
PROPERTY LAW — RIGHT OF PUBLICITY — NINTH CIRCUIT UPHOLDS WASHINGTON STATUTE RECOGNIZING POSTMORTEM RIGHTS OF INDIVIDUALS DOMICILED OUT OF STATE. — *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829 (9th Cir. 2014).

States have struggled to adequately define and protect an individual's right to control the commercial use of his identity for the entirety of the right's existence.¹ In 2008, Washington became one of the latest states to engage with the right of publicity when it extended the reach of its Personality Rights Act (WPRA),² which was recently featured at the center of litigation concerning the right to iconic guitarist Jimi Hendrix's image and personality. The Ninth Circuit's holding in *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*³ announced the end of this protracted dispute: by finding that Washington's statute could constitutionally be applied to the controversy even though Jimi Hendrix was domiciled in New York at the time of his death, the court granted property rights to Hendrix's heirs that, under New York law, remain part of the public domain. While on its face the opinion seems to be a victory for the protection of personality rights, the WPRA's imposition of Washington law on property that would otherwise be governed by New York law disrupts the traditional and previously stable rules relating to the right of publicity. The fact that the amended statute dictates and demands such a result reveals how the statute threatens to usher in a system in which one's right to intangible property is nebulous and subject to possible forfeiture.

The Ninth Circuit's ruling marks the culmination of a decade-long bout of litigation related to Jimi Hendrix's right of publicity. After the musician died intestate in New York in 1970, his estate passed to his father, James Allen ("Al") Hendrix,⁴ who assigned his rights to Experience Hendrix, L.L.C. and Authentic Hendrix, LLC (collectively, Experience).⁵ Experience purported to be "the sole authorized licensors of Jimi Hendrix performances, songs and publicity rights."⁶ Yet when Experience challenged Jimi Hendrix's brother Leon's use of the rock

¹ See William K. Smith, Comment, *Saving Face: Adopting a Right of Publicity to Protect North Carolinians in an Increasingly Digital World*, 92 N.C. L. REV. 2065, 2069–70 (2014); see also *id.* at 2108–16 (compiling states' right of publicity laws).

² See 2008 Wash. Sess. Laws. 328 (codified at WASH. REV. CODE § 63.60 (2014)).

³ 762 F.3d 829 (9th Cir. 2014).

⁴ *Experience Hendrix, L.L.C. v. James Marshall Hendrix Found.*, No. Co3-3462Z, 2005 WL 2922179, at *1 (W.D. Wash. Nov. 4, 2005).

⁵ *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd*, 766 F. Supp. 2d 1122, 1127 (W.D. Wash. 2011).

⁶ *Experience Hendrix, L.L.C.*, 2005 WL 2922179, at *1 (internal quotation marks omitted).

legend's name, signature, and image in 2005,⁷ both the Western District of Washington and the Ninth Circuit found that Experience did not possess the exclusive right to Jimi Hendrix's personality.⁸ Though Washington law recognized the right, New York — Hendrix's domicile at death — did not.⁹ Both courts resolved this conflict by following the default and near-universal practice of applying the law of an individual's domicile at death to the issue of the survivability of his right of publicity, thus concluding that the right did not survive Hendrix's passing.¹⁰

Within a year of and in direct response to these rulings,¹¹ the Washington legislature revised the WPR.A.¹² The amended statute crucially announced that Washington would retroactively recognize a postmortem right of publicity for all individuals "regardless of whether the law of the domicile . . . of the individual or personality at the time of death . . . recognizes a similar or identical property right."¹³ Experience then filed a new lawsuit against Hendrixlicensing.com¹⁴ to "protect and preserve the legacy of our beloved Jimi,"¹⁵ specifically by enforcing its trademarks under the Lanham Act and the Washington Consumer Protection Act.¹⁶ Hendrixlicensing.com counterclaimed, seeking a declaratory judgment that Experience did not own Hendrix's right of publicity under the WPR.A.¹⁷

Once again tasked with adjudicating the question of Jimi Hendrix's postmortem personality rights, the Western District of Washington held that Experience could not rely on Hendrix's right of publicity to constrain parties "from trading in images or likenesses of Jimi Hendrix."¹⁸ The opinion conceded that the amended WPR.A.

⁷ See *id.* at *1–2.

⁸ See *Experience Hendrix LLC v. James Marshall Hendrix Found.*, 240 F. App'x 739, 740 (9th Cir. 2007).

⁹ *Id.*

¹⁰ See *id.*; *Experience Hendrix*, 766 F. Supp. 2d at 1138.

