues as noted above with respect to assignments.

12 If the right is sold or licensed, who may sue for infringement?

Only the owner of the right, or an exclusive licensee, has standing to sue for infringement. The exclusive licensee only has standing to sue for an infringement of a right that is within the scope of its licence.

13 How long does protection of the right last?

Of those states that recognise the right of publicity, all provide that the right lasts at least throughout a person's lifetime. Many also recognise that the right exists after death (post-mortem rights). For a more detailed discussion on the post-mortem right of publicity, please see question 14.

14 Is the right protected after the individual's death? For how long? Must the right have been exercised while the individual was alive?

There is a split among the states on extending the right of publicity past death, although the clear trend is for recognition of a post-mortem right. The majority of states recognise a post-mortem right of publicity, although a few of those states have extra requirements. For example, Utah courts currently require the right to have been exercised during an individual's lifetime as a prerequisite to post-mortem protection. Tennessee's statute requires continuous exploitation of the post-mortem right for it to subsist beyond an initial 10-year term after an individual's death; two years of non-use results in a waiver of the right. This is akin to the 'abandonment' principle of trademark law. The length of time for post-mortem protection varies widely, from 20 years under Virginia's statute to 100 years under the statutes of Indiana and Oklahoma, while Nebraska's statute states that the right 'survive[s] the death of the subject' but does not specify for how long. Tennessee's statute provides that the right continues indefinitely, provided (as noted above) there is continual exploitation after an initial 10-year term. California's statute provides for 70 years of post-mortem protection. Several states (Connecticut, Georgia, Michigan, New Jersey and Utah) recognise the post-mortem right through common law (ie, case law) without specifying a duration. New York is one of the few states that expressly rejects a post-mortem right of publicity, although there is proposed legislation that would recognise a 70-year post-mortem term.

15 If post-mortem rights are recognised, who inherits the rights upon the individual's death? How is this determined?

Every state that recognises a post-mortem right allows the right to be transferred by contract, will or other testamentary instrument. For individuals who die intestate, each state has its own rules, although the majority of states apply their standard intestate succession rules, which vary but typically put the surviving spouse and children first in line. In California, the right of publicity statute establishes a specific order of succession. The surviving spouse or surviving issue (children or grandchildren) receives the entire right if either no spouse or no issue are alive, otherwise each receives one half of the right. Rights to the surviving issue are divided per stirpes, in accordance with California estate law (this means that the surviving grandchildren of a deceased child split equally the share that the deceased child would have received). If there is no surviving spouse or issue, the deceased's right of publicity ceases to exist. There has been recent case law focusing on whether the right of publicity exists for an individual who died prior to enactment of his or her state of domicile's post-mortem statute, and if so, to whom the right passes. In response, California recently amended its statute to make clear that the right applies to such decedents and falls under the 'residuary rights' clause of a decedent's will. According to the amended statute, 'a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights recognized under this section in accordance with the terms of that provision'.

16 Can the right be lost through the action or inaction of its owner?

The right cannot be lost while an individual is alive because no state currently requires that an individual's identity be commercialised. In other words, the right of publicity is not treated like a trademark, which, absent commercialisation, can be lost through abandonment. Previously, courts in Ohio and Utah held that commercialisation (or at least a proven intrinsic value in an individual's persona) was a prerequisite to protection, but both states have since enacted statutes without this requirement. As described above, Utah's courts require exploitation before death for a post-mortem right to exist. Additionally, in Tennessee an individual's post-mortem right is lost if the individual's successor fails to exploit the right for two consecutive years (after an initial 10-year term of 'free', guaranteed protection).

17 What steps can right owners take to ensure their right is fully protected?

While an individual is alive, his or her right does not need protection beyond vigilance with respect to infringers. There is more that an individual can do to maximise his or her post-mortem rights for the benefit of his or her heirs. For example, an individual can reside in a state with a favourable post-mortem right of publicity, such as California or Indiana, which are recognised by commentators as having some of the broadest and most robust protections; and expressly address the right in his or her will. Additionally, the successor-in-interest to a post-mortem right of publicity can maximise protection by immediately registering his or her claim to the right, if the decedent resided in a state that requires such registration (see question 9).

