

## Right of Publicity Laws: New Jersey

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Status: **Law stated as of 14 Sep 2021** | Jurisdiction: **New Jersey, United States**

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

### Overview of State Right of Publicity Law

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

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

New Jersey has recognized a common law right of publicity since at least 1907, when the court held that an individual has the right to prevent the unauthorized, commercial appropriation of their name or likeness (*Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 141-43 (Ch. 1907)).

New Jersey courts at first characterized the right of publicity as a privacy right, but it is now firmly grounded as a property-based right (*McFarland v. Miller*, 14 F.3d 912, 917 (3d Cir. 1994) (applying New Jersey law)). The court later clarified that if a plaintiff's claim is based on the appropriation of their likeness and name for the defendant's commercial benefit, it is an action for invasion of their property rights rather than injury to the person (*Canessa v. J.I. Kislak*, 97 N.J. Super. 327, 340-41 (Law Div. 1967)).

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

New Jersey has adopted the Restatement (Second) Torts (Restatement (Second) Torts § 652C), incorporating the appropriation invasion of privacy tort into its law. However, New Jersey considers this tort as a property-based tort and uses the terms "appropriation" and "right of publicity" interchangeably (*Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 907-08 (D. N.J. 1986) (applying New Jersey law)).

### Persons Protected

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

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

##### Natural Living Persons

New Jersey's common law right of publicity extends to all natural living persons, whether celebrity or noncelebrity.



The distinction between celebrities and others pertains only to the issue of damages. (*Canessa*, 97 N.J. Super. at 351-52.)

### Deceased Persons

The US District Court for the District of New Jersey held that New Jersey common law would recognize a postmortem right of publicity. However, the court did not decide whether this right survived death if the person's persona was not exploited during their lifetime, as the publicity of the person in question, Elvis Presley, was clearly commercialized during his life. (*Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339, 1355, n.10 (D.N.J. 1981).)

The court also avoided deciding how long the right would survive death, as that was not an issue in the case. The court did, however, suggest that a time be set by the New Jersey state legislature, which has not happened to date. (*Estate of Elvis Presley*, 513 F. Supp. at 1355 n.10.)

In a later case, the court cited *Estate of Elvis Presley* for the proposition that New Jersey common law would recognize a postmortem right of publicity (*Prima v. Darden Rests., Inc.*, 78 F. Supp. 2d 337, 345, 349 (D.N.J. 2000)). The US District Court for the Central District of California predicted that the New Jersey Supreme Court would set a postmortem right of publicity lasting 50 years after an individual's death (*Hebrew Univ. of Jerusalem v. Gen. Motors, LLC*, 2015 WL 9653154, at \*3 (C.D. Cal. Jan. 12, 2015)).

In another case, the son of Thelonious Monk filed a right of publicity claim against a brewery that had used Monk's name, image, and likeness to advertise one of its products. The US District Court for the Northern District of California, applying New Jersey law, held that the plaintiff pled sufficient facts to state a prima facie claim of infringement of its right of publicity. (*Monk v. North Coast Brewing*, 2018 WL 646679, at \*4-5 (N.D. Cal. Jan. 31, 2018).)

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

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

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

### Statute

There is no New Jersey statute that recognizes a right of publicity.

### Common Law

#### Duration

New Jersey recognizes a postmortem right of publicity. The New Jersey State Legislature has not addressed the duration of any postmortem right. The US District Court for the District of New Jersey suggested that the legislature set a time period and referenced the Copyright Act's 70-year duration as potentially instructive (*Estate of Elvis Presley*, 513 F. Supp. at 1355 n.10). However, the US District Court for the Central District of California has predicted that the New Jersey Supreme Court would set a postmortem right of publicity lasting 50 years after an individual's death (*Hebrew Univ. of Jerusalem*, 2015 WL 9653154, at \*3).

#### Exploitation Requirement

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

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

### Statute

There is no New Jersey statute that recognizes a right of publicity.

### Common Law

Under New Jersey common law, the right extends to all natural persons, celebrity and noncelebrity alike. The issue of commercial value is relevant only to the question of the amount of damages. (*Canessa*, 97 N.J. Super. at 339-40.)

