

Report Title:

Publicity Rights; Commercial Uses

Description:

Establishes property rights in the commercial use of a person's name voice, signature, photograph, or likeness. Makes application of chapter effective on August 1, 2009. Effective 7/1/2050. (SD2)

A BILL FOR AN ACT

RELATING TO PUBLICITY RIGHTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Notwithstanding any existing copyright law
2 concerning sound recordings, the purpose of this Act is to
3 protect the music of Hawaii, and all other works of authorship,
4 by establishing a property right in the commercial use of a
5 person's name, voice, signature, photograph, or likeness. This
6 right, generally called a "right of publicity", protects an
7 individual or personality from the unauthorized appropriation by
8 promoters and marketers of the music of Hawaii, without the
9 permission of the artists or their heirs, and the sale of
10 products that feature the artist's name, voice, signature,
11 photograph, or likeness but are objectionable to the artists or
12 heirs.

13 SECTION 2. The Hawaii Revised Statutes is amended by
14 adding a new chapter to be appropriately designated and to read
15 as follows:

16 "CHAPTER
17 PUBLICITY RIGHTS

1 § -1 **Property right in use of name, voice, signature,**
2 **photograph, or likeness.** Beginning August 1, 2009, every
3 individual or personality has a property right in the use of the
4 individual's or personality's name, voice, signature,
5 photograph, or likeness. This right exists in the name, voice,
6 signature, photograph, or likeness of individuals or
7 personalities living or deceased. This right shall be freely
8 transferable, assignable, and licensable, in whole or in part,
9 by any otherwise permissible form of inter vivos or testamentary
10 transfer, including without limitation a will or other
11 testamentary instrument, trust, contract, community property
12 agreement, or cotenancy with survivorship provisions or payable-
13 on-death provisions, whether the will or other testamentary
14 instrument, trust, contract, community property agreement, or
15 cotenancy document is entered into or executed by the deceased
16 individual or personality or by any subsequent owner of the
17 deceased individual's or personality's rights as recognized by
18 this chapter; or, if none is applicable, then the owner of the
19 rights shall be determined under the laws of intestate
20 succession applicable to interests in intangible personal
21 property. The property right does not expire upon the death of
22 the individual or personality, regardless of whether the law of

1 the domicile, residence, or citizenship of the individual or
2 personality at the time of death or otherwise recognizes a
3 similar or identical property right. The right exists whether
4 or not it was commercially exploited by the individual or the
5 personality during the individual or the personality's lifetime.
6 This chapter is intended to apply to all individuals and
7 personalities, living and deceased, regardless of place of
8 domicile or place of domicile at time of death. In the case of
9 a deceased individual or personality, the rights recognized
10 under this chapter shall be deemed to exist at the time of death
11 of any deceased individual or personality or subsequent
12 successor of their rights for the purpose of determining the
13 person or persons entitled to these property rights as provided
14 for in section -3.

15 § -2 **Definitions.** As used in this chapter, unless the
16 context clearly requires otherwise:

17 "Deceased individual" means any individual, regardless of
18 the individual's place of domicile, residence, or citizenship at
19 the time of death or otherwise, who has died.

20 "Deceased personality" means any individual, regardless of
21 the personality's place of domicile, residence, or citizenship
22 at the time of death or otherwise, whose name, voice, signature,

1 photograph, or likeness had commercial value at the time of the
2 individual's death, whether or not during the lifetime of that
3 individual, the individual used the individual's name, voice,
4 signature, photograph, or likeness on or in products,
5 merchandise or goods, or for purposes of advertising or selling,
6 or soliciting the purchase or sale of, products, merchandise,
7 goods, or services.

8 "Fund-raising" means an organized activity to solicit
9 donations of money or other goods or services from persons or
10 entities by an organization, company, or public entity. A fund-
11 raising activity does not include a live, public performance by
12 an individual or group of individuals for which money is
13 received in solicited or unsolicited gratuities.

