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NOTES

CHOICE OF LAW AND THE RIGHT OF PUBLICITY: DOMICILE AS AN ESSENTIAL FIRST STEP

INTRODUCTION

Choice of law analyses in right of publicity cases can lead to disturbingly disparate results. Sharp differences in state laws render the application of one state's law over another the deciding factor in many right of publicity actions.¹ Twenty-seven states recognize the right of publicity under either common law or statute.² Even among states recognizing the right, there are distinct differences in its definition. Some states define the right as sounding in tort,³ others consider it a property right.⁴ Perhaps the most dramatic difference concerns the question of descendibility. While some states regard descendibility as inherent in the right of publicity,⁵ others reject that idea and consider the right terminated at death.⁶

¹ Richard Cameron Cray, Comment, *Choice of Law in Right of Publicity*, 31 UCLA L. REV. 640, 644 (1984); Stanley Rothenberg et al., *Choice of Law in Sound-Alike Cases*, 14 ENT. L. REP. 3, 7 (1993).

² Of course, this means that twenty-three states have not recognized the right expressly. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:3 (2000).

³ *McFarland v. Miller*, 14 F.3d 912, 917 (3d Cir. 1994) (stating "In New Jersey, McFarland's claim to a right of publicity sounds in tort.").

⁴ CAL. CIV. CODE § 3344.1 (Deering 2000); IND. CODE ANN. § 32-13(1-20) (Michie 1999).

⁵ States that have expressly recognized descendibility in their respective statutes include California, Florida, Indiana, Kentucky, Nebraska, Nevada, Oklahoma, Tennessee, Texas, Virginia and Washington. However, these states sharply differ in the term of years after death in which the right would be recognized. (Tennessee: ten years or more if use continues, Indiana: one hundred years Kentucky: fifty years, etc.) MCCARTHY, *supra* note 2, at § 6:8.

⁶ States that do not expressly recognize descendibility include New York,

Most definitions of the right distinguishing it from its tort ancestry as a property right define it as both assignable and descendible.⁷ However, there is no common scheme or rule that settles the right as sounding in either tort or property. As the Supreme Court has set forth in *Zacchini v. Scripps-Howard Broadcasting Co.*,⁸ the states are free to make such determinations within their own statutory schemes or judicial arenas. Some states define the right as a pure property right and deem that it is descendible and assignable,⁹ while others resist this advance and maintain that the right should stay comfortably rooted with its tort companions.¹⁰ Not surprisingly, these varying definitions yield striking results in practice. Whereas one state finds that the right of publicity passes to the heirs of the deceased, another may find that a right not exploited in one's lifetime never came into existence. The unpredictability for litigants is distressing, to say the least. Plaintiffs run the risk of later learning that they have set up their licensing schemes in the wrong state upon the untimely death of their cash-cow licensor. Defendants run the risk of printing a poster or advertisement that must be kept out of states with extremely broad protective statutes, or of being forced to comply with a state's most restrictive guidelines.

While commentators scream for a unifying federal statute¹¹ to end the melee of "considerable disarray"¹² of "confused and conflicting"¹³ laws that are "inherently

Massachusetts, Rhode Island, Utah and Wisconsin. MCCARTHY, *supra* note 2, at § 6:8; see also *Heinz v. The Frank Lloyd Wright Found.*, No. 91 CV 0931, No. 91 CV 0942, 1992 U.S. Dist. LEXIS 10688, *38-*44 (N.D. Ill. July 16, 1992) (determining that no survivable right of publicity exists in Illinois, Wisconsin, or Arizona).

⁷ See *supra* note 4.

⁸ 433 U.S. 562, 573-75 (1977).

⁹ See *supra* note 4.

¹⁰ N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1999).

¹¹ See, e.g., Cray, *supra* note 1, at 641; Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 J. ART & ENT. LAW 227 (1999); Marci A. Hamilton et al., *Symposium: Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209 (1998); Richard S. Robinson, *Symposium: Preemption, The Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183, 183 (1998); J. Eugene Salomon, Jr., *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1179 (1987).

¹² WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 70[a] (1984).

¹³ Cray, *supra* note 1, at 651.

arbitrary"¹⁴—none seems forthcoming. Some stop-gap measure is essential to simplify matters in the meantime. That essential stop-gap measure is the comforting choice of law touchstone of domicile. New York and California are two fora that have had the most experience in addressing the complicated issue of defining the right of publicity when a choice of law problem presents itself in descendibility questions. Both states have ultimately concluded that a bifurcated approach is necessary.¹⁵ That is, the domicile of the decedent is looked to initially to determine whether the right of publicity exists. Then, another state's law can be applied to determine the scope of that right. This approach is not revolutionary; rather, it is in compliance with traditional choice of law rules regarding the descendibility of property.¹⁶

This Note examines the use of domicile as a touchstone in determining the existence of the right of publicity. From an examination of the rule used in practice to determine the descendibility of the right, this Note ultimately will show the wisdom of extrapolating the rule from that arena to the more garden variety right of publicity case where the claimant is still alive. Part I.A provides a brief background into the history and development of the right of publicity. Part I.B examines the factors affecting choice of law analyses that differ by state in an attempt to assess the difficulty of establishing any kind of stability. Part I.C addresses the effect of differing choice of law theories on the right of publicity, the familiar uneasiness of interpreting state right of publicity law in the federal courts, and the problems arising from diverse characterization of the right of publicity. Parts II.A and II.B examine how courts in California and New York, respectively, ultimately reached the conclusion that an initial domicile control to determine the right's existence is necessary. Part III will demonstrate the dangers inherent in defining the right of publicity without an initial domicile control. To prove this, Part III examines one of the largely untested right of publicity

¹⁴ *Id.* at 641.

¹⁵ See *Lord Simon Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1023-26 (C.D. Cal. 1998), *aff'd sub nom.*, *Diana Princess of Wales Mem'l Fund v. The Franklin Mint Co., Inc.*, 216 F.3d 1082 (9th Cir. 1999); *Rogers v. Grimaldi*, 875 F.2d 994, 1002-05 (2d Cir. 1989); *Southeast Bank, N.A. v. Lawrence*, 66 N.Y.2d 910, 489 N.E.2d 744, 498 N.Y.S.2d 775 (1985).

¹⁶ See discussion of property choice of law rules *infra* Part I.B.

statutes, the extremely broad Indiana statute.¹⁷ The Indiana statute is approached from the point of view of a hypothetical plaintiff and defendant embarking on a litigation. Part IV analyzes the operation of the domicile rule as it affects living plaintiffs, and illustrates that the domicile control is the most logical, fair, and effective stop-gap measure in determining the right of publicity's existence in the absence of any unifying federal regulation.

I. BACKGROUND OF RIGHT OF PUBLICITY AND CHOICE OF LAW PRINCIPLES

A. *Background of the Right of Publicity*

The right of publicity is, in hillbilly parlance, the red-headed step-child of misappropriation and the right to privacy. When Dean Prosser articulated the four varieties of the right to privacy in his seminal article,¹⁸ the right of publicity lurked somewhere in the gray area between "false light" and misappropriation.¹⁹ Perhaps reasonably, there was no place in Dean Prosser's schema for a right that was violated when someone's image was attached to a product for financial gain. Clearly, these public figures were not concerned about "hurt feelings," but rather hurt finances.²⁰ To appropriate an image

¹⁷ IND. CODE ANN. § 32-13-(1-20) (Michie 1999).

¹⁸ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

¹⁹ *Id.*

²⁰ We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses,

to sell a product is not quite a violation of one's right to privacy, since the subjects generally had been violating their own privacy right and left—maximizing the economic return for their personas in their own way.²¹

Enter the right of publicity, a phrase generally regarded as coined in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*²² and more fully articulated in Melville Nimmer's seminal article on the subject.²³ Not a violation of privacy, and not quite misappropriation of identity—the right of publicity provided a cause of action to those whose image had been adopted without their consent, usually to sell a product.²⁴ The Supreme Court later recognized the states' ability to develop the right of publicity, and since then states have been tinkering with the concept with strikingly different results.²⁵

The right of publicity has demonstrated a startling tenacity, even in the face of sharp criticism.²⁶ The criticisms range from First Amendment objections,²⁷ to federal preemption attacks,²⁸ to chicken-little style hand wringing

trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953). See also J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS § 28-6 (1999) ("While infringement of the right of publicity looks at an injury to the pocketbook, an invasion of appropriation privacy looks to an injury of the psyche."); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199 (1986).

²¹ Professor Michael Madow provides an exhaustive history of the invocation of celebrity in conjunction with the sale of products in America, dating back to the founding fathers. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993).

²² 202 F.2d at 868.

²³ Melville Nimmer, *The Right of Publicity*, 19 LAW AND CONTEMP. PROBS. 203 (1954).

²⁴ *Haelan Labs*, 202 F.2d at 868; see *supra* note 20.

²⁵ *Zacchini*, 433 U.S. at 573-75.

²⁶ Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 14 (1997).

²⁷ Madow, *supra* note 21; see also Douglas J. Ellis, *The Right of Publicity: Enriching Celebrities and the First Amendment: A Comment on Why Celebrity Parodies Are Fair Game for Fair Use*, 64 U. CIN. L. REV. 575 (1996); Linda J. Stack, *White v. Samsung Electronics America, Inc.'s Expansion of the Right of Publicity at the Expense of Free Speech*, 89 N.W. L. REV. 1189 (1995).

²⁸ *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986); see also *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645 (Cal. Ct. App. 1996).

about extending the right to pale impressions of celebrities.²⁹ Perhaps the loudest voices belong to those crying out to solve this insurmountable unpredictability by federal statute.

