COPYRIGHTS AND CREDITORS: WHAT WILL BE LEFT OF THE KING OF POP'S LEGACY? ♦

INTRODUCTION

On June 25, 2009, Michael Jackson, the King of Pop, died,

leaving behind a musical empire. Although Jackson was worth close to a billion dollars, at the time of his death he was reportedly $400 million dollars in debt.[1] While an inventory of Michael Jackson's assets and the details regarding their post-mortem distribution are not public as he willed them to a family trust,[2] it is plausible to assume that Jackson held copyrights in a variety of valuable recordings. It is also plausible to assume that Michael Jackson's post-mortem right of publicity is worth millions of dollars. The question then becomes what rights do Jackson's creditors have to these assets that are now held by his estate? While intellectual property is normally accessible to creditors, there are certain intellectual property assets such as federal copyright termination rights and the right of publicity that are not reachable. This Note explores creditors' rights to intellectual property of a debtor such as the late Michael Jackson, along with the various estate planning techniques a person in Jackson's position could implement to protect vulnerable intellectual property.

Parts I and II of this Note give a general overview of how a creditor can satisfy his judgments during the debtor's life and at death, while focusing on the unique challenges creditors face when collecting on intangible, intellectual property. Part III explores the federal statutory termination rights as codified in 17 U.S.C. § 203(a)(3) and creditors' ability to reach these rights. Part IV is a discussion of the right of publicity, and creditors' access to this right during the individual's life and at death. Finally, Part V explores the various ways in which a holder of intellectual property can protect his assets through the estate planning process.

I. CREDITORS' ACCESS TO INTELLECTUAL PROPERTY RIGHTS DURING THE HOLDER'S LIFETIME

A. *The Exemption of Intangible Property*

Suppose an artist like Michael Jackson holds a copyright worth several million dollars as his sole property. A creditor subsequently obtains a judgment against the artist for one million dollars; what rights does the creditor have to the copyright?

---

[1] *See* Ryan Nakashima & Alex Veiga, *Jackson Lived Like King but Died Awash in Debt: King of Pop Dies Before Comeback Bid Could Bolster Ailing Finances*, ABC NEWS, June 26, 2009, http://abcnews.go.com/Business/ MichaelJackson/wirestory?id=7935058&page=1.

[2] *See* Lorenzo Benet, *Family Reviews Michael Jackson's Will*, PEOPLE, June 30, 2009, http://www.people.com/people/package/article/0,,20287787_20288795,00.html. A British tabloid published an alleged copy of the Michael Jackson Family Trust document in late May 2010, but the authenticity of this document has not been determined, and is therefore not considered in this Note.

Generally, in all states, a creditor can reach a substantial amount of a debtor's real, personal, tangible, and intangible assets through various procedures in order to satisfy his judgment.[3]

However, certain property is considered exempt from execution.[4] Execution is a remedy where a court official seizes the debtor's assets, sells them at a judicial sale, and delivers the applicable proceeds to the creditor.[5] Intangible property, which lacks a physical existence, comprises a large part of the restrictions on execution. One rationale for the exemption was that intangible property was not recognized as property during the time the procedures for execution came into existence.[6] Another policy reason for exempting intangible property from a forced sale is to protect third party interests.[7]

Intellectual property, a form of intangible property, is also exempt from execution. The Supreme Court of the United States affirmed the exemption in a series of nineteenth century cases. In *Stephens v. Cady*, the Court found that a copyrighted copperplate used to create maps could be forcibly sold through a writ of execution, but the copyright associated with the plate could not.[8] The Court affirmed the immunity of intellectual property in *Stevens v. Gladding*[9] and *Ager v. Murray*.[10] The Court's rationale in exempting copyrights and patents was that they were seen as invisible, intangible property[11] created by Congress and not within the jurisdiction of any particular state.[12]

State law also exempts intellectual property from execution as it is universally seen as intangible property.[13] A pertinent example is California—the last domicile of Michael Jackson. In California,

---

3 *See* 3 DEBTOR-CREDITOR LAW § 27.03 (Matthew Bender 2010).
4 *See id.* § 27.02. Execution is also defined as "the judicial enforcement of a money judgment, usu[ally] by seizing and selling the judgment debtor's property." BLACK'S LAW DICTIONARY 264 (3d Pocket Ed. 2006).
5 *See supra* note 3, § 27.03.
6 *Id. See also* BLACK'S LAW DICTIONARY 573 (3d Pocket Ed. 2006).
7 *See supra* note 3, § 27.03.
8 Stephens v. Cady, 55 U.S. 528, 528-31 (1852) (a copyright is not the subject of seizure and sale, but may be reached by a creditor's bill in equity).
9 58 U.S. 447 (1854).
10 105 U.S. 126 (1881).
11 *Ager*, 105 U.S. at 130 ("The difficulties of which the learned justice here speaks are of seizing and selling a patent or copyright upon an execution at law, which is ordinarily levied only upon property, or the rents and profits of property, that has itself a visible and tangible."). *See also* Cherie L. Lieurance, *Judgment Creditors' Access to Intellectual Property Rights – Is Simple Execution in Sight?*, 7 WHITTIER L. REV. 375, 375-78 (1985).
12 Stevens v. Gladding, 58 U.S. 447, 451 (1854) ("[I]ncorporeal rights do not exist in any particular State or district; they are coextensive with the United States. There is nothing in any act of congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and districts.").
13 *See Ager*, 105 U.S. 126; *Stevens*, 58 U.S. 447; *Stephens*, 55 U.S. 528; *see also* Doreen Gridley, *The Immunity of Intangible Assets from a Writ of Execution: Must We Forgive our Debtors?*, 28 IND. L. REV. 755, 766 (1995).

intellectual property rights are not subject to execution.[14] The creditor's only option in enforcing a money judgment is to have a receiver appointed under Section 708.620 of the Code of Civil Procedure to carry out the sale.[15] However, a creditor may seek an attachment arising out of payments from intellectual property rights such as license fees or royalties.[16]

B. *Creditors' Ability to Reach Intellectual Property Through Alternative Procedures*

Since intellectual property is exempt from execution, creditors must pursue alternative remedies to satisfy their judgments. The alternatives to execution include garnishment, issuing creditors' bills, proceedings supplementary, and writs of *fieri facias*. The availability of these remedies varies from state to state.[17]

Garnishment is "a judicial proceeding in which a creditor asks the court to order a third party who is indebted to or is a bailee for the debtor to turn over to the creditor any of the debtor's property (such as wages or bank accounts) held by that third party."[18] Thus royalties, which are payments owed to a creator for each copy of a work sold under a copyright or patent,[19] are property that may be garnished to satisfy a creditor's judgment.[20] As a result, royalties are leviable property despite the inability of creditors to levy the actual intellectual property.[21]

Creditors can reach copyrights through a creditor's bill. A creditor's bill is an equitable proceeding where a judgment creditor seeks to reach property that is exempt from the process available to enforce a judgment.[22] The relief granted by a creditor's bill is a compulsory transfer or sale of the property by the author for the benefit of the creditor.[23] In *Ager v. Murray*, the Supreme Court slightly improved the remedy by appointing a trustee to sell the property, in this case a patent, if the creator-debtor refused to do so himself, but the Court still refused to

