



Valuating a Celebrity’s Right of Publicity for Estate Tax Purposes

A review of different valuation methodologies and the unique difficulties that arise when valuating right of publicity posthumously.

Sara Zerehi*

TABLE OF CONTENTS

I. INTRODUCTION	126
II. DEFINING RIGHT OF PUBLICITY	127
III. RIGHT OF PUBLICITY AND ESTATE PLANNING.....	129
IV. METHODOLOGIES FOR RIGHT OF PUBLICITY VALUATION ...	131
A. <i>Market Approach</i>	131
B. <i>Cost Approach</i>	132
C. <i>Income Approach</i>	132
V. INCOME APPROACH CONSIDERATIONS	133
A. <i>Establishing Expected Future Income</i>	133
1. Separating Right of Publicity from Personal Service	134
B. <i>Establishing the Remaining Useful Life</i>	136
C. <i>Determining an Appropriate Risk or Discount Rate</i>	138
1. Limited Market	139
2. Tarnished Reputation	139
3. Potential Legal Risk	140
VI. DISTINCTIVE CHALLENGES WHEN VALUATING RIGHT OF PUBLICITY: SEPARATING RIGHT OF PUBLICITY FROM TRADEMARK VALUE	141
VII. CONCLUSION	144

* Sara received her J.D. from UCLA School of Law and her B.A. in economics from UCLA. She would like to thank her parents, Eliza and Hamid, for their love and support.

I. INTRODUCTION

In recent years, the IRS has begun to challenge deceased celebrities' right of publicity valuation on estate tax forms. Because right of publicity is an abstract intangible asset, it is often overlooked when individuals with a profitable right of publicity plan their estate. Although right of publicity continues to have an increasing presence in celebrities' asset portfolios, much remains untouched in this realm of intellectual property valuation. There is still no consensus on what valuation methodologies are most appropriate when it comes to posthumous right of publicity valuation.

Valuation of an intangible property right like right of publicity is an especially abstract concept with unique difficulties. However, I believe that combining an accounting model with both common sense and expert considerations of the unique riskiness of this asset can create a comprehensive model for valuation. Specifically, I will start my analysis by first considering the three traditional calculations for intangible asset valuation: the market, cost, and income approaches. I will analyze their respective suitability in terms of valuing right of publicity and consider the benefits and drawbacks of each method. Ultimately, I conclude that the income approach is the most applicable and I will focus my discussion on utilizing this methodology for estimating the fair market value of postmortem right of publicity. I will also introduce the appraisal guidelines provided by the Internal Revenue Service (IRS). These guidelines include an important concept of using a discount factor to account for the inherent riskiness of this unique asset. To determine an appropriate discount factor, I will consider certain distinct factors that would increase the risk associated with this asset, which would in turn decrease its ultimate fair market value. Therefore, I suggest establishing a fair market value and then estimating a discount rate to account for risks and uncertainties. This involves considering multiple factors to derive a percentage that will then be deducted from the fair market value.

Lastly, I will reflect on the distinctive difficulties and considerations that arise with posthumous right of publicity valuation for estate tax purposes and how it compares to other intellectual property assets, namely trademarks. I will review the inherent difficulty in separating right of publicity value from trademark value. Oftentimes, trademark values can seem interdependent with right of publicity value. I will discuss various ways to think about how to dissect the two property rights while avoiding double counting these assets on an estate tax filing.

II. DEFINING RIGHT OF PUBLICITY

Modern society has been, and continues to be, fascinated with celebrities. Celebrities have a unique place in our society's pop culture and command a widespread interest from a large audience. From an economic perspective, a celebrity's right of publicity is a profitable asset. This is because celebrities are able to use their publicity to draw attention and interest from the public, facilitating a unique means of selling merchandise, advertising, and publicizing various goods and services. In fact, many celebrities can make more money from exploiting their fame than they can from their talent. Because of the economic and social significance of a celebrity's identity, there are certain legal protections available that allow celebrities to protect and control the commercialization of their personae.

The right of publicity is a state-protected intellectual property right that safeguards the commercial use of an individual's identity, usually identified as a person's name, image, photograph, likeness, voice, or signature.¹ Historically, the right of publicity derived from the state law right of privacy.² The right of publicity is the "inherent right of every human being to control the commercial use of his or her identity."³ Currently, each state in some way recognizes the right of privacy either by statute or by common law.⁴

Thirty-one states recognize the right of publicity. Nineteen of them do so through an explicit statute and twelve do so through common law decisions within their court systems.⁵ Even fewer states protect the right of publicity after the individual in question has died; currently, only about twenty states recognize a postmortem right of publicity.⁶ The law has defined the right of publicity as a type of "property" right.⁷ And like other forms of property, the right of publicity is freely transferable or licensable.⁸ Accordingly, the right of publicity is a descendible property right that is subject to estate taxes.⁹

¹ THOMAS PHILLIP BOGGESS V, CAUSE OF ACTION FOR AN INFRINGEMENT OF THE RIGHT OF PUBLICITY, 31 CAUSES OF ACTION 2D 121 (2006).

² J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1:2 (2d ed. 2016).

³ *Id.* at § 1:3.

⁴ *Id.* at § 1:2.

⁵ CHRISTOPHER P. CASEY & THOMAS J. HOPE, THE RIGHT OF PUBLICITY: AN OFTEN OVERLOOKED ASSET IN ESTATE PLANNING 69 (2011).

⁶ *Id.* at 72.

⁷ MCCARTHY, *supra* note 2, at § 10:6.

⁸ *Id.* at § 1:26.

⁹ I.R.C. § 1.167(a)-3 (West 2016).

