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A. Introduction

The untimely death of Michael Jackson this past June presents an opportunity to reassess some thorny estate tax issues that may arise when a celebrity dies owning valuable intellectual property.[1] Elsewhere we have debated hypothetical, tax-motivated changes to state laws relating to postmortem publicity rights.[2] This article will focus on existing legislation, like California's, that makes publicity rights both devisable and descendible.[3] Federal transfer taxes are levied on intangible property as well as tangible assets,[4] and therefore apply to intellectual property, including a celebrity's right of publicity and copyrights retained by an artist in his creations.[5] Using Jackson's estate as an example, and focusing primarily on publicity rights, we will examine two questions that any estate planner representing a celebrity client should consider. First, how should a personal representative value intellectual property for estate tax purposes? Second, what strategies are available to lessen the estate tax burden associated with some intellectual property rights?

B. Valuation Timing Issues

1. The estate of Michael Jackson: a case study. Jackson was a resident of California when he died on June 25, 2009.[6] For federal estate tax purposes, the code values a decedent's property as of "the time of his death."[7] The death of a major celebrity, however, poses an unusual problem, in that the celebrity's death, and in particular the manner in which the celebrity died, may add substantial value to (or significantly reduce the value of) the deceased celebrity's intellectual property rights. In his later years, Jackson was plagued by allegations of sexual misconduct that led at least one commentator to ask whether the value of his publicity rights could be adversely affected.[8] As it turned out, however, Jackson's death resulted in a voracious public appetite for his music and memorabilia, and his estate "may enjoy the financial security he never had."[9] How, then, should Jackson's estate be valued? Should the IRS get the benefit of knowing how the public is responding to Jackson's death, or should the valuation not take Jackson's death into account?[10] Is there another alternative?

To put Jackson's death into perspective, note that two other major celebrities also died within a day or two of Jackson: model and actress Farah Fawcett and television personality Ed McMahon.[11] McMahon was well known

[1]On Jackson's death, see Brooks Barnes, "A Star Idolized and Haunted, Michael Jackson Dies at 50," *The New York Times*, June 26, 2009, at A1.

[2]*Compare* Mitchell M. Gans, Bridget J. Crawford, and Jonathan G. Blattmachr, "Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights," 117 *Yale L.J. Pocket Part* 203 (2008), and Gans, Crawford, and Blattmachr, "The Estate Tax Fundamentals of Celebrity and Control," 118 *Yale L.J. Pocket Part* 50 (2008), with Joshua C. Tate, "Marilyn Monroe's Legacy: Taxation of Postmortem Publicity Rights," 118 *Yale L.J. Pocket Part* 38 (2008), and Tate, "Immortal Fame: Publicity Rights, Taxation, and the Power of Testation," 44 *Ga. L. Rev*. (forthcoming Fall 2009).

[3]Cal. Civ. Code section 3344.1.

[4]*See* sections 2031(a) and 2511(a).

[5]*See Estate of Andrews*, 850 F. Supp. 1279, 1295 (E.D. Va. 1994), *Doc 94-5716, 94 TNT 116-7* (holding a deceased author's name to be an asset of her estate). On the estate taxation of copyrights, see Bridget J. Crawford and Mitchell M. Gans, "Sticky Copyrights: Discriminatory Tax Restraints on the Transfer of Intellectual Property Rights," 67 *Wash. & Lee L. Rev.* (forthcoming 2010).

[6]*See* Barnes, *supra* note 1, at A1.

[7]Section 2033.

[8]*See* Paul L. Caron, "Estate Planning Implications of the Right of Publicity," *Tax Notes*, July 3, 1995, p. 95, *95 TNT 236-66*.

[9]Tim Arango, "Jackson Earnings Grow by Millions After Death," *The New York Times*, Aug. 13, 2009, at B1.

[10]For a concise introduction to this issue, see David Shulman, "Valuation, Timing, and Michael Jackson," July 16, 2009, *available at* http://www.sofloridaestateplanning.com.

