Right of Publicity Laws: Washington

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A Q&A guide to Washington right of publicity laws. This Q&A addresses the types of persons and aspects of identity protected by the right of publicity, remedies for violations of the right, defenses to right of publicity claims, personal jurisdiction and choice of law considerations, and transfer and licensing of the right. Answers to questions can be compared across a number of jurisdictions (see Right of Publicity Laws: State Q&A Tool (http://us.practicallaw.com/4-517-3258)).

1. Does your state recognize the right of publicity? If so, is the right of publicity recognized by statute or common law, or both?

OVERVIEW OF STATE RIGHT OF PUBLICITY LAW

Statute
Washington State recognizes a statutory right of publicity (Wash. Rev. Code § 63.60.010-080 (2012)).

Common Law
Washington does not recognize a common law right of publicity and instead addresses right of publicity through its explicit right of publicity statute (see Joplin Enters. v. Allen, 795 F. Supp. 349, 351 (W.D. Wash. 1992)).

2. Does your state recognize the appropriation invasion of privacy tort? If your state recognizes both a right of publicity and an appropriation invasion of privacy tort, please describe any significant distinctions between the two types of claims.

Washington recognizes a protectable interest in privacy, including appropriation, as a cause of action (Mark v. Seattle Times, 635 P.2d 1081 (Wash. 1981)). The cause of action is rarely used, however, given the state’s specific right of publicity statute.

PERSONS PROTECTED

3. What types of persons are protected by each law identified in Question 1?

Statute
Natural Living Persons

The Washington right of publicity statute protects natural living persons (Wash. Rev. Code §§ 63.60.010 and 63.60.020 (2012)).

Deceased Persons (Postmortem Rights)
Washington recognizes postmortem rights, but the term of protection after death depends on whether the person is defined as an individual or a personality (Wash. Rev. Code §§ 63.60.010 and 63.60.020 (2012)).

Corporations and Other Entities
The statute only applies to individuals or personalities. The rights under the statute are not provided to corporations, but a corporation may acquire an individual’s rights through an appropriate transfer (see Question 17). (Wash. Rev. Code §§ 63.60.010 and 63.60.020 (2012)).

Common Law
Washington does not recognize a common law right of publicity.

4. If your state recognizes a postmortem right of publicity:

- What is the duration of the postmortem right?
- Is there an exploitation requirement for maintenance of the postmortem right?

Statute
Duration
The term of Washington’s postmortem right of publicity depends on whether persons are defined as:

- **Individuals.** An individual is defined as “a natural person, living or dead.” Rights of an individual under the statute may be exercised:
PROTECTED ASPECTS OF IDENTITY

8. For each law identified in Question 1, please describe the aspects of a person’s identity that are protected.

Statute
The Washington right of publicity statute protects the following aspects of a person’s identity:
- Name.
- Voice.
- Signature.
- Photograph.
- Likeness.
(Wash. Rev. Code § 63.60.010 (2012)).

Name
A name is defined as the “actual or assumed name, or nickname, of a living or deceased individual that is intended to identify that individual” (Wash. Rev. Code § 63.60.020(6) (2012)).

Voice
No definition of what constitutes “voice” is provided in the statute.

Signature
Signatures are defined as “the one handwritten or otherwise legally binding form of an individual’s name, written or authorized by that individual, that distinguishes the individual from all others” (Wash. Rev. Code § 63.60.020(10) (2012)).

Photograph
Photograph is defined as “any photograph or photographic reproduction, still or moving, or any videotape, online or live television transmission, of any individual” in which “the individual is readily identifiable” (Wash. Rev. Code § 63.60.020(9) (2012)).

Likeness
Likeness is defined as “an image, painting, sketching, model, diagram or other clear representation, other than a photograph, of an individual’s face, body or parts of them, or the distinctive appearance, gestures or mannerisms of an individual” (Wash. Rev. Code § 63.60.020(5) (2012)).

REGISTRATION

9. Does any law identified in Question 1 require or otherwise permit registration of the right of publicity, including postmortem rights if recognized in your state? If so, please describe the:
- Benefits of registration and any adverse consequences for failing to register.
Suits by Non-Washington Residents

The rights afforded under the statute may be exercised regardless of the domicile of a living person as long as the other requirements under the statute are met. The statute also does not require that a deceased person be domiciled in Washington at the time of his death as long as the other requirements of the statute are met. (Wash. Rev. Code §§ 63.60.010 and 63.60.020 (2012).)