¹¹ See H.B. REP. 2727, 60th Leg., 2008 Reg. Sess., at 3 (Wash. 2008) ("Jimi Hendrix's personality rights have not been protected.")

¹² See WASH. REV. CODE § 63.60 (2014).

¹³ *Id.* § 63.60.010; see also *id.* § 63.60.030(1)(a) (recognizing the right as descendible).

¹⁴ Notably, Jimi's adopted sister Janie Hendrix controls Experience, while Hendrixlicensing.com is co-owned by Leon Hendrix. See Steve Green, *Las Vegas Jimi Hendrix Merchandiser Wins Round in Lawsuit*, LAS VEGAS SUN (Feb. 9, 2011, 2:31 PM), <http://www.lasvegassun.com/news/2011/feb/09/las-vegas-jimi-hendrix-merchandiser-wins-round-law> [<http://perma.cc/J3VP-FHJ9>].

¹⁵ Mike Seely, *Experience Hendrix Headed Back to Court*, SEATTLE WEEKLY (Mar. 5, 2009, 12:00 AM), <http://www.seattleweekly.com/home/922529-129/story.html> [<http://perma.cc/6SL3-J589>].

¹⁶ *Experience Hendrix*, 762 F.3d at 833.

¹⁷ *Id.* at 834.

¹⁸ *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122, 1143 (W.D. Wash. 2011).

“contain[ed] a clear directive to apply the law of Washington,”¹⁹ which would in turn “deem all rights to the use of Jimi Hendrix’s [personality] . . . as having descended via intestate succession to Al Hendrix” and, consequently, to Experience.²⁰ However, after underlining that Jimi Hendrix was essentially a stranger to Washington and that the WPRAs choice-of-law directive was therefore “arbitrary and unfair,”²¹ the court struck down the statute’s choice-of-law provisions as unconstitutional.²² Having rendered the choice-of-law amendments to the WPRAs inoperable, the court concluded that New York law applied and that Experience thus had no claim to Hendrix’s personality rights.²³

The Ninth Circuit reversed and remanded on the issue of the WPRAs constitutionality.²⁴ Writing for the panel, Judge Ebel²⁵ began by noting that neither the district court nor the parties disputed that the amended WPRAs recognized Experience as the owner of Jimi Hendrix’s postmortem right of publicity.²⁶ The key question, therefore, was whether the WPRAs could constitutionally be applied to the controversy. While reasoning that the WPRAs raised “difficult questions regarding whether another state must recognize [Washington’s] broad personality rights,”²⁷ Judge Ebel asserted that “[u]nder the narrow, non-speculative circumstances presented by this case” — specifically the defendant’s attempts to license Hendrix-related products for sale in Washington — the statute could constitutionally be applied.²⁸

Judge Ebel first addressed the argument that implementing the amended WPRAs demanded the application of the law of a state with insufficient contact with Jimi Hendrix in violation of the Due Process and Full Faith and Credit Clauses of the Constitution.²⁹ Repeating that only the “actual, non-speculative controversy at issue” was relevant,³⁰ Judge Ebel found that Washington had “sufficiently significant contacts” with the potential in-state sales of Hendrix-related goods li-

¹⁹ *Id.* at 1132–33.

²⁰ *Id.* at 1132.

²¹ *Id.* at 1140.

²² *See id.* at 1138–43 (finding that the WPRAs’s choice-of-law provisions violated the Due Process and Full Faith and Credit Clauses, and, alternatively, the dormant commerce clause).

²³ *Id.* at 1143.

²⁴ *Experience Hendrix*, 762 F.3d at 848–49.

²⁵ Judge Ebel was sitting by designation from the Court of Appeals for the Tenth Circuit. Judge Ebel was joined by Judge Fletcher. Judge Rawlinson concurred with respect to the WPRAs’s constitutionality but dissented on another question. *See id.* at 849.

²⁶ *Id.* at 835–36.

²⁷ *Id.* at 836.

²⁸ *Id.*

²⁹ *See Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122, 1138 (W.D. Wash. 2011).

