

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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HOUSE BILL 327
PROPOSED COMMITTEE SUBSTITUTE H327-CSRR-5 [v.21]

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Short Title: Right of Publicity.

(Public)

Sponsors:

Referred to:

March 2, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO PROHIBIT THE UNAUTHORIZED USE OF AN INDIVIDUAL'S RIGHT OF
3 PUBLICITY FOR COMMERCIAL PURPOSES AND TO PROVIDE AN
4 ENFORCEMENT MECHANISM OF THAT RIGHT.

5 The General Assembly of North Carolina enacts:

6 SECTION 1. The General Statutes are amended by adding a new Chapter to read:

7 "Chapter 41B.

8 "Right of Publicity.

9 **"§ 41B-1. Short title.**

10 This Chapter shall be known as the Right of Publicity Act.

11 **"§ 41B-2. Definitions.**

12 The following definitions apply in this Chapter:

- 13 (1) Commercial purpose. – The use of an aspect of an individual's personality in
14 any of the following ways:
15 a. On or in connection with products, merchandise, goods, services, or
16 commercial activities.
17 b. For the purpose of advertising, selling, or soliciting purchases of
18 products, merchandise, goods, services, or for promoting commercial
19 activities.
20 c. For the purpose of fund raising.
21 (2) Individual. – A living or deceased person, regardless of whether the identity
22 of that individual's personality has been used for a commercial purpose
23 during the individual's lifetime.
24 (3) Personality. – Any attribute of an individual that serves to identify that
25 individual to an ordinary, reasonable viewer or listener, including any of the
26 following:
27 a. Name.
28 b. Voice.
29 c. Signature.
30 d. Photograph.
31 e. Image.
32 f. Portrait.
33 g. Likeness.
34 h. Distinctive appearance.

1 (4) Photograph – Any photograph or photographic reproduction, still or moving,
2 or any videotape or live television transmission, of any person, such that the
3 person is readily identifiable. An individual shall be deemed to be readily
4 identifiable from a photograph when one who views the photograph with the
5 naked eye can reasonably determine the identity of the individual depicted in
6 the photograph.

7 (5) Right of publicity. – The property right of control and to choose whether and
8 how to use an individual's personality for commercial purposes.

9 (6) Television program. – A video program provided through a television
10 provider.

11 (7) Television provider. -- A broadcast station, a network, or an entity engaged
12 in the business of making available for purchase, by subscribers or
13 customers, multiple channels of video programming.

14 **"§ 41B-3. Transfer of right of publicity; limitation.**

15 (a) Methods of Transfer and Conveyance. – The right of publicity is freely transferable
16 and descendable, in whole or in part, by any of the following:

17 (1) Contract.

18 (2) License.

19 (3) Gift.

20 (4) Trust.

21 (5) Testamentary document. – The rights shall vest in the persons entitled to the
22 right of publicity under the testamentary instrument of the deceased
23 individual effective as of the date of that person's death. In the absence of an
24 express transfer in a testamentary instrument of the deceased individual's
25 right of publicity, a provision in the testamentary instrument that provides
26 for the disposition of the residue of the deceased individual's assets shall be
27 effective to transfer the right of publicity in accordance with the terms of
28 that provision.

29 (6) Intestate succession. – The right of publicity of an individual dying intestate
30 shall be distributed under the laws of intestate succession, and the right of
31 publicity may be exercised and enforced by a person or persons who possess
32 at least a one-half interest of the individual's right of publicity. Such persons
33 shall make a proportional accounting to, and shall act at all times in good
34 faith with respect to, any other person in whom the rights being enforced
35 have vested. The person or persons enforcing the right of publicity shall
36 account to any other person in whom the right of publicity has vested.

37 (b) Successor's Transference. – The right of publicity shall also be freely transferable or
38 descendable by any subsequent owner of the deceased individual's right of publicity as
39 recognized by this Chapter. Nothing in this Chapter shall be construed to render invalid or
40 unenforceable any contract entered into by a deceased individual during his or her lifetime by
41 which the deceased individual assigned the rights, in whole or in part, to use his or her
42 personality.

43 (c) Limitation on Right of Publicity. – No action shall be brought under this Chapter by
44 reason of any use of a deceased individual's right of publicity occurring after the expiration of
45 70 years after the death of the deceased individual. Failure to use a deceased individual's right
46 of publicity for any period of time during the 70 years after the death of the deceased individual
47 shall not limit enforcement of an action of a claim registered under G.S. 41B-6.

48 **"§ 41B-4. No unauthorized use of right of publicity for commercial purposes.**

49 (a) Prohibition. – Any person who knowingly uses another individual's personality for
50 commercial purposes without obtaining prior consent shall be liable for any damages sustained

1 by the person or persons to whom the right of publicity belongs. The consent required by this
2 section shall be exercisable by any of the following:

3 (1) The individual.

4 (2) The minor's parent or legal guardian, in the case of a minor.

5 (3) A licensee or successor in interest to whom the right of consent, or portion
6 thereof, has been transferred or has passed in accordance with G.S. 41B-3.

7 (4) An authorized agent of any of the above.

8 (b) No Collective Right of Publicity. – An individual's right of publicity shall be
9 enforced as a right with respect to the individual rather than as a right with respect to a
10 definable group. A definable group does not possess a collective right of publicity that is
11 enforceable under this Chapter.

12 **"§ 41B-5. Applicability.**

13 (a) Residence. – This Chapter applies to an act or event that occurs within North
14 Carolina, regardless of the domicile, residence, or citizenship of the individual to whose
15 personality the right applies.

