

## Right of Publicity Laws: Tennessee

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A Q&A guide to Tennessee 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

Tennessee recognizes the right of publicity as embodied in the Personal Rights Protection Act of 1984 (TPRPA) (T.C.A. §§ 47-25-1101 to 47-25-1108).

##### Common Law

The Tennessee Court of Appeals has recognized a common law right of publicity, emphasizing the recognition of individual property rights under Article I, Section 8 of the Tennessee Constitution (*State ex rel. Elvis Presley Int'l Mem'l Found. v. Cromwell*, 733 S.W.2d 89, 96-97 (Tenn. Ct. App. 1987)).

The TPRPA does not explicitly preclude a common law cause of action (*Elvis Presley*, 733 S.W.2d at 99-100). In addition, the Tennessee Court of Appeals has held that the TRPRA does not limit any right of publicity that existed before the Act's effective date (*Elvis Presley*, 733 S.W.2d at 99).

No known reported Tennessee court decision addresses any significant distinctions between the rights protected by the common law or by the statute. At least one federal court applying Tennessee law has noted in dicta that

Tennessee's common law and statutory right of publicity are coextensive (*Gauck v. Karamian*, 805 F. Supp. 2d 495, 500 n.5 (W.D. Tenn. 2011)).

One federal court applying Tennessee law has held that the TRPRA supplants whatever right of publicity may exist under Tennessee common law, at least regarding participants in broadcast sporting events. The court held that there is no right of publicity in sports broadcasts in Tennessee because:

- The TRPRA does not include an express right of publicity inherent through sports broadcasts.
- If the court could rely on case law to recognize other publicity rights regardless of the TRPRA, no Tennessee case specifically identified a right of publicity in sports broadcasts.

(*Marshall v. ESPN, Inc.*, 111 F. Supp. 3d 815, 824-25 (M.D. Tenn. 2015).)

#### 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.

The Tennessee Supreme Court recognizes the common law tort of invasion of privacy (*Langford v. Vanderbilt Univ.*, 287 S.W.2d 32, 38-39 (Tenn. 1956)). In an unpublished opinion, the Tennessee Court of Appeals held that Tennessee recognizes four types of invasion

of privacy, including misappropriation, as identified in the Restatement (Second) of Torts (*Burnette v. Porter*, 2011 WL 4529612, at \*3 (Tenn. Ct. App. Sept. 30, 2011); Restatement (Second) of Torts § 652A (1977)). The Tennessee Supreme Court recognized the separate tort of false light invasion of privacy based on Restatement (Second) of Torts § 652E, and the applicable damages set out in § 652H (*West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 643-48 (Tenn. 2001)).

Federal courts applying Tennessee law have also relied on the Restatement when analyzing invasion of privacy claims (*Scarborough v. Brown Grp., Inc.*, 935 F. Supp. 954, 963-64 (W.D. Tenn. 1995); *Evans v. Detlefsen*, 857 F.2d 330, 338 (6th Cir. 1988)).

### Persons Protected

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

##### Statute

###### Natural Living Persons

The Tennessee Personal Rights Protection Act (TPRPA) protects natural living persons (T.C.A. § 47-25-1103).

###### Deceased Persons (Postmortem Rights)

The TPRPA protects deceased natural persons (T.C.A. § 47-25-1103(b)).

###### Corporations and Other Entities

The statute applies to individuals, which means human beings, living or dead (T.C.A. § 47-25-1102(2)).

However, a federal district court has held that the stage name of a group of individuals, in this case “The Beatles,” was entitled to the same protection under the Tennessee statute as the name of any individual in that group (*Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342, 348 (M.D. Tenn. 1993)). Further, at least one federal court applying Tennessee law has noted in dicta that Tennessee’s common law and statutory right of publicity are coextensive (*Gauck*, 805 F. Supp. 2d at 500 n.5).

##### Common Law

###### Natural Living Persons

The right of publicity recognized under Tennessee common law protects natural living persons (*Elvis Presley*, 733 S.W.2d at 99).

###### Deceased Persons (Postmortem Rights)

The right of publicity recognized under Tennessee common law protects deceased natural persons (*Elvis Presley*, 733 S.W.2d at 99).

