



GOV. MSG. NO. 828

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

July 15, 2009

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fifth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

I am transmitting herewith SB1005 SD2 HD2 CD1, without my approval, and with the statement of objections relating to the measure.

SB1005 SD2 HD2 CD1

A BILL FOR AN ACT
RELATING TO PUBLICITY RIGHTS.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda Lingle".

LINDA LINGLE

EXECUTIVE CHAMBERS

HONOLULU

July 15, 2009

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 1005

Honorable Members
Twenty-Fifth Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, Senate Bill No. 1005, entitled "A Bill for an Act Relating to Publicity Rights."

The purpose of this bill is to confirm the existence of a property right in the commercial use of a person's name, voice, signature, or likeness, known as the right of publicity. The bill also states that a "publicity right" must be registered in the trade name registry maintained by the Department of Commerce and Consumer Affairs in order for the right to be recognized and protected.

It is understandable that heirs would want to protect and control the use of the images, names, and creative products of their family members who are deceased. However, such protections need to be implemented in a manner that does not adversely impact the growth of creative industries within Hawaii and that does not use a business registration system ill-suited for the protections sought.

This bill is objectionable because it fails to provide sufficient guidance and clarity on the registration rights and requirements necessary to recognize and protect "publicity rights."

The "publicity right" provided for in this bill has to do with intervivos and estate transfers unrelated to a business trade name, both in law and in fact. This bill offers no

STATEMENT OF OBJECTIONS
SENATE BILL NO. 1005
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meaningful guidance on how to revoke the right, how to terminate the right, the grounds for rejecting a registration, whether an appeal right exists to an administrative hearing or a court, whether the State can charge for the filing of a publicity right trade name, and how often the information must be updated. These are requirements set for the registration of trade names and trademarks that are absent in this bill.

Further, this bill allows for the registration of a publicity rights trade name that is owned by multiple parties, whereas, currently, the trade name registration system does not allow for multiple ownership. It is unclear how the State handles the registration of the publicity right when the ownership parties do not agree.

My Administration recognizes there are individuals, particularly within the Hawaiian community, who seek legal protection for the names and images of the many talented artists who are no longer with us. My Administration is willing to work with legislators, stakeholders, model legislation experts, and the National Conference of Commissioners on uniform State laws to identify and draft a bill that meets the objectives sought but not achieved in this legislation.

For the foregoing reasons, I am returning Senate Bill No. 1005 without my approval.

Respectfully,

A handwritten signature in black ink, appearing to read 'Linda Lingle', with a stylized, looping flourish at the end.

LINDA LINGLE
Governor of Hawaii

A BILL FOR AN ACT

RELATING TO PUBLICITY RIGHTS.

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

1 SECTION 1. The purpose of this Act is to confirm the
2 existence of a property right in the commercial use of a
3 person's name, voice, signature, or likeness known as the right
4 of publicity. The right of publicity protects a person, his or
5 her successors-in-interest, assignees or other transferees or
6 licensees, from the unauthorized appropriation of the person's
7 name, voice, signature, likeness, or other commercially valuable
8 attributes in connection with the sale, marketing, advertising,
9 or packaging of goods and/or services. While protecting the
10 "right of publicity", this Act provides exemptions from the need
11 for authorization with respect to certain important, legitimate,
12 and/or constitutionally protected activities.

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 Definitions. As used in this chapter, unless the
2 context clearly requires otherwise:

3 "Characteristic" means a distinctive appearance, gesture,
4 or mannerism recognized as an identifying attribute of a
5 personality.

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

9 "Deceased personality" means any individual, regardless of
10 the personality's place of domicile, residence, or citizenship
11 at the time of death or otherwise, whose name, voice, signature,
12 or likeness had commercial value at the time of the individual's
13 death, whether or not during the lifetime of that individual,
14 the individual used the individual's name, voice, signature, or
15 likeness on or in products, merchandise, goods, or for purposes
16 of advertising, selling, or soliciting the purchase or sale of
17 products, merchandise, goods, or services.

