

SENATE No. 1713

The Commonwealth of Massachusetts

PRESENTED BY:

Stanley C. Rosenberg

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

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

PETITION OF:

NAME:

Stanley C. Rosenberg

DISTRICT/ADDRESS:

Hampshire, Franklin and Worcester

SENATE No. 1713

By Mr. Rosenberg, petition (accompanied by bill, Senate, No. 1713) of Rosenberg for legislation relative to the right of publicity [Joint Committee on Tourism, Arts and Cultural Development].

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. 1800 OF 2009-2010.]

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

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. It is the intent of the legislature to ensure that the Commonwealth
2 fully capitalizes on the economic and social value of its cultural resources by encouraging locally
3 based artists, entertainers, and other notable personalities to maintain primary residence in the
4 state and attract out-of-state residents to establish primary residence in Massachusetts; therefore,
5 it is necessary to enact sufficient protections to prevent those individuals and their work from
6 being unduly misused or exploited.

7 SECTION 2: Chapter 214 of the General Laws is hereby amended by striking
8 out Section 3A and inserting in place thereof the following section:?

9 Section 3A.

10 (a) The following definitions shall apply to this Section.

"Commercial use" means:

(1) the use of a personality's identity (i) on or in goods, products or services, (ii) for the purpose of advertising goods, products or services or (iii) for fundraising.

(2) Without limiting what other uses may be determined not to be commercial, it is not a commercial use of any personality's identity for a person: (i) to use a personality's identity as part of a news report or commentary or as part of an artistic or expressive work, such as a live performance, work of art, literary work, theatrical work, musical work, audiovisual work, motion picture, television program, radio program, or the like, (ii) to use a personality's identity in an advertisement, promotion or commercial announcement for any such news report, commentary or work, (iii) to use a personality's identity in the personality's role as a member of the public where the personality is not named or similarly identified, (iv) to use a personality's identity in a manner that is incidental or de minimus, or (v) to use a personality's identity in a manner that is permitted under the laws or the Constitution of the United States or the Commonwealth of Massachusetts.

"Identity" means a personality's name, likeness, voice, signature, or an appearance or gesture that uniquely identifies that particular personality.

"Name" means the actual or assumed name or nickname of a personality that identifies that particular personality.

"Person" means any individual, firm, association, partnership, corporation, joint stock company, limited liability company, syndicate, receiver, common law trust, conservator, statutory trust, or any other concern or entity, however named, organized, formed, or created, and

includes not-for-profit corporations, associations, educational and religious institutions, political parties, campaign committees, and community, civic, and other organizations.

“Personality” means an individual whose identity has commercial value.

(b) Recognition of the right of publicity. A personality has a property interest in his or her identity, known as the “right of publicity,” that is the exclusive right to control the commercial use of the personality’s identity during the personality’s lifetime and for seventy-five (75) years after the date of the personality’s death, unless terminated earlier under paragraph (d)(5).

(c) Infringement; Exemption; Domicile; Civil action; Remedies.

(1) Except as otherwise provided in this Section, a person who knowingly makes a commercial use of a personality’s identity in the Commonwealth of Massachusetts during the personality’s lifetime or after the date of the personality’s death, without written consent of the personality or of the person or persons who collectively own more than a one-half interest in the personality’s right of publicity, shall have infringed the personality’s right of publicity.

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

(3) A person who owns or persons who collectively own more than a one-half interest in a personality’s right of publicity, and only such person or persons, may

53 enforce the personality's right of publicity by bringing a civil action against a person who has
54 infringed or is infringing the right of publicity to prevent and restrain the infringement, including
55 restraint on a preliminary basis, and to recover damages as described in paragraph (5) of this
56 subsection.

57 (4) This Section shall apply only in the following circumstances: (i)
58 the personality's domicile is in the Commonwealth of Massachusetts, (ii) in the case of a
59 deceased personality, the deceased personality's domicile was in the Commonwealth of
60 Massachusetts on the date of the personality's death, or (iii) the infringing use is directed only to
61 persons in the Commonwealth of Massachusetts and, if the personality is deceased, on the date
62 of the personality's death the personality was a domiciliary of a state that recognized a
63 descendible right of publicity for the personality.

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

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

73 (7) A defendant's good faith reliance upon the written consent of a
74 personality or a person who has or persons who collectively have registered the transfer of more

75 than a one-half interest in the personality's right of publicity under paragraph (d)(3) shall be a
76 complete defense in any action under this Section.

77 (d) Transferability; Registration; Termination.

78 (1) A personality's right of publicity is freely transferable, in whole or in part,
79 by any form of inter vivos or testamentary transfer, including, without limitation, by written
80 contract, assignment, license, gift, trust, testamentary document, or intestate succession, except
81 that no interest in the right of publicity shall escheat to any state, commonwealth, or other
82 jurisdiction. General Laws Chapter 190B, Section 3-101 notwithstanding, insofar as not
83 transferred during life, a deceased personality's personal representative or voluntary personal
84 representative shall be the transferee from the personality's death until the deceased
85 personality's right of publicity is transferred by such personal representative.

86 (2) All persons with partial interests in a personality's right of
87 publicity shall make annual accountings to each other of all revenues generated from exercising
88 and enforcing the personality's right of publicity, including, without limitation, from all
89 recoveries in civil actions and all expenses incurred in connection with such exercise and
90 enforcement. Such persons may vary their rights and obligations under this paragraph by written
91 agreement.

92 (3) A person or persons meeting the requirements of paragraph (c)(3)
93 to whom an interest in a personality's right of publicity has been transferred may not bring a
94 civil action under this Section unless the transferee has or all such transferees have registered the
95 transfer or transfers with the secretary of state as set forth in this paragraph: (i) A transferee
96 must register the transfer with the secretary of state on a form prescribed by the secretary of

state. The form shall include the name of the personality, the date of the transfer, the date of death and the personality's domicile at the time of death if the personality is deceased, the name and address of the transferee, the name and address of any persons authorized to act on behalf of the transferee, the method of transfer, and the nature and percentage of the interest in the right transferred. The information provided on the form and related documents shall be submitted by the transferee under the pains and penalties of perjury. The secretary of state may collect a fee for the registration that does not exceed the incremental costs of recording the documents and maintaining the registry. (ii) Upon receipt of the form and related documents for filing, the secretary of state shall post the form and documents in a registry of interests in transferred rights of publicity on a website on the internet that is accessible to the public. The secretary of state may microfilm or reproduce by other means any of the forms or documents and destroy the original form or documents. A reproduction of a record under this Section that is certified by the secretary of state shall be admissible in a court of law. The secretary of state is not required to retain a record or reproduction concerning a registration under this Section more than eighty (80) years after the date of the personality's death. (iii) A form or other document filed under this Section is a public record.

(4) A person or persons meeting the requirements of paragraph (c)(3) to whom an interest in a personality's right of publicity has been transferred may not recover damages or other relief for an infringement that occurred before the date that the transferee has or all such transferees have registered the transfer or transfers under paragraph (d)(3), except for a recovery in a civil action properly commenced prior to the transfer.

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

121 (6) No action may be brought under this Section more than seventy-
122 five (75) years after the date of the personality's death.

123 (e) This Section provides the exclusive rights and remedies for infringement
124 of the right of publicity occurring after the effective date of this Section and supersedes any
125 common law and statutory rights and remedies.