³⁰ *Experience Hendrix*, 762 F.3d at 836.

censed by the defendant.³¹ Because applying the law would thus be “neither arbitrary nor fundamentally unfair,” it was constitutional.³²

Judge Ebel ended his discussion of the WPRa by determining that the statute as applied did not violate the dormant commerce clause.³³ Once again, the court’s logic was buttressed by its narrow view of the issue: because the “limited . . . controversy at issue [did] not affect transactions occurring wholly outside Washington,”³⁴ he maintained that the WPRa would not “impermissibly burden interstate commerce.”³⁵ Judge Ebel thus determined that “the WPRa can be applied constitutionally” to Experience’s attempts to enforce its intra-Washington claim to Jimi Hendrix’s right of publicity and instructed the district court to enter summary judgment in favor of Experience.³⁶

The WPRa, as emphasized by the *Experience Hendrix* controversy, deviates sharply from traditional assumptions about the right of publicity specifically and property rights generally. Both the history of and contemporary justifications for personality rights stress that protecting individual control is intrinsic to the right and should be a guiding principle when courts and legislatures engage with the right. Yet by resolving central questions concerning the disposition of Jimi Hendrix’s personality rights with a law that Hendrix could not have anticipated would apply, the WPRa disrupted the predictability of law upon which individuals rely to plan into the future and control their personalities. The WPRa’s ultimately ineludible choice-of-law directive thus exposes how the statute could support a property regime of protean and insecure rights.

The right of publicity developed as an offshoot of the right of privacy,³⁷ and has historically remained intimately connected with an individual’s right to control the use of his image. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,³⁸ the first case to officially recognize an independent “right in the publicity value of [an individual’s] photograph,”³⁹ justified the right with reference to the harm that

³¹ *Id.*

³² *Id.* (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (opinion of Brennan, J.) (providing the minimum requirements under the Due Process and Full Faith and Credit Clauses needed to apply a state’s law in a specific case)) (internal quotation mark omitted).

³³ *See id.* at 837.

³⁴ *Id.*

³⁵ *Id.* (citing *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 434–38 (2005)).

³⁶ *Id.* The Ninth Circuit also denied the defendant’s petition for rehearing and petition for rehearing en banc. *See id.* at 832.

³⁷ I J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1.7 (2d ed. 2009). Today the right is recognized as a form of property. *Id.* § 10.7.

³⁸ 202 F.2d 866 (2d Cir. 1953).

³⁹ *Id.* at 868; *see* MCCARTHY, *supra* note 37, § 1.26.

nonrecognition might have on a personality.⁴⁰ The centrality of individual control to the property right remained consistent as right-of-publicity law developed over the succeeding decades,⁴¹ and, in its sole case on the topic,⁴² the Supreme Court explicitly identified the State's interest in the right as defined by the individual's interests.⁴³ This line of reasoning continued as courts began to recognize the right of publicity beyond the personality's death. For example, in an early case on the subject, the Eleventh Circuit upheld the postmortem right as a means of preventing unauthorized use of the deceased's personality,⁴⁴ thus maximizing an individual's control of his image. Today, this tradition lives on among scholars who defend the right of publicity with reference to an individual's natural or moral rights.⁴⁵

While other contemporary justifications for the right of publicity implicate alternative concerns, they all further the rightsholder's — and, by extension, the relevant personality's⁴⁶ — ability to control the personality's image. Apart from the moral rights position, policy arguments in support of the right of publicity can generally be broken up into two distinct categories: those based on creating incentives and those based on efficiently allocating rights.⁴⁷ Given that the incentive rationale justifies an individual's exclusive control over the right as a means of encouraging members of society to engage in culturally beneficial public activities,⁴⁸ its reasoning naturally advances the notion of individual control. And while efficient-allocation arguments — such as Professor Mark Grady's claim that a right of publicity is needed to “ensure that publicity assets are not wasted by a scramble to use them

⁴⁰ See *Haelan*, 202 F.2d at 868 (citing the fact that “prominent persons . . . would feel sorely deprived” if they did not receive compensation for the use of their likenesses).

⁴¹ See, e.g., *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (recognizing a celebrity's identity as “the fruit of his labors and . . . a type of property”); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Ct. App. 1983) (acknowledging a party's interest in “controlling the commercial exploitation of his personality,” which takes “considerable money, time and energy . . . to develop”).

⁴² See MCCARTHY, *supra* note 37, § 1.33.

⁴³ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (“[T]he State's interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual . . .”).

⁴⁴ See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 694 F.2d 674, 682 (11th Cir. 1983); see also *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 97–99 (Tenn. Ct. App. 1987) (listing justifications linked to an individual's interest in controlling her personality).

⁴⁵ Specifically, this argument maintains that, because an individual's identity is inherently “his own,” he should have the right to control its use. MCCARTHY, *supra* note 37, § 2.2 (quoting *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 79 (Ga. 1905)); see also *id.* § 2.1.