The staying power of the right can be attributed to its initial sex appeal.³⁰ Arguments in favor of advancing the right range from natural rights based theories, namely the Lockean ideal of owning the fruits of one's own labors,³¹ the Hegelian philosophy of personality as property,³² or, most recently, a Kantian model.³³ Economic theories behind the right have flourished as well, principally stressing the incentives in place for creativity when the product, the artist himself, is protected.³⁴ Further, the concept of stability in licensing and commercial endorsements is key when it is understood that exclusivity is what gives a persona's attachment to a product value.³⁵ There is no value in identifying Michael Jordan with Nike if, in fact, his persona can also be utilized with impunity by Reebok.³⁶

²⁹ The most articulate attack on celebrity overprotection is undoubtedly Judge Alex Kozinski's dissent filed upon denial of the motion to rehear Vanna White's claim against Samsung Electronics. *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting); see also Aaron A. Bartz, Comment, ... *And Where It Stops, Nobody Knows: California's Expansive Publicity Rights Threaten The Federal Copyright System*, 27 SW. U. L. REV. 299 (1997); William M. Heberer III, Comment, *The Overprotection Of Celebrity: A Comment On White V. Samsung Electronics America, Inc.*, 22 HOFSTRA L. REV. 729 (1994); Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 KAN. L. REV. 329 (1997).

³⁰ The seductive power of celebrity is overwhelming even to some of America's most incisive legal minds. See Kwall, *supra* note 26.

³¹ Nimmer, *supra* note 23, at 216; but, *c.f.* Madow, *supra* note 21, at 181-97; see, e.g., Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970).

³² "I am what is mine. Personality is the original personal property." NORMAN O. BROWN, *LOVE'S BODY* ch. 8 (1967).

³³ Alice Haemmerli, *Whose Who? The Case For A Kantian Right of Publicity*, 49 DUKE L. J. 383 (2000).

³⁴ Often, the infringer in a right of publicity case is characterized as "free riding" on the good will created by another's persona. See Madow, *supra* note 21, at 196.

³⁵ *Jim Henson Prod. v. Brady*, 867 F. Supp. 175, 189 (S.D.N.Y. 1994) (stating of the right of publicity that "the nature of that property is such that its value is diluted by unauthorized use.").

³⁶ *Id.* at 189 n.15.

B. *Choice of Law Theory*

Choice of law analysis has changed dramatically since the 1960s, characterized by a rise in policy-based approaches.³⁷ Formerly, the accepted method of determining the appropriate law to apply was to perform a vested rights analysis.³⁸ Stated simply, the law to be applied was the law of the place where the right first “vested.”³⁹ Generally, the rule of decision was provided by the local law of the place where the “last act necessary to bring a legal obligation into existence” occurred.⁴⁰ Although generally discredited by conflicts scholars, the vested rights approach is still the primary method of choice of law decision in “approximately one-third” of the states.⁴¹ Other states that originally seemed to be moving away from the vested rights approach have crept back to a more “rules-oriented” approach after dissatisfaction with a more interest based approach.⁴²

The vested rights theory was thought to be the best solution to a choice of law problem primarily for its inherent predictability.⁴³ The rigidity of the rules took the matter of choice of law out of the discretion of the trial judge, and minimized the likelihood of “forum shopping.”⁴⁴ In a tort action,

³⁷ WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 68 (1993).

³⁸ RICHMAN & REYNOLDS, *supra* note 37, at § 54; *see also* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935). Beale was creating a framework within which it was possible to apply the laws of another sovereignty. His work was a reaction to that of Joseph Story, who articulated choice-of-law principles based on the concept of “comity”. In other words, one state would apply the law of another state out of respect, at the discretion of the forum judge. The forum judge was thus applying the law of another state, not creating a new right or a new rule of decision within the forum. *See* JOSEPH STORY, CONFLICT OF LAWS (1834).

³⁹ This is unquestionably an oversimplification. Vested rights analysis involves a system of rigidly applied rules depending on what area of law is implicated. RICHMAN & REYNOLDS, *supra* note 37, at § 62-67.

⁴⁰ RESTATEMENT (SECOND) CONFLICT OF LAWS, Introductory Note to Topic 1 (1997).

⁴¹ RICHMAN & REYNOLDS, *supra* note 37, at § 63.

⁴² *Neumeier v. Kuehner*, 31 N.Y.2d 121, 386 N.E.2d 454, 335 N.Y.S.2d 64 (1972). RICHMAN & REYNOLDS, *supra* note 37, at § 54; *see also* Maurice Rosenberg, *The Comeback of Choice of Law Rules*, 81 COLUM. L. REV. 946 (1981).

⁴³ Despite the need for predictability, the price was often rigidity that led to absurd results. Numerous “escape devices” were developed to circumvent the rigidity of these rules. REYNOLDS & RICHMAN, *supra* note 37, at § 55.

⁴⁴ Rather, the rise of the “interest analyses” to supplant the traditional choice

the law applied was the place of the wrong.⁴⁵ In a contract action, the law applied was the law of the "place of making."⁴⁶ In a property action, the rule of decision generally depended on the "situs"⁴⁷ of the property.

Choice of law changed dramatically in the latter half of the twentieth century. Scholars sought to create a new methodology that would not have the same rigidity as the territorial or vested rights approaches.⁴⁸ Two major schools of thought that greatly influenced modern choice of law practice are Brainerd Currie's governmental interest analysis and the "most significant relationship" approach of the Restatement Second. Currie's approach is to deduce the policies behind the rule of decision in a particular case.⁴⁹ When the policies are assessed under Currie's theory, there is most often no real conflict. The interests of one state in deciding the matter are either non-existent or in line with the interests of the other state. These situations are deemed "false conflicts," and forum law is applied.⁵⁰

The most significant relationship approach uses Currie's idea of interest analysis as a factor to be weighed in determining which state has the most significant relationship with the transaction. Other factors include: the needs of interstate and international systems, the forum's relevant policies, the policies of other states involved, the protection of justified expectations, the basic policies underlying the specific

of law rules was criticized on the basis that such analyses would lead to forum shopping. REYNOLDS & RICHMAN, *supra* note 37, at § 76[a].

⁴⁵ RESTATEMENT (FIRST) CONFLICT OF LAWS § 377 (1934); *see also* REYNOLDS & RICHMAN, *supra* note 37, at §§ 62, 64.

⁴⁶ RESTATEMENT (FIRST) CONFLICT OF LAWS § 332; RESTATEMENT (SECOND) CONFLICT OF LAWS, Introductory Note, Ch. 7; *see, e.g.*, *Milliken v. Pratt*, 125 Mass. 374 (1878).

⁴⁷ *See* discussion of "situs," *infra* notes 58-63 and accompanying text.

⁴⁸ Scholars sought to avoid the absurd results that could occur under the vested rights theory. *See, e.g.*, *Ala. Great S. R.R. Co. v. Carroll*, 11 So. 803, 809 (Ala. 1892) (determining that plaintiff had no right of action since the injury occurred while train was operating through Mississippi, even though the negligence took place in Alabama).

⁴⁹ Currie first set forth his interest analysis theory in a law review article. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178. Finding no one pays any attention to law review articles, especially the footnotes, Currie then published a series of articles in book form. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

⁵⁰ RICHMAN & REYNOLDS, *supra* note 37, at § 75.

area of the law at issue, certainty, predictability and uniformity of results, and the ease of determining and applying foreign law.⁵¹ Some factors are more crucial to specific areas of law than other factors. In contract questions, for example, the expectations of the parties at the time of the transaction are key.⁵² In tort, the expectations of the parties are generally not considered because, obviously, no one expects an accident or a tort to occur.⁵³

Whatever changes have occurred in choice of law approaches, the rules governing property have remained essentially the same.⁵⁴ The uniformity that the territorial and vested rights approaches offered to choice of law analyses is even more important in questions of property than it is in tort or contract questions.⁵⁵ In tort questions, the modern approaches tend to focus on how best to implement the general policies of a state protecting its own citizens, or the general policies behind tort law.⁵⁶ In property, however, the parties' expectations and general policies of the forum are both subservient to the need for certainty in transactions, both of real property and personalty, called immovables and movables in conflicts parlance.⁵⁷

Situs is determined differently depending on the nature of the property question in issue. First, the situs of immovables is always deemed to be where the property is located. The situs of movables is governed by different rules depending on what kind of question is at issue.⁵⁸ If the question is regarding an inter vivos transaction, the situs is generally the location of the property at the time of the transaction.⁵⁹ If the question is one of succession on death, the domicile of the decedent is the situs and controls choice of law questions.⁶⁰

⁵¹ RESTATEMENT (SECOND) CONFLICT OF LAWS § 6.

⁵² *Id.* at § 145, cmt. b.

⁵³ *Id.*

⁵⁴ REYNOLDS & RICHMAN, *supra* note 37, at § 86.

⁵⁵ RESTATEMENT (SECOND) CONFLICT OF LAWS § 222, cmt. b.

⁵⁶ *Id.* at § 145, cmt. b.

⁵⁷ RESTATEMENT (SECOND) CONFLICT OF LAWS § 222, cmt. b.; RICHMAN & REYNOLDS, *supra* note 37, at § 66.

⁵⁸ Beyond the scope of this Note is the question of distribution of property after dissolution of marriage. Family law questions are largely governed by domicile. See RESTATEMENT (SECOND) CONFLICT OF LAWS.

⁵⁹ RICHMAN & REYNOLDS, *supra* note 37, at §§ 86-87.

⁶⁰ *Id.*

Therefore, under traditional choice of law approaches, the domicile at death of the person whose right of publicity is at issue should control the question of whether such a right has survived.⁶¹ Clearly, the succession on death questions are determined by situs law. The situs is the domicile of the decedent. Therefore, situs should control in such a case. Interestingly enough, the answer to the question remains the same under the more progressive theories. An interest-based analysis will reveal that the state where the decedent was domiciled has the strongest interest in determining whether or not the right of publicity survives.⁶² The most significant relationship analysis will also likely find that the domicile of the decedent should control these questions, since the domicile is likely to have the most significant relationship to the issue—the human capital of the now-deceased personality asserting the right.⁶³

Of course, cases are not decided theoretically. In practice, choice of law questions regarding descendibility have not been answered with the kind of uniformity one would expect under any of these choice of law schemes. First, states do not necessarily “adopt” a clean version of the approach of one or another choice of law school.⁶⁴ The choice of law analysis in practice is most often a “mish mash” of different schools of thought. Such confusion can explain differing results. Second, there are numerous “escape clauses” in the traditional view and “defenses” under the more modern view to applying the law of a foreign state.⁶⁵ Third, most of the cases that have defined the right of publicity have been brought in federal court. The already dicey questions of choice of law from state to state are complicated further when a federal court attempts to guess at an undecided state law question.⁶⁶ Fourth, characterization of the main issue in an action is key in any choice of law scheme, traditional or modern. When the cause of

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ RICHMAN & REYNOLDS, *supra* note 37, at § 77.

