



Right of Publicity Laws: New Jersey

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A Q&A guide to New Jersey right of publicity laws. This Q&A addresses the types of persons and aspects of identity protected by the right of publicity, remedies for violations of the right, defenses to right of publicity claims, personal jurisdiction and choice of law considerations, and transfer and licensing of the right. Answers to questions can be compared across a number of jurisdictions (see Right of Publicity: State Q&A Tool).

OVERVIEW OF STATE RIGHT OF PUBLICITY LAW

1. Does your state recognize the right of publicity? If so, is the right of publicity recognized by statute or common law, or both?

STATUTES

New Jersey does not have a right of publicity statute.

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COMMON LAW

New Jersey has recognized a common law right of publicity since at least 1907, when the court in *Edison v. Edison Polyform Manufacturing Co.* held that an individual has the right to prevent the unauthorized, commercial appropriation of his name or likeness (67 A. 392 (N.J. Ch. 1907)).

New Jersey courts initially characterized the right of publicity as a privacy right, but it is now firmly grounded as a property-based right (*McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994)). The court in *Canessa v. J.I. Kislak* clarified that as long as a plaintiff's claim is based on the appropriation of his likeness and name for the defendant's commercial benefit, it is an action for invasion of his property rights rather than injury to the person (235 A.2d 62 (N.J. Super. Ct. Law Div. 1967)).

2. Does your state recognize the appropriation invasion of privacy tort? If your state recognizes both a right of publicity and an appropriation invasion of privacy tort, please describe any significant distinctions between the two types of claims.

New Jersey has adopted Section 652C of the Restatement (Second) of Torts, incorporating the appropriation invasion of privacy tort into its law. However, New Jersey regards this tort as a property-based tort, and uses the terms "appropriation" and "right of publicity" interchangeably (*Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904 (D.N.J. 1986)).

PERSONS PROTECTED

3. What types of persons are protected by each law identified in *Question 1*?

NATURAL LIVING PERSONS

New Jersey's common law right of publicity extends to all natural living persons, whether celebrity or non-celebrity. The distinction between celebrities and others pertains only to the issue of damages. (*Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62 (N.J. Super. Ct. Law Div. 1967).)

DECEASED PERSONS

The US District Court for the District of New Jersey held that New Jersey common law would recognize a postmortem right of publicity. The court did not decide, however, whether this right survived death if the person's persona was not exploited during his or her lifetime, as the publicity of the person in question, Elvis Presley, was clearly commercialized during his life. (*Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).)

The court also avoided deciding how long the right would survive death, as that was not an issue in the case. The court did, however, suggest that a time be set by the New Jersey State Legislature, which has not happened to date. (*Estate of Elvis Presley*, at 1355 n.10.)

Prima v. Darden Restaurants, Inc. cited *Estate of Elvis Presley* for the proposition that New Jersey common law would recognize a postmortem right of publicity (78 F. Supp. 2d 337 (D.N.J. 2000)).

There does not appear to be any decisions from a New Jersey State court recognizing a postmortem right of publicity. Therefore, New Jersey State courts could decline to follow this line of federal cases and instead hold that there is no postmortem right of publicity under New Jersey common law. However, this outcome seems unlikely as the right of publicity is firmly grounded as a property-based right.

4. If your state recognizes a postmortem right of publicity:

- What is the duration of the postmortem right?
- Is there an exploitation requirement for maintenance of the postmortem right?

DURATION

Although New Jersey recognizes a postmortem right of publicity, the duration is uncertain, as neither the New Jersey State Legislature nor any court has addressed the issue. In *Estate of Elvis Presley v. Russen*, the US District Court for the District of New Jersey suggested that the legislature set a time period, and referenced the Copyright Act's 70-year duration as potentially instructive (513 F. Supp. 1339, 1355 n.10 (D.N.J. 1981)).

EXPLOITATION REQUIREMENT

New Jersey courts have not addressed or imposed any exploitation requirement for maintenance of a postmortem right of publicity.

5. Is right of publicity protection in your state subject to any requirement that the person's identity have commercial value?

Under New Jersey common law, the right extends to all natural persons, celebrity and non-celebrity alike, and the issue of commercial value is relevant only to the question of the amount of damages (*Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62 (N.J. Super. Ct. Law Div. 1967)).

