

NOTHING IS CERTAIN IN LIFE “EXCEPT DEATH AND  
[THEN] TAXES”<sup>1</sup>

*Comment*

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1. Fred Shapiro, *Quotes Uncovered: Death and Taxes*, FREAKONOMICS (Feb. 17, 2011, 1:30 PM), <http://freakonomics.com/2011/02/17/quotes-uncovered-death-and-taxes/>.

## ABSTRACT

*This comment argues that the value of a celebrity's right of publicity, as reported on the federal estate tax return, should account for and reflect the impact of post-death events and considerations. The comment suggests that courts will, ultimately, agree with valuation positions that the IRS has taken in similar estate tax cases where the IRS determined the correct value to report the right of publicity on a federal estate tax return.<sup>2</sup> Multiple factors, including the rationale underlying the IRS's valuation positions, may be considered to help explain why it is reasonable for the right of publicity to be assessed at a fair market value that reflects the impact of events following a celebrity's death. Despite the confusion that has surrounded this area of the federal tax law for many years, taxpayers can rely on the assumption that they should value the right of publicity at an amount that accounts for post-death considerations for federal estate tax purposes.*

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2. See Matthew Beddingfield & Allyson Versprille, *Lawyers Eye King of Pop's Case for Estate Valuation Answers*, BNA (Mar. 1, 2017), <https://www.bna.com/lawyers-eye-king-n57982084590> (noting recent U.S. tax court decisions where parties litigated the value of a celebrity's image).

## I. WHAT IS THE FEDERAL ESTATE TAX?

The United States government has relied on the federal estate tax as a significant source of funding since it was enacted in 1916.<sup>3</sup> The estate tax is levied on an individual's transfer of property at death.<sup>4</sup> Before the recent estate tax law change,<sup>5</sup> the tax was assessed on an individual's gross estate if valued above \$5.49 million.<sup>6</sup> The tax is calculated using the fair market value<sup>7</sup> of all property in the decedent's estate at the time of death.<sup>8</sup> Because the fair market value of an asset is determined in part by "relevant facts" that are reasonably expected to be known by a willing buyer and seller, events which are not reasonably foreseeable at the time of the taxpayer's death are not considered for valuation purposes.<sup>9</sup>

Researchers estimate that the top 10% of income earners in the United States will pay about 90% of the federal estate tax, with an even smaller percentage paying over 25% of the tax.<sup>10</sup> Even though the number of individuals whose estates may be subject to the tax seems insignificant, the estate tax liability causes a large and cumbersome tax burden, which could be characterized as an unreasonable impact on these estates.<sup>11</sup> When legislators change the formula to calculate the "gross value" of a decedent's estate,<sup>12</sup> taxpayers with estates close to the

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3. See Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, IRS PUBLICATIONS, 118, 120 (citing the Revenue Act of 1916 because it created a tax on the transfer of wealth from a decedent to a beneficiary levied directly on the estate); see also Steve Goldstein, *Here's How Many 'Morons' Pay the Estate Tax*, MARKETWATCH (Aug. 31, 2017, 10:14 AM), <http://www.marketwatch.com/story/heres-how-many-morons-pay-the-estate-tax-2017-08-29> (stating that roughly four thousand households paid around \$17.1 billion in estate taxes in the 2015 tax year).

4. I.R.C. § 2001(a) (Westlaw through Pub. L. No. 115-90).

5. See *infra* notes 96-98 and accompanying text (detailing the related changes in the federal estate tax laws).

6. See 2017 Instructions for Form 706, IRS Publication, 2 [hereinafter Form 706 Instructions] (explaining that this amount is indexed for inflation each year and is subject to change); see also *infra* notes 95-98 (explaining changes to the tax law, including the federal estate tax exemption threshold which is effective beginning with the 2018 tax year).

7. 26 C.F.R. § 20.2031-1(b) (Westlaw through Feb. 22, 2018) (defining the "fair market value" as the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts").

8. See I.R.C. § 2031(a) (Westlaw) (including real or personal, and tangible or intangible, property that must be considered part of the decedent's estate for tax purposes).

9. *First Nat'l Bank of Kenosha v. United States*, 763 F.2d 891, 893-94 (7th Cir. 1985).

10. *Key Elements of the U.S. Tax System*, TAX POL'Y CTR., <http://www.taxpolicycenter.org/briefing-book/who-pays-estate-tax> (last visited Mar. 27, 2019) (estimating nearly half of the tax will be paid by the wealthiest 0.1% individuals).

11. I.R.C. § 2001(c) (Westlaw) (stipulating that an estate with a gross value over \$1 million may be taxed at the highest possible estate tax rate of 40%, in addition to \$345,800 of tax liability).

12. See Jacobson et al., *supra* note 3, at 121 (reflecting various changes to the estate tax law since its enactment).

threshold become concerned.<sup>13</sup> This concern increases for high net-worth taxpayers, such as celebrities, with an extensive repertoire of artistic works and social following because their wealth continues to accumulate after death. Consequently, these taxpayers leave behind highly valued estates with significant tax burdens. Examples include the estates of John Lennon, Michael Jackson, and Elizabeth Taylor.<sup>14</sup>

For high-valued estates, accounting for an additional asset (such as the right of publicity) would likely increase the gross value of the estate and cause them to surpass the estate tax exemption threshold. In turn, these estates could face loftier and more devastating tax burdens than they would without including the additional asset. Therefore, it is essential for taxpayers, particularly those with considerable fortunes, to know precisely how to value specific aspects of their lives for estate tax purposes. For these reasons, the “right of publicity” is an important consideration for high net-worth individuals. Can the right of publicity asset value be assessed only from the time of the decedent’s death, or may the value also account for post-mortem uses of the asset? Recently, both the Internal Revenue Service (IRS) and courts have grappled with this issue. This comment will discuss the likelihood that, for federal estate tax purposes, the value of a celebrity’s right of publicity asset will also account for the right’s future uses following a celebrity’s death.