[11]*See* Loretta Laroche, "True Celebrities: Mourning Loss of Three Bona Fide Stars," *The Patriot Ledger*, June 29, 2009, at 8.

to generations of Americans as the longtime sidekick to Johnny Carson on *The Tonight Show*.[12] Fawcett was an internationally renowned actress and star of the television show *Charlie's Angels*, made even more famous by an iconic 1970s photograph, featuring her in a red swimsuit, ''that managed to capture the spirit of both the sexual revolution and the Californian lifestyle.''[13] Fawcett's death from cancer at the age of 62, however, was immediately eclipsed in the media by the death of the 50-year-old Jackson, which created or revived various speculations about alleged identity crises, sexual ambiguity, orphaned children, plastic surgery, and unfulfilled artistic potential.[14] While Jackson's death most likely would have sparked significant media attention regardless of its circumstances, the compelling story of a tragic and misunderstood figure taken before his time resulted in a burst of media saturation, including a televised memorial service watched by tens of millions.[15] Soon, Michael Jackson T-shirts, posters, commemorative books, and compact discs could be found in shops and supermarkets across America. However, Farah Fawcett and Ed McMahon T-shirts and souvenirs seemed relatively scarce, if they were to be found at all. In the summer of 2009, at least, the public clamored for Jackson's image and music; merchandising and business deals generated significant postdeath income for Jackson's estate.[16]

2. The valuation problem. In short, it seems likely that not just the fact of Jackson's death, but also the compelling narrative it invoked, helped to make him a much greater star in the afterlife than the living Jackson had been recently. Such frenzy, however, is scarcely the norm, as shown by the lack of media attention following the deaths of McMahon and Fawcett. How, then, should a personal representative value a deceased celebrity's publicity rights? Assuming the celebrity's copyrights or publicity rights have become more valuable at (or because of) death, how much of that increase is attributable to the fact of death, and how much to the events that occurred afterward? Under current law, this distinction is crucial.[17] The valuation of a property interest owned at death depends on ''market conditions and other facts known on the valuation date, without the benefit of hindsight.''[18] As the Fifth Circuit explained in *United States v. Land*, although the instant of death is brief, ''the court must pinpoint its valuation at this instant — the moment of truth, when the ownership of the decedent ends and the ownership of the successors begins.''[19] The tax value of the property is the amount a hypothetical ''willing buyer'' would pay at this moment to a ''willing seller'' for the asset, with ''neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.''[20] Thus, any valuation must take into account only information that would have been available to the hypothetical buyer and seller at the moment of death, and must not reflect postmortem changes in value. Subsequent developments may be considered only for the ''limited purpose'' of corroborating estimates as to the expectations the hypothetical contracting parties would have had before death.[21]

A hypothetical buyer and seller entering into a prospective bargain regarding Jackson's intellectual property rights would certainly take into account the manner of his death, but that did not become certain until the moment of Jackson's demise. We now know that Jackson died relatively young, a ''candle in the wind'' like Marilyn Monroe.[22] Until Jackson's early death became a certainty, however, a hypothetical buyer and seller would have considered the possibility that Jackson might have lived to old age, with some of the problems that haunted him in his youth resolving themselves. Had that occurred, Jackson's death might have produced a more restrained public reaction, and the present value of his intellectual property rights at death might be correspondingly lower. At the moment of Jackson's actual death, however, a hypothetical willing buyer and seller would take into account exactly how Jackson died and would anticipate the likely public reaction. No one, however, could project at that moment exactly how much Jackson's postmortem publicity rights would be worth, as that depended on factors beyond anyone's capability to predict (such as the absence or presence of other news sufficient to crowd out media coverage relating to Jackson's death). Nevertheless, courts have indicated that the fact of the decedent's death may be taken into account when it changes the value of the property at the moment the decedent dies.[23]

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[12]*See* ''Deaths Last Week,'' *Chicago Tribune*, June 28, 2009, at 6.

[13]Guy Adams, ''Farah Fawcett, the Original Charlie's Angel, Dies at 62,'' *The Independent*, June 26, 2009, at 14.

[14]*See* Barnes, *supra* note 1, at A1. For further discussion of the gossip surrounding Jackson's death, see Sarah Kershaw, ''Could Intervention Have Helped a Star?'' *The New York Times*, Aug. 6, 2009, at E1.

[15]*See* Brian Stelter, ''Blowout Ratings for a Farewell, On and Off,'' *The New York Times*, July 9, 2009, at B1.

[16]*See* Arango, *supra* note 9, at B1.

