

# Right of Publicity Laws: Maryland

**BRIAN WILLIAM HIGGINS, BLANK ROME, LLP, WITH PRACTICAL LAW  
INTELLECTUAL PROPERTY & TECHNOLOGY**

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A Q&A guide to Maryland 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 several 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

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (Md. Code Ann., Bus. Reg. § 19-503).

### COMMON LAW

Maryland courts have not decided whether a common law right of publicity exists in Maryland. Maryland courts, however, recognize the common law appropriation invasion of privacy tort (see Question 2).

**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.**

Maryland courts recognize the common law appropriation invasion of privacy tort. Maryland courts follow Section 652C of the Restatement (Second) of Torts (1977), which states that an individual who appropriates another's name or likeness for personal benefit is liable for an invasion of privacy (*Lawrence v. A.S. Abell Co.*, 475 A.2d 448, 450-51 (Md. 1984)). Therefore, under Maryland common law, a living person who believes another has appropriated his name or likeness for commercial purposes without his consent may bring an action in tort for remedies.

## PERSONS PROTECTED

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

### STATUTE

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

### COMMON LAW

#### Natural Living Persons

Maryland courts have not decided whether a common law right of publicity exists in Maryland. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts, which applies to an individual and the individual's exclusive use of his identity (name or likeness) (see Question 2; Restatement (Second) of Torts § 652C, cmt. a (1977)).

#### Deceased Persons (Postmortem Rights)

Maryland courts have not addressed whether the common law appropriation invasion of privacy tort exists as a postmortem right. However, the US District Court for the District of Maryland, interpreting Maryland law, suggested that while an action alleging a right of privacy invasion may be brought by one other than the

individual whose name or likeness was invaded, in the absence of a statute permitting otherwise, an action alleging a right of privacy invasion cannot be maintained after the death of the individual whose privacy was invaded (*Coppinger v. Schantag*, 2006 WL 38946, at \*3 (D. Md. Jan. 5, 2006)).

#### Corporations and Other Entities

Maryland courts have not addressed whether the common law appropriation invasion of privacy tort extends to corporations or other entities.

#### 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

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

#### COMMON LAW

Maryland courts have not decided whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort following Section 652C of the Restatement (Second) of Torts (1977) (see Question 2).

Maryland courts have not addressed whether the common law appropriation invasion of privacy tort exists as a postmortem right. However, the US District Court for the District of Maryland, interpreting Maryland law, suggested that an action alleging a right of privacy invasion cannot be maintained after the death of the individual whose privacy was invaded, unless a statute permits otherwise (see Question 3; *Coppinger*, 2006 WL 38946, at \*3).

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

#### STATUTE

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

#### COMMON LAW

Maryland courts have not decided whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts (1977) (see Question 2). For the appropriation invasion of privacy tort to be actionable, Maryland courts require that an individual's name or likeness have commercial or other tangible value.

In *Lawrence*, the mothers of two children whose photograph was printed in the defendant's newspaper sued the defendant claiming violation of the children's right of privacy. The Maryland Court of Appeals held that the children's likeness in the photograph in defendant's newspaper had no commercial value in that the children were neither famous nor professional models. Therefore, the plaintiff had no right of privacy action. (*Lawrence*, 475 A.2d at 453-54.)

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

#### STATUTE

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

#### COMMON LAW

Maryland courts have not decided whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts (1977).

Maryland courts have not addressed whether the common law appropriation invasion of privacy tort exists as a postmortem right. However, the US District Court for the District of Maryland, interpreting Maryland law, suggested that without a statute permitting otherwise, an action for invasion of the right of privacy cannot be maintained after the death of the individual whose privacy was invaded (see Question 3; *Coppinger*, 2006 WL 38946, at \*3).

#### 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?

Maryland's Fallen Soldier Privacy Act (FSPA) criminalizes the knowing use of a name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (Md. Code Ann., Bus. Reg. § 19-503).

The FSPA requires advance consent from at least one of the following:

- The soldier.
- The surviving spouse.
- The personal representative.
- The majority of the deceased soldier's heirs.