⁴⁶ Even when an individual assigns or sells his right of publicity, he generally maintains at least some legal or equitable interest in the use of the right. *Id.* § 10.14.

⁴⁷ See Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1180–90 (2006).

⁴⁸ See MCCARTHY, *supra* note 37, § 2.6.

up”⁴⁹ — revolve largely around promoting the public interest, the endeavor to guard against the exhaustion of the right’s value also benefits the relevant personality who holds the value-protected right, thereby furthering individual control. A more recent rationale that cites the protection of consumers from unauthorized branding of products⁵⁰ is no different, as the rightsholder maintains the power to dictate whether specific branding is authorized or not. Given that supporters of postmortem rights simply extend and expand the above arguments to defend posthumous protection of the right,⁵¹ furthering an individual’s ability to control his image ultimately underlies all major rationales for the right of publicity.

However, by eroding the background rules that govern personality rights, the WPRA undercuts this bedrock value. One’s ability to predict which state’s laws will apply in the future is a fundamental prerequisite for determining how to act in the present to control one’s image. For instance, Jimi Hendrix might hypothetically have selected New York as his domicile specifically to guarantee that New York law would apply to his personality rights after death; because that law does not recognize a postmortem right of publicity,⁵² his personality rights would have become public property.⁵³ Indeed, implicit in a property owner’s rights is the “unrestricted right of disposition,”⁵⁴ which, for intangible property, includes the right to abandon,⁵⁵ or to make the property public.⁵⁶ An artist might desire this outcome to relieve relatives of the burden of diligently tracking infringements,⁵⁷ to save these relatives from potential fiduciary liability,⁵⁸ or simply because he values contributing to the public domain. Alternatively, an individual domiciled in a state that recognizes a postmortem right of publicity extending for only a limited number of years might bequeath

⁴⁹ Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 98 (1994).

⁵⁰ See Dogan & Lemley, *supra* note 47, at 1164.

⁵¹ See MCCARTHY, *supra* note 37, § 9.9.

⁵² See N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009) (providing a right of publicity only to living persons).

⁵³ While such a scenario may seem farfetched, celebrities are becoming increasingly aware of how a state’s laws might affect their personality and, by extension, their legacy. See, e.g., Aisha Harris, *Can a Person’s Identity Enter the Public Domain?*, SLATE: BROWBEAT (Aug. 22, 2012, 9:02 AM), http://www.slate.com/blogs/browbeat/2012/08/22/bill_cosby_law_extends_publicity_rights_digicon_and_marilyn_monroe_s_estate_fight_over_her_digital_image_.html [<http://perma.cc/B4ZF-AQS9>].

⁵⁴ David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 577 (2014) (quoting *State ex rel. Elvis Presley Int’l Mem’l Found. v. Crowell*, 733 S.W.2d 89, 96 (Tenn. Ct. App. 1987)).

⁵⁵ See Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 390–92 (2010).

⁵⁶ Under Washington law, personality rights do not become public property until seventy-five years after the personality’s death. WASH. REV. CODE § 63.60.040(2) (2014).

⁵⁷ See Horton, *supra* note 54, at 595.

⁵⁸ *Id.*

the right to certain trusted descendants without any instruction, knowing that the right would likely not pass beyond those descendants.⁵⁹ Yet if that individual knew that an outside jurisdiction might superimpose laws recognizing a much longer duration of the right,⁶⁰ he might act differently, either by selecting different inheritors or providing instructions on how to use the right. By applying nationwide and retroactively, the WPRA introduces instability into the previously predictable question of what law will govern one's right of publicity. This instability directly undermines an individual's critical ability to exercise control over his identity — the very ability personality rights were created to provide.⁶¹

The uncertainty caused by the WPRA is more than a simple affront to an individual's ability to control his identity: the WPRA's deviation from stable background rules has the potential to legitimize competing claims to intangible property in a way that inherently defies traditional notions of property. Analogizing to the longstanding *situs* rule in physical property illustrates this point. The *situs* rule is a conflict-of-laws doctrine that provides that disputes involving tangible property are to be resolved under the law of the place where the property is located.⁶² Though it has faced much criticism,⁶³ the *situs* rule is followed nearly universally.⁶⁴ This widespread adherence is no accident: apart from creating a stable and predictable regime that protects an individual's knowledge and control of his rights,⁶⁵ the rule provides a consistent way to mediate competing claims to physical property. Indeed, if different jurisdictions did not all agree to apply the law of the state in which the property is located in disputes concerning the property, the

⁵⁹ For instance, Virginia recognizes a postmortem right of publicity with a duration of only twenty years. VA. CODE ANN. § 8.01-40.B. (2007).