[17]*See*, *e.g.*, *W.T. Grant Co. v. Duggan*, 18 F. Supp. 724, 726 (S.D.N.Y. 1937), *aff'd*, 94 F.2d 859 (2d Cir. 1938) (''the actual value of property is what a purchaser in fair and free market conditions would have given for it in fact, not what a court at a later time may think a purchaser would have been wise to give'').

[18]Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts*, para. 135.1.2, at 135-9 to -10 (2d ed. 1993).

[19]303 F.2d 170, 172 (5th Cir. 1962).

[20]Reg. section 20.2031-1(b).

[21]*Jephson's Estate v. Commissioner*, 81 T.C. 999, 1002 (1983) (noting that while value on the date of death ''is not to be judged by subsequent events,'' a court should find substantial importance in the reasonable expectations entertained on that date, and subsequent events ''may serve to establish both that the expectations were entertained and also that such expectations were reasonable and intelligent''); *see also Estate of McClatchy v. Commissioner*, 147 F.3d 1089, 1091-1093 (9th Cir. 1998), *Doc 98-21018, 98 TNT 125-6* (distinguishing between changes in value caused by the decedent's death, which can affect the estate tax valuation of the property, and changes that occur following distribution to the decedent's estate, which cannot).

[22]*Cf.* Elton John, ''Candle in the Wind,'' on *Goodbye Yellow Brick Road* (MCA Records 1973).

[23]In *Ahmanson Foundation v. United States*, the Ninth Circuit noted that while in most cases ''death itself does not alter the

(Footnote continued on next page.)

In applying the case law and regulations, therefore, it seems clear that the relevant time for valuation is the instant of Jackson's death, but the exact impact Jackson's death should have on the valuation is not clear. In any case, calculating the fair market value of Jackson's intellectual property assets at the precise moment of his death would be a herculean task. For example, only by comparing Jackson's income from publicity rights before death with the income after his death would it be possible to arrive at an estimate for tax purposes, and that estimate would be very rough. Moreover, as Ray Madoff has explained, the current regulations for valuing publicity rights assume a hypothetical market that does not exist, and are based on a ''myth of fungibility'' that does not accurately reflect the subjective nature of publicity rights, which the heirs or devisees may be unwilling to sell.[24] A prudent personal representative preparing an estate tax return, however, might not want test the validity of the current valuation rules.

3. Compliance. It seems inappropriate to measure value solely on the basis of the celebrity's lifetime receipts from intellectual property. Such an estimate could be either too high or too low, depending on the expected ''shelf life'' of the rights after death. Unless the alternative valuation date is selected,[25] the value must be calculated as of the time of death. However, any change in value following the celebrity's death is relevant only if it corroborates an estimate based on a hypothetical market transaction at the moment of the celebrity's demise. Although the initial burden of proof will be on the personal representative to defend his estimate of value,[26] section 7491 may provide some relief by shifting the burden of proof to the IRS if the personal representative can offer credible evidence that the valuation is accurate.[27] A valuation based on an accurate assessment of the price that a willing buyer and seller would pay at the moment of death will put the personal representative in a stronger position in the event of a dispute with the IRS.

C. Estate Planning for Celebrity Entertainers

There are two straightforward ways to avoid the estate taxation of celebrity intellectual property rights: devise them outright to a surviving spouse or to a charitable organization.[28] In the case of a devise to a spouse, the full value of the rights will be included in the survivor's estate on the survivor's subsequent death, effectively postponing, but not avoiding, the ultimate imposition of a tax. Many celebrities, however, may prefer to devise their intellectual property to individuals other than their spouse who qualify for neither the marital nor the charitable deduction. Jackson, for example, devised his estate to a trust,[29] purportedly for the benefit of his three children, his mother, and some charities.[30] (Because his will was a ''pour over'' and the trust terms have not been made public, one cannot be certain that this is the case.) Someone like Jackson, then, would have to consider other estate planning techniques for his publicity rights.

