

Michigan Needs a

# STATUTORY RIGHT OF Publicity

By Jeffrey Richardson

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## **Fast Facts:**

Michigan is the only Sixth Circuit state without a right of publicity statute, and the only one that does not provide post-mortem right of publicity protection.

Michigan celebrities rely on other states to receive post-mortem right of publicity protection.

The right of publicity defined by statute is one that both property owners and property sellers can navigate; the undefined right of publicity leads to litigation.



**O**n November 2, 2005, Detroit gathered to mourn the loss of Rosa Parks.<sup>1</sup> The recent legal history of the civil rights matriarch provides a glimpse into Michigan's failure to enact right of publicity protection. A central issue in the Wayne County probate litigation involving Rosa Parks's estate was the right to control her persona: "Since her death in October 2005, Parks' image has appeared in advertising for major brands, including Chevy Silverado trucks and Apple computers. Her family sued to gain some control, as they feel her legacy would be marred."<sup>2</sup> Right about now practitioners unfamiliar with this area of the law should begin scratching their heads: How does Rosa Parks have right of publicity protection when she died domiciled in Michigan, a state that does not provide a post-mortem right of publicity? If you are now sufficiently perplexed, welcome to the story of Michigan's right of publicity.

### Right of Publicity: Michigan's History

The roots of Michigan's right of publicity can be traced from 1899, beginning with *Atkinson v Doberty & Co.*<sup>3</sup> In *Atkinson*, the widow of Colonel John Atkinson brought an action to enjoin the production of cigars bearing the name and likeness of her recently deceased husband. *Atkinson* presents a simple fact pattern that would support multiple causes of action under modern theory. However, in 1899, the action was not brought upon a property right, but rested on the breach of an alleged duty that the Michigan Supreme Court was not yet ready to recognize: "We can only say that it is one of the ills that, under the law, cannot be redressed."<sup>4</sup>

The next significant Michigan development occurred in 1948. In *Pallas v Crowley*, an unauthorized publication of a young woman's portrait photograph was used in cosmetics advertising by a retail establishment.<sup>5</sup> The law had sufficiently progressed to recognize this cause of action: "[T]he law will consider the unauthorized publication of a photograph of a person as an invasion of such person's right of privacy and as a tort."<sup>6</sup> *Pallas* reflects a change in the common law, citing cases from eight jurisdictions supporting this cause of action.<sup>7</sup> The principles set forth by Samuel D. Warren and Louis D. Brandies in the 1890 article, "The Right to Privacy," had become integrated into the Restatement and common law, providing the necessary legal support: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."<sup>8</sup>

Michigan, however, was put on the right of publicity map when *Carson v Here's Johnny Portable Toilets, Inc* was decided in 1983.<sup>9</sup> The defendant was in the business of renting and selling "Here's Johnny" portable toilets, referring to his company as "The World's Foremost Comedian."<sup>10</sup> The founder was aware of the "Here's Johnny" slogan, acknowledging "that he coupled the phrase with the second one, 'The World's Foremost Comedian' to make a good play on a phrase."<sup>11</sup> Applying Michigan common law, the Sixth Circuit held that Johnny "Carson's right of publicity was in-

vaded because appellee intentionally appropriated his identity for commercial exploitation...."<sup>12</sup>

Michigan continued to extend the right of publicity in *Janda v Riley-Meggs*,<sup>13</sup> protecting the persona of an orthopedic surgeon. Dr. Janda had gained a significant reputation as a result of his substantial research regarding the prevention of softball injuries by use of a detachable base. Riley-Meggs developed a magnetic softball base, attempting to encourage sales through advertising specifically citing Dr. Janda and his study. The court held that the defendant "used results of the University of Michigan study to increase sales of the Megg-Nets bases."<sup>14</sup> The defendant did "not dispute that he used plaintiff's name and words without plaintiff's permission in order to increase sales of Megg-Nets bases."<sup>15</sup>