---

14 *See* CAL. CIV. PROC. §§ 481.010-481.225, 488.300-488.485 (West 2010); *see also* Brian L. Holman, *Attachment and Enforcement of Judgments Against Intellectual Property and Associate Rights to Payment*, L.A. COUNTY BAR NEWSL., Fall 2003.
15 CAL. CIV. PROC. § 708.620 (West 2010). *See also* Holman, *supra* note 14.
16 *See* CAL. CIV. PROC. §§ 488.470, 700.170 (West 2010); *see also* Holman, *supra* note 14.
17 *See* Gridley, *supra* note 13, at 766.
18 BLACK'S LAW DICTIONARY 309 (3d Pocket Ed. 2006).
19 *See id.* at 627.
20 *See* Sanders v. Armour Fertilizer Works, 292 U.S. 190 (1934); Victory Bottle Capping Mach. Co. v. O. & J. Mach, Co., 280 F. 753 (1st Cir. 1922); *see also* Lieurance, s*upra* note 11, at 383-84; Gridley, *supra* note 13, at 762.
21 *See Sanders*, 292 U.S. 190; *Victory Bottle Capping Mach. Co.*, 280 F. 753; *see also* Lieurance, s*upra* note 11, at 383-84; Gridley, *supra* note 13, at 762.
22 *See* Ager v. Murray, 105 U.S. 126 (1881); Stephens v. Cady, 55 U.S. 528 (1852).
23 *See* Lieurance, *supra* note 11, at 378-79.

apply execution against intellectual property.[24]

A third alternative for creditors is a proceeding supplementary to execution. A proceeding supplementary is "a proceeding held in connection with the enforcement of a judgment, for the purpose of identifying and locating the debtor's assets available to satisfy the judgment."[25] In *Coldren v. American Milling Research & Development Institute, Inc.*, the Indiana Court of Appeals found that the creditor's purchase of the debtor's rights and title to a patent was permissible under a proceeding supplementary.[26] Critics find this method to be substantially similar to execution, where a sheriff, acting upon a creditor's judgment, levies a debtor's asset and then sells it.[27]

Another alternative procedure to execution is a writ of *fieri facias*. In *McClaskey v. Harbison-Walker Refractories Co.*, the Court of Appeals for the Third Circuit held that the sheriff "acting pursuant to the court's order may be considered a legal representative . . . in the same manner as a trustee specifically appointed for that purpose" under 35 U.S.C. § 47, which allowed a patent to be transferred by a legal representative.[28] Thus, when the sheriff, under a writ of *fieri facias* in response to a creditor judgment, exacted a patent title, he had properly sold the title. When the sheriff subsequently gave the bill of sale to the plaintiff-creditor, it was a complete transfer of the interest in the patent right.[29] The court was careful to distinguish this procedure from execution; the court likened the writ to a remedy a creditor would find in a court of equity because the writ was issued by the court's authority.[30] However, the remedy is substantially similar to execution, and some critics have found the distinction between a writ of *fieri facias* and execution to be meaningless.[31]

Notably, the alternatives presented above are not as expedient or effective as execution, which places the creditor at a disadvantage. The alternatives make it more expensive to collect on the judgment, and the value of the property could decrease over the time it takes to collect.[32] Also, the point in time when a lien is actually placed on the debtor's property to protect the

---

[24] *Ager,* 105 U.S. at 131-32 (a patent is still not subject to simple execution, as it is a right assignable only by the author, but approved of the appointment of a trustee); *see* Lieurance, *supra* note 11, at 379.
[25] BLACK'S LAW DICTIONARY 568 (3d Pocket Ed. 2006).
[26] Coldren v. Am. Milling Research & Dev. Inst., 378 N.E.2d 870, 872 (Ind. Ct. App. 1978) (holding that patent and contract rights may be reached in a proceedings supplemental). *See also* Gridley, *supra* note 13, at 762, n.57.
[27] *See* Lieurance, *supra* note 11, at 387-88.
[28] McClaskey v. Harbison-Walker Refractories Co., 138 F.2d 493, 500 (3d Cir. 1943).
[29] *See id.*; *see also* Lieurance, *supra* note 11, at 385.
[30] *McClaskey*, 138 F.2d at 500.
[31] *See* Lieurance, *supra* note 11, at 386-87.
[32] *See* Gridley, *supra* note 13, at 757-58.

creditor's interest depends on the jurisdiction and the procedure used.[33] In some states, a lien on property to be seized under a writ of execution would become effective sooner than under an alternative procedure.[34] Therefore, creditors who must wait for a lien to attach to the property lose protection, face the risk that their claim will be subjugated to other debts, the property may decrease in value, or the property may be destroyed by the time the lien is placed.[35]

The alternatives to execution also place a greater strain on the judicial system. The parties must return after the original judgment has been rendered to submit additional filings and more hearings may be held to determine what assets should be used to satisfy the judgment.[36] Furthermore, the time delay inherent in these alternatives may encourage a debtor to destroy or diminish the value of the intellectual property.[37]

However, a creditor can attempt to satisfy his judgment through the tangible assets associated with intellectual property. In *Stevens v. Cady*, the Court distinguished between the physical engraving plate and the copyright to produce the maps. While the creditor received the engraving plate, he did not receive the copyright in the execution sale.[38] However, the plate is virtually useless until the copyright expires, and by that time it may be worthless or the creditor could be deceased. Other examples of tangible assets of an intangible copyright include master disks used to reproduce records[39] and motion picture negatives for copyrighted movies.[40] Again, acquiring these items may not satisfy the creditor's judgment, as the items may be worthless without the copyrights.[41]

Another remedy for the creditor is to seek the protection of equity during the time delay caused by the alternative procedures of collection. The court may issue an equitable lien on the intangible intellectual property during the trial and prior to

---

[33] *See id.* at 767.
[34] *See id.* at 768.
[35] *See id.* at 767.
[36] *See id.* at 758.
[37] *See id.* at 756.
[38] Stephens v. Cady, 55 U.S. 528, 531 (1852). The distinction between ownership of the copyright and the physical property has been codified in 17 U.S.C. § 202.
[39] *See* Capitol Records, Inc. v. Mercury Record Corp., 109 F. Supp. 330, 333, 338-39 (S.D.N.Y. 1952), *aff'd,* 221 F.2d 657 (2d Cir.1955); *see also* Gridley, *supra* note 13, at 771-72.
[40] *See* Walt Disney Prod. v. United States, 327 F. Supp. 189, 192 (C.D. Cal. 1971), *modified on other grounds,* 480 F.2d 66 (9th Cir.1973), *cert. denied,* 415 U.S. 934 (1974).
[41] But note that it may be more advantageous to acquire the material objects behind a patent. For example, in *Wilder v. Kent*, the court found that in the judicial sale of two patented machines the purchasers not only acquired the machinery, but also a license to use the machine. Wilder v. Kent, 15 F. 217 (C.C.W.D. Pa. 1883). *See also* Gridley, *supra* note 13, at 772.

judgment.[42] A lien could be statutory or equitable depending on the jurisdiction.[43] Once recorded by the creditor in the appropriate office (United States Patent and Trademark Office or the Copyright Office), other purchasers will have notice of the creditor's lien.

Thus, while a creditor can ultimately seize intellectual property, it cannot compel a sale by execution. The intangible nature of intellectual property makes obtaining it more difficult than when seizing tangible goods due the judicial restrictions placed upon collection. The creditor instead must seek a procedural alternative to the writ of execution to obtain a judicial sale of the intellectual property. The creditor may also seek an equitable lien to ease the burdens that the alternative procedures place on a creditor, mainly the time delay.

II. CREDITORS' ACCESS TO INTELLECTUAL PROPERTY RIGHTS AT DEATH

The next question to resolve is what rights creditors have to the intellectual property held by an insolvent estate in order to satisfy a judgment at the holder's death. Using the scenario outlined in the introduction, suppose a celebrity like Michael Jackson is worth $1 billion, mostly by way of intellectual property rights, and dies with $500 million in debt. What assets will be used to pay the creditors?

Before a creditor can receive any payments for his claims, the estate must first go through probate. Probate is a judicial process that involves proving or validating a will in court. The probate process includes: "determining whether the decedent died with or without a valid will, appointing a personal representative, ascertaining liabilities for debts and taxes, preparing an inventory of assets, submitting (and perhaps approving) an accounting, distributing the net assets, and closing the estate."[44] As state law generally governs estate law, this Note will use the Uniform Probate Code ("UPC") as a reference point.

