" 'CAUSE THIS IS THRILLER!": THE TRUE PRICE OF FAME AND AN ANALYSIS OF THE CURRENT SYSTEM FOR CALCULATING ESTATE TAXES ON THE POST-MORTEM RIGHT OF PUBLICITY

Comment

by Erin Mai

I. INTRODUCTION

June 25, 2009 marked the death of the world-famous music star Michael Jackson, also known as the King of Pop.[1] For approximately four decades, Jackson captivated audiences and fans everywhere with his unique contributions to music and dance.[2] He popularized complicated dance moves (such as the moonwalk) as well as fashion trends (like the single white glove).[3] Jackson's achievements include thirteen Grammy Awards and thirteen number one singles, including ever-popular songs such as "Beat It",

1. *See* Michael Jackson, http://en.wikipedia.org/wiki/Michael_Jackson (last visited Oct. 10, 2009). There was much dispute and stipulation to the cause of Jackson's death.
2. *See id*.
3. *See id*.

"Billie Jean", and "Bad."[4] Michael Jackson's albums have reached estimated record sales of 750 million worldwide.[5] As of 2010, his 1982 album *Thriller* remains the best-selling album of all time.[6] Jackson's life as an entertainer, as well as his turbulent and highly publicized personal life, has made him one of the most prominent celebrities of this century, even postmortem.[7] The distribution of Jackson's estate, specifically matters involving his descendible right of publicity, are proving to be complicated and challenging.[8]

So what *really* constitutes the price of fame and publicity?[9] This Comment discusses possible theoretical answers to that long-debated question, as well as the concept that a decedent continues to pay the price for his or her celebrity even after death. Part I of this Comment will discuss the concept of the right of publicity. In 1994, the Eastern District Court of Virginia held that the right to publicity was a taxable asset—a decision influencing estate planning for celebrities and similarly situated individuals.[10] Part II of this Comment discusses the facts and history of the *Andrews* case and addresses the importance of the holding that right of publicity is deemed a taxable asset. Part III examines the right of publicity as a taxable asset under state and federal law. Part IV of the Comment discusses the current IRS valuation systems used for calculating right of publicity worth. Part V examines implications and concerns associated with the lack of a well-established valuation system for valuing a right of publicity for estate tax purposes. Part VI discusses specific implications for Michael Jackson's estate and the taxes to be applied to his right of publicity. Part VII provides a proposal for fixing the right of publicity estate tax dilemma. Ultimately, this Comment reveals the flaws with the current system (or lack thereof) for taxing a celebrity's right of publicity, argues for a more reliable valuation system for calculating worth and taxes of rights of publicity, and argues that until a more reliable valuation can be developed, the right of publicity should not be taxed contrary to the holding in *Andrews*.

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4. *See id*.

5. Carl Bialik, *Spun: The Off-the-Wall Accounting of Record Sales*, THE WALL STREET JOURNAL (July 15, 2009), *available at* http://online.wsj.com/article/SB124760651612341407.html; Michael Jackson Album Sales Soar, http://edition.cnn.com/2009/SHOWBIZ/Music/06/26/michael.jackson.album.sales/ (last visited Oct. 10, 2009).

6. *See* Michael Jackson, http://en.wikipedia.org/wiki/Michael_Jackson (last visited Oct. 10, 2009).

7. *See id*. Aside from his accomplishments, Jackson was highly publicized for the transformation of his appearance and allegations of child sexual abuse. There were numerous sensational reports made about Jackson and his personal life—so many, in fact, that the media dubbed Jackson as "Wacko Jacko," a name Jackson despised.

8. Christopher Palmeri, *Settling Michael Jackson's Estate May Be a Thriller*, BUSINESSWEEK (June 25, 2009), *available at* http://www.businessweek.com/bwdaily/dnflash/content/jun2009/db20090625_228739.htm.

9. *See* Doug Gross, *Michael Jackson and the 'extreme' price of fame*, CNN.COM (June 29, 2009), *available at* http://www.cnn.com/2009/SHOWBIZ/06/26/michael.jackson.spotlight/index.html.

10. *See* Estate of Andrews v. United States, 850 F. Supp. 1279, 1295 (E.D. Va. 1994).

II. THE RIGHT OF PUBLICITY

While the right of publicity is most commonly associated with persons of celebrity stature similar to Michael Jackson, the right is not limited only to such celebrities. It is possible that issues relating to the value of a right of publicity for estate tax purposes can arise when settling estates—regardless of whether the decedent was of celebrity stature or not.[11] There is, however, split authority as to whether the common law right extends to non-celebrities.[12] The majority of jurisdictions extend the right to anyone regardless of celebrity status.[13] It is important to note, however, that a minority of jurisdictions appear to limit recovery to celebrities.[14]

Several courts have noticed that for some celebrities and people living in the eye of the public, publicity is their very livelihood.[15] The right of publicity is an independent concept and is the right to control one's name or likeness as well as the right to profit from one's name or likeness.[16] It is a right "relatively new in origin and [one that] differs from state to state and does not exist federally."[17] While not all states have statutes that expressly recognize the right of publicity, "the majority view is that the right exists by common law" in all states without legislation that defines the state's positions on the right.[18]

Further, not all states recognize a postmortem right of publicity, although an increasing number of states are beginning to recognize the right.[19] Most states that recognize a right of publicity also recognize the right postmortem.[20] There are a number of states that have already enacted postmortem rights of publicity by statute.[21] These states include California, Texas, and Tennessee.[22] However, note that New York is one of the states

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11. *See* Maheu v. CBS, Inc., 201 Cal. App. 3d 662, 678 (Ct. App. 1988).