The next important case in Michigan's right of publicity is *Ruffin-Steinback v dePasse*,<sup>16</sup> involving a four-hour, two-night miniseries depicting the lives of the Temptations' original members, as told by Otis Williams. None of the plaintiffs were compensated for use of their life-stories, and none of the plaintiffs consented to use of their likeness. The question presented was, "whether depicting one's life-story without his or her permission, particularly where some of the events are fictionalized, constitutes a violation of the right of publicity under Michigan law."<sup>17</sup> Reviewing decisions from other jurisdictions and the Restatement of Unfair Competition, the district court stated that although not controlling, these authorities "uniformly suggest that the right of publicity does not extend to prohibit depictions of a person's life-story," supporting the conclusion that "Michigan courts would not extend the right of publicity tort to these facts."<sup>18</sup>

The last case of note is *Parks v LaFace Records*,<sup>19</sup> in which Rosa Parks brought suit against the hip-hop group "Outkast" for using her name as the title of a song. The district court found that "an 'obvious relationship' between the content of the song and its title *Rosa Parks* renders the right of publicity inapplicable as a matter of law."<sup>20</sup> The district court chose the analysis employed in *Rogers v Grimaldi*<sup>21</sup> as the most appropriate tool for balancing publicity appropriation against free expression: "[W]ith respect to a right of publicity claim, a title that uses a celebrity's name will be protected by the First Amendment unless the title is 'wholly unrelated' to the content of the work or was 'simply a disguised commercial advertisement for the sale of goods or services.'<sup>22</sup> The circuit court of appeals overruled the



district court, however, finding that the evidence presented a question of fact: “[U]pon consideration of all the evidence, [a reasonable finder of fact] could find the title to be a ‘disguised commercial advertisement’ or adopted ‘solely to attract attention’ to the work.”<sup>23</sup>

*Ruffin-Steinback v dePass*, *Parks v LaFace Records*, and *Janda v Riley-Meggs* each highlight the “kitchen sink” complaint atmosphere surrounding the right of publicity, adding complexity to any analysis. In addition to counts stemming from right of publicity, these three cases included counts under the Lanham Act, for false representation and unfair competition, as well as under the Michigan Consumer Protection Act. Additionally, related claims may include common law counts for defamation, intentional interference with a business relationship, unjust enrichment, intentional infliction of emotional distress, and detailed First Amendment defenses. Other counts common to right of publicity complaints include copyright, misappropriation, intrusion privacy, disclosure privacy, and false light. It is imperative to remain focused on the specific “right of publicity” claim stated in these cases when examining the underlying policy for statutory drafting purposes.

## Hallmarks of a Right of Publicity Statute

Ohio, Kentucky, and Tennessee, each within the Sixth Circuit, have all enacted a right of publicity statute.<sup>24</sup> Michigan is the only Sixth Circuit state without a right of publicity statute. Two central issues in a right of publicity statute are (1) Is a post-mortem property right of publicity provided? and (2) To whom does right of publicity protection extend? All of the Sixth Circuit states—excluding Michigan—provide a post-mortem right of publicity. The length of post-mortem protection varies widely: Ohio, 60 years; Kentucky, 50 years; and Tennessee, 10 years. In Tennessee, however, the right continues perpetually, so long as there is no non-use for two consecutive years. To whom protection extends also varies: Tennessee and Ohio extend the right to any person, while Kentucky restricts the right to public figures.

Below are the remaining important facets of a right of publicity statute:

- Are specific uses, such as literary works, news reporting, and fine art, protected?
- Are specific uses, such as commercial advertising, prohibited?
- Is the common law supplanted or does it complement existing common law rights?
- What is the testamentary treatment of this property right?
- What remedies (damages, injunctive relief) and defenses are available?
- What are the jurisdiction and domicile requirements?
- Are the elements of personality, such as name, voice, and signature, protected?

Litigation has developed a broad interpretation for the elements of personality, which the statutes have tended to follow.

