

Publicity Rights Uncertainty Makes Maryland a Risky Place for Celebrities to Live or Die

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The right of publicity is the right of an individual to control the use of his or her persona for commercial purposes. Maryland is among the clear minority of States in which the right of publicity is not recognized as a property right either by statute or under the common law. In 1984, the Court of Appeals of Maryland adopted the rule that a person who appropriates to his own use or benefit the name or likeness of another may be liable for the tort of invasion of privacy. More than twenty years later, this remains the only reported Maryland decision dealing with the appropriation of likeness. In other States, the right to control the use of one's name, voice and likeness, the right of publicity, has evolved through legislation or the common law as a property right apart from invasion of privacy.

The distinction is an important one. The right to privacy is personal to the affected individual and therefore does not survive the death of the individual. Invasion of privacy is a tort action intended to compensate a living person who is injured as the result of another's wrongful act. After a person dies, he or she cannot be subjected to an intrusion into his or her private life. While the right of privacy dies with the person, the right of publicity has evolved as a property right that may be transferable and capable of surviving the death of its original owner. At least twenty-eight States have recognized a common law right of publicity or have created statutory versions of the right of publicity. Most are based on the rule that a person may be liable for appropriating the commercial value of another's identity by using without consent that person's name, likeness or other indicia of identity for purposes of trade. Of those States recognizing the right of publicity, many have addressed the issue of descendibility, and the great majority of those that have done so hold that the right is inheritable, survives death and can be the basis for lawsuits by heirs for posthumous infringement.

Although the modern and clear majority rule is that the right of publicity descends to the heirs of a decedent, Maryland lags behind by failing even to recognize the right itself by statute or reported appellate decision. As a result, there is uncertainty as to whether a living individual domiciled in Maryland can bring a successful cause of action for infringement of publicity rights under Maryland law. There is even more doubt as to whether the heirs of a famous person who is domiciled in Maryland at the time of death can inherit the right to exploit and protect the use of the deceased's name and likeness.

A recent New York case involving the estate of Marilyn Monroe illustrates the point. Ms. Monroe died in 1962, leaving a will with a residuary clause that bequeathed "the entire remaining balance" of her estate to Lee Strasberg, a life-long friend with whom she had studied as a young actress at the Actors Studio in New York City. Lee Strasberg died in 1982, leaving his estate to his wife, Anna, who became the administratrix of the Monroe estate. In 2001, the Court authorized Anna Strasberg to transfer the residuary assets of the Monroe estate to Marilyn Monroe, LLC ("MMLLC"), a Delaware company formed to hold and manage the intellectual property assets of the residuary beneficiaries of Marilyn Monroe's will. For many years, the estate took the position that the property bequeathed under Ms. Monroe's will included her right of publicity. CMG Worldwide, Inc. (CMG") was retained as agent for the purpose of licensing and collecting fees for the use of Ms. Monroe's name and image.

Sam Shaw was a photographer who photographed Marilyn Monroe throughout her career including the iconic image of her standing over the subway grate during his work on "The Seven Year Itch." When Shaw died, the copyrights in his photographs passed to his children who continued to license their use through Shaw Family Archives, Ltd. ("SFA"). When MMLLC learned that T-shirts bearing Shaw's images of Ms. Monroe were being sold at a Target retail store, and that SFA was maintaining a website where customers could purchase licenses for the use of Ms. Monroe's picture, image and likeness on various commercial products, MMLLC and CMG filed suit claiming that SFA and its licensing agent violated Marilyn Monroe's right of publicity by using her name, image and likeness for commercial purposes without the consent of her heirs.

On May 5, 2007, the United States District Court for the Southern District of New York held that neither California nor New York, the two States where Ms. Monroe could have been domiciled, recognized a descendible postmortem right of publicity at the time of her death. As a result, any publicity rights she enjoyed during her lifetime were extinguished at her death. The residuary clause in her will therefore could not transfer her publicity rights to her heirs because under the laws of both California and New York, she lacked the testamentary capacity to devise property she did not own at the time of her death. As a result, MMLLC is powerless to control SFA's commercial use of Ms. Monroe's images.

The heirs of a celebrity who dies in Maryland could share the same fate. Maryland has not even established a right of publicity for living persons, much less recognized descendible postmortem publicity rights. Given the traditional reluctance of the Court of Appeals to make new law where legislation could be deemed more appropriate, the Court may well refuse to recognize a right of publicity absent statutory authority. How the Court would react to a claim based on postmortem publicity rights is even harder to predict. The Legislature therefore needs to take action to bring Maryland within the majority of States that protect the publicity rights of celebrities, both while they are living and after death.

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