12. *See id*. at 671.

13. *See id*.

14. *See* House v. Sports Films & Talents, Inc., 351 N.W.2d 684 (Minn. Ct. App. 1984); *see* Cox v. Hatch, 761 P.2d 556, 564 (Utah 1988).

15. Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People By the Media*, 88 YALE L.J. 1577, 1588-89 (July 1979); *see, e.g.*, Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

16. Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L J. 1577, 1589 (July 1979).

17. Mark G. Tratos & Stephen Weizenecker, *Dead Celebrity Wars*, 25 ENTERTAINMENT AND SPORTS LAWYER 1, 16 (Summer 2007).

18. *Brief History of RoP*, http://rightofpublicity.com/brief-history-of-rop (last visited Jan. 22, 2010).

19. Joseph J. Beard, *Clones, Bones, and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead, and the Imaginary*, JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A., 441, 505 (Winter 2001).

20. *Id*.

21. *Id*.

22. *See* 16 BERKELEY TECH L.J. 1165, 1229 (2001); *see* CAL. CIV. CODE § 3344.1 (2000), TEX. PROP. CODE ANN. § 26.001-26.015 (2009) (stating that "an individual has a property right in the use of the individual's name, voice, signature, photograph, or likeness after the death of the individual."); *see* TENN. CODE ANN. § 47-25-1103 (2009) (stating that property rights in one's name or likeness "do not expire

that has yet to enact legislation.[23] New York's decision to refrain from enacting a statute creating postmortem rights of publicity is a highly debated topic.[24] However, proposed litigation seeks to amend New York's current law and to expand the right of publicity to extend after death.[25] "The rights created [by the proposed amendments] would be deemed to vest retroactively before such person's death so that the transfer by the deceased person or his or her transferees can occur before or at the time of death."[26]

Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. was the first case to rule on and directly recognize the right of publicity; Judge Jerome Frank coined the term "right of publicity."[27] The court held that:

> We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labeled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.[28]

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upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual's lifetime. . .").

23. *See* 16 BERKELEY TECH L.J. 1165, 1229 (2001); *see* N.Y. CIV. RIGHTS LAW § 50 (McKinney 1995) (protects the rights of "any living person"); *see also* Stephano v. News Group Publ'ns, Inc., 474 N.E.2d 580, 584 (N.Y. 1984) (noting that the right of publicity was brought within the privacy statute); *see also* Antonetty v. Cuomo, 502 N.Y.S.2d 902, 906 (N.Y. App. Div. 1986) (noting the statutory right created by Section 51 of the Civil Rights Law "does not survive death").

24. *See* Mark G. Tratos & Stephen Weizenecker, *Dead Celebrity Wars*, 25 ENTERTAINMENT AND SPORTS LAWYER 1, 16 (Summer 2007).

25. *Id.* at 16 (Summer 2007) (explaining that such an amendment retroactively create rights of publicity only for celebrities who died after January 1, 1938).

26. *Id.*

> The New York amendment seeks to amend and expand the current law pertaining to infringement of a person's right of publicity to include the same rights to the dead celebrity.
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> Section 1 of the New York amendment provides a misdemeanor criminal penalty for uses of "the name, portrait, voice, signature or picture of any deceased natural person who died within seventy years" prior to January 1, 2008. The use must be for "advertising purposes, or for the purposes of trade." Such use to be criminal must be "without having first obtained the written consent of such person's residuary or other legatees, devisees, distributees or the successors in interest thereof."
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> Section 2 of the amendment provides a civil action for such unauthorized use for advertising purposes or for the purposes of trade. The potential claimant is quite broadly defined as "the residuary or other legatees or devisees (or the successors in interest thereof), or the statutory heirs in the absence of a valid will . . ." The right exists only for persons who died 70 years prior to January 1, 2008. The New York amendment gives rise to claims in equity to prevent and restrain the use thereof and at law for any injuries sustained by reason of such use. In addition, for a knowing violation, the jury may award exemplary damages. *Id.*

27. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

28. *Id.*

The court in *Haelan* also discussed how the right of publicity could sometimes serve as an economic incentive:

> For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[29]

The Ohio Supreme Court in *Zacchini v. Scripps-Howard Broadcasting, Co.* agreed that a right of publicity provided "personal control over commercial display and exploitation of his personality and the exercise of his talents."[30] *Zacchini* also discussed different incentives served by the availability of a right of publicity.[31] First, the right of publicity provides somewhat of an economic incentive.[32] The court stated that the "right of publicity provides an economic incentive for [one] to make the investment required to produce a performance of interest to the public."[33] Second, the right of publicity also provides noneconomic incentives. The laws providing protection are "intended definitely to grant valuable, enforceable rights' in order to afford greater encouragement to the production of works of benefit to the public."[34]

In relation to Michael Jackson, his potential to financially profit off of his works likely provided motivation to invest time and monetary funds into those work efforts. Additionally, knowing he would have some controlling rights to his celebrity and his work successes likely motivated Jackson to continue working for over four decades. In other words, if after his first few initial successful songs, Jackson had *no* control over his songs or how his publicity as a result of the success of his songs was used, it would be unlikely that he would have any sort of motivation to continue to work to produce songs for the public's benefit or to continue to live in the public eye. If Jackson had no rights to his name and likeness, there would be no reason for him to continue to work; essentially, he would have been an entertainment slave to the public, working in exchange for virtually nothing.

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29. *Id*.

30. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 569 (Ohio 1977) (noting that Ohio's decision to protect the right of publicity partially rests upon the desire to compensate for the time and effort one invested into one's act or craft).

31. *See id*. at 563.

32. *Id*.

33. *Id*.

34. *Id*. at 577 (quoting Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 36).

III. FACTS AND HISTORY OF *ESTATE OF ANDREWS V. UNITED STATES*

Estate of Andrews v. United States remains one of the most influential and precedential cases regarding the right of publicity as a descendible asset for estate tax purposes. In 1994, a United States District Court for the Eastern District of Virginia held that the right of publicity was a taxable asset that could be valued for purposes of calculating the federal estate tax.[35] On November 11, 1986, Virginia C. Andrews (Andrews), an internationally recognized author of paperback fiction novels, entered into a contract with Pocket Books (the contract) to produce two manuscripts in consideration for "the largest advance ever offered to Andrews": $3 million against royalties.[36]

Shortly after signing the contract, Andrews died.[37] "[I]mmediately after learning of Andrews' death . . . , Romanos [(of Simon & Schuster—owner of the Pocket Books division)] expressed the view that it would be possible to continue publication of books in that genre under Andrews' name if another author could mimic Andrews' style."[38] Originally, the executors of the Estate were unenthusiastic about the idea of using a ghostwriter and they were apprehensive that "an unsuccessful ghostwriting effort could have a serious adverse effect on the sale" of titles published prior to Andrews's death and severely risk the Estate's capital.[39] However, within three months of Andrews's death, it was arranged for Andrew Neiderman duplicate Andrews's style as a ghostwriter.[40] Neiderman studied Andrews's previous works and produced an outline and ghostwritten text, which satisfied the executors and allowed for revisions to the original contract.[41] Romanos negotiated with the Estate to revise the 1986 contract to reflect that the works would proceed with a ghostwriter.[42] Despite the considerable risk and apprehension of failure, *Garden of Shadows*—the first ghostwritten text, was pronounced a commercial success.[43] Further negotiations, additional contracts, and several more books followed.[44]

On November 19, 1987, the Estate timely filed its federal estate tax return and paid $2,057,84.50 in federal estate taxes, Andrews' name was not listed among the assets.[45] Consequently, the estate taxes the Estate paid were not based upon the value of Andrews' name.[46] In November 1990, the IRS

35. Estate of Andrews v. United States, 850 F. Supp. 1279, 1279 (E.D. Va. 1994).
36. *Id.*
37. *Id.* at 1283.
38. *Id.*
39. *Id.*
40. *Id.*
41. *See Andrews*, 850 F. Supp. at 1283.
42. *Id.*
43. *Id.* at 1284.
44. *Id.*
45. *Id.* at 1281.
46. *Id.*

later asserted that Andrews' name was an asset of the Estate and had a value of $1,244,910.84 on the date of her death.[47] The IRS issued a notice of deficiency and assessed deficient taxes from Andrews' name in the amount of $649,201.77.[48] The estate paid the additional tax and interest (an amount totaling $947,483.87) under protest, and filed suit for a refund.[49]

The court rejected the Estate's argument that Andrews's name and likeness had no measurable value.[50] While the value of Andrews's right of publicity was tied to book sales, it was measurable nonetheless.[51] Instead, the court agreed with the IRS that Andrews's name was a taxable asset, and should have been included on the list of assets provided on the federal estate tax return.[52] The court's finding that a recognized name or likeness was an independent taxable asset had never before been held in prior cases.[53] Despite this conceptually new holding, the court began its analysis for valuing a "name and likeness" and what should be considered when determining such a value.[54]

In this case, the court found a number of factors were relevant and should be taken into consideration when valuing the worth of Andrews's name for estate tax purposes.[55] These relevant factors included the following: Andrews was an internationally recognized author; she achieved paramount success in her genre of literature which no other author in that genre had rivaled; her works repeatedly exhibited her unique writing style; and her most recent book was high on the national best-seller list.[56] The court also took into consideration when determining value that "there was the prospect of substantial commercial success if a ghostwriter could mimic Andrews' unique style" but that there was also a risk that the ghostwriting efforts might prove to be unsuccessful.[57] "Hence, the parties would know that purchase of the right to use Andrews' name in conjunction with a ghostwritten book would entail the risk that the purchase transaction might be for naught."[58]

The court rejected the IRS's contention that the value of *all* of the ghostwritten books should be considered in the valuation of Andrews' name; only the ghostwritten works under the initial contract should be considered.[59]

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47. *Id*.
48. *See Andrews*, 850 F. Supp. at 1281.
49. *Id*.
50. *Id*. at 1286.
51. *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 687 (1995) (noting that difficulty in valuing an asset will not preclude the IRS from assessing a tax).
52. *See* Estate of Andrews v. United States, 850 F. Supp. 1279, 1295 (E.D. Va. 1994).
53. *See id*. at 1288-89.
54. *Id*. at 1289-90.
55. *Id*.
56. *Id*.
57. *Id*. at 1291.
58. *Id*.
59. *Id*. at 1293.

The court did not support reliance upon contracts subsequent to the first on the basis that it was unreasonable on the date of Andrews' death for the parties to expect that several successful books would follow the two books originally contemplated by the first contract, even if the first ghostwritten book was lucrative.[60] The court then calculated that of the $3 million advance, $1,550,000 was attributable to the first book.[61] After applying mathematical methods to the starting point of $1,550,000, the court determined "the valuation of Andrews' name at date of death would be $703,500."[62]

While the holding in *Andrews* specifically affects the estate of Michael Jackson, it also affects the estates of *all* decedents who have rights of publicity included within their estates. In order to understand the significance of the *Andrews* holding, it is important to better understand the implications of enforcing estate taxes on the right of publicity property interests.