Even when a state lacks an established right of publicity, a celebrity's estate can attempt to get protection through other legal avenues.¹⁰ For example, the music icon Prince died domiciled in Minnesota, a state that currently lacks an established right of publicity statute.¹¹ However, his estate can continue to protect his name, image and likeness through the common law tort of invasion of privacy by appropriation of name or likeness.¹²

Generally, there are two main ways to monetize postmortem the right of publicity. First, the estate can license the use of the celebrity's right of publicity to a licensee. This usually means writing up a licensing agreement that limits the use to specified terms, territory, types of use, and duration of time for a fee. Occasionally, a celebrity's estate will grant gratis use for uses that promote a good cause or memorialize the deceased celebrity in a dignified manner. Licensing a celebrity's right of publicity means that a person or company would ask permission and generally pay a fee to use the celebrity's name, image, likeness, photograph, voice, or signature in a product, service, performance, campaign or advertisement. Secondly, the estate can realize money from policing the right of publicity. This means pursuing infringements and collecting any damages or settlements paid by infringers.

Even when celebrities intend to take advantage of the lucrative qualities of their right of publicity, many celebrities overlook this right when it comes to licensing. It might not seem as intuitive to license someone's right of publicity the way it is traditionally done for other intellectual property rights like copyrights and trademarks. For instance, if a licensee wanted to produce and sell a coffee table book with a quote attributable to Maya Angelou, they would have to license the copyright for the quote as well as Angelou's right of publicity for the use of her name in connection to the sale of a commercial good. Celebrity endorsements have become customary in advertising goods and services.¹³ Accordingly, whether celebrities realize their potential or not, the right of publicity is becoming an increasingly lucrative asset to many celebrities and their estates.¹⁴

¹⁰ THOMAS PHILLIP BOGGESS V, CAUSE OF ACTION FOR AN INFRINGEMENT OF THE RIGHT OF PUBLICITY, 31 CAUSES OF ACTION 2D 121 (2016).

¹¹ Oliver Herzfeld, *Prince's Post-Mortem Publicity Rights*, FORBES (May 16, 2016), <http://www.forbes.com/sites/oliverherzfeld/2016/05/16/princes-post-mortem-publicity-rights/#6ddf4e52d89d>, {<https://perma.cc/WH7L-SFPS>}.

¹² *Id.*

¹³ See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) ("The theory of the right [of publicity] is that a celebrity's identity can be valuable in the promotion of products and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity").

¹⁴ See *id.* at 833.

III. RIGHT OF PUBLICITY AND ESTATE PLANNING

When a celebrity dies in a state with postmortem rights, her right of publicity descends to her estate. Therefore, she needs to value it and include it in her 706 filing so it can be taxed appropriately.¹⁵ Form 706 is filed with the Department of the Treasury and is used to determine the estate tax applied by Chapter 11 of the Internal Revenue Code.¹⁶ This tax is imposed on the entire taxable estate, which is referred to as the “gross estate.”¹⁷ A decedent’s gross estate includes the fair market value at the time of death of all property, whether “real or personal, tangible or intangible, wherever situated” in which he or she had an interest.¹⁸ In determining whether the right of publicity counts as “property,” the court in *Haelan Laboratories, Inc. v. Topps Chewing Gum* put it simply: “the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”¹⁹

Moreover, the fair market value is “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.”²⁰ The “relevant facts” are what a hypothetical willing buyer and seller could reasonably have been expected to know at the time of death.²¹ Accordingly, events that were not reasonably foreseeable at the date of death are not considered in evaluating a fair market value.²²

The IRS applies a strict standard to property appraisal and requires the estate to value the asset based on its “highest and best use.”²³ The “highest and best use” standard measures the full income-producing potential of the

¹⁵ ROBERT M. BELLATI, ESTATE PLANNING FOR FARMS & OTHER QUALIFIED FAMILY BUSINESSES APPENDIX Y (1999).

¹⁶ Internal Revenue Service, *Instructions for Form 706* (2016), <https://www.irs.gov/instructions/i706/ch01.html>, {<https://perma.cc/7UH3-C79Q>}.

¹⁷ *See id.*

¹⁸ I.R.C. § 2031(a) (2014); I.R.C. § 2511(a) (2010). *See also* Estate of Andrews v. United States, 850 F.Supp. 1279 (E.D. Va. 1994) (holding that the right of publicity is intangible, personal property that is descendible, transferable, and under section 2031(a) of the IRS, part of a decedent’s gross estate, thereby making it subject to the federal estate tax).

¹⁹ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

²⁰ I.R.C. § 20.2031-1(b) (West 2016).

²¹ *First Nat’l Bank of Kenosha v. United States*, 763 F.2d 891, 893–94 (7th Cir. 1985).

²² *Id.* at 894.

²³ 43 C.F.R. § 2201.3-2 (2016).

property regardless of how the estate will actually monetize the asset.²⁴ This means that even if the estate does not actually profit from this intellectual property asset, the estate may still be responsible for paying taxes on its income producing potential.²⁵ This holds regardless of the valuation method utilized.²⁶ Additionally, a beneficiary's decision not to exploit the decedent's right of publicity would not affect the valuation process.²⁷ Accordingly, any attempt the beneficiary may make to place limitations on the use of the right of publicity would not affect its value under the "highest and best use" appraisal standard set by the IRS.²⁸

But what if the decedent is the one that places restrictions on his or her right of publicity? Recently some celebrities have been more cautious of the post-death tax effects on their right of publicity. Probably one of the most recent and publicized examples of this came from the beloved actor and comedian Robin Williams. Williams restricted his estate from exploiting his right of publicity for twenty-five years after his death.²⁹ This might sound strange when you think of how much money could have been produced from the use of Williams' name, image, voice, and likeness. Another *Aladdin* sequel would undoubtedly provide Williams' estate with a hefty paycheck. But on closer inspection, it seems that Williams made a well-thought-out and economically sound decision. In considering this property right in his estate planning, Williams saved his estate from an onerous estate tax burden.

