No. 11-35858
(Consolidated with No. 11-35872)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EXPERIENCE HENDRIX LLC,
a Washington Limited Liability Company, et al.

Plaintiffs and Appellants,
v.

HENDRIXLICENSING.COM LTD, etc. et al.

Defendant and Appellee.

Appeal From The United States District Court
For The Western District of Washington
USDC No. 2:09-CV-00285-TSZ
The Honorable Thomas Zilly, Senior District Judge, Presiding

BRIEF OF *AMICUS CURIAE* MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
FILED WITH CONSENT OF ALL PARTIES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Treatises

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and 29(c), *amicus curiae* Motion Picture Association of America, Inc. ("MPAA") discloses the following:

(1) MPAA is a not-for-profit trade association;

(2) MPAA does not have any parent companies; and

(3) There are no publicly held companies that own ten (10) percent or more of the stock of the MPAA.

Respectfully submitted this 21st day of March, 2014.

LEOPOLD, PETRICH & SMITH, P.C.

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I. INTRODUCTION AND STATEMENT OF INTEREST

Amicus Motion Picture Association of America, Inc. ("MPAA")[1] submits this brief in support of the Petition for Rehearing and a Rehearing En Banc, filed March 12, 2014, by Defendants and Appellees from the Panel's Opinion ("Op.") filed on January 29, 2014. The Opinion is reported at 742 F.3d 377.

Until the panel issued its Opinion, a determination of whether the estate of a deceased personality could assert a prima facie "right of publicity" claim was determined by the last domicile of a decedent (the "Domicile Rule").[2] The Opinion suddenly upended this settled choice-of-law rule.

This result – which is not justified by any legitimate interest of the state of Washington in persons who died domiciled anywhere else in the world (in this instance, in New York) – will encourage heirs and their licensees to file unfounded and wasteful lawsuits in states having outlier statutes that purport to create rights

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[1] The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The members are: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; Walt Disney Motion Pictures; and Warner Bros. Entertainment Inc. Counsel of record for all parties have consented to the filing of this brief. No parties' counsel has authored any part of this brief; no party or its counsel has contributed money to fund this brief. Amicus is the sole source of funding of this brief.

[2] "Almost all courts follow the rule that the existence or non-existence of a post-mortem right of publicity is determined by the law of the state of domicile at the time of death." 2 J.T. McCarthy, *The Rights of Publicity & Privacy* (2013 ed.) ("*McCarthy*") § 11:15 at 700.

that the governing domicile state does not afford. The resulting patchwork of conflicting rights among the states in the same persona will unduly burden interstate commerce and create a chilling effect in conflict with the First Amendment.

Motion pictures and other forms of storytelling and entertainment content are protected speech. *See Winters v. New York*, 333 U.S. 507, 510 (1948). Historical depictions of deceased personalities are among many common subjects of such speech. *See Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.2d 860, 867-69, 160 Cal. Rptr. 352, 603 P.2d 454 (1979) ("prominence invites creative comment."). Even though Washington State's right of publicity statute provides specific exemptions for "film" and "television programs," many states within the Ninth Circuit have no such statutes: Alaska, Arizona, Hawaii, Idaho, and Oregon. *See* 1 *McCarthy* § 6:8 (chart of state statutes). While the First Amendment clearly protects Amicus' right to produce and distribute expressive works whether or not a statutory exemption exists, *see* 2 *McCarthy*, §§ 8:64-66; 8:73-83, where no bright lines exist in the form of exemptions or the Domicile Rule, heirs are emboldened to assert groundless publicity claims. *See, e.g. Tyne v. Time Warner Entm't Co.,* 901 So.2d 802 (Fla. 2005).

The market for the entertainment industry is global; in the United States, it is a national, not an insular, state-by-state, market. Washington's publicity statute

(the "Act") on its face purports to create a new property right regarding every deceased personality in the world who has died since 1947 (and for 75 years after death) "regardless of the personality's place of domicile, residence, or citizenship at the time of death or otherwise." Wash. Rev. Code ("RCW") § 63.60.020. Any individual or entity that uses that name or likeness ("persona") without consent "on or in goods, merchandise, or products, entered into commerce in" Washington or for purposes of advertising "if any person disseminates or publishes such advertisements in this state" RCW § 63.60.050, is subject to an injunction, disgorgement of profits, orders to destroy infringing materials, and an award of attorneys' fees. RCW § 63.60.060.