1. Gifts. From a wealth transfer tax perspective, it is usually better to make lifetime gifts than death-time transfers. Gift tax is calculated on a tax-exclusive basis and estate tax is calculated on a tax-inclusive basis.[31] Also, gifts of undivided interests in property are valued with fragmentation discounts, which are not allowed for transfers at death, even if the death-time transfers go to different legatees.[32] For this reason, gifting is often beneficial from a wealth transfer tax perspective. Furthermore, it ''freezes'' value of property for transfer tax purposes, as postgift increases in the value of the transferred property accrue to the benefit of the donee, not the donor. For clients who are hesitant about making large lifetime gifts, lifetime sales may accomplish the same

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value of property owned by the decedent,'' the fact remains that ''in a few instances such as when a small business loses the services of a valuable partner, death does change the value of property,'' 674 F.2d 761, 768 (9th Cir. 1981). As the Fifth Circuit stated in *United States v. Land*, ''in the few cases where death alters value,'' courts must ''determine whether the value at the time of death reflects the change caused by death, for example, loss of services of a valuable partner to a small business,'' 303 F.2d at 172; *see also Estate of McClatchy v. Commissioner*, 147 F.3d 1089, 1092 (noting that valuation may be affected by death when ''death clearly is the precipitating event and is the only event required to fix the value of the property''). *But see* Allan B. Cutrow, *Estate Planning for the Artist*, 297 PLI/PAT 311, 324-325 (1990) (arguing that the fact of death should not be taken into account for valuation purposes, but noting *Ahmanson* as authority to the contrary).

[24]*See* Ray D. Madoff, ''Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity,'' *Va. Tax. Rev.* 760, 768-771, 800-802 (1998).

[25]*See* section 2032 (allowing the personal representative to elect a valuation based on the date of distribution of property occurring within six months of death). *See also* Jonathan G. Blattmachr and Alvina Lo, ''Alternate Valuation — Now, Perhaps, More Important Than Ever,'' 111 *J. Tax'n* 90 (2009).

[26]*See* Tax Ct. R. 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933); Bittker and Lokken, *Federal Taxation of Income, Estates and Gifts*, para. 115.4.2, at S115-33 (Supp. 2009).

[27]*See* section 7491.

[28]*See* section 2056 (estate tax marital deduction) and section 2055 (estate tax charitable deduction).

[29]Last Will and Testament of Michael Joseph Jackson, *available at* http://www.aolcdn.com/tmz_documents/0701_mj_will_wm.pdf. (''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 any amendments thereto made prior to my death. All such assets shall be held, managed and distributed as a part of said Trust according to its terms and not as a separate testamentary trust.'')

[30]Ethan Smith, ''Jackson's Will Leaves Estate to Family Trust,'' *The Wall Street Journal*, July 2, 2009, *available at* http://online.wsj.com/article/SB124645346588379701.html.

[31]In limited circumstances involving a decedent who makes a taxable transfer within three years of death, the gift tax may be more ''expensive,'' because the decedent's gross estate includes the amount of any gift tax paid on the transfer. Section 2035(b).

[32]Rev. Rul. 93-12, 1993-1 C.B. 202, *Doc 93-1173, 93 TNT 19-15*; *Ahmanson Foundation v. United States*, 674 F.2d 761 (9th Cir. 1981). *Cf.* Madoff, *supra* note 24, at 787-788 (1998) (arguing that *Ahmanson* cannot be interpreted as providing support for avoidance of estate tax through imposition of restrictions on postmortem use of property).

fixation of value. When a senior-generation family member sells assets to a younger-generation family member for fair market value, there is no transfer tax imposed at the time of the sale or on a subsequent increase in value of the property sold. If the intrafamily sale were for less than fair market value, the senior-generation family member will owe some gift tax on the transfer.

The main drawback of freeze techniques is that mistakes in valuation can result in a large tax bill. It may be that the more difficult an asset is to value, the less certain a taxpayer can be that the valuation is correct. Thus it may be less desirable to give or sell publicity rights than, say, real property. To reduce the risk of a gift, or at least reduce the risk of a relatively large gift, celebrities may consider using a defined formula sales price, a defined value consideration, and a division of a part gift/part sale into complete and incomplete portions.[33]