As I will discuss later on in this paper, the profitability of a celebrity's right of publicity has a finite life and the commercialization of Williams' right of publicity would likely not have extended past twenty-five years. Considering this, Williams arguably gave himself a right of publicity valuation of \$0. Furthermore, not only did Williams preempt the use of his publicity commercially, but he also assigned his publicity rights to a charitable foundation, enabling his trust to seek a charitable deduction.³⁰ In light of

²⁴ *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 692 (1995).

²⁵ 26 C.F.R. § 20.2031-1 (2016).

²⁶ See Joseph D. Wright, *Skyrocketing Dollars and the Tax Reform Act of 1997: Estate Planning for the Professional Athlete in a New Millennium*, 6 TULANE J. SPORTS LAWYERS 27, 40 (1999).

²⁷ See *Black v. Comm'r of Internal Revenue*, 38 T.C. 673 (1962).

²⁸ *Id.*

²⁹ See Eriq Gardner, *Robin Williams Restricted Exploitation of His Image for 25 Years After Death*, THE HOLLYWOOD REPORTER (March 30, 2015), <http://www.hollywoodreporter.com/thr-esq/robin-williams-restricted-exploitation-his-785292>, {<https://perma.cc/2FHX-NL3S>}.

³⁰ See *id.*

this, it seems Williams' intentions when placing limitations on his right of publicity are even more apparent: he was attempting to extricate his family from a severe tax burden.

Despite the intrigue of this interesting estate planning move, the majority of celebrities do not consider their right of publicity a valuable asset that greatly affects their estate tax burden. Therefore, their estates are left with an arduous task after they die: finding a method to properly estimate their right of publicity so that the IRS will not challenge its value. Financial advisory companies are accustomed to using strictly mathematical calculations, such as running regression models, plugging and chugging numbers into equations, discounting for present value, and applying industry percentages into an accepted accounting model for valuation. However, with the right of publicity, the basis of valuation is not as technical or mathematical. Right of publicity valuers often need more specialized knowledge about the market for image rights. Further, because the right of publicity is such a unique and abstract intellectual property right, a strictly mathematical methodology for valuation does not fit well. Accordingly, valuation strategies should be coupled with expert knowledge on the unique attributes of the entertainment industry in order to produce a justified figure.

IV. METHODOLOGIES FOR RIGHT OF PUBLICITY VALUATION

The fair market value appraisal of intangible property assets, including the right of publicity, involves consideration of three generally accepted valuation approaches: the market, cost, and income approaches.³¹

A. *Market Approach*

The market approach determines the fair market value of an asset by focusing on sales of comparable property.³² At a minimum, this approach assumes that there is an existing market of comparable properties and that a reasonable buyer would pay no more for a similar asset on the open market.³³ Applying this methodology to determining the value of a deceased celebrity's right of publicity would involve making comparisons to right of publicity valuations associated with similarly situated deceased celebrities.³⁴

³¹ See REILLY & ROBERT SCHWEIHS, *VALUING INTANGIBLE ASSETS* 113 (1 ed. 1999).

³² See Dr. Israel Shaked et. al., *Playing the Market (Approach): Going Beyond the DCF Valuation Methodology*, 28 AM. BANKR. INST. J. 58 (Dec./Jan. 2010).

³³ See REILLY & SCHWEIHS, *supra* note 31, at 115.

³⁴ See *Federal Estate Tax and the Right of Publicity*, *supra* note 24, at 690.

In determining if a celebrity is adequately comparable, a valuator should consider the subjects' level of fame, age, demographic audience, number of active royalty rates, similarity of licensing fees generated, and whether the celebrities are in a similar field of talent.

Although this method is intuitive, it is extremely difficult to implement because an appropriate comparable for a celebrity's right of publicity is often unavailable. A celebrity's persona is generally very unique; in fact, one reason why a celebrity's publicity is so valuable is because it is one-of-a-kind and is associated with a specific person. Occasionally, an argument can be made for a similarly situated comparable celebrity, but even if one is established, the comparable celebrity's valuation might be unreliable or unavailable. Accordingly, while this approach is generally intuitive, it is usually very difficult to implicate in the context of a celebrity's right of publicity.³⁵

B. Cost Approach

The cost approach determines fair market value of an asset by considering the current costs of replacing the asset in question.³⁶ The idea is that the cost it takes to replace an asset (by building or creating a similar asset from scratch) is reflective of its reasonable value.³⁷ Often, celebrities invest a lot of time, money, and energy into establishing a valuable public image allowing them to utilize their image or persona to realize profits.³⁸ This approach attempts to establish value by calculating the amount invested in building, marketing, and maintaining a celebrity brand. However, because of the virtual impossibility of establishing this figure, this approach is not effective when valuating right of publicity.

C. Income Approach

Lastly, the income approach focuses on the monetization potential of an intangible asset.³⁹ In this approach, the value of the right of publicity is the

³⁵ GORDON V. SMITH, CORPORATE VALUATION: A BUSINESS AND PROFESSIONAL GUIDE 146 (1988).

³⁶ Robert F. Reilly, *Intangible Asset Cost Approach Valuation Procedures*, 31 AM. BANKR. INST. J. 58, 59 (Sept. 2012).

³⁷ See Michael F. Beausang, Jr., *Valuation: General and Real Estate*, 132 3d Tax Mgmt. A-1, A-2 (1984).