The UPC states that upon the testator's death, a personal representative of the estate is encouraged to publish notice of the death once a week for three successive weeks in a general circulation newspaper or by direct mail.[45] Once a creditor

---

[42] *See* Adams Apple Distrib. Co. v. Papeleras Revinidas, S.A., 773 F.2d 925, 931 (7th Cir. 1985) (equitable lien placed on business' trademark); Jacobs, Bell & Baumol v. Curtis, 556 A.2d 817, 818 (N.J. 1989); *see also* Gridley, *supra* note 13, at 780.

[43] *See* Gridley, *supra* note 13, at 779.

[44] *See* John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 46 (2009).

[45] UNIF. PROBATE CODE § 3-801(a) (amended 2006); *see also* Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Non-Probate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 832-33 (2007). The Uniform Probate Code does not mandate

presents a claim to the representative within the statutory timeframe, the representative may elect to either allow the claim and pay the amount from the estate's assets or disallow the claim. If the claim is disallowed, the creditor must file a petition of allowance with the court or sue the personal representative to seek relief.[46] If the creditor does not receive payment after the granting of a judgment, they may seek to place a lien, mortgage, or pledge on property of the estate.[47] However, creditors may not seize any of the estate's assets through execution.[48]

Normally, estate assets must first be used to satisfy creditor judgments before any beneficiaries will be paid.[49] These assets include intellectual property rights such as copyrights, trademarks, patents, and publicity rights.[50] The value of the creator's intellectual property rights is difficult to determine, but is based on an evaluation of future earnings of the work. "The appraiser will typically base the date of death value on the average annual earnings during the three to five years before the creator's death" or if there is no earnings history, compare it to the property of others.[51] Copyrights, and other intellectual property, may also be depreciating assets, a factor which is included in the calculation of their value.[52]

Thus, creditors can still access intellectual property rights, such as copyrights, at death, but it must be done through the probate process. Execution is not an option. If the estate disallows the claim, the creditor must sue the estate and receive a judgment.[53] If the estate is illiquid and holds no other property with which to pay the creditor, the administrator of the estate will most likely have to sell the intellectual property to satisfy the creditor's judgment.[54] Even though the creditor would probably not gain direct control of the intellectual property, he would receive the revenue from the sale.

Despite a creditor's access to intellectual property both

---

publication of notice of death because of its costs and questionable effectiveness. *See* UNIF. PROBATE CODE § 3-801(a), Comment.

46 *See* UNIF. PROBATE CODE § 3-806 (a) (2006).

47 *See id.* § 3-812.

48 *See id.* Execution is defined as "the judicial enforcement of a money judgment, usu(ally) by seizing and selling the judgment debtor's property." BLACK'S LAW DICTIONARY 264 (3d Pocket Ed. 2006).

49 *See* 97 C.J.S. *Wills* § 1943 (2001).

50 *See* Michael Cherewka, *Collecting the Assets, Preparing the Inventory and Handling Claims Against the Estate*, 30765 NBI-CLE 41, 52 (2006) ("Copyrights, trademarks, patents and publicity rights are considered assets of decedent's estate . . . .").

51 Cheryl Hader, *Making the Intangible Tangible: Planning for Intellectual Property*, 29 EST. PLAN. 574, 578 (2002).

52 *See* Debra Perrotta, *Estate Planning for Owners of Patents and Copyrights*, 21 EST. PLAN. 94, 99 (1994).

53 *See* UNIF. PROBATE CODE § 3-806(a) (2006).

54 *See* Perrotta, *supra* note 52, at 98.

during the creator's lifetime and at death, there are still two intellectual property rights that may be protected—termination rights and the right of publicity. These two rights are discussed in further detail below.

III. THE PROTECTION OF COPYRIGHT TERMINATION RIGHTS

A. *Copyright Termination Rights*

1. Creation of Termination Rights

Federal power to create and govern the copyright system is found in the United States Constitution, Article I, Section 8, Clause 8. The clause reads: "[t]he Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[55] Congress first exercised its power by the creation of "An Act for the Encouragement of Learning" in 1790. Subsequent copyright acts, or revisions, were enacted in 1831, 1870, 1909, 1971, and 1976.[56]

Under the 1976 Act, copyright transfers of works created on or after January 1, 1978 are subject to termination thirty-five years after the initial grant.[57] A transfer of copyright includes "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license."[58] Exercising the right of termination causes the title of the copyright to revert back to the author or his assignees if an application is made within five years after thirty-five years have passed.[59]

The rationale behind the law was to protect authors from an unequal bargaining position when selling their work.[60] The value of the copyright—which is difficult to predict at its inception—could rise significantly after it has been exploited, but the author would have little recourse after the initial transfer.[61] In other

---

[55] U.S. CONST. art I, § 8, cl. 8.
[56] *See* Michael Rosenbloum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTELL. PROP. L. 163, 165-66 (1996).
[57] 17 U.S.C. § 203(a)(3) (West 2009).
[58] 17 U.S.C. § 101 (West 2009).
[59] 17 U.S.C. § 203(b) (West 2009). There are exceptions to statutory termination, which include works made for hire, grants by will, and grants by transferees. *See* MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 11.02(a)(1)-(a)(3) (Matthew Bender Rev. Ed., 2009).
[60] *See* NIMMER, *supra* note 59, § 11.01(a).
[61] *See* Harry Fox Agency, Inc. v. Mills Music, Inc., 543 F. Supp. 844, 859 (S.D.N.Y. 1982), *rev'd on other grounds*, 720 F.2d 733 (2d Cir. 1983), *rev'd sub nom.,* Mills Music, Inc. v.

words, the purpose of statutory termination rights is to combat "unremunerative grants" by authors.[62]

2. Vesting of Termination Rights

If an author dies before the termination rights have been vested in him, the right passes to the author's surviving spouse, children, and perhaps grandchildren. In the case of a surviving spouse with no surviving children or grandchildren, the spouse owns the entire interest. If there are surviving children, the spouse owns one-half of the termination interest and the children own the other half, split equally among them. If a child does not survive to the date of termination vesting, any surviving children of the deceased will receive equal shares of the deceased's termination rights.[63] If there are no successors to the termination right, it passes to the author's executor, administrator, personal representative, or trustee.[64] There is also a majority requirement in the execution of a termination right: a majority of the persons who succeeded to the termination right must agree to terminate it.[65]

Termination rights vest at the time the notice of termination was sent, while termination rights revert at the date specified in the notice.[66] In terms of succession of the termination rights, this means that if an author sends a notice of termination but dies before the date of termination occurs, the termination rights pass to the author's estate and not to his surviving spouse or children.[67] However, if the author dies, even within the five years after the initial thirty-five years, and has not issued a notice of termination, the termination rights will pass to the spouse or children if they issue such a notice. The author's estate itself cannot issue a notice of termination on the estate's behalf.[68] Also, if the author dies before the vesting of the termination rights and leaves no successors, the termination rights belong to "the author's executor, administrator, personal representative, or trustee."[69]

Snyder, 469 U.S. 153 (1985).
[62] NIMMER, *supra* note 59, § 11.01(a).
[63] *See* 17 U.S.C. §§ 203(a)-(b) (West 2009); *see also* NIMMER, *supra* note 59, § 11.03(2)(a).
[64] *See* 17 U.S.C. §§ 203(a)-(b) (West 2009).
[65] *See* 17 U.S.C. § 203(a)(1) (West 2009); *see also* NIMMER, *supra* note 59, § 11.03(A)(1).
[66] *See* 17 U.S.C. § 203(b)(2) (West 2009); *see also* NIMMER, *supra* note 59, §11.03(A)(1).
[67] *See* NIMMER, *supra* note 59, § 11.03(A)(1).
[68] *See id.* § 11.03(A)(3).
[69] 17 U.S.C. § 203(a)(2)(D) (West 2009).

