CHOICE OF LAW AND THE RIGHT OF PUBLICITY: RETHINKING THE DOMICILE RULE♦

MARY LAFRANCE∗

INTRODUCTION

The Queen of Soul, Aretha Franklin, died in her home state of Michigan in August of 2018. She left no will. Among the assets in her estate *may* be her right of publicity—that is, the exclusive right to exploit her name and likeness for commercial gain. But, was that right extinguished by her death? If it survived, who will have the power to exercise that right? The answer to these questions is . . . it depends. Among other variables, it depends on where the heirs seek to enforce the postmortem right, what choice of law rule is adopted by the courts of that jurisdiction, and, finally, how courts interpret the applicable substantive law.

The complexity arises because of the wide variation in the nature and scope of state laws protecting an individual's right of publicity. For foreign domiciliaries seeking to enforce their rights in the United States,

∗ IGT Professor of Intellectual Property Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

their national laws may come into play as well. The differences among the right of publicity regimes include, among others, (1) whether the right is protected at all;[1] (2) what aspects of a person's identity are protected; (3) what types of activities are actionable (e.g., commercial versus noncommercial); (4) what exceptions and limitations exist;[2] (4) alienability; (5) descendability; (6) remedies; and (7) the statute of limitations.

Because of the aforementioned differences, conflict of laws issues can arise when the unauthorized activity takes place outside of the individual's domicile.[3] Because only a few right of publicity statutes address choice of law, in most cases the choice falls to the court. There are many possibilities, including the law of the person's domicile, the law of the defendant's domicile, the law of the plaintiff's domicile (in the case of plaintiffs asserting rights derived from deceased personalities or persons who are assignees or licensees of another party's right of publicity), the law of the forum, or the law of the place where the infringement occurred. In some right of publicity cases, the choice of law is outcome-determinative; this is frequently the case, for example, where postmortem rights are involved.

While there have been calls for a uniform federal right of publicity, there is no indication that Congress will take this up in the near future. Furthermore, there are no international treaties harmonizing the right of publicity or specifying a choice of law principle for cross-border infringement claims.[4] Accordingly, choice of law issues will continue to arise in both domestic and international right of publicity disputes.

Courts have addressed choice of law problems in determining whether the plaintiff possesses an enforceable right of publicity, the nature and scope of that right, exceptions and limitations, as well as remedies. In resolving these choice of law questions, courts take widely

[1] The United Kingdom still does not protect an individual's right of publicity per se. Instead, the plaintiff must argue "passing off," which is an unfair competition claim akin to trademark infringement and, therefore, requires proof that the unauthorized use is likely to cause confusion as to the source or the affiliation. *See* Hayley Stallard, *The Right of Publicity in the United Kingdom,* 18 LOY. L.A. ENT. L. REV. 565, 570 (1998).

[2] Not surprisingly, Nevada has a statutory exemption for live celebrity impersonations. NEV. REV. STAT. § 597.790(2))(b).

[3] As discussed in Part II below, residence and domicile are similar, but not identical, legal concepts. For simplicity, this article uses the term domicile. Also, because the plaintiffs in some cases are estates, heirs, or licensees, rather than the individuals whose names or likenesses are at issue, this article will refer to those non-plaintiff individuals (living or deceased) variously as individuals, personalities, personae, or celebrities. The use of the term "celebrity" here does not imply that the individual is necessarily famous; instead, it merely suggests that his or her identity has been the subject of licensed or unlicensed commercial exploitation.

[4] Even though many countries recognize some form of the right of publicity, the right is not addressed in (i) copyright treaties, such as the Berne Convention for the Protection of Literary and Artistic Works or the WIPO Copyright Treaty, (ii) industrial property treaties, such as the Paris Convention for the Protection of Industrial Property, or (iii) broader intellectual property agreements, such as the TRIPS provisions of the WTO Agreement.

varying approaches. This is especially noticeable in cases involving postmortem rights, where the majority of courts have applied the law of the person's domicile at the time of death. A few jurisdictions, however, have rejected this approach.

The vast majority of these cases have been decided by federal courts exercising diversity jurisdiction. Their choice of law decisions, and often their decisions on substantive right of publicity laws, are typically based on the rules they believe the forum states would follow, rather than any laws that have actually been adopted by those states. At any time, therefore, a particular state court or legislative body could choose to reject these decisions and adopt different principles, and in a number of cases they have done so. Nonetheless, as a practical matter, the federal courts have played a significant role in developing right of publicity laws, as well as the choice of law principles that pertain to them.

Determining the best choice of law principle for right of publicity claims, and persuading courts to adopt this principle, will enhance predictability for potential plaintiffs and defendants in the foreseeable future. To begin this process, this article takes a critical look at the widespread practice of applying the law of the celebrity's domicile to determine the existence of an enforceable right of publicity. This article suggests that there are strong policy arguments against the domicile rule, and that courts adhering to the rule are confusing disputes over property ownership with disputes over liability for tortious injury to property.

Part I examines the handful of state statutes addressing choice of law for right of publicity claims. Part II examines some of the most significant case law, including cases that have applied the law of the domicile as well as cases adopting other approaches. Part III offers a policy critique of the domicile rule. Part IV concludes that there are strong policy arguments for rejecting the domicile rule, even in the case of postmortem rights.

I. RIGHT OF PUBLICITY STATUTES ADDRESSING CHOICE OF LAW

Although state right of publicity statutes rarely address choice of law, there are three exceptions: Indiana, Washington, and Ohio. The statutes in both Indiana and Washington specify that the statutory right of publicity applies to all personalities, living or deceased, regardless of their domicile.[5] Ohio's statute, in contrast, expressly limits its protection

[5] IND. CODE ANN. § 32-36-1-1 (West 2012) ("This chapter applies to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship."); § 32-36-1-6 ("'[P]ersonality' means a living or deceased person . . . ."); WASH. REV. CODE ANN. § 63.60.010 (West 2008) ("This chapter is intended to apply to all individuals and personalities, living and deceased, regardless of place of domicile or place of domicile at time of death.").

to Ohio domiciliaries.[6]

Despite the express choice of law provisions in the Indiana and Washington statutes, courts have sometimes been reluctant to enforce those provisions. One reason may be the courts' entrenched preference for the domicile rule.

Before 2008, Washington's right of publicity statute did not have a choice of law provision, although it expressly protected postmortem rights. In 2005, the Ninth Circuit upheld a district court's decision that the exclusive licensee of Jimi Hendrix's sole heir could not enforce Hendrix's postmortem right of publicity under Washington law, because the late musician was domiciled in New York at the time of his death.[7] Washington's legislature immediately, and retroactively, amended the statute to abrogate that decision.[8] A few years later, the same plaintiff brought suit against another infringer in the same district court, and the court again applied New York law, holding that Washington's express rejection of the domicile rule was unconstitutional.[9] Ultimately, the Ninth Circuit reversed this decision, upholding the constitutionality of Washington's decision to apply its own law to afford a postmortem right of publicity to a non-domiciliary.[10]

In *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*,[11] which involved consolidated cases arising in California and Indiana, the Ninth Circuit simply ignored the Indiana statute's choice of law provision, relying instead on Indiana's general choice of law rules: "Indiana['s] choice-of-law rules dictate that in resolving these state law claims we must apply the law of Monroe's domicile, New York, as controlling on all substantive matters related to the estate and disposition of property."[12] Similarly, in another Marilyn Monroe case arising under Indiana's long-arm statute, the Southern District of New York found it appropriate to adopt Indiana's choice of law rules, rather than New York's,[13] but did not apply the statutory choice of law provision, finding it "untenable" that a law enacted after Monroe's death could retroactively grant her a postmortem right.[14] Instead, the

[6] OHIO REV. CODE ANN. § 2741.03 (West 1999) (making the right applicable only to "the persona of an individual whose domicile or residence is in this state" or "whose domicile or residence was in this state on the date of the individual's death").

[7] Experience Hendrix LLC v. James Marshall Hendrix Found., 240 F. App'x 739 (9th Cir. 2007).

[8] Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd., 762 F.3d 829, 834–35 (9th Cir. 2015).

[9] Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd., 766 F. Supp. 2d 1122, 1141 (W.D. Wash. 2011).

[10] *Experience Hendrix L.L.C.*, 762 F.3d at 848.

[11] Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983 (9th Cir. 2012).

[12] *Id.* at 993 n.12.

[13] Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., 434 F. Supp. 2d 203, 210 (S.D.N.Y. 2006).

[14] Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 314 (S.D.N.Y. 2007).

court applied Indiana's general choice of law rule for construing a decedent's will, which required applying the law of the decedent's domicile.[15]

Even when Indiana is the forum state, federal courts have reached conflicting conclusions when asked to apply the statute to non-domiciliary decedents. In 2010, the Southern District of Indiana applied the statutory choice of law rule to allow a claim to proceed where the decedent (1) was domiciled in Illinois, and (2) died before the statute was enacted.[16] The judge found that there was "no question that the [s]tatute applies retroactively . . . ."[17] In contrast, the same court refused to apply the postmortem provisions retroactively in a 2011 case involving John Dillinger.[18] The conflicting decisions led the Indiana legislature to amend the statute in 2012 to make it explicitly retroactive.[19]

Ohio's statute appears to be unique in expressly limiting its right of publicity protection to Ohio domiciliaries. As a result, non-domiciliaries whose names and likenesses are exploited in Ohio will have no remedy under the statute. However, Ohio also recognizes the common-law right of privacy, which probably (although not explicitly) protects non-domiciliaries from unauthorized commercial appropriation even after the enactment of the statutory right of publicity in 1999.[20]

---

[15] *Id.* The court did not need to decide whether Monroe's domicile was New York or California, because it construed both laws as denying her a postmortem right. *Id.* at 315.