## II. WHEN DID THE RIGHT OF PUBLICITY BECOME A LEGAL CONCEPT?

Traditionally, courts have not recognized the right of publicity as a separate right. However, the Second Circuit’s 1953 decision in *Haelan Labs* changed this recognition practice.<sup>15</sup> In *Haelan Labs*, the Second Circuit held that the right of publicity is a separate and distinct legal right.<sup>16</sup> Over twenty years later, the United States Supreme Court further legitimized the right of publicity,<sup>17</sup> describing the right as giving individuals the ability to exert “exclusive control” over the commercial

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13. See Form 706 Instructions, *supra* note 6, at 2 (stating that, in 2017, the exemption threshold was \$5.49 million, adjusted for inflation); see *infra* note 97–98 (describing recent changes to the tax law, including the federal estate tax exemption threshold, effective beginning with the 2018 tax year).

14. See generally Michael Keenan, *Bob Marley, Elvis and the 14 Other Highest-Paid Dead Celebrities*, GOBANKINGRATES (Nov. 26, 2017), <https://www.gobankingrates.com/net-worth/elvis-michael-jackson-richest-estates-dead-celebrities> (listing John Lennon, Michael Jackson, and Elizabeth Taylor as the top three individuals with the highest valued estates).

15. See *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953), *cert. denied* 346 U.S. 816 (1953).

16. See *id.* at 868 (coining the phrase “right of publicity” while distinguishing that right from the “right of privacy”).

17. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 567 (1977) (consulting and agreeing with the Ohio Supreme Court’s opinion and recognition of the right of publicity as a right arising under Ohio law).

value of their name and likeness, as well as the ability to maintain control over how they earn a living.<sup>18</sup> This definition, as outlined by the Court, is analogous to the public's generally accepted definition of the right of publicity.<sup>19</sup> Despite this newfound legal recognition, however, a decedent's right of publicity was still considered valueless for federal estate tax purposes.<sup>20</sup>

### III. WHEN WAS THE RIGHT OF PUBLICITY RECOGNIZED FOR FEDERAL ESTATE TAX PURPOSES?

In 1994, the U.S. District Court for the Eastern District of Virginia was the first court to recognize that the right of publicity, as associated with a decedent's name, held value for tax purposes.<sup>21</sup> Because individuals previously believed the right of publicity was valueless for tax purposes, the court's decision rocked the worlds of estate planners and taxpayers alike.

In *Estate of Andrews*, the court contemplated whether Virginia C. Andrews's name should have been included as an asset in her estate for federal tax purposes.<sup>22</sup> Andrews was a best-selling and internationally known author who had tremendous commercial success before her death in December 1986.<sup>23</sup> On November 11, 1986, Andrews entered into a contract with her publisher, Pocket Books, under which she was required to produce two manuscripts in exchange for \$3 million in advances.<sup>24</sup> Unfortunately, Andrews died about a month later.<sup>25</sup> Shortly after her death, an executive at Pocket Books suggested that future publication of Andrews's books might still be possible by enlisting the help of another author who could mimic her style of writing.<sup>26</sup>

At first, the executor of Andrews's estate was reluctant to agree to use a ghostwriter to complete future books; he feared the use of a ghostwriter would negatively impact existing sales of Andrews's books.<sup>27</sup> The executor also worried that the use of a ghostwriter would reduce anticipated income streams.<sup>28</sup> Ultimately, the estate's executor

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18. See *id.* at 575-76.

19. Johnathan Faber, *Right of Publicity*, LUMINARY GROUP LLC, <http://righttopublicity.com/brief-history-of-rop> (last visited Mar. 13, 2019) (describing the right of publicity as containing three elements: name, image, and likeness).

20. Note, *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 683 (1995) [hereinafter *Taxing Estates for Celebrity Value*].

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

22. See *id.* at 1281.

23. *Id.*

24. *Id.* at 1282-83.

25. *Id.* at 1283.

26. *Id.*

27. *Id.*

28. *Id.*

agreed to utilize a ghostwriter and the estate revised the contract, which was initially executed by Andrews, to state that a ghostwriter could continue writing Andrews's book series.<sup>29</sup> The ghostwriter, Niederman, wrote a sequel to one of Andrews's books that was a commercial success. He subsequently entered into additional contracts to produce more novels penned under Andrews's name,<sup>30</sup> and the parties made genuine efforts throughout the project to maintain the illusion that Niederman's novels were Andrews's works.<sup>31</sup> Andrews's readers did not receive confirmation of her death until Niederman wrote the fifth book, which contained a preliminary note asserting that Andrews had completed the stories contained in the book before she died.<sup>32</sup> The court concluded that the note was promotional; Andrews's name was necessary to effectively promote the sale of the book.<sup>33</sup> Multiple parties, including the publisher and estate executors, also agreed that utilizing Andrews's name was critical to the continued success of these ghostwritten books after her death.<sup>34</sup>

Andrews's estate did not pay taxes on the value of her name because they did not list it as an asset when the federal estate tax return was filed.<sup>35</sup> However, the IRS performed an audit and issued a notice of deficiency for failure to include Andrews's name as an asset on its tax return.<sup>36</sup> The deficiency was approximately \$1.2 million, the amount the IRS determined Andrews's name was worth on the day of her death.<sup>37</sup> The IRS based its valuation on the earnings Andrews's novels generated before her death and the likelihood of her continuing success as an author post-mortem.<sup>38</sup> The IRS also considered the amount of royalties that Andrews's publisher justified as payment under her contract as well as the additional value that her "name, reputation, and mystique" would provide to the success of subsequent novels.<sup>39</sup>

The court focused its analysis on the evidence the IRS presented about the value of Andrews's name and agreed that her federal estate tax return should have included her name as a taxable asset.<sup>40</sup> The court began its analysis by considering a valid basis to determine how much

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29. *Id.*

30. *Id.* at 1284.

31. *Id.*

32. *Id.* at 1285.

33. *Id.*

34. *Id.*

35. *Id.* at 1281.

36. *Id.*

37. *Id.* at 1286.

38. *Id.* at 1286–87.

39. *Id.* at 1287.

40. *Id.* at 1287, 1295.