16 (b) Exceptions. – Consent for use of another individual's right of publicity shall not be
17 required for any of the following:

18 (1) Any of the following works if the work is fictional or nonfictional
19 entertainment, or a dramatic, literary, or musical work:

20 a. A play or book.

21 b. A musical composition.

22 c. A radio or television program.

23 d. A single and original work of art.

24 e. A work of political or newsworthy value

25 f. An audiovisual work.

26 (2) Any use of an individual's personality that is broadcast, transmitted,
27 published, or otherwise distributed by either of the following:

28 a. A newspaper or magazine, or a radio or television provider.

29 b. An Internet website owned, controlled, or maintained by a newspaper
30 or magazine or by a radio or television provider.

31 (3) Any use of the right of publicity of a deceased individual where the licensee
32 or successor in interest has failed to register a claim of right under
33 G.S. 41B-6 until such time as a claim of right has been registered.

34 (4) Any promotional material, advertisement, endorsement, or commercial
35 announcement for a use described in subdivision (1) or (2) of this
36 subsection.

37 (c) Limited Immunity. – No owner, officer, director, member, attorney, or employee of
38 any medium used for advertising, including, but not limited to, newspapers, magazines, radio
39 and television networks and stations, cable television systems, billboards, and transit ads, by
40 whom any use of an individual's right of publicity for commercial purposes in violation of this
41 section is published or disseminated, shall be liable for a violation of this Chapter unless the
42 person claiming a right of publicity establishes, by clear and convincing evidence, that the
43 owner, officer, director, member, attorney, or employee knowingly violated an individual's
44 right of publicity.

45 Nothing in this subsection shall supersede any of the exceptions set forth in subsection (b)
46 of this section. In no event shall any owner, officer, director, member, attorney, or employee
47 subject to this subsection be liable for punitive damages or attorney's fees.

48 (d) No Inconsistency With Federal Law. – The right of publicity established by this
49 Chapter shall not be construed as an intellectual property law for purposes of 47 U.S.C. § 230.

50 **"§ 41B-6. Registration.**

1 (a) Claim of Right – Any person claiming to be a successor in interest to the right of
2 publicity of a deceased individual under this Chapter or a licensee of a deceased individual's
3 right of publicity shall register that claim with the Secretary of State on a form prescribed by
4 the Secretary of State and upon payment of a fee of five hundred dollars (\$500.00). The fee
5 shall be nonrefundable. The form shall be verified and shall include the name and date of death
6 of the deceased individual, the name and address of the claimant, the basis of the claim, and a
7 sworn affidavit as to the rights claimed. Claims registered under this successors shall be public
8 records.

9 (b) Fee for Successors in Interest of Deceased Military. – Notwithstanding subsection
10 (a) of this section, the payment upon registration of a claim by a person claiming to be a
11 successor in interest to the right of publicity of a deceased individual who was serving as a
12 member of the armed forces of the United States in active federal service at the time of the
13 deceased individual's death shall be fifty dollars (\$50.00).

14 (c) Archiving and Access. – Upon receipt and after filing of any document under this
15 section, the Secretary of State shall post the document along with the entire registry of persons
16 claiming to be successors in interest to the right of publicity of a deceased individual or a
17 registered licensee under this section upon an Internet Web site. The Secretary of State may
18 microfilm or reproduce by other techniques any of the filings or documents and destroy the
19 original filing or document.

20 (d) Removal. – The microfilm or other reproduction of any document may be destroyed
21 by the Secretary of State 70 years after the death of the individual named therein. The Secretary
22 of State shall remove any document of claim from the Internet Web Site upon showing of a
23 court order that a person claiming to be a successor in interest has no property rights in the right
24 of publicity of the deceased.

25 (e) Immunity. – The Secretary of State shall be immune from any civil or criminal
26 liability as a result of accepting or posting claims as required by this section.

27 **"§ 41B-7. Remedies.**

28 (a) Actual Damages. – In any action brought under this Chapter, a person who has
29 violated this Chapter shall be liable to the injured party in an amount equal to the greater of:

30 (1) One thousand dollars (\$1,000).

31 (2) The actual damages resulting from the unauthorized use.

32 Actual damages shall include any profits from the unauthorized use that are attributable to the
33 use. In establishing such profits, the injured party is required to present proof only of the gross
34 revenue attributable to such use, and the person who violates this Chapter is required to prove
35 that person's deductible expenses.

36 (b) Other Remedies. – A court may also grant injunctive relief. Punitive damages may
37 be awarded to the injured party upon a showing of willful or wanton conduct by the person
38 violating this Chapter.

39 (c) Attorneys' Fees. – The prevailing party in any action under this section shall also be
40 entitled to attorneys' fees and costs.

41 (d) Statute of Limitations. – An action under this Chapter shall be brought within three
42 years. A cause of action shall not accrue until the damage to the injured party becomes apparent
43 or ought to have become apparent to the injured party, which event occurs first. No cause of
44 action shall accrue more than 10 years after the last act or omission of the defendant giving rise
45 to the cause of action."

46 **SECTION 2.** The duty of the Secretary of State under G.S. 41B-6(c), as enacted by
47 this act, to provide Internet access to records shall be satisfied by the posting online of a list of
48 names filed until the fee revenues provided in G.S. 41B-6(a) and (b), as enacted by this act,
49 accumulate sufficiently to fund more thorough posting of records.

50 **SECTION 3.** This act becomes effective January 1, 2010, and applies to actions or
51 events on or after that date. The right of publicity recognized under this act is expressly made

1 retroactive and shall be deemed to have existed at the time of death of any deceased individual
2 who died prior to January 1, 2010.