

HOUSE BILL No. 5964

March 18, 2010, Introduced by Reps. Byrnes, Ball, Meadows, Walsh and Dean and referred to the Committee on Judiciary.

A bill to create certain rights in attributes of an individual that have commercial value; to recognize transfer of those rights; to provide exceptions; to provide penalties and remedies; and to provide for powers and duties of certain state officers and departments.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. This act shall be known and may be cited as the "right
2 of publicity act".

3 Sec. 3. As used in this act:

4 (a) "Attribute" means an individual's name, voice, signature,
5 image, or likeness.

6 (b) "Commercial purpose" means the use of 1 or more of a
7 personality's attributes on or in a product or good, or for the
8 purpose of advertising, selling, or soliciting purchases of a

1 product, good, or service.

2 (c) "Name" means the actual or assumed name of a living or
3 deceased individual that identifies that particular individual.

4 (d) "News reporting or entertainment medium" means any medium
5 that is used to publish, broadcast, or disseminate news,
6 entertainment, information, or advertising.

7 (e) "Person" means an individual or a business,
8 proprietorship, firm, partnership, joint venture, syndicate,
9 business trust, labor organization, company, corporation,
10 association, committee, or any other organization or group of
11 persons acting jointly.

12 (f) "Personality" means a living or deceased individual, 1 or
13 more of whose attributes have commercial value, whether or not the
14 individual uses or authorizes the use of his or her right of
15 publicity for a commercial purpose during the individual's
16 lifetime.

17 (g) "Right of publicity" means the right to control use of a
18 personality's attributes for a commercial purpose as provided in
19 this act.

20 (h) "Transferee" means a person to whom a personality's right
21 of publicity is transferred, in whole or in part, by contract,
22 license, gift, trust, will, intestate succession, or other
23 operation of law.

24 Sec. 5. (1) A personality has a right of publicity during his
25 or her lifetime plus 50 years after the date of the personality's
26 death as provided in this act.

27 (2) The right of publicity is a property right that is freely

1 transferable, in whole or in part, by contract, license, gift,
2 trust, will, intestate succession, or other operation of law.

3 (3) If a will does not include an express transfer of a
4 deceased personality's right of publicity, a provision in the will
5 that disposes of the residue of the personality's assets is
6 effective to transfer the personality's right of publicity under
7 this act in accordance with the terms of that provision.

8 (4) If any deceased personality's right of publicity has not
9 been transferred by contract, license, gift, trust, or will, and
10 there is no surviving spouse, devisee, or descendant as described
11 in the estates and protected individuals code, 1998 PA 386, MCL
12 700.1101 to 700.8206, then the personality's right of publicity
13 does not pass to this state but terminates as of the date of death.
14 A court shall dismiss pending litigation over the personality's
15 right of publicity based upon the termination of the right of
16 publicity under this subsection.

17 Sec. 7. (1) Except as provided in section 5(4) or subsections
18 (2) to (5), a person is liable for a violation of a personality's
19 right of publicity if the person knowingly uses 1 or more of the
20 personality's attributes for a commercial purpose in this state
21 during the personality's lifetime or within 50 years after the date
22 of the personality's death without the consent of the personality
23 or of a transferee.

24 (2) Consent is not required for the use of 1 or more of a
25 personality's attributes in any of the following works in any
26 medium now known or hereafter used or devised, regardless of length
27 or format:

1 (a) A motion picture, television program, audiovisual work,
2 documentary, book, play, story, graphic novel, radio or other audio
3 program, musical composition, or sound recording, other than an
4 advertisement that is not exempt under subsection (3).

5 (b) A video game.

6 (c) An original work of art.

7 (d) A magazine, newspaper, article, newsletter, periodical,
8 sports or news broadcast, or other work of political,
9 informational, or newsworthy value.

10 (e) An editorial, fictional, nonfictional, artistic, or other
11 expressive work.

12 (3) Notwithstanding anything to the contrary in this section,
13 consent is not required for the use of 1 or more of a personality's
14 attributes in an advertisement, promotion, or solicitation for any
15 work or use that is excluded from the requirement for consent under
16 any other provision of this section.

17 (4) Consent is not required for the nominative use of 1 or
18 more of a personality's attributes for advertising or for the
19 facilitation of advertising delivered over a communications
20 network, if the nominative use does not falsely suggest an
21 endorsement or sponsorship by the personality of any product, good,
22 or service that the personality has not endorsed or sponsored.

23 (5) Consent is not required for use of 1 or more of a
24 personality's attributes that is incidental or de minimis or for
25 any use permitted under the laws or constitution of the United
26 States or of this state.

27 Sec. 9. (1) Only a person or persons who own more than 50% of

1 the personality's right of publicity may bring a civil action for a
2 violation of the personality's right of publicity for damages,
3 equitable relief, or both.