Andrews's name was worth on the day she died.<sup>41</sup> The court considered objective factors that had an impact on the value of her name,<sup>42</sup> including factors that parties participating in the market could have reasonably known about the asset.<sup>43</sup> Even though Niederman successfully acted as a ghostwriter for Andrews, the court acknowledged the risk that a hypothetical willing buyer and seller would recognize that the failure of a book penned under the author's name could have negative impacts on the sales and resulting value of her novels.<sup>44</sup>

Although the court agreed with the IRS that Andrews's name was an asset that was relevant for estate tax purposes, it concluded that the name was worth an amount that was less than the IRS's initial determination.<sup>45</sup> In arriving at this valuation, the court agreed it was appropriate to consider the 1986 contract that Andrews entered into prior to her death, given that the contract's "existence and the possibilities it presented were reasonably knowable on the date of death to the buyer and seller in the hypothetical transaction[.]"<sup>46</sup>

The court's holding is consistent with the general rule that the negotiated price in a contract for the sale of assets can be taken as persuasive evidence for the fair market value of such assets when the contract was made near the time of a party's death.<sup>47</sup> Contrary to the IRS's position that all subsequent ghostwritten novels should have been factored into the value of Andrews's name,<sup>48</sup> the court determined that only the potential for success of the first ghostwritten book could have been considered by buyers and sellers in determining the value of her name.<sup>49</sup> Therefore, after estimating the value of the first ghostwritten book required under the 1986 contract, the court determined that

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41. *See id.* at 1289 (noting that the value of an asset for estate tax purposes should account for the value agreed upon between hypothetical willing buyers and sellers based on what they "could reasonably have been expected to know at that time" (quoting *First Nat'l Bank of Kenosha v. United States*, 763 F.2d 891, 893-94 (7th Cir. 1985))).

42. *See id.* at 1289-90 (describing factors such as Andrews's recent and unparalleled success as an author, her unique style, and the content of her books to be among those that affected the value of her name at the time of her death).

43. *See id.* at 1290 (acknowledging that the "relevant market would have been in the publishing industry").

44. *Id.* at 1291.

45. *Id.* at 1295 (establishing that Andrews's name had a value of \$703,500 on the date of her death).

46. *Id.* at 1292.

47. *Id.* (noting the fair market value to be reliable if there is no material change in circumstances between the date of sale and the date of death).

48. *See id.* at 1293 (rejecting the IRS's position because it was unlikely that participating parties in a sales transaction could, at the time of Andrews's death, have foreseen the possibility that multiple ghostwritten books would have been published).

49. *See id.* at 1294.

Andrews's federal estate tax return should have listed her name as an asset in the amount of \$703,500.<sup>50</sup>

#### IV. HOW DO WE VALUE THE RIGHT OF PUBLICITY TODAY?

Ultimately, the Andrews court conceded that the right of publicity is a taxable asset that should be included in a decedent's gross estate.<sup>51</sup> However, the concept of taxing a person's name and likeness for estate tax purposes was far from being straightforward; courts then had to consider which valuation methods would best represent the amount at which the federal estate tax return should reflect the asset.

Generally, state law governs which assets are considered "property" owned by a decedent at the time of death.<sup>52</sup> Various states' common law rules acknowledge the general existence, or even lack thereof, of the right of publicity as a property right.<sup>53</sup> Additionally, about twenty states recognize a post-mortem right of publicity.<sup>54</sup> Alternatively, determining which property is subject to the estate tax is a matter of federal law.<sup>55</sup> As outlined in the Internal Revenue Code (IRC), the taxable gross estate value includes the value of all property, both tangible and intangible, owned by the decedent at the date of their death.<sup>56</sup> Because the right of publicity corresponds with the IRC's broad definition of "intangible property" included in a decedent's gross estate,<sup>57</sup> the IRS's historical efforts to tax intangible property rights strongly indicate that the IRS would attempt to classify the right as a taxable, intangible asset.<sup>58</sup>

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50. *See id.* at 1295.

51. *See generally id.*

52. *See* *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (recognizing that state law governs where a relevant state statute exists or a state's highest court has spoken on the particular matter).

53. *See, e.g.,* *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 324 (6th Cir. 2001) (acknowledging the significant weight of authority indicating the existence of the right of publicity as a property right); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 n.1 (6th Cir. 1983) (suggesting that Michigan law recognizes the right of publicity as one that protects the right and interest in the commercial exploitation of a celebrity's identity); *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987) (declaring that the right of publicity was descendible under Tennessee law); *see also A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Mar. 13, 2019) (noting that thirty-eight states have some form of common law precedent surrounding the right of publicity). *But see* *Reeves v. United Artists*, 572 F. Supp. 1231, 1235 (N.D. Ohio 1983), *aff'd*, 765 F.2d 79 (6th Cir. 1985) (rejecting the concept of the right of publicity as a property right).

54. J. THOMAS MCCARTHY, 2 RIGHTS OF PUBLICITY AND PRIVACY § 9:1 (2d ed. 2017) [hereinafter MCCARTHY, RIGHTS].

55. *Taxing Estates for Celebrity Value*, *supra* note 20, at 686–87.

56. I.R.C. § 2031(a) (Westlaw through Pub. L. No. 115-90).

57. *See id.*; *see also Taxing Estates for Celebrity Value*, *supra* note 20, at 687.