[16] Donovan v. Bishop, No. 1:09-cv-275-WTL-TAB, 2010 U.S. Dist. LEXIS 110204, at *15–16 (S.D. Ind. Oct. 14, 2010).

[17] *Id.* at *16.

[18] Dillinger, LLC v. Electronic Arts Inc., 795 F. Supp. 2d 829 (S.D. Ind. 2011). In another case involving Dillinger, LLC ("Dillinger"), the Indiana Court of Appeals narrowed the location of the postmortem right to a specific *county* for purposes of a venue dispute, holding that the situs of Dillinger's right of publicity was wherever the plaintiff was located, because "under the rule of '*mobilia sequuntur personam*,' the situs of intangible personal property is the legal domicile of the owner." Phillips v. Scalf, 778 N.E.2d 480, 483–84 (Ind. Ct. App. 2002). The court's approach thus differed from most courts' interpretation of the domicile rule, which looks to the domicile of the *decedent*, not the plaintiff. The Indiana court did not have that option, of course, because of the state's statutory choice of law provision.

[19] IND. CODE ANN. § 32-36-1-8 (West 2014).

[20] *See* OHIO REV. CODE ANN. § 2741.08 (West 1999) ("The remedies provided for in this chapter are in addition to any other remedies provided for by state or federal statute or common law."); *see also* James v. Bob Ross Buick, Inc., 855 N.E.2d 119, 122 n.2 (Ohio Ct. App. 2006). In a case predating the 1999 statute, which ultimately went to the United States Supreme Court, the Ohio Supreme Court applied the commercial appropriation branch of Ohio's common-law right of privacy to a probable non-domiciliary (Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454 (Ohio 1976), *rev'd and remanded*, 433 U.S. 562 (1977), discussed in *infra* note 99 and accompanying text). After enactment of the 1999 statute, Ohio courts have continued to enforce the common-law right against misappropriation of name or likeness—*see, e.g.*, *James*, 855 N.E.2d at 122–23 (where plaintiff was a fifteen-year employee of defendant's car dealership, and thus almost certainly domiciled in Ohio)—although they have not expressly addressed its application to non-domiciliaries.

II. THE LAW OF THE DOMICILE AND ALTERNATIVES

Unlike Washington, Indiana, and Ohio, most states do not provide a separate choice of law rule for the right of publicity. In the absence of a rule specific to the right of publicity, most courts have applied the default choice of law principles that apply to property disputes, on the theory that the right of publicity is a property interest. As a result, the majority of courts have applied the law of the plaintiff's domicile, or in the case of deceased persons, the law of the place where the decedent was domiciled at the time of death.[21]

The domicile rule has been endorsed by Professor McCarthy, the author of the leading treatise on the right of publicity. He justifies the rule as follows:

> This seems to be the only practical and fair rule to apply, and one which is usually applied to other types of personal property.
>
> 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. To avoid the lack of uniformity caused by applying the law of different states to property located in different states, the classic rule is to have the law of the decedent's domicile apply to the entire estate.
>
> It makes sense to apply the law of decedent's domicile to such an issue in order to avoid having the post mortem right of publicity viewed as "property" in the courts of one state and not in another state as to the estate of the same deceased person.[22]

The courts' preference for applying the law of the domicile to right of publicity infringement claims stands in sharp contrast to the favored choice of law principles for other kinds of tortious conduct. In most tort cases, courts apply either the law of the jurisdiction where the tortious conduct occurred—*lex loci delicti*—or that of the jurisdiction with the "most significant relationship" to the dispute, which is a determination based on weighing a number of factors.[23]

Not every court has embraced the domicile rule. In fact, most of the case law supporting the rule has involved postmortem rights. In contrast, courts seem reluctant to apply the rule when it would deny protection to the publicity rights of living individuals. To complicate matters, much of the case law comes from federal courts exercising

---

[21] 2 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 11:15 (2d ed. 2018).

[22] *Id. at* § 11:17 (citing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 75(c)(3) (3d ed. 2002)).

[23] 16 SONJA LARSEN & KARL OAKES, AMERICAN JURISPRUDENCE: CONFLICT OF LAWS § 99, at 164–66 (2d ed. 2018); § 102, at 168–70.

diversity or pendent jurisdiction. In deciding what choice of law rule the forum state would adopt, these courts engage in a certain degree of speculation. Nonetheless, since most right of publicity cases posing choice of law questions are litigated in federal courts, these cases accurately reflect the state of the law in practice, even if the federal courts do not always correctly surmise how a state court would rule.

Some courts do not apply the law of the domicile at all, while others apply it only to determine the threshold question of the existence of a right of publicity enforceable by the plaintiff. When courts do not use the law of the domicile, their preferred alternative is to apply the law of the jurisdiction with the "most significant relationship" to the dispute.

Even where courts apply the domicile rule only to determine the existence of a right of publicity, this approach departs from the choice of law principle applied to other torts. According to the Second Restatement of Conflicts of Law, the question whether a plaintiff possesses an interest that it entitled to legal protection should generally be determined under the law that has the most significant relationship to the occurrence and the parties.[24] The domiciles of the parties are only one factor in this analysis.[25] In most cases, the applicable law will be that of the place where the injury occurred. [26]

A critique of the domicile rule must begin by considering the reasoning that had led the majority of courts to adopt that rule. The materials that follow examine some of the leading cases in several jurisdictions. While most focus on postmortem rights, several involve the rights of living non-domiciliaries.

A. *California*

A leading case applying the domicile rule to postmortem rights is *Cairns v. Franklin Mint Co.*,[27] where the defendant was advertising and distributing merchandise throughout the United States that featured the name and likeness of the late Diana, Princess of Wales.[28] Because California's postmortem right of publicity statute did not specify the choice of law, the district court turned to California's default choice of law rules.[29] California (like many states) ordinarily applies the governmental interest analysis for choice of law determinations as to whether a tortious act has occurred.[30] However, because the postmortem

[24] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 158, 145 (AM. LAW INST. 1971).
[25] *Id.* §§ 6, 145.
[26] *Id.* § 158.
[27] Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1022 (C.D. Cal. 1998).
[28] *Id.*
[29] *Id.* at 1024–25.
[30] *Id.* at 1025.

right of publicity is a property right in California,[31] the district court instead applied the state's choice of law rule for personal property to determine whether the plaintiffs possessed Diana's postmortem right. That rule, which is codified in California Civil Code Section 946, provides, "[i]f there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile."[32]

The decision to apply section 946 might have been justified if the court had been adjudicating a dispute between two parties asserting conflicting claims to inheritance of Diana's postmortem right. The court asserted that "[section] 946 dictates that personal property is generally controlled by the law of a decedent's domicile at the time of his or her death,"[33] a rule traceable to the common law.[34] However, the common-law rule addresses the question of how a decedent's property is *distributed*.[35] It does not address the question of what property the decedent possessed in the first place. Thus, the common-law rule did not mandate reliance on United Kingdom law to determine (i) whether Diana possessed a right of publicity at all, (ii) whether that right constituted a property right or some other kind of right, or (iii) whether the right ceased to exist after her death.

Yet the district court found that the estate's infringement claim was "quintessentially the type of situation in which the general rule of section 946 is meant to apply because looking at the law of the domicile ensures that the property right will not be recognized as part of the Estate by some jurisdictions and not by others."[36] That could be true in a property dispute between putative heirs, where there is a need to quiet title in order to protect potential defendants against multiple conflicting claims. However, even if the right of publicity is viewed as property, a right of publicity infringement claim is not a dispute over *title* to property; it is a claim of tortious *injury* to property. In *Cairns*, there was no dispute over the ownership of Diana's postmortem rights, only a dispute as to whether those rights were infringed in California. The *Cairns* court did not explain why there would be a problem if Diana's estate could control commercial uses of her name and likeness in one state but not in another.

---

[31] *Id.* at 1025. Under current law, this is codified at CAL. CIV. CODE § 3344.1(b) (West 2012). At the time of the district court's decision, it was CAL. CIV. CODE § 990(b). Courts have held that California's common-law right of publicity is a property right as well. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

[32] CAL. CIV. CODE § 946 (West 1872); *see also* Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1541 (11th Cir. 1983) (applying section 946 to determine existence of Clyde Beatty's postmortem right of publicity in a case transferred from California).

[33] *Cairns*, 24 F. Supp. 2d at 1026.

[34] *Id.* (citing *In re* Moore's Estate, 12 Cal. Rptr. 436 (Dist. Ct. App. 1961)).

[35] *See, e.g.*, *In re Moore's Estate*, 12 Cal. Rptr. at 436–37.

[36] *Cairns*, 24 F. Supp. 2d at 1027.

