

# The Current State of Personality Rights (Rights of Publicity)

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# *White v. Samsung Electronics* 971 F.2d 1395 (9th Cir. 1991)



Revealed to be health food.  
2010 A.D.



Longest-running game show.  
2012 A.D.



*White v. Samsung Electronics*  
971 F.2d 1395 (9th Cir. 1991)



# *White v. Samsung Electronics* 971 F.2d 1395 (9th Cir. 1991)

- Statutory right of publicity claim
  - Any person who knowingly uses another's name, voice, signature, photograph, or likeness in any manner, for purposes of advertising or selling, without person's prior consent shall be liable
    - Held: Samsung not liable to White under statute b/c robot was not of her "likeness"

# *White v. Samsung Electronics*

## 971 F.2d 1395 (9th Cir. 1991)

- Common law right of publicity claim
  - Protects commercial interest of celebrities in their identities. Since a celebrity's identity can be valuable in the promotion of products, the celebrity has an interest in protecting against the unauthorized commercial exploitation of that identity
    - Has celebrity's identity been appropriated?
    - Held: Samsung liable under common law because White only person who stands on Wheel of Fortune set and turns letters; White's identity appropriated

# *White v. Samsung Electronics*

- Dissent on denial of rehearing: Holding wrongly expands common law right of publicity to include anything that reminds the viewer of the celebrity
  - Majority would find violation in monkey on a Wheel of Fortune set with a wig and gown. This gives White an exclusive right not in what she looks like or who she is, but in what she does for a living.
- 989 F.2d 1512 (9th Cir. 1993)

*Comedy III v. Saderup*  
21 P.3d 797 (Calif. 2003)



*Comedy III v. Saderup*  
21 P.3d 797 (Calif. 2003)





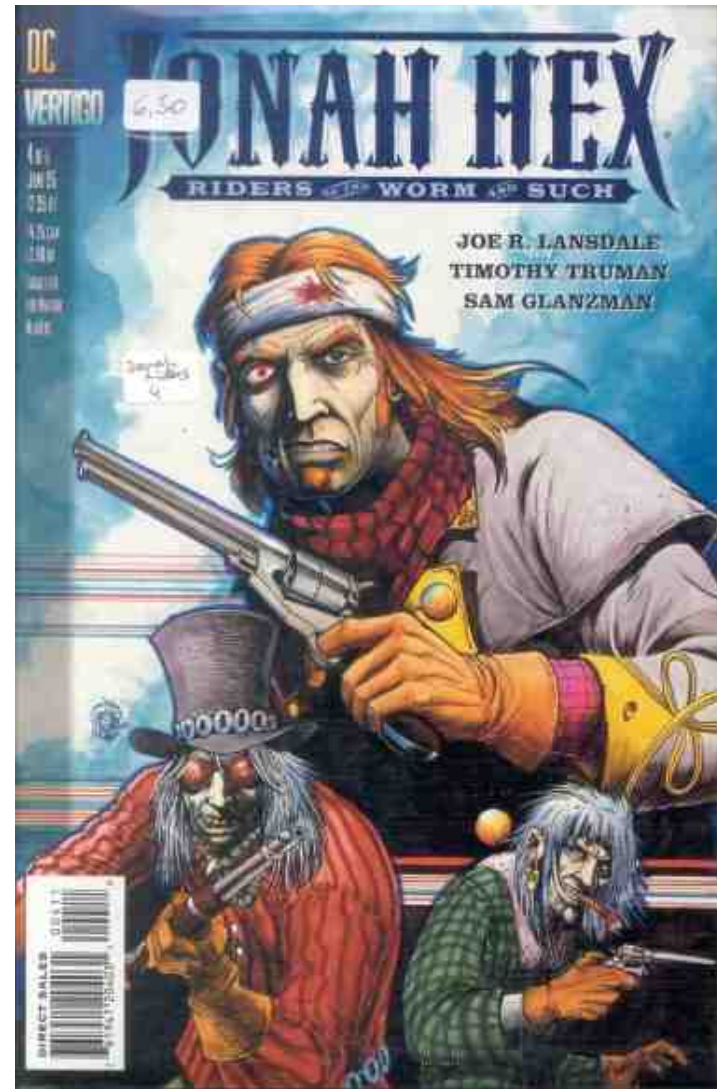
*Comedy III v. Saderup*  
21 P.3d 797 (Calif. 2003)

- Held: Though skillful, the sketches are literal (thus not transformative) depictions of The Three Stooges, which exploits their fame.
  - Therefore, the works violate California's right of publicity statute