For living persons, New Jersey does not require previous commercial exploitation of a person's persona for them to have a right of publicity. In one case, the plaintiffs, professional golfers, had not exploited their persona. The court noted that this lack of exploitation is not a justification for others to do so because the plaintiffs may wish to do it later. (*Palmer v. Schonhorn Enter., Inc.*, 96 N.J. Super. 72, 79 (Ch. Div. 1967).)

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

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

New Jersey law is undecided on whether the postmortem right of publicity extends to individuals whose persona was not exploited during their lifetime. In one case involving the postmortem right of publicity, the court expressly declined to comment on this issue, noting that the plaintiff had commercialized his identity during his life (*Estate of Elvis Presley*, 513 F. Supp. at 1355 n.10).

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

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

## Protected Aspects of Identity

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

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

New Jersey extends the right of publicity to the following:

- Name.
- Photograph.
- Image.
- Likeness.

- Performance characteristic.
- Biographical data.
- Vocal style.
- Screen persona.

#### Name

The use of a celebrity's name in a company's corporate name and advertisements creates a false impression of endorsement. According to the court, its pecuniary value also belongs to its owner, rather than to the person looking to make an unauthorized use of it. (*Edison*, 73 N.J. Eq. 136 at 141-43.)

#### Photograph, Image or Likeness

In one case, the plaintiff allowed their employer of 33 years to use a photograph of their family in a company publication. Years later, the employer used a reproduction of the same family photograph as an insert in the display and promotion of picture frames. The Appellate Division upheld a \$45,000 jury verdict for the plaintiff's misappropriation claim, holding that the unauthorized use of the family's photograph and likeness was for a commercial purpose and that the award was within the province of the jury. (*Faber v. Condecor, Inc.*, 195 N.J. Super. 81, 88-89 (App. Div. 1984).)

#### Performance Characteristics: Appearance, Dress and Style

The US District Court of the District of New Jersey, analyzing New Jersey law, held that a live theatrical presentation designed to imitate a performance of the late Elvis Presley violated his right of publicity (*Estate of Elvis Presley*, 513 F. Supp. at 1361).

#### Biographical Data

The publication of biographical data of a well-known figure is not per se an invasion of privacy. However, using the same data to capitalize on the name by using it in connection with a commercial project other than the dissemination of news, articles, or biographies is an invasion of privacy. (*Palmer*, 96 N.J. Super. at 79.)

#### Vocal Style

The US District Court for the District of New Jersey found that under New Jersey law, imitating a celebrity's voice can give rise to a cause of action for violation of the right of publicity, and concluded that the New Jersey courts would adopt this rule (*Prima*, 78 F. Supp. 2d at 349).

### Screen Persona

If an actor's screen persona becomes so associated with them that it becomes inseparable from the actor's own public image, the actor obtains an interest in the image which gives them standing to prevent others from using it without authority (see *McFarland*, 14 F.3d at 921-22).

### Registration

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

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

### Registration Benefits

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

### Requirements and Procedure

See Registration Benefits.

### Violations of the Right of Publicity

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

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

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

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

(*Prima*, 78 F. Supp. 2d at 349.)

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

See Question 14: First Amendment Protections.

### Remedies

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

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

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

#### Injunctive Relief

Courts have awarded injunctive relief by:

- Granting a preliminary injunction against an Elvis impersonator (*Estate of Elvis Presley*, 513 F. Supp. at 1382).
- Granting a preliminary injunction enjoining the publication and distribution of books with the plaintiff's photograph on the front and back cover and advertising materials containing plaintiff's likeness (*Dorsey v. Black Pearl Books, Inc.*, 2006 WL 3327874, at \*11-12 (D.N.J. Nov. 14, 2006)).
- Enjoining the use of professional golfers' names and player profiles in a game (*Palmer*, 96 N.J. Super. at 79).

#### Compensatory Damages

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

- The harm to their interest in privacy resulting from the invasion.
- The proven mental distress suffered if it is of a kind that normally results from this type of an invasion.
- Special damage that the invasion legally caused.

(*Leibholz v. Hariri*, 2011 WL 1466139, at \*11 (D.N.J. April 15, 2011).)

New Jersey state courts have suggested in dicta that courts must measure compensatory damages by:

- The benefit conferred on the defendant.
- The commercial value of the plaintiff's persona.