The Ninth Circuit upheld this decision, holding that neither Diana's estate nor its exclusive licensee could invoke the protection of California's postmortem right of publicity, because the United Kingdom, Diana's domicile at the time of her death, did not recognize a postmortem right of publicity.[37] Even though California's postmortem right of publicity statute had recently been amended to state that it applied to "acts occurring directly in this state,"[38] the Ninth Circuit interpreted this as a territorial limitation, rather than a choice of law provision.[39] Accordingly, the plaintiffs could not bring a claim under California's postmortem right of publicity.

Some federal courts in the Ninth Circuit have asserted that the choice of law analysis in postmortem right of publicity claims should be bifurcated, with the domicile rule governing the question whether the right exists, and a different test—typically the "most significant relationship" test—applying to the question of infringement. *Cairns* relied on one such case, *Joplin Enterprises v. Allen*,[40] in which the estate of Janis Joplin (who was domiciled in California at the time of her death) alleged that her postmortem right of publicity was infringed by a biographical play that included a simulated concert performance. Because Joplin's domicile, California, recognized a postmortem right of publicity, the court reached the merits of the infringement claim. It did not, however, carry out a conflicts analysis to determine which state's law should govern the infringement analysis, even though it had previously stated that the law of the state with the most significant interest in the dispute should govern this analysis. Instead, it analyzed the claim under both Washington and California law, implying that one of these states must have had the most significant relationship to the dispute. It was unnecessary to choose between them, however, because the court concluded that the plaintiff's claim would fail, no matter which state's law applied.[41]

Although the *Joplin* claim ultimately failed on the merits (because the California statute expressly exempted plays), if the defendant's

---

[37] Cairns v. Franklin Mint Co., 292 F.3d 1139, 1148 (9th Cir. 2002).

[38] *Id.* at 1145 (citing CAL. CIV. CODE § 3344.1(n)). The California Legislature added this language (and renumbered the statute) in June of 2000, just a few months after an earlier decision in this case, where the Ninth Circuit had upheld the district court's dismissal of the plaintiffs' postmortem right of publicity claim under the predecessor statute, CAL. CIV. CODE § 990, using the same default choice of law principle. *See* Diana Princess of Wales Mem'l Fund v. Franklin Mint Co., Nos. 98-56822, 99-55157, 1999 U.S. App. LEXIS 34568, at *3–4 (9th Cir. Dec. 30, 1999). After the statute was amended, the plaintiffs filed a motion to reinstate their claim under the amended statute, leading to the Ninth Circuit's 2002 decision.

[39] The court based its interpretation on the legislative history of the amendments, which indicated that the Legislature considered the statute language that would have extended protection to non-domiciliaries, and that a second amendment to reintroduce that language was considered, but later withdrawn. *Cairns*, 292 F.3d at 1148–49.

[40] Joplin Enters. v. Allen, 795 F. Supp. 349 (W.D. Wash. 1992).

[41] *Id.* at 351–52.

activity had not been exempt, the defendant could have been held liable under the law of Joplin's domicile, even if the defendant's activity were lawful in the jurisdiction where it occurred, which appears to be Washington.[42] In this case, because Washington did not have a right of publicity law, the defendant's exploitation of Joplin's identity within the state of Washington was lawful under the law of that state. Yet, under the domicile rule, the defendant could have been held liable under California law, even if the defendant's activity were restricted to Washington. Such a result leaves a merchant at risk of liability under foreign law, even for activities that are purely intrastate.

Only a few cases have addressed the choice of law question with respect to *living* persons who are domiciled in jurisdictions that do not recognize the right of publicity.[43] As discussed below, the courts in each of these cases have found a way to avoid the domicile rule, in order to recognize the living plaintiff's right of publicity.

In California, for example, the district court in *Cairns*—after applying the domicile rule to deny California's postmortem right to a *deceased* non-domiciliary—expressly declined to decide whether the same rule should apply to living persons.[44] Most such cases in California have applied the law of the forum, which has typically also been the plaintiff's domicile.[45]

However, during the interval between the district court and appellate court opinions in *Cairns*, the Ninth Circuit held, in *Downing v. Abercrombie & Fitch*,[46] that California law applied to a right of publicity claim brought by Hawaii residents, against the defendant, for unauthorized commercial use of their names and likenesses in California.[47] Although the opinion does not discuss whether, or to what extent, Hawaii recognized the right of publicity, no such right existed in Hawaii at that time.[48] One Hawaii state court had recognized a common-law privacy right that protected against unauthorized use of a private individual's name and likeness, based on allegations of "humiliation, annoyance and embarrassment."[49] However, because this was not the same as the *property*-based right of publicity recognized by

[42] The court's opinion never mentions where the alleged infringement took place. It was almost certainly Seattle, however, where for twenty-seven years, defendant Gaye Anderson operated a New Orleans-themed restaurant, which featured live jazz and blues. Paul de Barros, *'Celebration of Life' for Club Owner Gaye Anderson*, SEATTLE TIMES (Sept. 20, 2012, 7:01 PM), https://www.seattletimes.com/entertainment/celebration-of-life-for-club-owner-gaye-anderson/.

[43] The major reason for the small number of cases is the increasingly widespread recognition of the right of publicity, which leaves fewer jurisdictions where that right is completely unprotected.

[44] *See* Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1028 (C.D. Cal. 1998).

[45] *See id.* at 1028–29 (collecting cases).

[46] Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001).

[47] *Id.*; Cairns v. Franklin Mint Co., 292 F.3d 1139, 1148 (9th Cir. 2002).

[48] This is confirmed in Lightbourne v. Printroom, Inc., 307 F.R.D. 593 (C.D. Cal. 2015).

[49] Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141, 142–43 (Haw. 1968).

California, the plaintiffs were unlikely to succeed on their right of publicity claim if Hawaii law had applied. In fact, the district court dismissed the plaintiffs' claims based on choice of law, although the opinion does not report the district court's reasoning. The Ninth Circuit, however, reversed on the basis of the governmental interest analysis. Drawing a comparison to *Hurtado v. Superior Court*, in which the California Supreme Court applied California law to a wrongful death claim brought by Mexican plaintiffs (where Mexican law imposed a limit on wrongful death injuries),[50] the Ninth Circuit explained that the choice of law analysis should favor California when the other jurisdiction has no interest in having its own law applied:

> As the [*Hurtado*] court stated, one of the primary purposes of creating a cause of action in tort is to deter misconduct within its borders by persons present within its borders. By distributing its catalog within California, Abercrombie was operating within its borders.
>
> Hawaii, on the other hand, like Mexico in *Hurtado*, had no interest in limiting the extent of relief that its residents could obtain for a wrongful act against them in California. It is even more clear in this case[,] because Hawaii did not place any limitation on recovery; instead[,] it simply did not provide for the extent of relief California does in this type of action. It is pure fancy to believe that Hawaii would wish to restrict its residents from recovery that others could obtain in California solely because it had not enacted a statute like California's to complement its common law action for the same offense. Hawaii had no interest in having its law applied to this action brought in California.
>
> The California Supreme Court has made it clear that when California has an interest in enforcing its law within its borders[,] and a foreign state (in this case Hawaii) has no interest in having its law applied, then the law of California should be applied.[51]

Downing may answer the question left open by the district court in *Cairns*: if the application of the domicile rule would leave a living plaintiff without an adequate remedy for infringement of the right of publicity, some courts will simply reject the rule.

Nearly fifteen years after *Downing*, a federal court in California once again avoided applying the domicile rule to living nonresidents, although in this case it did not allow them to invoke California law. In *Lightbourne v. Printroom, Inc.*, a former college football player sought to certify a class action against a California defendant for making

---

50 Hurtado v. Superior Court, 522 P.2d 666 (Cal. 1974).

51 *Downing*, 265 F.3d 994 at 1006–07.

unauthorized commercial use of photographs;[52] however, the putative class included football players residing in different states.[53] This time, the Central District of California did not even mention the domicile rule; instead, it proceeded directly to the governmental interest analysis. Unlike *Cairns*, which had treated section 946 as dispositive for property claims, the *Lightbourne* court treated it as merely one factor in the interest analysis—that is, as indicating California's view that a plaintiff's state of residence has an interest in applying its own law to the injury.[54] This factor, in the end, was sufficient to dissuade the court from ruling that California law should apply to the nonresidents.[55]

The *Lightbourne* court distinguished *Downing*, by pointing out that, at the time of that decision, Hawaii had no right of publicity laws, whereas the "vast majority" of states, including Hawaii, had adopted some degree of right of publicity protection by the time of the *Lightbourne* case.[56] To the extent that their laws differed from California's, those states had a legitimate interest in applying their own policy choices to their own residents.[57]

The *Lightbourne* court's effort to distinguish *Downing* is not persuasive. It turns on a distinction between a state that does not protect a right at all (Hawaii in the past) and a state that protects the right to a different degree (Hawaii more recently, and many other states). Both of these are policy choices, and thus merit consideration in the interest analysis. The court's analysis would have been more convincing if it had found that Hawaii simply had not considered the policy question at the time of *Downing*. If a state has had no occasion to consider whether the right of publicity exists, it cannot have an interest in applying its policy, because it has no policy to apply. In contrast, a state that adopts a right of publicity, but makes it subject to express limitations, has made a policy decision that it may have a legitimate interest in protecting.

