



## **Estate Planning for Intellectual Property**

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AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL  
Digital Property Committee  
Estate Planning for Specialized Assets  
Estate Planning for the Entertainment Industry: Copyrights,  
Royalties, Name and Likeness Rights, Memorabilia and Other Entertaining Intangibles

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1. Unusual Assets of Entertainment Clients.
  - a. Of course, entertainment industry clients have the same sorts of assets that other clients have, including publicly traded stocks and bonds, cash, investment partnerships, hedge funds, life insurance, annuities, retirement plans and real estate, and these generally comprise the majority of the entertainment industry client's assets.
  - b. The unusual assets include the right to control the post-death exploitation of the celebrity's name and likeness, loan-out companies, personal memorabilia, "house trusts", royalties and residuals, and particularly for people in the music industry, copyrights and master recordings.
2. What are Name & Likeness Rights?
  - a. California is one of a minority of jurisdictions world-wide that recognizes a posthumous right to control a celebrity's name and likeness (also called the right of publicity or "personality rights"). The Celebrities Rights Act or Celebrity Rights Act, adopted in 1985, overturned the decision in Lugosi v. Universal Pictures, 25 C3d 813 (1979) where the California Supreme Court held that Bela Lugosi's personality rights terminated with Lugosi's death. Thus, there is no common law right of posthumous personality rights. The California statute was originally effective only as of January 1, 1985. Originally extending for 50 years after the celebrity's death, in 1999, in the Astaire Celebrity Image Protection Act, the act was broadened, and the period of protection was extended to seventy years after the celebrity's death. In 2007, in an effort to overturn a decision denying the Estate of Marilyn Monroe the right to control her name and likeness, the posthumous rights recognized under the Astaire Act were amended and "are expressly made retroactive, including to those deceased personalities who died before January 1, 1985"; and are "freely transferable or descendible ... by contract or by means of any trust or any other testamentary instrument, executed before or

after January 1, 1985." However, as discussed below, this latest effort was of no avail with regard to the Marilyn Monroe Estate.

- b. Note that only 28 of the 50 states recognize a common law or statutory right of publicity among the living, and only 20 (14 by statute and 6 by common law) recognize such a right surviving death. Other states have statutory rights of publicity with different durations. For example, in 1994 Indiana enacted a post-mortem right that lasts 100 years after the celebrity's death (largely at the behest of CMG Worldwide, a celebrity marketing firm based in Indiana). Note that New York does not have a posthumous right of publicity statute.
- c. California Civil Code section 3344.1 allows a celebrity's beneficiaries or heirs the right to control the exploitation of "deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services" for 70 years after the celebrity's death. These rights can be assigned during lifetime or at death, and if the celebrity dies intestate, the rights pass to specified heirs. Note that in general, these rights are limited to such things as product endorsements, or use of the individual's name and likeness on posters and tee shirts. It also extends to licensing rights for uses not otherwise permitted in an initial release. For example, if an actor appeared on a television variety show and the actor signed a release allowing the use in connection with that show, and the production company wanted to produce a "Best Of" compilation DVD, the person holding the actor's 3344.1 rights could license those rights.
- d. The rights do not extend to such things as a biography. Anyone could produce an unauthorized biography without getting the consent of the 3344.1 rights holders. The persons controlling other rights may be able to exact compensation for the use of those other rights (e.g., grand rights licensing of a singer/composer's music, or use of master recordings). For example, there is a new biographical movie of Jimi Hendrix called "All is By My Side" that was just premiered in 2013 at the Toronto Film Festival. The film stars Andre Benjamin from the band Outkast, and is written and directed by John Ridley. It deals with one year at the beginning of Jimi's professional career, ending just before his famous performance at the Monterrey Pop Festival. Jimi's sister controls the Estate which holds the rights to his musical compositions and they have licensed another production company to produce a biographical film that will include Jimi's recordings. Instead, the film uses new covers of songs that Jimi covered, including "Sgt. Pepper's Lonely Hearts Club Band," "Wild Thing," and "Hound Dog."