58. *Compare Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (declaring the state's interest in protecting the right of publicity to be "analogous to the goals of patent and



As previously stated, property is assessed at its fair market value on the date of the owner's death for federal estate tax purposes.<sup>59</sup> The IRS requires that an asset's fair market value be determined based on the asset's "highest and best use."<sup>60</sup> The highest and best use standard is a strict standard that measures the asset's full income-producing potential.<sup>61</sup> Thus, an estate will be responsible for paying taxes on all includible assets in the estate, such as intellectual property rights, regardless of whether the estate profits from using the assets.<sup>62</sup>

The IRS's endorsement of an estate adhering to the highest and best use standard, coupled with the high likelihood that the IRS regards the right of publicity as a taxable intangible property right, leads to the real question of valuation—which specific method should be utilized to determine the value of the right of publicity asset? Neither the courts nor the IRS have provided specific guidance about using a particular method of valuation.<sup>63</sup> Moreover, because there is no established market for the right of publicity asset, the process for determining the right's value for estate tax purposes has become a fact-specific inquiry.<sup>64</sup> Even though it may be inherently difficult to assign a value to an intangible property right, this difficulty will not preclude the IRS from attempting to levy a tax on the right of publicity asset.<sup>65</sup> Relatedly, courts have demonstrated a willingness to support the valuation methods that the IRS utilizes in valuing assets for federal tax purposes.<sup>66</sup> Because an asset should be assigned a value equal to its fair market value at the time the decedent dies,<sup>67</sup> there are three potential valuation approaches that may be used to value the right of publicity as an intangible asset: the cost, market, or income approach.<sup>68</sup>

First, the cost valuation approach is an analysis that focuses on the current costs that would be incurred to replace an asset to determine its fair market value.<sup>69</sup> To value the right of publicity, the cost valuation

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copyright law") with *Estate of Pascal v. Comm'r*, 22 T.C.M. (CCH) 1766, 1768 (1963) (agreeing with the IRS's determination that the rights to produce a musical should have been assigned a monetary value for federal estate tax purposes).

59. *Supra* note 8 and accompanying text.

60. 43 C.F.R. § 2201.3-2 (Westlaw through Feb. 22, 2018).

61. *Taxing Estates for Celebrity Value*, *supra* note 20, at 692.

62. *Id.*; see generally 26 C.F.R. § 20.2031-1(b) (Westlaw).

63. *Taxing Estates for Celebrity Value*, *supra* note 20, at 687-88.

64. *Id.* at 688.

65. *Id.* at 687.

66. *Id.*

67. *Id.* at 688.

68. See *id.*; see also Sara Zerehi, *Valuing a Celebrity's Right of Publicity for Estate Tax Purposes*, 8 HARV. J. SPORTS & ENT. L. 126, 131 (2017) (noting that appraising the fair market value of intangible property assets involves consideration of the three listed valuation approaches).

69. Zerehi, *supra* note 68, at 132 (explaining that current costs are reasonable to utilize in determining an asset's fair market value because they reasonably reflect the value that a third party

approach would assess the amount of money invested in maintaining a celebrity's brand.<sup>70</sup> Despite its simplicity, the IRS is not likely to utilize this valuation method for the right of publicity given the difficulty of calculating the exact amount a third party would "invest" in a celebrity.<sup>71</sup>

Second, the market valuation approach involves an analysis of the past and present sales of similarly situated property in the market.<sup>72</sup> Because the market valuation approach assumes the existence of a reasonable market and willing buyers for similar property, it reflects the value that a third party would pay to acquire a comparable intangible asset.<sup>73</sup> To determine the value of a specific celebrity's right of publicity, an appraiser would need to compare that celebrity and their associated value to "similarly situated deceased celebrities."<sup>74</sup> Even though the market valuation approach may consider various factors,<sup>75</sup> this approach also poses obstacles that are difficult to overcome. A celebrity's right of publicity has such a unique nature that "sales of comparable property are not available to the appraiser."<sup>76</sup> Thus, it may prove too difficult to assess the value of one celebrity's right of publicity by comparing it to another celebrity's right of publicity because any two celebrities are inherently different.

Finally, the income valuation approach considers three main factors to determine an intangible asset's future earnings-making potential and, thereby, its fair market value.<sup>77</sup> Also known as the "capitalization method,"<sup>78</sup> the income valuation approach ultimately

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in the market would pay to acquire a similar asset); *see also Taxing Estates for Celebrity Value, supra* note 20, at 690.

70. Zerehi, *supra* note 68, at 132.

71. *Taxing Estates for Celebrity Value, supra* note 20, at 690; *see also* Erandi Palihakkara, *Why the Kardashians Marketing Strategy is One for the Books*, HUFFINGTON POST (last updated Feb. 1, 2017), [https://www.huffingtonpost.com/erandi-palihakkara/why-the-kardashian-market\\_b\\_9136006.html](https://www.huffingtonpost.com/erandi-palihakkara/why-the-kardashian-market_b_9136006.html) (describing the significant investment efforts, such as time, money, and energy that celebrities expend to build and maintain a valuable public persona that may generate future profits).

72. Zerehi, *supra* note 68, at 131 (noting that this approach assumes there is an existing market of comparable properties available for analysis).

73. *Id.*

74. *Id.* (suggesting that endorsement contracts entered into by similarly situated celebrities may be considered to determine a deceased celebrity's right of publicity value).

75. *Taxing Estates for Celebrity Value, supra* note 20, at 690 (suggesting possible factors, such as the celebrity's level of fame, age, and audience that should be considered in ascertaining the celebrity's right of publicity value when compared to another deceased celebrity's value).

76. *Id.* (quoting GORDON V. SMITH, *CORPORATE VALUATION: A BUSINESS AND PROFESSIONAL GUIDE* 146 (1st ed. 1988)).

77. Zerehi, *supra* note 68, at 132-33 (naming the three significant factors as: "(1) the income generating capacity of the intangible asset, (2) the expected remaining useful life of the asset, and (3) the appropriate discount rate which reflects the riskiness of the asset"); *see also Taxing Estates for Celebrity Value, supra* note 20, at 688 (noting that to project the potential future earnings of an asset, the present earnings produced by the asset must also be considered).

78. *Taxing Estates for Celebrity Value, supra* note 20, at 688.

establishes the asset's fair market value by considering the asset's historical cash flows and utilizing those cash flows as a basis for projecting the future earnings that the asset will produce over its remaining useful life.<sup>79</sup> Because this approach focuses its analysis on historical factors, it is likely to be the most reliable method for determining the fair market value of a celebrity's right of publicity as of their date of death.<sup>80</sup> When current streams of income exist, it is easier to ascertain probable future income streams that are expected to be produced by the same asset.<sup>81</sup> Therefore, as the most objective and reliable valuation method, the income approach should be used for purposes of valuing the right of publicity.<sup>82</sup>

Aside from determining which valuation method will provide the most accurate fair market value of the right of publicity as an intangible asset, another challenging aspect is resolving whether the right of publicity falls under the scope of intellectual property law.<sup>83</sup> Although courts respect the right of publicity as a legal right standing within its own distinct body of law,<sup>84</sup> courts have also inferred that its characteristics are more similar to those associated with the principles underlying trademark law.<sup>85</sup> Given the unclear nature of the right of publicity, there are additional difficulties one may encounter when valuing the right of publicity as an asset.