IV. THE RIGHT OF PUBLICITY AS A TAXABLE ASSET

Generally, the question of what property a decedent owned is a state law question, determined conclusively by statute or by the state's highest court.[63] The mere qualification of property pursuant to a state's law does not automatically subject that property interest to the federal estate tax.[64] What property is subject to an estate tax is a federal question given little attention.[65]

Are rights of publicity property? The Tenth Circuit court in *Cardtoons v. Major League Baseball Player Association* explained that "[l]ike trademark and copyright, the right of publicity involves a cognizable property interest."[66] The court further explains that "[p]ublicity rights, then, are a form of property protection that allows people to profit from the full commercial value of their identities."[67]

Shortly after the *Andrews* decision, the court in *Southeast Bank, N.A. v. Lawrence* discussed the right of publicity, and what type of property it should be characterized as.[68] The court in *Lawrence* found the right of publicity is a personal property asset, and further discussed that questions concerning decedents' personal property rights should be determined by addressing the

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60. *Id*.

61. *See Andrews*, 850 F. Supp. at 1294.

62. *See id*. at 1294-95.

63. Comm'r v. Estate of Bosch, 387 U.S. 456, 462-463 (1967).

64. *See* Michael F. Beausang, Jr., *Valuation: General and Real Estate*, 132 3d Tax Mgmt. (BNA) A-2 (1984); *see also Federal Estate Tax and Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683 (noting that "[t]he existence of a state law property interest does not, however, necessarily mean that the interest is subject to the federal estate tax.").

65. Michael F. Beausang, Jr., *Valuation: General and Real Estate*, 132 3d Tax Mgmt. (BNA) A-2 (1984).

66. Cardtoons v. Major League Baseball Player Assn., 95 F.3d 959, 967 (10th Cir. 1996).

67. *Id*. at 968.

68. Southeast Bank, N.A. v. Lawrence, 489 N.E.2d 744, 744 (N.Y. 1985).

substantive law of a decedent's domicile.[69] Classifying the right of publicity as a form of personal property implies its eligibility for having the federal estate tax applied to a descendible right of publicity asset.

Additionally, the decision in *Andrews* mandates listing a decedent's right of publicity as part of the gross estate on the estate tax returns.[70] The Internal Revenue Code (IRC) defines a decedent's gross estate generally as "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."[71] Essentially, all descendible assets and rights transferable to the beneficiaries are part of a decedent's gross estate and are therefore valued and accordingly taxed.[72] According to *Andrews*, a decedent's right of publicity is a descendible and transferable right.[73] Furthermore, the court in *Southeast Bank* held that the right of publicity is a type of personal property.[74] Therefore, a right of publicity is intangible, personal property that is descendible, transferable, and, under section 2031(a) of the IRC, is part of a decedent's gross estate—thereby making it subject to the federal estate tax.[75]

In relation to Michael Jackson, it will be necessary to include the value of his name and likeness as a right of publicity asset and list it on the estate tax return.[76] By listing Jackson's right of publicity on the tax return, his name and likeness become subject to the federal estate tax.[77] The amount of the tax will greatly depend upon the value of Jackson's right of publicity, making the valuation and valuation process crucial.[78]

V. CURRENT IRS VALUATION SYSTEMS FOR CALCULATING THE WORTH OF A RIGHT OF PUBLICITY

Generally, tax liability depends on the value of property included in the gross estate.[79] All property owned by decedent at death comprises the gross estate.[80] Therefore, the value for a decedent's right of publicity directly

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69. *Id*. at 745.

70. *See* Estate of Andrews v. United States, 850 F. Supp. 1279, 1289 (E.D. Va. 1994).

71. I.R.C. § 2031(a) (West 2002). *See also id*. § 2032(a) (noting that, as an alternative, executors may elect to set valuation at six months after death or at the exact time of death). *See also id*. § 2001(b), *available at* http://www.law.cornell.edu/uscode/html/uscode26/usc_sec_26_00002001----000-.html (stating that, generally, tax liability depends on the value of property included in the gross estate; all property owned by decedent at time of death comprises the gross estate).

72. *See id*. § 2001(b), *available at* http://www.law.cornell.edu/uscode/html/uscode26/usc_sec_26_00002001----000-.html.

73. *Andrews*, 850 F. Supp. at 1298.

74. *Southeast Bank*, 489 N.E.2d at 745.

75. I.R.C. § 2031(a).

76. *See Andrews*, 850 F. Supp. at 1293.

77. *Id*.

78. *See id*. at 1289.

79. *See* I.R.C. § 2001(b), *available at* http://www.law.cornell.edu/uscode/html/uscode26/usc_sec_26_00002001----000-.html.

80. *Id*. § 2031(a).

affects the value of the gross estate, which in turn directly affects tax liability. Since the value of a right of publicity asset could significantly affect estate tax liability, it is all the more important to properly value a decedent's right of publicity. However, this can prove to be quite challenging.

