

SENATE No. 2022

The Commonwealth of Massachusetts

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In the Year Two Thousand Fourteen
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SENATE, Monday, March 3, 2014

The committee on Tourism, Arts and Cultural Development to whom was referred the petition (accompanied by bill, Senate, No. 1630) of Stanley C. Rosenberg, Benjamin B. Downing, Gale D. Candaras, Garrett J. Bradley and other members of the General Court for legislation relative to the protection of the commercial value of artists, entertainers, and other notable personalities,- reports the accompanying bill (Senate, No. 2022).

For the committee,
Kathleen O'Connor Ives

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An Act protecting the commercial value of artists, entertainers, and other notable personalities.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 214 of the General Laws is hereby amended by striking out
2 section 3A, as appearing in the 2010 Official Edition, and inserting in place thereof the following
3 section:-

4 Section 3A. (a) As used in this section, the following words shall, unless the context
5 clearly requires otherwise, have the following meanings:-

6 “Aspect”, one part of a personality’s identity, such as a name or image, for which the
7 right of publicity may be transferred separately from the right of publicity for other parts of a
8 personality’s identity under paragraph (1) of subsection (d).

9 "Commercial use", the use of a personality’s identity (A) on or in goods, products or
10 services, (B) for the purpose of advertising goods, products or services or (C) for fundraising;
11 provided, that commercial use shall not include: (1) use of a personality’s identity as part of a
12 news report or commentary; or (2) use of a personality’s identity as part of an artistic or
13 expressive work, such as a live performance, work of art, literary work, theatrical work, musical

14 work, motion picture, film or audiovisual work (provided such work does not include any
15 interactive electronic or digital gaming), television program, radio program or the like; or (3) use
16 of a personality's identity in an advertisement, promotion or commercial announcement of any
17 such news report, commentary or expressive work containing the personality's identity; or (4)
18 use of a personality's identity in the personality's role as a member of the public where the
19 personality is not named or otherwise identified; or (5) use of a personality's identity or a group
20 of personalities' identities in a manner that is incidental or de minimus; or (6) use of a
21 personality's identity in a manner that is otherwise permitted by law.

22 "Identity", a personality's name, likeness, voice, or signature that uniquely identifies that
23 particular personality.

24 "Name", the actual or assumed name or nickname of a personality that identifies that
25 particular personality.

26 "Person", any individual, firm, association, partnership, corporation, joint stock company,
27 limited liability company, syndicate, receiver, common law trust, conservator, statutory trust or
28 any other concern or entity, however named, organized, formed or created; provided, that this
29 shall include not-for-profit corporations, associations, educational and religious institutions,
30 political parties, campaign committees and community, civic and other organizations.

31 "Personality", an individual whose identity has commercial value.

32 "Right of Publicity", the property interest established in subsection (b).

33 (b) A personality shall have a property interest in such personality's identity and shall
34 have the exclusive right to control the commercial use of the personality's identity during the

35 personality's lifetime and for 70 years after the date of the personality's death, unless terminated
36 earlier under paragraph (5) of subsection (d).

37 (c) (1) Except as otherwise provided in this section, a person who knowingly makes
38 a commercial use of a personality's identity in the commonwealth during the personality's
39 lifetime or for 70 years after the date of the personality's death, without written consent of the
40 personality or of the person or persons who collectively own more than 50 per cent of the aspect
41 of the personality's right of publicity that was commercially used, shall have infringed the
42 personality's right of publicity.

43 (2) Paragraph (1) shall not apply to an owner of any medium used for advertising
44 through which an infringing use is published, broadcast or disseminated, unless it is established
45 that the owner had actual knowledge that the use of the personality's identity was an
46 infringement of the personality's right of publicity.

47 (3) Paragraph (1) shall not apply to uses of a personality's identity in the
48 distribution of audio and/or visual works for sale, license, or other transfer to third parties, but it
49 shall apply to commercial uses by third party purchasers, licensees and transferees from such
50 distributors.

51 (4) A person who owns, or persons who collectively own, more than 50 per cent
52 of the commercially used aspect of a personality's right of publicity, and only such person or
53 persons, may enforce the personality's right of publicity by bringing a civil action against a
54 person who has infringed or is infringing the right of publicity to prevent and restrain the
55 infringement, including restraint on a preliminary basis, and to recover damages as described in
56 paragraph (5).