⁶⁵ Sometimes called “pervasive problems,” concepts used also as “escape devices” include public policy questions, substance versus procedure questions, renvoi, depeçage, etc. RICHMAN & REYNOLDS, *supra* note 37, at § 55.

⁶⁶ See, e.g., *Factors, Etc., Inc. v Pro Arts*, 579 F.2d 215 (2d Cir. 1978); see also Cray, *supra* note 1.

action is characterized as a "tort" action, certain rules apply. Conversely, when the cause of action is characterized as a "property" action, other choice of law rules apply.

C. *Choice of Law Difficulties Inherent in Right of Publicity Cases*

Characterization of right of publicity issues is by no means uniform. In fact, characterization has led to most of the uncertainty surrounding choice of law approaches and results in right of publicity cases.⁶⁷ In more traditional systems, characterization operates as a kind of "escape clause"—allowing courts to apply a different choice of law rule by changing the "characterization" of a certain action. A forum with no right of publicity, and disdain for the cause of action, could characterize the action as a "tort" action and apply the law of the "place of the wrong" rather than characterizing it as a property action governed by situs rules. Federal courts attempting to determine what a state court would do in the same situation are often forced to guess at an additional factor—namely, how does that state court characterize the right of publicity.⁶⁸ Characterization is thus an issue in all of the problem areas leading to disunity in choice of law questions about the right of publicity.⁶⁹

The reason for the problem of characterization is the right of publicity's history. An outgrowth from the tort of invasion of privacy, the right of publicity has found it difficult to shed its tort skin. In practice, the right of publicity operates as a property right. Damages are not sought for personal injury, but for the injuriousness of appropriating an image for financial gain. Essentially, the tort that these actions most closely resemble is conversion—the conversion of one's image, or one's personality. The first element in an action for conversion is that the litigant alleging conversion must prove

⁶⁷ MCCARTHY, *supra* note 2, at § 11:8.

⁶⁸ McFarland v. Miller, 14 F.3d 912, 917 (3d Cir. 1994).

⁶⁹ In an early leading case concerning the descendibility of the right of publicity, the California Supreme Court deemed the question of characterization "pointless." *Lugosi v. Universal Pictures*, 603 P.2d. 425, 428 (1979). However, later cases highlighted the essential quality of the inquiry in terms of choice of law. *See, e.g., Acme Circus v. Kuperstock*, 711 F.2d. 1538, 1541 n.1 (11th Cir. 1983).

that she is the legal owner of the subject matter of the litigation. The Restatement directs that these first questions in an action for conversion be answered by the section of rules governing property.⁷⁰ Therefore, under the Restatement, the question of whether a right of publicity exists or not, and thus whether it is capable of being "converted," should be defined by property choice of law principles.

Applying property principles to the question of the rights' existence is inherently logical. Essentially, the question is, does the forum recognize the individual's right to own certain essential elements of his or her demeanor, personality, etc.? If the forum does recognize that right, then it is possible to convert that ownership and the right of publicity action survives. If not, the question of damages for converting the right of publicity is moot.⁷¹ How do courts determine whether the litigant asserting the right of publicity has such a right?⁷² While questions about how such a right should be enforced or how damages should be measured might be answered by applying the forum's traditional or modern choice of law analysis, the threshold question of whether such a right exists should be determined by a hard and fast rule, like domicile.⁷³

The rule of domicile determining descendibility is easily applied with predictable, uniform results. The problem of characterization is no longer present because once the right's claimant is deceased, courts have no difficulty analyzing the cause of action using property choice of law principles. The case has clearly left the bounds of the right of privacy, where the damage is hurt feelings and loss of dignity, and is firmly in the realm of pecuniary loss when the estate brings the action on behalf of the decedent. The garden-variety right of publicity

⁷⁰ RESTATEMENT (SECOND) CONFLICT OF LAWS § 147, cmt. i.

⁷¹ One cannot steal something that does not exist. Such a theft is akin to the sound of one hand clapping. This bifurcated approach is also followed in cases outside of New York and California applying those state's laws. *Joplin Enter. v. Allen*, 795 F. Supp. 349, 350-51 (W.D. Wash. 1992).

⁷² Constitutionally, a forum cannot bar a cause of action it itself recognizes. *Hughes v. Fetter*, 341 U.S. 613, 613 (1951). However, a forum cannot apply its own law if it has no substantial contacts with the cause of action. *Home Ins. v. Dick*, 281 U.S. 397, 410 (1930).

⁷³ Although some would certainly argue that domicile is far from a "hard and fast" rule, it is certainly the best touchstone available to conflicts sufferers. Domicile is a flexible concept, but is generally determinable. The rule system that has emerged for determining domicile at least gives one a place to start.

case, brought while the claimant is still alive, could benefit greatly from the domicile touchstone in terms of predictability and uniformity. While traditional choice of law analysis would still define the scope of the rule, whether or not the right exists would be determined by the claimant's domicile.⁷⁴

Domicile also provides a much needed check on broad statutes that claim to protect the rights of anyone asserting a claim, regardless of their contact with the forum. Indiana, for example, has a right of publicity statute that protects people within one hundred years of their death, regardless of their contacts with Indiana.⁷⁵ In other words, a representative of the estate of Mark Twain, Humphrey Bogart, Walt Disney, Babe Ruth, Tupac Shakur, or any other prominent figure could make a *prime facie* case in Indiana.⁷⁶ The contacts, or lack thereof, of these figures with Indiana are explicitly irrelevant under that statute's protections.⁷⁷ A domicile touchstone could reign in these overbroad protections, while still permitting claimants to control their own destinies by seeking out the protections of these statutes while living.

II. DOMICILE AND DESCENDIBILITY IN PRACTICE

This Part examines recent cases in California and New York concerning the descendibility of right of publicity, and assesses the effectiveness of the domicile rule in both forums. California explicitly provides a statutory scheme for the recognition of right of publicity after death,⁷⁸ while New York has cryptically rejected the idea of survivability.⁷⁹ Both states

⁷⁴ *Acme Circus*, 711 F.2d at 1541.

⁷⁵ IND. CODE ANN. § 32-13 (1-20) (Michie 1999).

⁷⁶ Interestingly, the estates of both Humphrey Bogart and Babe Ruth have licensed all of their publicity rights to the Curtis Management Group (CMG), a prominent figure in the licensing of deceased celebrities. CMG also represents the interests of Marilyn Monroe, Mickey Mantle, James Dean, and countless other icons. See <http://www.cmgww.com> (last visited Oct. 12, 2001). Curtis Management Group enjoys the protection of the broad Indiana statute since it is headquartered in Indianapolis. Therefore, as an Indiana domiciliary, it would continue to do so in terms of recognition of the rights under a domicile-controlled choice of law rule. However, the scope of the rule—whether it indeed extends for 100 years after death, etc.—would be determined by traditional choice of law analysis.

⁷⁷ IND. CODE ANN. §32-13-1(a).

⁷⁸ CAL CIV. CODE § 3344.1 (Deering 2000).

⁷⁹ *Stephano v. News Group Pub.*, 64 N.Y.2d 174, 183, 474 N.E.2d 580, 584,

have ultimately concluded that a bifurcated approach is necessary to first establish whether the right exists based on the claimant's domicile, and then to determine its scope by the applicable choice of law interest analysis.⁸⁰

A. *Descendibility and Choice of Law in California*

California enacted § 990 of its civil code in direct contradiction to a judicial determination that the right of publicity was not descendible.⁸¹ As of January 1, 2000, the statute has been renumbered, dubbed the Astaire Celebrity Image Protection Act, and its protections extended to last up to seventy years after death. The statute provides that a successor in interest must register as such with the Secretary of State in order to bring an action under the statute.⁸² A deceased personality under the statute is someone whose "name, voice, signature, photograph, or likeness" had commercial value at the time of his or her death.⁸³ The commercial value can exist regardless of whether that deceased personality elected to capitalize on that value while living.⁸⁴

The statute itself makes no mention of the claimant's domicile.⁸⁵ The sparse case law applying the statute, however, has put domicile center stage in choice of law questions. In *Lord Simon Cairns v. Franklin Mint Co.*, the United States District Court for the Central District of California addressed choice of law in relation to § 990 for the first time.⁸⁶ Plaintiffs were the trustees for the estate of the late Princess Diana. Defendants had filed for a series of trademarks involving

485 N.Y.S.2d 220, 224 (1984) (determining that the right of publicity in New York is limited to that provided by statute).

⁸⁰ See sources cited, *supra* note 15.

⁸¹ *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979).

⁸² CAL. CIV. CODE § 3344.1.

⁸³ *Id.* at § 3344.1(a)(1).

⁸⁴ *Id.*

⁸⁵ This is in spite of the fact that domicile was much discussed in the debate surrounding the statute's enactment. See *Lord Simon Cairns v. Franklin Mint Co.*, 120 F. Supp. 2d 880, 884-86 (C.D. Cal. 2000) [hereinafter *Cairns II*].

⁸⁶ 24 F. Supp. 2d 1013, 1024 (C.D. Cal. 1998) [hereinafter *Cairns I*]. Because § 990 was the statute in effect when the case was decided, references in the text still refer to the statute by that number. It has now been renumbered as CAL. CIV. CODE § 3344.1 so that it now follows its cousin for the living, § 3344.

Diana's name,⁸⁷ and had further sold and promoted various items depicting the name and image of Princess Diana without authorization of the estate.⁸⁸ Among other complaints,⁸⁹ plaintiffs alleged that defendants had violated Princess Diana's statutory right to publicity under California Civil Code § 990.