In 2016, *Downing* led another court to reject the domicile rule in *Rams v. Def Jam Recordings, Inc.*,[58] which involved a right of publicity claimant domiciled in Denmark, where (arguably) the right of publicity was not recognized.[59] Although the case was heard in the Southern District of New York, the court was required to apply California choice of law principles, because the case had been transferred from California.[60] Consistent with *Downing*, the court refused to apply the

[52] *Lightbourne*, 307 F.R.D. 593.
[53] *Id.* at 597.
[54] *Id.* at 599.
[55] *Id.* at 600.
[56] *Id.* at 599.
[57] *Id.* at 599–600.
[58] Rams v. Def Jam Recordings, Inc., 202 F. Supp. 3d 376 (S.D.N.Y. 2016).
[59] *Id.* at 386.
[60] *Id.*

law of the plaintiff's domicile, and instead applied California's governmental interest analysis.[61] The court distinguished *Cairns* as involving a postmortem right.[62]

B. *Massachusetts*

Long before California began edging away from the property-based choice of law rule for non-domiciliaries, the First Circuit had already adopted its own, somewhat bizarre, approach. In *Bi-Rite Enterprises, Inc. v. Bruce Miner Co.*,[63] United Kingdom recording artists objected to the use of their names and likenesses on posters that the defendant (a Massachusetts corporation) distributed in the United States without the entertainers' consent. Two of the plaintiffs—Bi-Rite and Artemis—were exclusive licensees of the recording artist's U.S. merchandising rights; additionally, members of Judas Priest, Duran Duran, and Iron Maiden were named as individual plaintiffs.[64]

The district court in Massachusetts did not undertake a choice of law analysis on the question whether the right of publicity could be licensed. Indeed, rather than considering the law of any specific state, it simply stated a general principle, adopted by several circuits, that the right can be assigned and licensed.[65]

However, on the question whether the British performers owned an enforceable right of publicity in the first place, the district court applied Massachusetts' choice of law rule for property, which looks to the law of the property's situs.[66] Massachusetts courts, however, had never addressed the situs of the right of publicity, leaving the federal court to develop its own rule. Unlike many courts, the district court did not rule that the situs of the right was the celebrity's domicile. According to Massachusetts' highest court, the state's right of publicity statute[67] protected "the interest in not having the commercial value of one's name, portrait or picture appropriated to the benefit of another."[68] Therefore, the district court held that the situs of a person's right of publicity must be "where the 'commercial value' of one's persona is exploited."[69]

In determining the place of exploitation for purposes of this rule,

---

[61] *Id.* at 386–87.
[62] *Id.* at 386.
[63] Bi-Rite Enters., Inc., v. Bruce Miner Co., 757 F.2d 440 (1st Cir. 1985).
[64] Bi-Rite Enters., Inc. v. Bruce Miner Poster Co., 616 F. Supp. 71, 73 (D. Mass. 1984). The individual plaintiffs resided in the U.K. With respect to the performers who had licensed their rights exclusively to Bi-Rite and Artemis, some lived in the U.S. and some in the U.K. *Id.* at 75.
[65] *Id.* at 73.
[66] *Id.* at 74. Because the parties agreed that property choice of law rules should apply, (also citing case law from the Second Circuit), the court had no reason to consider other possibilities.
[67] MASS. GEN. LAWS ANN. ch. 214, § 3A (West 1973).
[68] *Bi-Rite Enters.*, 616 F. Supp. at 74.
[69] *Id.*

the district court held that domicile might be relevant; however, a more important consideration would be "where the plaintiff has developed and exploited his right of publicity through licensing agreements, assignments or merchandising schemes."[70] The court's language here is a bit confusing, as the "plaintiffs" in the case included individual celebrities, as well as exclusive licensees of other celebrities. The celebrities who licensed their rights exclusively to Bi-Rite and Artemis might be viewed as having exploited those rights (i) only where Bi-Rite and Artemis were located, or (ii) in every place where the licensed products were distributed. The court's language also implies that the place of exploitation would not include everywhere that the commercial value of the persona was *actually* exploited (including unlicensed exploitations by the defendant); instead, it included only those places where that value was exploited with the *consent* of the celebrity. Under this approach, a celebrity would be well advised to choose licensees based on their place of incorporation.

With respect to the performers who had licensed their exclusive rights to Bi-Rite and Artemis, the district court decided that the existence of their publicity rights would be determined by the law of the state where the exclusive licensees were incorporated (Illinois and Connecticut, respectively). With respect to the individual plaintiffs, all of whom resided in the U.K., the court applied the law of Georgia, because their "merchandising representative" was located there. Although Massachusetts was the forum state, and therefore provided the choice of law rule, the opinion does not indicate whether any of the defendant's infringing activities took place there; indeed, it does not indicate where any of those activities took place.

From the court's description, and the fact that these performers were named as individual plaintiffs instead of their representative, it is clear that the Georgia company was not their exclusive licensee. Instead, it was merely "responsible for policing and protecting the use of the groups' names, logos, and likenesses."[71] Using the location of a non-exclusive agent seems like a particularly slender thread on which to hang the choice of law determination, especially since a celebrity might have non-exclusive agents in several different jurisdictions. The district court's willingness to adopt this dubious approach suggests that it was eager to avoid the consequences of the domicile rule, which would have left the members of these three prominent bands unprotected against

[70] *Id.* The court bolstered this analysis by arguing that the law of New York—a jurisdiction that had no connection to the case—required a right-of-publicity plaintiff to demonstrate that he had exploited his right of publicity in a manner that showed his awareness of its commercial value—a questionable interpretation of New York law that was based entirely on federal court decisions. *Id.*

[71] *Id.* at 75.

unauthorized merchandising in many—if not most—U.S. jurisdictions.

Despite its somewhat bizarre reasoning, the district court's decision was upheld on appeal.[72] For reasons that are unclear, but which probably reflect the positions adopted by the litigants, the First Circuit considered only two options for the governing law: (i) the law of the celebrity's domicile and (ii) the residence of the exclusive licensee or merchandising representative.[73] In contrast to the district court, the appellate court attempted to ground its choice of law analysis more firmly in Massachusetts law. It described the state's choice of law rules as "in transition" between older and more modern approaches, and suggested that the rigidity of the older approach was especially ill-suited for the multi-faceted nature of the right of publicity:

> The state has turned away from the rigid, single-factor analysis associated with the first *Restatement of Conflict of Laws* (1934) in favor of the more flexible, multiple-factor, "interest analysis" or "most significant relationship" analysis exemplified by the *Restatement (Second) of Conflict of Laws* (1971). Under the older approach, courts determined which jurisdiction's law governed by categorizing an action (as a tort, contract, or property dispute, for example) and then looking to a single connecting factor (such as place of injury, place of agreement, or situs of property).[74]
>
> The "right of publicity" does not fit neatly into any of the categories—Tort, Property, Contract, etc.—which provided the framework for traditional (First Restatement) choice of law analysis. The alleged infringement in the present action implicates elements of both Tort and Property law.
>
> If Massachusetts still adhered to the single-factor mode of analysis of the First Restatement, categorizing this action would be critical. Indeed, the parties' briefs are largely dedicated to asserting that one categorization or another is appropriate. However, Massachusetts' choice of law rules no longer rest on such a rigid system. Massachusetts' current approach is based on a set of overarching principles and considerations applicable to all choice of law questions.[75]

The appellate court, therefore, applied the "interest" analysis favored by more recent Massachusetts case law as well as the Second Restatement, and concluded that the United Kingdom had no real interest in preventing its domiciliaries from enforcing their rights of

---

[72] Bi-Rite Enters., Inc. v. Bruce Miner Co., 757 F.2d 440 (1st Cir. 1985).
[73] *Id.* at 442.
[74] *Id.*
[75] *Id.* at 445 n.2 (citation omitted).

publicity in the United States.[76] In determining the interests of Georgia, Illinois, and Connecticut, the court lumped all three states together, referring to "the law of the United States," and disregarding any differences among the laws of the three states.[77]

Despite the lack of precision in its analysis, the First Circuit court was the first to articulate a strong policy basis for rejecting the domicile rule:

> The final considerations listed in section 6(2) of the Second Restatement are "certainty, predictability, and uniformity of result, and ease in the determination and application of the law to be applied." With respect to these considerations, the better decision is obvious. Any rule basing publicity rights on the nationality of the performer would give rise to unnecessary confusion. To require American producers and merchandisers of novelties to tailor their expectations and actions according to the nationality of the individuals depicted would be anomalous and unworkable.[78]

The court also suggested, without elaboration, that applying the domicile rule to give lesser commercial rights to foreign domiciliaries than to Americans might amount to unconstitutional discrimination.[79]

The end result in *Bi-Rite* is unique among right of publicity cases. Although the court declined to apply the domicile rule based on the actual domiciles of the celebrities, and purported to apply the governmental interests test, the result was a bizarre version of the domicile rule, under which the court used the domiciles of the celebrities' licensing agents instead of the domiciles of the celebrities themselves.

