

SENATE No. 02382

The Commonwealth of Massachusetts

SENATE, July 26, 2012

The committee on Ways and Means, to whom was referred the Senate bill protecting the commercial value of artists, entertainers, and other notable personalities (Senate, No. 1713); report recommending that the same ought to pass with an amendment substituting a new draft with the same title (Senate, No. 2382).

For the committee,

STEPHEN M. BREWER.

The Commonwealth of Massachusetts

_____ **In the Year Two Thousand Twelve** _____

1 SECTION 1. Chapter 214 of the General Laws is hereby amended by striking out section
2 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", 1 part of a personality's identity, such as a name or image, for which the right
7 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: (i) use of a personality's identity as part of a
12 news report or commentary or as part of an artistic or expressive work, such as a live
13 performance, work of art, literary work, theatrical work, musical work, audiovisual work,
14 motion picture, television program, radio program or the like, (ii) use of a personality's identity
15 in an advertisement, promotion or commercial announcement for any such news report,
16 commentary or work containing the personality's identity, (iii) use of a personality's identity in

17 the personality's role as a member of the public where the personality is not named or similarly
18 identified, (iv) use of a personality's identity or a group of personalities' identities in a manner
19 that is incidental or de minimis or (v) use of a personality's identity in a manner that is otherwise
20 permitted by law.

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

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

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

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

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

32 (b) A personality shall have a property interest in such personality's identity and shall
33 have the exclusive right to control the commercial use of the personality's identity during the
34 personality's lifetime and for 70 years after the date of the personality's death, unless terminated
35 earlier under paragraph (5) of subsection (d).

36 (c) (1) Except as otherwise provided in this section, a person who knowingly makes
37 a commercial use of a personality's identity in the commonwealth during the personality's

38 lifetime or for 70 years after the date of the personality's death, without written consent of the
39 personality or of the person or persons who collectively own more than 50 per cent of the aspect
40 of the personality's right of publicity that was commercially used, shall have infringed the
41 personality's right of publicity.

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

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

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

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

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

69 (7) A defendant's reliance upon the written consent of a personality or a person
70 or persons who collectively own more than 50 per cent of the commercially used aspect of the
71 personality's right of publicity and who have registered the transfer of such interest: (i) under
72 paragraph (3) of subsection (d); (ii) in another state that is the domicile of a living personality; or
73 (iii) if the personality is deceased, in another state that is the personality's last domicile, shall be
74 a complete defense in any action under this section.

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

82 personality's death until the deceased personality's right of publicity is transferred by such
83 personal representative.

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

88 (3) A transferee shall register the transfer with the state secretary on a form
89 prescribed by the secretary. The form shall include the name of the personality, the date of the
90 transfer, the date of death and the personality's domicile at the time of death if the personality is
91 deceased, the name and address of the transferee, the name and address of any persons
92 authorized to act on behalf of the transferee, the method of transfer and the nature and percentage
93 of the interest in the right transferred. The information provided on the form and related
94 documents shall be submitted by the transferee under the pains and penalties of perjury. The
95 state secretary may collect a fee for the registration that does not exceed the incremental costs of
96 recording the documents and maintaining the registry. Upon receipt of the form and related
97 documents for filing, the state secretary shall post the form and documents in a registry of
98 interests in transferred rights of publicity on the state secretary's website. A reproduction of a
99 record under this section that is certified by the state secretary shall be admissible in a court of
100 law. The state secretary shall not be required to retain a record or reproduction concerning a
101 registration under this section for more than 80 years after the date of the personality's death. A
102 form or other document filed under this section shall be considered a public record under clause
103 Twenty-sixth of section 7 of chapter 4 or chapter 66.

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

110 (5) A deceased personality's right of publicity shall terminate (i) if at any time
111 there is no transferee or (ii) upon proof that no transferee has registered a transfer during the
112 personality's life or within 5 years after the personality's death.

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

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