

SENATE No. 1800

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act relative to the right of publicity..

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 Section
2 3A and inserting in place thereof the following section:-

3 Section 3A. The Right to Publicity.

4 (a) The following definitions shall apply to this Section:

5 “Commercial Use” (1) the use of an individual’s identity in any medium and in any
6 manner in connection with (i) the offering for sale, sale, promotion, or advertising of a product,
7 merchandise, good, or service, (ii) fundraising, or (iii) other purposes of trade. Whether such a
8 use is commercial shall be determined without regard to whether it is for profit or not for profit.
9 Use of an individual’s identity is not a commercial use solely because the material or medium
10 containing such use is commercially sponsored or contains advertising. It is a question of fact
11 whether or not the use of the individual’s identity is so directly connected with the commercial
12 sponsorship or with the advertising as to constitute a commercial use.

13 (2) Without limiting what other uses may be determined not to be commercial, it is not a
14 commercial use of any individual's identity (i) to publish, print, display, or use the individual's
15 identity as part of any bona fide news report or commentary having a legitimate public interest or
16 as part of an artistic or expressive work, such as a live performance, work of fine art, literary
17 work, theatrical work, musical work, film, television, radio, or the like, except where the use is
18 directly connected with advertising or another commercial use as defined in (1), above; (ii) to use
19 a photograph depicting the individual as a member of the public where the individual is not
20 named or similarly identified in connection with the use of the photograph; or (iii) to provide a
21 medium through which a commercial use is made, unless it is established that the person had
22 knowledge of the commercial use or unless the use was intended to promote the medium itself.

23 "To exercise" the right of publicity means to make a commercial use of an individual's
24 identity or to consent in writing to such commercial use by another person or persons.

25 "Identity" means any attribute of an individual that identifies that individual, including,
26 without limitation, a name, likeness, voice, signature, or any distinctive appearance, gesture, or
27 mannerism.

28 "Individual" means a natural person, living or deceased.

29 "Licensee" means any person who has written consent to make commercial use of an
30 individual's identity from the individual or the other person or persons authorized to exercise the
31 individual's right of publicity in subsection (c)(2).

32 "Name" means any legal, professional, or other name, including, without limitation, an
33 assumed name or nickname, by which an individual is known or that is intended to identify that
34 individual.

35 “Person” means any individual, firm, association, partnership, corporation, joint stock
36 company, limited liability company, syndicate, receiver, common law trust, conservator,
37 statutory trust, or any other concern or entity by whatever name known or however organized,
38 formed, or created, and includes not-for-profit corporations, associations, educational and
39 religious institutions, political parties, campaign committees, and community, civic, or other
40 organizations.

41 “Successor-in-interest” means any person with an interest in an individual’s right of
42 publicity as provided in subsection (c)(1) as an assignee, transferee, legatee, executor,
43 administrator, personal representative, heir-at-law, distributee, guardian, conservator or
44 otherwise. “Successor-in-interest” does not mean the individual or a licensee.

45 (b) Recognition of the right of publicity. Every individual has a property interest known
46 as the right of publicity, which is the exclusive right to control commercial use of the
47 individual’s identity during the individual’s lifetime and for seventy-five (75) years after the
48 individual’s death, unless terminated earlier under subsection (c)(4).

49 (c) Transferability; Exercise; Termination.

50 (1) Notwithstanding any applicable law to the contrary, an individual’s right of publicity
51 is freely transferable and descendible, in whole or in part, including, without limitation, by any
52 form of inter vivos or testamentary transfer or by intestate succession, except that no interest in
53 the right of publicity shall escheat to any state, commonwealth, or other jurisdiction.

54 (2) An individual’s right of publicity may be exercised or enforced only by (i) the
55 individual, (ii) the person as successor-in-interest or licensee granted such power, or (iii) the

56 persons controlling as successors-in-interest or licensees granted such power, in the aggregate,
57 more than one-half of the interests in the individual's right.

58 (3) All persons with an interest in an individual's right of publicity shall make annual
59 accountings to each other of all revenues generated from exercising and enforcing the right of
60 publicity including, without limitation, from any recovery in a civil action and all expenses
61 incurred in connection with such exercise and enforcement. Such persons may vary their rights
62 and obligations under this paragraph by written agreement.

63 (4) A deceased individual's right of publicity will terminate (i) if at any time there is no
64 successor-in-interest or (ii) upon proof that no successor-in-interest or licensee has made
65 commercial use of the individual's identity for any continuous period of five (5) years occurring
66 after the individual's death.

67 (d) Infringement; Civil action; Remedies.

68 (1) Infringement. Any commercial use of an individual's identity, other than by the
69 person or persons authorized to exercise the individual's right of publicity in subsection (c)(2),
70 shall constitute an infringement of the right of publicity.

71 (2) The person or persons authorized to enforce an individual's right of publicity in
72 subsection (c)(2) may bring a civil action against any person who has infringed or is infringing
73 the individual's right of publicity, to prevent and restrain the infringement, including on a
74 preliminary basis, and to recover damages as described in paragraphs (3) and (4) of this
75 subsection (d).

76 (3) Damages for infringement shall be awarded in an amount equal to the greater of (i)
77 \$1,000 or (ii) The actual damages suffered as a result of the infringement plus any profit
78 attributable to the infringement that is not taken into account in computing the actual damages.
79 In establishing such profit, the injured person or persons alleging infringement must prove only
80 the gross revenue attributable to the infringement, and the infringer must prove any deductible
81 expenses.

82 (4) If the infringer has knowingly infringed the individual's right of publicity, the court,
83 in its discretion, may award enhanced damages in an amount not to exceed three times the
84 damages described in paragraph (3) of this subsection.

85 (5) When an action under this section is pending, the court may, in its discretion, (i) order
86 that any materials claimed to have been made or used in the infringement of the individual's
87 right of publicity be impounded and (ii) enjoin the use of any articles of tangible personal
88 property or media, including but not limited to plates, molds, masters, tapes, and film negatives,
89 used to reproduce those materials.

90 (6) As part of a final judgment or decree, the court may order the destruction or other
91 reasonable disposition of all materials made or used in the infringement and of any articles of
92 tangible personal property or media used to reproduce those materials.

93 (7) In any action under this section the court may order the infringer to pay reasonable
94 costs, including attorneys' fees, incurred in connection with the enforcement of an individual's
95 right of publicity.

96 (e) This section shall supercede and control notwithstanding any other general or special
97 law to the contrary.