2. Defined value clauses. A recent Tax Court case pending on appeal addresses the use of defined value clauses in cases involving difficult-to-value assets. In *Estate of Christiansen v. Commissioner*,[34] the decedent left her entire estate to her only child. The will provided that if the daughter disclaimed any property under the will, the disclaimed property would pass partly to a charitable lead annuity trust, of which the daughter was a remainder-beneficiary, and partly to a charitable foundation created by the decedent. The daughter disclaimed a fractional interest in her mother's estate. The disclaimer's terms referred to values "as . . . finally determined for federal estate tax purposes."[35] As a result of the disclaimer, all property in excess of a pecuniary amount passed to the charitable lead trust and to the foundation. The IRS argued that the charitable deduction should be disallowed because the valuation language constituted an impermissible "condition subsequent" (that is, a challenge by the IRS) on the gift and was contrary to public policy.[36] The Tax Court rejected the deduction for property passing to the trust but upheld the disclaimer in favor of the foundation, finding that the valuation dispute with the IRS did not make the transfer contingent and no public policy precluded the application of the deduction to the foundation.[37]

While the validity of the Tax Court's approach is not entirely settled,[38] *Christiansen* does suggest interesting planning possibilities. The existing regulations seem to create authority for this strategy[39] and perhaps led the Tax Court to its conclusion.[40] If the strategy is valid, a celebrity could minimize her estate tax exposure by limiting the portion of her intellectual property rights that passes to a nonspouse, noncharitable beneficiary and directing that the excess be paid to a charitable foundation. As a policy matter, however, the strategy is problematic, in that the IRS will have a diminished incentive to raise valuation issues on audit if no additional tax will be produced even if its challenge is successful. Indeed, such a forced-valuation planning strategy could be eliminated by regulation, even if courts widely accepted it.[41]

3. Other lifetime planning. A celebrity might also consider additional lifetime planning with publicity rights that would have minimal or no gift tax consequences. A celebrity with valuable publicity rights might, for example, consider forming a limited partnership with his children. The children could contribute cash in return for general partnership interests and the celebrity could contribute his publicity rights in return for a limited partnership interest. If properly structured, the creation of the limited partnership should not be treated as a direct or indirect gift.[42] The limited partnership could then enter into agreements to exploit the celebrity's image and likeness and, in some cases, agreements regarding songs or other artistic creations of the celebrity, if owned by the entity. It appears that under a statute like California's, a celebrity could transfer to the limited partnership the postmortem rights to use his image.[43]

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[33]These techniques are discussed in greater detail in Jonathan G. Blattmachr and Michael L. Graham, *Gift Tax Safety Nets for Installment Sales to Grantor Trust*, *available at* http://www.interactivelegal.com/docs/alerts/Installment_Sale_to_Grantor_Trust.pdf (last visited Aug. 22, 2009).

[34]130 T.C. 1 (2008), *Doc 2008-1539, 2008 TNT 17-7*, appeal docketed, No. 08-3844 (8th Cir. Mar. 9, 2008). *See* Michael E. Morden, "Reallocating Wealth After *Christiansen*: A Fresh Look at Formula Clauses," 35 *ACTEC J.* 97, 97 (2009) (noting that the case "may change the way practitioners view and use formula clauses").

[35]*Id.* at 5.

[36]*Id.* at 14. For an analysis in another context of the interplay of forced valuation clauses and public policy, see *Commissioner v. Procter*, 142 F.2d 824 (4th Cir. 1944), *cert. denied*, 323 U.S. 756 (1944). *Procter* was rejected by the *Christiansen* court as inapplicable. 130 T.C. at 17.

[37]*Christiansen*, 130 T.C. at 13, 14-18. The amount passing to the charitable lead trust did not qualify as a valid disclaimer because the daughter was a remainder-beneficiary of the trust. Only the portion passing to the foundation qualified as a valid disclaimer.

(Footnote continued in next column.)

[38]The government has appealed on the grounds that the bequest was subject to a condition after the decedent's death, namely, a valuation challenge. Brief for Appellant at 1, *Christiansen v. Commissioner*, 2009 WL 789131 (8th Cir. 2009) (No. 08-3844).

[39]Reg. sections 25.2518-3(a)(1)(ii) and -(b); 20.2055-2(c) and (e).

[40]*See Christiansen*, 130 T.C. at 13-15 (citing regulations).

[41]On the strong deference a court must extend to a Treasury regulation, see Mitchell M. Gans, "Deference and the End of Tax Practice," 36 *Real. Prop. Prob. & Tr. J.* 731 (2002). *See also* Gans and Jay A. Soled, "A New Model for Identifying Basis in Life Insurance Policies: Implementation and Deference," 7 *Fla. Tax Rev.* 569, 598-605 (2006).