³⁸ See generally Erandi Palihakkara, *Why the Kardashians Marketing Strategy is One for the Books*, HUFFINGTON POST (Feb. 4, 2016), http://www.huffingtonpost.com/erandi-palihakkara/why-the-kardashian-market_b_9136006.html, {<https://perma.cc/L3L8-RZQ2>}.

³⁹ See REILLY & SCHWEIHS, *supra* note 31, at 113.

present value of the expected stream of income received by ownership of the asset for the duration of the asset's profitable life.⁴⁰ Specifically, this method appraises the intangible asset by basing its value on historical evidence of yearly cash flows that are then projected over the asset's remaining useful life and subsequently discounted to present value.⁴¹

Determining the fair market value of a person's right of publicity under this approach requires many numerical considerations including estimates of profitability, future earnings potential, the duration of time in which income streams are feasible, and an estimation of the various risks associated with the realization of the forecasted income.⁴² Stated simply, this approach considers the income that the asset is currently producing in an attempt to project the income the property will produce in the future. In general, the income approach considers three main factors: a) the income generating capacity of the intangible asset, b) the expected remaining useful life of the asset, and c) a discount rate reflecting the risk associated with the asset.⁴³

Because the income approach accounts for the riskiness of an asset and establishes estimates by examining the historical income stream of the asset—here, the celebrity—I found it to be the most applicable to evaluating the value of a celebrity's postmortem right of publicity. Below, I will go over each factor and address how I would accommodate this approach to fit the valuation of this unique intellectual property asset. I will also discuss the various risks that should be considered when determining a risk factor to apply to the overall fair market value. In the end, I found that using a percentage to discount a lump sum value determined by the present value of projected future streams of income produced a reliable, comprehensive, and justified estimate.

V. INCOME APPROACH CONSIDERATIONS

A. *Establishing Expected Future Income*

Determining a celebrity's expected future income usually requires evaluating historical revenue attributable to right of publicity. This could mean past endorsement deals the celebrity entered into during life, any royalties for products bearing the celebrity's name or image, and any licensing agree-

⁴⁰ *Id.*

⁴¹ See Beausang, *supra* note 37, at A-5.

⁴² See REILLY & SCHWEIHS, *supra* note 31, at 115.

⁴³ IRS § 5: USPAP, Intangible Property Valuation Guidelines at § 4.48.5.2.4 (July 1, 2006).

ments allowing the use of the celebrity's right of publicity. For heightened accuracy, usually the retrospective valuation does not extend beyond the ten years preceding the celebrity's death.⁴⁴

1. Separating Right of Publicity from Personal Service

Evaluating past right of publicity revenue is by no means a simple calculation. This is mostly because there is one substantial difference between the income produced by a celebrity's right of publicity during her life versus after her death: after she dies, she can no longer provide any personal services. The majority of projects involving a celebrity's right of publicity also involve at least some level of personal assistance.⁴⁵ Let's consider an example to clarify the distinction between personal service and publicity rights. When a celebrity is hired to film a commercial, she is getting paid for her time on set and the labor involved in memorizing lines, acting out scenes, spending time in hair and makeup, and so on. She is also getting paid a premium because the company is using her celebrity status to advertise a product or service – this is the portion of the fee attributable to right of publicity. Accordingly, if you are basing the value of postmortem right of publicity on the stream of revenue acquired during life, the personal service component has to be stripped out from the projects considered in order to have an independent and accurate figure.

So how do we go about calculating this split? This is especially difficult since different levels of personal service often exist for each project a celebrity might be hired for. Therefore, I find it best to think about the level of service and publicity as a spectrum; on one end is right of publicity value and on the other is personal service value. If the ticker is halfway between both ends, that means the fee accounts for 50% personal service and 50% use of the celebrity's right of publicity.

To wrap our heads around this a bit more, consider an easy scenario where there is no personal service complication. When a magazine pays a celebrity for use of a photograph from her wedding day, it is usually paying for full image rights only, with no personal service component. This makes sense, since there was no additional labor required to produce the photograph. The celebrity simply provided an image already in existence and licensed out her right of publicity to the magazine. This would mean that

⁴⁴ See REILLY & SCHWEIHS, *supra* note 31, at 115.

⁴⁵ See *Garcia v. Comm'r of Internal Revenue*, 140 T.C. 141, 161 (2013) (distinguishing between allocating a specified portion of a famous golfer's fees towards compensation for personal service and allocating a different portion of the fee towards royalties).

100% of the fee she receives represents payment for the right of publicity only. This is an ideal scenario when trying to value right of publicity income separate from personal service. It also provides the valuator with a basis fee that she can consider when determining a fee split. Unfortunately, this is a very rare scenario. Even if a valuator is lucky enough to stumble on a project using only the right of publicity, she would still have to consider the duration of the license, the territory in which the image can be used, and a multitude of other factors that might affect the fee value. Nonetheless, this is pretty much as good as it gets. And this fee would be a helpful basis for the valuator to establish a more relevant and clean calculation of future income streams for a right of publicity.

Now let's consider the more complicated scenario where a celebrity is paid to shoot a commercial. Again, it would be inaccurate to attribute the entire fee obtained for this project to the cost of licensing her name and image only, since the celebrity had to provide labor for this project. So how do we account for personal service here? In order to strip out the personal service component and isolate the revenue attributable to right of publicity only, a valuator can consider various factors to determine a percentage of fees that account for the personal service component. One of these factors would be the level of service provided. Intuitively, the personal service component of a three-day commercial shoot would be more than a one-hour red carpet appearance. Likewise, factors like travel time, the opportunity cost of being unable to do other projects, and level of specialized skill involved in the service would all tip the scale towards a higher personal service allocation. Although the intuition behind using a factor consideration is grounded, it is inherently very abstract and hard to account for mathematically. Accordingly, it is important to determine and consider an exhaustive list of pertinent factors that would justify the numerical estimation that is determined.