14 "Individual" means a natural person, living or dead.

15 "Likeness" means an image, painting, sketching, model,
16 diagram, or other clear representation, other than a photograph,
17 of an individual's face, body, or parts thereof, or the
18 distinctive appearance, gestures, or mannerisms of an
19 individual.

20 "Name" means the actual or assumed name, or nickname, of a
21 living or deceased individual that is intended to identify that
22 individual.

1 "Person" means any natural person, firm, association,
2 partnership, corporation, joint stock company, syndicate,
3 receiver, common law trust, conservator, statutory trust, or any
4 other concern by whatever name known or however organized,
5 formed, or created, and includes nonprofit corporations,
6 associations, educational and religious institutions, political
7 parties, and community, civic, or other organizations.

8 "Personality" means any individual whose name, voice,
9 signature, photograph, or likeness has commercial value, whether
10 or not that individual uses the individual's name, voice,
11 signature, photograph, or likeness on or in products,
12 merchandise, or goods, or for purposes of advertising or
13 selling, or solicitation of purchase of, products, merchandise,
14 goods, or services.

15 "Photograph" means any photograph or photographic
16 reproduction, still or moving, or any videotape, online or live
17 television transmission, of any individual, in which the
18 individual is readily identifiable.

19 "Signature" means the one handwritten or otherwise legally
20 binding form of an individual's name, written or authorized by
21 that individual, that distinguishes the individual from all
22 others.

1 § -3 **Transfer, assignment, and license.** (a) Beginning
2 August 1, 2009, every individual or personality has a property
3 right in the use of the individual or personality's name, voice,
4 signature, photograph, or likeness. This right shall be freely
5 transferable, assignable, and licensable, in whole or in part,
6 by contract or inter vivos transfer. This right shall not
7 expire upon the death of the individual or personality, but
8 shall be owned and enforceable by the following successors,
9 heirs, or other transferees of living or deceased individuals or
10 personalities:

11 (1) Except where rights were transferred or assigned
12 before the deceased personality's death by means of
13 any contract or trust instrument, the right shall be
14 owned by the person entitled to the rights under the
15 deceased individual's or personality's last will and
16 testament or, if none, then by the beneficiaries or
17 heirs under the laws of intestate succession
18 applicable to interests in intangible personal
19 property generally of the individual or personality's
20 domicile, regardless of whether the law of the
21 domicile of the deceased individual or personality, at

1 the time of death, or thereafter, recognizes a similar
2 or identical property right; or

3 (2) If the deceased individual or personality transferred
4 or assigned any interest in the personality rights
5 during the individual or personality's life by means
6 of any contract or trust instrument, then the
7 transferred or assigned interest shall be held as
8 follows:

9 (A) If the transferred or assigned interest was held
10 in trust, in accordance with the terms of the
11 trust;

12 (B) If the interest is subject to a cotenancy with
13 any survivorship provisions or payable-on-death
14 provisions, in accordance with those provisions;

15 (C) If the interest is subject to any contract,
16 including without limitation an exclusive
17 license, assignment, or a community property
18 agreement, in accordance with the terms of the
19 applicable contract or contracts;

20 (D) If the interest has been transferred or assigned
21 to a third person in a form that is not addressed
22 in this section, by the individual or

1 personality, or the successor, heir, or other
2 transferee of the living or deceased individual
3 or personality, then the interest may be
4 transferred, assigned, or licensed by that third
5 person, in whole or in part, by any otherwise
6 permissible form of inter vivos or testamentary
7 transfer or, if none is applicable, under the
8 laws of intestate succession applicable to
9 interests in intangible personal property of the
10 third person's domicile, regardless of whether
11 the law of the domicile of the deceased third
12 party, at the time of death, or thereafter,
13 recognizes a similar or identical property right.

14 (b) A property right exists whether or not those rights
15 were commercially exploited by or under the authority of the
16 individual or the personality, or the individual or
17 personality's successors or transferees, during the individual
18 or the personality's lifetime.