One court suggested that, in addition to the commercial value of the use of the name and likeness in the advertising field, damages could be based on quantum meruit. (*Canessa*, 97 N.J. Super. at 352 n.5.)

Emotional harm, even without any economic injury, is a sufficient claim for damages in New Jersey. One court affirmed a \$45,000 award for emotional damages, noting that damages may be recovered for invasion of privacy, even if the injury is only mental anguish. (*Faber*, 195 N.J. Super. at 90.)

As with other causes of action, the court cannot award damages for speculative harms (*Leibholz*, 2011 WL 1466139, at \*11).

### Infringer's Profits

New Jersey case law on the recovery of an infringer's profits is not well-developed, although at least one court has suggested that damages may be based on *quantum meruit* (*Canessa*, 97 N.J. Super. at 352 n.5).

### Punitive or Exemplary Damages

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

### Attorneys' Fees

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

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

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

## Statutory Exemptions and Defenses

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

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

- First Amendment protections.
- Consent.
- De-minimis, incidental, fleeting use exemption.
- Traditional, equitable defenses.

### First Amendment Protections

New Jersey recognizes First Amendment protection for works that are:

- **Political.** For example, the Supreme Court of New Jersey held that the use of plaintiff's name and image on a campaign flyer did not satisfy the commercial purpose element of the misappropriation tort. The court found the political campaign flyers represented political speech attacking the judgment of a candidate running for public office and that this type of speech was at the heart of First Amendment guarantees. (*G.D. v. Kenny*, 205 N.J. 275, 311-12 (2011).)
- **News-related.** For example, the court affirmed summary judgment for defendants, holding that the defendants' publication of plaintiff's name, occupation, and address in connection with a home purchase was not an actionable appropriation because the use was not commercial and it was related to a newsworthy event (*Bisbee v. John C. Conover Agency, Inc.*, 186 N.J. Super. 335, 342-44 (App. Div. 1982)).
- **Entertainment-based.** Although New Jersey recognizes First Amendment protection for works of entertainment, it is a fact-intensive analysis and works of entertainment do not always have immunity under the law. For example:
  - the US Court of Appeals for the Third Circuit reversed the District Court's grant of summary judgment to Electronic Arts (EA) on former Rutgers quarterback Ryan Hart's right of publicity claim. The Third Circuit, adopting the "transformative use test," held that the video game publisher's digital depiction of Hart was not transformative enough to outweigh Hart's right of publicity, stating that "the digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game. This is not transformative; the various digitized sights and sounds in the video game do not alter or transform the Appellant's identity in a significant way." (*Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013).); and
  - the US District Court for the District of New Jersey decided that although "The Big El Show" had an informational and entertainment element, the show served primarily to commercially exploit the likeness

of Elvis Presley “without contributing anything of substantial value to society” (*Estate of Elvis Presley*, 513 F. Supp. at 1359).

The First Amendment also does not shield the use of a person’s persona to advertise a work of entertainment. For example, the US District Court for the District of New Jersey, analyzing New Jersey law, held that the use of a photograph of a Vietnam veteran in a letter advertising a nonfiction book about the Vietnam War violated the veteran’s right of publicity. The court noted that if the photograph were used in the book itself, the First Amendment would have protected it, “regardless of what type of profit defendant expected to make with its book series.” (*Tellado v. Time-Life Books*, 643 F. Supp. 904, 914 (D.N.J. 1986).)

### Balancing Tests for First Amendment Protection

The Third Circuit rejected the “predominant use test” and the “Rogers’ test” and adopted the “transformative use test” to balance the competing interests of the First Amendment and the right of publicity. Transformative works add significant expression or recast, or both, to a persona, resulting in a work that is not simply a literal depiction or imitation of a celebrity for commercial gain. These transformative works are especially worthy of First Amendment protection because they do not threaten markets for celebrity memorabilia that the right of publicity was designed to protect. (*Hart*, 717 F.3d at 159-165.)

In that case, the Third Circuit held that, as a whole, the video games at issue did not transform the plaintiff’s identity enough to escape the right of publicity claim (*Hart*, 717 F.3d at 170).

### Consent

Consent is a defense to a right of publicity claim. However, consent for one type of use does not work as a waiver for other purposes or shield the defendant from liability if the actual use goes beyond the consent (for example, by exceeding the authorized scope or duration) (*Canessa*, 97 N.J. Super. at 358; *Faber*, 195 N.J. Super. at 89).