In *Garcia v. Commissioner of Internal Revenue*, the Tax Court officially recognized the necessity to separate one's "personal service" revenue from one's right of publicity revenue.⁴⁶ In *Garcia*, experts provided testimony that under the general industry standard, personal services are more valuable than use of publicity revenue.⁴⁷ In order to achieve a justified allocation of the split between personal service and right of publicity rights, the parties provided two experts to opine on their methods of attributing this allocation.⁴⁸ The expert witnesses introduced a method to determine the division of right of publicity and personal service based on past royalties in previous

⁴⁶ *Id.* at 161.

⁴⁷ *Id.* at 152.

⁴⁸ *Id.*

contracts when available.⁴⁹ Most probably, the idea behind this proposal was that a celebrity would get a one-time fee for the labor provided, but licensing out their right of publicity would be accounted for by the royalties granted. This makes sense because licensing intellectual property rights oftentimes involves an allocation of a percentage of profits as opposed to a flat fee. Further, determining the right of publicity apportionment to be based on the percentage of royalties due allows valuers to have a numerical value for their split. This means if 10% of the fee a celebrity receives comes from royalties, then his or her right of publicity allocation would be 10% and his personal service would account for 90%. Moreover, this percentage can be applied to fees collected from other projects that do not have a royalty arrangement. Using the royalty method might be preferable to a valuator because it would be more difficult for the IRS to challenge a mathematically-based valuation than one based on various factors that give you an arguably arbitrary number. Furthermore, courts have repeatedly characterized payments for the right to use a celebrity's name and likeness as royalties because the celebrity has an ownership interest in the right that justifies his receiving a portion of sales attributable to his right of publicity.⁵⁰

B. *Establishing Remaining Useful Life*

The remaining useful life of an intangible asset ceases when it is no longer profitable.⁵¹ Therefore, when we are valuating the right of publicity, we are only concerned with the extent to which a celebrity's persona would continue to have financial appeal after his or her death.⁵² In evaluating the remaining life of an asset, it is important to recognize the difference between "legal life" and "useful life."⁵³ The legal life of the right of publicity is straightforward—legal determinants like statutes, ordinances, or administrative rulings set the duration of an asset's legal life.⁵⁴ In statutes provid-

⁴⁹ *Id.*

⁵⁰ *Goosen v. Comm'r of Internal Revenue*, 136 T.C. 547, 559 (2011) (internal citations omitted). Though, in *Goosen*, the Court further stated that, "The characterization of [a taxpayer's] endorsement fees and bonuses depends on whether the sponsors primarily paid for [the taxpayer's] services, for the use of [the taxpayer's] name and likeness, or for both. . . We must divide the intent of the sponsors and of [the taxpayer] from the entire record, including the terms of the specific endorsement agreement." *Id.* at 560.

⁵¹ REILLY & SCHWEIHS, *supra* note 31, at 213.

⁵² Matthew Savare, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129, 174–175 (2004).

⁵³ REILLY & SCHWEIHS, *supra* note 31, at 180.

⁵⁴ *Id.*

ing for a postmortem right of publicity, the length varies from twenty years to one hundred years after death, with the majority of states looking to federal copyright law for an idea of how to set the duration of the right after the celebrity has died.⁵⁵ For example, the “legal life” of a celebrity’s post-mortem right of publicity in California is seventy years from the date of death,⁵⁶ mirroring the legal life of a copyright.⁵⁷

While legal determinants set the legal life of the asset, economic determinants set the “useful life.”⁵⁸ Because we are only interested in the examining the period of time in which the asset remains profitable,⁵⁹ any value produced beyond the actual life would be considered negligible for purposes of valuation.⁶⁰ This means, instead of projecting a stream of income into the future for seventy years, we would only do so for the duration of time we expect that asset to maintain profitability. Like other intangible assets, the duration of a celebrity’s right of publicity profitability depends on the availability of willing buyers in the market.⁶¹

The market appeal a celebrity maintains after death usually depends on the celebrity’s popularity during life. For instance, iconic celebrities like Muhammad Ali and David Bowie would undoubtedly have a longer useful right of publicity life than most due to their pervasive notoriety during their lifetime. On the other hand, a celebrity with less worldwide appeal and popularity, such as former model and reality TV star Anna Nicole Smith, will have a smaller viable market and thus more difficulty exploiting her right of publicity beyond a few years after her death. Although Smith died domiciled in California and her right of publicity would have a legal life of seventy years,⁶² when valuating her right of publicity under the income ap-

⁵⁵ MCCARTHY, *supra* note 2, at § 9:16.

⁵⁶ CAL. CIVIL CODE § 3344.1 (West 2012).

⁵⁷ 17 U.S.C.A. § 302 (West 1998) (“Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.”)

⁵⁸ Newark Morning Ledger Co. v. United States, 507 U.S. 546, 551–552 (1993).

⁵⁹ Robert F. Reilly, *Intangible Asset Remaining Useful Life Analysis for Bankruptcy Purposes*, 20 AM. BANKR. INST. J. 32 (Mar. 2001).

⁶⁰ See Vince O’Brien & Lynne Klein, Address at the Intellectual Property in State Court Conference: Economic Analysis of Remedies in Right of Publicity Cases (Feb. 15-17, 1991) (predicting that right of publicity suffers a natural decline over time which is measurable because experts can “develop an earnings profile to see the effect of the passage of time” on a celebrity’s stream of income).

⁶¹ See Reilly, *supra* note 59.