C. *New York*

The domicile rule remains firmly entrenched in New York, where both state and federal courts treat the right of publicity as personal property for purposes of the choice of law analysis.[80] The property characterization is ironic, both because the New York courts have expressly characterized the right of publicity as a privacy right,[81] and

[76] *Id.* at 443–46.
[77] *Id.* at 444, 446.
[78] *Id.* at 446. The court added that the domicile rule created uncertainty for foreign performers seeking to exploit their rights in the United States. *Id.* But, this argument is less persuasive. Granted, some individuals might be uncertain as to what a court would consider their legal domicile. However, for others whose domicile is clear, the domicile rule offers simplicity and certainty, even if it is not the most economically beneficial.
[79] *Id.* at 444 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that discrimination against people of Chinese race and nationality who were seeking permission to operate laundries denied equal protection and violated the Fourteenth Amendment)).
[80] Se. Bank, N.A. v. Lawrence, 489 N.E.2d 744 (N.Y. Ct. App. 1985).
[81] Stephano v. News Grp. Publ'ns, Inc., 474 N.E.2d 580 (N.Y. 1984); James v. Delilah Films,

also because the right is not descendible.[82] New York state and federal courts do not take a bifurcated approach to the choice of law analysis; where the plaintiff is a non-domiciliary, the courts have applied the law of the domicile to all aspects of the claim.

In *Southeast Bank, N.A. v. Lawrence*,[83] a postmortem case with an interesting twist, the estate of Tennessee Williams brought suit in order to prevent the defendant from naming a Manhattan theatre after Tennessee Williams.[84] The lower court did not undertake a choice of law analysis and simply applied New York law.[85] However, the New York Court of Appeals reversed, holding that the applicable substantive law was that of Florida, because Williams was domiciled there at the time of his death. Unfortunately for the plaintiff, under Florida law, the only parties that can own a postmortem right are (1) those to whom a decedent licensed his right of publicity during his lifetime, and (2) the decedent's surviving spouse and children.[86] Since the plaintiff belonged to neither of these classes, it could not assert Williams' postmortem right under Florida law.[87]

The Second Circuit has construed New York law as applying the domicile rule to living plaintiffs. In *Rogers v. Grimaldi*,[88] Ginger Rogers brought a right of publicity claim against the filmmakers and distributors of a film that used her name as a character's name and in the film's title. Because Rogers was domiciled in Oregon, which had no statute or case law on the right of publicity, the Second Circuit was forced "to engage in the uncertain task of predicting what the New York courts would predict the Oregon courts would rule as to the contours of a right of publicity under Oregon law."[89] After a convoluted analysis,[90] the court concluded that Oregon's right of publicity law would protect free expression to the same degree as the laws of New York and California.[91]

Inc., 544 N.Y.S.2d 447 (N.Y. Sup. Ct. 1989).

[82] The right is purely statutory, because New York does not recognize a common-law right of publicity. *Stephano*, 474 N.E.2d 580.

[83] *Lawrence*, 489 N.E.2d 744.

[84] *Id.* at 745.

[85] Se. Bank, N.A. v. Lawrence, 483 N.Y.S.2d 218 (App. Div. 1984), *rev'd*, 489 N.E.2d 744 (N.Y. Ct. App. 1985).

[86] *Lawrence*, 489 N.E.2d at 745.

[87] *Id.* Ironically, the lower court (which did not address choice of law at all) had interpreted New York law as providing a common-law descendible right of publicity. *Lawrence*, 483 N.Y.S.2d at 223, *rev'd*, 489 N.E.2d 744. This position was repudiated by the Court of Appeals almost immediately. *Stephano*, 474 N.E.2d 580.

[88] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).

[89] *Id.* at 1002.

[90] This included determining whether New York, in order to predict the future content of Oregon law, should (1) presume Oregon's law would be similar to New York's, or (2) examine the law of multiple jurisdictions. *Rogers*, 875 F.2d at 1002–05.

[91] *Rogers*, 875 F.2d at 1004.

As recently as 2014, the Southern District of New York continued to apply the domicile rule to living plaintiffs in accordance with New York law. In *Cummings v. Soul Train Holdings LLC*,[92] the court dismissed an Illinois domiciliary's right of publicity claims under New York law against New York defendants, holding that the plaintiff could bring his claims only under Illinois law.[93] The Illinois claim failed, however, because the activity fell within a statutory exception. As in *Southeast Bank* and *Rogers*, the court did not distinguish between the choice of law for determining ownership of the right and for infringement; it did not even identify these as discrete issues.

Even though New York right of publicity and right of privacy claims are based on the same statutory provision, which draws no distinction between them,[94] the Southern District of New York consistently applies a different conflicts approach to each type of claim. Even where a plaintiff brings both claims based on the same set of facts, the court treats right of publicity claims as property claims subject to the domicile rule and treats privacy claims as torts subject to the "most substantial relationship" test.[95]

D. *Ignoring Choice of Law*

It is surprising how often right of publicity cases involving non-domiciliaries are decided without any consideration of choice of law (at least, none that is evident from the courts' opinions). When courts fail to address the issue, they usually apply the substantive law of the forum or of the place where the infringing activity took place. This has happened in cases involving both living and deceased plaintiffs.

In *Estate of Elvis Presley v. Russen*,[96] the District Court of New Jersey failed to address choice of law even though it would have been outcome-determinative. Instead, the court simply applied the law of the place where infringement occurred, without even acknowledging the possibility that a different jurisdiction's law should determine descendability. As a result, the court held that Elvis Presley's estate

---

92 Cummings v. Soul Train Holdings LLC, 67 F. Supp. 3d 599 (S.D.N.Y. 2014).

93 The opinion does not indicate where the infringing materials were distributed, but given their nature (DVD compilations as well as related television ads and internet videos), the distribution was probably in multiple states, if not nationwide.

94 N.Y. Civ. Rights Law § 51 (authorizing injunctive relief against unauthorized use of name, likeness, or voice for purposes of trade, together with damages for "injuries sustained by reason of such use").

95 *See, e.g.*, Zoll v. Ruder Finn, Inc., No. 02 Civ. 3652(CSH), 2003 WL 22283830, at *10 (S.D.N.Y. Oct. 2, 2003); Mathews v. ABC Television, Inc., No. 88 CIV. 6031(SWK), 1989 WL 107640, at *3–4 (S.D.N.Y. Sept. 11, 1989); Bi-Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1983); *see also* Zoll v. Ruder Finn, Inc., No. 02 Civ. 3652(CSH), 01 Civ. 1339(CSH), 2004 WL 42260, at *3-4 (S.D.N.Y. Jan. 7, 2004) (applying the "most significant relationship" test to unjust enrichment claim arising out of the same facts as the 2003 decision).

96 Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981).

could assert his postmortem right against the producer of a live impersonation show in New Jersey. The court's analysis focused on whether New Jersey common law would recognize a right of publicity and, if so, whether it would also recognize a postmortem right. The opinion makes no mention of Tennessee law, nor does it attempt to weigh the respective interests of Tennessee and New Jersey. This was significant, because at the time of this decision (1981), the question whether Tennessee recognized a postmortem right was the subject of conflicting decisions in multiple courts,[97] and the resulting uncertainty was not resolved until legislation was enacted in 1984.[98]

The famous case of *Zacchini v. Scripps-Howard Broadcasting Co.*[99] is another case in point, this time involving a living personality. Although that case is best known for the Supreme Court's opinion balancing Hugo Zacchini's right of publicity against the First Amendment rights of a television news program, the case is also noteworthy for considering only the law of Ohio, even though Zacchini—a touring circus performer (the "human cannonball")—was highly unlikely to have been an Ohio domiciliary, and was in all probability domiciled in Florida.[100] Because Florida recognized the right of publicity at that time,[101] the court's failure to consider Florida law may not have been outcome-determinative, although there may have been differences in the scope of protection.

In *Apple Corps Ltd. v. Leber*, the Los Angeles Superior Court applied New York law to a right of publicity claim brought by the licensee of the Beatles' right of publicity.[102] Without explanation, the court made a conclusory statement that New York law applied. At no point did the court discuss the domiciles of the Beatles (all of whom

---

97 *See* Factors Etc., Inc. v. Pro Arts, Inc., 444 F. Supp. 288 (S.D.N.Y. 1977), *aff'd and remanded,* 579 F.2d 215 (2d Cir. 1978); Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980); Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090 (S.D.N.Y. 1980), *rev'd,* 652 F.2d 278 (2d Cir. 1981); Commerce Union Bank v. Coors of Cumberland, Inc., No. 81-1252-III, 7 Med. L. Rptr. 2204 (Tenn. Ch. Oct. 2, 1981).

98 TENN. CODE ANN. §§ 47-25-1101–1108 (1984).

99 Zacchini v. Scripps-Howard Broad. Co., No. 33713, 1975 WL 182619 (Ohio Ct. App. July 10, 1975), *rev'd*, 351 N.E.2d 454 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977).

100 The plaintiff was the younger Hugo Zacchini, not his uncle, the original "human cannonball." Lee Levine & Stephen Wermiel, *Essay: The Court and the Cannonball: An Inside Look*, 65 AM. U. L. REV. 607, 611 (2016). Although none of the published opinions mention Hugo Zacchini's domicile, the Zacchini family, like many circus performers, resided in Tampa, Florida. Paul Guzzo, *Hugo Zacchini, Who Wowed Crowds as Human Cannonball, Dead at 88*, TAMPA BAY TIMES (Nov. 10, 2016), http://www.tampabay.com/news/obituaries/hugo-zacchini-who-wowed-crowds-as-human-cannonball-dead-at-88/2302266; *Obituary: Hugo Zacchini*, DIGNITY MEMORIAL, https://www.dignitymemorial.com/obituaries/tampa-fl/hugo-zacchini-7147149 (last visited Aug. 30, 2018). No accounts of Zacchini's family suggest that any of the performers ever resided in Ohio.

