

## NOTE

### The Right to Publicity After Death: Postmortem Personality Rights in Washington in the Wake of *Experience Hendrix v. HendrixLicensing.com*

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“It’s funny how most people love the dead. Once you’re dead, you’re made for life.”<sup>1</sup>

#### I. INTRODUCTION

People have always been fascinated by fame. Many are drawn to celebrities, and more importantly, the money that often comes along with fame.<sup>2</sup> Celebrities often come from humble beginnings and work for many years before they attain any level of notoriety or earn any significant income. Accordingly, as the level of celebrity (and wealth) increases, so does the need for protection.

Celebrities and their capacity to earn money from their likeness are protected under the right of publicity or personality. The right of publicity or personality refers to “the inherent right of every human being to control the commercial use of his or her identity.”<sup>3</sup> As there is no federally protected right of publicity, each state has created its own protections for this intellectual property right.<sup>4</sup> Generally, the right of publicity pro-

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1. Jimi Hendrix; see JERRY HOPKINS, *THE JIMI HENDRIX EXPERIENCE* 9 (1993).

2. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 148–49 (1993).

3. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2011).

4. *Id.*

vides celebrities with legal protection in the form of a tort action, and allows them to retain control over the commercial use of their identity or persona.<sup>5</sup> Under right of publicity doctrines, celebrities can bring an unfair competition claim against any individual who infringes this important intellectual property right.<sup>6</sup>

While the states are fairly consistent in protecting the rights of living individuals, the level of protection for deceased celebrities varies among the states.<sup>7</sup> Some states allow the right to extend beyond death, while others refuse to recognize a postmortem right of publicity.<sup>8</sup> Even among states that do recognize a postmortem right of publicity, the right is protected to varying degrees, with some states providing explicit statutory protections and others providing only common law protections.<sup>9</sup>

Given the inconsistencies among the states, the continuing right to publicity after death has been the subject of much litigation over the last few years, especially in light of the fact that many celebrities continue to earn vast amounts of money even after death.<sup>10</sup> The most notable cases involve well-known celebrities such as Marilyn Monroe, Elvis Presley, and Jimi Hendrix.<sup>11</sup> In each case, the court refused to extend the right of publicity past death, denying intellectual property protections to each celebrity's estate.<sup>12</sup>

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5. *Id.* § 1:3. "Persona" includes names, nicknames, voice, pictures, and performing style. *Id.* § 4:46.

6. *Id.* § 1:3; see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992).

7. John W. Branch, David H. Green & Karl A. Hefter, *No Respect for the Dead: Protecting Deceased Celebrity Personality Rights*, 76 PAT. TRADEMARK & COPYRIGHT J. 678 (2008); see also *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 326 nn.12–14 (6th Cir. 2001) (noting that sixteen states recognize a postmortem right of publicity under statute or common law, while two states explicitly refuse to recognize a postmortem right of publicity).

8. See *Herman Miller, Inc.*, 270 F.3d at 326 nn.12–14.

9. See *id.*

10. See Kathy Heller, *Deciding Who Cashes in on the Deceased Celebrity Business*, 11 CHAP. L. REV. 545, 545 (2008) ("According to the annual list published by Forbes.com, the thirteen 'Top Earning Dead Celebrities' grossed a combined total of \$232 million in twelve months ending October, 2007. The Forbes list is topped by the estate of Elvis Presley, which generated \$49 million, and includes familiar names like Albert Einstein and John Lennon, as well as relative newcomers, such as the rapper, Tupac Shakur, and the 'Godfather of Soul,' James Brown. According to industry estimates, 'after Mr. Presley, Ms. Monroe and James Dean are the most valuable dead-celebrity brands.'").

11. See, e.g., *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980); *Experience Hendrix, L.L.C. v. Elec. Hendrix, L.L.C.*, No. C07-0338 TSZ, 2008 WL 3243896 (W.D. Wash. Aug. 7, 2008); *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007).

12. See *Memphis Dev. Found.*, 616 F.2d at 959 ("[H]eretofore, the law has always thought that leaving a good name to one's children is sufficient reward in itself for the individual, famous or not. Commercialization of this virtue after death in the hands of heirs is contrary to our legal tradition and somehow seems contrary to the moral presuppositions of our culture."); *Shaw Family Archives*, 486 F. Supp. 2d at 314 ("Thus, at the time of her death in 1962 Ms. Monroe did not have any post-

Notably, litigation involving Jimi Hendrix's personality rights led to the 2008 passage of the Washington Personality Rights Act (WPRA), which expanded the existing personality rights statutes to ensure that the rights were protected after death.<sup>13</sup> As a result, Washington State was regarded as having the strongest statutory protection of personality rights for deceased individuals.<sup>14</sup> But in February 2011, the District Court for the Western District of Washington held that the amendments to the Washington Personality Rights Act were unconstitutional.<sup>15</sup> In his opinion, Judge Thomas S. Zilly reasoned that the WPRA violated the Due Process, Full Faith and Credit, and dormant Commerce Clauses of the U.S. Constitution.<sup>16</sup>

This Comment explores the development of publicity rights and states' methods of protecting, or their failure to protect, the rights of deceased celebrities. Part II provides background on celebrity rights in the United States and examines the evolution of rights in Washington State. Part III examines the district court's decision in *Experience Hendrix, L.L.C., v. HendrixLicensing.com, Ltd.*<sup>17</sup> Part IV offers suggestions for ways in which the Personality Rights Act can be amended to ensure the continuation of publicity rights after death without violating the Constitution. Part V provides a summary and conclusion.

## II. BACKGROUND: THE RIGHT TO PUBLICITY

The right of publicity ensures that an individual has the right to control the commercial exploitation of his or her name, picture, and likeness in connection with the sale, advertisement, or solicitation of products and merchandise.<sup>18</sup> Courts originally recognized only a general common law right of privacy, which was extended to cover the use of a person's identity.<sup>19</sup> In 1953, Judge Jerome Frank introduced the idea of a "right of publicity" in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>20</sup> By 2000, many states had provided statutory protections for the right of publicity.<sup>21</sup>

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mortem right of publicity under the law of any relevant state. As a result, any publicity rights she enjoyed during her lifetime were extinguished at her death by operation of law.").