⁶² See REILLY & SCHWEIHS, *supra* note 31, at 180.

proach, we will only consider the projection of cash flow over only a few years postmortem which signifies the profitable life of the asset.⁶³

The IRS's standard is to determine fair market value based on what is reasonably foreseeable at the date of death.⁶⁴ One consideration would be to examine the income-producing patterns of the celebrity's right of publicity near the time of death. If the celebrity was not producing much income off of his right of publicity in his last ten years of life, then this is indicative that the market for their postmortem right of publicity is low as well. A valuator should examine the number of endorsements, merchandise, advertisements, media-related events (such as public appearances, interviews, and photo shoots), books, movies, TV-shows, and the like, that the celebrity was involved in at or shortly before the time of death. All of these factors would be helpful considerations in determining the duration of appeal the right of publicity would maintain postmortem.

C. *Determining an Appropriate Risk or Discount Rate*

Monetizing a deceased celebrity's right of publicity can be an unattractive investment: it is full of uncertainties because there is always some risk of realizing no profits at all, and the market for this asset is hard to gauge.⁶⁵ Accordingly, the value determined from a projected future stream of income based on profits during the celebrity's lifetime needs to be discounted by a percentage to account for the unique risks apparent after death.⁶⁶ In order to determine an appropriate and justified discount rate, I am proposing that factors such as market limitations, tarnished reputations, and potential legal risks ought to be considered.

⁶³ Transcript of Record at 124, *People of the State of California v. Simpson*, available at <http://simpson.walraven.org/feb06-97.html>, {<https://perma.cc/JQZ8-WBSZ>} (where the court found that a celebrity with the fame and stature of O.J. Simpson could arguably exploit his right of publicity for an extended duration of time. In calculating Simpson's publicity value for the civil trial, plaintiff's expert witness, Mark Roesler considered a series of variables in determining that Simpson could exploit his right of publicity for profit for a useful life of 24 years).

⁶⁴ See *First Nat'l Bank of Kenosha*, 763 F.2d at 894.

⁶⁵ See *Estate of Andrews v. United States*, 850 F. Supp. 1279, 1295 (E.D. Va. 1994) (applying a 33% discount factor to account for the uncertainty of profiting off a novel written by a ghost writer after the subject author had died).

⁶⁶ See *id.*; see also Robert F. Reilly, *What Lawyers Need to Know About the Valuation of Intellectual Property*, 57 PRAC. LAW. 41, 56 (Oct. 2011).

1. Limited Market

Perhaps one of the most important considerations in valuating post-mortem right of publicity is the extent of the market appeal of a celebrity's name, image and likeness. Of course, there are certain celebrities that are more profitable than others. For instance, a celebrity like James Dean has high profitability because he appeals to a large audience. His right of publicity is especially lucrative because it can be used in relation to multiple demographics, many generations, and various markets. His name, image, and likeness have been used by high fashion designers like Dolce & Gabbana for men's hair products, on merchandise from cell phone cases to bobbleheads, and even in top songs from pop stars like Taylor Swift.⁶⁷ Because of this, his right of publicity is a highly profitable asset that continues to be valuable for its sixth consecutive decade.

On the other hand, a less popular celebrity does not have as many money-producing capabilities in as many markets. Therefore, it is important to consider the industry the celebrity is in and whether their persona is conducive to a wide range of products, endorsements, or other campaigns that could produce revenue. For the most part, a deceased musician, actor, or athlete is more profitable than a deceased author, artist, or scientist. This is because the former occupations generally entail the use of a person's name and image in connection with their talent, giving them a stronger physical presence in the media. Their identity gains more familiarity with society, causing it to be more profitable.

2. Tarnished Reputation

A celebrity with a tarnished reputation would experience a devaluation in their right of publicity. A prime example of this is Michael Jackson. Jackson's profitability off his music at his time of death is undeniable. But claiming his right of publicity has profitability postmortem is much more uncertain. It is well known that Jackson had a tarnished reputation after multiple child molestation and abuse allegations.⁶⁸ Further, the media

⁶⁷ See, e.g., *Recent Projects*, JAMESDEAN.COM (Dec 14, 2015), <http://www.jamesdean.com/community/recentprojects.html>, {<https://perma.cc/SFA3-QGEG>}; TAYLOR SWIFT, *STYLE* (Big Machine Records 2015).

⁶⁸ See, e.g., Josh Mankiewicz, *New Details About 1993 Jackson Case*, NBC NEWS (Sept. 3, 2004), http://www.nbcnews.com/id/5906855/ns/dateline_nbc-newsmakers/t/new-details-about-jackson-case/, {<https://perma.cc/4X8B-AGXA>}; Steve Knopper, *Michael Jackson's 2005 Child Molestation Trial: Journalists Remember the Public Frenzy, Porn, Hijinks*, BILLBOARD.COM (July 1, 2016), <http://www.billboard.com/>

heightened Jackson's negative reputation by publicizing footage of Jackson dangling his infant son Prince Michael "Blanket" Jackson II off a hotel balcony⁶⁹ and by focusing attention on his cosmetic surgeries.⁷⁰ Although Jackson participated in highly profitable endorsement campaigns with big companies like Pepsi during his lifetime,⁷¹ after his child molestation allegations the exploitation of his right of publicity separate from his music career was virtually non-existent.⁷² Jackson's controversial personal life undoubtedly increased the risk associated with monetizing his right of publicity. Therefore, considerations like reputation are vital to determining an appropriate and accurate value for this asset.

3. Potential Legal Risk

As noted above, the posthumous right of publicity is a state-protected right.⁷³ The existence or non-existence of this right is determined by the law of the state of domicile at the time of death.⁷⁴ Usually to be considered legally domiciled in a state one must: 1) physically reside there, and 2)

articles/columns/pop/7424014/michael-jackson-child-molestation-trial-journalists-remember, {<https://perma.cc/GF2V-C4EN>}; Julia Brucculieri, *Choreographer Wade Robson Claims Michael Jackson Ran Sophisticated Child Abuse Operation*, HUFFINGTON POST (Sept. 15, 2016), http://www.huffingtonpost.com/entry/choreographer-wade-robson-claims-michael-jackson-ran-sophisticated-child-abuse-operation_us_57dab93ee4b0071a6e05aa1f, {<https://perma.cc/NY6T-7DGP>}.