B. *Termination Rights & Creditors' Judgments*

1. Protection from Creditors

Statutory termination rights are inalienable. The creator has no control over the transferability of the termination rights at his death because the rights immediately pass to his statutory heirs.[70] Consequently, creditors cannot reach these termination rights, as inalienable property is exempt from creditors.[71] The 1976 act states: "[t]ermination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."[72] Again, the rationale for making termination rights inalienable was to protect authors and their heirs in the bargaining process. If termination rights were alienable, authors could be coerced into assigning their termination rights along with the copyright for a small value at the beginning of the work's lifetime to the benefit of the grantee, which defeats the purpose of the termination rights.[73]

The inalienable nature of statutory termination is a response to the deficient protection of renewal rights for authors who secured original copyrights under the 1909 Act.[74] In *Fred Fisher Music Co. v. M. Witmark & Sons*, the Supreme Court held that the 1909 Copyright Act did not prohibit an author from assigning his renewal interest during the original term of the copyright.[75] In short, renewal rights are alienable.[76] However, the 1976 Act protects renewal rights granted prior to 1976 by granting the right to terminate the assignment of copyright renewal rights. According to the Southern District of New York, 17 U.S.C. § 304 (c) allows "[f]or transfers of renewal rights effected prior to January 1, 1978, [by] provid[ing] the author or the author's successors with the right to terminate a transfer and reclaim the rights."[77] Again, these termination rights are inalienable.[78]

2. Copyright Termination and Michael Jackson's Estate

A large portion of Michael Jackson's estate will most likely be

---

70 *See* 17 U.S.C. § 203(a)(5) (West 2009); Stewart v. Abend, 495 U.S. 207, 230 (1990). *But see* Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193 (2d Cir. 2008) (holding that grantees could defeat termination rights by "superseding" earlier grants).
71 *See* Michael Sjuggerud, *Defeating the Self-Settled Spendthrift Trust in Bankruptcy*, 28 FLA. ST. U. L. REV. 977, 979 (2001) (stating that creditors cannot reach a property interest that federal law has made inalienable).
72 17 U.S.C. § 203(a)(5) (West 2009).
73 *See* NIMMER, *supra* note 59, § 11.07.
74 *See id.*
75 Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 659 (1943).
76 *See* Music Sales Corp. v. Morris, 73 F.Supp.2d 364, 372 (S.D.N.Y. 1999).
77 *Music Sales Corp.*, 73 F. Supp. 2d at 372; 17 U.S.C. § 304(c) (West 2009).
78 *See Music Sales Corp.*, 73 F. Supp. 2d at 372.

comprised of copyrights. Jackson died $400 million dollars in debt.[79] If his estate is insolvent, testamentary gifts given by Jackson may be subject to collection by creditors. However, as discussed above, Michael Jackson's creditors will not be able to reach his termination rights.

Any of Michael Jackson's termination rights that are still viable, meaning the 35 year period has not passed and/or Jackson did not send notice to terminate any applicable copyrights transfers, passed to his statutory heirs at his death. Michael Jackson was divorced at the time of his death, and all three of his children survived his death. As such, the statutory successors to any copyright termination rights are his three children. Each child would receive one-third of the interest in the termination right to any applicable copyright.

So, for example, the three surviving children could have the power to terminate the assignment of the copyright for the hit song "Wanna Be Startin' Something." The song was copyrighted in 1983 and assigned in 1984.[80] Thus, this assignment is subject to termination in 2019. In the years 2019 through 2024, his children could demand the copyright to this song back if the assignment still exists, and receive a substantial amount of income from the continued licensed use of the copyright or create new assignments. Jackson's creditors, however, could not seize this income as the copyright termination rights ceased to be his property at this death.

IV. CREDITORS AND THE RIGHT OF PUBLICITY

A. *The Right of Publicity, Generally*

The right of publicity is defined as the right to control the commercial[81] use of one's identity.[82] This new right was first coined in the 1953 case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[83] Judge Frank wrote:

> We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an

---

79 *See* Nakashima & Veiga, *supra* note 1.
80 Sources on file with author.
81 The RESTATEMENT OF THE LAW OF UNFAIR COMPETITION defines commercial as for "purposes of trade;" It does not include news reporting or entertainment. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:35 (2004).
82 *See id.* § 1.3.
83 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

accompanying transfer of a business or of anything else.[84]

The right of publicity is considered an intellectual property right.[85]

The right of publicity was a response to celebrities who wanted to be in control of how and when their identities were commercialized. The right to privacy, with its emphasis on remedying the mental anguish of exposure, was an ill fit when a celebrity's identity was already widespread in the media.[86] The right of publicity is meant to protect the commercial value of the individual's identity, but not to compensate for mental distress as provided for in privacy law.[87] Publicity rights are a property right capable of being trespassed on, while the right to privacy is a personal tort action.[88] Similarly, publicity rights may be assignable while privacy rights are not.[89]

State law governs the right of publicity. Currently, there are thirty-one states that recognize a right of publicity.[90] In some states it is governed by common law and in others it is a statutory right.[91] The degree of protection varies within the states as well; some only protect appropriation of a person's name or image, while others protect voice, signatures, and taglines.[92] All states with statutory protection allow recovery for any damages or injuries caused by a violation of the statute.[93]

B. *Creditors' Access to the Right of Publicity*

The next pertinent issue to examine is creditors' access to the right of publicity. There exists a reluctance to allow creditors to seize publicity rights. If creditors are able to obtain a celebrity's right of publicity, they are then able to sell this right to the highest bidder and deprive the individual of the use of his identity. This

---

84 *Id.*
85 *See* MCCARTHY, *supra* note 81, § 1.8.
86 *See id.* § 1.25. Under the right of privacy, courts had difficulty applying the doctrine to celebrities who were frequently in the limelight. They denied relief to such individuals whose identities were unwillingly used in commercial ads because their identities were no longer private, so there could be no mental distress.
87 *See id.* § 1.7.
88 *See id.* William Prosser later divided privacy into four distinct torts: (1) intrusion; (2) disclosure; (3) false light; and (4) appropriation. His classifications have been accepted by the SECOND RESTATEMENT OF TORTS and nearly all state courts. *Id.* § 1.19.
89 *See* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953); MCCARTHY, *supra* note 81, § 1.27.
90 *See* MCCARTHY, *supra* note 81, §§ 6.3, 6.8. The thirty-one states are: Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.
91 *See id.* § 6.4.
92 *See* Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1336 (2002).
93 *See* MCCARTHY, *supra* note 81, § 6.5.

lack of control over one's identity is exactly what the right of publicity sought to protect.[94] Once a third party has bought an individual's publicity rights, a celebrity's identity may be used in ways that are offensive to the celebrity who no longer has standing to sue.

The celebrity's indignation over the use of their image may stem from a desire to protect their identity from all commercial exploitation, a desire to protect the value of their identity from excessive exploitation, or an aversion to the particular message of the advertisement itself.[95] Thus, publicity rights "implicate personal dignity, reputational interests, and human autonomy" to a higher extent than other intellectual property rights and should not be forcibly sold.[96] Forcible sale of the right of publicity also leads to the loss of future profits for the individual and serves as a disincentive to create future works.[97]

As such, publicity rights are usually not considered assets for legal claims.[98] The state of Illinois, for example, which acknowledges a right of publicity, explicitly bans any security interests in or attachments to publicity rights held by the debtor.[99] California reached the same result in the case of *Goldman v. Simpson*, by denying a motion by Frederic Goldman to assign O.J. Simpson's inter vivos right of publicity to satisfy a civil judgment in a wrongful death suit.[100] California Civil Code § 3344 grants a right of publicity that protects against the unauthorized commercial use of one's name, voice, signature, photograph or likeness without consent.[101] This right is voluntarily transferrable and assignable.[102] But the court declined to mandate the sale of Simpson's right of publicity despite the fact that the rights are assignable.