There is not a well-established method to determine the value of a right of publicity.[81] In fact, "[t]ax law provides no single answer to the question of what valuation technique must be used to value property."[82] While there may not be a set valuation technique, property should nevertheless be valued at its "fair market value" on the date of the decedent's death.[83] The IRS currently uses a variety of techniques to assess the value of rights of publicity.[84]

A. The Income Method of Valuation

The income method of valuation, also known as the capitalization method, attempts to project future income produced by the property based on the value of income the property is currently producing.[85]

> [T]his method is commonly applied to income-producing real estate. Significantly, it is used to value many forms of intellectual property, such as patents, profit participants, and residuals. The key to this method is identifying the future income to be capitalized and the rate of capitalization. The rate of capitalization takes account of the time value of money based on current rates of return and the risk that the property will not produce the projected income. The greater the risk associated with the income projection, the higher the capitalization rate, and the lower the value of the property.[86]

Under circumstances where there is current, existing income from the utilization of a decedent's right of publicity, the capitalization method would be the simplest of the available valuation techniques for the IRS to use in valuing that decedent's right of publicity.[87] In an instance where there is pre-existing income from a right of publicity, the difficulty for the IRS to "examine the streams of income from existing and anticipated endorsement contracts and sponsorship agreements, to ascertain rates of return, and to

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81. *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 688 (1995).

82. *Id*.

83. *Id*.

84. *See id*.

85. *Id*.

86. *Id*. at 688-89.

87. *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 689 (1995).

discount the future stream of income for the risks that the income stream will decrease as a result of the personality's death" is relatively low.[88]

B. The Market Approach

The market approach attempts to find the "fair market value" of the property by relying on and calculating the sale price of the property "when or if it were sold."[89] The property's sale price is most likely the most reliable source for its fair market value "[a]ssuming that the sale takes place in an arm's-length transaction, and that the sale occurs within a reasonable time before or after the decedent's death. . . ."[90]

This approach generally looks to sale prices of other similar, comparable property in ascertaining the sale price of the property at hand.[91] "For estate tax purposes, the pieces of property in question need only resemble one another . . . . [T]he value of a deceased personality's right of publicity may be determined in relation to endorsement contracts entered into by personalities similarly situated, in terms of age, fame, and other subjective factors."[92]

While the market approach method may be reliable for types of property such as real estate, it may be less reliable for valuing rights of publicity.[93]

> It may be difficult to estimate a sale price for the right of publicity. If the personality appeals to a limited market—as in the case of V.C. Andrews [in *Estate of Andrews*]—it is possible to determine a sale price. However, if a personality's celebrity appeals to a large market for endorsements, the estimation of a sale price for the right of publicity is far more difficult.[94]

Despite the fact that the court in *Andrews* used the market approach, the approach is rarely used to determine the value of intangible assets; the assets are so unique that there is no comparable property similar enough to rely on in calculating the sale price.[95]

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88. *Id*.

89. *Id*.

90. *Id*.

91. *See id*. at 689-90. "The determination whether the pieces are similar is a fact-specific inquiry." *Id*. at 689.

92. *Id*.

93. *See Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 690 (1995).

94. *Id*.

95. *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 690 (1995); *see also* Mitchell M. Gans, Bridget J. Crawford & Jonathan G. Blattmachr, *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203 (2008), *available at* http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/intellectual-property/postmortem-rights-of-publicity:-the-federal-estate-tax-consequences-of-new-state%11law-property-rights/ ("In the case of a unique asset, the court will refer to experts' opinions to determine value.").

C. The Combined Method

One expert suggests that some form of hybrid method, which would combine the income method and market approach, would be the best suited method for valuing a decedent's right of publicity.[96]

> Under this combined method, it is necessary first to examine the value of the personality's endorsement income streams existing at the time of death, such as royalty and licensing agreements. Using the existing contracts as a valuation baseline, the next step is to assess the marketability of the personality's endorsements at the time of death by examining offers for additional endorsements and any other indicators of the marketability of the personality's name.[97]

These "other indicators of marketability" can include a comparable proxy.[98] When examining the values of comparable personalities' rights of publicity the focus should be on the:

> nature of the proxy's rights of publicity, the proxy's relevant industry, and available endorsement vehicles. Specifically, consideration should be given to what made the personality famous, to what industry or industries that fame is most applicable, and to what endorsements that fame is marketable.[99]

"Other indicators of marketability" can also include what are known as "marking points."[100]

Each right of publicity valuation situation should be individually examined to determine the impact of "marking points" on the value of the decedent's name and likeness.[101] 'Marking points' are "significant events, including the personality's death, that either positively or negatively affect the values used."[102] The concept of marking points is particularly significant regarding Michael Jackson's estate and his right of publicity. "[A]llegations that Michael Jackson molested children may have been a negative marking point, requiring that calculations of future value based on income streams prior to the allegations be discounted to take into account the impact of the allegations on future endorsement availability."[103] Other potential marking

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96. *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 690 (1995).

97. *Id*.

98. *See id*. at 691-92.

99. *See id*. at 691.

100. *See id*.

101. *See id*.

102. *Id*.

103. *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 691 (1995).

points for Jackson may have included his positions regarding plastic surgery, or his concert series "This Is It"—which was scheduled to commence in July of 2009, eighteen days following the date of his death.[104]

VI. IMPLICATIONS AND CONCERNS ASSOCIATED WITH THE LACK OF A WELL-ESTABLISHED VALUATION SYSTEM FOR VALUING A RIGHT OF PUBLICITY FOR ESTATE TAX PURPOSES

The court in *Andrews* rejected the argument that "name or likeness" has no measureable value, and that such difficulty of valuation should preclude that asset from being taxed.[105] There are a number of consequences that can, and will, arise with this approach adopted by the court in *Andrews* and other subsequent courts. By recognizing rights of publicity as taxable assets, the courts failed to take into account the likely tax consequences. A descendible postmortem property right has federal estate tax consequences that state legislators appear not to have considered.[106]

The determined value for a right of publicity can drastically affect tax liability for an estate. The value of the right of publicity contributes to the aggregate value of the gross estate, and the value of the gross estate will indicate the amount of taxes to be attached to the estate for estate tax purposes.[107] With the value of the right of publicity's near direct effect on taxes, it is easy to see the importance of properly calculating an accurate value for the right of publicity. Yet, the IRS does not use any set methodology for calculating the worth and value of a decedents' rights of publicity.[108] We must consider the many implications and problems created by this lack of a valuation system.