(Md. Code Ann., Bus. Reg. § 19-503.)

A soldier is an active duty member of the US armed forces, or a federal active duty member of the Maryland State National Guard or Reserve force. The US armed forces includes:

- The Army.
- The Marine Corps.
- The Navy.

- The Air Force.
- The Coast Guard.
- The National Guard.
- The Reserve forces.
- Other standard US military agencies.

(Md. Code Ann., Bus. Reg. § 19-501.)

The FSPA does not cover:

- Non-commercial advertisement for any:
  - product;
  - good;
  - ware; or
  - merchandise.
- Non-commercial reporting of:
  - news;
  - public affairs; or
  - sports broadcast or account.
- The use of a soldier's picture, portrait, or image that is not facially identifiable.
- A photograph of a monument or a memorial that is placed on any:
  - product;
  - good;
  - ware; or
  - merchandise.

(Md. Code Ann., Bus. Reg. § 19-502.)

The FSPA does not require proof that the soldier's identity had commercial value.

Violation of the FSPA is a misdemeanor punishable by either or both:

- A fine of up to \$2,500.
- Imprisonment of up to one year.

(Md. Code Ann., Bus. Reg. § 19-504.)

### 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

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, protects the use of a deceased soldier's:

- Name.
- Portrait.
- Picture.
- Image.

(See Question 7; Md. Code Ann., Bus. Reg. § 19-503.)

#### COMMON LAW

Maryland courts recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second)

of Torts (1977). Although the specific question has not been considered by Maryland courts, the common law protects an individual's name and likeness so long as the individual's identity is recognizable (see *Lawrence*, 475 A.2d at 453-54).

### 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.

Maryland does not recognize a civil right of publicity either by statute or common law.

### VIOLATIONS OF THE RIGHT OF PUBLICITY

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

#### STATUTE

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

#### COMMON LAW

Under Maryland's common law appropriation invasion of privacy tort, a plaintiff who alleges misappropriation must plead and prove all of the following:

- The right of privacy pertains to an actual living individual.
- The individual's name or likeness has some demonstrated commercial or other tangible value at the time of the misappropriation.
- Defendant used the individual's name or likeness without consent.
- Defendant made financial commercial gains because of the unauthorized use.

(See *Coppinger*, 2006 WL 38946, at \*2-3; *Barnhart v. Paisano Publ'ns.*, 457 F. Supp. 2d 590, 595-96 (D. Md. 2006); *Lawrence*, 475 A.2d at 453-54; W. Prosser, *Privacy*, 48 Cal. L. Rev. 338, 419 (1960).)

There is no common law test for identifiability for establishing invasion of privacy by appropriation. Where, however, a defendant demonstrates that the individual's identity may not be so apparent, a Maryland court may shift the burden to the plaintiff to prove that the likeness of the individual is readily apparent or recognizable (see *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397-99 (9th Cir. 1992)).

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

**STATUTE**

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

**COMMON LAW**

Maryland courts have not decided whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law tort of the invasion of privacy by appropriation following Section 652C of the Restatement (Second) of Torts (1977) (see Question 2).

There is no common law test for identifiability for establishing invasion of privacy by appropriation.

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

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

**COMMON LAW**

Maryland courts have not decided whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts (1977) (see Question 2).

Currently, the state case law in this area is not developed with respect to damages. Violating the common law appropriation invasion of privacy tort in Maryland may include the following civil remedies:

- Monetary damages.
- An injunction.
- Punitive damages, if appropriate (see *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992)).

(See generally Restatement (Second) of Torts § 652H (1977).)

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

Maryland does not recognize a civil right of publicity either by statute or common law. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

**EXEMPTIONS AND DEFENSES****14. For each law identified in Question 1, what are the key defenses to a civil claim?****STATUTORY EXEMPTIONS AND DEFENSES**

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

**COMMON LAW EXEMPTIONS AND DEFENSES**

Maryland courts have not considered whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts (1977) (see Question 2).