18 "Fund-raising" means an organized activity to solicit
19 donations of money or other goods or services from persons or
20 entities by an organization, company, or public entity. A
21 fund-raising activity does not include a live, public



1 performance by an individual or group of individuals for which
2 money is received in solicited or unsolicited gratuities.

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

4 "Likeness" means an image, photograph, painting, sketching,
5 model, diagram, or other recognizable representation of an
6 individual's face or body, and includes, in the case of a
7 personality, a characteristic.

8 "Name" means the actual or assumed name, or nickname, of a
9 living or deceased individual that is intended to identify that
10 individual.

11 "Person" means any natural person, firm, association,
12 partnership, corporation, company, syndicate, receiver, common
13 law trust, conservator, statutory trust, or any other entity by
14 whatever name known or however organized, formed, or created,
15 and includes nonprofit corporations, associations, educational
16 and religious institutions, political parties, and community,
17 civic, or other organizations.

18 "Personality" means any individual whose name, voice,
19 signature, likeness, or other attribute of their personality has
20 commercial value, whether or not that individual uses the
21 individual's name, voice, signature, likeness, or other
22 attribute of their personality on or in products, merchandise,



1 goods, or for purposes of marketing, advertising, selling, or
2 soliciting the purchase of products, merchandise, goods, or
3 services.

4 "Photograph" means any photograph or photographic
5 reproduction, still or moving, or any videotape, online or live
6 television transmission, of any individual, in which the
7 individual is readily identifiable.

8 "Publicity rights trade name registration" means a
9 registration with the department of commerce and consumer
10 affairs of a trade name under chapter 482, using the
11 department's procedures for trade name registration, wherein the
12 trade name shall consist of the assigning individual or
13 personality's full legal name and the words "publicity rights",
14 preferably in all capital letters. In administering publicity
15 rights trade name registrations under this chapter, the
16 department shall be exempt from:

- 17 (1) Any liability in excess of that which the department
18 would have for a trade name registration, other than a
19 "publicity rights trade name registration";
- 20 (2) Any duty to decide between competing registrants or
21 the rights established by registration; and



1 (3) Any duty to construe the meaning of any provision of
2 this chapter;

3 provided that the duties under paragraphs (2) and (3) shall be
4 duties of the courts of competent jurisdiction.

5 "Signature" means a handwritten or otherwise legally
6 binding form of an individual's name, written or authorized by
7 that individual, that distinguishes the individual from all
8 other individuals.

9 § -2 Property right in use of name, voice, signature, or
10 likeness. Every individual or personality has a property right
11 in the use of the individuals or personality's name, voice,
12 signature, and likeness. The right shall continue to exist for
13 a fixed period of time after death, as prescribed in
14 section -4. This right shall be freely transferable,
15 assignable, and licensable, in whole or in part, by any
16 otherwise permissible form of inter vivos or testamentary
17 transfer, including without limitation a will or other
18 testamentary instrument, trust, contract, community property
19 agreement, or cotenancy with survivorship provisions or
20 payable-on-death provisions, whether the will or other
21 testamentary instrument, trust, contract, community property
22 agreement, or cotenancy document is entered into or executed by



1 the deceased individual or personality or by any subsequent
2 owner of the deceased individual's or personality's rights as
3 recognized by this chapter; or, if none is applicable, then the
4 owner of the rights shall be determined under the laws of
5 intestate succession applicable to interests in intangible
6 personal property. The right exists whether or not it was
7 commercially exploited by the individual or the personality
8 during the individual or the personality's lifetime. The right
9 does not expire upon the death of the individual or personality,
10 regardless of whether the law of the domicile, residence, or
11 citizenship of the individual or personality at the time of
12 death or otherwise recognizes a similar or identical property
13 right. This chapter is intended to apply to all individuals and
14 personalities, living and deceased, regardless of place of
15 domicile or place of domicile at time of death. In the case of
16 a deceased individual or personality, the rights recognized
17 under this chapter shall be deemed to exist at the time of death
18 of any deceased individual or personality or subsequent
19 successor of their rights for the purpose of determining the
20 person or persons entitled to these property rights as provided
21 for in section -3.