101 Florida enacted its right of publicity statute in 1967. FLA. STAT. § 540.08 (1967).

102 *See* Apple Corps Ltd. v. Leber, No. C299149, 1986 WL 215081 (Cal. Super. Ct. June 3, 1986).

were still living in 1979, when the case was filed).[103] Since the United Kingdom recognizes no right of publicity at all, it is disappointing to see no discussion of the choice of law issue in the court's opinion.

In *KNB Enterprises v. Matthews*, the plaintiff asserted the rights of 452 models from whom he had received assignments of their rights of publicity.[104] While the court's opinion focuses primarily on rejecting a copyright preemption defense, it does note that the right of publicity is assignable under California law.[105] However, the court did not even mention the domiciles of the 452 models, much less address the existence and assignability of the right of publicity in those jurisdictions.

Another interesting example is *Noriega v. Activision/Blizzard*,[106] in which Manuel Noriega, former dictator of Panama, brought a right of publicity claim against the makers of a videogame in which he was depicted. The court's brief order does not address choice of law at all, and it resolves the suit on First Amendment grounds. At the time of the litigation, Noriega was not a U.S. domiciliary. He had already served prison terms in the U.S. and France and was serving an additional term in Panama at the time he filed the suit. The court's order omits any discussion of the Panamanian right of publicity or whether any such right exists.

Although a court need not undertake a choice of law analysis if there is no relevant difference in the laws of the jurisdictions,[107] in several of these cases the substantive differences were likely to be significant. When the choice of law issue is overlooked, it is most likely because the parties failed to raise it. Regardless of the reason, there is a consistent pattern in these cases: when the court fails to consider choice of law, it treats the plaintiff's domicile as irrelevant to the substantive issues.

III. CRITIQUES OF THE DOMICILE RULE

The domicile rule presents a number of problems. First, determining a person's domicile can be difficult, especially in the case of celebrities that maintain homes in multiple jurisdictions. Second, applying the domicile rule can add complexity to cases involving multiple plaintiffs with different domiciles, such as members of a band or plaintiffs in a class action. Third, the justifications for applying the

[103] *See* Richard Harrington, *$10 Million to Beatles*, WASH. POST (June 5, 1986), https://www.washingtonpost.com/archive/lifestyle/1986/06/05/10-million-to-beatles/0ce022ae-1237-42db-9deb-6e7e020c2132/?noredirect=on&utm_term=.fa011404fac1.
[104] KNB Enters. v. Matthews, 92 Cal. Rptr. 2d 713, 715–16 (2000).
[105] *Id.* at 715 n.2.
[106] Noriega v. Activision/Blizzard, Inc., No. BC 551747, 2014 WL 5930149 (Cal. Super. Ct. Oct. 27, 2014).
[107] *Id.* at *28.

law of the domicile to property disputes do not apply to disputes over whether a particular kind of intellectual property exists as a matter of law.

A. *Difficulties in Determining Domicile*

Determining a person's domicile can be difficult. Many celebrities, such as wealthy people, athletes, and entertainers, maintain residences in multiple jurisdictions. This uncertainty creates a burden on merchants, who cannot know for sure which state's law governs the personality rights in question without costly litigation.

There is no fixed legal definition for a person's domicile. Although the terms are often used synonymously,[108] domicile does not mean the same thing as residence.[109] A person can have multiple residences, but only one domicile.[110] While residence reflects a person's physical abode at a particular time,[111] the concept of domicile involves a person's subjective intent to remain or return to that place[112]:

> "[D]omicile" is the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning, but which the law may also assign to him constructively; whereas "residence" connotes any factual place of abode of some permanency, more than a mere temporary sojourn . . . . "Domicile" normally is the more comprehensive term, in that it includes both the act of residence and an intention to remain . . . .[113]

In determining domicile, courts typically consider a number of factors, including "current residence, voting registration and voting practices, location of personal and real property, location of brokerage and bank accounts, location of spouse and family, membership in unions and other organizations, place of employment or business, driver's license and automobile registration, and payment of taxes."[114] In addition, domicile may have different meanings in the context of different statutes.[115] In some contexts, residence and domicile may be

---

[108] Smith v. Smith, 288 P.2d 497, 499 (Cal. Sup. Ct. 1955); Whittell v. Franchise Tax Bd., 41 Cal. Rptr. 673, 676–677 (1964).

[109] U.S. v. Venturella, 391 F.3d 120, 125 (2d Cir. 2004) (quoting Rosario v. Immigration & Naturalization Serv., 962 F.2d 220, 224 (2d Cir. 1992)).

[110] *Id.*

[111] *Id.*

[112] *See* Gaudin v. Remis, 379 F.3d 631, 636 (9th Cir. 2004).

[113] *Smith*, 288 P.2d at 499.

[114] Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., No. CV 05-02200 MMM (MCx), 2008 WL 655604, at *15 (C.D. Cal. Jan. 7, 2008) (quoting Lew v. Moss, 797 F.2d 747, 750 (9th Cir. 1986)).

[115] Kirk v. Bd. of Regents of Univ. of Cal., 78 Cal. Rptr. 260, 262–63 (1969).

synonymous.[116]

It is possible for courts in different jurisdictions to reach different conclusions as to a particular person's domicile.[117] This could occur because the jurisdictions apply different legal rules to the determination, or because the courts draw different inferences from the evidence.[118]

There is perhaps no better example of the difficulty of determining domicile than the case of Marilyn Monroe. At the time of her death, she maintained homes in both California and New York.[119] She executed her will in New York and named a New York attorney as her executor. Then, she moved to California where she worked in motion pictures and purchased a home in which she lived until her death the following year.[120] During this period, she also maintained a furnished apartment and staff in New York.[121] Her will was probated in New York over a period of forty years,[122] throughout which time, in order to avoid California estate and income taxes, her executor consistently took the position that Monroe was domiciled in New York at the time of her death, submitting numerous documents to the California tax authorities to support this claim.[123] The heirs took the same position in successfully defeating a claim against the estate by a person claiming to be Monroe's biological child.[124]

Some forty years after prevailing in the tax proceeding, the heirs asserted infringement of Monroe's postmortem right of publicity in California. Initially, the district court ruled against the heirs, interpreting California's right of publicity statute as denying postmortem rights to persons who died before its enactment.[125] A few months later, however, the California legislature amended the statute to abrogate this decision, and the court vacated its prior ruling and reconsidered the heirs' claim.[126]

In the new proceeding, however, the court undertook a choice of law analysis.[127] If Monroe was domiciled in New York at the time of her death, as the heirs had asserted in the prior tax proceedings, then she could not bequeath her right of publicity, because New York did not

116 Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1181 (C.D. Cal. 2008).
117 RESTATEMENT § 11 cmt n.
118 *Id.*
119 *See* Milton H. Green Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 986 (9th Cir. 2012).
120 *See id.*
121 *See id.* at 986, 988.
122 *Id.* at 986–87.
123 *Id.* at 987–89.
124 *Id.* at 990.
125 Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., No. CV 05-02200 MMM (MCx), 2008 WL 655604, at *1 (C.D. Cal. Jan. 7, 2008).
126 *Id.* at *14.
127 *Id.* at *14.

recognize a postmortem right of publicity.[128] Accordingly, the heirs would be unable to protect her postmortem right in California.[129]

In contrast to their position in the prior tax proceedings, the heirs now argued that Monroe was domiciled in California at the time of her death. To explain their change of position, they asserted that they had recently come into possession of "thousands of documents" relevant to determining whether her domicile was in New York or California.[130] Because those documents were not yet before the court, the court held that summary judgment on the domicile question would be premature.[131] The court also refused to give definitive weight to the finding of the California tax authority and a statement in the New York probate proceeding that Monroe was a New York resident at the time of her death,[132] because residence and domicile are not the same.[133]

Ultimately, the district court managed to avoid addressing the merits of the domicile question, because it held that the heirs were judicially estopped from asserting that Monroe was domiciled in California due to the contrary position they successfully asserted in the tax proceedings.[134] Applying the law of the decedent's domicile, therefore, the Ninth Circuit held that Monroe's heirs could not assert a postmortem right, even though California expressly recognized such a right. Accordingly, Monroe had no postmortem rights in California,[135] a decision the Ninth Circuit upheld on appeal.[136]

Given the complexity of the judicial estoppel analysis, it is noteworthy that the district court preferred to resolve the case on that basis, rather than address the domicile question on its merits. Had it addressed the merits, the issue would have been extremely difficult to resolve.

Another illustration is *Rostropovich v. Koch Int'l Corp*.[137] In this case, a Russian musician brought claims, under the New York and

---

128 Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1158 (C.D. Cal. 2008).

129 *Id.*

130 *Milton H. Greene Archives, Inc.*, 2008 WL 655604, at *15. In addition to Monroe's purchase of a home in California, the heirs submitted that she had licensed her dog in California, attended psychotherapy sessions in Los Angeles, and held a Connecticut driver's license with a California address. *Id.* at *16.

131 *Id.* at *16.

132 *Id.* at *18–19.