19 **§ -4 Right is exclusive for individuals and**
20 **personalities.** (a) For individuals, except to the extent that
21 the individual may have assigned or licensed the rights, the
22 rights protected in this chapter are exclusive to the

1 individual, subject to the assignment or licensing of the rights
2 during the individual's lifetime, and are exclusive to the
3 persons entitled to the rights under section -3 for a period
4 of twenty years after the death of the individual, including to
5 the extent that the persons entitled to the rights under section
6 -3 may have assigned or licensed these rights to others.

7 (b) For personalities, except to the extent that the
8 personality may have assigned or licensed the rights, the rights
9 protected in this chapter are exclusive to the personality,
10 subject to the assignment or licensing of the rights during the
11 personality's lifetime, and to the persons entitled to these
12 rights under section -3 for a period of seventy years after
13 the death of the personality, including to the extent that the
14 persons entitled to these rights under section -3 may have
15 assigned or licensed these rights to others.

16 (c) The rights granted in this chapter may be exercised by
17 a personal representative, attorney-in-fact, parent of a minor
18 child, or guardian, or as authorized by a court of competent
19 jurisdiction. The terms "personal representative", "attorney-
20 in-fact", and "guardian" shall have the same meanings as in
21 chapter 560.

1 **§ -5 Infringement of right; use without consent; profit**
2 **or not for profit.** Beginning August 1, 2009, any person who
3 uses or authorizes the use of a living or deceased individual or
4 personality's name, voice, signature, photograph, or likeness,
5 on or in goods, merchandise, or products entered into commerce
6 in this State, or for purposes of advertising products,
7 merchandise, goods, or services, or for purposes of fund-raising
8 or solicitation of donations, or if any person disseminates or
9 publishes advertisements in this State, without written or oral,
10 express or implied consent of the owner of the right, has
11 infringed this right. An infringement may occur under this
12 section without regard to whether the use or activity is for
13 profit or not for profit.

14 **§ -6 Infringement of right; circuit courts; injunctions;**
15 **liability for damages and profits; impoundment; destruction;**
16 **attorneys' fees.** (a) Beginning August 1, 2009, the circuit
17 courts of this State may grant injunctions on reasonable terms
18 to prevent or restrain the unauthorized use of the rights in a
19 living or deceased individual or personality's name, voice,
20 signature, photograph, or likeness.

21 (b) Any person who infringes the rights under this chapter
22 shall be liable for the greater of \$10,000 or the actual damages

1 sustained as a result of the infringement, and any profits that
2 are attributable to the infringement and not taken into account
3 when calculating actual damages. To prove profits under this
4 subsection, the injured party or parties shall submit proof of
5 gross revenues attributable to the infringement, and the
6 infringing party is required to prove the infringing party's
7 deductible expenses. For the purposes of computing statutory
8 damages, the use of a name, voice, signature, photograph, or
9 likeness in or related to one work constitutes a single act of
10 infringement regardless of the number of copies made or the
11 number of times the name, voice, signature, photograph, or
12 likeness is displayed.

13 (c) At any time while an action under this chapter is
14 pending, the court may order the impounding, on reasonable
15 terms, of all materials or any part thereof claimed to have been
16 made or used in violation of the injured party's rights, and the
17 court may enjoin the use of all plates, molds, matrices,
18 masters, tapes, film negatives, master recordings, copies of
19 recordings, optical disk stampers, or other articles by means of
20 which these materials may be reproduced.

21 (d) As part of a final judgment or decree, the court may
22 order the destruction or other reasonable disposition of all

1 materials found to have been made or used in violation of the
2 injured party's rights, and of all plates, molds, matrices,
3 masters, tapes, film negatives, master recordings, copies of
4 recordings, optical disk stampers, or other articles by means of
5 which these materials may be reproduced.

6 (e) The prevailing party may recover reasonable attorneys'
7 fees, expenses, and court costs incurred in recovering any
8 remedy or defending any claim brought under this section.