1 § -3 Transfer, assignment, and license. (a) A right
2 recognized by this chapter shall be freely transferable,
3 assignable, and licensable, in whole or in part, by contract or
4 inter vivos transfer. This right shall not expire upon the
5 death of the individual or personality, but shall be owned and
6 enforceable by the following successors, heirs, or other
7 transferees of living or deceased individuals or personalities:

8 (1) Except where a right recognized by this chapter was
9 transferred or assigned before the deceased
10 personality's death by means of any contract or trust
11 instrument, a right recognized by this section shall
12 be owned by the person entitled to the right under the
13 deceased individual's or personality's last will and
14 testament or, if none, then by the beneficiaries or
15 heirs under the laws of intestate succession
16 applicable to interests in intangible personal
17 property generally of the individual or personality's
18 domicile, regardless of whether the law of the
19 domicile of the deceased individual or personality, at
20 the time of death, or thereafter, recognizes a similar
21 or identical property right; or



1 (2) If the deceased individual or personality transferred
2 or assigned any interest in a right recognized by this
3 chapter during the individual or personality's life by
4 means of any contract or trust instrument, then the
5 interest so transferred or assigned shall be held as
6 follows:

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

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

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

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 valid transferee of the living or deceased
3 individual or personality, then the interest may
4 be transferred, assigned, or licensed by that
5 third person, in whole or in part, by any
6 otherwise permissible form of inter vivos or
7 testamentary transfer or, if none is applicable,
8 under the laws of intestate succession applicable
9 to interests in intangible personal property of
10 the third person's domicile, regardless of
11 whether the law of the domicile of the deceased
12 third 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 transferred, assigned, or licensed a
22 right recognized by this chapter, the rights protected in this



1 chapter are exclusive to the individual, and are exclusive to
2 the persons entitled to the rights under section -3 for a
3 period of seventy years after the death of the individual,
4 including to the extent that the persons entitled to the rights
5 under section -3 may have transferred, assigned, or licensed
6 these rights to others.

7 (b) For personalities, except to the extent that the
8 personality may have transferred, assigned, or licensed a right
9 recognized by this chapter, the rights protected in this chapter
10 are exclusive to the personality, and are exclusive to the
11 persons entitled to the rights under section -3 for a period
12 of seventy years after the death of the personality, including
13 to the extent that the persons entitled to the rights under
14 section -3 may have transferred, assigned, or licensed the
15 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,"
20 "attorney-in-fact," and "guardian" shall have the same meanings
21 as in chapter 560.



1 § -5 Infringement of right; use without consent; profit
2 or not for profit. Except as provided in section -7, any
3 person who uses or authorizes the use of a living or deceased
4 individual or personality's name, voice, signature, or likeness,
5 on or in goods, merchandise, or services 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 that contain a living or
10 deceased individual or personality's name, voice, signature, or
11 likeness, without express or implied consent of the owner of the
12 right, has infringed a publicity right under this chapter. An
13 infringement may occur under this section without regard to
14 whether the use or activity is for profit or not for profit.

15 § -6 Infringement of right; circuit courts; injunctions;
16 liability for damages and profits; impoundment; destruction;
17 attorneys' fees. (a) The circuit courts of this State may
18 grant injunctions on reasonable terms to prevent or restrain the
19 unauthorized use of a right recognized by this chapter.

20 (b) Any person who infringes a right granted by this
21 chapter shall be liable for the greater of \$10,000 or the actual
22 damages sustained as a result of the infringement, and any



1 profits that are attributable to the infringement and not taken
2 into account when calculating actual damages; provided that each
3 search of an individual's name on an internet search engine
4 shall be exempt from the statutory damages identified in this
5 subsection. To prove profits under this subsection, the injured
6 party or parties may submit proof of gross revenues attributable
7 to the infringement, and the infringing party may be required by
8 the court to provide evidence of the infringing party's
9 deductible expenses. For the purposes of computing statutory
10 damages, the use of a name, voice, signature, or likeness
11 constitutes a single act of infringement regardless of the
12 number of copies made or the number of times the name, voice,
13 signature, or likeness is displayed.