13. See H.B. Rep. 2727, 60th Leg., Reg. Sess. (Wash. 2008).

14. Branch, Green, & Hefter, *supra* note 7, at 1.

15. *Experience Hendrix, L.L.C., v. HendrixLicensing.com, Ltd.*, 766 F. Supp. 2d 1122, 1140, 1142 (W.D. Wash. 2011).

16. *Experience Hendrix*, 766 F. Supp. 2d at 1140, 1142.

17. *Id.* at 1122.

18. MCCARTHY, *supra* note 3, § 1:3.

19. *Id.* § 1:4.

20. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) ("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

*A. Discrepancies in Right of Publicity Protections Among the States*

Eleven states provide only a common law right of publicity, including Alabama, Arizona, Connecticut, Georgia, Hawaii, Maine, Michigan, Minnesota, Missouri, New Jersey, Oregon, and South Carolina.<sup>22</sup> Nineteen other states have enacted statutory measures to further protect the right of publicity, most notably Washington, California, Tennessee, and Indiana.<sup>23</sup> These states are notable because the statutory measures were enacted mostly for the protection of celebrities who live or lived in each state. For example, California's publicity rights statute was enacted because "California has an overriding interest in safeguarding its citizens from the diminution in value of their names and likenesses, enhanced by California's status as the center of the entertainment industry."<sup>24</sup> Similarly, Tennessee enacted its Personal Rights Protection Act of 1984 in response to litigation surrounding the estate of Elvis Presley.<sup>25</sup>

Even among the states providing statutory protections, there is much variation in these laws. Some statutes were created in response to specific cases in which courts refused to recognize a right of publicity or privacy.<sup>26</sup> Others were created "because other states had recently done so and it seemed the sensible thing to do."<sup>27</sup> Some statutes protect only a person's name or likeness<sup>28</sup> while others offer protection for a person's name, likeness, photograph, and voice.<sup>29</sup>

One of the main differences in each state's statutory approach is the way in which the state protects (or declines to protect) postmortem publicity rights. For example, California and Illinois both provide express postmortem statutory rights. While California offers protection for 70

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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, 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."); see also MCCARTHY, *supra* note 3, § 1:4.

21. MCCARTHY, *supra* note 3, § 1:4.

22. Brittany A. Adkins, Comment, *Crying out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 501 (2010).

23. *Id.*

24. MCCARTHY, *supra* note 3, § 6:22 (quoting *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1202 (9th Cir. 1988)).

25. *Id.* § 6:16.

26. *Id.* § 6:6.

27. *Id.*

28. These states include, for example, Massachusetts, Nebraska, and Kentucky. MCCARTHY, *supra* note 3, § 6:8.

29. Examples of states offering at least one of these additional protections include California, Indiana, and Nevada. *Id.*

years after death, Illinois protects these rights for only 50 years.<sup>30</sup> In contrast, states like Massachusetts and Rhode Island do not provide any explicit protection for postmortem rights in their statutes.<sup>31</sup>

The conflicting treatment of postmortem publicity rights is due largely to the way each state views the right to publicity. Some states treat the right as a property right while others treat the right as a privacy right. As such, the differences in privacy laws and property laws lead to different outcomes in each state.

### 1. Personality as a Privacy Right

The concept of a “right of publicity” has its origins in privacy law.<sup>32</sup> Although the concept of privacy can have many different meanings, for the purposes of understanding rights of publicity, the following definition articulated by the U.S. Supreme Court applies:

[B]oth the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.<sup>33</sup>

The Supreme Court uses a broad definition of privacy, encompassing the right to control the use of information about one’s private self.<sup>34</sup> This broad definition is especially important to celebrities because they stand to lose or gain income depending on the level of control they have over their publicity rights.<sup>35</sup>

Courts have historically focused on the “indignity or mental trauma” associated with the nonpermissive commercial use of someone’s identity.<sup>36</sup> Many well-known celebrities brought suit for damages they suffered from the commercial use of their identity; however, these were usually monetary rather than psychological damages.<sup>37</sup> Thus, the right of publicity developed into a commercial tort under unfair competition law.<sup>38</sup> Several states (such as New York, Utah, and Wisconsin) classify

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30. *Id.*

31. *Id.*

32. *Id.* § 1:7.

33. *Id.* § 1:6 (quoting *U.S. Dept. of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 751 (1989)).

34. MCCARTHY, *supra* note 3, § 1:6.

35. *See generally* Madow, *supra* note 2.

36. MCCARTHY, *supra* note 3, § 1:7.

37. *Id.*

38. *Id.*

the right of publicity as a privacy right.<sup>39</sup> As such, the right is entirely personal and cannot survive after the individual dies.<sup>40</sup> It belongs only to a living person and cannot be transferred to heirs.<sup>41</sup>

In other states (such as Washington and Indiana), the right of publicity is recognized as a property right that encompasses the same rights and attributes as tangible property.<sup>42</sup>

## 2. Personality as a Property Right

Like personal property, the personality right “can be possessed and controlled to the exclusion of others. Its economic benefits can be realized and enjoyed. It can also be the subject of a contract and can be assigned to others.”<sup>43</sup> As such, the right does not terminate at an individual’s death and can be transferred to others, including heirs and entities.<sup>44</sup>

Among states that recognize the right of publicity as a property right, most find jurisdiction in the celebrity’s domicile. This is due to the fact that courts have held that the economic harm that a celebrity suffers from the unauthorized use of his identity occurs in the state where the celebrity lives and where he or she headquarters his or her business.<sup>45</sup> Furthermore, the accepted means for managing the estate of a deceased individual is his or her domicile.<sup>46</sup> Thus, when determining whether the right of publicity is included in the estate of a deceased celebrity, the traditional rule is to look to the law of the state where the individual is domiciled at the time of death.<sup>47</sup> Courts generally apply the law of the state in which the individual was domiciled to the entire estate to avoid creating conflicts by applying different states’ laws to each piece of property located in that state.<sup>48</sup> Establishing the domicile lends uniformity to questions of property law.<sup>49</sup> The question of property distribution after death is determined by the location of the property at issue.<sup>50</sup> As the “property”

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39. *Id.* § 6:8.

40. Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 270 (2007).

41. Robert C. Cumbow, *Protecting Your Image: Questioning Publicity Rights Law*, WORLD TRADEMARK REV. Aug.–Sept. 2011, at 84.

42. *State ex rel. Elvis Presley Int’l Mem’l Found. v. Cromwell*, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987).

43. *Id.*

44. Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1227 (1986).