For living persons, New Jersey does not require prior commercial exploitation of a person's persona for him to possess a right of publicity. In *Palmer v. Schonhorn Enterprises, Inc.*, professional golf plaintiffs had not exploited their persona. The court noted that this lack of exploitation should not be justification for others to do so because the plaintiffs may wish to do it later. (232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).)

6. If your state recognizes a postmortem right of publicity, is postmortem protection subject to any lifetime exploitation requirement?

New Jersey law is undecided on whether the postmortem right of publicity extends to individuals whose persona was not exploited during their lifetime. In *Estate of Elvis Presley v. Russen*, the court expressly declined to comment on this issue, noting that Elvis Presley had commercialized his identity during his life (513 F. Supp. 1339 (D.N.J. 1981)).

7. Are any classes of persons (for example, members of the Armed Services) given special right of publicity protection in your state? If so, what is the nature of the protection?

There are no specially protected classes of persons under New Jersey common law.



PROTECTED ASPECTS OF IDENTITY

8. For each law identified in *Question 1*, please describe the aspects of a person's identity that are protected.

New Jersey extends the right of publicity to the following:

- Name.
- Photograph.
- Image.
- Likeness.
- Performance characteristic.
- Biographical data.
- Vocal style.
- Screen persona.

NAME

In *Edison v. Edison Polyform Manufacturing*, the court granted famous inventor Thomas Edison an injunction, restraining the defendant from using his name in its corporate name and in its advertisements for pain killers. The court held that this use created a false impression of endorsement, and stated that if a man's name is his own property, it is difficult to understand why the peculiar cast of one's features is not also one's property. According to the court, its pecuniary value should also belong to its owner, rather than to the person seeking to make an unauthorized use of it. (67 A. 392 (N.J. Ch. 1907).)

PHOTOGRAPH, IMAGE OR LIKENESS

In *Faber v. Condecor, Inc.*, the plaintiff allowed his employer of 33 years, Kodak, to use a photograph of his family in a company publication. Years later, the defendant used a reproduction of the same family photograph as an insert in the display and promotion of picture frames. The Appellate Division upheld a \$45,000 jury verdict for the plaintiff's misappropriation claim, holding that the unauthorized use of the family's photograph and likeness was for a commercial purpose and that the award was within the province of the jury. (477 A.2d 1289 (N.J. Super. Ct. App. Div. 1984).)

PERFORMANCE CHARACTERISTICS: APPEARANCE, DRESS AND STYLE

In *Estate of Elvis Presley v. Russen*, the court found that a live theatrical presentation designed to imitate a performance of the late Elvis Presley violated his right of publicity (513 F. Supp. 1339 (D.N.J. 1981)).

BIOGRAPHICAL DATA

The publication of biographical data of a well-known figure does not per se constitute an invasion of privacy, but using that same data to capitalize on the name by using it in connection with

a commercial project other than the dissemination of news or articles or biographies does (*Palmer v. Schonhorn*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967)).

VOCAL STYLE

The US District Court for the District of New Jersey found that imitating a celebrity's voice can give rise to a cause of action for violation of the right of publicity, and concluded that the New Jersey courts would adopt this rule (*Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000)).

SCREEN PERSONA

If an actor's screen persona becomes so associated with him that it becomes inseparable from the actor's own public image, the actor obtains an interest in the image which gives him standing to prevent others from using it without authority (for example, see *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994)).

REGISTRATION

9. Does any law identified in *Question 1* require or otherwise permit registration of the right of publicity, including postmortem rights if recognized in your state? If so, please describe the:

- Benefits of registration and any adverse consequences for failing to register.
- Registration requirements and procedure.

REGISTRATION BENEFITS

Registration of the right of publicity is not required or otherwise available in New Jersey.

REQUIREMENTS AND PROCEDURE

See *Registration Benefits*.

VIOLATIONS OF THE RIGHT OF PUBLICITY

10. For each law identified in *Question 1*, what are the elements of a civil claim?

The elements of a right of publicity claim under New Jersey common law are:

- Standing to sue (that is, the plaintiff owns an enforceable right in the identity or persona of the person).
- Unauthorized commercial use by defendant of one or more indicia of this identity or persona.

- A likelihood that the use will cause damage to the commercial value of that persona.

(*Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000).)

