

State of South Dakota

NINETIETH SESSION
LEGISLATIVE ASSEMBLY, 2015

373W0295

HOUSE JUDICIARY ENGROSSED NO. **HB 1225** 02/18/2015

Introduced by: Representatives May and Campbell and Senator Bradford

1 FOR AN ACT ENTITLED, An Act to prohibit the unauthorized commercial use of a
2 personality's right of publicity and provide a civil remedy therefor.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. Terms used in this Act mean:

- 5 (1) "Commercial purpose," the use of an aspect of a personality's right of publicity in
6 connection with a product, merchandise, goods, service, or commercial activity; for
7 advertising or soliciting purchases of a product, merchandise, goods, service, or for
8 promoting a commercial activity; or for the purpose of fund-raising;
- 9 (2) "Personality," a living or deceased natural person who is a citizen of this state, or
10 who died domiciled in this state whose name, voice, signature, photograph, image,
11 likeness, distinctive appearance, gesture, or mannerism identifies a specific person
12 and has commercial value, whether or not the person uses or authorizes the use of the
13 person's rights of publicity for a commercial purpose that serves to identify a specific
14 person;
- 15 (3) "Right of publicity," a personality's property interest in the personality's name, voice,



1 signature, photograph, image, likeness, distinctive appearance, gesture, or
2 mannerism.

3 Section 2. No person may use any aspect of a personality's right of publicity for a
4 commercial purpose during the personality's lifetime or for seventy years after the death of the
5 personality without the express written consent of the personality, or if the personality is
6 deceased without the express written consent of the personality's next of kin or other person or
7 entity that owns the right of publicity.

8 Section 3. The provisions of this Act apply to a personality who is deceased prior to July 1,
9 2015.

10 Section 4. A personality's right of publicity terminates if the personality is deceased and
11 there is no living next of kin of the personality and the personality has not assigned his or her
12 rights.

13 Section 5. The personality, or if the personality is deceased, the personality's next of kin or
14 other owner of the right of publicity, has a cause of action for a violation of a personality's right
15 of publicity against the person for any violation of section 2 of this Act. If the court finds a
16 violation of section 2 of this Act, the court may order:

- 17 (1) Temporary or permanent injunctive relief;
- 18 (2) Damages in the amount of one thousand dollars or the actual damages, including
19 profits derived from the unauthorized use, whichever amount is greater;
- 20 (3) In determining a defendant's profits, the plaintiff is required to prove the gross
21 revenue attributable to the unauthorized use, and the defendant is required to prove
22 properly deductible expenses; and
- 23 (4) If the court finds that the violation of section 2 of this Act was knowing, willful, or
24 intentional, treble, but not computed on the defendant's profits, or punitive damages,

1 as the plaintiff elects.

2 Section 6. The provisions of this Act do not apply to the use of a personality's name, voice,
3 signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in any:

4 (1) Literary work, theatrical work, musical composition, audio visual work, film, radio,
5 or television program;

6 (2) Material that has political or newsworthy value;

7 (3) Original work of fine art;

8 (4) Promotional material or advertisement, for a news reporting or entertainment
9 medium, that uses all or part of a past edition of the medium's original broadcast and
10 does not convey or suggest that the personality endorses the news reporting or
11 entertainment medium;

12 (5) An advertisement of commercial announcement for a use described in this section;
13 and

14 (6) Any use of a right of publicity before December 31, 2014.

15 Section 7. The provisions of this Act do not apply to the use of a personality's name to
16 truthfully identify the personality as the author of a written work or a performer of a recorded
17 performance if the written work or recorded performance is otherwise rightfully reproduced,
18 exhibited, or broadcast.

19 Section 8. The provisions of this Act do not apply to the use of a personality's name, voice,
20 signature, photograph, image, likeness, distinctive appearance, gesture, or mannerism in
21 connection with a broadcast or reporting of an event or a topic of general or public interest
22 including unauthorized biographies.

23 Section 9. The provisions of this Act do not apply to a personality whose name, voice,
24 signature, photograph, image, likeness, distinctive appearance, gesture, or mannerism has

1 commercial value solely because the personality has been formally charged with or convicted
2 of a crime.

3 Section 10. A successor in interest to the right of publicity of a deceased personality
4 pursuant to this Act or a licensee thereof may not recover damages or equitable relief for a use
5 prohibited pursuant to this Act that occurs before the successor in interest registers a claim of
6 right of publicity pursuant to section 11 of this Act.

7 Section 11. Any person claiming to be a successor in interest to the right of publicity of a
8 deceased personality pursuant to this Act or a licensee thereof may register that claim with the
9 secretary of state on a form prescribed by the secretary of state and upon payment of a one
10 hundred dollar filing fee to the secretary of state. The form shall be verified and shall include
11 the name and date of death of the deceased personality, the name and address of the claimant,
12 the basis of the claim, and the rights claimed.

13 Upon receipt and after filing of any document pursuant to this section, the secretary of state
14 shall post the document along with the entire registry of persons claiming to be a successor in
15 interest to the right of publicity of a deceased personality or a registered licensee pursuant to this
16 section on the secretary of state's website.

17 The secretary of state may microfilm or reproduce by other technique, any filing or
18 document filed pursuant to this section and may then destroy the original filing or document.
19 The secretary of state may destroy the microfilm or other reproduction of the filing or document
20 seventy years after the death of the personality named therein.

21 A claim registered pursuant to this section is a public record.

22 Section 12. The provisions of this Act constitute the sole and exclusive bases regarding a
23 misappropriation of name, image, or likeness of a personality and the personality's right of
24 publicity, and any remedy for a violation of such rights.