The first issue for the court was whether or not Diana's right to publicity existed under § 990. Certainly, on its face, the statute gives no indication that it is intended to be limited to California domiciliaries.⁹⁰ The successors-in-interest to Princess Diana's estate complied with § 990's registration requirements.⁹¹ Defendants, however, asserted that the question of whether Diana's right to publicity existed was governed by the law of her domicile at the time of her death — Great Britain.⁹² Great Britain does not recognize the right to publicity.⁹³ Therefore, the defendants urged, despite compliance with § 990, Diana's right of publicity did not survive her death.

Although California utilizes a version of Currie's "governmental interest" analysis to settle choice of law questions,⁹⁴ defendants here asserted that California Civil Code § 946 controlled.⁹⁵ California Civil Code § 946 provides that, in a question of personal property, "if there is no law to the contrary, in the place where the property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile."⁹⁶ The court agreed that this statute

⁸⁷ *Id.* at 1022.

⁸⁸ *Id.* The items included a "Diana, Princess of Wales Porcelain Portrait Doll," a "Diana, Queen of Hearts Jeweled Tribute Ring," a "Diana, England's Rose Diamond Pendant," a "Princess Diana Tiara Ring," an "England's Rose Heirloom Collector's Plate," a "Diana, The People's Princess Doll," a "Princess Diana Crown Ring," and the "Diana, Forever Sparkling Classic Drop Earrings." Not surprisingly, the advertising and packaging for these items featured the name and likeness of Princess Diana. *Id.*

⁸⁹ Plaintiffs also asserted claims of false designation of origin under the Lanham Act, of federal trademark dilution under 15 U.S.C. § 1125, false advertising under the Lanham Act, and unfair competition and misleading advertising in violation of California Business and Professions Code. *Cairns I*, 24 F. Supp. 2d at 1022.

⁹⁰ *Id.* at 1029.

⁹¹ *Id.* at 1021. The successors filed on September 30, 1997—approximately one month after Diana's death on August 31, 1997.

⁹² *Id.* at 1025.

⁹³ *Id.* at 1023; *Bi-Rite Enter. Inc. v. Bruce Miner Co.*, 757 F.2d 440, 442 (1st Cir. 1985); see also MCCARTHY, *supra* note 2, at § 6.21.

⁹⁴ *Cairns I*, 24 F. Supp. 2d at 1024 (citations omitted).

⁹⁵ *Id.* at 1025.

⁹⁶ *Id.* (quoting CAL. CIV. CODE § 946 ("By what law governed . . . If there is no law to the contrary, in the place where personal property is situated, it is deemed to

controlled, and that Diana's domicile at death determined the question of whether her right of publicity survived. Since Great Britain does not recognize such a right, plaintiff's § 990 claim failed.

Effectively, this federal court limited California's statute to California domiciliaries or domiciliaries of one of the other twenty-four states that recognize some form of a right of publicity. While the power of a federal court to define the scope of state right of publicity laws is uncontroverted,⁹⁷ federal courts have not had much success in terms of the staying power of their interpretations.⁹⁸ This district court, however, had the benefit of experience. Having seen the development of the right of publicity, especially in the area of descendibility,⁹⁹ the court made an excellent argument for deciding questions of whether or not the right of publicity exists based primarily on the domicile of the decedent.

First, the court characterized the rule in § 946 as the "traditional common law rule" sometimes called "*mobilia sequuntur personam*."¹⁰⁰ In other words, intangible personal property is found at the domicile of its owner, unless, as § 946 provides, some exception applies to that general rule.¹⁰¹ The court struggled with this idea of an exception. Since § 946 itself provides that the situs of the property is the domicile of its owner, what exception could there be that situates the property

follow the person of its owner, and is governed by the law of his domicile.")).

⁹⁷ In fact, much of the development of the right of publicity has taken place in the federal courts. The ease of tacking on a state right of publicity claim to other "federal question" claims under the Lanham Act and federal trademark statutes has often put the federal courts in the awkward position of determining questions of first impression regarding the right of publicity, often with quickly reversed results. See *supra* note 76.

⁹⁸ The interplay regarding questions of descendibility between the federal circuits and their respective highest state courts, not to mention each other, is almost comical in scope. Witness the "Elvis is Alive—or not. . . ." controversy as it plays out in the following cases. See, e.g., *Factors, Etc. Inc. v. Pro Arts, Inc.* 652 F.2d 278 (2d Cir. 1981); *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980); *State of Tennessee ex rel The Elvis Presley Mem'l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. 1987).

⁹⁹ *Cairns I*, 24 F. Supp. 2d at 1025. Following *Acme Circus Operating Co., Inc. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983). Also, citing McCarthy's comments on the "Elvis Presley" and "Marx Brothers" cases. MCCARTHY, *supra* note 2.

¹⁰⁰ *Cairns I*, 24 F. Supp. 2d at 1026 (citations omitted).

¹⁰¹ *Id.*

somewhere else?¹⁰² First, the court deemed that it must determine where the property is situated for the purposes of the § 946 exception, and then whether there is law to the contrary in that forum. To straighten out this analytical pretzel, the court assumed first, for the purpose of assessing whether there is law to the contrary, that the general rule did not apply and that the property was situated in California.¹⁰³ Unfortunately for the plaintiffs, the only abrogation of the general rule defining domicile as the controlling factor dealt with in rem jurisdiction, and not the question of whether a property right existed in the first place.¹⁰⁴ This distinction proved fatal, and the court found no “law to the contrary” in California sufficient to eradicate the general rule that domicile controlled. Therefore, even assuming that the property was situated in California, there was no “contrary law” to rescue the claim from the fatal domicile rule. Further, the court emphasized that there is nothing in § 990 that takes that statute out from under the umbrella of § 946. If the legislature had fully intended for domicile not to control the disposition of the right of publicity, it certainly could have included an exception to § 946 within the text of § 990.¹⁰⁵

Plaintiffs’ two final efforts to revive Diana’s right of publicity claim met similar fates. First, plaintiffs claimed that the situs of the property was in California because that was where the registration certificate was filed. Second, plaintiffs claimed that the interest in the right of publicity was an existing chose in action governed by California law. The court, however, was unconvinced by both claims. The registration form does not embody the right, but simply serves to give notice of the intent to claim the right.¹⁰⁶ The claim that Diana’s right of publicity was a chose in action failed because the right never came into existence. Since the choice of law question

¹⁰² This self-reflective circle is common in conflicts. Like the ancient symbol for eternity, the snake is eating its own tail. While not a pure *renvoi* situation, this statute’s reflecting on itself is a version of that conflicts phenomenon. See RICHMAN & REYNOLDS, *supra* note 37, at § 58.

¹⁰³ *Cairns I*, 24 F. Supp. 2d at 1026.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1027.

¹⁰⁶ *Id.* at 1028.

effectively nullified the right from ever having vested, there was no chose in action to assert.¹⁰⁷

Essentially, the *Cairns I* court judicially established that the first step in applying the California right of publicity statute dealing with deceased personalities was to assess whether that personality has such a right according to the law of her domicile at the time of death. The court was careful to limit this holding to § 990 and distinguished it from its California Civil Code cousin for the living, § 3344.¹⁰⁸ The court noted, however, that cases based on § 3344 have typically selected the law of the property owner's domicile under the governmental interests test.¹⁰⁹

The Court of Appeals for the Ninth Circuit approved of the district court's approach in an unpublished decision.¹¹⁰ Specifically, the circuit court held that the district court correctly found that § 990 was properly modified by the provisions of § 946. First, the court noted that § 990 contains no choice of law provision. Second, and "perhaps most compelling," the Ninth Circuit was swayed by the district court's reliance on *Acme Circus v. Kuperstock*.¹¹¹ Section 990 was enacted a year after the *Acme Circus* decision, which held that right of publicity claims were determined under the rubric of § 946.¹¹² If the legislature had intended to correct this assumption, surely it would have provided explicitly that § 946 does not apply.

Interestingly, the court, relying on an earlier legislative draft, went on to note that § 990 had been amended to include a choice of law provision effective January 1, 2000, that extends the right to descendants of celebrities not domiciled in California at the time of death.¹¹³ However, the

¹⁰⁷ *Id.* at 1027.

¹⁰⁸ *Cairns I*, 24 F. Supp. 2d at 1028 n.11.

¹⁰⁹ *Id.* (citing *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988)); *Fleury v. Harper & Row Pub., Inc.* 698 F.2d 1022 (9th Cir. 1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825-26 (9th Cir. 1974); *Page v. Something Weird Video*, 908 F. Supp. 714, 716 (C.D. Cal. 1995); see also *Joplin Enter. v. Allen*, 795 F. Supp. 349 (W.D. Wash. 1992).

¹¹⁰ *Diana Princess of Wales Mem'l Fund v. Franklin Mint Co., Inc.*, 216 F.3d 1082 (9th Cir. 1999).

¹¹¹ 711 F.2d 1538 (1983).

¹¹² *Acme Circus*, 711 F.2d at 1538.

¹¹³ Specifically, the court states: "[T]he California legislature has amended Section 990, effective January 1, 2000, to expressly include a choice-of-law provision

final version of the amended statute, now § 3344.1, does not include such an express choice of law provision. The statute, now called the Astaire Celebrity Image Protection Act, primarily extends the term of protection to seventy years after death.¹¹⁴ Also, the amendment requires the Secretary of State to post claimant's registrations on the World Wide Web, providing for better access and notice to potential users.¹¹⁵

The only provision that could possibly affect choice of law provisions is revised section (n), which states, "This section shall apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in this state."¹¹⁶ While this provision requires that the infringement take place within the state of California, it is clearly more of a jurisdictional provision than a modification of who may bring such an action. This provision is insufficient to constitute a "law to the contrary" under the provisions of § 946.