To establish a defense to the appropriation invasion of privacy tort, a defendant must prove that the use of the name and likeness was any of the following:

- Proper.
- Incidental use.
- Protected speech under the First Amendment because it was newsworthy.

(*Lawrence*, 475 A.2d at 453.)

Defendants have also successfully raised other defenses in Maryland (see *Lawrence*, 475 A.2d at 453-54; *Barnhart*, 457 F. Supp. 2d at 596; *Comins v. Discovery Commc'ns, Inc.*, 200 F. Supp. 2d 512, 523 (D. Md. 2002)).

**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****Statute**

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act (FSPA), however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

An individual who violates the FSPA is guilty of a misdemeanor, and the statute of limitations is one year (Md. Code Ann., Bus. Reg. § 19-504; Md. Code Ann., Cts. & Jud. Proc. § 5-106(a)).

**Common Law**

Maryland courts have not decided whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts (1977) (see Question 2).

Maryland common law has a general statute of limitations for civil claims that expires three years from the date the action accrues (Md. Code Ann., Cts. & Jud. Proc. § 5-101).

## CALCULATION

### Statute

Maryland has no civil right of publicity statute.

### Common Law

Maryland's common law statute of limitations for a civil tort claim is three years from the date the action accrues, unless another provision of the Maryland Code provides a different period of time for commencing an action (Md. Code Ann., Cts. & Jud. Proc. § 5-101).

## 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.

## PERSONAL JURISDICTION

Maryland does not recognize a civil right of publicity either by statute or common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts (1977) (see Question 2).

Maryland's long-arm statute authorizes personal jurisdiction over non-residents in any action claiming injury to a person or property within the state, if certain in-state activities have occurred (Md. Code Ann., Cts. & Jud. Proc. § 6-103).

## CHOICE OF LAW

For tort claims, Maryland courts ordinarily follow the traditional choice of law principle of *lex loci delicti*, which applies the law of the place where the last event required to give rise to the tort occurred (*Laboratory Corp. of Am. v. Hood*, 911 A.2d 841, 845 (Md. 2006)).

## TRANSFERS, LICENSES, AND WAIVERS

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

## STATUTE

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

## COMMON LAW

Maryland courts have not decided whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts (1977) (see Question 2).

Maryland courts have not explicitly addressed whether the appropriation invasion of privacy tort is a transferable property right. Maryland's Court of Appeals, however, adopted the Restatement's invasion of privacy definition and, in doing so, implicitly acknowledged comments accompanying the Restatement (see *Lawrence*, 475 A.2d at 450-51).

Restatement comments include that "the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it" (Restatement (Second) of Torts § 652C, cmt. a (1977)). Therefore, if this issue were presented to a Maryland court today, the court could hold that the right of privacy is a property right that may be licensed. Depending on the scope of the license, this would allow that person to control the commercial use of the individual's name and likeness.

### 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

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

### Common Law

Maryland courts have not decided whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts (1977) (see Question 2).

Maryland courts have not explicitly addressed whether the appropriation invasion of privacy tort is a transferable property right. For more information, see Question 17.

## CONSENT FROM A MINOR

### Statute

Maryland has no civil right of publicity statute.

### Common Law

Maryland courts have not addressed obtaining consent from a minor for purposes of the appropriation invasion of privacy tort.

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

## STATUTE

Maryland has no civil right of publicity statute. Maryland's Fallen Soldier Privacy Act, however, criminalizes the knowing use of the name, portrait, picture, or image of a soldier killed in the line of duty within the past 50 years in advertising for a commercial advantage without advance consent (see Question 7; Md. Code Ann., Bus. Reg. § 19-503).

## COMMON LAW

Maryland courts have not decided whether a right of publicity exists in Maryland common law. Maryland courts, however, recognize the common law appropriation invasion of privacy tort by following Section 652C of the Restatement (Second) of Torts. Maryland courts have not addressed whether the common law appropriation invasion of privacy tort exists as a postmortem right (see Question 3).

## 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 Maryland (as of the close of the 2018 Maryland General Assembly).

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