# *Winter v. DC Comics* 69 P.3d 473 (Calif. 2003)



Johnny and Edgar Winter (top);  
Johnny and Edgar Autumn (right)



*Winter v. DC Comics*  
69 P.3d 473 (Calif. 2003)

- Applies *Comedy III* test to comic books
  - Comic books do not depict plaintiffs literally
  - Plaintiffs were the “raw materials” from which the comic books were synthesized
  - Distinction between parody and non-parody irrelevant to the transformative test
    - What matters is whether the work is transformative, not whether it is parody

*Winter v. DC Comics*  
69 P.3d 473 (Calif. 2003)

- Held: The defendants sold comic books depicting fanciful, creative characters, not pictures of the Winter brothers
  - First Amendment protects such use
  - Irrelevant if put celebrity in bad light
- *See also, No Doubt v. Activision*, 192 Cal.App.4th 1018 (2011) (use of famous musician in Guitar Hero-type video game not transformative)

## *Shaw v. CMG Worldwide*

486 F.Supp.2d 309 (S.D.N.Y. 2007)

“[A]t the time of Ms. Monroe’s death in 1962, neither New York nor California permitted a testator to dispose by will of property she did not own at the time of her death. ... [T]he law in effect at the time of Ms. Monroe’s death did not recognize descendible postmortem publicity rights and did not allow for distribution under a will of property not owned by the testator at the time of her death.”

## *Greene v. CMG*

568 F.Supp.2d 1152 (C.D. Calif. 2008)

“On January 7, 2008, the court granted plaintiff’s motion for reconsideration. It noted that SB 771 clearly expressed the California legislature’s intent to clarify § 3344.1 as originally enacted....”

## *Greene v. CMG*

568 F.Supp.2d 1152 (C.D. Calif. 2008)

“... by making explicit the fact that the right of publicity of a personality who died before January 1, 1985 was deemed to have existed at the time the personality died, such that it could pass through the residual clause of her will.”

## *Greene v. CMG*

568 F.Supp.2d 1152 (C.D. Calif. 2008)

“The court made clear that these holdings were conditional, in the sense that they were dependent on a finding that Monroe was a domiciliary of California when she died. ... Whether Monroe could bequeath such a right, therefore, depended on whether she was domiciled in California or in New York.”



## *Greene v. CMG*

568 F.Supp.2d 1152 (C.D. Calif. 2008)

“[P]laintiffs currently take a position that is inconsistent with that intentionally advanced...in the California inheritance tax proceedings... assertions that Monroe was domiciled in New York at the time of her death; and plaintiffs, having benefitted from...assertions because their predecessors were beneficiaries under Monroe’s will, would gain an unfair advantage if permitted now to establish that Monroe was in fact domiciled in California....”

# *Greene v. CMG*

568 F.Supp.2d 1152 (C.D. Calif. 2008)

“Consequently, the court concludes that the doctrine of judicial estoppel bars plaintiffs from asserting that Monroe was domiciled in California at the time of her death.”

– Case is on appeal to the Ninth Circuit

- 10/13/11. Oral argument occurred on October 13
- Listen to it online at:

[http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000008164](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000008164)

*Experience Hendrix, LLC v. Foundation*  
240 Fed. Appx. 739 (9th Cir. 2007)

“[W]e first determine there is an actual conflict between Washington and New York law because the WPRA recognizes a posthumous right of personality, while New York did not recognize such a right at the time of Jimi Hendrix’s death in 1970.”

*Experience Hendrix, LLC v. Foundation*  
240 Fed. Appx. 739 (9th Cir. 2007)

“Since an actual conflict exists,  
Washington choice of law rules direct us  
to determine which jurisdiction has the  
‘most significant relationship’ to a given  
issue, looking at the factors listed in  
Restatement (Second) of Conflict of Laws  
§ 6 (1971).”

*Experience Hendrix, LLC v. Foundation*  
240 Fed. Appx. 739 (9th Cir. 2007)

“The WPRA does not contain a statutory directive to apply Washington law to this case because it does not include a choice of law provision nor does the legislative history expressly indicate an intent that the WPRA apply to out-of-state facts.”

*Experience Hendrix, LLC v. Foundation*  
240 Fed. Appx. 739 (9th Cir. 2007)

“...in light of the general rule that New York law should apply because it was the domicile of Jimi Hendrix at the time of his death, see Restatement (Second) of Conflict of Laws § 260 (1971), we conclude that New York has the most significant relationship to the intellectual property rights and the parties at issue here.”