## Indiana

Indiana is an important right of publicity state, as its statute provides a generous post-mortem period and far-reaching protection; further, its border relationship with Michigan provides transactional familiarity. The *Detroit Free Press* reported that before the Wayne County Probate litigation, the Rosa Parks Institute had “contracted with CMG Worldwide of Indianapolis to market Parks’s name.”<sup>25</sup> One may go to <http://www.cmgworldwide.com> and see Rosa Parks listed among its clientele. Thus, to follow Michigan’s right of publicity, we must find our *way back home in Indiana*.<sup>26</sup>

The Indiana statute provides 100 years of post-mortem protection.<sup>27</sup> Further, following trends, the statute provides a broad definition of personality aspects protected: name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, and mannerisms.<sup>28</sup> Interestingly, the statute does not extend protection when personality aspects are used in ways traditionally protected by the First Amendment, as in literary works, theatrical works, musical compositions, film, radio, or television programs; original works of fine art; or material that has political or news value.<sup>29</sup> Thus, oddly enough, the statute that now protects the persona of Rosa Parks would not have provided a right of publicity platform for the *Parks v LaFace Records* litigation.

The perplexing question persists: How does Rosa Parks have a right of publicity protection if she died domiciled in Michigan, a state that does not provide a post-mortem right of publicity? The first sentence of the Indiana statute reads as follows: “This chapter applies to an act or event that occurs within Indiana, *regardless of a personality’s domicile*, residence, or citizenship.”<sup>30</sup> Indeed, the statute goes on to extend this gift to at least all United States residents beyond death: “The rights recognized under this chapter are property rights, freely transferable and descendible, in whole or in part, by the following: . . . (6) Operation of the laws of intestate succession applicable to the state administering the estate and property of an intestate deceased personality, regardless of whether the state recognizes the property rights set forth under this chapter.”<sup>31</sup> Or, more clearly stated, absolutely no domicile requirement



applies to Indiana's post-mortem right of publicity. All deceased Michigan celebrities are welcome and, indeed, a review of <http://www.cmgworldwide.com> turns up the likes of former Michigan celebrities Joe Louis and Ty Cobb.

This generous statute allows celebrities with valuable personas to continue living in their home states—such as Michigan—without worry that they will compromise their right of publicity. Indeed, in a sense, this statute allows Indiana to import Rosa Parks's persona and exploit its value by protecting it long after its value in Michigan has expired.

### Legislative Proposals in Michigan

The State Bar of Michigan Arts, Communications, Entertainment, and Sports (ACES) Section and its membership have been advocating for a Michigan right of publicity statute for years. Initially, Gregory Reed, former ACES chairperson and lead counsel for *Parks v LaFace Records* and *Ruffin-Steinback v dePasse*, drafted a proposed right of publicity statute. Then, in 2002, ACES formed a committee to review Michigan's right of publicity and make recommendations. The efforts of the committee resulted in a proposed statute approved at the ACES annual meeting on October 1, 2004. The proposed statute is available for review at <http://www.michbar.org/arts/pdfs/RightofPublicity.pdf>. The committee took great care to solicit the involvement of ACES membership in (1) determining whether to propose a right of publicity statute, and (2) determining what policies to implement in a proposed statute. First, a section meeting was held to review the legal issues surrounding the right of publicity. During this meeting, a checklist was disseminated and members' opinions regarding the elements of a statute were solicited. The checklist and questionnaire were next mailed to ACES membership to gather responses from those not in attendance. The responses were reviewed and a statute was drafted, in light of the specific policy recommendations of ACES membership.

The checklist reflected all of the elements that were integrated into the final statute. The final recommendation promotes clear, delineated protection. The statute extends protection to actions arising from within Michigan, regardless of domicile. The statute extends a post-mortem right of publicity to each individual for 50 years. The statute clearly defines the elements of personality, and does not restrict the protection of these elements to celebrities. The rights provided are deemed supplemental to the common law. Exceptions are provided for news broadcasting and works of art, while increased clarity is provided on issues of damages, impoundment, and injunctive relief. Finally, the statute contains a thorough list of affirmative defenses: incidental use, no actual use, fictional use, transformative use, implied consent, and parody. The statute defines a middle path that protects persona from commercial appropriation while protecting publicly beneficial uses from litigation.

### Current Policy's Effect

Many argue that the right of publicity has grown beyond reasonable limits; others argue that the right of publicity poses a

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threat to First Amendment concerns. Although these concerns are valid, the interests in expression that prompt them are not "less supported" under a right of publicity statute. Again, recall that Rosa Parks's claim in *Parks v LaFace Records* would have failed under the Indiana statute: "This chapter does not apply to the following: (1) The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in any of the following: (A) Literary works, theatrical works, musical compositions, film, radio, or television programs." Sec 32-36-1-1.<sup>32</sup> The right of publicity defined by statute is one that both property owners and property sellers can navigate; the undefined right of publicity leads to litigation.