First, the court reasoned that while under California Code of Civil Procedure § 708.510, the court may assign the right to payment due from royalties or commissions of "intangibles" such as copyrights or patents, the recovery is limited to payment

---

94 *See* Jacoby & Zimmerman, *supra* note 92, at 1358.
95 *See id.* at 1359-60.
96 *Id.* at 1361. Certain states also exempt tangible property that is seen as integral to a person's identity and self-esteem, such as the homestead, wedding rings, or family heirlooms. *See id.*
97 *See id.* at 1330.
98 *See id.* at 1338, 1347. Publicity rights have been found to be an asset in divorce and tax proceedings. However, in these circumstances, the individual is not forced to divest the asset in its entirety, but instead share the profits. *See id.* at 1338.
99 765 ILL. COMP. STAT. ANN. 1075/15 (Lexis 2010); MCCARTHY, *supra* note 81, § 10.83.
100 *See* Laura Hock, *What's in a Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and the Suit's Implications for Celebrities*, 35 PEPP. L. REV. 347, 387 (2008).
101 CAL. CIV. CODE § 3344 (Deering 2010).
102 Although California Civil Code § 3344 does not explicitly mention assignment or transferability, it implies that consent must always be directly obtained from the individual. MCCARTHY, *supra* note 81, § 6.36.

received from those rights and does not outwardly allow assignment or transfer of the intangibles.[103] The right of publicity would fall under the category of an intangible, and therefore, a creditor could only collect on payments received from the right of publicity, and not seize the right itself.

The court also took into consideration the unique nature of the right of publicity. The right of publicity is intimately connected to human dignity and personality. To force the sale of the right might lead to the celebrity's image being used in "disgraceful" ways he does not approve of. A celebrity has the right to choose whether or not they wish to commercialize their fame. Forcing an involuntary sale of the right deprives the individual of this choice.[104] Furthermore, sale of the right of publicity may also include the right to force the celebrity to make public appearances. If so, mandating such appearances could be a form of involuntary servitude, in violation of the Thirteenth Amendment.[105] The court also discussed the impracticability of assigning the right of publicity to a creditor. If the right of publicity were assigned to a creditor, would the court need to continuously monitor the assignment until the judgment was fulfilled? Would the assignee be able to sue third parties who infringed upon the celebrity's right?[106]

Thus, despite the fact that the right of publicity is freely assignable, the judicial system and the legislature are hesitant to allow it to be involuntarily sold to creditors. There are very few cases where publicity rights were used to satisfy creditors' judgments, and these cases were only in the context of federal taxation or divorce.[107] None of these cases involved a selling of the right in its entirety—the celebrity was instead forced to share any income derived from the right or to pay additional estate taxes.[108] The unique, personable traits of the right of publicity warrant its special treatment as compared to other freely alienable rights. There is no clear way to sever the dignity interests of the individual from the economic benefits for the creditor.[109] Selling the right could be seen as infringing on an individual's dignity and autonomy. However, creditors could seek to attach a claim to any

---

103 CAL. CIV. PROC. CODE § 708.510 (Deering 2010); Hock, *supra* note 100, at 384.
104 *See* Hock, *supra* note 100, at 385.
105 *See id.* at 355.
106 *See id.* at 384-86.
107 *See* Estate of Andrews v. United States, 850 F. Supp. 1279 (E.D. Va. 1994); Piscopo v. Piscopo, 555 A.2d 1190 (N.J. Ch. 1988); Golub v. Golub, 527 N.Y.S.2d 946 (Sup. Ct. 1988); Elkus v. Elkus, 572 N.Y.S.2d 901 (N.Y. App. Div. 1991); *see also* Jacoby & Zimmerman, *supra* note 92, at 1338-39.
108 *See id.*
109 *See* Jody C. Campbell, *Who Owns Kim Basinger? The Right of Publicity's Place in the Bankruptcy System*, 13 J. INTELL. PROP. L. 179, 198 (2005).

income a celebrity received from their right of publicity to satisfy a judgment. But, it is important to remember that collecting on the right of publicity is not possible in the nineteen states that do not recognize that right at all.

C. *Creditors' Access to Post-Mortem Rights of Publicity*

Nineteen states recognize a descendible post-mortem right of publicity, and protection differs depending upon the jurisdiction.[110] The duration of this right varies from ten to 100 years after death, or in some states, is eternal.[111] States also have different laws regarding whether or not a post-mortem right of publicity is found to exist. Utah, for example, requires exploitation of the right during one's lifetime in order for the right to be descendible, while in other states the right is always descendible if the persona has commercial value.[112] Only two states have considered the issue of a common law right of post-mortem publicity and expressly rejected it—New York and Wisconsin.[113]

It is necessary to examine whether or not a creditor could reach a post-mortem right of publicity held by an insolvent estate. If this descendible post-mortem right can be freely devised to an heir by the celebrity testator, can creditors demand that the estate use this asset to satisfy the claim?

It appears that post-mortem rights of publicity are considered assets of the decedent's estate and reachable by creditors. Case law exists where the value of the deceased's right of publicity is included in the estate for federal estate tax purposes. In *Estate of Andrews*, the district court concluded that the value of the right of publicity embodied in a famous decedent's name is includable in the decedent's estate.[114] In that case, the executor of Virginia C. Andrews's estate did not include the value of her name as an asset on the estate tax return. The Internal Revenue Service sent a notice of deficiency stating that Andrews's name is an asset valued

---

110 *See* MCCARTHY, *supra* note 81, § 9.18. States that recognize post-mortem publicity include: California, Florida, Illinois, Indiana, Kentucky, Nevada, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, Nebraska, and Virginia. The following five states have a common law post-mortem right of publicity: Connecticut, Georgia, Michigan, New Jersey, and Utah. *Id.*

111 Indiana and Oklahoma have post-mortem publicity rights that last for 100 years. IND. CODE § 32-36-1-8; 12 (West 2010); OKLA. STAT. ANN. TIT. 12. §§ 1448-1449 (West 2010). Nebraska's post-mortem right of publicity has no stated duration. NEB REV STAT §§ 20-201-211 (Lexis 2010). *See also* MCCARTHY, *supra* note 81, § 9.19.

112 *See* Nature's Way Products, Inc. v. Nature-Pharma, Inc., 736 F. Supp. 245 (D. Utah 1990).

113 For New York, see N.Y. CIV. RIGHTS §§ 50-51 (2009). For Wisconsin, see WIS. STAT. ANN. § 995.50 (2009); Hagen v. Dahmer, No. CV-94-C-0485, 1995 WL 822644, at *4 (E.D. Wis. Oct. 13, 1995) (Wisconsin statute is limited to living persons and common law is similarly limited.). *See also* MCCARTHY, *supra* note 81, § 9.19.

114 Estate of Andrews v. United States, 850 F. Supp. 1279 (E.D. Va. 1994).

at $1,244,910.84 on the date of her death, creating a deficit of $649,201.77 in unpaid taxes.[115] If the post-mortem right of publicity is considered property of the estate, some administrators may have no other choice than to exploit the right in order to pay the tax due.[116] If an estate executor would have to sell a decedent's right of publicity to satisfy tax bill, it is also likely that the estate would have to sell the right to meet other obligations, such as private creditor bills.

However, this Note argues that it is problematic to include the post-mortem right of publicity as estate property that could be sold to satisfy creditor judgments. Objections to allowing the post-mortem right to be included in the estate are akin to the reluctance to force inter vivos rights to be sold to creditors.[117] First, the right of publicity is intensely unique to the individual dignity and autonomy. The right was created to protect an individual's image, and this protection should continue after death. An executor should not be forced to sell a deceased celebrity's image in a way that could taint the star's legacy.