###### Corporations and Other Entities

Tennessee courts have not addressed whether corporations or other entities are protected under the common law. However, a federal district court has held that the stage name of a group of individuals, in that case “The Beatles,” was entitled to the same protection under the Tennessee statute as the name of any individual in that group (*Apple Corps*, 843 F. Supp. at 348). At least one federal court applying Tennessee law has noted in dicta that Tennessee’s common law and statutory right of publicity are coextensive (*Gauck*, 805 F. Supp. 2d at 500 n.5).

#### 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

###### Duration

The initial duration of the statutory postmortem right of publicity in Tennessee is ten years after the individual’s death (T.C.A. § 47-25-1104(a)).

After the initial ten-year term, the statutory postmortem right can last indefinitely if continuously exploited. The right terminates if there is proof that the executor, assignee, heir, or devisee of the right did not commercially exploit the right for a two-year period after the initial ten-year term (T.C.A. § 47-25-1104(b)(2)).

###### Exploitation Requirement

See Duration.

##### Common Law

###### Duration

Tennessee courts have not addressed the duration of a postmortem right of publicity. At least one federal court interpreting Tennessee law has noted that common law rights are coextensive with statutory rights (*Gauck*, 805 F. Supp. 2d at 500 n.5).

### Exploitation Requirement

See Duration.

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

### Statute

The Tennessee Personal Rights Protection Act (TPRPA) does not expressly require the individual's name, photograph, or likeness to have commercial value (T.C.A. § 47-25-1103(a)). However, the Tennessee Court of Appeals has held that rights under the TPRPA only exist where a person's photograph or likeness is identifiable (*Wells v. Chattanooga Bakery, Inc.*, 448 S.W.3d 381, 388-89 (Tenn. Ct. App. 2014)).

The statute expressly states that postmortem protection does not require commercial exploitation before death (T.C.A. § 47-25-1103(b)).

### Common Law

Tennessee courts have not explicitly addressed whether commercial value is a necessary requirement for a common law claim. At least one federal court interpreting Tennessee law has noted that common law rights are coextensive with statutory rights, which suggests that there is no commercial value requirement (*Gauck*, 805 F. Supp. 2d at 500 n.5).

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

### Statute

Tennessee's right of publicity statute states that the right of publicity survives death even if the right was not commercially exploited before death (T.C.A. § 47-25-1103(b)).

### Common Law

Tennessee courts have not addressed whether the common law postmortem protection is subject to any lifetime exploitation requirement. Notably, the Tennessee Court of Appeals has expressly declined to address the issue (*Elvis Presley*, 733 S.W.2d at 99 n.11). However, at least one federal court interpreting Tennessee law has noted that common law rights are coextensive with statutory rights (*Gauck*, 805 F. Supp. 2d at 500 n.5).

#### 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?

Tennessee's right of publicity statute provides for recovery of additional monetary damages from any person who knowingly violates the right of publicity of any member of the armed forces. The plaintiff may recover:

- Three times the amount of actual damages suffered.
- Reasonable attorneys' fees.

(T.C.A. § 47-25-1106(d)(2).)

A member of the armed forces is a member of the US armed forces or a member of a reserve or Tennessee national guard unit who is in, or was called into, active service or active military service of the US (T.C.A. § 47-25-1106(d)(2)).

### 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

Tennessee's right of publicity statute protects an individual's:

- Name.
- Photograph.
- Likeness.

(T.C.A. § 47-25-1105(a).)

One federal court has extended protection under Tennessee's statute to non-natural persons, finding that the statute protects the stage name of a group of individuals, "The Beatles" (*Apple Corps*, 843 F. Supp. at 348).

### Common Law

At a minimum, common law protection exists for an individual's:

- Name.
- Likeness.

(*Elvis Presley*, 733 S.W.2d at 93-99.)

Tennessee takes an expansive view of property that conceivably could include voice, signature, catchphrases, or aspects of persona (see *Elvis Presley*, 733 S.W.2d at 97). However, there are no known reported Tennessee decisions addressing protection of these aspects under common law. At least one federal court interpreting Tennessee law has noted that common law protection is coextensive with the statute (*Gauck*, 805 F. Supp. 2d at 500 n.5).

### 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 of the right of publicity is not required or available under Tennessee law.