11. Please describe any tests for identifiability provided by statute or case law in your state.

See *Question 14: First Amendment Protections*.

REMEDIES

12. What are the available remedies for a civil violation of each law identified in *Question 1*?

Courts have granted injunctive relief and awarded compensatory damages in right of publicity cases.

INJUNCTIVE RELIEF

Courts have awarded injunctive relief in:

- *Estate of Elvis Presley v. Russen*. The court granted a sweeping preliminary injunction in connection with an Elvis impersonator (513 F. Supp. 1339 (D.N.J. 1981)).
- *Dorsey v. Black Pearl Books, Inc.* The court granted preliminary injunction enjoining the publication and distribution of books with the plaintiff's photograph on the front and back cover and advertising materials containing plaintiff's likeness (2006 U.S. Dist. LEXIS 83093 (D.N.J. Nov. 14, 2006)).
- *Palmer v. Schonhorn Enterprises, Inc.* The court enjoined the use of professional golfers' names and player profiles in a game (232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967)).

COMPENSATORY DAMAGES

There are few reported cases discussing compensatory damages for right of publicity claims under New Jersey law. However, in at least two cases, the US District Court for the District of New Jersey followed the Restatement (Second) of Torts, which states that a party establishing a cause of action for misappropriation may recover damages for:

- The harm to his interest in privacy resulting from the invasion.
- His mental distress proved to have been suffered if it is of a kind that normally results from this type of an invasion.
- Special damage which the invasion legally caused.

(*Leibholz v. Hariri*, 2011 U.S. Dist. Lexis 41246, *34 (D.N.J. April 15, 2011), quoting *Restatement (Second) of Torts*, § 652H.)

Other New Jersey courts have suggested in dicta that courts should measure compensatory damages by the benefit conferred on the defendant or the commercial value of the plaintiff's

persona. One court suggested that, in addition to the commercial value of the use of the name and likeness in the advertising field, damages could be based on *quantum meruit*. (*Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62 (N.J. Super. Ct. Law Div. 1967).)

Emotional harm, even without any economic injury, is a sufficient damages claim in New Jersey. The court in *Faber* affirmed a \$45,000 award for emotional damages, noting that damages may be recovered for invasion of privacy, even if the injury is only mental anguish. (*Faber v. Concedor*, 477 A.2d 1289 (N.J. Super. Ct. App. Div. 1984).)

As with other causes of action, the court will not award speculative damages (*Leibholz*, at *34).

INFRINGER'S PROFITS

New Jersey case law is not well-developed regarding recovery of an infringer's profits, although at least one court has suggested that damages may be based on *quantum meruit* (*Canessa*, at 352 n.5).

PUNITIVE OR EXEMPLARY DAMAGES

New Jersey case law is not well-developed regarding recovery of punitive or exemplary damages.

ATTORNEYS' FEES

New Jersey case law is not well-developed regarding recovery of attorneys' fees in right of publicity cases, although New Jersey follows the general US rule that parties are responsible for their own attorneys' fees, absent a statutory or contractual basis for recovery.

13. Are there any criminal penalties in your state for violations of the right of publicity?

There are no criminal penalties in New Jersey for violations of the right of publicity.

EXEMPTIONS AND DEFENSES

14. For each law identified in *Question 1*, what are the key defenses to a civil claim?

The following exemptions and defenses to right of publicity claims have developed under New Jersey case law:

- First Amendment Protections.
- Consent.
- De-Minimis, Incidental, Fleeting Use Exemption.
- Traditional Equitable Defenses.



FIRST AMENDMENT PROTECTIONS

New Jersey recognizes First Amendment protection for works that are:

- **Political.** In *G.D. v. Kenny*, the court held that the use of plaintiff's name and image on a campaign flyer failed to satisfy the commercial purpose element of the misappropriation tort. The court found the political campaign flyers represented political speech attacking the judgment of a candidate running for public office and that this type of speech was at the heart of First Amendment guarantees. (*15 A.3d 300 (N.J. 2011)*).
- **News-related.** In *Bisbee v. John C. Conover Agency, Inc.*, the court affirmed summary judgment for defendants, holding that publication of plaintiff's name, occupation and address in connection with the purchase of a home did not constitute actionable appropriation because the use was not commercial and it was in connection with a newsworthy event (*452 A.2d 689 (N.J. Super. Ct. App. Div. 1982)*).
- **Entertainment-based.** In *Hart v. Electronic Arts, Inc.*, the court granted summary judgment to a video game publisher, dismissing a putative class of NCAA football players right of publicity claims, finding that publisher's First Amendment rights trumped players' right of publicity (*2011 U.S. Dist. LEXIS 101254, *44 (D.N.J. Sept. 8, 2011)*).

