

SB 175 – AS AMENDED BY THE SENATE

01/25/12 0168s

2011 SESSION

11-1031

05/01

SENATE BILL **175**

AN ACT regulating the commercial use of a person's identity.

SPONSORS: Sen. Odell, Dist 8; Sen. Houde, Dist 5; Rep. Chandler, Carr 1; Rep. Daniels, Hills 6

COMMITTEE: Commerce

ANALYSIS

This bill prohibits, with certain limited exceptions, the commercial use of a person's identity without prior authorization for such use.

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Explanation: Matter added to current law appears in **bold italics**.
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eleven

AN ACT regulating the commercial use of a person's identity.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Purpose. The legislature finds that:

2 I. A person's right to control the commercial use of his or her identity, sometimes called the
3 "right of publicity," is a critically important property and privacy right that has been widely
4 recognized in the United States, including by the courts of this state.

5 II. In addition to that judicial recognition, several states have enacted legislation codifying
6 this right to ensure clear and consistent protection against unauthorized commercial use of a
7 person's identity. The adoption of similar legislation in New Hampshire will cement
8 New Hampshire's rightful place as a protector of individual rights.

9 III. This act will codify this right for living people and make clear that individuals who are
10 domiciled in New Hampshire at the time of death retain a protectable right regarding the
11 commercial use of their identities that is descendible to their heirs or successors.

12 IV. This act will respect the New Hampshire constitution and the United States
13 Constitution by balancing the right to control the commercial use of one's name and/or likeness
14 against the rights to freedom of expression. As such, the right recognized and protected under this
15 chapter is subject to a number of specified statutory exemptions for expressive conduct.

16 2 New Chapter; Commercial Use of Individual Identity. Amend RSA by inserting after chapter
17 359-L the following new chapter:

18 CHAPTER 359-M

19 COMMERCIAL USE OF INDIVIDUAL IDENTITY

20 359-M:1 Definitions. In this chapter:

21 I. "Person" means any natural person.

22 II. "Identity" means a person's name, professional name, nickname, signature, photograph,
23 image, likeness, voice, or any other attribute that serves to identify the person to an ordinary,
24 reasonable viewer or listener.

25 359-M:2 Recognition of the Right to Control Commercial Use of Identity. Every person has the
26 right to control the commercial use of his or her identity.

27 359-M:3 Transferability. The right to control the commercial use of one's identity is a property
28 right that is freely transferable and descendable, in whole or in part, during and after a person's life
29 by means of (1) a written contract, license, conveyance, or assignment or a will, trust, or other
30 testamentary instrument, executed before or after the enactment of this chapter, and by the original

1 holder or his or her successor-in-interest, or (2) intestate succession occurring before or after the
2 enactment of this chapter. In the absence of an express transfer in a testamentary instrument of the
3 right to control commercial use of a person’s identity, a provision in a testamentary instrument that
4 provides for the disposition of the residue of the deceased person’s assets shall be effective to transfer
5 that right in accordance with the terms of that provision.

6 359-M:4 Duration and Termination.

7 I. The right protected under this chapter endures for a term consisting of the life of the
8 person plus 70 years after his or her death, regardless of whether the person commercially exploits
9 the right during his or her lifetime.

10 II. A person’s right under this chapter shall be deemed to have existed prior to the
11 enactment of this chapter, and at the time of the death of the original holder or his or her successor-
12 in-interest, whether that death occurs before or after the enactment of this chapter, for the purpose
13 of determining entitlement to the right.

14 III. The right protected under this chapter terminates if its holder dies without having
15 transferred or devised it, either during his or her life or through a will, trust, or other testamentary
16 instrument, and there are no surviving natural persons to whom the right can pass by intestate
17 succession.

18 IV. The right protected under this chapter, insofar as it extends beyond a person’s death,
19 applies only to any person who died a domiciliary of the state of New Hampshire. With regard to any
20 person still living, this paragraph shall not be construed to alter or expand the in personam
21 jurisdiction or choice of law principles to be applied in an action brought under this chapter.

22 359-M:5 Authorization For Use Required.

23 I. Any use of a person’s identity during the term of the right protected under this chapter, on
24 or in products, merchandise, or goods, or for the purpose of advertising, marketing, selling, or
25 soliciting purchases of products, merchandise, goods, or services, requires the written authorization,
26 including by electronic means, of that person or his or her successor-in-interest.

27 II. Any such use without written authorization is prohibited.

28 359-M:6 Exceptions. This chapter shall not apply to the following:

29 I. Use of a person’s identity in an attempt to portray, describe, impersonate, or refer to that
30 person in any of the following informational or expressive works, regardless of length or format,
31 appearing in any medium now known or hereafter devised, provided that the work does not in and of
32 itself constitute a commercial advertisement for a product, merchandise, goods, or services:

33 (a) A news, public affairs, public interest, or sports broadcast or account.

34 (b) A play, book, story, graphic novel, article, editorial, commentary, or other similar
35 written or theatrical work.