To better understand why it is problematic to value this right accurately, it is helpful to consider the similarities between valuing assets under trademark law and right of publicity law and how those similarities pose problems for federal estate tax purposes. Because taxpayers often protect assets under trademark law for the same reasons a celebrity might want to protect their right of publicity,<sup>86</sup> it can be difficult to separate an asset's trademark value from its publicity

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79. Zerehi, *supra* note 68, at 133 (citing Michael F. Beausang, Jr., *Valuation: General and Real Estate*, 132 3d Tax Mgmt. A-1, A-5 (1984)).

80. *Id.* (specifying that the appropriate historical cash flows to consider would be a celebrity's past income earnings).

81. *See Taxing Estates for Celebrity Value*, *supra* note 20, at 689 (naming endorsement contracts and sponsorship agreements as examples of current streams of income that would make it easier to identify possible future streams of income).

82. Zerehi, *supra* note 68, at 133.

83. *Id.* at 126.

84. *See Faber*, *supra* note 19 (inferring from the existence of the right of publicity's own history, precedents, and policy rationales that it stands as a separate body of law apart from both areas of trademark and copyright law).

85. *See Taxing Estates for Celebrity Value*, *supra* note 20, at 687 (describing courts noting that the right of publicity is analogous to trademark entitlements). *See generally* *Motown Record Corp. v. Hormel & Co.*, 657 F. Supp. 1236, 1241 (C.D. Cal. 1987) (protecting the "persona" of a famous music band group through the use of applying trademark laws).

86. *See Zerehi*, *supra* note 68, at 142 (noting that celebrities will "trademark their names as a way to get extra protections on their right of publicity").

right value on the tax return.<sup>87</sup> Moreover, the methods that are utilized to value an asset for both trademark and publicity right purposes typically account for some of the same factors.<sup>88</sup>

The concepts that lie behind valuing an asset as a trademark and valuing an asset as a publicity right are strikingly comparable;<sup>89</sup> thus, they present obstacles that make it difficult to isolate the value of a celebrity's right of publicity on a standalone basis. For example, consider a situation in which a trademark uses a celebrity's name.<sup>90</sup> Because the celebrity's name, image, and likeness "ha[ve] already done all the hard work," it would be reasonable to conclude that the trademark value is identical to the celebrity's right of publicity value.<sup>91</sup> While this may not seem troublesome on its face, consider that Federal Form 706 requires taxpayers to report an asset's trademark value as a separate line item.<sup>92</sup> Including a trademark, which has a value based on a celebrity's name, as an asset in the gross estate could make it almost impossible to accurately reflect and record a separate value for the right of publicity on the estate tax return. The two rights would hold very similar, if not identical, values for federal estate tax purposes.

#### V. THE TAX LAW CHANGES AND THEIR EFFECT ON THE RIGHT OF PUBLICITY

Despite the accepted notion that intangible rights, including intellectual property rights, are inherently difficult to value, the IRS maintains the practice of assigning values to these assets.<sup>93</sup> This practice often requires the estate to also account for the celebrity's post-mortem publicity rights in valuing the asset.<sup>94</sup> To complicate matters further, the Trump Administration has cast some doubt on the future of estate taxes and,<sup>95</sup> consequently, estate planning. Even though the Administration

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87. *Id.*

88. *Id.*

89. *Id.* at 142-43 (Valuing a right of publicity may be understood as determining the premium that a licensor is willing to pay because of a celebrity's public stature, and valuing a trademark may be understood as determining the seller's ability to obtain a higher market price for a branded product when compared to an identical un-branded product.).

90. *Id.* at 143.

91. *Id.*

92. *Id.* at 142.

93. *Id.* at 129-30.

94. *Taxing Estates for Celebrity Value*, *supra* note 20, at 687.

95. Dan Caplinger, *Trump's Tax Plan: What the Death of the Estate Tax Really Means for Average Americans*, THE MOTLEY FOOL (Oct. 15, 2017, 8:16 AM), <https://www.fool.com/taxes/2017/10/15/trump-tax-plan-what-the-death-of-the-estate-tax-re.aspx>.

has expressed a desire to repeal the federal estate tax permanently,<sup>96</sup> it has yet to do so.

The Administration enacted a law called the Tax Cuts and Jobs Act,<sup>97</sup> which doubles the estate tax exemption for both single adults and those whose filing status qualifies as “married filing jointly.”<sup>98</sup> As a result of these changes to the federal estate tax law, the Joint Committee on Taxation estimated that the number of taxable estates in the United States will drop from about 5,000 to around 1,800 in 2018.<sup>99</sup> Given the likelihood that significantly less taxpayers will be subject to the estate tax under the new federal tax law, many taxpayers may fall prey to the mindset that it will be less critical for them to determine an accurate value for their right of publicity asset. However, the necessity for determining an appropriate valuation method for the asset will return after the Tax Cuts and Jobs Act’s provisions lapse.<sup>100</sup>

Consequently, taxpayers must continue making a good-faith effort to determine an accurate fair market value at which to include their right of publicity assets on their federal estate tax returns.

#### VI. THE RIGHT OF PUBLICITY VALUE AND ITS POST-DEATH CONSIDERATIONS

The uncertain federal tax law background within which the estate tax is situated lends itself to more chaos than clarity. As mentioned above, the IRS’s effort to value the right of publicity for federal tax purposes are recent and unprecedented. For these reasons, individuals face great difficulty in determining which valuation methods to use, as well as which factors to account for, to reach the most accurate asset value. Nonetheless, the right of publicity also possesses characteristics that may assist individuals in calculating an accurate value for estate planning and tax purposes.<sup>101</sup> Even though courts have previously been reluctant to consider post-death events for purposes of valuing a

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96. *Id.* (commenting that Trump has voiced the desire to do away with the federal estate tax in its entirety).

