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Lawyers Eye King of Pop's Case for Estate Valuation Answers



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By [Matthew Beddingfield](#) and [Allyson Versprille](#)

Estate tax attorneys are hoping a U.S. Tax Court case involving the estate of Michael Jackson will clarify for other estates how to properly value a celebrity's likeness at death for tax purposes.

The trial, which ended Feb. 24, deals with the vastly different values the Jackson estate and the Internal Revenue Service placed on the star's "right of publicity," or right to control the commercial use of Jackson's name or image after his death in 2009. The estate, pointing to the lack of endorsement deals and accusations of child molestation later in Jackson's life, placed a value of \$2,105 on his after-death image rights. The IRS, using the success of Jackson's estate in monetizing the singer's name and image to the tune of more than \$1 billion through licensing deals, said that figure should be \$161 million. The 40 percent tax on it would be about \$64.5 million (*Estate of Jackson v. Commissioner*, T.C., No. 17152-13, trial ended 2/24/17).

So how does a valuation discrepancy of millions of dollars occur? According to tax and estate professionals, both parties in the Jackson case are overreaching. With a Tax Court trial pending concerning the Whitney Houston estate's intellectual property and image rights, and the death of Prince in April 2016, whose depth of untapped intellectual property is still unknown, estate planners and tax litigators will likely look to the Jackson case for guidance on to properly value the after-death image.

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"Assuming this case goes to opinion, it will have significant precedential value," said Matthew F. Kadish, a partner at Kadish, Hinkel & Weibel who specializes in tax and estate issues.

The customary rules for estate valuations go out the window when dealing with a celebrity, Jeffery E. Nusinov, managing attorney of Nusinov Smith LLP, told Bloomberg BNA. Nusinov represented the estate of Tom Clancy, the best-selling author of "Clear and Present Danger" and other military thrillers, in a \$11.8 million tax liability case against the IRS in 2016.

Regarding celebrity estate cases, specifically in terms of image right valuations, Nusinov said, "the same concepts you typically deal with are exponentially more complicated. You now have a public perception that doesn't match the individual's actual pre-death

financial state. Image doesn't always mean you have money in the bank."

Looking Back

While the concept of the right of publicity as a distinct commercial tort was recognized by the U.S. Supreme Court in 1977, the issue of a celebrity's estate being responsible for tax on the individual's right of publicity wasn't addressed until a 1994 case involving the estate of V.C. Andrews, the best-selling author of "Flowers in the Attic."

The author's estate failed to list Andrews's name among its assets when it filed its estate tax return. The IRS issued a deficiency notice, claiming that Andrews's name was an asset that held a value of more than \$1.2 million on the date of her death, rendering a tax deficiency of \$650,000. A federal district court used elements of both the estate's and the IRS's valuations, and concluded that Andrews's name had a value of \$700,000 at the time of her death. The ruling changed the common thinking used by estate planners that a decedent's right of publicity had no value for federal estate tax purposes at the time of the taxpayer's death.

Notable Right-of-Publicity Estate Cases

	<p>• Case <i>Estate of Andrews v. United States</i> <i>U.S. Court of Appeals for the Eastern District of Virginia</i></p> <p>• Status Decision entered May 1994</p>	<p>• Issue Court ruled that bestselling author V.C. Andrews's estate owed tax on author's right of publicity, valued by the court at \$700,000. Ghostwriters had been writing under Andrews's name after her death. Landmark case finding that a descendible right of publicity should be included in a decedent's gross estate for federal estate tax purposes.</p>
	<p>• Case <i>Milton H. Green Archives, Inc. v. CMG Worldwide, Inc.</i> <i>U.S. Court of Appeals for the Ninth Circuit</i></p> <p>• Status Decision entered August 2012</p>	<p>• Issue Court ruled that The Milton Green Archives could continue selling images of Marilyn Monroe without paying Monroe's estate. The case led to California recognizing postmortem publicity rights.</p>
	<p>• Case <i>Estate of Jackson v. Commissioner</i> <i>U.S. Tax Court</i></p> <p>• Status Petition filed July 2013. Trial has concluded</p>	<p>• Issue Michael Jackson's estate challenges an IRS valuation of \$161 million for the pop star's right of publicity. According to the estate, Jackson's image at death only had a value of \$2,105 due to accusations of child molestation and lack of endorsement deals later in life.</p>
	<p>• Case <i>Estate of Houston v. Commissioner</i> <i>U.S. Tax Court</i></p> <p>• Status Petition filed May 2016. Joint status report due from both parties May 29, 2017</p>	<p>• Issue Whitney Houston's estate challenges more than \$11 million in IRS-assessed estate tax deficiencies and penalties. According to the IRS, the estate underreported the value of the singer's intellectual property rights, including her publicity rights.</p> <p>a Bloomberg BNA graphic</p>