### Violations of the Right of Publicity

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

#### Statute

A defendant violates the Tennessee right of publicity statute by using or infringing on the use of another individual's name, photograph, or likeness in any medium:

- Knowingly.
- As an item of commerce for:
  - advertising products, merchandise, goods, or services; or
  - fundraising, solicitation of donations or purchases of products, merchandise, goods, or services.
- Without:
  - the individual's prior consent;
  - the prior consent of a parent or legal guardian, if the individual is a minor; or
  - the consent of the executor or administrator, heirs, or devisees, if the individual is deceased.

(T.C.A. § 47-25-1105(a).)

#### Use for Advertising or Solicitation

Statutory right of publicity claims are limited to uses in:

- Advertising.
- Fundraising.
- Solicitation of purchases of goods and services.

(T.C.A. § 47-25-1105(a).)

A federal district court has held that the use of "The Beatles" name or likeness by a Beatles cover band (including the first names of the individual members) in an artistic performance did not violate Tennessee's right of publicity statute, although use in advertising materials was a violation (*Apple Corps*, 843 F. Supp. at 348-50).

#### Common Law

Under Tennessee common law, a violation of the right of publicity occurs when one party uses an individual's name or image and the use is both:

- For a commercial purpose or other benefit.
- Without authority of the individual or their assignees or devisees.

(See *Elvis Presley*, 733 S.W.2d at 97-99.)

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

Tennessee's right of publicity statute does not provide specific tests for identifiability. No known reported Tennessee case law describes any tests for identifiability, although the Tennessee Court of Appeals has held that a young boy in a photograph appearing as "an anonymous character" with "no identifiable features" was not identifiable as the plaintiff, who filed suit 34 years later as an adult (*Wells*, 448 S.W.3d at 389).

#### Remedies

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

#### Injunctive Relief

Under Tennessee law, the court may grant an injunction on terms it deems reasonable to prevent or restrain the unauthorized use of the name, photograph, or likeness (T.C.A. § 47-25-1106(a)).

As part of the injunction, the court may authorize:

- Confiscation of the unauthorized items.
- Seizure of all instrumentalities used in connection with the violation (for example, a computer or trade tools).
- Liquidation of the infringing items and instrumentalities to satisfy any monetary damages award.

(T.C.A. § 47-25-1106(a).)

Seizure of instrumentalities is a broad remedy that may be significantly more costly to the violator than merely seizing the actual infringing items.

### Scope of Injunction

The US Court of Appeals for the Sixth Circuit, applying Tennessee law, upheld a nationwide injunction prohibiting the use of Elvis Presley's name, likeness, and image for the sale, distribution, marketing, advertising, and licensing of unauthorized goods or services (*Elvis Presley Enters. v. Elvisly Yours, Inc.*, 936 F.2d 889, 896-97 (6th Cir. 1991)).

### Impoundment and Destruction

The court may order the impoundment and destruction of any infringing items and materials made or used in violation of the individual's rights (T.C.A. § 47-25-1106(b), (c)).

### Compensatory Damages and Profits

Tennessee's statute allows individuals suffering a violation of their right of publicity to recover:

- Actual damages suffered.
- Any profits attributable to the use or infringement and which have not been taken into account in computing the actual damages.

(T.C.A. § 47-25-1106(d).)

Profit (or lack of profit) is not relevant to liability (T.C.A. § 47-25-1106(d)(1)).

A plaintiff who has established a violation of the common law right of publicity may recover for:

- Harm to the plaintiff's interest.
- Mental distress.
- Special damages.

(*West*, 53 S.W.3d at 648 (citing Restatement (Second) of Torts § 652H (1977)).)

### Additional Enhanced Damages for Armed Services Members

If a person knowingly uses or infringes the rights of a member of the armed forces, the plaintiff may recover:

- Three times the amount of actual damages suffered.
- Reasonable attorneys' fees.

(T.C.A. § 47-25-1106(d)(2)).

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

A violation of the statutory right of publicity is a Class A misdemeanor under Tennessee law (T.C.A. § 47-25-1105(b)).

## Exemptions and Defenses

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

### Statutory Exemptions and Defenses

The Tennessee right of publicity statute specifically exempts:

- Use of the name, photograph, or likeness in connection with any:
  - news;
  - public affairs; or
  - sports broadcast or account.
- Unauthorized use of an individual's name, photograph, or likeness by owners or employees of any advertising medium, unless those owners or employees had knowledge of the unauthorized use.