⁶⁹ See *Michael Jackson Dangles His Baby Over a Hotel Balcony*, YOUTUBE (Nov. 25, 2010), <https://www.youtube.com/watch?v=9ElddgJCgyg>, {<https://perma.cc/893K-6UQA>}; see also Jennifer Vineyard, *Michael Jackson Calls Baby Dangling Incident A Terrible Mistake*, MTV NEWS (Nov. 20, 2012), <http://www.mtv.com/news/1458799/michael-jackson-calls-baby-dangling-incident-a-terrible-mistake/>, {<https://perma.cc/C7VL-NE2Q>}.

⁷⁰ See, e.g. *Revealed: Scalpel by Scalpel, How Michael Jackson Destroyed his Looks in 100 Operations. . . and How He'd Have Looked Without Surgery*, DAILY MAIL REPORTER (Feb. 6, 2015), <http://www.dailymail.co.uk/news/article-2943351/Scalpel-scalpel-Michael-Jackson-destroyed-looks-100-operations-d-looked-without-surgery.html>, {<https://perma.cc/5AYN-QBQB>}.

⁷¹ See Monica Herrera, *Michael Jackson, Pepsi Made Marketing History*, BILLBOARD.COM (July 3, 2009), <http://www.billboard.com/articles/news/268213/michael-jackson-pepsi-made-marketing-history>, {<https://perma.cc/E56H-263R>}.

⁷² See generally JONATHAN VANKIN, *THE BIG BOOK OF SCANDAL* (1997) (discussing why Michael Jackson's child molestation allegations, child abuse allegations, and repeated bizarre behavior contributed his tarnished reputation in the media).

⁷³ See MCCARTHY, *supra* note 2, at § 10:6.

⁷⁴ See MCCARTHY, *supra* note 2, at § 11:15.

intend to remain there.⁷⁵ Moreover, a person can only maintain one domicile at a time.⁷⁶ Domicile is often a hotly contested issue with respect to rights of publicity because a celebrity could be granted a valuable postmortem right of publicity in one state, such as California, but have no protections at all if determined to be domiciled in another state, such as New York.⁷⁷ If there is a domicile issue that could potentially lead to a challenge of this intellectual property right altogether, it could lead to prolonged and expensive litigation, which could decrease the value of the asset or leave it nonexistent altogether.⁷⁸ Therefore, it is important to consider the availability of postmortem protection and possibility of a domicile challenge when valuating right of publicity.

VI. DISTINCTIVE CHALLENGES WHEN VALUATING RIGHT OF PUBLICITY: SEPARATING RIGHT OF PUBLICITY FROM TRADEMARK VALUE

Close parallels can be drawn between the origins of trademark law and right of publicity law. Trademark law originated as a protection for producers against others trying to profit from their mark's goodwill;⁷⁹ similarly, right of publicity law "grants a natural person an 'exclusive right to control the commercial value of his name and likeness and to prevent others from

⁷⁵ *Smith v. Smith*, 288 P.2d 497, 499 (Cal.1955) (internal citations omitted); *see also Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) ("A person's domicile is her permanent home, where she resides with the intention to remain or to which she intends to return.").

⁷⁶ *See Smith*, 288 P. 2d at 499.

⁷⁷ *See Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 996 (9th Cir. 2012) (finding it inconsistent when "in every prior judicial and quasi-judicial proceeding, the Monroe entities took the position that Monroe died domiciled in New York; Monroe LLC now asserts that Monroe died domiciled in California."). The court prevented Monroe's estate from availing themselves of the posthumous right of publicity protections under California law because her will had been probated in New York. Monroe was ultimately determined to be domiciled in New York, a state which does not recognize posthumous right of publicity, at the time of her death.

⁷⁸ *See id.*

⁷⁹ M.P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1841 (2007) ("[T]rademark law was not traditionally intended to protect consumers. Instead, trademark law, like all unfair competition law, sought to protect producers from illegitimate diversions of their trade by competitors American courts protected producers from illegitimately diverted trade by recognizing property rights.").

exploiting that value without permission.’”⁸⁰ Often, celebrities trademark their name as a way to get extra protections on their right of publicity.⁸¹ Besides right of publicity law, celebrities can claim damages from false endorsement and unfair competition under trademark law by registering their name with the United States Patent and Trademark Office.⁸² For example, Humphrey Bogart has a trademark on his name “HUMPHREY BOGART.”⁸³ This allows him protections under right of publicity law as well as trademark law.

Because of the stark intersection between trademark and right of publicity law, celebrities who trademark their names often come across a problem when evaluating their right of publicity. The trademark value of a deceased celebrity’s name is valued and denoted on a separate line on his or her estate tax forms,⁸⁴ but there is an undeniable overlap between a trademark bearing her name and the right of publicity, which also encompasses the protection of the celebrity’s name. Accordingly, there is significant difficulty in attempting to separate trademark and right of publicity value.

One way to combat this issue is to consider a similar analysis as we did above in our discussion of the difficulty and abstract nature of trying to isolate right of publicity value from an often present personal service component. Trademark value has a slight, yet distinct, difference from right of publicity valuation in that it is valuing the premium paid for a product because of the goodwill of the mark attached to it.⁸⁵ Thus, trademark valuation should focus on the goodwill of the celebrity’s name in relation to the specific good or service as opposed to the goodwill of the celebrity herself.

