



Amending a Washington State Statute to Ignore Choice of Law Principles Could Not Gain Jimi Hendrix's Heirs a Post-Mortem Right of Publicity: Court Rules Amendment Unconstitutional

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Jimi Hendrix died before his time in a London hotel room in 1970. His legend lives on.¹ But his right of publicity appears to have died with him.

Right of publicity generally developed out of the right of privacy and is entirely governed by state law, which varies from state to state. A post-mortem right to publicity is only available in some states. States with many deceased celebrities or very famous deceased celebrities often want to give their constituents the greatest economic advantage they can in exploiting post-mortem rights, predominantly in the area of merchandising. Such was the case in Washington state, the birthplace of Hendrix.

Despite the best efforts of his father, the sole heir of Hendrix's estate, and the company to which Hendrix's father assigned all of his rights, Experience Hendrix LLC, Hendrix's right of publicity likely cannot be resurrected because New York – Hendrix's place of domicile at the time of his death – did not have a post-mortem right of publicity. See *Experience Hendrix, L.L.C. v. The James Marshall Hendrix Foundation*, No. C03-3462Z (W.D. Wash., Apr. 15, 2005), *aff'd*, 240 Fed. Appx. 739 (9th Cir. 2007).

After these decisions, the Washington legislature amended the Washington Personality Rights Act (the "Act") to require that courts ignore choice of law principles in applying the Act. Thus, *de facto* creating a national right of publicity claim for Washington plaintiffs based upon the Act. Thereafter, Experience Hendrix sued Hendrixlicensing.com, Ltd., among other defendants, in an effort to stop their use of Hendrix's image on posters and other merchandise. Likely seeing the problem with the amendment, Experience Hendrix actually omitted its claims under the Act from an amended complaint. Nevertheless, the Court in *Experience Hendrix LLC v. Hendrixlicensing.com, Ltd.*, slip

¹ In deference to the artist, this author is listening to Jimi Hendrix play the blues while he writes.



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op., No. C09-285Z (W.D. Wash., Feb. 8, 2011),² took up the question of the constitutionality of the amendment pursuant to a motion for partial summary judgment by the defendant. The Court expressly noted that Experience Hendrix never conceded that Hendrix's right of publicity expired at the time of his death and found that Hendrixlicensing.com had standing under the Declaratory Judgment Act to have the constitutionality of the amendment decided.

The Court held that the amendment to the Act was unconstitutional under the Due Process and Full Faith and Credit Clauses, as well as the dormant Commerce Clause, striking the language that had circumvented choice of law principles.³ The Court's reasoning offers an interesting read, both for its treatment of choice of law inquiries, which unfortunately are routine in right of publicity cases, and for its recognition of at least some of the varying standards currently applied across states in determining right of publicity claims. It remains to be seen if the Ninth Circuit will uphold the Court's ultimate decision because this author is nearly certain an appeal will follow, absent a settlement of the case.

As has been advocated in various venues, this decision supports the efforts of many who believe it is time for a federal right of publicity statute that would provide one clear standard for publicity rights throughout the country. Not only do the different standards applied across states raise the costs of litigation, they also raise the cost of advertisers' marketing efforts and licensing efforts by rights holders. A federal statute would harmonize state laws and provide predictability.

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² Available at http://scholar.google.com/scholar_case?case=16136031992295213124.

³ The Court held the following language of the Act unconstitutional:

RCW 63.60.010, fourth sentence: "regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death or otherwise recognizes a similar or identical property right";

RCW 63.60.010, last sentence: "regardless of place of domicile or place of domicile at time of death";

RCW 63.60.020(1): "regardless of the individual's place of domicile, residence, or citizenship at the time of death or otherwise";

RCW 63.60.020(2): "regardless of the personality's place of domicile, residence, or citizenship at the time of death or otherwise";

RCW 63.60.030(1)(a): "regardless of whether the law of the domicile of the deceased individual or personality, at the time of death, or thereafter, recognizes a similar or identical property right"; and

RCW 63.60.030(1)(b)(iv): "regardless of whether the law of the domicile of the deceased third party, at the time of death, or thereafter, recognizes a similar or identical property right."