One such problem to be considered is the potential for a supposed "tax catastrophe," when can result from taxing a decedent's right of publicity. "The estate tax inclusion of a decedent's postmortem publicity rights could result in an estate tax liquidity problem common in estates consisting of assets that are difficult to sell or convert to cash."[109]

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104. Michael Jackson's This Is It, http://en.wikipedia.org/wiki/Michael_Jackson's_This_Is_It (last visited Sep. 14, 2010) (stating that the "This Is It" concert series would likely have been a marking point with a positive impact on Jackson's right of publicity value).

105. *See* discussion *supra* Part II.

106. Mitchell M. Gans, et al., *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203 (2008), *available at* http://thepocketpart.org/2008/04/01/ganscrawfordblattmachr.html.

107. *See* discussion *supra* Part II.

108. *See* discussion *supra* Part III.

109. Mitchell M. Gans, Bridget J. Crawford & Jonathan G. Blattmachr, *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203, 207 (2008), *available at* http://thepocketpart.org/2008/04/01/ganscrawfordblattmachr.html.

Additionally, "the estate tax value of rights of publicity easily could exceed the estate's liquid assets available to pay taxes."[110] In other words, beneficiaries are liquidating assets in order to cover the huge estate tax placed on postmortem publicity because the other assets are not sufficient to cover such a monstrous tax liability.[111] If not properly planned for, the estate taxes resulting from high values of postmortem rights of publicity can deplete an entire estate for the value of a right of publicity.[112]

The following example illustrates the potential problems with placing estate taxes on a decedent's publicity rights:

> Consider, for example, a hypothetical case of a well-known actor who dies with a twenty million dollar estate—marketable securities worth ten million dollars and descendible postmortem publicity rights valued at ten million dollars. Assume that the actor is not survived by his spouse, and he bequeaths his entire estate to his adult children. For simplicity purposes, assume further that there are no available deductions, credits, exemptions, or exclusions and that the estate tax rate is fifty percent. In this case, the estate will need to use all of the liquid assets to pay the federal estate tax bill of ten million dollars (fifty percent of the twenty million dollar gross estate). Even if the adult children might prefer—for privacy or other reasons—to refrain from exploiting their inherited postmortem rights of publicity, they will need to do so in order to receive any financial benefit from the estate.[113]

Essentially, beneficiaries can end up paying extravagant estate taxes in exchange for a decedent's right of publicity—an asset that may not have been properly valued to begin with.[114] This opens the door for the possibility of the IRS to overtax vastly on property that is not actually worth as much as it was valued. Situations where assets are liquidated and/or estates are depleted in order to recompense the high estate taxes resulting from overvalued rights of publicity being included in the gross estate could be avoided if the rights of publicity accurately valued.[115]

VII. IMPLICATIONS FOR MICHAEL JACKSON'S POST-MORTEM RIGHT OF PUBLICITY AND POTENTIAL ESTATE TAXES

While Michael Jackson's public persona was shrouded in mystery and speculation, there is *no* speculation or uncertainty about the widespread belief

110. *Id*. at 203.
111. *See id*.
112. *See id*.
113. *Id*. at 207.
114. *See id*.
115. *See id*. at 207-08.

that the distribution and settling of his estate will be complicated.[116] Following Jackson's death during the summer of 2009, entertainment attorney John Branca produced what he claimed to be Michael Jackson's final controlling will—executed seven years prior in July of 2002.[117]

Jackson's 2002 will instructed that his assets be placed in a family trust and that his mother, Katherine Jackson, be deemed the guardian of his three children.[118]

> The will . . . lists three executors, including lawyer John Branca and music industry executive John McClain. The will makes no provision for bequests to Jackson's father or any of his eight siblings, and a court filing indicates that beneficiaries of the Michael Jackson Family Trust are limited to his children and mother Katherine. Six other relatives, including his brother Tito's three sons, are named as 'contingent remainder beneficiaries' who would share the estate in the event that Jackson's principal beneficiaries died before he did. Branca and McClain believe that the value of Jackson's estate 'exceeds $500 million' and consists of 'non-cash, non-liquid assets,' including Jackson's share of lucrative music royalty rights. In the case that Jackson's mother were to predecease him (or was unable or unwilling to serve as guardian), Jackson stipulated that singer Diana Ross should be appointed guardian of his minor children.[119]

Despite will contests, Jackson's 2002 will was still valid.[120]

According to renowned tax professor Bridget Crawford, "an Estate Tax Disaster Looms for Michael Jackson's Estate if he and his counsel did not properly plan for the enormous value of his descendible right of publicity."[121] "It is possible the actual value for estate tax purposes may exceed the liquid assets of his estate."[122]

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116. *See infra* p.1.

117. Harriet Ryan, *Michael Jackson's Will Surfaces*, LOS ANGELES TIMES, July 1, 2009, *available at* http://articles.latimes.com/2009/jul/01/local/me-jackson-legal1 (last visited Jan. 6, 2010).

