

RIGHT OF PUBLICITY ACT

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5964

Sponsor: Rep. Pam Byrnes

Committee: Judiciary

Complete to 8-18-10

A SUMMARY OF HOUSE BILL 5964 AS INTRODUCED 3-18-10

Generally speaking, the "right of publicity" refers to the right of an individual to control the commercial use of his or her name, likeness, and persona. The commercial use of an individual's name, likeness, and/or persona without proper authorization — such as in a television commercial or magazine advertisement — can result in a lawsuit under common law.

House Bill 5964 would create the "Right of Publicity Act" to protect attributes of a "personality" that have commercial value; extend those rights for 50 years after the person's death; recognize transfers of those rights; provide exceptions for certain purposes and entities; provide a civil cause of action and remedies for violations; allow transferees of a person's right of publicity to register with the Secretary of State (SOS); require the SOS to create and maintain a public, searchable database of transferred rights of publicity; and make the wrongful registration of a transferred right of publicity a criminal offense. The bill would supersede common law.

Right of Publicity

The right of publicity created under the bill would apply to a "personality", defined as a living or deceased individual, one or more of whose attributes had commercial value, whether or not the individual used or authorized the use of his or her right of publicity for a commercial purpose during his or her lifetime. A personality (or his or her transferee) would have a "right of publicity" during the personality's lifetime and for 50 years after the personality's death.

The "right of publicity" would mean the right to control use of the personality's attributes for a commercial purpose as provided in the bill. "Attribute" would mean an individual's name, voice, signature, image, or likeness. "Commercial purpose" would mean the use of one 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 product, good, or service.

Right of Transfer

The right of publicity would be a property right freely transferable, in whole or in part, by contract, license, gift, trust, will, intestate succession, or other operation of law. If a will

did not expressly transfer a right of publicity, it would be transferred according to the will's provision for disposing of the residue of the person's assets.

The right of publicity would terminate on the personality's death, rather than pass to the state, if not transferred as described above, and if there were no surviving spouse, devisee, or descendant. In this situation, a court would have to dismiss pending litigation over the personality's right of publicity.

“Transferee” would mean a person to whom a personality's right of publicity was transferred, in whole or in part, by contract, license, gift, trust, will, intestate succession, or other operation of law. “Person” would mean an individual, a business, firm, proprietorship, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization for group of persons acting jointly.

Liability

A person would be liable in a civil action for violating a personality's right of publicity if he or she knowingly used one 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 personality's death without the consent of the personality or of a transferee.

A person who violated a personality's right of publicity would be liable for actual damages attributable to the unauthorized use of one or more of the personality's attributes, including profits attributable to the unauthorized use not taken into account in computing actual damages, or \$1,000, whichever was greater. The court could triple the amount of the award, exclusive of profits, in an exceptional case in which it found that the violator acted egregiously. The plaintiff would bear the burden of proof as to the gross revenue attributable to the unauthorized use and the defendant would bear the burden of proof as to any expenses deductible from the gross profits.

The court could award the prevailing party reasonable attorney fees, costs, and expenses.

Right to Sue

Only a person or persons who owned more than 50 percent of the personality's right of publicity could bring a civil action for a violation of the personality's right of publicity for damages, equitable relief, or both. The person bringing an action would have to account to any other person holding a fractional interest.

Beginning April 1, 2011, a transferee could not bring an action for a violation unless he or she had registered the transfer of the personality's right of publicity with the Secretary of State. Beginning July 1, 2011, a transferee could not recover damages, attorney fees, or other relief for a violation that occurred before the date that the transferee registered the transfer.

Further, if, on the date the deceased personality died, his or her official residence (domicile) was out of state, a purported transferee of the personality's right of publicity could not register any transfer, bring an action, or recover any remedies under the bill unless – on the date of death – both of the following applied:

** The other state recognized a descendible right of publicity for the personality at the time of death; and,

** The transferee had registered the transfer in that state, if that state had a registration system for doing so.

Registration

A transferee of a personality's right of publicity could register the transfer with the Secretary of State (SOS) on an agency-prescribed form. The form would have to include all of the information required by the bill: the name of the personality, the date of the transfer, the date of death and the personality's domicile at death (if the personality was 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, and the nature and percentage of the right transferred. The transferee would have to verify the information provided on the form. The SOS could collect a registration fee not to exceed the incremental costs of recording the documents and maintaining the registry. All forms and documents filed under this provision would be public records.

Registration database

By April 1, 2011, the SOS would have to create and maintain a registry of transfers of a personality's right of publicity as a public, searchable computerized database on the SOS website. Registration documents submitted by transferees would be posted online. The SOS could microfilm or reproduce by other means any of the submitted forms and destroy the originals. A reproduction of a record certified by the SOS would be admissible in court. A record or reproduction would have to be retained by the SOS for at least 55 years after the personality's death.

Wrongful registration

Registering a transfer without a reasonable belief of being a transferee of a personality's right of publicity would be a misdemeanor offense punishable by imprisonment for not more than 90 days or a fine of not more than \$500, or both. (Note: The maximum term of imprisonment under this provision would only result in a search of the state criminal database; to trigger a search of the national criminal databases, an offense must carry a maximum term of imprisonment greater than 92 days.)

Exceptions

The bill would not establish a cause of action against an owner of a news reporting or entertainment medium that published, broadcasted, or disseminated any advertisement or solicitation in violation of the act unless evidence established that the owner had actual knowledge that the contracting party did not have the required authorization.

A court could not grant an injunction against a news reporting or entertainment medium that had 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.

In addition, consent would not be required for the use of one or more of 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 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 not exempt under the bill's provisions.

** A video game.

** An original work of art.

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

** An editorial, fictional, nonfictional, artistic, or other expressive work.

Further, consent would not be required for the following:

** The use of one or more of a personality's attributes in an advertisement, promotion, or solicitation for any work or use excluded from the requirement for consent under any other provision of the bill.

** The nominative use of one or more of a personality's attributes for advertising or for the facilitation of advertising delivered over a communications network, if the nominative use did not falsely suggest an endorsement or sponsorship by the personality of any product, good, or service that the personality had not endorsed or sponsored.

** The incidental or de minimus use of one or more of a personality's attributes or any use permitted under the federal or state constitution or laws.

Absolute Defense

It would be 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 the bill's provisions.

FISCAL IMPACT:

House Bill 5964 would have an indeterminate, but likely negative, fiscal impact on the judiciary. Expectedly, the judiciary will see an increase in its caseload and administrative duties due to the introduction of a new civil action, but the difference is likely to be negligible.

The bill creates a new misdemeanor offense related to a person registering a transfer of a personality's right of publicity without a reasonable belief that the person is a legal transferee, punishable by up to 90 days imprisonment or a fine of not more than \$500. To the extent that the bill increased the numbers of misdemeanor convictions, it could increase local costs of jail incarceration or misdemeanor probation, both of which vary by jurisdiction. Any increase in penal fine revenues could benefit local libraries, which are the constitutionally-designated recipients of those revenues.

An analysis of the fiscal implications for the Secretary of State regarding creating and maintaining a public database of registered transfers is in process.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Ben Gielczyk
Bob Schneider

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.