The Washington Act as amended in 2008 violates the dormant Commerce Clause on its face and in practice because it withdraws from the public domain the use of personas of certain deceased personalities and confers a monopoly of such rights on local economic groups of heirs. It also violates the Full Faith and Credit and Due Process Clauses. The only "contact" with the state cited to justify the new choice of law rule – "the loss of sales in Washington" premised on the new Act – is an example of circular reasoning. The Opinion's prediction that erecting a barrier in Washington to the unlicensed sale of goods based on the Domicile Rule "does not affect transactions occurring wholly outside Washington" has no basis in fact, given the national nature of the market for entertainment products.

II. THE OPINION IGNORES THE SALIENT CONSTITUTIONAL LIMITATIONS IMPOSED BY THE DORMANT COMMERCE CLAUSE

"Modern dormant Commerce Clause jurisprudence primarily 'is driven by concern about economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (citations omitted). Thus, "a corollary concern of the dormant Commerce Clause is that 'this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw material and finished goods.'" *Id*. (Citations omitted). The Opinion does not cite the leading two-tier test on the Dormant Commerce Clause required by *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970).

First, when a state discriminates against interstate commerce, or favors in-state economic interests over out-of-state interests, "'it is virtually *per se* invalid'." *Yakima Valley Mem. Hosp. v. Washington State Dep't. of Health*, 731 F.3d 843, 846 (9th Cir. 2013)(citation omitted).[3] In fact the only purpose and effect of the "no-domicile" 2008 amendment to the Act was to withdraw the Jimi Hendrix persona from the public domain (at least in Washington) and to confer a monopoly on Plaintiff, a local economic interest. Op. at 8-9. To that extent, the interstate

[3] The district court agreed with Plaintiff that WPRA does not *facially* discriminate against interstate commerce or favor Washington businesses over out-of-state concerns – and the Panel apparently concluded that it need not look further, Op. at 14, but Defendant made that claim. ECF #22, Appellees' Br. at 17-21.

commerce in Jimi Hendrix's persona was unduly burdened to favor a local economic interest. The new monopoly power will allow a local interest to try to leverage nationwide control over uses of the Hendrix persona.

Even assuming, as the Panel did, Op. at 14, that the amended Act on its face did not discriminate in favor of local interests to the disadvantage of interstate commerce, *Pike* required application of a second inquiry: whether the statute "regulates even-handedly to effectuate a legitimate local public interest," has only "incidental" effects on interstate commerce, and imposes no burden on such commerce that is "clearly excessive in relation to the putative local benefits." 397 U.S. at 142.

Courts have equated "legitimate local public interest" with the health, life and safety of the state's citizens. *Yakima*, 731 F.3d at 848. Plaintiffs argued that Washington is home to two large companies which manage and license publicity rights. ECF #11, Appellants' Br. at 30-31. Clearly, creating and awarding a local monopoly has nothing to do with health, life or safety.

The creation of a property interest in Hendrix' persona in Washington has more than "incidental" effects on interstate commerce that would use the Hendrix persona in national markets, based on the generally accepted domicile rule.[4] This

[4] The Act confers this new monopoly on "the beneficiaries or heirs under the laws of intestate succession applicable to interests in intangible personal property generally of the … personality's domicile …". WRC § 63.60.030(1)(a) (emphasis

Court has acknowledged that "significant burdens on interstate commerce generally result from inconsistent regulation of activities that are inherently national or require a uniform system of regulation. *National Ass'n*, 682 F.3d at 1148.