118. *See The Last Will of Michael Joseph Jackson*, The Smoking Gun, *available at* http://www.thesmokinggun.com/archive/years/2009/0701091mjwill1.html (last visited Jan. 6, 2010) (provides a copy of Jackson's will in its entirety).

119. *Id.*

120. Free Britney, *Michael Jackson Will Valid Despite Error*, THE HOLLYWOOD GOSSIP, October 22, 2009, http://www.thehollywoodgossip.com/2009/10/michael-jackson-will-valid-despite-error/ (stating that, "also interestingly, if the will were declared invalid, MJ's prior 1997 [will] would be the basis for the distribution of his estate. The 1997 will creates a trust. Just like the 2002 will's trust, Katherine Jackson gets 40 percent for her lifetime, MJ's children get 40 percent and the remaining 20 goes to charity. So basically, nothing would have changed." *See also Jackson's Will Still Valid*, contactmusic.com, Oct. 22, 2009, http://www.contactmusic.com/news.nsf/story/jacksons-will-still-valid_1119864 (Jackson's executors insist 2002 will is still valid despite harmless error).

121. *Michael Jackson's Looming "Estate Tax Disaster"*, http://taxprof.typepad.com/taxprof_blog/2009/06/michael-jacksons-.html (June 29, 2009, 9:10 EST).

122. *Michael Jackson Estate: Value of Right of Publicity*, http://ipandentertainmentlaw.wordpress.com/2009/07/02/michael-jackson-estate-value-of-right-of-publicity/ (July 2, 2009, 12:00 EST).

So, in what ways could Michael Jackson have prepared and planned for the immense value of his right of publicity? Paul L. Caron, Associate Dean of Faculty and distinguished professor at the University of Cincinnati College of Law, notes that estate planning, particularly for the famous, should include planning for potential tax consequences of a descendible right of publicity. Caron further explains:

> Practitioners fortunate enough to have clients with potentially valuable descendible rights of publicity should carefully consider the estate planning implications of [Estate of Andrews v. Commissioner, 850 F. Supp. 1279 (E.D. Va. 1994). One response would be to have clients early in their careers make gifts of the right to trusts for their children or grandchildren when the value of the right is negligible. Any subsequent appreciation in the value of the right thus would escape the reach of the transfer tax. A testamentary response would be to place restrictions on the right of publicity, thereby reducing (or perhaps even eliminating) the value of the right subject to tax. A parallel approach would be to waive the decedent's interest in the right. These approaches, of course, also would reduce or eliminate the benefits to be received by the client's heirs. Another response would be to simply treat the right as any other asset to be exploited for financial gain, and to plan for the resulting estate tax burden through the use of income from the exploitation, life insurance proceeds, or otherwise.
>
> In devising the appropriate strategy, the practitioner should, as always, carefully consider the client's wishes. . . .The cash-strapped heirs would be hard pressed in this situation to respect the decedent's privacy wishes that the right of publicity is designed to protect. Proper planning for the publicity-shy celebrity may be to impose restrictions on the right of publicity to accord with his privacy interests without subjecting the heirs to an estate tax burden. In contrast, for the celebrity like Michael Jordan who has aggressively exploited his name during life, it may not make sense to impose any restrictions on the right of publicity. The best approach for such a celebrity may be to maximize the benefits to his heirs through an unfettered right of publicity, at the cost of a 55 percent estate tax bite to be paid for with the fruits of the exploitation.[123]

Caron also explains, however, that it unfortunately appeared as though Jackson did not plan for the potentially massive value of his right of publicity, and this lack of planning may trigger some serious problems for the estate:

> As there does not appear to have been any estate planning for Michael Jackson . . . the value of the estates right of publicity will be quite extensive and estate taxes are due within 9 months following the date of death. This will cause a potential disaster for an estate which has debts of around a half a billion dollars already, numerous disputes and litigation issues which will

123. Paul L. Caron, *Estate Planning Implications of the Right of Publicity*, 68 Tax Notes 95, 97 (1995). *See supra* 100 (an entry from Paul L. Caron's blog including the same quoted material).

> need to be resolved and assets worth up to around a billion dollars prior to the value of the right to publicity but with no spouse his estate will receive just a $3.5 million estate tax exemption and while Paul McCartney or someone may buy the Beatles catalog which is the largest estate asset but it is not marketable in the same way that 100 shares of IBM stock would be and liquidating assets within the time period to pay estate taxes could be problematic.[124]

While Caron has provided respectable suggestions for testators and their attorneys to use when planning to avoid the tax trap that can be fallen into should a decedent not properly arrange for the potential tax consequences of a valuable descendible right of publicity, this can be near impossible when there is no consistent IRS valuation system to be relied upon while attempting to plan for handling one's right of publicity asset.

Further, should proper planning to avoid dire estate tax consequences even be an issue? Should testators and attorneys really have to strategize in attempts to beat the IRS and its "system"? It is unjust for the IRS to place taxes on right of publicity assets when no set system exists for reliably calculating the value of the right of publicity asset to be taxed—particularly when the amount of the estate tax relies so heavily upon the value of the asset. Without ensuring that the value determined for a right of publicity asset is proper and correct, the IRS cannot assure that the estate tax amount placed on that asset is also a correct and fair amount.

Ensuring an accurate value for a right of publicity asset has proved to be quite challenging. If it were not so difficult, then the IRS likely would have already created a system that was able to do so. However, the right of publicity is a particularly complicated asset to value. Essentially, it involves predicting how popular or unpopular a person will be with the public following his or her death. There are endless issues that could affect one's postmortem popularity for better or for worse. In the case of Michael Jackson, there is no way to predict with certainty just how his child molestation allegations or severely altered appearance could affect his popularity. There is no way for the IRS to calculate with any sort of certainty just how a decedent's postmortem popularity will be affected, thereby making it impossible to predict the value of a right of publicity with any accuracy.