- e. Generally, the rights could not stop a “tribute show”, although the 3344.1 rights holders might be able to stop the use of trademarks and trade names in connection with the show.
- f. It appears that the rights only extend to people who were California residents at the date of death, but even that is not entirely clear. In *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012), the Ninth Circuit held that because of judicial estoppel, New York law applied to the question, that New York law did not provide for a posthumous right of publicity, and therefore Marilyn Monroe LLC did not inherit that right and could not enforce it against others. It is amazing because the California legislature specifically amended section 3344.1 to overturn an earlier ruling in the case! But, because of the unusual facts in the Marilyn Monroe case (the initial litigation between the parties was concluded before the California legislature acted), it can’t be used as authority for the general proposition that it applies only to California decedents.
- g. There are other ways that a celebrity’s rights can be protected.
  - i. First, anyone wishing to reproduce a specific photograph or motion picture must negotiate with the owner of the federal copyright in that work. Note that ownership of a print or negative does not carry with it copyright protection; the photographer will generally retain the copyright.
  - ii. Second, there may be trademark issues. For example, Marilyn Monroe LLC has registered the name “Marilyn Monroe” as a federal trademark for a wide variety of goods and services. Anyone selling similar goods and services will likely face a trademark or unfair competition claim under the Lanham Act. If the mark “Marilyn Monroe” is deemed to be a “famous” mark, federal anti-dilution law will protect it from being used even on unrelated goods or services. Potential trademark defendants will have to rely on the descriptive fair use defense in 15 U.S.C. § 1115(b)(4), and be prepared to defend it through a likely appeal.
  - iii. Third, other states that have a post-mortem right of publicity law may apply a choice-of-law rule that looks the law of the state where the rights are being exploited, rather than the state of domicile at the time of death. Washington State has a right of publicity statute that purportedly applies to any exploitation of a celebrity’s image in the state of Washington, regardless of domicile. A federal district court, however, has held that the Washington law is unconstitutional. See *Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122 (W.D. Wash. 2011). That ruling was appealed to the Ninth Circuit and there was a hearing in March, 2013. Although it is a common practice to look to the law of the

state where the deceased person was domiciled, it is far from clear that it should be unconstitutional for a state to apply its own law to transactions that occur inside that state.

3. Protecting and Valuing Name & Likeness Rights

a. State Registration.

- i. As soon as possible after a celebrity's death, the holders of the 3344.1 rights should register those rights with the California Secretary of State's office. There is a \$10 filing fee. The form to register as a celebrity's "successor in interest" can be found at:

<http://www.sos.ca.gov/business/sf/forms/np-sf-407.pdf>

- ii. You can do a search for the person who controls the rights on the California Secretary of State's web site at:

[http://www.sos.ca.gov/business/sf/sf\\_siisearch.htm](http://www.sos.ca.gov/business/sf/sf_siisearch.htm)

b. Who will control the rights?

- i. We will sometimes create a "name and likeness" trust to vest ongoing control of the rights in a single individual (Trustee) even where the income from exploitation is to be shared among a number of persons. This trust will last as long as the rights remain protectable.
- ii. In the absence of a "name & likeness" trust, the rights will pass under the residuary provisions of the Will or living trust, or in the absence of such documents, to the statutory heirs.

c. Valuation.

- i. In my experience, the value of a celebrity's name and likeness tends to be relatively small. Whatever value the name and likeness rights held pre-death, the celebrity can no longer make personal appearances to promote a new product, and the celebrity will no longer be appearing in new films or television programs, or releasing new records, so the celebrity's merchandising rights will diminish.
- ii.. There are, of course, exceptions to the rule, such as where the name and likeness have become associated with a particular product. Elizabeth Taylor licensed her name to Elizabeth Arden in 1987 and they created a number of well-selling perfumes and related scent products. These rights

had value at Elizabeth's death and will continue to have value after her death. Back in the 1950s, Rose Marie Reid created a line of swimsuits and sold her trademarks, and a well known tax case later arose as to the capital gain vs. ordinary income characterization of the income, but the fact remains that the name and likeness became associated with a product.

- iii. As with any other asset, the name and likeness is to be valued at the moment of death, with knowledge of the death, but without regard to post-death events.
- iv. Following a celebrity's death, an appraiser should be engaged to value the celebrity's name and likeness. The value will generally be based on a discounted cash flow model, assuming that the celebrity made efforts to exploit his or her name and likeness during his or her lifetime and thus there is a "track record" of income that can be projected and discounted. In connection with a performer, it is important to distinguish between "tour merchandise" sold at concerts (which has a very large profit margin but a limited marketplace) and general merchandising rights. Since an entertainer will never again go on tour, I believe that tour merchandise should be excluded from the history and future projections. Various companies, such as Bravado, handle the exploitation of these rights.
- v. The valuation of Michael Jackson's name and likeness is currently pending in the United States Tax Court. As can be seen from the press reports after the filing, the Estate valued Mr. Jackson's name and likeness rights at \$2,105. The IRS has valued the same rights at \$434,264,000. The Estate based its value on an appraisal by the Moss Adams firm, using highly credentialed appraisers. The IRS based its value on an appraisal by Wayne Coleman, who is generally known in the business as a royalty auditor, and who lacks any formal appraisal designations.