4 (2) A person who violates a personality's right of publicity
5 is liable for actual damages attributable to the unauthorized use
6 of 1 or more of the personality's attributes, including any profits
7 of the violator attributable to the unauthorized use and not taken
8 into account in computing actual damages, or \$1,000.00, whichever
9 is greater. The court may award treble actual damages, exclusive of
10 profits, in an exceptional case if it finds that the violator acted
11 egregiously.

12 (3) The burden of proof in establishing the profits of the
13 violator attributable to the unauthorized use is as follows:

14 (a) The plaintiff bears the burden of proof as to the gross
15 revenue attributable to the unauthorized use.

16 (b) The defendant bears the burden of proof as to any
17 deductible expenses.

18 (4) The court may award the prevailing party in a civil action
19 under this act reasonable attorney fees, costs, and expenses
20 relating to an action.

21 (5) A person who brings an action for a violation of a
22 personality's right of publicity shall account to any other person
23 who holds a fractional interest in the personality's right of
24 publicity.

25 Sec. 11. (1) Beginning April 1, 2011, a transferee shall not
26 bring an action for the violation of a personality's right of
27 publicity unless the transferee, in addition to meeting the

1 requirements of section 9(1), has also registered the transfer of
2 the personality's right of publicity as provided in subsection (4).

3 (2) Beginning July 1, 2011, a transferee shall not recover
4 damages, attorney fees, or other relief for a violation of a
5 personality's right of publicity that occurs before the date that
6 the transferee registers the transfer under subsection (4).

7 (3) If a deceased personality's domicile was not in this state
8 on the date of the personality's death, a purported transferee of
9 the personality's right of publicity shall not register any
10 transfer, bring an action, or recover any remedies under this act,
11 unless the law of the state in which the personality was domiciled
12 on the date of the personality's death recognized a descendible
13 right of publicity for the personality at the time of death and, if
14 that state has a registration system for the registration of
15 transfers of a personality's right of publicity, the transferee has
16 also registered in that state.

17 (4) A transferee of a personality's right of publicity may
18 register the transfer with the secretary of state on a form
19 prescribed by the secretary of state. The form shall include the
20 name of the personality, the date of the transfer, the date of
21 death and the personality's domicile at the time of death if the
22 personality is deceased, the name and address of the transferee,
23 the name and address of any person authorized to act on behalf of
24 the transferee, the method of transfer of the right, and the nature
25 and percentage of the right transferred. The information provided
26 on the form shall be verified by the transferee. The secretary of
27 state may collect a fee for the registration that does not exceed

1 the incremental costs of recording the documents and maintaining
2 the registry.

3 (5) Upon receipt of the form and any related document for
4 filing, the secretary of state shall post the document in a
5 registry of transfers of a personality's right of publicity on a
6 website on the internet that is accessible to and searchable by the
7 public. The secretary of state may microfilm or reproduce by other
8 means any of the forms or documents and destroy the original form
9 or document. A reproduction of a record under this section that is
10 certified by the secretary of state shall be admissible in a court
11 of law. The secretary of state shall retain a record or
12 reproduction concerning a registration under this section for not
13 less than 55 years after the death of the personality.

14 (6) A form or other document filed under this section is a
15 public record.

16 (7) A person who registers a transfer under this section
17 without a reasonable belief that the person is a transferee of the
18 personality's right of publicity is guilty of a misdemeanor
19 punishable by imprisonment for not more than 90 days or a fine of
20 not more than \$500.00, or both.

21 (8) By April 1, 2011, the secretary of state shall make
22 available to the public and maintain on the department of state's
23 website a computerized database for recording transfers of the
24 right of publicity as provided in this act.

25 Sec. 13. (1) It is an absolute defense to an action for a
26 violation of the right of publicity that the defendant relied in
27 good faith upon the written or electronic consent of a personality

1 or of a transferee who registered the transfer under section 11.

2 (2) This act does not establish a cause of action against an
3 owner of any news reporting or entertainment medium that publishes,
4 broadcasts, or disseminates any advertisement or solicitation in
5 violation of this act, unless evidence establishes that the owner
6 had actual knowledge that the contracting party did not have
7 authorization for the use of 1 or more of the personality's
8 attributes as required under this act.

9 (3) The court shall not grant an injunction against a news
10 reporting or entertainment medium that has contracted with a person
11 for the publication, broadcast, or dissemination of an
12 advertisement based on a violation of the right of publicity in
13 that advertisement.

14 Sec. 15. This act provides the exclusive rights and remedies
15 for a violation of the right of publicity and supersedes any common
16 law rights and remedies concerning the right of publicity as of the
17 effective date of this act.