Although New Jersey recognizes First Amendment protection for works of entertainment, it is a fact-intensive analysis and works of entertainment do not always have immunity under the law. For example, in *Estate of Elvis Presley v. Russen*, the court decided that although "The Big El Show" contained an informational and entertainment element, the show served primarily to commercially exploit the likeness of Elvis Presley "without contributing anything of substantial value to society" (*513 F. Supp. 1339, 1359 (D.N.J. 1981)*).

In addition, use of a person's persona to advertise a work of entertainment is not shielded by the First Amendment. For example, in *Tellado v. Time-Life Books*, the court held that the use of a photograph of a Vietnam veteran in a letter advertising a non-fiction book about the Vietnam War violated his right of publicity. The court noted that if the photograph were used in the book itself it would have been protected by the First Amendment, "regardless of what type of profit defendant expected to make with its book series." (*643 F. Supp. 904, 914 (D.N.J. 1986)*).

Balancing Tests for First Amendment Protection

In *Hart*, the US District Court for the District of New Jersey applied two different tests to balance the competing interests of the First Amendment and the right of publicity, declining to adopt one over the other because the defendants were entitled to summary judgment under both. The tests are:

- **Transformative use test.** The transformative use test, which has its foundations in the fair use defense from copyright law, was first adopted in the seminal *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (*21 P.3d 797 (Cal. 2001)*). Transformative works add significant expression or recast, or both, to a persona, resulting in a work that is not simply a literal

depiction or imitation of a celebrity for commercial gain. These transformative works are especially worthy of First Amendment protection, because they do not threaten markets for celebrity memorabilia that the right of publicity was designed to protect.

With respect to *Hart*, the court held that, as a whole, the video game contained numerous creative elements other than Hart's image and the game permitted users to alter his image in many ways (for example, his abilities, gear and personal characteristics). For the court, these game features and additional content made the use sufficiently transformative for EA's First Amendment right to outweigh Hart's right of publicity. (*Hart*, at *44.)

- **The Rogers test.** Developed in the context of trademark law, it applies liability if the title to the challenged work has no relevance to the underlying work, or, if the title bears some relevance, if the title misleads the public as to the source of the work. Under this test, the court concluded that Hart's image in the video game has "great relevance" to the game itself, which is a virtual game of football set on a collegiate football field. (*Hart*, at *44.)

CONSENT

Consent is a defense to a right of publicity claim (*Canessa v. J.I. Kislak, Inc.*, *235 A.2d 62 (N.J. Super. Ct. Law Div. 1967)*). However, consent for one type of use will not operate as a waiver for other purposes or shield the defendant from liability if the actual use goes beyond the consent (for example, by exceeding the authorized scope or duration) (*Faber v. Concedor*, *477 A.2d 1289 (N.J. Super. Ct. App. Div. 1984)*, cert. denied, *99 N.J. 178 (1984)*).

DE MINIMIS, INCIDENTAL, FLEETING USE EXEMPTION

New Jersey recognizes an exemption for incidental and de minimis uses. For example, one case rejected a misappropriation claim due to the "merely incidental" use of plaintiff's image in relation to the total presentation (*Jeffries v. Whitney E. Houston Acad. P.T.A.*, *2009 N.J. Super. LEXIS 1895, *12 (App. Div. July 20, 2009)*).

TRADITIONAL EQUITABLE DEFENSES

New Jersey recognizes the equitable defenses of laches and acquiescence in right of publicity cases (*Estate of Elvis Presley*, at 1351).

15. For each law identified in *Question 1*:

- What is the statute of limitations for a civil claim?
- How is the statute of limitations calculated?

STATUTE OF LIMITATIONS

The statute of limitations for right of publicity claims under New Jersey law is six years (see *Canessa v. J.I. Kislak, Inc.*, *235 A.2d 62 (N.J. Super. Ct. Law Div. 1967)* and *N.J. Stat. Ann. § 2A:14-1 (2011)*).