133 *Id.*

134 *Milton H. Greene Archives, Inc.*, 568 F. Supp. 2d at 1198–99.

135 *Id.* at 1199.

136 Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 1000 (9th Cir. 2012) (calling it "a textbook case for applying judicial estoppel"). The Ninth Circuit also held that the district court did not abuse its discretion in finding that the executor "intentionally misled the courts." *Id.* at 996.

137 Rostropovich v. Koch Int'l. Corp., 94 CIV. 2674 (JFK), 1995 WL 104123 (S.D.N.Y. Mar. 7, 1995).

California right of publicity statutes, against a company that distributed his recordings in the U.S. Originally a Soviet citizen, the plaintiff left the Soviet Union in 1974, and his citizenship was revoked in 1978, at which point he became a "stateless person."[138] Applying New York choice of law rules (because New York was the forum state), the district court stated that "the substantive law of a plaintiff's domicile generally applies to a right of publicity claim."[139] Under the circumstances, however, the court found it "virtually impossible" to determine the plaintiff's domicile.[140] Accordingly, it abandoned the domicile rule, and instead inquired which state had the most significant interest in the outcome of the litigation.[141] The answer was New York, because the plaintiff owned two homes there, and the defendants had offices and engaged in business there.[142]

If courts have this much difficulty resolving domicile questions, how, then, can an ordinary merchant selling celebrity-emblazoned t-shirts, posters, or coffee mugs be expected to undertake the domicile analysis for each celebrity he or she features? The people with the most valuable rights of publicity will often be the very people whose domicile is most challenging to determine. Moreover, even after the domicile of a particular person has been resolved in one dispute, when a merchant in a different jurisdiction faces a potential infringement claim involving the same persona, there is no guarantee that the court hearing that dispute would reach the same conclusion.

B. *Multiple Plaintiffs*

In a case such as *Bi-Rite*,[143] application of the domicile rule can mean that identical claims by different plaintiffs in the same action must be resolved under the laws of different jurisdictions. Even though the *Bi-Rite* court purported to reject the domicile rule, its ultimate holding was the equivalent of applying the domicile rule to the three corporations.

The problem is even more pronounced in class actions, where application of the domicile rule can preclude certification of the class, even where the plaintiffs have all suffered the same injury by the same defendant; without certification, it may be impractical for any of the plaintiffs to obtain a remedy. For example, in *Dryer v. National Football League*,[144] where former football players alleged that the

138 *Id.* at *1.
139 *Id.* at *8.
140 *Id.*
141 *Id.*
142 *Id.* at *9.
143 *See supra* notes 63–79 and accompanying text.
144 Dryer v. Nat'l Football League, No. 09–2182 (PAM/AJB), 2013 WL 5888231 (D. Minn. Nov. 1, 2013).

defendant violated their rights of publicity by using their images in NFL Films productions, the district court warned that class certification was "highly problematic, if not unlikely," because each plaintiff's claim might be governed by the law of the state where he resided or the home state of his former team.[145] The 25,000 putative class members resided in twenty states, some of which had right of publicity statutes, some of which recognized the right at common law, and the remainder of which did not recognize the right at all.[146]

C. *Consistency with Analogous Doctrines*

The law of the domicile has traditionally been applied to competing claims to ownership of property. However, ownership disputes are a far cry from disputes over the existence of intellectual property or privacy rights.

According to the Second Restatement of Conflicts:

> The functions served by domicil[e] in Conflict of Laws fall into three broad categories. These are judicial jurisdiction; choice of law, particularly in matters where continuity of application of the same law is important, as family law and decedents' estates; and governmental benefits and burdens.[147]

None of these categories encompasses questions regarding the existence or infringement of intellectual property rights. However, the category of "matters as to which continuity is important" is the one most closely related to intangible personal property disputes. The Second Restatement offers the following examples of issues that fall into this category:

> In the area of choice of law, the law of a person's domicil[e] may determine such matters relating to his personal status as the validity of his marriage and his legitimacy. The same law governs the transfer of his movable property upon death; it determines the validity of his will with respect to such property or its distribution in the event of intestacy.[148]

For example, only the domicile can impose an inheritance tax on intangibles included in a decedent's estate.[149] In the case of intestacy,

---

[145] *Id.* at *5. Other possibilities included the law governing each player's contract, the law of the NFL's home state, and the law of NFL Films' home state. *Id.*

[146] *Id.*

[147] RESTATEMENT § 11 cmt c. The language in the 1988 revised version of the Restatement is identical.

[148] *Id*. In the case of real property, however, the law of the situs controls. *Id.* §§ 236 (intestacy), 239 (testamentary dispositions).

[149] *Id.* § 11 cmt c. An interesting issue would arise if the decedent's domicile did not recognize a postmortem right of publicity, but sought to impose an inheritance tax based on the value of the postmortem right recognized in other jurisdictions. While this issue can be avoided if the law of

the domicile would also determine which categories of persons are entitled to inherit.[150] For testamentary dispositions of personal property,[151] the Second Restatement indicates that the domicile will determine whether an interest is transferred and the nature of that interest.[152] Other testamentary matters resolved under the law of the domicile include a person's capacity to make a will or to accept an inheritance, the lawfulness of a clause in a will, the required formalities, and the type of estate created.[153]

None of these functions is the same as the determining whether (1) the property *exists* in the first place, or (2) has been damaged or misappropriated by a tortfeasor. Courts that apply the domicile rule in deciding whether to recognize a non-domiciliary's right of publicity have conflated these issues with issues pertaining to the lawfulness of property *transfers*.

The right of publicity is not the only type of intellectual property that is subject to different rules in different jurisdictions. At the international level, laws pertaining to copyright, trademark, and trade secrets will vary in different countries, despite a degree of harmonization achieved through treaties and trade agreements. Within the U.S., there are variations among the states in their laws protecting trademarks, trade secrets, certain types of state-protected copyrights,[154] ideas, and information. Despite these differences, courts rarely depart from the principle that the eligibility of subject matter for protection under any of these doctrines is a matter determined under the law of the place where the unauthorized exploitation occurred. Applying the domicile rule to deny the existence of a particular person's right of publicity runs counter to this self-determination principle. In contrast, applying the domicile rule to *identify the owner(s)* of the right of publicity (e.g., in a dispute over inheritance) is consistent with the rules that govern ownership in these other intellectual property doctrines.

One of the doctrines most closely related to the right of publicity is

the decedent's domicile determines the existence of a postmortem right in all jurisdictions, that reason is not itself sufficient to overcome the other objections to the domicile rule. The parties to the dispute can present evidence of the value of the postmortem right in the jurisdictions where it is recognized, but can also argue that the value is too speculative to be subject to taxation, especially if there is doubt as to whether, and to what extent, the estate will actually exploit the postmortem right. In many cases, the issue will simply not arise, because value of the estate will be below the threshold for taxation. *See* Jennifer E. Rothman, *Whitney Houston Estate Settles with the IRS over Right of Publicity Valuation*, ROTHMAN'S ROADMAP TO RIGHT OF PUBLICITY (Jan. 5, 2018, 2:00 PM), https://www.rightofpublicityroadmap.com/news-commentary/whitney-houston-estate-settles-irs-over-right-publicity-valuation.

150 RESTATEMENT § 260 cmt b.

151 In the case of real property, however, the law of the situs controls. *Id.* § 239.

152 *Id.* § 263.

153 *Id.* § 263 cmts. a–c.

154 In the case of copyrights, certain state protections for older sound recordings have recently been preempted by federal law. *See* 17 U.S.C. § 301(c) (2018).

the right of privacy. In some jurisdictions, such as New York, the rights are one and the same.[155] The right of publicity corresponds closely to the fourth branch of privacy law—the commercial misappropriation of a person's name or likeness.[156] In most jurisdictions, the two torts are distinguished largely by the nature of the injury—economic harm for the right of publicity and injury to feelings for the invasion of privacy. Yet, in adjudicating privacy claims, most courts apply the law of the place where the invasion occurred, unless another state has a more significant relationship to the event and the parties.[157]

Another doctrine that is closely analogous to the right of publicity is common-law copyright. There are a number of common-law copyright cases that illustrate these principles.

An early example is *Ferris v. Frohman*,[158] in which an English playwright sought to enforce his common-law copyright in the United States, even though his play had lost its common-law copyright in England, after it was publicly performed there. The U.S. Supreme Court held that the loss of protection in England had no effect on the play's common-law copyright in the U.S.: "The deprivation of the common-law right, by force of the statute, was plainly limited by the territorial bounds within which the operation of the statute was confined."[159]

To similar effect is the 1925 case of *Roberts v. Petrova*,[160] in which a New York state court determined that the plaintiff had no common-law copyright in his play in England. Adopting the reasoning of the Supreme Court in *Ferris*, however, the state court held that the loss of copyright protection in England did not deprive the play of its common-law copyright in the U.S.[161]: "[I]f, as the defendant rightfully contends, a statute conferring rights and remedies can have no extraterritorial effect, how should the same statute have extraterritorial effect for the deprivation of rights and remedies?"[162]

A more recent example is *Capitol Records, Inc. v. Naxos of America, Inc.*,[163] where the New York Court of Appeals upheld a claim of common-law copyright infringement in pre-1972 sound recordings made in the United Kingdom during the 1930s. At the time of the dispute, the recordings had entered the public domain in the United Kingdom due to the expiration of their fifty-year copyright terms.[164]

155 N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1909).
156 Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824–25 (9th Cir. 1974).
157 RESTATEMENT § 152. California applies the law of the forum, unless another state has a more significant interest. Fleury v. Harper & Row, Pubs., Inc., 698 F.2d 1022, 1025 (9th Cir. 1983).
158 Ferris v. Frohman, 223 U.S. 424 (1912).
159 *Id.* at 434.
160 Roberts v. Petrova, 213 N.Y.S. 434 (N.Y. Sup. Ct. 1925).
161 *Id.* at 436.
162 *Id.* at 435.
163 Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250 (N.Y. Ct. App. 2005).
164 *Id.* at 264.