(T.C.A. § 47-25-1107(a), (c).)

The statute also provides that use of a protected aspect of identity in a commercial medium is not a use for advertising or solicitation purposes merely because the material containing the use is commercially sponsored or contains paid advertising. Instead, it is a question of fact whether the use of the protected aspect was so directly connected to the advertising or solicitation that it constituted a use for advertising or solicitation. (T.C.A. § 47-25-1107(b).)

### Common Law Exemptions and Defenses

There are no Tennessee court cases on any other significant defenses arising under common law.

#### 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

Tennessee applies a one-year statute of limitations to both statutory and common law right of publicity actions (T.C.A. § 28-3-104(a)(1); see *Moore v. Weinstein Co. LLC*, 2010 WL 8913520, at \*8 (M.D. Tenn. May 12, 2010); *Gibbons v. Schwartz-Nobel*, 928 S.W.2d 922, 926 (Tenn. Ct. App. 1996)).

### Calculation

The statute of limitations begins to run when either:

- The plaintiff discovers the injury.
- In the exercise of reasonable care and diligence, the plaintiff should have discovered the injury.

(*Moore*, 2010 WL 8913520, at \*8.)

### Personal Jurisdiction and Choice of Law

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

- Personal Jurisdiction.
- Choice of Law.

### Personal Jurisdiction

Tennessee state courts have not considered significant personal jurisdiction issues in the context of a right of publicity claim. Generally, personal jurisdiction over an out-of-state defendant is determined under Tennessee's long-arm statute (T.C.A. § 20-2-214).

However, the Tennessee Court of Appeals has held that a distributor's transfer of a video to libraries in Tennessee via computer transfer was insufficient to establish personal jurisdiction in a case that included a right of publicity claim under the Tennessee statute. The court held that the California-based distributor did not evidence any conduct directed towards the citizens of Tennessee or have the intent and purpose of serving the Tennessee market. (*Gibbons*, 928 S.W.2d at 924-25.)

### Choice of Law

Tennessee state courts have not addressed significant choice of law issues concerning right of publicity claims. However, a federal district court applying Tennessee law used the multi-factor test in Restatement (Second) of Conflict of Law § 145 to determine that an Arizona right of publicity law governed, due to that state's stronger relationship with the claim (*Moore v. Weinstein Co., LLC*, 2012 WL 1884758, at \*30-31 (M.D. Tenn. May 23, 2012)).

### Transfers, Licenses, and Waivers

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

### Statute

Tennessee statutory protection for the right of publicity specifically permits transferring the right to:

- Executors.
- Assigns.
- Heirs.
- Devisees.
- Licensees.

(T.C.A. § 47-25-1103(b).)

### Common Law

Tennessee case law universally recognizes that the right of publicity is a property right and is freely descendible (*Polygram Records, Inc. v. Legacy Entm't Group, LLC*, 205 S.W.3d 439, 445-46 (Tenn. Ct. App. 2006); *Elvis Presley*, 733 S.W.2d at 99).

**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 are no specific statutory restrictions on the form of the agreement.

#### Common Law

Tennessee courts have not addressed restrictions on or requirements for valid transfers of the right of publicity.

### Consent from a Minor

#### Statute

Under Tennessee's right of publicity statute, use of a minor's name, photograph, or likeness requires the prior consent of the minor's parent or legal guardian (T.C.A. § 47-25-1105(a)).

#### Common Law

Tennessee courts have not addressed the requirements for obtaining 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

Tennessee's right of publicity statute specifically allows the transfer of postmortem rights to:

- Executors.
- Assigns.
- Heirs.
- Devisees.
- Licensees.

(T.C.A. § 47-25-1103(b).)

Executors, assignees, heirs, devisees, or licensees automatically have exclusive use of the postmortem rights for ten years after the individual's death. To maintain these exclusive rights, the executor, assignee, heir, devisee, or licensee must commercially exploit the rights within two years after the initial ten-year period (see Question 4).

### Common Law

Tennessee courts have not addressed the specific rules for ownership or transfer of the common law postmortem right of publicity.

### 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.**

There is no other right of publicity law or pending legislation in Tennessee.

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