The pragmatic legislator understands that not having a right of publicity statute in Michigan leads to one result: exporting Michigan celebrities to other jurisdictions. The pragmatic legislator is disappointed that Rosa Parks's estate had to travel to Indiana after her death to protect the value of her persona. The pragmatic legislator understands that all of the revenue generated through licensing protected by Indiana law must to some extent first sift through Indiana before entering the Michigan economy. It is time for legislators to act on these understandings, recognizing that inaction has a dramatic effect: inaction does *not* curtail the right of publicity, but merely constrains economic opportunity. The effect of inaction is simply to export Michigan celebrities without recompense.

The economic benefits and licensing fees that could be generated in Michigan are well documented. We need not leave our state to look at Tiger Woods and Michael Jordan to understand these revenue sources. Rosa Parks and former Michigan resident Muhammad Ali provide sufficient examples:

Even if Parks' estate isn't worth the millions some have claimed, experts say, her name and image could be worth millions for decades to come. "Maybe tens of millions," said Charles L. Sharp, a marketing professor at University of Louisville, noting that former boxing great Muhammad Ali last year sold most of the rights to his name and likeness for \$50 million to be used on such products as snack food.<sup>33</sup>

## Conclusion

Michigan must join the 18 other states—including all of our economic contemporaries and all other states of the Sixth Circuit—that protect the right of publicity by providing a clearly delineated statutory right of publicity. Legislation is necessary to bring Michigan into congruence with current commercial expectations, and to stop the export of Michigan personas with nothing in return. ■



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## FOOTNOTES

1. *Thousands attend Rosa Parks' funeral in Detroit*, USA Today, November 2, 2005.
2. Suzette Hackney, *Parks' family gets say in icon's legacy*, Detroit Free Press, March 15, 2007.
3. *Atkinson v Doherty & Co*, 121 Mich 372 (1899).
4. *Id.* at 384.
5. *Pallas v Crowley*, 322 Mich 411 (1948).
6. *Id.* at 414.
7. *Id.*
8. *Id.* at 416, citing American Law Institute's 4 Restatement Torts, § 867 p 398.
9. *Carson v Here's Johnny Portable Toilets, Inc*, 698 F2d 831 (CA 6, 1983).
10. *Id.* at 833.
11. *Id.*
12. *Id.* at 836.
13. *Janda v Riley-Meggs Industries, Inc*, 764 F Supp 1223 (ED Mich 1991).
14. *Id.* at 1230.
15. *Id.*
16. *Ruffin-Steinback v dePasse*, 82 F Supp 2d 723 (ED Mich 2000) aff'd 267 F3d 457 (CA 6, 2001).
17. *Id.* at 729.
18. *Id.* at 730–731.
19. *Parks v LaFace Records*, 76 F Supp 2d 775 (ED Mich 2000) aff'd in part rev'd in part 329 F3d 437, 448 (CA 6, 2003).
20. *Id.* at 780.
21. *Rogers v Grimaldi*, 875 F2d 994 (CA 2, 1989).
22. *Id.* at 460, citing *Rogers* at 1004.
23. *Id.* at 461, citing *Rogers* at 1004–1005.
24. Ky Rev Stat Ann 391.170 (1999). Ohio Rev Code Ann 2741.04. Tenn Code Ann 47-25-1101.
25. David Ashenfelter and Suzette Hackney, *Millions at stake in name of Parks*, Detroit Free Press, January 29, 2007.
26. James Hanley and Ballard MacDonald, *Indiana*, 1917.
27. Ind Code Ann 32-36-1-8(a).
28. Ind Code Ann 32-36-1-7(1-9).
29. Ind Code Ann 32-36-1-1(c)(1)(A-C).
30. Ind Code Ann 32-36-1-1(a).
31. Ind Code Ann 32-36-1-16(6).
32. Ind Code Ann 32-36-1-1.
33. Ashenfelter and Hackney, n 25, *supra*.