45. MCCARTHY, *supra* note 3, § 11:16.

46. *Id.* § 11:17.

47. *Id.*

48. *Id.*

49. Melinda R. Eades, Note, *Choice of Law and the Right of Publicity: Domicile as an Essential First Step*, 66 BROOKLYN L. REV. 1301, 1309 (2001).

50. *Id.*

at issue in a publicity rights case is the persona of the celebrity or individual, it is important to determine where the person was domiciled at the time of death.<sup>51</sup> This becomes especially important in cases like those involving Jimi Hendrix where a celebrity's estate establishes domicile in one state, even though the celebrity was born in and lived in another state, and the celebrity died in a third state.<sup>52</sup>

### *B. Development of the Right of Publicity in Washington State*

In 1998, the Washington State Legislature enacted the Personality Rights Act (the Act). The Act established a statutory basis for each person's right to the use of his name, voice, signature, photograph, or likeness.<sup>53</sup> The right was not limited to celebrities, but was established for each person, whether or not their identity was used commercially during their lifetime.<sup>54</sup> The right was defined as a property right that is exclusive to the person during their lifetime and does not expire when they die.<sup>55</sup>

The Act allowed the personality right to be transferred in a will or "by the laws of intestate succession."<sup>56</sup> The Act also provided that the right existed for a period of 75 years after death for a person whose identity has commercial value, or a personality.<sup>57</sup> Deceased personalities were defined as "all such persons who have died since 1948."<sup>58</sup>

Finally, the Act created a right of action for damages against any person who uses a person's identity (whether a personality or not) without prior consent.<sup>59</sup> The Act provided several exceptions for fair use, such as satire, literary or musical works, and magazine articles.<sup>60</sup> The legislature passed the Act because, after several Washington cases involving the estate of Jimi Hendrix, the legislature determined that the statute was lacking in its protections for postmortem publicity rights.

### 1. Litigation Involving the Estate of Jimi Hendrix

Jimi Hendrix died intestate in London in 1970.<sup>61</sup> As Jimi had no wife or children, Hendrix's father, Al Hendrix, was the sole heir to his

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51. *Id.* at 1313.

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

53. H.B. Rep. 2727, 60th Leg., Reg. Sess. (Wash. 2008).

54. *Id.* at 1.

55. S.B. Rep. 2727, 60th Leg., Reg. Sess. (Wash. 2008).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 2.

60. *Id.*

61. HARRY SHAPIRO & CAESAR GLEBBEEK, *JIMI HENDRIX, ELECTRIC GYPSY* 8 (1990).

estate.<sup>62</sup> In 1995, Al Hendrix assigned his rights to the estate of Jimi Hendrix to two limited liability companies, Experience Hendrix and Authentic Hendrix.<sup>63</sup> In 2005, these assignees brought a right of publicity claim against Electric Hendrix in federal district court in Washington State.<sup>64</sup> Judge Thomas Zilly dismissed the case, finding that, as Hendrix was domiciled in New York at the time of his death, New York law must apply to the case.<sup>65</sup> New York law only recognizes the right of publicity in living persons; thus, no right of publicity descended to Al Hendrix at the time of Hendrix's death.<sup>66</sup> Because Al did not acquire Jimi Hendrix's publicity rights, he could not assign or transfer them to Experience Hendrix and Authentic Hendrix. In 2007, the Ninth Circuit affirmed the decision.<sup>67</sup> The panel agreed that New York law (providing no posthumous right of publicity) applied to the case and therefore affirmed the district court's grant of partial summary judgment.<sup>68</sup>

## 2. Amendments to the WPRRA

After the Ninth Circuit affirmed the *Electric Hendrix* decision,<sup>69</sup> Washington State Representative Pederson sponsored legislation seeking to amend the publicity rights statute. The legislature introduced House Bill 2727 in 2008 to strengthen the original Act passed ten years earlier.<sup>70</sup> Representative Pederson sought to tighten up the law to protect deceased personalities who died before 1998.<sup>71</sup> Several other interested parties testified to the importance of ensuring that the right of publicity survived postmortem.<sup>72</sup> All were concerned with clarifying the existing personality rights law to protect people who had organized their interests based on the existing law of personality rights.<sup>73</sup> Discussions centered around the fact that the bill was especially important in Washington State due to the

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

63. *See Experience Hendrix, L.L.C. v. James Marshall Hendrix Found.*, No. C03-3462Z, 2005 WL 2922179, \*2 (W.D. Wash. Nov. 4, 2005).

64. *Id.*

65. *Id.*

66. *Id.* at \*3.

67. *Experience Hendrix, L.L.C. v. James Marshall Hendrix Found.*, 240 F. App'x 739 (9th Cir. 2007).

68. *Id.* at 740.

69. *Id.* at 739.

70. H.B. Rep. 2727, 60th Leg., Reg. Sess., at 2 (Wash. 2008).

71. *Id.* at 3.

72. S.B. Rep. 2727, 60th Leg., Reg. Sess. (Wash. 2008). Two notable figures who testified were Dave Green of Corbis and Karen Davis, an attorney who represented Experience Hendrix, LLC.

73. *Id.* at 3.

presence of Getty Images and Corbis, companies concerned with licensing rights of publicity.<sup>74</sup>

House Bill 2727 passed the House 94–0 and the Senate 46–0 and was signed into law by Governor Gregoire on March 19, 2008.<sup>75</sup> The amended statute provided that in the State of Washington, the right of publicity continues after a person’s death without regard to where the person was domiciled when they died or whether the jurisdiction where the person was domiciled recognized a similar right at the time of death.<sup>76</sup> The effect of the amended statute was to essentially create a national right of publicity claim for any plaintiff who was able to obtain personal jurisdiction in the state of Washington.<sup>77</sup>

### III. EXAMINATION OF THE DISTRICT COURT’S HOLDING

In a series of cases concerning the estate of Jimi Hendrix, the court had determined that Jimi Hendrix was domiciled in New York when he died.<sup>78</sup> Under New York law, Hendrix’s right of publicity did not survive at his death and was not passed to his father (his sole heir).<sup>79</sup>

After the 2008 changes to the WPR, the statute essentially served to allow the plaintiffs in the *Experience Hendrix* case to circumvent any issues arising from Hendrix being domiciled in New York. However, Judge Zilly objected to the amendments to the WPR, finding them to be unconstitutional for several reasons.