Infringement**18** What constitutes infringement of the right?

The right of publicity is infringed when an individual has a valid, enforceable right and one of the protected aspects of his or her persona is used, without the individual's permission, in a commercial context. Some states also require proof that the unauthorised use of the identity or persona is likely to cause damage to its value. Infringement can occur even where the infringer does not use the individual's actual persona. Courts have found the use of 'sound-alikes' and 'look-alikes' in advertisements to be infringing where the fake persona identifies the individual. For example, in 1988, a federal court held that singer/actress Bette Midler's common law right of publicity was infringed when a car commercial used a sound-alike to mimic her singing voice on the soundtrack. In 1992, this same federal court held that television personality Vanna White's common law right of publicity was infringed when an electronics company's advertisement used the image of a robot bearing White's distinctive attributes. (This decision was subsequently criticised by commentators as an overly expansive interpretation of the right of publicity's scope).

19 Is an intent to violate the right necessary for a finding of infringement?

No. However, knowledge by the infringer that his or her actions will identify the individual is often required for an award of punitive or exemplary damages.

20 Does secondary liability exist for the right? What actions incur such liability?

Only California case law has expressly recognised secondary liability for a violation of the right of publicity. No other state court has accepted or rejected it, and no state statute expressly recognises it. In California, a court relied upon the Restatement (Second) of Torts to find a company secondarily liable for giving 'substantial assistance' to a direct violator of the right of publicity. In this case, the defendant: controlled user accounts for a network of websites owned and run by third parties; maintained a code of conduct for the sites; and split user fees with the website owners. Some of the third-party sites used pictures of individuals who had assigned their rights of publicity to

the plaintiff, and the plaintiff sued the defendant for secondary right of publicity liability.

Analogising to secondary liability under trademark and copyright law (ie, the defendant directly benefited financially from the infringement, and had the ability to control the content of the websites), the court preliminarily held that the plaintiff was likely to prevail. Passive distributors are protected by some state statutes and courts, such as in California, where by statute 'the owners or employees of any medium used for advertising' are not liable if an advertisement violates an individual's right of publicity, unless they had 'knowledge of the unauthorized use' of the persona.

21 What defences exist to an infringement claim?

There are several common defences for infringement of the right of publicity:

- exempted behaviour: most states with right of publicity statutes provide exemptions from liability for certain activities. For example, California's statute has express exceptions for the unauthorised use of an individual's name, likeness and so forth in connection with news, public affairs, sports broadcasts or accounts and political campaigns. New York's statute does not contain express exceptions, but the statute only prohibits unauthorised uses for 'advertising purposes or for the purposes of trade', and therefore all other uses are exempted. 'Purposes of trade' can be a grey area; for example, it is generally accepted that the use of an individual's name or likeness in a newspaper article is exempt, even though the newspaper publisher seeks to sell copies of the paper at a profit;
- First Amendment: the First Amendment of the US Constitution provides broad protections for speech and expression. While courts have held that expression that merely appropriates an individual's economic value is not protected under the First Amendment, creative expression that contains significant, independent transformative elements is protected and trumps the right of publicity.

To illustrate, in 2001 a California court held that a T-shirt design that was simply a hand-drawn image of the movie comedy team the Three Stooges was 'little more than the appropriation of the celebrit[ies]' economic value', and therefore a violation of those deceased celebrities' rights of publicity. By contrast, in 2003 the same California court held that a comic book's use of mutant characters who displayed several distinctive attributes of two blues musicians (brothers Johnny and Edgar Winter) was protected by the First Amendment because the comic books were expressive, transformative works. Pursuant to First Amendment principles, the California post-mortem statute expressly exempts the use of a deceased personality's name, likeness and so forth in such First Amendment-protected works as plays, books, musical compositions, motion pictures and television programmes. To illustrate, under this exemption a movie studio could produce a new, fictional motion picture featuring such well-known deceased actors as James Dean, Marilyn Monroe or Humphrey Bogart (appearing through the use of look-alike performers or digital technology) and their estates would be powerless to stop it (at least with respect to exploitation of the motion picture in California). By contrast, California's statute for living persons does not contain this exemption, indicating that the California legislature intended broader freedom for the unauthorised use of a deceased person's publicity right than a living person's. However, as reflected in the *Winter* decision – involving two living musicians – First Amendment principles remain available as a defence in cases involving living persons. (Query, however, whether the result in the *Winter* case would have differed had the comic book publisher used the Winter brothers themselves as characters, rather than fictional mutants who simply displayed some of their attributes);