CALCULATION

New Jersey case law on the calculation of the statute of limitations in right of publicity claims is not well-developed. However, as a general rule, New Jersey employs the “discovery rule,” which holds that a cause of action accrues when a plaintiff knows, or after the exercise of reasonable diligence, should know, that he has been injured and that his injury was caused by the fault of another (*Rolax v. Whitman*, 175 F. Supp. 2d 720 (D.N.J. 2001)).

PERSONAL JURISDICTION AND CHOICE OF LAW

16. Please describe any statutory requirements or significant case law involving rights of publicity claims concerning:

- Personal Jurisdiction.
- Choice of law.

PERSONAL JURISDICTION

New Jersey case law on personal jurisdiction involving right of publicity claims is not well-developed. However, as a general rule, to establish personal jurisdiction under New Jersey’s long-arm statute, the plaintiff must show that the defendant has purposefully directed its activities toward the residents of the forum state or otherwise purposefully availed itself of the privilege of conducting activities within the forum state, therefore invoking the benefits and protections of its laws (*IMO Indus. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998)).

CHOICE OF LAW

New Jersey regards right of publicity claims as tort claims. When analyzing choice of law questions in the context of tort claims, New Jersey applies a flexible governmental interest analysis requiring application of the law of the state with the greatest interest in resolving the particular issue. In applying this standard, the court performs its choice of law analysis on an issue-by-issue basis, and may even apply different states’ laws to different issues in the same litigation. (*Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000).)

In *Prima*, for example, a singer died in Louisiana after performing most of his life in Nevada. His widow lived in New Jersey. She sued the Olive Garden for using a sound-alike singer in its commercials under New Jersey law, which considered the right of publicity descendible. The defendants argued that Louisiana law, which considered the right of publicity a personal right of privacy and therefore not descendible, should apply. (*Prima*, at 345.)

The US District Court of New Jersey ultimately held that although the singer never lived in New Jersey, the issue of the survivability of his right of publicity was controlled by New Jersey law. The dispositive issues for the court were that his widow, a beneficiary

of the singer’s estate, lived in New Jersey and the state had a significant interest in protecting its citizens from tortious conduct, and that Louisiana had no interest in prohibiting a celebrity’s estate from inheriting his right of publicity. (*Prima*, at 347.)

TRANSFERS, LICENSES AND WAIVERS

17. Is the right of publicity a transferable (assignable) right in your state?

New Jersey regards the right of publicity as a property right, and it is therefore:

- Assignable for commercial purposes during a person’s life.
- Descendible to the person’s estate on his death.

(*Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000).)

18. Please describe any specific restrictions on or requirements for valid transfers (if the right is transferable), licenses or waivers of the right of publicity in your state, including:

- Whether transfers, licenses and waivers must be made in writing.
- Requirements for obtaining consent from a minor.

FORM OF AGREEMENT

New Jersey law does not contain any specific restrictions on or requirements for valid transfers, licenses or waivers of the right of publicity.

CONSENT FROM A MINOR

New Jersey law does not contain any specific requirements for obtaining a publicity consent from a minor.

19. If your state recognizes a postmortem right, are there any statutory or common law rules for ownership or transfer of the right?

New Jersey courts have not determined whether the postmortem right of publicity extends to individuals whose persona was not exploited during their lifetime.



OTHER SIGNIFICANT LEGISLATION AND CASE LAW

20. Please briefly describe any other significant right of publicity statutes, pending legislation, and case law in your state not otherwise addressed in this survey.

The court in *McFarland v. Miller* held that a right of publicity civil action filed during the plaintiff's lifetime survived his death and could be maintained by the estate (*14 F.3d 912 (3d Cir. 1994)*).

Adding to the right of publicity protections in New Jersey, one case held that "celebrity goodwill," which the court compared to the right of publicity, is a marital asset subject to equitable distribution. The court likened "celebrity goodwill" to "professional goodwill," which it defined as basically reputation that is likely to generate future business. For the court, individuals with particular and uncommon skill for some specialized discipline "transforms the average professional or entertainer into one with measureable goodwill." (*Piscopo v. Piscopo, 555 A.2d 1190 (N.J. Super. Ct. Ch. Div. 1988)*.)

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