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Senate Bill 983 (as introduced 12-11-07)  
Sponsor: Senator Hansen Clarke  
Committee: Commerce and Tourism

Date Completed: 4-28-08

## **CONTENT**

**The bill would create the "Right of Publicity Act" to do the following:**

- Establish the right to control commercial use of a personality's attributes.**
- Provide that a person would be liable for violating a right of publicity if the person took certain actions during the personality's lifetime or within 50 years after his or her death.**
- Allow a personality or a person to whom the right of publicity had been transferred to bring a civil action for a violation.**

### Right of Publicity

A personality would have a transferable property interest in his or her right of publicity for his or her lifetime plus 50 years. ("Right of publicity" would mean the right to control commercial use of a personality's attributes as provided in the bill. "Personality" would mean a living or deceased individual whose name has commercial value, whether or not the individual uses or authorizes the use of his or her right of publicity for a commercial purpose during the individual's lifetime.)

The bill would not create a right of publicity in any of the following:

- The use of a personality's attributes in a literary or theatrical work, musical composition, film, or radio or television program.
- Use of a personality's attributes in connection with the broadcast or reporting of an event or topic of general or public interest.
- Material with political or newsworthy value.
- An original work of fine art.
- Promotional material or advertising for a news reporting or entertainment medium, if it used all or part of past material from the medium's own broadcast or publication and did not convey or suggest that the personality endorsed the news reporting or entertainment medium.
- The use of a personality's name truthfully to identify the personality in connection with work of the personality.
- An advertisement or commercial announcement for either of the first two uses described above.

"Attribute" would mean an individual's name, voice, signature, image, likeness, or persona and would include distinctive characteristics of the individual's appearance, gestures, or mannerisms.)

### Violation of a Right of Publicity

A person would be liable for a violation of a right of publicity if the person did any of the following in this State during the personality's lifetime or within 50 years after the date of the personality's death without the consent of the personality or of a person to whom the personality's right of publicity had been transferred by contract, license, gift, trust, testamentary document, or operation of law:

- Used an attribute of a personality for a commercial purpose.
- Created or caused to be created any goods, merchandise, or other materials that incorporated an attribute of a personality.
- Knowingly transported or caused to be transported into or within the State any goods, merchandise, or other materials that incorporated an attribute of a personality.
- Knowingly caused advertising or promotional material featuring an attribute of a personality to be published, distributed, exhibited, or disseminated.

("Commercial purpose" would mean the use of a personality's attribute on or in connection with a product, goods, a service, or a commercial activity for the purpose of fund-raising, advertising, or soliciting purchases.)

### Civil Action

A personality or a person to whom the personality's right of publicity had been transferred could bring a civil action for a violation of the right of publicity for damages, equitable relief, or both. A person who held a 50% or greater interest in a personality's right of publicity could exercise and enforce the rights and remedies provided in the bill and would have to account to any other person who held a fractional interest in the right of publicity.

A person who violated a right of publicity would be liable for actual damages, including profits derived from the unauthorized use, or \$1,000, whichever was greater. If the violation were willful, knowing, or intentional, the violator would be liable for treble damages.

The burden of proof in establishing the profits from a violation would be as follows:

- The plaintiff would bear the burden of proof as to the gross revenue attributable to the unauthorized use.
- The defendant would bear the burden of proof as to any expenses deductible from gross profits.

The court would have to award the prevailing party in a civil action reasonable attorney fees, costs, and expenses relating to the action.

A court could order the impoundment of any goods, merchandise, or other materials alleged to have been made or used in violation of the right of publicity for any period that an action under the bill was pending. Impounded materials could include plates, molds, matrices, masters, tapes, negatives, or other items from which the goods, merchandise, or other materials were manufactured or reproduced. As part of a final judgment, the court could order the destruction or other reasonable disposition of items manufactured or used in violation of the right of publicity.

The court could not grant an injunction against a news reporting or entertainment medium that had contracted with a person for the publication or broadcast of an advertisement and that incorporated the advertisement in tangible form into material that was prepared for broadcast or publication. ("News reporting or entertainment medium" would mean a medium that publishes, broadcasts, or disseminates advertising in the normal course of its

business, such as a newspaper, magazine, radio, or television network or station, or cable television station.)

It would be an affirmative defense to an action under the bill that a person had implied consent for the use or that the use was one of the following:

- Incidental.
- Fictional.
- Transformative.
- Parody.

#### Other Rights & Privileges

The bill would not supersede the right or privilege recognized under any other law that applied to a news reporting or entertainment medium. The rights and remedies provided in the bill would be in addition to any other rights and remedies provided by law.

Legislative Analyst: Craig Laurie

#### **FISCAL IMPACT**

The bill would have a minimal fiscal impact on the judiciary. It is likely that the number of civil actions filed under the bill would be small, and any costs could be absorbed by the courts.

Fiscal Analyst: Stephanie Yu

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.