#### *A. Background and Procedural Posture*

Al Hendrix assigned various rights to Experience Hendrix, including the copyright for various songs and several federally registered trademarks.<sup>80</sup> After the Washington legislature amended the WPR in 2008, Experience Hendrix brought action against HendrixLicensing.com, alleging that defendants violated the Lanham Act,<sup>81</sup> the Washington

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74. *Id.* at 4.

75. 2008 House Bill 2727: *Extending Personality Rights to a Deceased Person*, WASH. VOTES, <http://www.washingtonvotes.org/2008-HB-2727> (last visited July 1, 2012).

76. H.B. Rep. 2727, 60th Leg., Reg. Sess. (Wash. 2008).

77. See Phillip Barengolts, *Amending a Washington State Statute to Ignore Choice of Law Principles Could Not Gain Jimi Hendrix’s Heirs a Post-Mortem Right of Publicity: Court Rules Amendment Unconstitutional*, PATISHALL IP BLOG (March 31, 2011), [http://www.pattishall.com/pdf/3-31-11-Jimi\\_Hendrix\\_ROP\\_Case\\_Blog\\_Post.pdf](http://www.pattishall.com/pdf/3-31-11-Jimi_Hendrix_ROP_Case_Blog_Post.pdf).

78. See *supra* Part II.B.1.

79. See *supra* Part II.B.1.

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

81. The Lanham Act is federal legislation that protects against trademark infringement, dilution, and false advertising. 15 U.S.C. § 1051.

Consumer Protection Act, and state common law.<sup>82</sup> Experience Hendrix also sought to prevent HendrixLicensing.com from using song titles, lyrics, and renditions of Hendrix's name.<sup>83</sup>

After instituting the action, Experience Hendrix sent a letter to the defendant's customers and issued a press release accusing the defendants of trademark infringement.<sup>84</sup> Experience Hendrix then sought a preliminary injunction, which was denied in part, as the court concluded that the use of Hendrix's name constituted fair use.<sup>85</sup> The case came before the United States District Court for the Western District of Washington on the defendant's motion for partial summary judgment.<sup>86</sup> The defendants additionally filed counterclaims, seeking a declaration that the 2008 amendments to the WPRa do not apply to Jimi Hendrix.<sup>87</sup>

Ultimately, the court granted partial summary judgment in favor of the defendants as to their declaratory judgment counterclaim and declared that the defendants were not constrained by any right of publicity from trading in images or likenesses of Jimi Hendrix. The court also declared that the use of the names "Hendrix" and "Jimi Hendrix" constituted fair use.<sup>88</sup>

Judge Zilly first addressed the issue of which state's law to apply, pointing out that the language of the WPRa requires courts to apply Washington law without regard to the person's domicile at the time of death.<sup>89</sup> Under the WPRa, the court would be required to reach a different result with regard to Jimi Hendrix's postmortem right of publicity than the laws of New York would require.<sup>90</sup> Thus, the court had to determine whether the requirements of the WPRa were subject to constitutional restrictions.<sup>91</sup>

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82. *Experience Hendrix*, 766 F. Supp. 2d at 1127–28.

83. *Id.* at 1128.

84. *Id.*

85. *Id.* "Fair use" is a First Amendment protection that encompasses uses of a person's likeness in connection with news or public affairs. *See, e.g.,* MCCARTHY, *supra* note 3, § 6:117.

86. *Experience Hendrix*, 766 F. Supp. 2d at 1126.

87. *Id.* at 1129.

88. *Id.* at 1143.

89. *Id.* at 1132–33 ("Unlike the original WPRa, the 2008 amendments contain a clear directive to apply the law of Washington. Indeed, the revised language appears to have been simply lifted from a Ninth Circuit opinion that suggests how to phrase a choice-of-law provision. Because the WPRa prescribes application of Washington law 'regardless of place of domicile or place of domicile at time of death,' RCW 63.60.010, the issue before the Court is whether such legislative directive is 'subject to constitutional restrictions.'").

90. *Id.* at 1132.

91. *Id.*

*B. Constitutionality of the WPRO*

The court first took issue with the language in the Act referring to the individual's domicile:

The WPRO, as modified, does much more than impose liability for the unauthorized use "of a living or deceased individual's or personality's name, voice, signature, photograph, or likeness, on or in goods, merchandise, or products entered into commerce in this state." The WPRO purports to govern whether a right of publicity exists, whether it continues post-mortem, and how it may be transferred during life and after death, regardless of where the particular individual or personality is or was domiciled. In addition, although the WPRO requires that allegedly infringing goods, merchandise, or products enter into commerce in Washington, it does not contain a similar restriction concerning infringements occurring in the advertising of goods or services or in fund-raising or solicitation of donations. Rather, the statute defines infringement as unauthorized use in advertising or fund-raising without regard to where such activities transpire, and then separately precludes the dissemination or publication of such advertisements within the State of Washington.<sup>92</sup>

As such, the court stated that six specific provisions were unconstitutional: (1) the fourth sentence of RCW 63.60.010 ("regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death or otherwise recognizes a similar or identical property right");<sup>93</sup> (2) the last sentence of RCW 63.60.010 ("regardless of place of domicile or place of domicile at time of death");<sup>94</sup> (3) the language in RCW 63.60.020(1) ("regardless of the individual's place of domicile, residence, or citizenship at the time of death or otherwise");<sup>95</sup> (4) the stipulation in RCW 63.60.030(1)(a) ("regardless of whether the law of the domicile of the deceased individual or personality, at the time of death, or thereafter, recognizes a similar or identical property right");<sup>96</sup> (5) RCW 63.60.030(1)(b)(iv) ("regardless of whether the law of the domicile of the deceased third party, at the time of death, or thereafter, recognizes a similar or identical property right");<sup>97</sup> and (6) RCW 63.60.020(2) ("regardless of the personality's place of domicile, residence, or citizenship at the time of death or otherwise").<sup>98</sup>

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92. *Id.* at 1135 (citation omitted).