#### 4. Personal Memorabilia and Celebrity Value

- a. A celebrity's personal memorabilia can have value far in excess of the intrinsic value of the items.
- b. Generally, the more intrinsically valuable the object, the less "celebrity value" will attach to it. For example, an original Picasso painting will likely sell for the same price regardless of the celebrity identity of the owner. Note that celebrity homes rarely sell for more, and sometimes sell for less, than comparable properties, since the buyer must deal with fans who stop in front of the home to take photographs (thinking that the celebrity still lives there.) At most, a celebrity owned home may attract more lookers than another home.

- c. Generally, the more related the objects are to the celebrity, the greater the value. Thus, Elizabeth Taylor was noted for her jewelry, and at the auction of her jewelry, significant premiums were realized over the value that such items would have likely obtained if anyone else had owned the items.
- d. Generally, the more iconic the piece, the greater the value. For example, the clothing that Michael Jackson wore for the “Thriller” album cover and in the “Thriller” video would command much higher prices than similar items that he may have owned but either never wore or where there are no photographs of him wearing the items.
- e. Items of historical value can have value. For example, the 1919 contract by which Babe Ruth was traded from the Boston Red Sox to the New York Yankees, though not signed by Babe Ruth but rather by the club managers, was sold at auction at Sotheby’s in 1995 for \$996,000, far more than a mere signature by Babe Ruth would have sold for!
- f. Items of greater rarity have greater value than items of lesser rarity. For example, a Grammy is generally rarer, and thus are worth more than, MTV’s Video Music Award “Moon Men”. However, since 1950, the Academy has issued Oscars pursuant to an agreement that the Academy retains an option to acquire any Oscar statuette for \$1 from the recipient or any other person to whom it is transferred (and anyone who received an Oscar after 1950 had to agree to treat any Oscar previously received as being subject to the same restriction). Thus, we believe that most Academy Award statuettes are only worth \$1. Similarly, Emmys are subject to being reclaimed the Television Academy in the case of a proposed sale. See <http://emmyonline.com/trademarks>, rendering them effectively unsaleable. In fact, the Academies have been successful in asserting their rights (e.g., Mary Pickford’s Oscar, and Estelle Getty’s Emmy).
- g.. There are few people really qualified to appraise celebrity personalty. Laura Woolley of The Collector’s Lab is probably the best qualified person to handle these appraisals. Some of the large auction companies such as Bonhams, Sotheby’s and Christie’s will perform appraisals. Some other auction houses, such as Julien’s and Heritage, conduct auctions of entertainment related items.

## 5. Residuals & Participations

- a. Unlike royalties (discussed separately in the section on copyrights), residuals and participations are additional deferred compensation paid as a result of the exploitation of materials in which the individual performed or to which the individual contributed.

- b. Residuals are amounts paid through an entertainment industry Guild (the Director's Guild of America, the Writer's Guild of America, and the Screen Actors Guild), financed by payments from producers pursuant to industry wide collective bargaining agreements. Film musicians get residuals through the American Federation of Musicians. The initial use for which a product was produced does not generate a residual (e.g., the first showing of a television show or initial theatrical release of a film), but reuse (e.g., showing a motion picture film on television, or a rerun of a series) does generate residuals. Residuals are payable even if a production has not "broken even". Older shows (e.g., "I Love Lucy") may not be covered by residuals, and the amount tends to decline dramatically over time. After the individual's death, the individual's residuals are generally payable to person's loanout company, or if payable to the individual, then pursuant to the individual's will or trust. Generally, the Guild will only pay to one individual, so if there are multiple beneficiaries, the Guild requires that a designated payee be agreed upon by the payees. The WGA (but not SAG or the DGA) will allow the individual to designate a residual beneficiary on a special form.
- c. Participations (often called "points") are individually negotiated deals whereby the producer pays an individual a certain percentage of the producer's gross, often as adjusted for certain expenses, or a certain percentage of a defined net profit, from the film or television series. Historically, net profit participations have rarely generated payments because of "creative accounting". A television series formerly could generate significant profits when a film was syndicated for reruns, but with the rise of studio affiliated cable television channels and production companies co-owned by studio affiliates, and declining television audiences, participations are yielding smaller revenues than in the past, even for independent producers and series creators. These can be assigned pursuant to the contract to the individual's living trust.
- d. A musician will generally be entitled to receive a certain amount for each download or CD sold. These payments are usually offset against advances paid by the recording company, and often result in the musician receiving nothing because the advance exceeds the payments. However, with the rise of such services as Pandora, Spotify, Google Play, Rdio, Beats Music, iHeartRadio and Rhapsody, these sources of income for musicians will continue to decline. The amount paid for a CD sale is considerably greater than for a song download, which in turn is much greater than for playing a song on a music service.
- e. These rights are largely illiquid, and thus could create an estate tax problem on the client's death. It may be possible to sell the rights to a company such as Content Partners, or make a deal with the payor to pay a single negotiated up-front amount. Still, the best approach is to anticipate a liquidity problem and obtain life



insurance (such as through an irrevocable insurance trust) to help fund the estate tax. Also, note that there may be difficulty in valuing the rights.