California's post-mortem right of publicity statute was created to protect an individual's legacy – as evidenced by its legislative history. In 1985, California enacted a post-mortem publicity right statute. The rationale behind the statute was to protect deceased celebrity's images from abuse or ridicule.[118] The legislative history of the first statute stated:

> [T]he bill is intended to address circumstances in which (a) commercial gain is had through the exploitation of the name, voice, signature, photograph, or likeness of a celebrity or public figure in the marketing of goods or services or (b) a celebrity or public figure is subjected to abuse or ridicule in the form of a marketed product. Such goods or services typically involved the use of a deceased celebrity's name or likeness, e.g., on posters, T-shirts, porcelain plates, and other collectibles; in toys, gadgets, and other merchandise; in look-alike services.[119]

Later amendments to the statute, in response to the Marilyn Monroe[120] cases, granted post-mortem rights retroactively to any

---

115 *Id.* at 1281.
116 *See* Joshua C. Tate, *Immoral Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 GA. L. REV. 1, 20 (2009).
117 *See* discussion *supra,* notes 95-110.
118 *See* Kathy Heller, *Deciding Who Cashes in on the Deceased Celebrity Business*, 11 CHAP. L. REV. 545, 561 (2008).
119 Astaire v. Best Film & Video Corp., 116 F.3d 1297, 1303 (1997).
120 Federal District Courts in both New York and California held that Marilyn Monroe's post mortem publicity rights did not pass through her will because her death in 1962 occurred before any post-mortem rights existed, and thus Monroe could not bequeath property rights she did not own. *See* MCCARTHY, *supra* note 81, § 9.20.

person who died prior to January 1, 1985.[121] The first statute expressly granted the post-mortem rights to family members, as they are more likely to protect the artist's image from abuse or ridicule.[122] Future amendments of the statute, furthered by concerns for a celebrity's post-mortem image and the family's rights to such images, strengthened post-mortem publicity rights.[123]

The current statute, California Civil Code § 3344.1, creates a property right that is freely transferrable or descendible. If there is no testamentary provision for the publicity rights, they are included under the residue clause[124] of the will.[125] While the new amendments allow post-mortem rights of publicity to be freely alienable or descendible, the amendments still create the ultimate effect of granting the rights to individuals most sensitive to the image and reputation of the celebrity. Since no such rights existed prior to 1984, most celebrities who died before this time period did not specifically bequeath post-mortem publicity rights in their wills. As such, these rights would fall to the residuary heirs, "ensuring that the rights are eventually owned and controlled by an individual or entity with very limited sensitivity to 'abuse or ridicule' of the celebrity's name and likeness."[126] Since there is a specific intent to protect deceased celebrities from abuse and ridicule in the post-mortem right of publicity statutes, the debtor-creditor system should follow suit and not force heirs to exploit the rights to pay off debts.

In addition to legislative protection of post-mortem publicity rights, estate law also provides a mechanism to protect celebrities' post-mortem identity through "deadhand" restrictions. Deadhand restrictions are conditions that the testator placed in his will or trust regarding how his property should be treated after his death.[127] Deadhand restrictions regarding an individual's post-mortem right of publicity include the manner in which their post-mortem persona can be used.[128] Courts decide whether or not to uphold the restrictions based upon their reasonableness. The factors courts examine are: (i) the nature of the property; (ii) the nature of the restriction; (iii) the purpose of the restriction and;

---

121 *See id.*
122 *See* Heller, *supra* note 118, at 561-62.
123 *See id.* at 554.
124 The residue is the remainder of the estate after payment of all debts, expenses, taxes, and testamentary gifts have been made. BLACK'S LAW DICTIONARY 252 (3d Pocket Ed. 2006).
125 *See* CAL. CIV. CODE § 3344.1(b) (West 2009).
126 Heller, *supra* note 118, at 561.
127 *See* William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions,* 58 ARK. L. REV. 43, 46 (2005).
128 *See id.* at 48.

(iv) the impact of the restriction on the heirs and others.[129] Using this test, a testator's reasonable restrictions on the use of their post-mortem identity should be upheld.[130] The right to publicity is an extremely personal right; as such, the testator should have control over the right. Respecting testamentary intent particularly protects celebrities who did not commercialize their identities during their lifetime.[131] Even if the right of publicity is lucrative, the testator's intent should prevail - their identity should not be sold to satisfy a creditor's judgment. To do otherwise would be contrary to the testator's intent, and potentially harmful to the legacy of the deceased.

The valuation of postmortem publicity rights may also be problematic if they were used to satisfy a creditor's judgment. The court will rely on expert opinion to determine the value of the rights, as it is a unique asset.[132] This method, however, can be speculative. It is difficult to determine what effect death will have on the publicity rights of the celebrity. According to Paul Caron, on "one hand, death would undoubtedly adversely affect the value of the right as [a famous athlete's] extraordinary exploits become more removed from the public's consciousness. On the other hand, death would remove the possibility of some future transgression that could undercut the value of the name."[133]

For example, Elvis Presley's publicity rights at the time of his death in 1977 were valued at less than $5,000,000. By 1999, the value of his publicity rights was estimated at $75,000,000.[134] The uncertainty in valuing the post-mortem right of publicity makes it difficult to assign the rights to satisfy a judgment. The valuation could also include uses that the deceased would find disgraceful, and therefore his heirs should not be forced to use the deceased's identity in that fashion.[135] Thus, contrary to current policy, the post-mortem right of publicity should not be accessible to creditors of the estate as it undercuts the purpose of the right, it may not respect testamentary freedom, and the right is difficult to valuate.

---

129 *See id.* at 59.
130 *See id.* at 96.
131 *See id.* at 92.
132 *See* Mitchell M. Gans et al., *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203, 206 (2008).
133 Paul L. Caron, *Estate Planning Implications of the Right of Publicity*, 68 TAX NOTES 95, 96 (1995).
134 *See id.*
135 *See* Drennan, *supra* note 127, at 50.

V. ESTATE PLANNING TECHNIQUES FOR INTELLECTUAL PROPERTY HOLDERS

A. *Trusts*

There are certain nonprobate transfers of intellectual property that may escape a creditor's reach. The issue of creditors' access to nonprobate transfers was comprehensively addressed by the Uniform Law Commission in section 102 of the Uniform Nonprobate Transfers on Death Act.[136] This act was also adopted in full by section 6-102 of the Uniform Probate Code as well.[137] Section 102 states:

> A "nonprobate transfer" means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this State to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor's probate estate.

The transferees of such a nonprobate transfer are liable for claims against the decedent's estate up until the value of the transfer if the probate estate cannot satisfy the debts.[138]

In order for property to be protected from creditors, the estate-planning vehicle cannot fall under the definition of nonprobate transfer as set forth in Section 102.[139] The settlor must surrender control of the property and remove it completely from the estate. For example, creditors cannot reach copyrights that have been placed in certain trusts.[140]

A trust is "an arrangement whereby a trustee manages property as a fiduciary for one or more beneficiaries."[141] A trust can be used as a means of a gratuitous wealth transfer or in a commercial setting.[142] The trustee holds legal title to the property that has been granted by the settlor, while the beneficiaries hold equitable title.[143] The beneficiaries are usually entitled to payments from the trust income and/or payments from the trust corpus. It is possible for a settlor to hold all three positions in a trust: settlor, trustee, and beneficiary.[144] However, if a settlor is

---

136 *See* Gagliardi, *supra* note 45, at 852.
137 *See id.*
138 *See id.* at 854-55.
139 *See id.* at 854.
140 *See infra* § IV.A.
141 JESSE DUKEMINIER, WILLS, TRUSTS AND ESTATES 541 (8th ed. 2009).
142 *See id.* at 555.
143 *See id.* at 541.
144 *See id.* at 547.

also a trustee, there must be an additional beneficiary because a trustee must owe fiduciary duties to someone beside themselves. Without the additional beneficiary, the equitable and legal titles would merge.[145] In the trust relationship, a beneficiary may also be a trustee.[146] An inter vivos trust is created during the settlor's lifetime by either a declaration of a trust[147] or by a deed of trust, as opposed to a testamentary trust, which is created by a will.[148]

One of the most common trusts used to protect property from creditors is an irrevocable inter vivos trust. Irrevocable simply means that once created, the trust cannot be amended, modified, or terminated.[149] Such a transfer is not subject to creditors' claims under section 102 as long as the settlor did not have the power to remove the trust assets during his lifetime.[150]

However, it is necessary to contrast irrevocable inter vivos trusts to revocable inter vivos trusts for estate planning purposes. In 1940, the Supreme Court held in *Helvering v. Clifford* that a settlor who created a revocable five year trust where the income was payable to third party beneficiaries, but retained complete control over the corpus of the trust and its reversion, was still considered the owner of the trust's assets and could be taxed on the income of the corpus.[151] This decision is significant as the Internal Revenue Service is a creditor.