However, the court held that the records were still protected by common-law copyright under New York law, stating that "there is no justification under New York law for substituting the British copyright term in place of New York's common-law protection for these recordings."[165] The court expressly rejected the argument that New York was prohibited from recognizing copyright in a work that was in the public domain in its country of origin.[166]

A similar analysis applied to a common-law copyright claim in *Rostropovich v. Koch Int'l Corp*.,[167] where a Russian musician who made recordings with orchestras in Russia during the 1960s brought misappropriation and privacy claims against a company that later distributed those recordings in the U.S. The court held that the musician had a property interest in his performances under New York law, even though he had no such right under Russian law: "Such property rights arise under New York law and while Russian law may govern intellectual property rights in Russia, Russian law has no force or effect here regarding rights that arise under our laws."[168]

Thus, in the closely analogous area of common-law copyright, the fact that one jurisdiction—even the plaintiff's domicile—denies the existence of the legal right does not affect the rights of other jurisdictions to recognize that right within their own territorial boundaries.

The law of trade secrets is analogous as well, because a trade secret is a type of intangible property. There can be no cause of action for misappropriating a trade secret unless a court determines that the plaintiff in fact possesses a trade secret. Whether a particular piece of information qualifies as a trade secret in a particular jurisdiction depends on how that jurisdiction defines a trade secret. Yet, the concept of what constitutes a protectable trade secret has not always been the same in every state.[169] Most courts addressing trade secret claims have applied the law of the place where the misappropriation occurred—*lex loci delicti*—even if the owner of the trade secret, and thus the injury, is

165 *Id.* at 265. The question was certified to the New York Court of Appeals by the Second Circuit.

166 It probably did not occur to any of these parties to argue that the copyright status of the work should depend on the domicile of its author. Determining the identity of the "author" of a sound recording under U.K. law would have required a separate choice of law analysis. *See, e.g.*, Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 89 (2d Cir. 1998).

167 Rostropovich v. Koch Int'l. Corp., 94 CIV. 2674 (JFK), 1995 WL 104123, at *34 (S.D.N.Y. Mar. 7, 1995).

168 *Id.* at *6.

169 Christopher Rebel J. Pace, *The Case for Federal Trade Secrets Act*, 8 HARV. J. L. & TECH. 427, 444 (1995) (collecting examples). However, the recent expansion of federal protection for trade secrets in the 2016 Defend Trade Secrets Act is likely to reduce the importance of choice of law in this field.

located elsewhere.[170]

Trademarks are another form of intellectual property with close parallels to the right of publicity. A trademark has commercial value because it represents the identity and reputation of a merchant, just as a celebrity's name or likeness can derive commercial value from the identity and reputation of the celebrity. Whether and to what extent a jurisdiction will recognize a particular trademark as protectable depends not on the laws of the merchant's domicile, but on the laws of the jurisdiction where protection is sought.[171]

D. *Conflict with State's Authority to Regulate Business*

Allowing the law of a celebrity's domicile to dictate what merchants in another jurisdiction can or cannot do permits the law of one state to restrict the authority of another state to regulate business within its borders. Merchants operating in one state, therefore, cannot rely on the law of their own state to determine whether they are operating lawfully. To the extent that states willingly adopt the domicile rule, they are ceding a portion of their economic regulatory authority to other jurisdictions and allowing another state's choices to control the conduct of their own citizens. While a state certainly can choose such a regime, the burden of that choice will fall on persons attempting to conduct business in the state. It will also fall on the courts, which will have to determine the domicile of each plaintiff and then ascertain the relevant law of that domicile. In many cases, the domicile rule has forced courts to guess what law another state might adopt.[172] In contrast, where the forum state is also the place where the infringement occurred, the rule of *lex loci delicti* would enable the court to focus on ascertaining the law of its own jurisdiction—or developing that law if the question is one of first impression.

---

[170] *See, e.g.*, Domtar AI Inc. v. J.D. Irving, Ltd., 43 F. Supp. 3d 635, 641 (E.D.N.C. 2014) (plaintiff's claim under North Carolina trade secrets law was barred, because misappropriation occurred in Canada); 3A Composites USA, Inc. v. United Indus., Inc., No. 5:14-CV-5147, 2015 U.S. Dist. LEXIS 122745, at *10 (W.D. Ark. Sept. 15, 2015) (similar to *Domtar*, 43 F. Supp. 3d); Chattery Int'l, Inc. v. JoLida, Inc., No.: WDQ-10-2236, 2012 U.S. Dist. LEXIS 57512, at *12–13 (D. Md. Apr. 24, 2012); SciGrip, Inc. v. Osae, 13 CVS 2854, 2018 NCBC LEXIS 10 (N.C. Super. Ct. Jan. 30, 2018) (rejecting "most significant relationship" test in favor of *lex loci delicti*, meaning the place where the misappropriated trade secret was used).

[171] *See, e.g.*, ITC v. Punchgini, Inc., 482 F.3d 135 (2d Cir. 2007) (finding Indian company's trademark unprotectable under federal law, but certifying to state court question whether the same mark was protected under New York law); Grupo Gigante SA De CV v. Dallo & Co., Inc., 391 F.3d 1088 (9th Cir. 2004) (applying federal trademark and unfair competition law to determine whether Mexican company had protectable trademark in California); Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1030–31 (2d Cir. 1989) (applying New York law to determine whether Minnesota company's trademark was sufficiently distinctive to be protected against dilution); Paleteria La Michoacana v. Productos Lacteos Tocumbo S.A. De C.V., 69 F. Supp. 3d 175 (D.D.C. 2014) (applying federal trademark law to determine whether Mexican company had protectable trademark in District of Columbia).

[172] *See, e.g.*, Rogers v. Grimaldi, 875 F.2d 994, 1002–05 (2d Cir. 1989).

CONCLUSION

The widespread reliance on the law of the domicile in cases involving infringement of the right of publicity is an anomaly. Courts addressing privacy claims, or infringements of other types of intellectual property, generally apply the law of the place where the wrongful conduct occurred, or else apply the "most significant relationship" test. The adoption of the law of the domicile results from conflating claims of tortious injury to property with disputes over inheritance of personal property.

There are strong policy arguments for rejecting the domicile rule. They include the difficulty of ascertaining domicile, the obstacles created for cases involving multiple plaintiffs, and the imposition of one state's policy choices on activities taking place in a different state, especially where those activities fall within a state's traditional authority to regulate economic activity within its borders.

Rejecting the domicile rule for postmortem rights poses one problem, but not an insurmountable one. While sound policy arguments favor applying either the rule of *lex loci delicti* or the most significant relationship test to determine whether a postmortem right of publicity exists, and for how long, ordinarily the domicile of the decedent provides the substantive rules for determining who inherits the decedent's assets, including the right of publicity. In most cases, this bifurcated approach is feasible. However, there may be a few situations where applying the law of the domicile would leave no heir to enforce the right. Under Florida law, for example, unless a license was granted during the persona's lifetime, only the surviving spouse and children can enforce the right.[173] If this class has no members, then no one can enforce the right, even if the jurisdiction where infringement took place recognizes a postmortem right. If another heir steps forward to enforce the right, the jurisdiction where infringement occurred would have three options: (1) treat the right as no longer enforceable; (2) determine whether the putative heir is the proper plaintiff under the general inheritance laws of the domicile (as in the Indiana statute[174]); or (3) make this same determination under its own inheritance laws, either those of general application or those formulated specifically for the right of publicity.

Finally, when infringement claims are based on the content of broadcasts, transmissions, or publications that circulate in multiple jurisdictions, applying the substantive law of each jurisdiction can lead to conflicting results. However, this problem is not unique to the right of publicity. It can arise with respect to other state law doctrines that

[173] FLA. STAT. § 540.08 (2007).
[174] IND. CODE § 32-36-1-16 (2002).

protect intellectual property or personal rights such as reputation and privacy. For broadcasters and other disseminators that do not wish to limit their territorial reach, the safest strategy in these circumstances will be to comply with the laws of the market that imposes the greatest restrictions.

With respect to domestic law, all of these problems can be eliminated by enacting a uniform preemptive federal right of publicity. However, because it is highly unlikely that such a measure will be enacted in the next few years, these issues will continue to challenge the courts for the foreseeable future. In addition, even a uniform federal right of publicity will not necessarily resolve issues pertaining to plaintiffs who are domiciled outside the United States. For these reasons, courts and legislatures that have defaulted to the domicile rule in the past should re-examine this choice to determine whether it is the best policy choice for the regulation of their internal markets.