93. *Id.* at 1141.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

### 1. Due Process and Full Faith and Credit Clause Constitutionality

The court first stated that the Act was unconstitutional under the Due Process and Full Faith and Credit Clauses of the U.S. Constitution.<sup>99</sup> The court noted that when it comes to procedural matters, a state may apply its own laws even when related substantive issues are governed by laws of another state.<sup>100</sup> But when deciding the merits of a claim, the state must meet a “significant contact” standard.<sup>101</sup> This means that the choice of the forum state’s law rather than the domicile state’s law cannot be arbitrary or fundamentally unfair.<sup>102</sup>

In this case, the defendants did not (and, as the court notes, could not) show that Washington had sufficient interest in the defendants’ property rights to justify applying Washington law to the issue of post-mortem publicity rights.<sup>103</sup> Additionally, the court noted that “[n]ot only is Washington’s choice-of-law directive at odds with the almost unanimous views of courts that have grappled with the survivability of the right of publicity, it also runs contrary to the traditional approach for resolving the testamentary or intestate disposition of personal property.”<sup>104</sup>

### 2. Dormant Commerce Clause Constitutionality

The court also found that the Act was unconstitutional under the dormant Commerce Clause.<sup>105</sup> The court explained that the Commerce Clause gives Congress the power to regulate commerce among the states.<sup>106</sup> Courts have interpreted the Commerce Clause to deny states the same authority vested in Congress (this interpretation provides the “dormant” aspect).<sup>107</sup> Thus, states cannot apply their individual statutes to commerce that takes place in other states.<sup>108</sup>

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99. *Id.* at 1134–35.

100. *Id.* at 1135.

101. “[T]o satisfy constitutional requirements, the state ‘must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.’” *Id.* (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985)).

102. *Experience Hendrix*, 766 F. Supp. 2d at 1137.

103. “With respect to individuals or personalities domiciled in other jurisdictions, however, Experience does not even attempt to argue that Washington has sufficient interests in their property rights to justify application of Washington law to the issue whether such individuals’ or personalities’ rights of publicity survive their deaths.” *Id.* at 1135.

104. *Id.* at 1138.

105. *Id.* at 1141–42.

106. *Id.* at 1141.

107. *Id.*

108. *Id.* at 1142.

The court agreed with defendant's characterization of the WPRAs as "creating a Washington-centered national right-of-publicity system."<sup>109</sup> The court saw the WPRAs as an attempt by Washington to govern commercial transactions that have no connection at all with Washington, including "a variety of transactions occurring 'wholly outside' Washington's borders, including right-of-publicity transfers between non-residents via contract, testamentary device, or intestate succession, and the creation and dissemination in other forums of advertising incorporating the names or likenesses of non-domiciliaries."<sup>110</sup> Furthermore, the WPRAs attempt to govern transfers between out-of-state citizens and to control advertising in other areas that incorporates the names and likenesses of personalities with no connection to Washington.<sup>111</sup>

Accordingly, the court held that, as the WPRAs seek to govern commercial transactions occurring outside Washington's borders, the choice-of-law directive in the WPRAs violates the dormant Commerce Clause.<sup>112</sup> The court explicitly found the same provisions of the WPRAs that it determined were in violation of the Due Process and Full Faith and Credit Clauses were additionally unconstitutional under the dormant Commerce Clause.<sup>113</sup>

### *C. Policy Against Upholding the WPRAs*

The court also noted several policy reasons for striking down the WPRAs. First, it pointed out that the choice-of-law directive is in opposition to the traditional approach for dealing with personal property after death.<sup>114</sup> The court saw this as evidence of the arbitrariness of the WPRAs amendments.<sup>115</sup>

The court went on to explain that enforcing the provisions of the WPRAs will lead to inconsistent and unjust results.<sup>116</sup> As only Washington and one other state (Indiana) have statutes that disregard the law of the domicile, anyone using a deceased personality's name or likeness would be subject to contradictory standards.<sup>117</sup> This would create a situation where defendants would be unable to avoid litigation in Washington,

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1143.

114. *Id.* at 1138; MCCARTHY, *supra* note 3, § 11:17 ("The traditional rule, under both the First and Second Restatement of Conflicts, for determining the testamentary or intestate disposition of personal property is to look to the law of decedent's domicile at the time of death.").

115. *Experience Hendrix*, 766 F. Supp. 2d at 1138.

116. *Id.*

117. *Id.*

as it is not feasible to restrict sales to only states other than Washington.<sup>118</sup>

Furthermore, many plaintiffs would likely be motivated to specifically divert sales to Washington so that they can take advantage of the protections of the WPRA.<sup>119</sup> Finally, the court was concerned that, although defendants may do everything possible to avoid having any conduct in Washington, they would still be subject to the WPRA because specific jurisdiction may be based solely on the effects within the forum state.<sup>120</sup>

The court concluded its policy discussion by emphasizing the importance of the law of domicile to avoid the negative consequences with which the court was concerned.<sup>121</sup> The court explained that, as a personality can have only one domicile at the time of death, the law of domicile is “a constant, based upon which the scope and survivability of any right of publicity may be derived.”<sup>122</sup> This means that any person using the image or likeness of a personality that has passed into the public domain does not need to worry about restricting its sales to certain states.<sup>123</sup> This would also eliminate the incentive for plaintiffs to divert sales to a specific state to obtain jurisdiction there (“forum shopping”).<sup>124</sup>

#### IV. A PROPOSAL TO PRESERVE PERSONALITY RIGHTS AFTER DEATH IN WASHINGTON STATE

The district court correctly concluded that the Washington Personality Rights Act, when applied, violates the Due Process, Full Faith and Credit, and dormant Commerce Clauses. Although the Act as it stands today is invalid, it is still important for the right of publicity to be descendible for the protection of celebrities and their families.

In light of the importance of a descendible right of publicity, this Part puts forth the argument that, to avoid the constitutional issues addressed in *Experience Hendrix*, the Washington State Legislature should make further amendments to the statute. Washington publicity rights laws should provide sufficient postmortem protections of publicity rights while avoiding the constitutional issues that arose in the *Experience Hendrix* case.

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118. *Id.* at 1138–39.

119. *Id.* at 1139.

120. *Id.* (quoting *Calder v. Jones*, 465 U.S. 783, 789–91 (1984)).

121. *Experience Hendrix*, 766 F. Supp. 2d at 1139–40.

122. *Id.* at 1139.

123. *Id.* at 1140.

124. *Id.*

*A. The District Court Was Correct in Its Constitutionality Analysis*

In its holding in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court made clear that state-created publicity rights are not per se unconstitutional.<sup>125</sup> But unlike *Zacchini*, many modern right of publicity cases center on the use of a celebrity's likeness in interstate commerce.<sup>126</sup> As such, far-reaching statutes like the WPRA, while not per se unconstitutional, often violate the Due Process and Commerce Clauses of the Constitution.