The Treasury department later codified such trusts as grantor trusts in the Internal Revenue Code, sections 671-677. When a settlor holds a reversionary interest over more than five percent of the initial value of the trust at its inception, a grantor trust is created.[152] So, if the settlor retains enough control over the trust

---

145 *See id.* at 548. The mandatory existence of additional beneficiaries when the trustee is also a beneficiary does not necessary harm the settlor. The settlor could place property in a trust, declare himself the trustee, and receive the income for life from the trust. The additional beneficiary would only take at the settlor's death. *See id.*

146 *See id.*

147 A declaration of trust is where the settlor declares that he is holding certain property in trust; it does not require delivery, only intention. *See id.*

148 A deed of trust is where the settlor transfers the property to another trustee. *See id.*

149 BLACK'S LAW DICTIONARY 736 (3d Pocket Ed. 2006). There are exceptions to the rule that irrevocable trusts cannot be modified. An irrevocable trust may be modified or terminated if both the settlor and all the beneficiaries agree. However, if the settlor does not agree or he is dead, the court may approve a modification when, due to unanticipated circumstances, "modification or deviation will further the purposes of the trust." RESTATEMENT (THIRD) OF TRUSTS § 66 (2003); UNIF. TRUST CODE § 412 (2000). Second, if the settlor is dead and there are no unforeseen circumstances, but all beneficiaries consent to a modification or termination, the key issue is the material purpose of the trust. If all beneficiaries of a trust consent to modification, the court may order it so as long as "it determines that the reasons for termination or modification outweigh the material purpose" of the trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 65 (2003). The Uniform Trust Code allows modification or termination if such change is not inconsistent with a material purpose of the trust. UNIF. TRUST CODE § 411 (2000).

150 *See* Gagliardi, *supra* note 45, at 857-60.

151 Helvering v. Clifford, 309 U.S. 331 (1940).

152 *See* DUKEMINIER, *supra* note 141, at 576.

principle, it is not only attributable to the settlor for tax purposes, but it is also available to satisfy creditors' judgments against the debtor-settlor. In sum, estate planners must not leave any valuable reversionary interest to the settlor in order to avoid income taxes and creditors.[153]

In a similar vein, utilization of revocable trust assets to satisfy creditors' judgments against the settlor was further clarified in *State Street Bank & Trust Co. v. Reiser*.[154] In *State Street Bank*, the plaintiff bank sought to possess the assets of a revocable inter vivos trust in satisfaction of the debt owed to the bank by the estate of the deceased settlor. The settlor retained the power to amend or revoke the trust, and the right to direct the disposition of the principle and income during his lifetime. The court held that when a person creates a revocable trust and retains discretionary powers to amend or revoke it, and the probate estate is not sufficient to pay the debts of the decedents, the settlor's creditors may reach the trust assets. Both *Helvering* and *State Street Bank* are in line with section 102 of the Uniform Nonprobate Transfers on Death Act.

Basically, in terms of revocable trusts and creditors rights, if the settlor had control over certain assets at the time of his death, and could have used those assets for his own benefit, creditors may reach those assets.[155] However, the corollary to this rule is that "to the extent the power of revocation must be exercised in conjunction with another person, the assets of the trust generally will not be subject to creditor claims under Section 102" of the Uniform Nonprobate Transfers on Death Act.[156] In order for a beneficiary to avoid liability, it is necessary for the estate planner to spread discretionary authority within a revocable inter vivos trust.

1. Keeping the Property and Avoiding Creditors – Self Settled Asset Protection Trusts

Another method to protect assets is the use of self-settled asset protection trusts. However, this kind of trust is relatively controversial and is only statutorily recognized in eleven states and several foreign jurisdictions.[157] It is controversial because the traditional rule is that a settlor cannot shield personal assets from

---

153 *See id.* at 377.
154 State Street Bank & Trust Co. v. Reiser, 389 N.E.2d 768 (Mass. App. 1979).
155 *See State Street*, 389 N.E.2d at 768; *see also* Livesay v. Carolina First Bank, 665 S.E.2d 158 (N.C. App. 2008).
156 Gagliardi, *supra* note 45, at 855.
157 *See* DUKEMINIER, *supra* note 141, at 625. Alaska was the first state to establish a trust of this kind. Delaware, Misssouri, New Hampshire, Nevada, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming have passed similar statutes. *See id.* The rationale behind passing this type of trust is to attract trust business to the state. *See id.*

creditors by placing them into a trust for the settlor's own benefit. Even if the trust was irrevocable and contained a spendthrift provision, if there were assets available to the settlor during his lifetime, these assets would be reachable by creditors at his death. But, a self-settled asset protection trust creates the opposite effect; it protects a settlor's assets against his own creditors.[158] In Alaska and Delaware, self-settled asset protection trusts have no limit on duration; they can last indefinitely.[159] In most states, in order for the trust to be valid, the initial transfer must not be fraudulent.[160] Thus, any holder of intellectual property could transfer the property or its profits into a self-settled asset protection trust, and any future claims by creditors against this property would be barred.

B. *Alternatives to Trusts*

In addition to protecting actual intellectual property, creators could also protect the income, such as royalties or licensing fees, they receive from the intellectual property. This can be done by placing the monetary assets in an irrevocable inter vivos trust as described above or using the income to buy jointly held real property, life insurance, or U.S. savings bonds. Using these mechanisms, beneficiaries are protected from the deceased settlor's creditors. For example, jointly held real property is explicitly excluded from creditors' reach by the wording of section 102, which states a nonprobate transfer is one "other than a transfer of a survivorship interest in a joint tenancy of real estate."[161]

A joint tenancy in real property requires that two or more owners take the same interests in a property by the same instrument and right of possession. In a joint tenancy, there also exists a right of survivorship, where the surviving joint tenant assumes the deceased's interests.[162] A joint tenancy is not subject to creditors' judgments because the decedent's share of the property is treated as non-existent at his death.[163] The rationale behind this policy is to ease the title search process and to keep the surviving tenant's real estate out of probate court.[164] For example, if a husband and wife purchase a home as joint tenants,

---

158 *See* Gagliardi, *supra* note 45, at 858-60.
159 *See* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1043-44 (2000).
160 *See* DUKEMINIER, *supra* note 141, at 626.
161 Gagliardi, *supra* note 45, at 862. But a few states, such as South Dakota, do subject jointly held property to the claims of the deceased tenant. *See id.* at 863.
162 BLACK'S LAW DICTIONARY 709 (3d Pocket Ed. 2006).
163 *See* DUKEMINIER, *supra* note 141, at 418.
164 *See* Gagliardi, *supra* note 45, at 862-63.

and one spouses dies heavily indebted, the deceased spouse's creditors will not be able use the real estate to satisfy their judgments. Thus, joint tenancy is one more method to protect income earned from intellectual property.

Life insurance contracts can also be used to transfer property at death. A life insurance contract is a contractual arrangement where the settlor pays a premium to the insurance company, and when he dies the insurance company must pay the policy benefits to the named beneficiary.[165] If the beneficiaries are either a spouse or child, the beneficiaries will not be forced to pay the settlor's creditors.[166] This protection does not come from section 102, as the settlor has the power to change the beneficiaries up until death. The protection of life insurance benefits is created by state statute. In a similar vein, federal and state laws also protect retirement plans, granting either partial or complete exemption from creditors.[167] As a result, an intellectual property holder could use the income from the property to purchase life insurance contracts or retirement plans to shield their income from any future creditors.

C. *Intellectual Property and Tax Implications*

Furthermore, intellectual property holders may also want to take into account tax implications during the estate planning process. Property that is owned or controlled by the creator is includable in the estate for federal estate tax purposes, and the right of publicity, unless otherwise transferred, is also includable.