This postmortem domicile provision was recently found unconstitutional, and that decision is under appeal (see Question 16).

Washington does not address when an individual is considered identifiable or readily identifiable for a claim under the right of publicity statute.

REMEDIES

Injunctive Relief

Washington courts may grant injunctions on “reasonable terms.” Courts have discretion to:

- Give preliminary and permanent injunctive relief.
- Determine the territorial scope of injunctive relief.
- Order the materials made or used in violation of the party's rights to be:
  - impounded; or
  - destroyed or otherwise disposed of.
(Wash. Rev. Code § 63.60.060(1), (3)-(4) (2012).)

Statutory and Actual Damages

Courts may award the greater amount of either:

- $1,500.
- The actual damages sustained as a result of an infringement. (Wash. Rev. Code § 63.60.060(2) (2012).)

Use of the name, voice, signature, photograph or likeness in or related to one work constitutes a single act of infringement, regardless of the number of copies made or the number of times the identifying element is displayed (Wash. Rev. Code § 63.60.060(2) (2012)).

Profits

In addition to actual damages, the court can award any profits attributable to the infringement and not taken into account in an accounting of actual damages. To prove profits, the injured party must submit proof of gross revenues attributable to the
infringement and the infringing party must prove its deductible expenses. (Wash. Rev. Code § 63.60.060(2) (2012)).

Attorneys' Fees
The prevailing party can recover reasonable attorneys' fees, expenses and court costs incurred in defending the right of publicity claim (Wash. Rev. Code § 63.60.060(5) (2012)).

13. Are there any criminal penalties in your state for violations of the right of publicity?
There are no criminal penalties for violation of the right of publicity statute. Criminal penalties generally do not exist for violation of a right of privacy in Washington unless it is considered voyeurism (Wash. Rev. Code § 9A.44.115 (2012)).

EXEMPTIONS AND DEFENSES

14. For each law identified in Question 1, what are the key defenses to a civil claim?

Statutory Exemptions and Defenses

Defenses
The Washington right of publicity statute provides for consent as a defense. Consent can be oral or written and express or implied (Wash. Rev. Code § 63.60.050 (2012)).

Exemptions From Entire Statute
The Washington statute provides for a number of exemptions, including exemptions for the use of or authorization to use a person’s identity in the following:
- Single and original works of fine art, including but not limited to photographic, graphic and sculptural works of art that are not published in more than five copies.
- Literary works, theatrical works, musical compositions, film, radio, online or television programs, magazine articles, news stories, public affairs reports, or sports broadcasts or accounts, or with any political campaigns when the use does not inaccurately claim or state an endorsement by the individual or personality.
- An advertisement or commercial announcement for a use:
  - for which consent is not required under the statute; and
  - that is in connection with one of the two above exempted uses.
- Advertisements, commercial announcements or packaging for the authorized sale, distribution, performance, broadcast or display of a literary, musical, cinematographic or other artistic work using the name, voice, signature, photograph, or likeness of the writer, author, composer, director, actor, or artist who created the work, where such individual or personality consented to the use of these aspects of publicity on or in connection with the initial sale, distribution, performance or display of them.
- The advertisement or sale of a rare or fine product, including but not limited to books, which incorporates the signature of the author. (Wash. Rev. Code § 63.60.070(2) (2012)).

The statute does not apply to the use of or authorization to use a person’s name that is merely descriptive and used fairly and in good faith only to identify or describe something other than the individual or personality, such as, without limitation, to:
- Describe or identify:
  - a place;
  - a legacy;
  - a style;
  - a theory;
  - an ownership interest, or
  - a party to a transaction.
- Accurately describe the goods or services of a party. (Wash. Rev. Code § 63.60.070(5) (2012)).

The statute also does not apply to the use of a person’s identity when the use is either:
- Insignificant.
- De minimis.
- Incidental. (Wash. Rev. Code § 63.60.070(6) (2012)).

Exemptions from Infringement Provision of Statute
Consent is not required for use of a person’s identity or likeness regarding matters of cultural, historical, political, religious, educational, newsworthy or public interest, including, without limitation, either:
- Comment.
- Criticism.
- Satire.
- Parody. (Wash. Rev. Code § 63.60.070(1) (2012)).

A matter does not lose its exempt status because it appears in the form of a paid advertisement if it is clear that the principal purpose of the advertisement is to comment on the matter (Wash. Rev. Code § 63.60.070(1) (2012)).