Additionally, unforeseen events could occur post-death that would dramatically affect the popularity and value of a decedent's right of publicity. However, there is no way for the IRS to take those unforeseen events into consideration when calculating the worth of a right of publicity asset.

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124. *Estate Tax Issues Concerning the Right of Publicity*, http://florida-probate.blogs.com/florida_probate_attorney/2009/06/estate-tax-issues-concerning-the-right-of-publicity.html (June 29, 2009, 12:00 CST).

Furthermore, a person's celebrity status can often unexplainably surge or decline upon his or her death. This, too, is unforeseeable and unpredictable, and therefore impossible to be taken into account when calculating the value of a right of publicity. For instance, Jimi Hendrix was not nearly as recognizable and famous during his lifetime as he is now after death.[125]

Without the instilment of a system that can be proven to reliably and consistently determine accurate values for right of publicity assets, the IRS is essentially being permitted to zealously overtax estates, thereby causing the depletion of entire estates. Beneficiaries are unjustly and unknowingly being deprived of any true benefit from the property due to inaccurate tax amounts resulting from improper calculations of the value for right of publicity assets.

Again, I ask what is the true price of fame? Celebrities and public figures subsist their lives in the spotlight and are subject to the judgment of the public eye. These celebrities and personalities make immense sacrifices as part of such a lifestyle—often times a lifestyle he or she did not voluntarily choose for his or herself.

Michael Jackson was pushed into stardom at an early age. He began performing at the age of four.[126] Along with career success came fame—in the entertainment profession, the two almost always come hand in hand. As a result, Jackson ultimately was deprived of what most would consider to be a "normal" childhood. "And I remember going to the record studio and there was a park across the street and I'd see all the children playing and I would cry because it would make me sad that I would have to work instead," he once said.[127] Jackson lived his entire life in the public eye. He sacrificed his privacy and was subjected to constant ridicule, all in order to do what he loved most: perform.

Many people might argue that in exchange for the sacrifices Jackson and other celebrities must make as a result of their fame, there is the reception of prosperity, power, and economic prowess. Additionally, as previously discussed, in exchange for celebrities' talents, work, and—more often than not—life in the public eye, these celebrities are entitled to a right of publicity.

However, without a proper valuation system to accurately calculate the worth of right of publicity assets, these celebrities are basically being stripped of that right of publicity that he or she earned through hard work and sacrifice. Instead of rewarding these celebrities and public figures for the hard work and sacrifices made during his or her lifetime, the IRS is instead ultimately punishing them for it by overtaxing the celebrity's estates.

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125. *See* Jimi Hendrix, http://www.wikimusicguide.com/Jimi_Hendrix (last visited Jan. 23, 2010).

126. The King of Pop, http://www.michael-jackson.com/ (last visited Jan. 14, 2010).

127. Brainy Quote, http://www.brainyquote.com/quotes/quotes/m/michaeljac361166.html (last visited Jan. 14, 2010).

Even after death, a celebrity will likely be forced to continue to pay the price for his or her fame. His or her beneficiaries will be burdened with the right of publicity asset and the associated taxes instead of benefiting from that right of publicity. Why? Simply because the IRS cannot create an accurate, reliable system to calculate the value of a postmortem right of publicity asset.

VIII. PROPOSED SOLUTION FOR THE POSTMORTEM RIGHT OF PUBLICITY VALUATION AND ESTATE TAX PROBLEMS

Professor Bridget J. Crawford has previously made a proposal to solve the federal estate tax consequences of new state-law property rights, which would include the postmortem right of publicity. Crawford argues her solution is relatively simple. She suggests the modification of state laws to "provide that the postmortem rights of publicity pass automatically to a decedent's surviving spouse and descendants then the value of those rights should not be subject to federal estate taxation."[128]

> An unrestricted postmortem publicity right that survives a decedent's death likely will receive estate tax treatment similar to certain tort claims that survive a decedent's death. For example, included in a decedent's gross estate for federal estate tax purposes is the value of heirs' post-death claims for a decedent's lifetime pain and suffering. By parity of reasoning, then, the value of publicity rights that may be enforced by a decedent's heirs after his or her death should be included in the gross estate. But if postmortem publicity rights pass only to specific individuals designated by statute and not by the decedent, then the value of those rights should not be included in the decedent's gross estate, by analogy to wrongful death benefits.[129]

However, while Crawford argues her proposed solution to be simple, it appears there is an even more simple solution. Until a more reliable valuation system is developed, the right of publicity should simply not be deemed a taxable asset. Contrary to the holding in *Estate of Andrews v. United States*, the difficulty in valuing the descendible postmortem right of publicity asset *should* preclude the IRS from assessing an estate tax on that particular right of publicity asset. Unless changes are made, Michael Jackson's *Thriller* lyrics will continue to accurately describe the IRS and its unjust application of estate taxes to postmortem right of publicity assets: " 'Cause this is thriller, thriller night. And no one's gonna save you from the beast about to strike."[130]

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128. Bridget J. Crawford, Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights, Pace Law Faculty Publications (2008), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1489&context=lawfaculty.

129. *Id.*

130. Thriller Lyrics, http://www.elyrics.net/read/m/michael-jackson-lyrics/thriller-lyrics.html (last visited Jan. 24, 2010).