[42]*See, e.g.*, *Estate of Jones*, 116 T.C. 121, 128 (2001), *Doc 2001-6611, 2001 TNT 45-12*. *See also* Mitchell M. Gans, "Deference and Family Limited Partnerships: A Case Study," in 39 *Ann. Heckerling Ins. on Est. Plan.* 5-9 (Tina Portuondo ed., 2005) ("well advised taxpayers ought to be able to avoid the IRS's gift-on-formation argument through the simple expedient of proper maintenance of the capital accounts").

[43]Cal. Civ. Code section 3344.1(b). ("The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument, executed before or after January 1, 1985.")

Estate tax valuation discounts associated with limited partnerships and limited liability companies have been under attack from the IRS.[44] But if the estate can show that there was a sufficient nontax purpose for forming the limited partnership, the entity should not be disregarded for estate tax purposes.[45] Consider *Mirowski v. Commissioner*, in which the Tax Court validated estate tax discounts associated with a family limited partnership in which the entity was used to manage patent litigation, among other things.[46]

In *Mirowski*, the decedent inherited from her husband various patents relating to an implantable heart defibrillator device and interests under patent license agreements. Mirowski contributed these and other assets to an LLC of which she was the sole member and the general manager.[47] Mirowski retained ''more than enough personal assets to meet her living expenses.''[48] She then made a gift of 48 percent of the total LLC interests by transferring 16 percent to each of three *inter vivos* trusts (one for each of her three daughters). On Mirowski's death, the IRS asserted a $14 million deficiency on the grounds that the assets of the LLC were includable in her gross estate under section 2036(a).[49] The Tax Court disagreed and ruled in favor of the estate. The court reasoned that the bona fide sale exception under section 2036 applied to this case because ''the record establishes the existence of a legitimate and significant nontax reason for creating the family limited partnership, and the transferor received partnership interests proportionate to the value of the property transferred.''[50] Mirowski's nontax reasons for creating and funding the LLC included maintaining the family's assets in a way that would allow the family to manage them (including litigation associated with the patents)[51] and make some investments that would not otherwise be available if the assets were held by individual family members.[52] Like patents and patent litigation, the management and use of a deceased celebrity's publicity rights may be enhanced by having the rights held through one legal entity, even if by different beneficial owners.

In the future, Congress may enact legislation about discounts regarding these kinds of entities. The legislation might be less likely to affect LLCs or limited partnerships funded by publicity rights, however, given the business-oriented nature of these assets. For that reason, limited partnerships and LLCs would appear to have continued vitality for planning in this context. Note, however, that cases like *Mirowski* involve death-time valuation. A lifetime gift or sale, especially a sale to a grantor trust (that is, a sale that would be ignored for income tax purposes) might therefore be preferable.[53]

As a possible alternative to a family limited partnership or a lifetime sale to a grantor trust, an individual whose intellectual property rights are expected to be worth relatively little could employ a tax allocation clause in an effort to prevent the tax imposed on the publicity rights from depleting the remainder of the individual's estate.[54] Such a clause could require the recipient of the intellectual property rights to be responsible for paying all transfer taxes attributable to the intellectual property rights. In some cases, if a recipient of publicity rights, for example, has difficulty borrowing money to pay the tax, that could provide evidence that the rights are not greatly valued by the market, limiting the estate's overall tax exposure. However, in the case of a celebrity like Jackson, whose publicity rights are in fact worth a great deal, the recipient might have to borrow money to pay the estate tax and, depending on the situation, might have difficulty finding a lender if the amount was very high. Moreover, some celebrities may have nontax reasons for discouraging the sale of their publicity rights or other intellectual property,[55] and a clause that imposes all tax on the recipient of those rights might lead to overexploitation to pay the tax.

4. Extensions to pay. In some cases, the value of the postmortem intellectual property rights of a celebrity like Jackson could be so great that the estate might not have the liquid assets to pay the estate tax liability on time. In that case, the personal representatives should file a request for an extension to pay the tax. Under section 6161(a)(2), the IRS is authorized to extend the time for payment of estate tax for up to 10 years on a showing of

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[44] *See, e.g.*, Wendy C. Gerzog, ''*Rector* and *Gore*: Two Recent FLP Cases,'' *Tax Notes*, Mar. 3, 2008, p. 1039, *Doc 2008-3396*, or *2008 TNT 43-45*; Gerzog, ''*Bongard*'s Nontax Motive Test: Not Open and *Schutt*,'' *Tax Notes*, June 27, 2005, p. 1711; Gerzog, ''*Erickson*: A Primer on FLPs,'' *Tax Notes*, July 16, 2007, p. 201, *Doc 2007-15371*, or *2007 TNT 137-47*.