The concept behind valuing trademarks is quite similar to that behind the right of publicity. One way to think about the value of a celebrity’s right of publicity is to think about the premium a licensor is willing to pay for that celebrity because of their public stature. In other words, if you

⁸⁰ See *World Wrestling Fed’n. Entm’t, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 433 (W.D. Pa. 2003) (citing *Brockum Co. v. Blaylock*, 729 F. Supp. 438, 445 (E. D. Pa. 1990)).

⁸¹ See *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003); see also *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013 (C.D. Cal. 1998); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996); *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

⁸² 15 U.S.C. § 1125(a) (2012).

⁸³ Word Mark TESS Search for “Humphrey Bogart,” UNITED STATES PATENT AND TRADEMARK OFFICE, {<https://perma.cc/YU9S-A7PC>} (December 4, 2016, 3:21 PM).

⁸⁴ See General Instructions, IRS (last visited Dec. 4, 2016), <https://www.irs.gov/instructions/i706/ch01.html>, {<https://perma.cc/Z5XK-ZNLD>}.

⁸⁵ See 26 C.F.R. § 1.197-2 (2013).

needed an actor for your commercial, what is the premium you would pay to hire Meryl Streep over a no-name actor off the street? Similarly, a brand's trademark reflects a seller's ability to obtain a higher selling price and a larger market share for a branded product than would an identical unbranded product.⁸⁶ A price premium approach would simply consider the price difference between two or more comparable commodities: one with a trademark brand, and one without.⁸⁷

Adjusting this trademark valuation concept to the intersection with right of publicity involves considering the value of the product or service separate from the value of the celebrity's right of publicity. Probably the most effective way to determine this distinction mathematically is by valuing the premium paid for the product or service by virtue of the celebrity's name, allocating a percentage of that value to the celebrity's right of publicity valuation, and then allocating the remaining portion to the trademark valuation. This would not only simplify the undertaking needed to determine the figures for a single valuation but it would also avoid double counting on the estate tax filing.

Trademark value can also be determined by considering the cost it takes to build the brand (recall our review of the "cost approach" above). Specifically, brand replacement cost signifies the amount a company spends to build up a brand name (i.e. money spent on advertising, designing logos, creating a loyal consumer base, etc.).⁸⁸ Therefore, trademark value can be estimated by summing up all historical costs of development for the trademark.

However, this concept of trademark value based on cost of brand establishment is generally not applicable when considering a trademark that uses a celebrity's name. When you think about the intersection of trademark and right of publicity value in terms of brand development, it seems the value of the celebrity's name, image and likeness has already done all the hard work. In fact, the appeal of trademarking your name when you are a celebrity is that it usually represents a way to skip the brand establishment step and monetize the existing value of your celebrity. In this case, one way of looking at this is to say trademark value is identical to right of publicity value.

⁸⁶ See *Nestle Holdings, Inc. v. Comm'r of Internal Revenue*, 152 F.3d 83, 84 (2d Cir. 1998).

⁸⁷ See *id.* at 88 (calculating the trademark value as a percentage of sales that would be the same as the difference between its actual economic profits and its hypothetical ones where the profit is considered under unbranded conditions. The percentages of revenues help determine royalty rates; the actual trademark value is the same as the stream of royalties.).

⁸⁸ *Id.*

Thus, establishing the trademark value separate from the right of publicity value would be impossible since they are one in the same.

Another potentially more useful argument could be made using this same concept. The premium value of the trademark would be fully attributable to the right of publicity alone, making the trademark value nonexistent. But if there was any cost invested into the promotion of the celebrity's name in association with the product, above and beyond what existed before the product was introduced, this additional cost would be attributable to the trademark value.

Although the concept of trademark value and right of publicity value in some cases seems inextricable, there are ways to think about these intellectual property rights that allow valuers to distinguish their values. Ultimately, appraisers can separate these values by determining a percentage of the trademark value attributable to the right of publicity. Furthermore, appraisers can consider the cost invested into the promotion of the trademarked good or service that exceeds the existing right of publicity value before the trademark was introduced.

VII. CONCLUSION

Valuating intangible assets is a complicated task, and there is something particularly difficult when it comes to valuing a celebrity's right of publicity postmortem. However, this is an important and lucrative task; there is a lot of value in the future of postmortem right of publicity. Some of the world's most iconic personalities have continued to make money from the grave even decades after their death.⁸⁹ Celebrities like Audrey Hepburn, Elizabeth Taylor, and James Dean have defied the odds and have kept their images relevant even after their death.⁹⁰ With advancements in technology like hologram imaging, famous deceased personas are able to re-appear from the grave.⁹¹ More than ever, postmortem right of publicity is becoming a significant intellectual property right that is in a position to have expanding commercial value. And as the value in this asset is becoming ever more apparent, the IRS is beginning to keep a closer eye on celebrities' estate tax filings. Thus, this paper has shed light on the increasing need for a widely-

⁸⁹ See *Top-Earning Dead Celebrities 2015*, FORBES (Nov. 12, 2015), <http://www.forbes.com/dead-celebrities/>, {<https://perma.cc/63P2-7SDC>}.

⁹⁰ See *id.*

⁹¹ See Andrew Leonard, *Whitney Houston, Buddy Holly Return: Inside the Celebrity Hologram Trend*, ROLLING STONE (Dec. 4, 2015), <http://www.rollingstone.com/music/features/inside-the-celebrity-hologram-trend-20151204>, {<https://perma.cc/8DVW-TTFD>}.

accepted and reasoned methodology for postmortem right of publicity, it has provided insight on preferable methodologies to accomplish this goal, and it has surveyed the distinctive challenges that accompany the valuation of this unique asset.