### De Minimis, Incidental, Fleeting Use Exemption

New Jersey courts recognize an exemption for incidental and de minimis uses. For example, one case rejected a misappropriation claim due to the “merely incidental” use of plaintiff’s image in relation to the total presentation

(*Jeffries v. Whitney E. Houston Acad. P.T.A.*, 2009 WL 2136174, at \*4 (N.J. App. Div. July 20, 2009)).

### Traditional Equitable Defenses

New Jersey recognizes the equitable defenses of laches and acquiescence in right of publicity cases (*Estate of Elvis Presley*, 513 F. Supp. at 1351).

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

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

### Statute of Limitations

The statute of limitations for right of publicity claims under New Jersey law is six years (N.J.S.A. 2A:14-1; see *Canessa*, 97 N.J. Super. at 355).

### Calculation

New Jersey case law on calculating the statute of limitations in right of publicity claims is not well-developed. However, New Jersey courts have followed the “discovery rule,” which holds that a cause of action accrues when a plaintiff knows or should know after exercising reasonable diligence that both:

- They have been injured.
- Another person caused their injury.

(*Rolax v. Whitman*, 175 F. Supp. 2d 720, 727 (D.N.J. 2001) (applying New Jersey law); see *Vispisano v. Ashland Chem. Co.*, 107 N.J. 416 (1987).)

### Personal Jurisdiction and Choice of Law

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

- Personal Jurisdiction.
- Choice of Law.

### Statute

There is no New Jersey statute that recognizes a right of publicity.

### Common Law

#### Personal Jurisdiction

New Jersey case law on personal jurisdiction involving right of publicity claims is not well-developed. However, to establish personal jurisdiction under New Jersey's long-arm statute, the plaintiff must show that the defendant has purposefully:

- Directed its activities toward the forum state's residents.
- Availed itself of the privilege of conducting activities within the forum state, therefore invoking the benefits and protections of its laws.

(*IMO Indus. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998).)

#### Choice of Law

New Jersey courts consider right of publicity claims as tort claims. When analyzing choice of law questions in tort claims, New Jersey applies a flexible governmental interest analysis requiring application of the law of the state with the greatest interest in resolving the issue. In applying this standard, the court performs its choice of law analysis on an issue-by-issue basis and may even apply different states' laws to different issues in the same litigation. (*Prima*, 78 F. Supp. 2d at 344-45.)

For example, in one case, a singer died in Louisiana after performing most of his life in Nevada. His widow lived in New Jersey. She sued the Olive Garden for using a sound-alike singer in its commercials under New Jersey law, which considered the right of publicity descendible. The defendants argued that Louisiana law, which considered the right of publicity a personal right of privacy and therefore not descendible, must apply. (*Prima*, 78 F. Supp. 2d at 345.)

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

- His widow, a beneficiary of the singer's estate, lived in New Jersey.
- New Jersey had a significant interest in protecting its citizens from tortious conduct.
- Louisiana had no interest in prohibiting a celebrity's estate from inheriting his right of publicity.

(*Prima*, 78 F. Supp. 2d at 347-49.)

### Transfers, Licenses, and Waivers

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

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

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

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

(*Prima*, 78 F. Supp. 2d at 345.)

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

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

### Form of Agreement

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

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

### Consent from a Minor

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

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

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

#### Statute

There is no New Jersey statute that recognizes a right of publicity.

#### Common Law

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

### Other Significant Legislation and Case Law

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

The US Court of Appeals for the Third Circuit, analyzing New Jersey law, held that a right of publicity civil action filed during the plaintiff's lifetime survived the plaintiff's death and could be maintained by the estate (*McFarland*, 14 F.3d at 921-22).

Adding to the right of publicity protections in New Jersey, the court in one case held that "celebrity goodwill," which the court compared to the right of publicity, is a marital asset subject to equitable distribution. The court likened "celebrity goodwill" to "professional goodwill," which it defined as basically reputation that is likely to generate future business. The court held that individuals with particular and uncommon skill for some specialized discipline "transforms the average professional or entertainer into one with measurable goodwill." (*Piscopo v. Piscopo*, 231 N.J. Super. 576, 578-79 (Ch. Div. 1988).)

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