As *Experience Hendrix* involved the use of Jimi Hendrix's likeness in interstate commerce (a Nevada-based corporation selling Hendrix memorabilia in stores owned by a New Jersey-based company with locations throughout the United States), the application of the WPRA to the case necessarily elicits constitutional questions. The district court was correct in concluding that the WPRA violates the Due Process and Commerce Clauses, rendering the 2008 WPRA amendments unworkable.

1. Due Process

The Fourteenth Amendment provides that

[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>127</sup>

Although civil defendants are not afforded the same strict due process protections as criminal defendants, "the basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil penalties."<sup>128</sup>

The district court correctly concluded that the amended WPRA violates the Due Process Clause. As noted by Judge Kozinski in his dissent in *White v. Samsung Electronics*, "[t]he broader and more ill-defined one state's right of publicity, the more it interferes with the legitimate inter-

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125. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578–79 (1977) ("We conclude that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.").

126. See generally Jeremy T. Marr, Note, *Constitutional Restraints on State Right of Publicity Laws*, 44 B.C. L. REV. 863 (2003).

127. U.S. CONST. amend. XIV, § 1.

128. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 n.22 (1996) (citation omitted) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977)).

ests of other states.”<sup>129</sup> This interference with the interests of other states constitutes a violation of the Due Process Clause.

First, application of the WPRA leads to uncertainty for any business that wishes to use the likeness of a celebrity in commerce. Although the use may be acceptable under the laws of the state in which the business is domiciled, the business may still be subject to punishment in the State of Washington. Any such business or individual would not be on notice as to which law applies to them, or how they can ensure compliance with the laws. When a business or individual engages in acts that are lawful in one state but is then subject to damages in another state, there arise concerns about the fair notice requirements of the Due Process Clause.<sup>130</sup> The WPRA thus violates the “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictat[ing] that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”<sup>131</sup>

Furthermore, the WPRA’s stipulation that Washington publicity rights law applies regardless of domicile violates the Due Process Clause. The WPRA makes an outright statement that Washington will apply its law without taking into account the interest of any other state, the appropriateness of applying the laws of another state, or the interests of the citizens of other states. This extension of Washington’s reach beyond constitutional limitations violates due process limitations by “mak[ing] otherwise lawful conduct unlawful.”<sup>132</sup>

## 2. Full Faith and Credit

Article IV of the Constitution provides that “full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”<sup>133</sup> To determine whether a state’s law violates the Full Faith and Credit Clause, courts examine “the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation.”<sup>134</sup> If the court determines that the state seeking to apply its law “has only an insignificant

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129. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1519 (1993) (Kozinski, J., dissenting).

130. See Hillel Michael Elkins, Note, *Take My Likeness, Please: Threats to the Right of Publicity in Light of State Farm Mutual Automobile Insurance Co. v. Campbell*, 78 S. CAL. L. REV. 1371, 1393 (2005).

131. *BMW of N. Am.*, 517 U.S. at 574.

132. Elkins, *supra* note 130, at 1383.

133. U.S. CONST. art. IV, § 1.

134. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981).

contact with the parties and the occurrence or transaction, application of its law is unconstitutional.”<sup>135</sup>

In the instant case, the State of Washington had only limited contact with the parties and the occurrence or transaction. The plaintiff was domiciled in Washington, while the defendant was domiciled in Nevada. The transaction or occurrence (the sale of Jimi Hendrix-related materials) was initiated by a company with its principle place of business in New Jersey. Although Jimi Hendrix was born in Washington State, this was not a significant contact because he no longer lived in Washington at the time of his death (and for several years prior). Thus, the only contact with the State of Washington was the plaintiff’s residence. As applying Washington’s law to a case with so few significant contacts with the state violated the Full Faith and Credit Clause, the court was correct in determining that the WPRA could not be applied without violating important constitutional limitations.

Similar problems will arise in any other case to which the current version of the WPRA is applied. Anytime a significant state contact such as the location of the decedent’s domicile is ignored by stipulation of state law, this will result in applying the law of the state with fewer connections to the case. Giving more weight to the law of a state where the celebrity was not domiciled at the time of death therefore results in a violation of the Full Faith and Credit Clause.

### 3. Dormant Commerce Clause

The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”<sup>136</sup> This amendment, coupled with the Commerce Clause’s grant of power to Congress “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,”<sup>137</sup> implies that there is a prohibition against individual states creating statutes that burden interstate commerce or discriminate against other states. This prohibition is known as the dormant Commerce Clause.

The district court was correct in its conclusion that the “regardless of domicile” provisions of the WPRA violate the dormant Commerce Clause. The Supreme Court has long recognized that a statute has the potential to violate the dormant Commerce Clause if it places a substantial burden on interstate commerce when applied to activities that take

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135. *Id.* at 311.

136. U.S. CONST. amend. X.

137. U.S. CONST. art. I, § 8, cl. 3.

place across state lines.<sup>138</sup> Other federal courts have repeatedly struck down state statutes that, when applied, resulted in a Commerce Clause violation.<sup>139</sup> It therefore stands to reason that a state publicity rights statute that similarly burdens interstate commerce would be invalid.<sup>140</sup>

The amended WPRAs falls into this category. The statute explicitly states that its provisions universally apply “regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death or otherwise recognizes a similar or identical property right.”<sup>141</sup> This stipulation that Washington’s publicity rights law should apply to essentially any situation in which there is an accusation of infringement of a deceased individual’s rights places an undue burden on interstate commerce.

First, the amendments to the WPRAs created a state law that prevents individuals and businesses in other states from engaging in commercial activities that are lawful in their home states. Statutes having this effect have been recognized as violating the Commerce Clause by “diminish[ing] . . . entitlement to fair notice of the demands that the several States impose on the conduct of . . . business.”<sup>142</sup>

Second, the broad scope of the WPRAs has in effect created a national standard to which advertisers must adhere. Especially with the widespread use of Internet advertising, advertisers are forced to either create multiple marketing campaigns for different states, or conform to the requirements of the WPRAs.<sup>143</sup> As there is extra expense incurred in creating multiple campaigns,<sup>144</sup> advertisers are essentially forced to use the WPRAs as their guideline for any advertisements used nationwide. This broad application impermissibly restricts interstate commerce.