## 6. Loanout and Other Companies

- a. Most highly paid persons in the entertainment industry use loanout companies to provide their services to production companies. These may be S corporations or C corporations, depending on whether you want to pass through foreign tax credits. The main purpose is to allow deductions at the corporate level for agent's commissions (generally, 10%), personal manager fees (typically 15%) business manager fees, lawyer fees (often 5% or 10%), publicists and personal assistants, as well as contributions to corporate retirement plans, at a cost of bearing the employer's cost of employment taxes and the cost of maintaining the corporation (e.g., minimum franchise tax, tax return preparation costs, and payroll costs). Generally, income cannot be accumulated in a C corporation because it would be a personal holding company under Section 541, subject to the PHC tax. Generally, only "above the line talent" (screenwriters, directors, producers and significant actors) are allowed by the studios to use loanout companies. When a person is going to perform services outside the United States (so that foreign tax credits would accrue), it is best to render services through a S corporation (so that the tax credits will pass through) or individually; and when services are rendered in New York City, due to a limitation on deductibility of salary above a very low base under their city income tax, it is best to perform services personally.
- b. The stock of the company should be transferred to the client's living trust, so that after the individual's death, a new Board of Directors can be elected and new officers appointed. At a minimum, someone other than the individual (such as the business manager) should be an officer of the company with the ability to write checks against the company's accounts.
- c. There should be a written employment agreement that expressly provides for payment of deferred compensation after the individual's death. Particularly in the case of a C corporation loanout company, it is essential to be able to "zero out" the income of the company in the years after the individual's death, when profit participations and residuals may still be flowing into the company. If the individual is deceased, and thus rendering no more services, on what basis would you be able to defend against an IRS audit asserting that the payments to the individual's estate are actually just a dividend, rather than the payment of compensation? Generally, the loanout company must remain in effect without liquidation, since liquidation would accelerate the future income to be received from the profit participation or residuals into the liquidation year.

- d. Entertainers who are musicians may be part of a band, and thus have other companies with which they must deal. For example, the band itself may be organized as a company. There may be a separate touring company. If the entertainer is a composer, there may be an ASCAP or BMI or SESAC affiliated entity to receive the writer's share of publishing royalties.
- e. There may be a production company if the individual is also doing production (e.g., Ron Howard is a co-owner of Imagine, and Drew Barrymore is a co-owner of Flower Films, and Tom Hanks is a co-owner of The Playtone Company.) It is important to consider the buy-sell provisions, if any, of such a company, and the funding of a purchase, and the liquidity available to deal with either a purchase of the other owner's interest or estate tax funding.

## 7. House Trusts

- a. It is quite common for celebrities to own their personal residences through a "confidential house trust" where the Trustee is typically the business manager or a lawyer, but very occasionally you'll find a bank or trust company as the Trustee. The purpose of such a trust is to keep the client's name off the property records, so that a stalker will have a more difficult time finding out where the celebrity lives.
- b. A house trust has some benefit, but one should not "oversell" its benefits. A determined stalker will likely be able to find where the celebrity lives, from the internet (e.g., a site such as [www.celebrityaddressaerial.com](http://www.celebrityaddressaerial.com)). Someone could follow the celebrity home after an event, or a limousine driver sent to pick him or her up could give the address to someone who might publish the information, or someone involved in the purchase of the home (say, an employee of the escrow company or of one of the brokers) could similarly leak the information. I tell clients that having a house trust is a bit like locking the door to your home. A determined thief can still break a window or force the door or pick the lock, but at least you've made it a bit harder for the thief to get into your home. Similarly, a determined stalker could still find where the celebrity lives, but why make it easy?
- c. It is important to coordinate the house trust with the regular living trust. If there is a married couple, will it terminate at the first spouse's death? Does it include the required Family Code Section 761 language to make sure that community property retains its status?
- d. A major problem with a "house trust" is that many lenders will refuse to loan money secured by real property held by such a trust. If the client removes the home from the trust for purposes of obtaining the loan, and then re-transfers the property to the trust, the transfer will be apparent on the property records. It may

be possible, in some cases, to have the client be a co-Trustee, but provide that title can be taken in the name of any one co-Trustee, and have the lender agree to treat this as a qualifying loan.