36 (c) A speech.

37 (d) A musical composition or musical lyrics.

1 (e) A radio program, sound recording, or other similar audio work.

2 (f) A documentary, motion picture, television program, or other similar audiovisual
3 work.

4 (g) An original work of art.

5 (h) Any work used in connection with any political campaign.

6 (i) An article, editorial, commentary, magazine, newspaper, periodical, or other work of
7 political or newsworthy value.

8 (j) A video game or other similar audio visual work if the use of a person’s identity in
9 such game or work is protected by the United States Constitution or federal case law.

10 II. Use of a person’s image in a photograph that does not single the person out as an
11 individual, but rather depicts the person as a member of a group or the public, provided that the
12 person is not named or otherwise identifiable in connection with the use of the photograph.

13 III. Truthful identification of a person as the author, composer, performer, or creative
14 contributor to or of a work or lawfully recorded performance, under circumstances in which the work
15 or recorded performance is otherwise lawfully reproduced, exhibited, or broadcast.

16 IV. Promotional materials, advertisements, or commercial announcements for a use
17 described in paragraph I, II, or III, or the facilitation of the same, provided that the use of the
18 person’s identity in such promotional materials, advertisements, or announcements is related to the
19 promoted, advertised, or announced use of that same person’s identity.

20 V. Use of a person’s identity in promotional material or an advertisement for a news
21 reporting or an entertainment medium that:

22 (a) Uses such identity solely as originally contained in all or part of a past or future
23 edition of the medium’s own broadcast or publication; and

24 (b) Does not convey or reasonably suggest that the person endorses the news reporting
25 or entertainment medium.

26 VI. Use of a person’s identity in promotional material or an advertisement for an aggregator
27 of news reporting and/or entertainment content that:

28 (a) Uses such identity solely as originally contained in all or a part of the content of any
29 news medium or entertainment medium available via the aggregator to the aggregator’s customers;
30 and

31 (b) Does not convey or reasonably suggest that the person endorses the news and/or
32 entertainment aggregator. As used in this paragraph, the term “aggregator” means a party who
33 receives content not of its own creation from others which it transmits or otherwise provides to
34 others.

35 VII. Use of a person’s identity in connection with the efforts of a government agency to
36 promote travel and tourism in this state, portray historical events, or commemorate persons or
37 physical sites that are significant in the history of this state, except where the use is directly

1 connected with commercial use, benefit, or sponsorship by a nongovernmental agency; provided,
2 however, that if a government agency intends to have photographs taken at a public event for use
3 pursuant to this paragraph, the government agency shall, if practical, announce or otherwise inform
4 the public, or request the sponsor of the event to announce or otherwise inform the public, that
5 photographs may be taken that can be used in materials for the promotion of travel and tourism in
6 this state without permission from the person photographed.

7 VIII. Use of a person's identity that is merely descriptive and used in good faith solely for
8 the purpose of referring to products, merchandise, goods, or services that have been marketed,
9 advertised, or sold by means of an authorized use of that person's identity, or the facilitation of the
10 same.

11 359-M:7 Remedy; Enforcement.

12 I. The right protected under this chapter may be exercised and enforced by any one person
13 or entity who holds, or persons or entities who together hold, more than a 1/2 interest in the right.

14 II. Any use of a person's identity that occurs in violation of this chapter is subject to:

15 (a) Injunctive relief to prevent or restrain the prohibited use; and

16 (b) An action at law for any injuries or damages sustained by reason of the prohibited
17 use.

18 III. In any suit brought to enforce the right protected under this chapter, the plaintiff may
19 recover an amount equal to the greater of \$2,500 or actual damages incurred as a result of the
20 prohibited use and any profits that are attributable to the prohibited use but not otherwise taken
21 into account in computing actual damages. In establishing profits attributable to a prohibited use,
22 the plaintiff shall be required to present proof only of the gross revenue attributable to use, and the
23 defendant shall be required to prove his, her, or its deductible expenses.

24 IV. Any plaintiff or defendant that prevails in an action to enforce the right protected under
25 this chapter shall be entitled to recover reasonable attorney's fees, costs, and expenses.

26 V. No owner, employee, or provider of any medium used for the distribution, transmission,
27 or aggregation of advertising, news reporting, and/or entertainment content is liable pursuant to this
28 chapter for any prohibited use of a person's identity in an advertisement promoting the goods or
29 services of a third party unless it is established that the owner, employee, or provider had actual
30 knowledge that the use was unauthorized and the owner, employee, or provider did not create the
31 advertisement.

32 VI. Nothing in this chapter may be construed to impose liability for offering the
33 transmission, routing, or providing of connections for communications, between or among points
34 specified by a user, of material of the user's choosing, without modification to the content of the
35 material sent or received.

36 359-M:8 Applicability. The prohibitions set forth in this chapter apply only to unauthorized use
37 of a person's identity occurring on or after January 1, 2013.

1 3 Effective Date. This act shall take effect January 1, 2013.