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138. *See, e.g.,* *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529–30 (1959) (“A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those . . . entering . . . its territory.”).

139. *See, e.g.,* *Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 63 F.3d 652 (7th Cir. 1995) (holding that requirement that out-of-state communities adopt Wisconsin’s recycling program regulated conduct wholly outside Wisconsin and was thus invalid); *In re Nat’l Century Fin. Enters., Inc.*, 755 F. Supp. 2d 857, 887–88 (S.D. Ohio 2010) (holding that Ohio Securities Act that applied to transactions outside Ohio violated the Commerce Clause); *Connecticut v. Cahill*, 180 F. Supp. 2d 392, 400 (N.D.N.Y. 2001) (holding that New York regulation denying access to lobstering waters unless applicants surrendered their rights to access waters of any other state violated Commerce Clause).

140. *See, e.g.,* *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1288 (9th Cir. 1999) (Kozinski, J., dissenting) (“Just as a state law regulating the length of trucks is invalid under the dormant Commerce Clause if it poses an undue burden on interstate commerce . . . so California’s right of publicity law is invalid . . .”).

141. WASH. REV. CODE § 63.60.010 (2008).

142. *BMW of N. Am. v. Gore*, 517 U.S. 559, 585 (1996).

143. *Marr, supra* note 126, at 891.

144. *Id.*

Modern Commerce Clause jurisprudence recognizes that state laws like the WPRA “violate two [] principles of commerce clause jurisprudence: (1) that states cannot directly regulate interstate commerce; and (2) that incidental regulations of interstate commerce cannot be excessive in light of local interests furthered by the law.”<sup>145</sup> As the WPRA violates both of these principles, the district court’s conclusion that the WPRA is in violation of the dormant Commerce Clause is in keeping with current jurisprudence and was thus accurate.

### *B. Justifications for a Descendible Right of Publicity*

There are many reasons why it is important for the right of publicity to be descendible. The Eleventh Circuit articulated the first of these reasons: “if the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity’s untimely death would seriously impair, if not destroy, the value of the right of continued commercial use.”<sup>146</sup>

Other courts have put forth several other important reasons. For example, the Tennessee Court of Appeals stated that a descendible right of publicity promotes an individual’s right to have his or her assets distributed as specified in a will while protecting the celebrity’s right to pass on the value of the personality he or she has created to his or her heirs and assigns after death.<sup>147</sup>

The Tennessee Court of Appeals went on to explain that allowing publicity rights to descend to a celebrity’s heirs prevents the unjust enrichment of third parties and protects the rights of any licensees who have contracted with the celebrity.<sup>148</sup> Additionally, as a matter of policy, descendible publicity rights further the public interest in counting on the truth of representations regarding celebrity sponsorship of goods, as “[f]alsely claiming that a living celebrity endorses a product or service

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145. *Hyatt Corp. v. Hyatt Legal Servs.*, 601 F. Supp. 381, 383 (1985) (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982)).

146. See Lapter, *supra* note 40, at 271 (citing *Martin Luther King Jr. Ctr. for Soc. Change v. Am. Heritage Prods., Inc.*, 694 F.2d 674, 682–86 (11th Cir. 1983)).

147. *State ex rel. Elvis Presley Int’l Mem’l Found. v. Cromwell*, 733 S.W.2d 89, 97–98 (Tenn. Ct. App. 1987) (“We have also concluded that recognizing that the right of publicity is descendible promotes several important policies that are deeply ingrained in Tennessee’s jurisprudence. First, it is consistent with our recognition that an individual’s right of testamentary distribution is an essential right. If a celebrity’s right of publicity is treated as an intangible property right in life, it is no less a property right at death.”).

148. *Id.* at 98–99 (“[C]oncluding that the right of publicity is descendible recognizes the value of the contract rights of persons who have acquired the right to use a celebrity’s name and likeness. The value of this interest stems from its duration and its exclusivity. If a celebrity’s name and likeness were to enter the public domain at death, the value of any existing contract made while the celebrity was alive would be greatly diminished.”).

violates [Tennessee State Law]. It should likewise be discouraged after a celebrity has died.”<sup>149</sup>

As it is clearly important to ensure that the right of publicity is descendible, the Washington State Legislature should consider new changes to the WPRO, taking into account the constitutional limitations on the current law and narrowing the scope of the WPRO to avoid those limitations.

### C. Proposal for Legislative Changes

In recent years, many scholars have advocated for a federal right of publicity law, citing the need for uniformity across the states. As stated by the Third Circuit Court of Appeals, “[t]he state of the law is still that of a haystack in a hurricane.”<sup>150</sup> Adopting a federal right of publicity law would address many of the issues with inconsistent state laws and the difficulty in determining which law to apply and how to apply it. Advocates hope that “federal legislative action [would] correct the shortcomings of the current scheme, effectively protecting individuals’ property rights while simultaneously placing the proper incentives on potential plaintiffs and defendants.”<sup>151</sup>

A federal law would also help to rectify the constitutional concerns addressed by the district court in the *Experience Hendrix* case. However, lawmakers have been reluctant to step in and create legislation that would clear up any confusion in the different right of publicity laws among the states.

In light of the continuing lack of a federal law, the Washington State Legislature should amend the WPRO to protect a celebrity’s right of publicity after the celebrity’s death while staying in line with the limitations of the Constitution. The legislature could narrow the scope of the WPRO by requiring a nexus between the commercial use of a celebrity’s likeness and the State of Washington. This would allow the heirs of a deceased celebrity to enforce their rights while assuaging Due Process, Full Faith and Credit, and dormant Commerce Clause concerns.

Under choice of law principles, the forum state (here, Washington) must have a reasonable basis for applying its own law to a case.<sup>152</sup> The state has a reasonable basis for applying its law only if (1) an event (such

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149. *Id.* at 99.

150. *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485 (1956).

151. Blair Joseph Cash, Note, “*Hasta La Vista Funny Guys*”: *Arnold Schwarzenegger’s Fictional Voice Misappropriation Lawsuit Against Comedians Imitating His Voice and the Case for a Federal Right of Publicity Statute*, 18 J. INTELL. PROP. L. 207, 229 (2010).