The representatives of Diana's estate were reinvigorated by the language in the Ninth Circuit's opinion stating that the amended statute contained a choice of law provision. The estate made the above argument surrounding section (n) and moved to reinstate their right of publicity claim before the district judge. However, Judge Paez clarified that the Ninth Circuit was most likely responding to the legislative history surrounding the provision, and not the final draft of the statute. Judge Paez correctly construed section (n) as a jurisdictional provision, not a choice of law provision.¹¹⁷

The provisions of § 946 state that the place where the property is situated may control personal property if there is some law to the contrary there. If not, the general rule of domicile controlling property governs. There is nothing in the section (n) provision requiring infringement action to take

that expands coverage of the statute to heirs of celebrities who were not domiciliaries of California at the time of death." *Diana Princess of Wales Mem'l Fund v. The Franklin Mint Co., Inc.* 1999 U.S. App. LEXIS 34568, *4 (9th Cir. 1999). This language was later stricken from the opinion. See *Diana Princess of Wales Mem'l Fund v. The Franklin Mint Co., Inc.* 2000 U.S. App. LEXIS 2847. The original opinion relied on an earlier draft of the legislation. See discussion in this part, *supra*.

¹¹⁴ CAL. CIV. CODE § 3344.1(h).

¹¹⁵ *Id.* at § 3344.1(f)(3).

¹¹⁶ CAL. CIV. CODE § 3344.1(n).

¹¹⁷ *Cairns II*, 120 F. Supp. 2d at 882-83.

place in California that takes the cause of action out of the § 946 umbrella in terms of conflicts principles. Even assuming that the right of publicity is "situated" in California, the provision in the amended statute does not provide a "law to the contrary" as to what law controls. It merely states that the law applies to infringement actions taking place within the state of California.

Judge Paez's opinion denying the reinstatement of plaintiff's right of publicity claim clearly explains both the legislative history surrounding the question of whether or not to include a choice of law provision in the amended statute, and details an interesting colloquy between the district court and the Ninth Circuit that ultimately led the Circuit Court to amend its opinion. First, as to the question of whether to include a choice of law provision, the district court explained that early drafts included a provision, much like Indiana's, that § 3344.1 would apply regardless of the claimant's domicile.¹¹⁸ Senator Burton, the amendment's proponent, was motivated by, among other things, the desire to legislatively overturn the decision in *Cairns I*.¹¹⁹ However, Senator Burton accepted successive amendments that eliminated the "regardless of domicile" choice of law provision. As Judge Paez described:

Assembly Member Kuehl explained that this language had been deleted in order to maintain neutrality on the choice-of-law issue. Specifically, Kuehl said, "[w]e somewhat (sic) with notable lack of courage, I think, decided not to jump into that question because, at the moment, the law does not either require one to be a domiciliary—at least in the statutory law—¹²⁰ does not require this or not require this. I didn't want to go that far."

Furthermore, Judge Paez demonstrated that the Ninth Circuit relied on an earlier draft of the statute when it stated, in the course of affirming his *Cairns I* decision, that the newly amended statute contained a choice of law provision. The Ninth Circuit cited to a draft that included the provision.¹²¹ In response to that decision and specifically that dicta within

¹¹⁸ *Id.* at 884.

¹¹⁹ *Id.* at 884 n.2.

¹²⁰ *Id.* at 884.

¹²¹ S. 209, 1999 Legis. Sess. (Cal. 1999).

it, Judge Paez issued a minute order postponing the resolution of the plaintiff's motion to reinstate pending the Ninth Circuit's ruling on the defendant's petition for rehearing. In that minute order, Judge Paez stated:

The Ninth Circuit characterized a recent amendment, effective January 1, 2000, to California's right to publicity statute . . . as a "choice of law provision." The Court may have to consider whether the new amendment is a choice-of-law provision in order to rule on the pending motion. Upon a review of the parties' papers, the text of the amended statute, and its legislative history, it appears to the Court that this new provision may not be a choice of law provision.¹²²

"In response," Judge Paez concluded, "the Ninth Circuit panel issued an order amending its previous ruling to delete the words 'choice of law' but otherwise denying the petition for rehearing."¹²³

In sum, the amendments reinforce, rather than negatively impact, the decision in *Cairns I*. Efforts to legislatively overrule the decision were considered and ultimately defeated. The Ninth Circuit's unpublished affirmance ultimately deleted the earlier dicta professing that the amended statute contained such a provision. Therefore, the *Cairns* decision stands as a means of settling the issue of descendibility in California, and perhaps indicates the wave of the future in determining the disposition of right of publicity claims for living plaintiffs.

B. *Descendibility and Choice of Law in New York*

The New York right of publicity is also controlled by statute, although it is termed the right of privacy. New York Civil Rights Law §§ 50 and 51 explicitly limit recovery to living persons.¹²⁴ In the late 1970s and early 1980s, representatives of deceased celebrities had some success in the federal district

¹²² *Cairns II*, 120 F. Supp. 2d at 886. The decision of Judge Paez also details the persuasive reasons provided by several prominent law professors for not including a provision in the statute that specifically ignores domicile. These reasons include the provision's likely unconstitutionality and, "of interest to the court" the fact that California "has no legitimate interest in protecting deceased non-California celebrities." *Id.* at 886.

¹²³ *Id.*

¹²⁴ N.Y. CIV. RIGHTS L. §§ 50, 51.

court at widening the protection to include the possibility of a "common law" right of publicity.¹²⁵ Theoretically, this "common law" right provided protection after death.¹²⁶ After the district courts twice found a common law right of publicity that was descendible, the Court of Appeals for the Second Circuit twice applied a choice of law analysis and determined that another state's right of publicity law controlled.¹²⁷ While the circuit court's holdings did not explicitly overrule the district court's finding of descendibility, it also did not substantiate that finding.¹²⁸ Not until almost twenty years later did New York's highest court provide any guidance as to the descendibility question, and then only by cryptically limiting the New York right of publicity to its statutory definition, which is limited to living persons.¹²⁹ Later, the New York Court of Appeals somewhat clarified its position on descendibility—by not passing on the question in *Southeast Bank v. Lawrence*.¹³⁰

Although embarrassing, the fact that the district courts reached the "wrong" answer in determining whether the right is descendible did not create confusion. Indeed, the confusion was there before the district courts passed on it. The confusion was there after the Second Circuit declined to rule on the question when it was no longer properly before the court. Actually, in *Factors v. Pro Arts*,¹³¹ the choice of law analysis

¹²⁵ *Groucho Marx Prod. v. Day and Night Co.*, 689 F.2d 317 (2d Cir. 1982); *Factors*, 579 F.2d 278. These two early choice of law analyses cases were examined contemporaneously in Cray, *supra* note 1. The facts of each case and procedural history are articulately covered in that work.

¹²⁶ New York's right of publicity is encompassed in the "right to privacy" statutes which apply only to living people. Therefore, in order to deem the right descendible, it had to be a "common law" right.

¹²⁷ *Factors*, 579 F.2d at 282-83; *Groucho*, 689 F.2d at 319.

¹²⁸ *Factors*, 579 F.2d at 283 n.8; *Groucho*, 689 F.2d at 319.

¹²⁹ *Stephano v. News Group Pub.*, 64 N.Y.2d 174, 183, 474 N.E.2d 580, 584, 485 N.Y.S.2d 220, 224 (1984).

¹³⁰ Applying Florida law, the law of Williams' domicile, the Court of Appeals determined that Tennessee Williams did not have an enforceable property right in his "right of publicity." The court then stated, "In light of this holding, we do not pass upon the question of whether a common-law descendible right of publicity exists in this State." *Southeast Bank, N.A. v. Lawrence*, 66 N.Y.2d 910, 912, 489 N.E.2d 744, 745, 498 N.Y.S.2d 775, 776 (1985).

¹³¹ 579 F.2d 278.

entered the picture rather late, at the appellate stage, as a means of trying to straighten out the confusion—not add to it.¹³²

In both cases, the Second Circuit looked primarily to domicile in determining what law to apply.¹³³ In *Factors*, Presley's Tennessee domicile was a strong argument that Tennessee law should apply.¹³⁴ Even if New York law controlled any aspect of the scope of that right, the Second Circuit held that in line with the Restatement on Conflict of Laws domicile should control whether the right actually exists.¹³⁵ Similarly, in *Groucho*, the district court had applied New York law. The Second Circuit, instead, applied the law of the Marx Brothers' domicile at death, California.¹³⁶

Examining the confusion on descendibility in New York provides more evidence of the danger inherent in interpretation of the state right of publicity statutes by federal courts. The danger of a federal district court interpreting the law of the state in which it sits on a question that has yet to reach the state courts is risky enough. *Factors*, however, was forced to spin the analysis out even further. Confronted with a recent Sixth Circuit ruling that the right of publicity was not descendible under Tennessee law, the court was forced to confront the question of how much persuasive authority another circuit's interpretation of state law should be given. The Tennessee state courts had yet to answer the question of descendibility. The Sixth Circuit extrapolated that when confronted with the question, the Tennessee courts would likely answer in the negative.¹³⁷ Ultimately, the *Factors* court went along with the Sixth Circuit's interpretation.

¹³² "Curiously, the choice of law issue had received no attention from the parties in this litigation. . . ." *Factors*, 652 F.2d at 280.

¹³³ *Id.* at 280-81.

¹³⁴ *Id.* at 281; *Groucho*, 689 F.2d at 318.

¹³⁵ *Factors*, 652 F.2d at 281.

¹³⁶ *Groucho*, 689 F.2d at 320.

¹³⁷ The Sixth Circuit panel had obviously never been to Graceland. In fact, when the question was finally before Tennessee's highest court, the rights of Memphis' favorite son were resuscitated. The Court held that the right was descendible, thus insuring that Elvis' licensees and, not to mention, his daughter Lisa Marie, will continue to benefit from the King's substantial celebrity good will. *The State of Tennessee ex. rel. The Elvis Presley Mem'l Found. v. Crowell*, 733 S.W.2d 89, 97-99 (1987); see also *supra* note 97.

While there was considerable confusion en route to the current established law, and, some would argue, there is still considerable room for clarification, the current wisdom is that New York does not recognize descendibility.¹³⁸ However, this has not stopped the courts from recognizing such a descendible right when the complainant is domiciled in a place where descendibility is recognized.¹³⁹ Also, the fact that the courts looked to domicile as a controlling factor in determining whether the right existed was not the cause of the confusion. The inherent cause, implicated in any interplay between the federal and state court systems on an issue of first impression, was uncertainty as to the state's substantive law. This uncertainty was not due to a weakness in the choice of law analyses performed, but the inherent weakness of a judicial system attempting to act as a legislator.