- federal copyright pre-emption: due to the US Constitution's Supremacy Clause, state laws that conflict with federal laws are pre-empted. In the right of publicity context, many defendants have claimed that various states' right of publicity laws were pre-empted by federal intellectual property legislation, most notably the Copyright Act. While there is conflicting authority on this issue, courts have generally not been sympathetic to this defence, either because the right of publicity is seen as containing an 'extra element' missing from copyright law (exploitation of an identifiable persona for advertising or trade purposes) or as not covering the same subject matter as copyright law (a person's likeness versus a work of authorship). Therefore, while copyright ownership of a motion picture or sound recording allows the owner to exploit an artist's performance in such film or sound recording, it does not give the owner the right to exploit the artist's image or voice in advertising or trade;
- delay: right of publicity infringement claims are subject to the same standard defences as generally apply in American civil litigation, such as expiration of the statute of limitations or estoppel by laches, waiver or acquiescence. The length of the statute of limitations varies from state to state; in California it is two years, and in New York it is one year.

Remedies

- 22** What remedies are available to an owner of the right of publicity against an infringer? Are monetary damages available?

The plaintiff in a right of publicity case may seek compensatory damages, punitive or exemplary damages and injunctive relief (both preliminary and permanent). Some states (Indiana, Ohio, Tennessee and Washington) also allow the plaintiff to seek the destruction of infringing materials. Many, though not all, state courts have imposed injunctions that are nationwide in scope, even covering those jurisdictions that do not expressly recognise the right of publicity.

- 23** Is there a time limit for seeking remedies?

Yes, a claim for infringement of the right of publicity must be brought in a court within the applicable statute of limitations period. The defence of estoppel by laches (ie, delay that prejudices the defendant) may also apply. See question 21.

- 24** Are attorneys' fees and costs available? In what circumstances?

Some states allow attorneys' fees to be recovered, but it varies by state. In California, the statute specifies 'The prevailing party or parties in any action under this section shall also be entitled to attorneys' fees and costs.' New York state law generally does not allow courts to award attorneys' fees. Thus, absent express recognition by statute, the general 'American Rule' applies (ie, each party (including the prevailing party) must pay its own attorneys' fees).

- 25** Are punitive damages available? If so, under what conditions?

Yes, most states allow for punitive damages in egregious cases such as when the defendant's actions were done with knowledge that such actions were infringing or in reckless disregard of the individual's publicity rights. The egregiousness may be found through, for example, fraud, premeditation, 'conscious disregard' of the owner's rights or failure to check whether the plaintiff had expressly authorised any use of his or her image. It may also include continuation of the infringing actions after receiving a cease-and-desist letter from the owner of the publicity right. In New York, punitive damages are available when the defendant 'knowingly used' the plaintiff's identity. California's statute merely states that courts 'may' award punitive damages; according to the California Civil Code, such an award requires a finding of 'oppression, fraud or malice'.

- 26** What significant judgments have recently been awarded for infringement of the right?

When determining compensatory damages awards, courts often try to determine the fair market value of the identity or persona that was appropriated. Sample judgments include the following:

- in 1986, the Beatles were awarded \$5.6 million in damages from a company that had produced three years of near-constant live stage shows imitating the Beatles' likenesses and sound. The court applied a 12.5 per cent royalty rate to the show's gross income to arrive at the damages amount;
- as noted in question 18, in 1988 singer/actress Bette Midler was awarded \$400,000 in damages after an automobile company used a singer who imitated her voice in a television commercial;
- in 1992, singer Tom Waits was awarded \$375,000 in compensatory damages and \$2 million in punitive damages after a radio commercial for potato chips featured a singer who imitated his voice;
- in 1998, a court awarded \$40,000 in compensatory and exemplary damages to Dr K J Yesudas, a famous singer from India, for the distribution of pirated and low-quality audio tapes that displayed his name and picture on the tape packaging; and
- in 2006, a professional model was awarded \$25,000 in damages after her photos were used in advertising despite the photographer having signed an agreement that expressly forbade their use for commercial purposes.