## 8. Copyrights and Termination Rights

- a. An author will generally receive copyright royalties, although generally there will be an advance paid to the author that must be recouped before any amounts become payable.
- b. A composer will receive publishing royalties, generally through the writer's share of copyright royalties paid through performing rights organizations (ASCAP, BMI or SESAC), or through "grand rights" licenses (from use in an opera, play or musical, from the publisher), or through synchronization licenses (for use in a film, television show, commercial, video game, web site, etc.) Note that if the original recording is to be used, a license must also be obtained from the owner of the master recording. "Mechanical licenses" are obtained when someone wants to record a song written by another person and put out a CD or otherwise distribute the song (a "cover"); these are generally obtained from the publisher or from the Harry Fox Agency. The publisher typically gets half of the payment and the author/composer gets the other half.
- c. Some celebrities have copyrights, particularly musicians who may write their own song. The "old" Copyright Act governs copyrights issued prior to 1978. The "new" Act governs copyrights issued in or after 1978. The term of protection for "old Act" rights is, in general, 95 years, but that consists of an initial term of 28 years plus a renewal term of 67 years. The term of protection for "new Act" copyrights obtained by an individual is the life of the author plus 70 years. For an anonymous work, a pseudonymous work, or a work made for hire, the copyright lasts for 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first.
- d. For "old Act" copyrights, if a transfer was made before 1978, you can terminate the transfer after 56 years, or in some cases, after 75 years. For transfers made in or after 1978, **if the transfer was made by the author (i.e., it is not a work made for hire)**, the transfer can be terminated during a five year period that generally begins 40 years after the transfer (but if it involves publication rights, then if earlier, 35 years from publication). For example, a book written or a song written and licensed in 1958 would be reaching its 56 year termination period in 2014. Thus, many songs from "Golden Age of Rock & Roll" will become subject to termination in the relatively near future.

- e. For “new Act” copyrights (**other than an anonymous work, a pseudonymous work, or a work made for hire**), the author, or if the author is deceased, his or her statutory heirs, can reclaim the copyright during a period between 35 and 40 years after the rights were granted; and there must be a notice sent between two and ten years before the effective date. So, for example, if a copyright was obtained right when the new law was enacted, in January, 1978, the 35 year period would be up in 2013. Since last year was the first year in which such copyrights can actually be reclaimed, you can expect to see a lot of litigation as to exactly what happens upon a termination. This issue has become particularly important in the music publishing industry (e.g., “Werewolves of London”, the Rolling Stones’ “Beast of Burden” and the Police “Roxanne” were all 1978 releases.)
- f. If the author is living, then the rights can be claimed by the author, but if the author is deceased, then the “statutory heirs” are the surviving spouse, as to 50%, and the descendants, as to 50%. If there is no spouse, or there are no descendants, then the rights belong all to the other or others. If there are no statutory heirs, then the rights can’t be reclaimed. A majority of the statutory heirs must agree to termination (typically, the spouse plus at least one child.) If there are joint authors, a majority of the authors must agree.
- g. As soon as notice of termination is given, the rights in the reverted copyright vest in the person or persons who gave the notice. Suppose that an author or composer want to disinherit his children, or wants to be sure that the rights do not vest outright in the spouse or children but rather wants the copyrights to vest in a trust, or wants some split other than 50% to the spouse and 50% to the children. In that case, the author should give notice 25 years after the rights were granted, so that even if the author dies before the 35 year date for reversion, the rights will come to the author or his estate. If the author doesn’t get around to serving the notice prior to his death, then the rights will instead belong to the statutory heirs.
- h. Note that the new Copyright Act exempts from the term “transfer” a transfer “by will”. Thus, the question arises as to whether a transfer of a copyright to a living trust is a “transfer” that can be terminated 35 years after the transfer occurs. The better practice is to allow copyrights to pass “by will”, and accordingly a General Assignment into a living trust should generally exclude copyrights. This is particularly the case where the author would not want his statutory heirs to benefit from the works (e.g., if the author wants the copyright to benefit charity.) Note that in most cases, even if the transfer is subject to termination, it won’t be able to occur without the majority agreement of the affected parties. For example, let’s say that the estate plan leaves the copyrights to a trust for the sole benefit of the surviving spouse for life, remainder to the children. During the life of the surviving spouse, unless the surviving spouse and at least one child agree, the

transfer cannot be terminated. If the surviving spouse wants to continue to get all of the income for life, the surviving spouse would not agree to termination since it would deprive the surviving spouse of half the income (absent some sort of deal with the children that assured the surviving spouse of a sufficient income make it worthwhile to agree to the termination.)