57 (5) This section shall apply only in the following circumstances: (i) the
58 personality's domicile is in the commonwealth, (ii) in the case of a deceased personality, the
59 deceased personality's domicile was in the commonwealth on the date of the personality's death
60 or (iii) the infringing use is directed only to persons in the commonwealth and, if the personality
61 is deceased, on the date of the personality's death the personality was a domiciliary of a state that
62 recognized a descendible right of publicity for the personality and the persons owning the
63 infringed aspect of such right of publicity has registered such interest under any applicable laws
64 of such state.

65 (6) Damages for infringement of the right of publicity shall be awarded in an
66 amount equal to the greater of (i) \$1,000 or (ii) the actual damages suffered as a result of the
67 infringement, including any profit of the infringer attributable to the infringement that is not
68 taken into account in computing the actual damages. In establishing such profit, the person
69 alleging the infringement shall prove the gross revenue attributable to the infringement and the
70 alleged infringer shall prove any deductible expenses.

71 (7) The court may award the prevailing party in an action under this section
72 reasonable attorney's fees, expenses and court costs incurred in recovering any remedy or
73 defending any claim under this section.

74 (8) A defendant's reliance upon the written consent of a personality or a person or
75 persons who collectively own more than 50 per cent of the commercially used aspect of the
76 personality's right of publicity and who have registered the transfer of such interest: (i) under
77 paragraph (3) of subsection (d); (ii) in another state that is the domicile of a living personality; or

78 (iii) if the personality is deceased, in another state that is the personality's last domicile, shall be
79 a complete defense in any action under this section.

80 (d) (1) A personality's right of publicity is freely transferable, in whole or in part, by
81 any form of inter vivos or testamentary transfer, including, but not limited to, by written contract,
82 assignment, license, gift, trust, testamentary document or intestate succession; provided, that no
83 interest in the right of publicity shall escheat to any state, commonwealth or other jurisdiction.
84 Notwithstanding section 3-101 of chapter 190B of the General Laws, insofar as a personality
85 does not transfer the right of publicity, in whole or in part, during life, a deceased personality's
86 personal representative or voluntary personal representative shall be the transferee from the
87 personality's death until the deceased personality's right of publicity is transferred by such
88 personal representative.

89 (2) A person or persons meeting the requirements of paragraph (3) of subsection
90 (c) to whom an interest in a personality's right of publicity has been transferred shall not bring a
91 civil action under this section unless the transferee has or all such transferees have registered the
92 transfer or transfers with the state secretary under this subsection.

93 (3) A transferee shall register the transfer with the state secretary on a form
94 prescribed by the secretary. The form shall include the name of the personality, the date of the
95 transfer, the date of death and the personality's domicile at the time of death if the personality is
96 deceased, the name and address of the transferee, the name and address of any persons
97 authorized to act on behalf of the transferee, the method of transfer and the nature and percentage
98 of the interest in the right transferred. The information provided on the form and related
99 documents shall be submitted by the transferee under the pains and penalties of perjury. The

100 state secretary may collect a fee for the registration that does not exceed the incremental costs of
101 recording the documents and maintaining the registry. Upon receipt of the form and related
102 documents for filing, the state secretary shall post the form and documents in a registry of
103 interests in transferred rights of publicity on the state secretary's website. A reproduction of a
104 record under this section that is certified by the state secretary shall be admissible in a court of
105 law. The state secretary shall not be required to retain a record or reproduction concerning a
106 registration under this section for more than 80 years after the date of the personality's death. A
107 form or other document filed under this section shall be considered a public record under clause
108 Twenty-sixth of section 7 of chapter 4 or chapter 66.

109 (4) A person or persons meeting the requirements of paragraph (3) of subsection
110 (c) to whom an interest in a personality's right of publicity has been transferred shall not recover
111 damages or other relief for an infringement that occurred before the date that the transferee has
112 or all such transferees have registered the transfer or transfers under paragraph (3); provided, that
113 a transferee or transferees may recover for infringements that occurred during the period alleged
114 in a civil action properly commenced by the personality or transferor prior to the transfer.

115 (5) An aspect of a deceased personality's right of publicity shall terminate (i) if at
116 any time there is no transferee of such aspect or (ii) if no transferee has registered a transfer
117 thereof during the personality's life or within 5 years after the personality's death.

118 (6) No action shall be brought under this section for any commercial use of a
119 personality's identity occurring more than 70 years after the date of the personality's death.

120 SECTION 2. Section 3A of chapter 214 of the General Laws shall provide the exclusive
121 rights and remedies for infringement of the right of publicity occurring after the effective date of
122 this act and shall supersede any common law or statutory rights and remedies.