97. P.L. 115-97 (Dec. 22, 2017).

98. *See* Kimberly Amadeo, *Trump’s Tax Plan and How It Affects You*, THE BALANCE (last updated Feb. 5, 2018), <https://www.thebalance.com/trump-s-tax-plan-how-it-affects-you-4113968> (doubling the estate tax exemption from \$5.49 million to \$11.2 million for single adults and raising the exemption from \$10.98 million to \$22.4 million for couples). These amounts are indexed for inflation. *Id.*

99. Ashley Ebeling, *Final Tax Bill Includes Huge Estate Tax for the Rich: The \$22.4 Million Exemption*, FORBES (Dec. 21, 2017, 8:46 AM), <https://www.forbes.com/sites/ashleaebeling/2017/12/21/final-tax-bill-includes-huge-estate-tax-win-for-the-rich-the-22-4-million-exemption/#b658491d5413>.

100. *See id.* (explaining that, unless the law is extended, the Tax Cuts and Jobs Act’s provisions will sunset after the tax year 2025).

101. *See supra* Part IV.

decedent's right of publicity,<sup>102</sup> it is reasonable to assume they will, ultimately, conclude that accounting for post-death events in the valuation analysis will provide the most accurate value of a celebrity's post-mortem publicity right.

Generally, the value of property owned by an individual can appreciate following that individual's death. Moreover, when property is transferred between a decedent and subsequent owner, the subsequent owner will be taxed on the property's appreciation.<sup>103</sup> By extension, because the right of publicity is also defined as a form of property,<sup>104</sup> it is probable that the right would appreciate following the owner's death. Given this likelihood, the asset value as of the date of death should also account for events that occur after death, such as an increase in an individual's popularity. This comment proceeds by discussing and supporting the hypothesis that the federal estate tax return should reflect the right of publicity asset at a value that accounts for post-death factors and considerations.

#### VII. ANALOGIZING TO THE RIGHT OF PUBLICITY

As previously mentioned, academics have likened the right of publicity to "intellectual property rights such as trademarks and copyrights."<sup>105</sup> Intellectual property rights are not only transferable after the creator or owner dies or ceases to exist,<sup>106</sup> but they also remain valuable—and are subject to a change in value—following the creator or owner's death.<sup>107</sup> Because both trademarks and copyrights are considered intellectual property,<sup>108</sup> they are also considered descendible property rights that may be passed down to the original

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102. See, e.g., *Estate of Andrews v. United States*, 850 F. Supp. 1279, 1289–90, 1293 (E.D. Va. 1994) (assessing the value of Andrews's right of publicity at an amount that did not account for subsequent events following her death).

103. See I.R.C. § 1014(a) (Westlaw through Pub. L. No. 115-90) (instructing that when an asset's value appreciates, the subsequent owner of property that is transferred from a decedent must value the property at its fair market value as of the decedent's date of death).

104. MCCARTHY, RIGHTS, *supra* note 54, § 10.6.

105. *Id.* § 9.5.

106. See Stuart Meyer, *The Transfer of Intellectual Property Rights: Can There Be Too Much Freedom in the Marketplace for Ideas?*, FENWICK & WEST 1, 1 (2009), [https://www.fenwick.com/FenwickDocuments/Transfer\\_IP\\_Rights.pdf](https://www.fenwick.com/FenwickDocuments/Transfer_IP_Rights.pdf) (noting that it has been traditional practice for the sale and licensing of intellectual property rights to occur ancillary to related commercial activity).

107. See *Insight on Estate Planning, Handling Intellectual Property Rights in an Estate Plan*, WEINSTOCK LAW, <https://www.weinstocklaw.com/files/newsletters-04.pdf> (last visited Mar. 13, 2019) (stating that intellectual property rights have the potential to remain valuable for an extended period following the creator or owner's death).

108. See J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.14 (5th ed. 2018); see also 17 U.S.C.A. § 201(a) (Westlaw through Pub. L. No. 115-90) (explaining how to ascertain initial ownership of copyrights).

owner's heirs at law after the owner's death.<sup>109</sup> Further, trademarks, copyrights, and publicity rights all share a common characteristic: they involve a "proprietary" right.<sup>110</sup> Hence, because the right of publicity is similar, and often compared, to trademarks and copyrights, the right of publicity can be categorized as a descendible property right that has the potential to change in value following the owner's death.

It is also helpful to analogize the right of publicity to property in general. The right of publicity has been cited as a property right that continues to exist after its owner's death and that can be transferred or licensed following the celebrity's death.<sup>111</sup> The fact that the right of publicity can be transferred after death further supports the idea that the right of publicity is a descendible property right, whether it passes through intestate succession or testamentary devices.<sup>112</sup> Heirs and beneficiaries who inherit these publicity rights have the option to transfer or license the rights to a third party.<sup>113</sup> Therefore, the right's asset value should reasonably account for post-mortem factors and events that may affect it following a celebrity's death.

Notably, some individuals have criticized the characterization of the right of publicity as a descendible property right because a right does not need to be labeled "property" to have a post-mortem duration.<sup>114</sup> As Judge Frank stated in *Haelan Labs*, labeling the right of publicity as property does not mean its definition should be consistent with the general definition of all property.<sup>115</sup> Similarly, Stephen Hoffman contends that the right of publicity should not be characterized as property but, instead, as a right that terminates at death.<sup>116</sup> Hoffman argues the courts have analyzed the right of publicity as property because of "conclusory characterizations" resulting from circular

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109. See *Presley v. Russen*, 513 F. Supp. 1339, 1365 (D.N.J. 1981) (declaring the ability of trademarks to pass to Elvis Presley's legal representative as part of the assets of Presley's estate); see also 17 U.S.C.A. § 201(d) (Westlaw) (describing the copyright owner's ability to transfer or pass the copyright as personal property through the laws of intestate succession).