- i. How do you value copyrights subject to copyright termination? If the author dies before the time for notice of termination to be given (i.e., within the first 25 years), then it seems to me that you only take into account the projected income through the end of the 35 year period. That's because the statutory heirs have a right given by statute to claim the copyright, and the author has no right to control the rights. Suppose, in the alternative, that the author dies within the 10 year period prior to termination becoming effective, and that the author has given notice of termination. Then, you've got to include in the value the right to receive income through the balance of the statutory term of protection. The interesting issue is what happens when the author dies during the period when a termination notice could have been given, but the notice was not given. In that case, the rights vest as a matter of law in the statutory heirs, but since the author could have given notice, should you value the rights only until the termination period could be effected by the heirs, or do you value the rights through the term of protection?
- j. Who will control the exploitation of the works after the author's death? Should the estate plan vest control in a special trust, with a "literary trustee", to control the works?
- k. Note that some characters may "creep into" the public domain. For example, a recent case won by Los Angeles lawyer Leslie Klinger holds that certain elements of the Sherlock Holmes character are in the public domain, while other elements (developed in later works still under copyright) are not in the public domain. The case may be on appeal to the Seventh Circuit.
- l. Where a screenwriter produces a work for hire, the Writer's Guild basic agreement gives "separated rights" to the screenwriter. For example, in television, those rights are:
  - (1) The right to produce a stage version based upon the material.
  - (2) The right to produce a theatrical motion picture based upon the material.
  - (3) The right to publish a book based upon the material or to publish the script.
  - (4) The right to manufacture and sell merchandise based upon the material.
  - (5) The right to produce a radio program based upon the material.
  - (6) The right to produce a live television program based upon the material.
  - (7) The right to produce interactive programs based upon the material.
  - (8) Other rights now known or known in the future

If the screenwriter wrote a screenplay for a theatrical motion picture, those rights are:

(1) The right to publish the script, or books based on the script, subject to a holdback period; but the studio has the right to cause a novelization to be published in conjunction with the release of the film, for the purpose of marketing the film. The writer has the first right to negotiate to write the novelization, and will get a payment if someone else writes the novel.

(2) The right to produce a stage version of the material more than two years following general release of the motion picture if the Company has not exploited the dramatic stage rights. If the film is not released, the writer may produce a stage version based upon the material five years after the date of the contract with the studio. If the studio uses the dramatic stage rights, the writer must be paid.

Screenwriters also have certain additional rights to payments in the case of a remake or sequel.

#### 9. Master Recordings

- a. Most recording artists do not control their own master recordings; rather, recording companies control these recordings. These are the recordings (formerly tapes, now music recorded on hard disk drives) of musicians performing, fully mixed by a record producer, used for creation of compact discs and downloads and similar music delivery systems.
- b. When used in other situations (say, on a television commercial or a film soundtrack), payments may have to be made to both the owner of the master recording and the music publisher/composer. Note that if someone produces a “cover” of a song, then the owner of the master does not get paid; the revenue goes only to the publisher and composer.

#### 10. Principal and Income Issues.

- a. Probate Code section 16362 treats all “liquidating assets” (including a copyright, royalty right or a right to receive payments under an arrangement that does not provide for interest on the unpaid balance), unless the Trustee establishes a depreciation reserve, as only 10% income and 90% a return of principal.
- b. The trust agreement can, and probably should, treat all receipts from such sources (including profit participations and copyright royalties) as income, since that is what the client probably expects. However, if the client intentionally wants to limit the income beneficiary’s income rights, then the standard provision under law accomplishes that result.

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# Estate Planning for Intellectual Property

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## Trust services

### Objective

Many families of substantial means employ a variety of trusts as a component of their comprehensive wealth management. We recognize the value that an experienced and knowledgeable trustee—always serving with fiduciary care and responsibility—brings to the goals of their wealth planning.

### Approach

Through our CIBC National Trust Company, we have authority to serve as a professional trustee throughout the country. This authority provides us with the flexibility to serve our clients regardless of where they live in the U.S. and establish their trusts, and no matter where their children or grandchildren relocate.

Additionally, when our clients' wealth planning calls for the trust benefits afforded by Delaware law, we have the ability, through the CIBC Delaware Trust Company, to meet those special planning needs. For generations, Delaware has built a trust-friendly body of legislation and has supported its laws with a knowledgeable and effective court structure. Unlike many jurisdictions that are newer to the trust scene, Delaware boasts a robust community of seasoned trust professionals, along with accountants and attorneys who specialize in trusts.

### Trustee responsibilities

A key element of our fiduciary model is the relationship we have with our client families. Trusts that you create for your next generations, as well as trusts that may have been created for you by previous generations, are all managed as a part of your family's comprehensive wealth picture. Trust assets are invested in a way that coordinates with overall family asset allocation, and the terms of trusts are carried out with personal knowledge of the needs and resources of your family members.