[45] Mitchell M. Gans and Jonathan G. Blattmachr, ''Family Limited Partnership Formation: Dueling Dicta,'' 35 *Cap. U. L. Rev.* 1, 2 (2006).

[46] *Estate of Mirowski v. Commissioner*, T.C. Memo. 2008-74, 95 T.C.M. (CCH) 1277, *Doc 2008-6681*, *2008 TNT 60-8*.

[47] *Id.* at *35.

[48] *Id.* at *31.

[49] *Id.* at *51.

[50] *Id.* at *56 (quoting *Bongard v. Commissioner*, 124 T.C. 95, 118 (2005), *Doc 2005-5359*, *2005 TNT 50-11*).

[51] *Id.* at *46.

[52] *Id.* at *60.

[53] *See* Michael D. Mulligan, ''Sale to a Defective Grantor Trust: An Alternative to a GRAT,'' 23 *Est. Plan.* 3 (Jan. 1996); and Mulligan, ''Defective Grantor Trusts Offer Many Tax Advantages,'' 19 *Est. Plan.* 131 (June 1992). *See also* Jonathan G. Blattmachr and Michael L. Graham, *supra* note 33, and Blattmachr and Scott Nammacher, ''Bill Would Have Far Reaching Effect on Gift and Estate Tax Valuation,'' *available at* http://www.ssrn.com/abstract=1460303 (discussing the potential impact of H.R. 436, 111th Cong. (2009) on estate tax valuation rules and criticizing the bill as an ''attempt to legislate the earlier family attribution concepts into law, in spite of the history of case law in direct contradiction to its reasonableness'').

[54] On the use of tax allocation clauses, see, e.g., Regis W. Campfield, *Estate Planning and Drafting*, 65-67 (3d ed. 2007); and Bridget J. Crawford and Jonathan G. Blattmachr, ''Estate Tax on Gift Tax: The Liability Conundrum,'' *Tax Notes*, June 8, 2009, p. 1268, *Doc 2009-11913*, or *2009 TNT 108-15*.

[55] On the reluctance of some celebrities to exploit their publicity rights commercially and the implications of that reluctance for estate tax valuation, see Madoff, *supra* note 24, at 780-782.

"reasonable cause."[56] The legislative history makes clear that Congress intended this provision to provide relief to estates facing liquidity problems.[57] A celebrity's estate that includes valuable postmortem publicity rights or copyrights should be eligible on this basis.

Note also that if the decedent engaged in lifetime estate planning and transferred publicity rights to a limited partnership or an LLC, the personal representatives may be eligible for an extension under section 6166 if the entity was an active business that commercially exploited the celebrity's publicity rights.[58] Under section 6166, if the value of a closely held business interest included in the gross estate of a U.S. citizen or resident exceeds 35 percent of the value of the adjusted gross estate, the executor can elect to extend the time for paying that portion of the estate tax that is attributable to the inclusion of those interests in the gross estate.[59] A qualifying estate may elect to pay only interest annually for the first five years after the otherwise normal due date (nine months after a decedent's date of death). In years 6 to 14, the estate must pay each year one-tenth of the total estate tax due, plus interest.[60] A decedent who previously transferred his publicity rights to an LLC, for example, might easily meet the 35 percent threshold test. Assuming that the LLC was an active trade or business and otherwise meets the definition of a closely held business,[61] the extension to pay under section 6166 is granted as a matter of right, if a timely election is made.[62]

If for any reason limited partnerships or LLCs were disregarded for purposes of section 2036, it is conceivable that they would nevertheless be respected for purposes of section 6166, if operating an active trade or business. Some celebrities who might otherwise not consider transferring their publicity rights to a business entity might do so to become eligible for the extension to pay under section 6166. For that reason, Congress may wish to consider legislation that addresses the liquidity problems of estates composed largely of difficult-to-value publicity rights. A specific rule granting an automatic extension to file might then mean fewer celebrities using entities solely to gain an extension and would be more predictable than the "reasonable cause" test of section 6161.