110. See MCCARTHY, RIGHTS, *supra* note 54, § 9.6 (describing proprietary rights as those that involve legally enforceable rights that are inherent in the commercial value of intangible property and that are "distinct from emotional, physical, dignitary, reputational or 'civil' rights").

111. See *id.* § 9.5.

112. See *id.* (citing *Lugosi v. Universal Pictures Co., Inc.*, 172 U.S.P.Q. 541, 1972 WL 17709 (Cal. Super. Ct. Trial Div. 1972) (concluding that the individual's right of publicity was a property right that descended to his heirs); see also *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 844 (S.D.N.Y. 1978) (specifying that the right of publicity is an assignable property right).

113. MCCARTHY, RIGHTS, *supra* note 54, § 9.5.

114. See *id.* (noting the circular reasoning lying behind the rationale of some individuals in characterizing the right of publicity as a property right).

115. *Haelan Labs Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied* 346 U.S. 816 (1953) (stating that affixing the label of property merely indicates that the subject of the claim has pecuniary worth).

116. MCCARTHY, RIGHTS, *supra* note 54, § 9.5 (citing S.J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 134 (1980)).

reasoning: courts find that because the right of publicity is a property right, and property rights are inheritable, the right of publicity must also be inheritable.<sup>117</sup> Others, however, have reasoned that it would be considered “an unusual exception to the traditional rules of American law” to hold that property does not need to be descendible.<sup>118</sup> Therefore, it is appropriate to regard the right of publicity as possessing similar, if not the same, characteristics as all property, including the ability to have a fair market value that can be affected by post-death events and considerations.

Furthermore, to support the notion that the right of publicity is property that can appreciate in value following a celebrity’s death, we may also explore the way property is viewed in income tax cases. In these cases, courts must identify legal rights as property because property is taxable.<sup>119</sup> For example, in *First Victoria National Bank*,<sup>120</sup> Judge Goldberg reasoned that the right of publicity is an example of a new form of property, and he justified this consideration by listing common characteristics of all property.<sup>121</sup> The term “property” has a fluid definition; some cases stand for the proposition that the right of publicity is consistent with all property and its associated characterizations, while others have emphasized that the right of publicity is not property for purposes of applying the federal income tax laws.<sup>122</sup> Even so, those income tax cases describing the right of publicity as a non-property right can be easily distinguished, so as not to disturb the right’s overall characterization as a form of property.<sup>123</sup> Courts have also held that legal rights do not need to be characterized in the same way for post-mortem purposes as they are for current tax purposes.<sup>124</sup> Overall, it is proper to characterize the right of publicity as property and, consistent with common characterizations of property, to value the right in an amount that considers post-mortem factors, which may affect its value.

The IRS’s actions may provide the most convincing evidence for taxpayers to consider subsequent events when valuing their right of publicity for estate tax purposes. For example, in 2017, the IRS brought

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117. *Id.*

118. *Id.*

119. *Id.*

120. *See generally* *First Victoria Nat’l Bank v. United States*, 620 F.2d 1096 (5th Cir. 1980).

121. *See id.* at 1103–04 (listing common property characteristics such as the ability to be transferred, devised, inherited, and descendible to heirs via intestate succession).

122. MCCARTHY, RIGHTS, *supra* note 54, § 9.5.

123. *See, e.g.,* *Miller v. C.I.R.*, 299 F.2d 706, 710 (2d. Cir. 1962) (holding that that right of publicity is not considered property for purposes of characterizing income as a capital gain).

124. *See id.* at 710–11 (applying tax technical definitions in a narrow context because the income tax case at issue involved a highly technical and narrowly construed statute).



a lawsuit against Michael Jackson's estate<sup>125</sup> for undervaluing Jackson's right of publicity on the date of his death and failing to include it at its proper value on the estate's tax return.<sup>126</sup> Essentially, the Jackson estate tax return reflected the value of Jackson's publicity right at the amount it was worth on the date of his death rather than in an amount that accounted for subsequent events.<sup>127</sup> The IRS's position, however, was that Jackson's name, image, and likeness were worth far more than the estate's initial assessment; it argued that the value of Jackson's image rights should have accounted for events that occurred and affected Jackson's image and its value after his death.<sup>128</sup> Although the lawsuit is ongoing,<sup>129</sup> other cases concerning similar valuation issues support the IRS's position in the Jackson estate case and also indicate that it is a position on which taxpayers may rely when valuing their assets for estate tax purposes.<sup>130</sup> These cases demonstrate that the estate has a responsibility to pay tax on an asset valued at an amount that reflects post-death considerations.<sup>131</sup>

While taxpayers can rely on the outcome of related estate tax cases to help them determine the most reasonable value to report their right

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125. See *IRS vs The Estate of Michael Jackson - Daily Updates*, MJVIBE (Feb. 9, 2017, 11:46 PM), <http://www.mjvibe.com/irs-vs-the-estate-of-michael-jackson-daily-updates/> [hereinafter *Daily Updates*] (noting that Michael Jackson's estate delivered opening statements in tax court earlier that week).

126. See Janet Novack, *IRS: We Made a Mistake Valuing Michael Jackson's Estate*, FORBES (Oct. 3, 2014, 1:47 PM), <https://www.forbes.com/sites/janetnovack/2014/10/03/irs-we-made-a-mistake-valuing-michael-jacksons-estate/#2d7049d95265> [hereinafter Novack, *IRS: We Made a Mistake*] (discussing the IRS's contention that Michael Jackson's name and likeness is worth \$434 million, as opposed to the estate's initially listed value of \$2,105).

127. *Id.* (discussing how subsequent movies with his songs in the soundtrack added to the value of his estate).

128. See Beddingfield & Versprille, *supra* note 2 (paraphrasing an estate planner advisor's opinion that "there was an 'explosion' in the value of Jackson's publicity rights after his death"); see also Novack, *IRS: We Made a Mistake*, *supra* note 126 (citing a Forbes senior editor's work that describes the high level of success Jackson's estate experienced after his death, including earning more than \$700 million due to business endeavors that capitalize on Jackson's name, image, and likeness). See generally Respondent's Pretrial Memorandum, *Estate of Jackson v. Comm'r* (17152-13 T.C.) (arguing that Michael Jackson's right of publicity should account for foreseeable post-death events that generated income for the estate).

