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LAW BULLETIN MEDIA

## Act prompts new look at right of publicity after person's death

**Question:** Can the right of publicity survive a person's death?

**Discussion:** In August 2022, the Allen Toussaint Legacy Act went into effect in Louisiana. The Act is named after the New Orleans pianist. The act protects an individual's right of publicity even after the individual is deceased. While Louisiana had protected a person's right to control the commercial use of their name, image and likeness while they were living, the right ended when they died. That is no longer the case.

Specifically, the law prohibits commercial use in Louisiana of an individual's identity without consent for a period of 50 years after an individual's death (or sooner if not used for three years following death). The term "consent" is intended to mean consent from the person's estate or similar representative. There are exceptions. For example, the right does not apply to a performance in audiovisual works that expires on the person's death. It is also subject to fair use, First Amendment and other exceptions relating to the use in creative works.

The law also covers "dig-



### IP NEWS CHALLENGE

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ital replicas" which means computer-generation production of the professional performer's likeness or voice. Creating these digital replicas also requires consent.

With this law, Louisiana joins about half of the states in the United States that also protect the right of publicity after a person's death.

One of the most famous instances of the posthumous right of publicity involved Elvis Presley. Tennessee did not have a for-

mal right of publicity statute at the time of his death. But in a case decided shortly afterward, the court determined that the posthumous right of publicity not only existed but that it was descendible.

As a result, an organization that was trying to raise money for a statue of Elvis had to get consent from Elvis' estate to sell small versions of the statue. Tennessee enacted a posthumous right of publicity statute not long thereafter.

Minnesota also does not have a posthumous right of publicity statute. When music legend Prince died, the market was flooded with unlicensed merchandise using his likeness. Minnesota tried to enact legislation but it was withdrawn due to many problems, including interference with First Amendment rights.

**Answer:** In most of the United States, a person's right of publicity survives their death.

**Case Cite:** The Allen Toussaint Legacy Act (Louisiana)

**Sur-Reply:** Judge Jerome Frank is often cited as having coined the term "right of publicity" in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).