*Experience Hendrix, LLC v.  
HendrixLicensing.com*

*No. 09-285 (W.D. Wash. Feb. 8, 2011)*

“...Not only is Washington’s choice-of-law directive at odds with the almost unanimous views of courts that have grappled with the survivability of the right of publicity, it also runs contrary to the traditional approach for resolving the testamentary or intestate disposition of personal property. This status as an outlier evidences the arbitrariness of the WPRA’s choice-of-law provision and portends of the potential unfair ramifications of its application.”

*Experience Hendrix, LLC v.  
HendrixLicensing.com*

*No. 09-285 (W.D. Wash. Feb. 8, 2011)*

“Courts look to the law of the domicile for a reason. The domicile has the requisite contacts with a particular individual or personality to generate a state interest in defining his or her property rights and how they may be transferred. To select, as the WPRA suggests, the law of a state to which the individual or personality is a stranger, constitutes no less random an act than blindly throwing darts at a map on the wall.”



*Experience Hendrix, LLC v.  
HendrixLicensing.com*  
No. 09-285 (W.D. Wash. Feb. 8, 2011)

“This capriciousness will likely lead to inconsistent and unjust results. Indiana is the only state other than Washington that attempts by statute to disregard the law of the domicile. Thus, with respect to a personality who was domiciled in New York at the time of death, Washington and Indiana would stand alone in disregarding New York law abating such personality’s right of publicity....”

*Experience Hendrix, LLC v.  
HendrixLicensing.com*

**No. 09-285 (W.D. Wash. Feb. 8, 2011)**

“Given the arbitrary and unfair nature of the WPRA’s choice-of-law directive concerning the existence of a post-mortem right of publicity, the Court GRANTS partial summary judgment in favor of defendants on their first declaratory judgment counterclaim and hereby DECLARES that such provision violates the Due Process and Full Faith and Credit Clauses of the United States Constitution.”

- Case is on appeal to the Ninth Circuit

## *CMG v. Upper Deck*

2008 WL 4690983 (S.D. Ind.)

“Plaintiff’s argument that the situs of material events occurred in Indiana merely because plaintiffs suffered injury here proves too much. It would mean that plaintiffs could force defendants from anywhere to defend themselves in Indiana against plaintiffs’ claims to have worldwide exclusive rights....”

*CMG v. Upper Deck*  
2008 WL 4690983 (S.D. Ind.)

“...Indiana has little or no connection with the controversy at issue. CMG, the only party connection to Indiana, is merely acting as an agent for the estates of these players, so its location is not material. In addition, no Indiana property rights are implicated by this case as Topps has not established that any of the Legends were domiciled in Indiana at the time of each of their respective deaths.”

*CMG v. Upper Deck*  
2008 WL 4690983 (S.D. Ind.)

“New York on the other hand, was the domicile of two of the players in question (Lou Gehrig and Christy Mathewson) at the time of their deaths, so New York law applies to any publicity rights that CMG allegedly holds and allegedly transferred to Topps with respect to these former players. In contrast, ... none of the players identified by Plaintiffs ... were domiciled in Indiana at the times of their deaths, so the Indiana Right of Publicity Act is inapplicable to this case.”

## *Dillinger, LLC v. Electronic Arts*

2011 WL 2446296 (S.D. Ind. June 15, 2011)

“[T]he Court finds that the Indiana Supreme Court would agree with *Shaw*: Indiana’s right-of-publicity statute doesn’t apply to personalities who died before its enactment.”

“Because the Plaintiff seeks to enforce publicity rights of John Dillinger, who died in 1934, well before the enactment of the right-of-publicity statute, the Plaintiff has failed to state a claim under that statute.”

# *Dillinger, LLC v. Electronic Arts*

2011 WL 2446296 (S.D. Ind. June 15, 2011)

“The statutory provisions, individually and collectively, that [plaintiff] cited are ambiguous; they can be read equally to protect personalities who live and die after the statute’s 1994 enactment, as they can be read to protect those who have ever lived. Providing causes of action for the heirs of the millions of people who died between 1894 and 1994 – *i.e.* during the 100 year post-death period of protection – would greatly expand the potential liabilities that the statute creates.”

*Dillinger, LLC v. Electronic Arts*  
2011 WL 2446296 (S.D. Ind. June 15, 2011)

“At present, given the existence of a reasonable alternative reading of the statute, the Court must presume that the Indiana Supreme Court would not endorse such a result but would instead adopt the narrower reading.”



# Questions?

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Thanks!