The Opinion attempts to cabin the effects of the Act by stating that it "does not affect transactions occurring wholly outside Washington." Op. at 14. However, interstate commerce will have to stop at the Washington borders or pay the toll exacted by the newly enacted monopoly, or else suffer the consequences of the state's tort remedies. If upheld, the Act will encourage the balkanization of state laws[5] regarding post-mortem rights of publicity, including conflicting rules regarding inheritance, transfer, priority of conflicting claims, and marital rights.

III. THE ACT IS ARBITRARY AND FUNDAMENTALLY UNFAIR AND VIOLATES THE FULL FAITH AND CREDIT CLAUSE AND DUE PROCESS CLAUSE.

The Opinion quotes *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) as the leading authority for the proposition that

> for a State's substantive law to be selected [and applied to a particular case] in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state

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added). The statute thus relies on New York domicile to identify the owner, while ignoring domicile to create the new property right.

[5] The *amici* brief filed in support of Plaintiffs' appeal argued that the Washington rule would create uniformity – within Washington. ECF #16-2, at 24. By contrast, a Domicile Rule would have a uniform effect nationally for a given persona.

> interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

Op. at 12 (bracketed material added by Opinion). The sole "contact" cited by the Opinion – apparently to weigh against Hendrix's domicile in New York – is "the loss of sales in Washington of Pitsicalis-licensed goods." Op. at 12. This "contact" has a chimerical quality. Because of the Domicile Rule, no one had a property right in Hendrix's persona before the 2008 amendment to the Act. Op. at 8. Thus, but for the 2008 amendment jettisoning the Domicile Rule, Plaintiff had no publicity right to give it an expectation that it could control sales. It is circular to rely on the fact of the 2008 amendment to justify the 2008 amendment. If that were a "sufficient contact," no choice of law rule could ever be challenged.

The Opinion states that "Washington does have an interest in recognizing personality rights in all people, living and deceased, whose images may be traded upon within its borders." Op. 13, n. 6. (Emphasis added.) This *ipse dixit* statement is devoid of constitutional content or guidance to future litigants. Does it mean that every State can create its own (potential contradictory) rules of intestacy, ownership and transfer regarding the same persona? The Act is arbitrary and fundamentally unfair.

IV. THE PANEL SHOULD, AT A MINIMUM, CLARIFY THE OPINION'S STATEMENT THAT THE STATUTE ON ITS FACE OR IN PRACTICE "DOES NOT AFFECT TRANSACTIONS OCCURRING WHOLLY OUTSIDE WASHINGTON."

It is not clear what the Panel intended by its statement, Op. at 14, that the "controversy" does not affect transactions occurring wholly outside Washington. In the district court, Petitioners raised a constitutional challenge to the Act on its face and in practice. On its face, the statute applies to commerce within Washington without regard to whether that commerce is a part of the stream of interstate commerce.[6] A burden or obstacle that adversely affects interstate commerce is presumptively unconstitutional. *Yakima*, 731 F.3d at 846. Simply hypothesizing a purely intrastate effect does not address the facial unconstitutionality.

[6] The Opinion states at 12 n. 4: "[Appellee] Pitsicalis argues that the WPRA has a much broader potential application. But the actual, non-speculative controversy before this court does not implicate those possible broader applications of the WPRA." This statement does not address the facial reach of the Act; nor does it realistically address the impact on interstate commerce in fact.

V. CONCLUSION

The Petition for rehearing and suggestion for a rehearing *en banc* should be granted.

DATED: March 21, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, LOUIS P. PETRICH, certify that this amicus brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(a)(7)(C) and contains 1,968 words, exclusive of the Corporate Disclosure Statement, the Table of Contents and the Table of Authorities, as counted by the Microsoft Windows 7 word-processing program used to generate this brief.

I certify that this amicus brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Windows 7 word-processing program with a 14-point Times New Roman font.

DATED: March 21, 2014

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Numbers: 11-35858, 11-35872

BRIEF OF AMICUS MOTION PICTURE ASSOCIATION OF AMERICA, INC. SUPPORTING PETITION FOR PANEL REHEARING AND REHEARING EN BANC

I, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on March 21, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.8

/s/ Cynthia A. Touchard
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