

'Til Death Do Us Part

Artists should carefully construct licensing agreements to take into account the disposition of their business, copyrights, and trademarks in the event of their death.

BY JOSHUA KAUFMAN, ESQ

Death never comes at a convenient time—not for the living or the dead. Its impacts are always emotional, but they also can have significant business ramifications, as well. In the context of an artist or any licensor, their agent, and their licensee, what happens to the relationships, contacts, or agreements between the parties when the artist/licensor passes away?

Post-death scenarios take two different tracks depending on whether or not the artist/licensor had incorporated and was working as an entity rather than in an individual capacity. Many artists incorporate as corporations or limited liability companies (LLC). If they did and transferred their intellectual property assets such as copyrights and trademarks to the LLC or company, and the entity entered into the agreements in its name with licensees or agents, from a legal point of view, the fact that the artist died has very little significance. This also would be the case even if the artist is the sole shareholder of the entity, the manager of the LLC, and the only officer and director of the company. It does not matter; the entity continues to exist and be responsible for the fulfillment of any obligations and would enjoy the benefits that flow to the entity.

This line of reasoning applies as well with a licensee if it is incorporated as a legal entity. Also, if an agent has incorporated or is an LLC, the artist would still be bound to the agency even if the agent died. Sometimes an individual agent is the sole reason one has contracted with that particular company, and with the death of the agent one has no contacts and/or no faith in the agency but still is bound unless

and trademarks can be a property and are bequeathed through a will. Many people draft complex wills dividing assets with specific bequests of gifts, extensive trusts, and estate planning to lower taxes and the like but do not consider their copyrights in any comprehensive, specific manner. Therefore, if they are not specifically mentioned in a will, the copyrights become part of what is known as the residuary estate.

Many people do not realize that copyrights and trademarks can be a property and are bequeathed.

there was a clause in their agreement that if the agent died or left the company they have the right to terminate the agreement. What this often does is leaves agents, artists, and licensees not dealing with the people who they have been dealing with for years but rather with those who inherit the stocks or shares.

If the artist has not created an entity through which to run the business, the situation becomes more complicated. First to be considered is who owns the underlying rights. Generally speaking, this will be copyrights, although they also can include trademark rights. Many people do not realize that copyrights

Many wills have a clause that provides that anything not specifically bequeathed or covered in the rest of the will goes to the residuary beneficiaries. As such, copyrights often pass to heirs in a rather haphazard matter. In a properly drafted will, the owner can bequeath the copyrights to specific individuals, to a charitable organization, or even to a trust to administer. The proceeds can be segregated from the assets, and a special personal representative who might be knowledgeable about the handling of copyrights, trademarks, and licensing can be appointed separate and distinct from the personal representative who might be responsible for the rest of the estate. In either event, while the estate is

✧ 'Til Death Do Us Part (continued)

in probate, which could be as short as six months to a year—or it could be for many years—the personal representative of the estate will control the disposition of the assets of the estate including the copyrights and/or trademarks.

The issue of estates and contracts generally is governed by state law. What the impact if someone dies has on a contract and who inherits or controls the rights are all subject to state law. There are some complex copyright issues dealing with heirs; however, the general disposition

and liability of license agreements post-death often will be governed by the appropriate state law. The clause often seen in contracts that everyone ignores because it is simply “boiler-plate” is the “choice of law clause.” The state law chosen in those clauses generally is based on whomever drafted the contract as they usually choose the state in which they are located. This clause often can determine the terms and the effect of death and what law governs in the license agreement.

One difficult issue is what

happens if there are ongoing obligations the artist must fulfill, specifically to provide new art, approve product, or assist in the design of products. Can the estate or entity provide archived works, substitute another artist, and/or make the necessary decisions? These answers will vary based on each arrangement. If the answer is no, the estate or entity may be in breach of the license, and it could be subject to termination or even damages. These issues should be dealt with in the underlying agreement if possible. ♣

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