The owner or employee of a publication in which a person’s identity was published is not subject to penalty under the statute as long as the advertisement or solicitation was not intended to promote the medium itself (Wash. Rev. Code § 63.60.070(4) (2012)).

Common Law Exemptions
Washington does not recognize a common law right of publicity.
The court also analyzed the issue under the Commerce Clause of the US Constitution. The court found that the amended statute seeks to govern transactions occurring wholly outside of Washington, including transfer of publicity rights that occur outside the state (Experience Hendrix, at 1142). Based on these arguments, the court found that the statute also violated the Commerce Clause and stated this as an alternative basis for finding the relevant portions of the statute to be unconstitutional (Experience Hendrix, at 1142).

On October 17, 2011, the plaintiff filed a Notice of Appeal to the Ninth Circuit Court of Appeals. As of this date, the appeal remains pending.

**TRANSFERS, LICENSES AND WAIVERS**

17. Is the right of publicity a transferable (assignable) right in your state?

**Statute**

The right of publicity in Washington is freely transferable, assignable and licensable, in whole or in part, by any form of transfer that is otherwise permissible, including:

- Will.
- Trust.
- Contract.
- Community property agreement.
- Co-tenancy with survivorship provisions.
- Payable-on-death provisions.
- The operation of the laws of intestate succession for postmortem rights.

(Wash. Rev. Code § 63.60.020(1), (2) (2012)).

**Common Law**

Washington does not recognize a common law right of publicity.

18. Please describe any specific restrictions on or requirements for valid transfers (if the right is transferable), licenses or waivers of the right of publicity in your state, including:

- Whether transfers, licenses and waivers must be made in writing.
- Requirements for obtaining consent from a minor.

**Form of Agreement**

Washington's right of publicity statute does not specifically require that an assignment, transfer or license be in writing. Agreements, contracts or promises must generally be in writing (Wash. Rev. Code § 19.36.010 (2012)). Therefore, any assignment, transfer or license must meet the general requirements for documents in Washington.
Consent From a Minor
A minor is generally bound by any contract unless the contract is disaffirmed within a reasonable time after the minor attains the age of majority (Wash. Rev. Code § 26.28.030 (2012)). The age of majority in Washington is 18 (Wash. Rev. Code § 26.28.010 (2012)).

19. If your state recognizes a postmortem right, are there any statutory or common law rules for ownership or transfer of the right?

The Washington statutory postmortem right of publicity is transferable (see Question 17).

OTHER SIGNIFICANT LEGISLATION AND CASE LAW

20. Please briefly describe any other significant right of publicity statutes, pending legislation, and case law in your state not otherwise addressed in this survey.

The Washington statute was amended in 2008 to address concerns surrounding ongoing litigation between parties claiming rights similar to those claimed by the Jimi Hendrix estate, including the musician’s right of publicity (see Question 16). Given how recently the statute was amended, there is limited case law concerning most amended provisions. There is also limited significant case law regarding the historical provisions of the statute.

For more information on right of publicity laws in Washington, search for the following resources on our website.

Practice Notes:
- Copyright: Overview
  http://us.practicallaw.com/2-505-5835
- Right of Publicity: Overview
  http://us.practicallaw.com/2-505-8377
- Trademark: Overview
  http://us.practicallaw.com/9-512-8249
- Acquiring Trademark Rights and Registrations
  http://us.practicallaw.com/2-505-1700
- Intellectual Property Rights: The Key Issues
  http://us.practicallaw.com/2-500-4365
- Trademark Infringement and Dilution Claims, Remedies and Defenses
  http://us.practicallaw.com/1-508-1019
- Trademark Searching and Clearance
  http://us.practicallaw.com/4-507-2834

Standard Documents:
- Copyright Infringement Cease and Desist Letter
  http://us.practicallaw.com/5-502-5818
- Publicity Waiver and Release
  http://us.practicallaw.com/8-503-5024
- Trademark Infringement Cease and Desist Letter
  http://us.practicallaw.com/8-502-6487
- Trademark License Agreement (Pro-licensor)
  http://us.practicallaw.com/8-500-7097

Checklists:
- Registering a Trademark Checklist
  http://us.practicallaw.com/6-502-8835
- Rights Clearance Checklist
  http://us.practicallaw.com/3-509-4209
- Trademark License Checklist
  http://us.practicallaw.com/6-505-6135

Article: know-how
- Right of Publicity Laws: State Q&A Tool
  http://us.practicallaw.com/4-517-3258

For the links to the documents referenced in this note, please visit our online version at http://us.practicallaw.com/1-521-4632.