### Benefits of Delaware Trust Law

Perpetual (Dynasty) Trusts	State Income Tax Benefits	Self-Settled Asset Protection Trusts	Quiet Trusts	Directed Trusts	Decanting Statute
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Whether for next year or the next generation—we can help in developing solutions that are a reflection of your values and family circumstances and are customized to your family's goals.

# Welcome and Sponsor Thank You



**Kim Kamin**  
CEPC President

# Special Meeting for Bylaws Vote



*Notice of this special meeting along with a copy of the proposed amended and restated bylaws, a redline against the existing bylaws, and a summary of the significant changes was distributed to all CEPC members on November 20, 2020.*

*A motion to approve the amended and restated bylaws is being made and seconded at this time.*

Please take a moment to cast your vote by completing the poll appearing on your screen:

- Yes, approve
- No, do not approve

# Workshop Committee Report



**Erica Lord**  
Workshop Committee

# Workshop and Fundamentals Course

## Upcoming Events



### ❖ Upcoming Workshops:

- December 8<sup>th</sup> Workshop – “The Perilous Pot Trust” Noon - 1:30 p.m.
- January Workshop – “Planning and Administering with Art & Tangible Personal Property”

### ❖ The 2021 Fundamentals Course

- January 14<sup>th</sup> “*Introduction to Estate Planning*”
- January 27<sup>th</sup> “*Overview of Estate, Gift and Generation-Skipping Transfer Tax*”
- February 3<sup>rd</sup> “*Income Tax Considerations for Trusts and Estates and ITC*”
- February 9<sup>th</sup> “*Drafting Estate Planning Documents*”
- February 17<sup>th</sup> “*Putting It All Together*”

# Other Upcoming Programs and Events



## ❖ January 27<sup>th</sup> for CEPC's next Virtual Monthly Program

- “Well-Being Trusts – the Future of Imbuing Trusts with Positivity, Meaning and Purpose” with Richard Franklin and Ray Odom

*Invite a prospective CEPC member as a complimentary guest!*

## ❖ Fourth Fridays Informal Virtual Networking (“Coffee with Friends”) – 8:30am

- January 22<sup>nd</sup>
- February 26<sup>th</sup>
- March 26<sup>th</sup>
- April 23<sup>rd</sup>
- May 28<sup>th</sup>
- June 25<sup>th</sup>

# Speaker Introduction



**Julie Pleshivoy**  
Vice President & Program Committee Chair,  
CEPC





Chang H. Chae is a partner in the Los Angeles law firm of Hoffman, Sabban & Watenmaker, a P.C., where he practices in the areas of estate planning, probate and trust administration. He is a Fellow of the American College of Trust and Estate Council and is a Certified Specialist in Estate Planning, Trust & Probate Law by the State Bar of California Board of Legal Specialization. Mr. Chae served as Co-Chair of the Trusts and Estates Section of the Beverly Hills Bar Association and is currently Co-Chair of the Motion Picture and Television Fund Professional Advisory Network. He has been published in *California Trusts and Estates Quarterly* and has given lectures to professional and lay audiences on estate planning and charitable giving (including the ABA Taxation Annual Meeting, USC Tax Institute and USC Trust and Estate Conference). Mr. Chae has served as a member of the board of directors for a community college foundation, as chairperson for a planned giving committee and as a professional advisor to a community foundation. He is a member of the International Society of Trust and Estate Practitioners and is rated AV® Preeminent™ by LexisNexis Martindale-Hubbell. Mr. Chae has been repeatedly recognized as a Best Lawyer® and named by *Law & Politics Magazine* and *Los Angeles Magazine* as one of Southern California's top lawyers ("Super Lawyers") in the area of estate planning and probate. He earned his B.A. degree, with honors, from Grinnell College and his J.D. degree, with distinction, from the University of Iowa. He also attended the London School of Economics and Political Science.



# ESTATE PLANNING FOR INTELLECTUAL PROPERTY

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Chang H. Chae

Hoffman, Sabban & Watenmaker, APC

# Famous Chicago Celebrities

- Harrison Ford
- Robin Williams
- Bill Murray (big Cubs fan)
- Kanye West (one of his kids is named Chicago)
- John Cusack (Chicago sports fan)
- Melissa McCarthy (went to Joliet Catholic Academy)
- Shonda Rhimes (grew up in University Park)
- Chance the Rapper (grew up in West Chatham)

# When Do We Encounter Copyrights?

Songwriters (ASCAP/BMI/SESAC; Publishing vs Author)

Composers (particularly musicals)

Book authors (particularly if film based on a book)

Screenwriters only on occasion (generally “works for hire”)

# Term of Protection

It's COMPLICATED

Generally for pre-1978 work, 28 years plus 67 year renewal (so 95 years), with some termination rights after 56 years

Generally, for later works, life plus 70 years (individual author) or 95 years; but “termination rights” re individual authors between 35 and 40 years post grant, with notice given not less than 2 years nor more than 10 years prior to effective date (i.e., years 25 to 38)

# Terminations

Only for individual authors

Termination by the author, or if deceased, by a majority in interest of (a) the author's spouse if living (50%) and (b) the author's issue if any (50%)

Once timely notice is given, the rights vest in the parties entitled to give notice in those proportions, but reversion only on the effective date.

