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:

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

Sec. 3. As used in this act:

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

(b) "Commercial purpose" means the use of 1 or more of a personality's attributes on or in a product or good, or for the purpose of advertising, selling, or soliciting purchases of a
(c) "Name" means the actual or assumed name of a living or deceased individual that identifies that particular individual.

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

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

(f) "Personality" means a living or deceased individual, 1 or more of whose attributes have 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.

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

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

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

(2) The right of publicity is a property right that is freely
transferable, in whole or in part, by contract, license, gift, trust, will, intestate succession, or other operation of law.

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

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

Sec. 7. (1) Except as provided in section 5(4) or subsections (2) to (5), a person is liable for a violation of a personality's right of publicity if the person knowingly uses 1 or more of the personality's attributes for a commercial purpose 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 transferee.

(2) Consent is not required for the use of 1 or more of a personality's attributes in any of the following works in any medium now known or hereafter used or devised, regardless of length or format:
(a) A motion picture, television program, audiovisual work, documentary, book, play, story, graphic novel, radio or other audio program, musical composition, or sound recording, other than an advertisement that is not exempt under subsection (3).

(b) A video game.

(c) An original work of art.

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

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

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

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

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

Sec. 9. (1) Only a person or persons who own more than 50% of
the personality's right of publicity may bring a civil action for a
dviolation of the personality's right of publicity for damages,
equitable relief, or both.

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

(3) The burden of proof in establishing the profits of the
violator attributable to the unauthorized use is as follows:
(a) The plaintiff bears the burden of proof as to the gross
revenue attributable to the unauthorized use.
(b) The defendant bears the burden of proof as to any
deductible expenses.

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

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

Sec. 11. (1) Beginning April 1, 2011, a transferee shall not
bring an action for the violation of a personality's right of
publicity unless the transferee, in addition to meeting the
requirements of section 9(1), has also registered the transfer of
the personality's right of publicity as provided in subsection (4).

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

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

(4) A transferee of a personality's right of publicity may
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 person authorized to act on behalf of
the transferee, the method of transfer of the right, and the nature
and percentage of the right transferred. The information provided
on the form shall be verified by the transferee. 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.

(5) Upon receipt of the form and any related document for
filing, the secretary of state shall post the document in a
registry of transfers of a personality's right of publicity on a
website on the internet that is accessible to and searchable by 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 document. 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 shall retain a record or
reproduction concerning a registration under this section for not
less than 55 years after the death of the personality.

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

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

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

Sec. 13. (1) It is an absolute defense to an action for a
violation of the right of publicity that the defendant relied in
good faith upon the written or electronic consent of a personality
or of a transferee who registered the transfer under section 11.

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

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

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