In *Estate of Andrews*,[168] the court found that the value of the right of publicity associated with a decedent's name is includable in their estate under section 2033 of the Internal Revenue Code, which describes the valuation of the gross estate at death.[169] The celebrity in this case was author Virginia C. Andrews. Following her death in 1986, the estate did not include her name as a property interest on the estate tax return. After auditing the return, the Internal Revenue Service found Andrews' name to be worth roughly $1.2 million. The court found that the right of publicity associated with Andrews' name is includable under section 2033 despite the fact it is considered "intangible property."[170]

---

165 *See* DUKEMINIER, *supra* note 141, at 419.
166 *See id.* at 418.
167 *See* Gagliardi, *supra* note 45, at 863-64.
168 850 F. Supp. 1279 (E.D. Va. 1994).
169 *See* Caron, *supra* note 133, at 95; 26 U.S.C. § 2033 (West 2011).
170 *Id.* The fact that post-mortem publicity rights are includable in a decedent's estate for tax purposes defeats the statute's purpose to protect these rights. If the rights are includable in the estate, the estate tax can be quite expensive. If the estate is otherwise

On a separate note, bequeathed post-mortem publicity rights may not be included in estate tax valuation depending upon the beneficiary.[171] If the rights are given to a surviving spouse under the estate tax marital deduction, they will not be included in the estate valuation for tax purposes. The same is true if they are given to a charity under the charitable deduction.[172] Also, using the estate planning methods previously described will help protect the decedent's estate from heavy tax burdens stemming from the post-mortem right of publicity.

The Copyright Act of 1976 also provides a tax benefit for copyright holders. Prior to this act, if a copyright holder transferred anything less than the entire copyright, the court deemed the transfer a license only. With the 1976 Copyright Act came divisibility. Divisibility allows a holder to grant less than full ownership of a copyright, but the effect of this transfer that it is still considered an absolute assignment of ownership. For income tax purposes, this allows a copyright owner to shift income to family members in a lower income bracket. For estate tax purposes, a copyright owner can reduce the gross amount of his estate by transferring separate copyright rights. However, as stated previously, if the author retains too many rights to his copyright, it may be included in the author's estate.[173]

Another method to help avoid tax burdens is through incorporation. By creating a corporation that owns the intellectual property, authors can help control income tax liability by controlling salary payments. The excess capital can then be diverted to into corporate pension plans or profit sharing plans for the authors. Secondly, incorporating allows the creator to give income to family members through dividends. The dividends could also qualify for the annual gift tax exclusion, helping to reduce the donor's gift tax burden.[174]

Another benefit of incorporation includes the possible deferment of estate tax payments. If the organization is deemed to be a "closely held business," and the value of the creator's interest in that business exceeds thirty-five percent of the gross estate, the Internal Revenue Service will allow the estate tax to be paid in ten equal installments starting no later than five years after

---

illiquid, the heirs of the publicity rights may be forced to exploit the decedent's image despite the decedent's or heirs' wishes to the contrary. This is problematic for celebrities who valued their privacy and did not exploit their publicity rights during their lifetime. Modifying state laws to make post-mortem rights of publicity automatically pass to statutory heirs would bypass the issue of estate tax, and may also protect the creator from creditors since the property is inalienable. *See id.* at 97; Gans, *supra* note 132, at 207.

171 *See* Gans, *supra* note 132, at 206.

172 *See id.*

173 *See* Perrotta, *supra* note 52, at 100.

174 *See id.* at 101-02.

death. This is beneficial to an estate that is comprised mostly of intellectual property, which could be illiquid, by giving the executor time to create liquidity to pay the estate tax. Finally, incorporation may also help avoid capital gains tax on any copyrights sold by the authors.[175] If a corporation holds the intellectual property, it may be considered as being held primarily for sale or as inventory, so any income received on this property would not be considered capital gains.[176]

D. *Michael Jackson's Estate Planning*

The late Michael Jackson, in accordance with his last will, disposed of his entire estate into a trust by way of a pour-over clause. The will states:

> I give my entire estate to the Trustee or Trustees then acting under that certain Amended and Restated Declaration of Trust executed on March 22, 2002 by me as Trustee and Trustor which is called the Michael Jackson Family Trust, giving effect to my amendments thereto made prior to my death. All assets shall be held, managed, and distributed as a part of said Trust according to its terms and not as a separate testamentary trust.[177]

As demonstrated above, a pour-over clause allows the settlor of an inter vivos trust to transfer additional property to the trust at his death.[178] It is not clear whether the Michael Jackson Family Trust is revocable or irrevocable as pour over clauses are valid for either type of trust.[179] Regardless of the trust type, property that is disposed of by a pour-over clause must first be probated.[180] As a result, the future trust property is first considered to be assets of the estate and subject to creditors.[181] It is likely that Jackson's trust lawyers advised him to fund the trusts as fully as possible before death to avoid probate of these assets, including his valuable copyrights.[182]

The trust property that was transferred before Michael Jackson's death may be protected from creditors depending upon

---

175 *See id.*
176 *See id.*
177 *Last Will of Michael Joseph Jackson: Transcript of Michael Jackson's Last Will and Testament*, *available at* http://www.foxnews.com/entertainment/2009/07/01/michael-joseph-jackson/ (last visited Mar. 25, 2011) [hereinafter *Last Will of Michael Joseph Jackson*].
178 *See* MARK L. ASCHER ET AL., SCOTT AND ASHER ON TRUSTS § 7.1.3 (Aspen 2009).
179 *See id.* Moreover, information on Michael Jackson's trusts will probably remain private unless there is future litigation as trust documents do not need to be probated, which is a main benefit of non-probate transfers. *See* Martin, *supra* note 44, at 43-44, 53.
180 *See* Martin, *supra* note 44, at 55.
181 *See supra* note 49 and accompanying text.
182 *See* Martin, *supra* note 44, at 55-56; Ryan Davis, *IP Battles to Ensue Following Michael Jackson's Death,* LAW 360, June 26, 2009, www.law360.com.

the type of trust created. If the trust is irrevocable, it is probably not subject to creditors, as long as Jackson did not retain the sole power to withdraw property from the trust during his lifetime.[183] However, from the description of the will it appears that Jackson was a trustee of the trust.[184] As such, it would be necessary to examine Jackson's level of control over the trust property and whether there were additional trustees in order to determine the level of protection afforded. If the trust was revocable, there is little chance that the property included in the trust will be protected from Jackson's creditors, unless discretionary power of the trust was spread between several trustees.[185] However, as previously discussed, Jackson's copyright termination rights and post-mortem publicity rights will still be shielded from his creditors. His copyright termination rights are protected because they are statutorily inalienable. Jackson's post-mortem publicity rights should be protected because of the host of issues associated with the forcible sale of this right, including the protection of identity, testamentary freedom, and valuation.[186]

CONCLUSION

This Note has explored creditors' access to intellectual property rights in probate transfers as well as non-probate transfers, using the recent death of Michael Jackson as an example. While intellectual property is usually accessible to creditors if the author dies bankrupt, there are two intellectual property rights that may be immune: copyright termination rights and the right of publicity. Intellectual property holders also have several estate planning options available to protect their work and its income from creditors and tax burdens, as outlined in this Note.

Jessica Bozarth[*]

183 *See supra* note 149-150 and accompanying text.
184 *See Last Will of Michael Joseph Jackson*, *supra* note 177.
185 *See supra* notes 154-155 and accompanying text.
186 *See supra* notes 79-93, 110-135 and accompanying text.

[*] Staff Member, Cardozo Arts & Ent. L.J. (2009-2010). J.D. Candidate, Benjamin N. Cardozo School of Law (2011); B.A., magna cum laude, Drexel University (2008). I would like to thank the editors and staffers of the *Cardozo Arts & Entertainment Law Journal* for all of their assistance in the publication of this Note. Special thanks to Professor Stewart E. Sterk for his advice throughout the writing process.