In fact, the choice of law analyses performed in *Factors* and *Groucho* were identical to those performed in the later state cases clarifying the New York position. As in the federal courts, the New York Court of Appeals looked to domicile to control the question of descendibility—or, in other words, the question of whether or not the right of publicity still existed.¹⁴⁰ The logic of *Factors* and *Groucho* was not questioned on this point. The defining decisions of *Stephano v. News Group Publications*¹⁴¹ and *Southeast Bank v. Lawrence*¹⁴² further articulated the New York position on first, the question of descendibility, and second, the choice of law analysis to be applied. *Stephano* clarified that “no common law right of publicity” exists in New York.¹⁴³ *Southeast Bank*, on the other hand, confirmed that New York looks to domicile to determine if personal property exists, and therefore to determine whether a right of publicity exists.¹⁴⁴

¹³⁸ *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586 (2d Cir. 1990).

¹³⁹ *Jim Henson Prod. v. Brady*, 867 F. Supp 175, 189 (S.D.N.Y. 1994) (holding that Connecticut would recognize a descendible right of publicity).

¹⁴⁰ *Southeast Bank, N.A. v Lawrence*, 66 N.Y.2d 910, 489 N.E.2d 744, 498 N.Y.S.2d 775 (1985).

¹⁴¹ 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984).

¹⁴² 66 N.Y.2d 910, 489 N.E.2d 744, 498 N.Y.S.2d 775 (1985).

¹⁴³ *Stephano*, 64 N.Y.2d at 185, 474 N.E.2d at 584, 498 N.Y.S.2d at 776.

¹⁴⁴ *Southeast Bank, N.A.*, 66 N.Y.2d at 912, 489 N.E.2d at 745, 498 N.Y.S.2d at 776.

Some might say that this argument proves too much, that if a domicile rule did not create the confusion, neither did it resolve it. While resolution and clear answers are desirable, perfect clarity is not always possible. A clear domicile-controlling rule in choice of law questions regarding the right of publicity provides a neutral principle necessary to answer the initial question of whether the right ever came into existence. The scope of the right will still be affected by the controlling state's approach to choice of law questions. If a state has chosen the "most significant relationship" approach, that approach can determine the correct law to apply in enforcing the right. Domicile would merely address the question of the right ever coming into being. The aim is not to answer every question, but merely to answer the first and arguably most important one.

There is case law sufficient to suggest that New York has already extended the domicile control as a threshold question to all right of publicity cases. In *Rogers v. Grimaldi*,¹⁴⁵ the Second Circuit sitting in diversity looked to the plaintiff's domicile to determine the existence of her right of publicity.¹⁴⁶ The state courts have not yet determined whether the bifurcated approach will be applied with success to living plaintiffs. However, there is no indication that the Second Circuit misinterpreted the direction in which the right of publicity is headed.

III. DOMICILE CONTROLS IMPOSED ANSWER OVERBREADTH CONCERNS RAISED BY UNTESTED EXPANSIVE RIGHT OF PUBLICITY STATUTES

In recent years, many state legislatures have enacted right of publicity statutes affording broad protection to recognizable personalities. For example, Indiana enacted §§ 1-20 of its property law, devoting an entire chapter of its

¹⁴⁵ 875 F.2d 994 (2d Cir. 1989).

¹⁴⁶ The New York Court of Appeals has clearly stated that "right of publicity" claims are governed by the substantive law of the plaintiff's domicile because rights of publicity constitute personality. *Southeast Bank*, 66 N.Y.2d at 912, 489 N.E.2d at 745, 498 N.Y.S.2d at 776 (1985). The Second Circuit later extrapolated this New York rule to include living plaintiffs as well. *Rogers, v. Grimaldi*, 875 F.2d at 1002 ("Rogers is an Oregon domiciliary, and thus Oregon law governs this claim.").

legislation to the creation of an expansive right of publicity. The statute clearly sets out in its first line that it applies as against any prohibited activity occurring in Indiana, regardless of the complainant's domicile.¹⁴⁷ Moreover, the statute applies to any personality living or deceased for fewer than one hundred years.¹⁴⁸ Further, the statute purports to dictate the right of publicity policies of other states. Title 32, article 13, chapter 1, section 16, clause 6 proclaims that the property rights in the right of publicity are descendible, regardless of whether the state administering the estate and property of an intestate deceased personality recognizes the property rights set forth under the chapter. Without a domicile control, the Indiana statute runs afoul of the Constitution in several ways. This Section uses hypotheticals to illustrate the manner in which the statute exceeds Indiana's legislative power.

Assume that a small feminist publishing company called Her Voice, Inc., incorporated and headquartered in New York, prints an advertisement for its services in *Ms. Magazine* depicting Susan B. Anthony. The caption reads, "She gave us our voice. Don't forget to use it." *Ms. Magazine's* national subscription base and distribution carries the advertisement over the Indiana state line. As it happens, under these facts both *Ms. Magazine* and Her Voice, Inc. have violated Indiana's right of publicity statute.

The advertisement fits the proscribed "commercial purpose" definition outlined in the statute, falling under none of its set forth exceptions.¹⁴⁹ Anthony is a "personality" as defined by the statute. Even if the advertisement depicted a sketch of her image, not a photograph, it would still run afoul of her Indiana right of publicity.¹⁵⁰ The advertisement does her this disservice in Indiana even though Ms. Anthony never authorized the use of her right of publicity during her lifetime.¹⁵¹

It is altogether possible that Her Voice, Inc. ran the advertisement without any research at all into Ms. Anthony's right of publicity. Often, publicity rights are stepped on when

¹⁴⁷ IND. CODE § 32-13-1-1(a) (Michie 1999).

¹⁴⁸ IND. CODE § 32-13-1-8 (Michie 1999).

¹⁴⁹ IND. CODE § 32-13(1-20) (Michie 1999).

¹⁵⁰ *Id.*

¹⁵¹ See *supra* note 110.

an organization simply assumes that a personality has fallen into the public domain. However, assume that Her Voice, Inc. has a competent in-house counsel who conducted some research prior to the advertisement's publication. That research would have revealed that, at her death, Anthony was domiciled in New York. Further, the research would have also revealed that New York does not recognize a descendible right of publicity. A rudimentary analysis of the choice of law issues involved would lead a practitioner to believe that Anthony's rights of publicity in the advertisement would be controlled by New York law, considering all of the factors taking place there.

In fact, the advertisement may not raise an eyebrow in any other jurisdiction. However, Indiana would permit an action under its expansive statute. Susan B. Anthony died in 1906, bringing her well within Indiana's one-hundred-year umbrella. Of course, whether Ms. Anthony ever traveled through Indiana is irrelevant, since the statute's first principle is that it should apply regardless of domicile. Assuming someone turns up who can assert a claim under its statutory guidelines, Indiana's statute allows full usurpation of traditional choice of law guidelines in determining whether the right of publicity exists.

First, assume Anthony died intestate. Under traditional choice of law rules, her property would be divided according to New York law—the law of her domicile at death. Since New York does not recognize a descendible right of publicity, the right of publicity would not pass to her heirs. However, Indiana solves that problem for the prospective litigant. Indiana Code § 32-13-1-16(6) recognizes the right of publicity even if New York, the state administering Anthony's estate and property, does not. Therefore, a distant relative could suddenly come into a windfall she never expected under the New York legislative scheme.

Indiana does not have the power to legislate rights of publicity into existence in New York regardless of New York law. The statute, on the one hand, concedes that New York is the state that controls the administration of Anthony's property, including her right of publicity. On the other hand, it asserts that Indiana has the power to determine that a right of publicity exists even when the state controlling the intestate succession of that personalty does not recognize the

descendible right. Surely this violates New York's legislative power. If New York does not wish to recognize a descendible right of publicity, as it has clearly determined on numerous occasions, Indiana, a state with little or no contact with this cause of action, cannot give rise to one.¹⁵²

Further, the fact that Indiana's expansive statute bars the entry of this advertisement across its state lines has dormant Copyright Clause implications.¹⁵³ Judge Alex Kozinski of the Ninth Circuit foresaw such dormant Copyright Clause implications in broad rights of publicity in his dissent in *White v. Samsung Electronics*:

Under the dormant Copyright Clause, state intellectual property laws can stand only so long as they don't "prejudice the interests of other States." *Goldstein v. California*, 412 U.S. 546, 558, 37 L. Ed. 2d 163, 93 S. Ct. 2303 (1973). A state law criminalizing record piracy, for instance, is permissible because citizens of other states would "remain free to copy within their borders those works which may be protected elsewhere." *Id.* But the right of publicity isn't geographically limited. A right of publicity created by one state applies to conduct everywhere, so long as it involves a celebrity domiciled in that state. If a Wyoming resident creates an ad that features a California domiciliary's name or likeness, he'll be subject to California right of publicity law even if he's careful to keep the ad from being shown in California. See *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1540 (11th Cir. 1983); *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317, 320 (2d Cir. 1982); see also *Factors Etc. v. Pro Arts*, 652 F.2d 278, 281 (2d Cir. 1981). The broader and more ill-defined one state's right of publicity, the more it interferes with the legitimate interests of other states.¹⁵⁴

Indiana does not have the power to prejudice the interests of other states with its expansive right of publicity statute.¹⁵⁵ As the statute stands now, the burden on other states' interests and citizens is direct and significant.¹⁵⁶ For

¹⁵² The contact required in order to provide a forum for a cause of action is expansive under the Constitution. See *supra* note 72.

¹⁵³ IND. CODE § 32-13-1 (8,9) (Michie 1999).

¹⁵⁴ *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1518-19 (9th Cir. 1993). Judge Kozinski considered the possibility that a broad right of publicity could run afoul of other state's interests even if it contained, as he assumes it does, an internal domicile control. Surely a broad statute, such as Indiana's, which expressly rejects such a control, is even more of a problem. *Id.*

¹⁵⁵ *Goldstein v. California*, 412 U.S. 546, 558 (1973).