Josh Eagle, the University of South Carolina's Solomon Blatt professor of law, represented the IRS in the Andrews case. Eagle told Bloomberg BNA that the government based its valuations of the estate's right of publicity on the notion of publishers using Andrews's name to "ghostwrite" novels in her style of storytelling. "It's purely the creative product that is connected to the value of the name. If a new song 'produced by' Michael Jackson came out that would be the closest thing," he said.

Others cases, including Marilyn Monroe's estate suing over the right to use images of the actress without paying for publicity rights, have further solidified the idea that an estate has a responsibility to pay tax on the deceased's after-death image rights. However, the issue of how to correctly value the rights without running afoul of the IRS is still creating headaches for practitioners, estate tax attorneys told Bloomberg BNA.

An Issue of Timing

Valuing a celebrity's right of publicity can be likened to using a weigh station at a truck stop, Kadish said. "You weigh the value at the time of death. This is the razor's edge that the whole issue in the Jackson estate case is teeter-tottering on," Kadish said. "The taxpayer in the Michael Jackson case is arguing to look back, and the IRS is arguing to look forward."

Jonathan S. Forster, a shareholder at Weinstock Manion in Los Angeles who advises clients on estate planning matters, said there was an "explosion" in the value of Jackson's publicity rights after his death. "Planners try to argue that 'we're valuing the name and likeness at the moment the person passes away,' which is before this explosion takes place," Forster said, adding that the IRS has the benefit of hindsight when looking at what it thinks would be a fair value of the celebrity's publicity rights.

Kadish said that while some case law allows events after the death of a taxpayer to be used when valuing image rights, he thinks the Tax Court will hold that the IRS can't include events that

occurred after Jackson's death to calculate a taxable sum.

"The argument for the taxpayer is that his image was toxic. People didn't want to be around him, people misunderstood him," Kadish said. "Their argument is that the value is less because of toxicity, and I agree with that argument."

Forster echoed that view, saying that if the purpose of the federal estate tax return is to report the value as of the person's date of death, he predicts the IRS will have a difficult time justifying the inclusion of Jackson's post-death financial success in the value of his estate.

Entrepreneurial Estate

The IRS argued in a [Feb. 1 pretrial brief](#) that the post-death events that generated income for the estate—including a documentary entitled "This Is It" and Cirque du Soleil shows that used the singer's image and songs—were foreseeable and should be considered in valuing Jackson's right of publicity at the time of his death.

"Subsequent events, which are reasonably foreseeable as of the valuation date, may be considered because they would be foreseeable to a willing buyer and a willing seller and they would therefore affect the valuation of the property as of the date of death," the IRS said.

"The IRS really has a good argument because the value of Jackson's image rights after death turned out to be staggering," Kadish said, referencing

Jackson's current first-place ranking on Forbes' [top-earning dead celebrities list](#).

However, some practitioners think the IRS is asking too much.

The government is asking the estate to have a crystal ball in conducting its valuations, Nusinov said. "You have to look at what opportunities may have been available at the date of death versus opportunities created by an entrepreneurial legatee who was able to transform a brand into an economic success," Nusinov said, adding that the value of the celebrity's right of publicity would be significantly diminished by a trustee in charge of that aspect of the estate who didn't have an "entrepreneurial spirit."

"Years after the death of Michael Jackson you have an executor of the estate that happened to make wise decisions based on taking good guidance and trying to maximize it," Nusinov said, highlighting Jackson's estate successfully monetizing the singer's name, likeness and music. "The government now wants to penalize this person because it did turn out to be a success. They are saying 'you just happened to be the person there and anyone could have done it,' and it's simply not the case."

Key to Winning?

The key to winning a case like Jackson's is being able to put forth the more reasonable argument for how the estate valued the deceased's image rights, Scott Weingust, a valuation analyst and

managing director at Stout Risius Ross Inc., said.

“From the IRS’s perspective, ‘you don’t want to be overreaching,’” Weingust said. “If you’re the estate, you don’t want to do everything you can to get the lowest possible value. You want to be forthcoming that there is opportunity and there is value and you accounted for it.”

An opinion in the Jackson estate case isn’t likely for at least a year. Post-trial briefs are expected within the next four months.

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