5. IRD. As a final matter, we note that the relationship between postmortem publicity rights and income in respect of a decedent (IRD) is unexplored. Although there is no clear definition of IRD, in most cases it will be earned income in an "accrual" sense. Ferguson, Freeland, and Stephens describe four "salient characteristics" of IRD:

> First, the item of income must have been taxable to the decedent had he survived to the time the income was realized. This is to say, the income must have been attributable to his services, his sales, or his income-producing property.
>
> Second, although the decedent must have become "entitled" to the income by his death, his rights must not have matured sufficiently to require inclusion of the income in his final income tax return under the accounting method employed by him.
>
> Third, what is transferred at death must be a passive right to receive income, as distinguished from "property" entitled to a fair market value basis under [section] 1014(a).
>
> Fourth, the recipient of the right to the income in question must have acquired it solely by reason of the death of the taxpayer who created it. This characteristic subjects income in respect of a decedent to two important limitations, each of which sheds further light upon the basic concept: First, [section] 691 presupposes a gratuitous transfer from a decedent at death of a right to income. Second, the ultimate proceeds must be received solely because of the taxpayer's passive status as the decedent's transferee of the specific right.[63]

So, for example, if a taxpayer dies on March 15, interest accrued on a bond through that date constitutes IRD. Interest earned thereafter is not IRD, even though the taxpayer would have received the interest had he lived. Another example of facts giving rise to IRD would involve an employee who dies in the middle of a pay period. The employee-decedent's final paycheck is IRD. In the case of a married decedent, typically his will would specify that a credit shelter trust will not be funded with IRD, because doing so causes erosion of the value of the decedent's spouse's unified credit. It may be important to allocate non-IRD assets rights to the marital bequest, not the credit shelter bequest. In cases when there are insufficient non-IRD assets to satisfy the credit shelter bequest, it may be appropriate to consider a "supercharged" credit shelter trust.[64]

Publicity rights most likely do not constitute IRD at all. They are property rights, not accrued income. In Jackson's case, if he was owed certain amounts for services he had rendered, those receipts will constitute IRD to his estate. But to the extent that the beneficiaries of his *inter vivos* trust become the owners of the right to exploit Jackson's image and likeness, receipts from post-death agreements to launch a Michael Jackson line of clothing, for example, should not be treated as IRD.

D. Conclusion

Just as publicity rights are difficult to value, they are also difficult to understand. The estate and gift tax consequences of these rights can be complicated, as our

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[56]Section 6161(a)(2).

[57]H.R. Conf. Rep. No. 94-1380, 94th Cong. 2d Sess. 3, 31 (1976), reprinted in 1976-3 C.B. (vol. 3) 735, 765.

[58]For a detailed discussion of the requirements of section 6166, see Jonathan G. Blattmachr et al., "Untangling Installment Payments of Estate Tax Under 6166," 36 *Est. Plan.* 3 (2009).

[59]Section 6166(a)(1).

[60]Section 6166(f).

[61]Section 6166(b)(1).

[62]*See supra* note 58.

[63]M. Carr Ferguson et al., *Federal Income of Estates & Beneficiaries*, 146-148 (1970) (citations omitted).

[64]*See* Mitchell M. Gans et al., "Supercharged Credit Shelter Trust," *Prob. & Prop.* 52 (July-Aug. 2007).

own dialogue elsewhere has shown.[65] For most individuals, at least, the commercial value of our entertainment potential after death will be negligible. But for some international superstars, lifetime and postmortem publicity rights, in addition to any copyrights in artistic creations, may be a potentially huge source of revenue. Estate planning with publicity rights is territory that is uncharted — or perhaps ''off the charts,'' as Jackson's posthumous fame already is. Those who represent celebrity clients should pay close attention to developments in this area of the law. To quote Jackson himself, ''No one wants to be defeated'' in a confrontation,[66] whether over a tax bill or otherwise. Nevertheless, when it comes to paying an estate tax bill, it *does* matter who is wrong and who is right.[67]

[65]*See supra* note 2.

[66]Michael Jackson, ''Beat It,'' on *Thriller* (Epic Records 1982).

[67]*But cf. id.* (''Showin' how funky and strong is your fight / It doesn't matter who's wrong or right.'')