No termination of transfers "by Will"; but lifetime transfer to Trust can be terminated.

# Valuation; When to Exercise Termination

- How to determine present value of future receipts
- Implications of Terminations of Transfers on valuation
- Early termination to control disposition, or late termination to minimize value
- Exercising Termination Rights Early to Control Exploitation
  - No earlier than 25 years after the execution of the grant or, if the grant covers the right of publication, no earlier than 30 years after the execution of the grant or 25 years after publication under the grant (whichever comes first)
  - Not less than two years before exercise (Generally, Year 33 for 35 year term)

# Copyrights & Community Property

- Federal Preemption? Apparently no.
- Marriage of Worth, 195 Cal. App. 3<sup>rd</sup> 768 (1987)
- Rodrigue v. Rodrigue, 55 F. Supp. 2d 534, 547 (E.D. La. 1999); rev'd 218 F.3d 432 (5th Cir 2000)

# Basis Step-Up at Death

- Were rights sold or licensed?
- Capital Gains
  - Author status ceases on death
  - Author status not a problem for music rights
- Amortization (generally over remaining useful life (15 years max))



# Planning for Post-Death Exploitation

- Should you name a “literary executor”?
- Should you create a “literary trust”?
- Planning for incapacity as well as death

# Principal & Income Issues

- What does the client expect?
- PC 16362: 10% income, 90% principal

# Social Media and Value of Followings

- Capitalizing on Social Media
  - Kylie Jenner gets \$1.2 million for her Instagram posts (141 million followers)
  - LeBron James tweet worth \$139,474 (23.2 million followers)
  - Frankie Muniz tweet worth \$252 (175,000 followers)
- Kylie built her billion dollar business on own advertising
- Casting agents will hire based on followers (ready made advertising)

# Top Celebrities (Instagram Rich List 2020)

- Dwayne Johnson – 187 million
- Kylie Jenner – 181 million
- Cristiano Ronaldo – 224 million
- Kim Kardashian – 175 million
- Ariana Grande – 191 million
- Selena Gomez – 180 million
- Beyonce Knowles – 149 million
- Justin Bieber – 139 million
- Taylor Swift – 135 million
- Neymar – 139 million

# Interesting IP Cases

- Michael Jordan v. Jewel Food Stores (ad congratulating Jordan)
- Vanna White v. Samsung Electronics America (robot case)
- Carson v. Here's Johnny Portable Toilets

# Planning with Name & Likeness

- Bequeath to Marital Trust (if married)
- Leave to charitable foundation (Robin Williams case)
- Trustee to exploit name and likeness

# IRS Audits

- Valuation Issues (find qualified appraiser)
- Auditor focused on post-death earnings (Michael Jackson case)
- Auditor focused on pre-death earnings (watch out for performance royalties)
- Slippery arguments:
  - Didn't exploit name and likeness
  - Didn't maximize exploitation of name and likeness

# Right of Publicity

California (CCC Sec. 3344.1): Protected for 70 years post-death

Registering & Checking Successor in Interest Filings

<https://specialfilings.sos.ca.gov/sii>

<https://bpd.cdn.sos.ca.gov/sf/forms/np-sf-407.pdf>

New York: Not Descendible (Marilyn Monroe)

Illinois: Protected for 50 years post-death (starting 1999)



# Right of Publicity

Options When Post-Death Rights Don't Exist:

Copyrights (discussed above)

Trademarks – commercial names, phrases, logos

Trade Names – official name under which individual or company conducts business

# Right of Publicity

## Valuation:

- Prior Use

- Lack of Availability for Appearances

- Aging Fan Base

- Surge of Interest Immediately Post Death

- For musical groups: Group vs Individual

- Robin Williams case: Restricting Use & Charitable Deduction

# Issues for Another Day

Professional Memorabilia (Signed Scripts, Musical Instruments, Signed Lyric Sheets)

Maintaining Privacy (House Trusts, Avoiding Probate)

Dealing with Music Rights (ASCAP/BMI/SESAC), Master Recordings, Publishing Companies, Etc.

# Question & Answer