⁶⁰ Indiana, which also applies its right of publicity law regardless of an individual's domicile, IND. CODE § 32-36-1-1(a) (2014), recognizes the right for 100 years after the personality's death, *id.* § 32-36-1-8. Other states have laws that imply the right might never become public property. *See, e.g.*, NEB. REV. STAT. § 20-208 (2012); TENN. CODE ANN. § 47-25-1104 (2013).

⁶¹ Of course, had Jimi Hendrix wished to make his personality rights public after death, he could have so specified in his will, thus defeating the WPRA's demands. However, this assumes that Hendrix would have known which out-of-state laws could trump the law of his domicile. Notably, the WPRA did not exist at the time of Hendrix's death, yet applies retroactively to all personalities. *See* WASH. REV. CODE § 63.60.010 (2014). Therefore, to preserve his control over his personality, Hendrix would have had to anticipate how a then-nonexistent law might undermine his wishes for his property and respond appropriately. The burden that the WPRA and similar laws place on rightsholders is thus exceedingly great.

⁶² James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 118–19 (2014).

⁶³ *See, e.g.*, Russell J. Weintraub, "At Least, To Do No Harm": Does the Second Restatement of Conflicts Meet the Hippocratic Standard?, 56 MD. L. REV. 1284, 1307–09 (1997).

⁶⁴ *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 8.1 (5th ed. 2006) (noting that the rule commands "almost mystical" acceptance).

⁶⁵ *See* Stern, *supra* note 62, at 141 ("Uniformity is . . . needed because without it, [communication obstacles and information costs] would be aggravated.").

extent of one's property rights and even the identity of the property owner might change across state lines. Because ownership of real property has historically included the right to exclude the rest of the world,⁶⁶ the consistency provided by the universal adherence to the situs rule serves to safeguard traditional understandings and expectations regarding property by ensuring that a single legal rule determines ownership of all pieces of property.⁶⁷

This same consistency is needed for the right of publicity and other intangible property rights. Even though owners of intangible property cannot identify a true situs, they have a similar interest in avoiding a situation in which different states apply different conflict-of-laws rules, resulting in competing and contradictory claims to their property.⁶⁸ Yet in the realm of personality rights, the amended WPRA's choice-of-law directive ignores the near-universal rule that the law of a personality's domicile governs;⁶⁹ should an individual lawfully use the likeness of a personality from a state that does not recognize a postmortem right of publicity to create a product that is later diverted into Washington, that individual forfeits his all but universally recognized right to the likeness.⁷⁰ Thus, the WPRA's departure from the right of publicity's traditional domicile rule not only undermines the individual's ability to control his personality rights, but also undercuts the stability of those very rights. Other legislatures and jurisdictions should be circumspect about passing or validating legislation that demands the types of conclusions reached in *Experience Hendrix*, and should instead endeavor to honor longstanding choice-of-law practices in disputes concerning intangible property.

⁶⁶ See RESTATEMENT (FIRST) OF PROP. § 1 cmt. a illus. 1 (1936) (“A is the owner of Blackacre. B is any other person. A normally has a right that B shall not walk across Blackacre.”); Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360 (2001) (“Property rights historically have been regarded as in rem.”).

⁶⁷ See Stern, *supra* note 62, at 145 (“Property’s ambitions to offer a complete and reliable account of legal rights in a resource are thwarted by a conflict-of-laws regime that imagines two sovereigns with concurrent jurisdiction over the same property dispute, capable of propounding different rules and making different determinations of property rights holding.”).

⁶⁸ Presumably for this reason, conflict-of-laws rules for intangible property tend to be strikingly uniform. See *id.* at 170–73 (observing that copyright and patent, as largely matters of federal law subject to the exclusive appellate jurisdiction of the Court of Appeals for the Federal Circuit, are “governed by a situs rule, and their situs is federal territory,” *id.* at 170–71).

⁶⁹ See *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122, 1138–41 (W.D. Wash. 2011) (noting the domicile approach is the “traditional approach,” *id.* at 1138).

⁷⁰ Notably, that individual would not be entitled to any compensation for the loss of his property, see *Experience Hendrix*, 762 F.3d at 837, and in fact would be liable for damages, WASH. REV. CODE § 63.60.060 (2014). Moreover, the WPRA can compel such forfeiture even when the use of the personality has no connection to Washington: when a likeness is used to advertise, fundraise, or solicit donations anywhere in the country, the statute can apply. See *id.* § 63.60.050.