Litigation

- 27** In what forum are right of publicity infringement proceedings held?

Right of publicity infringement proceedings are held in American civil courts. The plaintiff chooses the state in whose court the lawsuit is brought. The case will remain there unless it is dismissed or transferred for a procedural reason (eg, lack of personal jurisdiction over the defendant).

Which state's substantive law will apply to an infringement litigation is a complex question with no settled answer. The court will apply the law of its own state, the law of the state where the alleged infringement occurred (if infringement occurred outside of the forum state) or the law of the publicity rights owner's domicile (if different from the forum state and the 'infringement state'). Which state law it chooses depends on the forum state's conflict of laws rules and a determination of which state has the most significant relationship to the lawsuit. There is some consensus among the states with respect to cases involving the post-mortem right of publicity – most courts apply the law of the state in which the individual resided at the time of death.

Because right of publicity claims are state law claims, they are typically brought in state courts. However, such claims may instead be brought in federal court if certain jurisdictional requirements are met, such as the presence of other (ie, federal) claims in the action or, alternatively, if 'diversity jurisdiction' is met (this requires the parties to be citizens of different states or non-US citizens, and the controversy to involve more than \$75,000). In infringement lawsuits involving celebrities' rights of publicity, it is common for the celebrity (or, if such celebrity is deceased, his or her estate or heirs) to also assert that the unauthorised use constitutes unfair competition, false advertising, trademark infringement or a combination thereof. Because federal courts have jurisdiction over these latter claims, such additional allegations give the federal court jurisdiction over the entire case, including the right of publicity claim. Plaintiffs generally tend to prefer litigating in the federal courts if jurisdiction is available.

28 Are disputed issues decided by a judge or a jury?

A case is decided by a judge unless either party elects to have it decided by a jury. If such an election is made, the jury will decide all questions of fact, while questions of law shall still be decided by the judge. Individuals (as opposed to corporations) typically elect to have their cases heard by a jury, especially when the adverse party is a large corporation, because parties tend to view juries as being more sympathetic to individuals.

29 To what extent are courts willing to consider, or bound by, the opinions of other national or foreign courts that have handed down decisions in similar cases?

A court follows its own prior decisions under the doctrine of 'precedent'. A court is only bound by the rulings of a higher court in whose jurisdiction it sits. The final arbiter of state laws (such as right of publicity laws) is the state's highest court, not the US Supreme Court, which is a federal court. If the parties are litigating a right of publicity infringement case in federal court due to the existence of federal jurisdiction (see question 27), the federal court will look to state court decisions for guidance in interpreting a state right of publicity statute. If there is no state court decision on point, it can ask the state's highest court for assistance in addressing the question. This procedure is called 'certifying' the question to the state's highest court. Both state and federal courts will look to court decisions of other jurisdictions for guidance if there is no relevant decision in their own jurisdiction on the question at issue. However, the courts are not bound by these out-of-jurisdiction decisions. Recently, a few American courts have looked to the court decisions of other countries for guidance, although this practice is controversial.

30 Is preliminary relief available? If so, what preliminary measures are available and under what conditions?

Yes, a court may grant a preliminary injunction. While the standards for preliminary injunctions may vary from state to state, generally a court will grant relief based upon an evaluation of such factors as:

- whether the plaintiff will suffer irreparable injury if the injunctive relief is not granted;
- the plaintiff's likelihood of success on the merits;
- whether the plaintiff could be compensated through other remedies, such as monetary damages;
- a balance of the hardships between the parties if the preliminary injunction is granted versus if it is denied; and
- how the preliminary injunction will affect the public interest.

If the plaintiff obtains a preliminary injunction, he or she will likely be required to post a bond that may be forfeited to the defendant if the court later finds (following trial) that the preliminary injunction was wrongly granted.

31 What avenues of appeal are available in main proceedings or preliminary injunction proceedings? Under what conditions?