¹⁵⁶ In an argument that is beyond the scope of this Note, it should be noted

example, if this statute was allowed to stand in this scenario, it would provide for the impoundment and destruction of this offending advertisement. *Ms. Magazine* would be forced to reprint its issue solely for Indiana's consumption in order not to run afoul of the statute. In a national market, such state line scare tactics are egregious. The chilling effect such a statute could have on future shipments of magazines is also daunting. Publications would be forced to either comply with the requirements of the most expansive right of publicity statutes or risk destruction of product. A rational magazine publisher would probably decide simply not to publish "borderline" advertisements.¹⁵⁷ The confusion and high costs inherent in tracking down estate representatives would preclude the research, and likely a simple policy of advertisement rejection would supplant the editorial process.

The Indiana statute is, of course, not limited to advertisements. Tee shirts, posters, postcards, ashtrays, pencils, shot glasses—any product that depicts an aspect of persona is covered under the statute's "commercial purpose" definition.¹⁵⁸ This provision, combined with the one hundred year term of protection means that any product bearing the image of a personality such as Mark Twain, Queen Victoria, Grover Cleveland, or even Leo Tolstoy¹⁵⁹ could fall under Indiana's protection. A distant relative, unable to assert a cause of action in almost any other forum, could travel from the Steppes of Russia to Indiana and assert a right of publicity claim against dreaded unlicensed Tolstoy tee shirts.

that the premier licensor of descendible rights of publicity is headquartered in Indianapolis. See *supra* note 76. Certainly, chapter thirteen of Indiana's property law is a tremendous legal windfall for CMG and its clients. The local interest of protecting the rights of publicity of those clients—the foremost personalities of the twentieth century according to CMG, is significant. But significant enough to require the adherence to Indiana's expansive law by every publisher or other producer of material that may constitute a "commercial purpose" under the broad statute?

¹⁵⁷ See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 11.4 (1999) ("[M]ost businesses will not carve up their territorial market on the basis of a lawyer's advice as to the law in some states. They must do business nationwide or not at all.").

¹⁵⁸ In today's market, the types of products licensed depicting images of recognizable personalities is virtually limitless. Some of the more absurd examples include stopwatches licensed by supermodel Kathy Ireland and Malcolm X "fisherman's hats."

¹⁵⁹ Edward H. Rosenthal, *Selling Princess Diana: Legal Limits on Celebrity Memorabilia*, 4 *INTELLECTUAL PROPERTY STRATEGIST* 2, 3 (1977).

Unlicensed Tolstoy tee shirts or posters could be impounded and destroyed at Indiana's borders.¹⁶⁰ Considering the vast protection afforded by the statute to personalities who may not assert a right of publicity anywhere else, and the expansive product range covered in the "commercial purpose" definition, the burden on interstate commerce is significant.

Also, as many commentators have indicated, such a burden forces producers—who must "compete nationally or not at all"—to comply with the regulation of the most restrictive state. In other words, Indiana is essentially imposing nationwide restrictions on production because the rational manufacturer is unlikely to alter distribution based on individual differences in state law.¹⁶¹ The simpler answer is to comply with the most expansive statute—in this case, Indiana. Therefore, Indiana's legislature is not only legislating rights into existence in contradiction with other states' legislatures—it has also preempted Congress in this regard by setting the nationwide standard for persona-depicting products.

The most troubling constitutional concern with expansive statutes like Indiana's is the conflict with the publisher's or producer's First Amendment protection.¹⁶² The chilling effect likely to occur after the first action is brought under Indiana's statute will affect all future invocations of celebrity. Take the example of a greeting card company in Seattle, Washington whose designer creates a humorous card depicting Susan B. Anthony in a leather corset with a whip.¹⁶³ While such a card would be fair game in most of the fifty states, because Ms. Anthony died domiciled in New York, a state that does not recognize the descendible right of publicity, it would be banned in Indiana. Would the publisher think twice before permitting such a card to hit the stands? Possibly. While

¹⁶⁰ The grand-niece of Tolstoy would be wise to seek the assistance of CMG in Indianapolis. CMG represents the interests of other writers, entertainers, musicians and historical figures including Malcom X, Amelia Earheart, Jack Kerouac, Babe Ruth, Frank Lloyd Wright, and Oscar Wilde. See <http://www.cmgww.com>.

¹⁶¹ MCCARTHY, *supra* note 2, at § 6:58.

¹⁶² The considerable scholarly commentary on the impact of the First Amendment on the right of publicity is beyond the scope of this note. See *supra* note 27.

¹⁶³ Thanks to Brooklyn Law School Professor Michael Madow for the subversive greeting card example. Not, of course, specifically involving Ms. Anthony. I'm afraid that image is all mine.

the artistic merit and social value of the greeting card are debatable, such factors are not normally considered when determining whether a speaker has a First Amendment right to speak. Here, what could be construed by some as a subversive statement about gender roles has been silenced.¹⁶⁴

In short, Indiana's statute is constitutionally problematic for three reasons. First, it violates legislative due process by overriding the policy of the state controlling the succession of intestate property. Second, it imposes heavy burdens on interstate commerce and copyright regulations with its expansiveness. Third, the First Amendment concerns surrounding the right of publicity are magnified by Indiana's expansive statute. However, an amendment allowing domicile to control the statute's application may save it from inevitable judicial correction.¹⁶⁵

If Indiana required an element of domicile to control choice of law application, many of the constitutional concerns would be ameliorated. The Susan B. Anthony hypothetical above would not implicate Indiana's statute. Traditional choice of law principles would allow the beleaguered general counsel of Her Voice, Inc. some sort of predictability in terms of determining whether Anthony's right of publicity survived her. The greater predictability created by adding a domicile element would also provide protection against the interstate commerce burden. Publishers would have right and wrong answers about the right of publicity, at least in terms of whether or not it exists. This could also aid in thawing the chilling effect on those same publisher's and printer's First Amendment rights.

IV. EXTENDING THE DOMICILE RULE

Thus far, this Note has demonstrated that domicile controls the rule regarding the descendibility of the right of publicity.¹⁶⁶ Also, Part III demonstrated the problems inherent in a statute that ignores domicile as a controlling factor. These same problems exist for living plaintiffs, though to a lesser

¹⁶⁴ While Ms. Anthony may object to her costume in the depiction, surely she would not object to subversive gender modeling.

¹⁶⁵ Indiana should take note—California's § 990 also provided protection regardless of domicile only to be judicially corrected. See discussion in *supra* Part II.A.

¹⁶⁶ See *supra* Part II.A and II.B.

degree, when domicile does not figure into the analysis of what law applies. Examining the garden-variety right of publicity action shows that there is no viable reason why the domicile rule should not control the threshold questions in right of publicity choice of law analysis for living plaintiffs.

Arguments against employing domicile controls to govern the threshold question of whether the right of publicity exists include the idea that as an intangible property right, the right of publicity has no particular "situs."¹⁶⁷ In response to the suggestion that New York has implemented the bifurcated approach of domicile to control the right's existence, J. Thomas McCarthy urges that such a choice of law analysis should be limited to only descendibility questions.¹⁶⁸ Further, some commentators urge that domicile is no longer a valid consideration in light of the mobility in today's modern society and the rise of intangible property.¹⁶⁹ In fact, none of these arguments are sustainable in light of the need for predictability in determining right of publicity cases.¹⁷⁰

True, the right of publicity, if a property right at all, is definitely intangible. Nonetheless, this does not necessarily render it without a situs for choice of law purposes. When there is some document that expresses aspects of an intangible property right, like a stock certificate, the situs of that document is generally the situs of the right.¹⁷¹ The former rule

¹⁶⁷ Cray, *supra* note 1, at 654.

¹⁶⁸ MCCARTHY, *supra* note 2, at § 11:17.

¹⁶⁹ Cray, *supra* note 1, at 654.

[T]he doctrine of domicile has adequately served as a practical working rule in the simpler societies out of which it arose. More particularly, its difficulties of application were circumscribed when wealth predominantly consisted of realty and tangibles, and when restricted modes of transportation and communication conditioned fixity of residence. In view of the enormous extent to which intangibles now constitute wealth, and the increasing mobility of men, . . . the necessity of a single headquarters for all legal purposes . . . tends to be a less and less useful fiction. In the setting of modern circumstances, the inflexible doctrine of domicile—one man, one home—is in danger of becoming a social anachronism.

Texas v. Florida, 306 U.S. 398, 429 (1939) (Frankfurter, J., dissenting).

¹⁷⁰ Though some states still regard the right as sounding in tort, its proponents urge that it is in fact a property right. As such, stability and predictability are essential. See discussion of property choice of law rules in Part I.B, *supra*.

¹⁷¹ The problems in determining the "situs" of intangible property have specifically been addressed primarily in issues of in rem or quasi in rem jurisdiction. In

of the situs of a debt for jurisdictional purposes was that the debt followed the debtor. However, later case law determined that jurisdiction over the debt, without more, did not constitute jurisdiction over the debtor. This has caused the old common law idea of intangible property following its owner to fall into some disrepute.

In the case of a right of publicity, the right is more like a stock certificate than a debt or other chose in action without a situs. The piece of paper in the example of the stock certificate serves as evidence of the intangible's existence. In much the same way, the personality herself is adequate evidence of the right's existence. The right of publicity is evidenced by the aspects of the personality's demeanor, likeness, and voice that have been deemed to be commercially valuable. These aspects literally travel with the personality. She herself is living proof, so to speak, that she is in possession of these qualities. The commercial use to which her likeness has been put is presumptive evidence of its value. In this way, the human being asserting the right is herself the situs—much like the stock certificate or other document establishes the existence of an intangible interest in a corporation. The individual herself is her own best evidence.

This is decidedly unlike a chose in action or a debt, the situs of which is no longer considered to follow the debtor or the assertor of the action for jurisdictional questions.¹⁷² Limiting the question to choice of law, rendering the person and her right of publicity inseparable,¹⁷³ is an utterly

such questions, where the document in question is the embodiment of such intangible rights, such as a negotiable instrument or a stock certificate, the court has been held to have jurisdiction over the intangible and thus the situs is inseparable from the document. RESTATEMENT (SECOND) CONFLICT OF LAWS § 363 (1988); *Cities Serv. Co. v. McGrath*, 342 U.S. 330 (1955). Whereas the principle of the document's location determining situs has eroded in jurisdictional questions, *Shaffer v. Heitner*, 443 U.S. 186 (1977), there is no reason to suspect it is not a viable situs determination for choice of law purposes.