152. James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 194 (1976).

as creating a contract or completing a transaction) closely connected with the cause of action has taken place in the forum state; and (2) applying the state's law would not be unfair to the party opposing the application of the law.<sup>153</sup> Additionally, the issue must arise from conduct from which the opposing party did or could have received some material benefit; or if there was no material benefit, it must have been foreseeable that the party might be subject to the laws of the forum state.<sup>154</sup> Applying this three-part test will satisfy Due Process, Full Faith and Credit, and dormant Commerce Clause concerns, which all require some form of significant state contacts and fairness to survive a constitutional challenge.<sup>155</sup>

The first part of the test for whether the state has a reasonable basis for applying its law creates a nexus requirement. This requirement ensures that the state seeking to apply its own law has sufficient contacts with the cause or action to justify the application of its own rules.<sup>156</sup> Similarly, dormant Commerce Clause doctrine employs a nexus requirement.<sup>157</sup> Applied mostly in the area of taxation, there is a requirement of "some definite link, some minimum connection . . . between a taxing state and the person, property, or transaction that the state seeks to tax."<sup>158</sup> This limits the authority of the states and prevents states from creating regulations that encroach upon Congress's power to regulate interstate commerce.<sup>159</sup>

Similarly, incorporating nexus requirements into the WPRA could allow the statute to serve its intended purpose of protecting the rights of deceased celebrities while avoiding the constitutional problems that concerned the court in the *Experience Hendrix* case. The Washington State Legislature could redraft the statute to require that the defendant's commercial use of the celebrity's likeness has sufficient contacts (a "nexus") with Washington State. Sufficient contacts could encompass things like advertising in Washington using the celebrity's likeness, deriving monetary benefit in Washington from the use of the likeness, and engaging in activities in Washington from which the defendant expects to receive a monetary benefit.

Under existing dormant Commerce Clause cases, it is fairly easy to establish a connection with the forum state for the purposes of fulfilling a

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153. *Id.*

154. *Id.*

155. *See supra* Part IV.A.

156. Martin, *supra* note 152.

157. 14A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 6934 (rev. vol. 2012).

158. *Id.*

159. Kirk J. Stark, *The Federal Role in State Tax Reform*, 30 VA. TAX REV. 407, 429 (2010).

nexus requirement.<sup>160</sup> Courts have found that many types of activities create such a nexus, including occasionally visiting the state, having an employee in the state, storing items in the state, and carrying on business partially within (in addition to outside) the state.<sup>161</sup> Specifically, Washington courts have found that a nexus existed with the State of Washington, even when a company had no permanent offices or employees in Washington, because the company sent sales representatives to meet with Washington customers, a “practice . . . significantly associated with its ability to establish and maintain its Washington market.”<sup>162</sup>

It would be fairly easy for a Washington plaintiff to establish that a defendant’s commercial activities using the likeness of a deceased celebrity had a nexus with the state. Once the nexus requirement is placed in the WPR, a plaintiff could easily show that a defendant had advertised in Washington, sent products or materials to Washington, established some sort of market in Washington, or derived some monetary benefit from Washington citizens.

For example, in the case at hand, the defendant, HendrixLicensing.com “distribute[d] or [sought] to distribute posters, fine art prints, apparel, and other novelty items bearing the likeness of, or art created by, Jimi Hendrix, accompanied with his name.”<sup>163</sup> The company was located in Las Vegas, Nevada; however, the defendant’s customers offered the items for sale at stores in Washington State, including Spencer’s Gifts.<sup>164</sup> Under a nexus requirement, a court could easily conclude that the defendant derived monetary benefit from selling items bearing Hendrix’s likeness in Washington, sent its products to Washington, carried on business in Washington, and acted in ways intended to establish or maintain a market for Jimi Hendrix merchandise in Washington. Thus, under a modified version of the WPR, Experience Hendrix would have been able to recover for damages. At the same time, the WPR would not violate the Due Process, Full Faith and Credit, and dormant Commerce Clauses of the Constitution.

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160. 14A FLETCHER, *supra* note 157, § 6934.

161. *See, e.g.*, Walter Hellerstein, *State Taxation of Interstate Businesses: Perspective on Two Centuries of Constitutional Adjudication*, 41 TAX LAW 37, 56–57 (1987); *see also* Standard Pressed Steel Co. v. Dep’t of Revenue, 419 U.S. 560 (1975); United Airlines v. Mahin, 410 U.S. 623 (1973); Orvis Co., Inc. v. Tax Appeals Tribunal, 86 N.Y.2d 165 (1995).

162. Lamtec Corp. v. Dep’t of Revenue, 246 P.3d 788 (Wash. 2011).

163. Experience Hendrix, L.L.C. v. HendrixLicensing.com, Ltd., 766 F. Supp. 2d 1122, 1128 (W.D. Wash. 2011).

164. *Id.*

## V. CONCLUSION

The right to personality and publicity has changed in many ways over the years. It is handled differently across the country, with some states having stronger protections than others. Until recently, Washington State had some of the strongest personality rights protections for deceased celebrities. But the decision of the district court in *Experience Hendrix, L.L.C. v. HendrixLicensing.com, Ltd.* effectively eliminated some of these protections.

The district court correctly concluded that the WPRA as amended in 2008 violates the Due Process, Full Faith and Credit, and dormant Commerce Clauses. The stipulation that Washington's publicity rights law applies "regardless of domicile" violates the Due Process Clause in that it leads to uncertainty as to which state law will apply and fails to take into account the interests of any other state. Additionally, the WPRA violates the Full Faith and Credit Clause by ignoring the significant contacts parties may have with others states, which would then make the other state's law more applicable. Finally, the WPRA violates the dormant Commerce Clause by overburdening commerce that takes place across state lines.

As celebrities are largely dependent on the moneymaking capabilities of the use of their likenesses, the State of Washington has a strong interest in protecting the rights of celebrities and individuals, both during life and after death. In light of the absence of a federal law addressing the right of publicity, the legislature is left with the option of amending the current WPRA.

To ensure that personality rights continue after death, the Washington legislature should amend the Washington Personality Rights Act. The Act can be amended to protect personality rights after death while remaining within constitutional boundaries. To do so, the legislature could alter the WPRA to require a significant nexus between the commercial use of the celebrity's likeness and the State of Washington, implicating issues of fairness. This would narrow the scope of the law to ensure that the Act does not violate the Due Process, Full Faith and Credit, and dormant Commerce Clauses while still allowing heirs to retain a celebrity's right to publicity after they have passed away.