The losing party may appeal a trial court's decision, either after the final judgment or after a preliminary injunction ruling, through the standard appeal procedures of the court system in which the case was heard. In the various states, this typically consists of one intermediate appellate court and a final court of highest jurisdiction. The federal system follows this same structure and the court of highest jurisdiction is the US Supreme Court. Generally, the court of highest jurisdiction is not obligated to consider an appeal (ie, it has the discretion to decline to hear the case). Generally, appellate courts at any level will only overturn a trial court's factual findings when such findings were 'clearly erroneous', while findings of law are reviewed on a de novo basis.

32 What is the average cost and time frame for a first-instance decision, for a preliminary injunction, and for appeal proceedings?

It varies greatly, but a right of publicity proceeding can cost at least several hundred thousand dollars and take more than a year, if pursued through trial. A substantial portion of the total is likely to consist of discovery costs, given the expansive discovery permitted under the American court system. A preliminary injunction proceeding might cost \$100,000, especially if the court allows expedited discovery and hears live witness testimony, which in effect converts the proceeding into a 'mini-trial'. A preliminary injunction hearing can take place within a few weeks or a few months after the case is filed and typically lasts a few days. An appeal proceeding might cost \$50,000 to \$100,000, and might take up to a year following the trial court's decision.

These estimates are very rough approximations because the actual costs and time frames are highly contingent on the facts and issues involved in the case and on the courts' schedules.

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Update and trends

The right of publicity is a developing area of law that is completely undeveloped in many states and undergoing changes in others. Currently, the trend is towards universal recognition of the right, including:

- a post-mortem right;
- no requirement of previous commercialisation or use; and
- defining the protected elements of persona broadly.

There is currently a bill pending in the New York State Senate (8373A) that would amend New York's statute to include a post-mortem right of publicity for a term of 70 years after death, provided that the decedent's persona was of commercial value at the time of death.

Numerous commentators have recommended that the differences in the various states' laws be resolved through enactment of a uniform, federal right of publicity statute. To this end, in the late 1990s a committee of the International Trademark Association (INTA) drafted a proposed federal right of publicity statute. However, this draft was never endorsed by the INTA leadership. There is currently no active movement to develop a federal right of publicity statute.

Chart of states that recognise the right of publicity†

State	Principal legal source	Post mortem protection
Alabama	Common law	
Arizona	Common law	
California	Common law; additional state statute	70 years after death
Connecticut	Common law	Yes, but of uncertain duration
Florida	Common law; additional state statute	40 years after death
Georgia	Common law	Yes, but of uncertain duration
Hawaii	Common law	
Illinois	Common law; additional state statute	50 years after death
Indiana	State statute	100 years after death
Kentucky	Common law; additional state statute	50 years after death
Louisiana	No civil law, but criminal statute prohibits violation of a soldier's right of publicity	Uncertain duration
Massachusetts	State statute	
Michigan	Common law	Yes, but of uncertain duration
Minnesota	Common law	
Missouri	Common law	
Nebraska	State statute (common law rejected)	Yes, but of uncertain duration
Nevada	State statute	50 years after death
New Hampshire	Common law	
New Jersey	Common law	Yes, but of uncertain duration
New York	State statute (common law rejected)	None
Ohio	Common law; additional state statute	60 years after death
Oklahoma	State statute	100 years after death
Pennsylvania	Common law; additional state statute	30 years after death
Rhode Island	State statute	
Tennessee	State statute	10 years as a right; indefinite with continual exploitation
Texas	Common law; additional state statute	50 years after death
Utah	Common law; additional state statute	Yes, but of uncertain duration
Virginia	State statute	20 years after death
Washington	State statute	10 years if identity has no 'commercial value'; 75 years if it does
West Virginia	Common law	
Wisconsin	Common law; additional state statute	None
The following states have yet to consider the right of publicity: Alaska; Arkansas; Colorado; Delaware; Idaho; Iowa; Kansas; Maine; Maryland; Mississippi; Montana; New Mexico; North Carolina; North Dakota; Oregon; South Carolina; South Dakota; Vermont; Wyoming.		

† Gaps in the chart indicate where neither state laws nor court opinions have addressed the issue.

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