¹⁷² In fact, the circumstances under which that principle has eroded are jurisdictional questions. See *supra*, note 104. In *Harris v. Balk*, 198 U.S. 215 (1905) it was deemed that jurisdiction of a debt no longer was sufficient to give the court personal jurisdiction over the debtor. This is the origination of the idea that the debt and the debtor are no longer inseparable. Here, no one would seriously assert that, as in *Harris v. Balk*, jurisdiction over the right of publicity necessarily gives personal jurisdiction over the personality herself.

¹⁷³ Presuming the right is not assigned, of course. In the case of an assignment, the choice of law principals can be carefully set out in the assignment

reasonable touchstone. If domicile is sufficient for the larger and more complicated question of jurisdiction, as it always is,¹⁷⁴ it should similarly be sufficient as a defining factor as to the existence of a right of publicity.

The *Cairns I* court easily dispensed with the Estate's allegations that California was the situs of Diana's right of publicity. First, the Estate sought to bring the intangible property within California cases dealing only with jurisdictional questions.¹⁷⁵ The *Cairns I* court wisely distinguished these cases, concerning jurisdiction over intangible property, from those pertaining to whether the intangible property even existed in the first place.¹⁷⁶ Second, the Estate attempted to establish California as the situs on the grounds that the registration of the claim to assert the right was filed there.¹⁷⁷ The *Cairns I* court countered that the registration was not a manifestation of the right; it was, instead, a notice of the estate's intention to prosecute others wishing to exploit Diana's right of publicity.¹⁷⁸ Finally, in a bit of circular reasoning, the Estate alleged that Diana's right of publicity had risen to a "chose in action," located in California because the offending products had been distributed there.¹⁷⁹ There can be no chose in action if the right itself never came into existence,¹⁸⁰ it is necessary to answer that threshold question before a chose in action can be deemed to exist.¹⁸¹ Therefore, in line with the principles of § 946, domicile was looked to as the most rational law governing the property.¹⁸²

itself. Then, questions of choice of law would be determined by contracts principles. Most often, courts will defer to the expectations of the parties and the choice of law expressed in the contract, if there is one. Courts would likely deem parties in such a case to have expected that their assignment was valid, and would likely find that the right of publicity existed.

¹⁷⁴ Personal jurisdiction is always assertable over a person domiciled in the forum seeking to assert jurisdiction. Domicile is *prima facie* sufficient minimum contacts. *Milliken v. Meyer*, 311 U.S. 457 (1940).

¹⁷⁵ *Cairns I*, 24 F. Supp. 2d at 1026-27.

¹⁷⁶ *Id.* at 1026-27.

¹⁷⁷ *Id.* at 1027.

¹⁷⁸ *Id.* at 1027-28.

¹⁷⁹ *Cairns I*, 24 F. Supp. 2d at 1028.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

In a parenthetical footnote, McCarthy urges that the New York extension of the domicile control to living plaintiffs is an "overgeneralization of a narrow rule."¹⁸³ At the same time, McCarthy concedes that a domicile controlling rule would lead to a high degree of predictability.¹⁸⁴ Further, he urges that domicile shopping is not a legitimate concern.¹⁸⁵ McCarthy argues, however, that a "fairer" rule is the "most significant relationship" test advanced by the Restatement Second of Conflict of Laws.¹⁸⁶ The "narrow" rule of domicile controlling descendibility is, in fact, easily applied to living plaintiffs without necessarily "overgeneralizing" or leading to unfair results. A person's domicile is a substantial factor in any choice of law analysis.¹⁸⁷ The initial question of whether the right of publicity ever came into existence is the most essential element where predictability is concerned.¹⁸⁸ The scope of the right, once it is determined to exist, can easily be determined by an interest analysis, as McCarthy proposes.

For example, say that a plaintiff domiciled in New York brings an action in another state which does not recognize the right of publicity but which follows a Currie-type governmental interest analysis. Under a domicile control rule, the forum state would first look to the law of plaintiff's domicile, New York, to determine whether that right exists. Finding that the New York statute does grant the right of protection to its domiciliaries who are still alive,¹⁸⁹ that forum state could then engage in the more thorough choice of law analysis to determine the scope of that right. Likely, the New York statute would control since New York has an interest in protecting the rights of its domiciliaries. The forum in question

¹⁸³ MCCARTHY, *supra* note 2, at § 11.15 n.11.

¹⁸⁴ *Id.* at § 11:18.

¹⁸⁵ *Id.*

¹⁸⁶ The multifaceted functional test of the Second Restatement of Conflict of Law [sic] offers an unpredictable approach, but one that is fairer than a rigid rule resting solely upon domicile. . . . If the state of a plaintiff's domicile does not recognize the rights of publicity or privacy and the state (or states) of infringement does, the court can look to the policy behind the one state's recognition and the other's rejection. If the policy of the rejecting state will not be offended by applying the law of the recognition state, then that seems a fair result.

Id.

¹⁸⁷ See discussion of choice of law theories, *supra* Part I.B.

¹⁸⁸ *Id.*

¹⁸⁹ See discussion of New York right of publicity, *supra* Part II.B.

likely does not have an interest in denying plaintiff her right of publicity. Therefore, the action is an example of Currie's "false conflict" situation, where generally the law of the state with an interest is applied.¹⁹⁰

At the same time, if a plaintiff whose domicile does not recognize the right of publicity attempted to "shop" for a forum that did, the domicile rule would preclude this action. As a preliminary matter, the forum would determine that plaintiff had no such right, nor any expectation of any such right as determined by her domicile and therefore could not seek to take advantage of a forum that did. In this manner, the domicile rule addresses the troubling question of forum shopping that many conflict rules are in place to discourage.¹⁹¹ The interest analysis is precluded, but wisely. An interest analysis that gave rise to a right that plaintiff had no grounds to expect is a kind of result-oriented judicial activism, not the "fairer" result McCarthy suggests.

Another argument against the domicile control rule is that the concept of domicile has lost its power in modern society. True, it is possible in the twentieth century to be so mobile that one is, for practical purposes, stateless.¹⁹² However, there is generally one place that is the center of at least one's business activities. Over the past twenty years, it has become more and more fashionable for celebrities to incorporate companies to which they assign their rights of publicity. While incorporation does afford them the opportunity to choose a

¹⁹⁰ Similarly, if the same state used a "most significant relationship" analysis, New York law would also control the first question of whether the right exists. That being determined, the various factors articulated in Section 6 of the Restatement could be addressed to determine what law applies to the right. See discussion of choice of law theories, *supra* Part I.B.

¹⁹¹ Some would argue that forum shopping is encouraged by the implementation of a domicile rule. Potential plaintiffs could seek to domicile themselves in a forum receptive to the right of publicity. However, as McCarthy points out, people rarely determine questions of domicile based on what law applies there. While it is a sort of "chicken or egg" question, it is, however, likely that the law of one's domicile is the law one expects to be applied in an action. If people chose where to live based on the expansiveness of right of publicity statutes, one can expect that the streets of French Lick, Indiana will soon resemble the red carpet in front of the Dorothy Chandler Pavilion on Oscar night.

¹⁹² *Rostropovich v. Koch Int'l Corp.* 94 Civ. 2674, 1995 U.S. Dist. LEXIS 2785 (S.D.N.Y. 1995); see also *Matthews v. ABC Television, Inc.*, No. 88 Civ. 6031, 1989 U.S. Dist. LEXIS 10694, *9 (Sept. 11, 1989) (lamenting the chore of divining the right of publicity law of Kenya.).

forum for their rights to be developed within, celebrities who have taken steps to protect their rights should be afforded that extra protection. For the purposes of determining domicile in terms of right of publicity questions, the company's seat of incorporation would control.¹⁹³ While some would argue that this practice leads to exactly the kind of forum shopping that the domicile rule is in place to control, in fact this is not the case. When a personality has reached the kind of prominence where an assignment of rights to a corporation is economically sound, such an assignment serves as adequate notice that the personality seeks to exploit those rights. Rarely does someone who does not intend to exploit those rights, assign them.

The domicile rule is concerned more with plaintiffs asserting rights "after the fact." Simply, it does not make sense to permit forum shopping to protect rights the plaintiff did not expect to have. Forum shopping aside, it has always been the case that economic decisions are based on factors such as simplicity and ease of doing business. People intending to actively exploit their rights of publicity have always sought amenable for a, domicile rule or no domicile rule.

Instead of a domicile control, commentators have argued that another factor more closely related to the infringement should control. For example, some commentators have urged that "the place of greatest infringement" is the deciding factor.¹⁹⁴ Still others have argued that "the place of greatest exploitation" is the most logical rule to follow.¹⁹⁵ In fact, neither of these schemes is effective in a national market to address the most critical issue in right of publicity actions: predictability. First of all, in a national distribution market it is basically impossible to determine where the "place of greatest infringement" is located. It is equally impossible to determine where the personality has focused the exploitation of those rights.

¹⁹³ The domicile of a corporation is generally the place of incorporation and the location of the business headquarters.

¹⁹⁴ Cray, *supra* note 1, at 641; see also MCCARTHY, *supra* note 2, at § 11.3[D][2].

¹⁹⁵ Bi-Rite Enter. Inc. v. Bruce Miner Poster Co., 616 F. Supp. 71, 74 (D. Mass. 1984).

CONCLUSION

The domicile control rule provides an essential, easily definable touchstone for deciding initial questions of whether the right of publicity has come into existence. As a stop-gap measure, it is necessary to establish a uniform means of determining such questions for the sake of predictability. Until more states have defined the right, or, alternatively, Congress has set forth a unifying statute, the New York courts have implemented the wisest analytical structure. In addition, the domicile control should be included in any right of publicity legislation to avoid the constitutional pitfalls of overbroad statutes. The bifurcated analysis of domicile first, interests second, leads to smooth, predictable initial answers and should be implemented by more courts in deciding choice of law problems as to right of publicity questions.

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