9 (f) The remedies provided for in this section are
10 cumulative and are in addition to any others provided for by
11 law.

12 § -7 **Exemptions from use restrictions; when chapter does**
13 **not apply.** (a) For purposes of section -5, the use of a
14 name, voice, signature, photograph, or likeness in connection
15 with matters of cultural, historical, political, religious,
16 educational, newsworthy, or public interest, including without
17 limitation, comment, criticism, satire, and parody relating
18 thereto, shall not constitute a use for which consent is
19 required under this chapter. A matter exempt from consent under
20 this subsection does not lose its exempt status because it
21 appears in the form of a paid advertisement if it is clear that

1 the principal purpose of the advertisement is to comment on the
2 matter.

3 (b) This chapter does not apply to the use or
4 authorization for use of an individual or personality's name,
5 voice, signature, photograph, or likeness, in any of the
6 following:

7 (1) Single and original works of fine art, including but
8 not limited to photographic, graphic, and sculptural
9 works of art that are not published in more than five
10 copies;

11 (2) A literary work, theatrical work, musical composition,
12 film, radio, online or television program, magazine
13 article, news story, public affairs report, or sports
14 broadcast or account, or with any political campaign
15 when the use does not inaccurately claim or state an
16 endorsement by the individual or personality;

17 (3) An advertisement or commercial announcement for a use
18 permitted by subsection (a) or (g) or paragraph (1) or
19 (2);

20 (4) An advertisement, commercial announcement, or
21 packaging for the authorized sale, distribution,
22 performance, broadcast, or display of a literary,

1 musical, cinematographic, or other artistic work using
2 the name, voice, signature, photograph, or likeness of
3 the writer, author, composer, director, actor, or
4 artist who created the work, where the individual or
5 personality consented in a writing signed by the
6 individual or personality or their successor-in-
7 interest, to the use of the individual or
8 personality's name, voice, signature, photograph, or
9 likeness on or in connection with the initial sale,
10 distribution, performance, or display thereof; and
11 (5) The advertisement or sale of a rare or fine product,
12 including but not limited to books, which incorporates
13 the signature of the author.

14 (c) It is no defense to an infringement action under this
15 chapter that the use of an individual or personality's name,
16 voice, signature, photograph, or likeness includes more than one
17 individual or personality so identifiable; provided that the
18 individuals or personalities complaining of the use shall not
19 bring their cause of action as a class action.

20 (d) Section -5 shall not apply to the owners or
21 employees of any medium used for advertising, including but not
22 limited to newspapers, magazines, radio and television stations,

1 online service providers, billboards, and transit ads, who,
2 without prior notice that the use would be in violation of this
3 chapter, have published or disseminated any advertisement or
4 solicitation in violation of this chapter, unless the
5 advertisement or solicitation was intended to promote the medium
6 itself.

7 (e) This chapter does not apply to a use or authorization
8 for use of an individual or personality's name that is merely
9 descriptive and used fairly and in good faith only to identify
10 or describe something other than the individual or personality,
11 such as, without limitation, to describe or identify a place, a
12 legacy, a style, a theory, an ownership interest, or a party to
13 a transaction or to accurately describe the goods or services of
14 a party.

15 (f) This chapter does not apply to the use of an
16 individual or personality's name, voice, signature, photograph,
17 or likeness when the use of the individual or personality's
18 name, voice, signature, photograph, or likeness is an
19 insignificant, de minimis, or incidental use.

20 (g) This chapter does not apply to the distribution,
21 promotion, transfer, or license of a photograph or other
22 material containing an individual or personality's name, voice,

1 signature, photograph, or likeness to a third party for use in a
2 manner which is lawful under this chapter, or to a third party
3 for further distribution, promotion, transfer, or license for
4 use in a manner which is lawful under this chapter."

5 SECTION 3. This Act shall take effect on July 1, 2050.