129. See Edvard Pettersson, *Michael Jackson Estate May Avoid Penalties in IRS Dispute*, BLOOMBERG (Dec. 28, 2017, 6:30 PM), <https://www.bloomberg.com/news/articles/2017-12-29/michael-jackson-estate-poised-to-avoid-penalties-in-irs-dispute> (listing recent updates in the tax court case between Michael Jackson's estate and the IRS).

130. See Petition, Exhibit A, Schedule F (Other Miscellaneous Property), Form 886-A (Explanation of Items), *Estate of Houston v. Comm'r*, No. 12098-16 (T.C. May 23, 2017) (listing an adjustment of approximately \$11.7 million to Whitney Houston's rights of publicity asset).

131. See Beddingfield & Versprille, *supra* note 2 (noting recent U.S. tax court decisions in which the value of a celebrity's image was litigated); see also Janet Novack, *Could Prince Estate End Up Following Michael Jackson's Into Tax Court?*, FORBES (Apr. 25, 2016, 7:47 PM), <https://www.forbes.com/sites/janetnovack/2016/04/25/could-prince-estate-end-up-following-michael-jacksons-into-tax-court/#7eddf3d82be9> (suggesting the IRS could contest the value at which Prince's estate initially assesses his right of publicity).

of publicity for federal estate tax purposes, it is also useful to consider the rationale underlying the IRS's valuation positions in those cases. For instance, in *Estate of Andrews*, the IRS's valuation of Andrews's publicity right was premised on the understanding that authors would use her name in ghostwritten novels.<sup>132</sup> To demonstrate that point, Eagle, who represented the IRS, alluded to the idea that a song produced by Michael Jackson would be successful purely because his name would be associated with the production.<sup>133</sup> It is a widely held belief that Michael Jackson attained overwhelming success in his music career.<sup>134</sup> Given the level of success he accomplished during his lifetime, the amount by which Jackson's estate increased in value following his death was not only reasonably foreseeable, but almost certain to occur. Because this increase in value was reasonably foreseeable to any willing buyer and seller, Jackson's estate should have valued his publicity right at an amount that reflected the level of wealth that utilizing his name, image, and likeness would bring to his estate following his death.<sup>135</sup> Overall, in cases concerning publicity right asset valuation issues, the IRS has based its assessments on the generally-accepted notion that an asset's fair market value should be established according to reasonably foreseeable subsequent events expected to be known by a willing buyer and seller.<sup>136</sup> Therefore, for estate tax purposes, a taxpayer may reasonably rely on the assumption that an estate must not "overreach" by undervaluing a celebrity's right of publicity;<sup>137</sup> the estate must recognize the opportunity for success following a celebrity's death and value the publicity right asset accordingly.<sup>138</sup>

#### VIII. DEATH AND TAXES

There are numerous reasons why the estate tax, specifically as it relates to the right of publicity, remains a complicated and uncertain

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132. See Beddingfield & Versprille, *supra* note 2 ("It's purely the creative product that is connected to the value of the name.").

133. See *id.* (analogizing the success of the publication of ghostwritten books using Andrews's name to the production of a song by Michael Jackson).

134. See *10 Reasons Michael Jackson Became the King of Pop*, GRAMMY (May 15, 2017, 2:08 AM), <https://www.grammy.com/grammys/news/10-reasons-michael-jackson-became-king-pop> (listing various honors and awards that Michael Jackson received during his lifetime).

135. *Contra* Beddingfield & Versprille, *supra* note 2 (describing the Jackson estate's argument that his right of publicity value was on the lower end because Michael Jackson's image was "toxic" at the time of his death).

136. See, e.g., *Haelan Labs Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 893-94. (2d. Cir.), *cert. denied* 346 U.S. 816 (1953).

137. See Beddingfield & Versprille, *supra* note 2 (stating that when operating from the perspective of the IRS, "you don't want to be overreaching" by undervaluing the estate's assets).

138. *Id.* (quoting Scott Weingust, stating: "If you're the estate . . . [y]ou want to be forthcoming that there is opportunity and there is value and you accounted for it.").

area of the federal tax law. Since its inception in 1916, estate tax law has undergone numerous revisions, including a revocation and reinstatement period.<sup>139</sup> Given the unpredictability of its future under the Trump Administration, it is possible that estate tax law will experience further changes after the expiration of the Tax Cuts and Jobs Act at the end of year 2025.<sup>140</sup> Moreover, the decision to include the right of publicity as a taxable asset in a decedent's gross estate is a recent development in estate tax law.<sup>141</sup> Although fewer individuals may be subject to the estate tax over the next seven years,<sup>142</sup> the unstable foundation of federal estate tax law understandably causes concern for individuals who may be subject to the tax in the future. Because the IRS has initiated lawsuits against various celebrities' estates, such as Michael Jackson, to contest the publicity right values included on their tax returns, it is reasonable to conclude that the IRS disagrees with the valuation positions that the estates are currently taking.<sup>143</sup> Hence, it is necessary for individuals to take care in their estate planning endeavors by attempting to assign an accurate value to the right of publicity asset. The value at which the federal estate tax return reports the asset could have a potentially large impact on the amount of estate tax that the taxpayers will ultimately have to remit to the government. After all, once the gross value of a taxpayer's estate exceeds the exemption threshold, it is not a question of whether the taxpayer will have to pay the tax but, rather, it is a question of how much the taxpayer will have to pay. As this comment demonstrates, "death and taxes"<sup>144</sup> are the only two things that are certain in this world; it is an inescapable conclusion that taxes exist not only in life, but even after death, too.

*Ryan Chapa*

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139. Jacobson et al., *supra* note 3, at 118, 121 (showing that the gift tax, which is a subset of the estate tax law, was repealed and later reinstated in years 1926 and 1932, respectively).

140. See Ebeling, *supra* note 99.

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

142. See Ebeling, *supra* note 99.

143. See *Daily Updates*, *supra* note 125.

144. Shapiro, *supra* note 1.