14 (c) At any time while an action under this chapter is
15 pending, the court may, pursuant to Rule 65 of the Hawaii Rules
16 of Civil Procedure, order the impounding, on reasonable terms,
17 of all materials or any part thereof claimed to have been made
18 or used in violation of the injured party's rights, and the
19 court may enjoin the use of all plates, molds, matrices,
20 masters, tapes, film negatives, master recordings, copies of
21 recordings, optical disk stampers, or other articles by means of
22 which these materials may be reproduced.



1 (d) As part of a final judgment or decree, the court may
2 order the destruction or other reasonable disposition of all
3 materials found to have been made or used in violation of the
4 injured party's rights, and of all plates, molds, matrices,
5 masters, tapes, film negatives, master recordings, copies of
6 recordings, optical disk stampers, or other articles by means of
7 which these materials may be reproduced; provided that the
8 property of a common carrier, internet service provider,
9 internet search engine provider, or other similarly situated
10 entities shall be exempt from the destruction or disposition
11 requirements identified in this subsection; provided further
12 that if the entity has received written notice of the infringing
13 nature of the material submitted to the entity's agent
14 designated pursuant to 17 United States Code section 512(c) and
15 that entity fails to remove the material expeditiously following
16 receipt of the notice, then this exemption shall not apply.

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

20 (f) The remedies provided for in this section are
21 cumulative and are in addition to any others provided for by
22 law.



1 § -7 Exemptions from use restrictions; when chapter does
2 not apply. (a) For purposes of section -5, the use of a
3 name, voice, signature, or likeness in connection with matters
4 of cultural, historical, political, religious, educational,
5 newsworthy, or public interest, including without limitation,
6 comment, criticism, satire, and parody relating thereto, shall
7 not constitute a use for which consent is required under this
8 chapter. A matter exempt from the requirement of advance
9 consent under this subsection does not cease to be exempt if it
10 appears in the form of a paid advertisement and the principal
11 purpose of the advertisement is to comment on the matter.

12 (b) This chapter shall not apply to the use or
13 authorization for use of an individual or personality's name,
14 voice, signature, or likeness, in, or to display, any of the
15 following:

- 16 (1) Single and original works of fine art, including but
17 not limited to photographic, graphic, and sculptural
18 works of art that are not published in more than five
19 copies;
- 20 (2) A literary work, theatrical work, musical composition,
21 sound recording, radio program, motion picture,
22 television program or other audiovisual work, magazine



1 article, news story, public affairs report, or sports
2 broadcast or account, or materials related to a
3 political campaign, when the use does not inaccurately
4 claim or state an endorsement by the individual or
5 personality;

6 (3) An advertisement or commercial announcement for a use
7 permitted by subsection (a) or (g) or paragraph (1) or
8 (2);

9 (4) An advertisement, commercial announcement, or
10 packaging for the sale, distribution, broadcast,
11 performance, or display of a literary, musical,
12 cinematographic, or other artistic work, or the
13 recording or copy thereof, using the name, voice,
14 signature, or likeness of the writer, author,
15 composer, director, actor, or artist who created the
16 work, where the individual or personality has
17 expressly or impliedly consented to the use of the
18 individual or personality's name, voice, signature, or
19 likeness on or in connection with the initial or any
20 subsequent sale, distribution, performance, or display
21 thereof; and



1 (5) The advertisement or sale of a rare or fine product,
2 including but not limited to books, which incorporates
3 an original signature of the author.

4 (c) It shall not constitute a defense to an infringement
5 action under this chapter that the use of an individual or
6 personality's name, voice, signature, or likeness includes more
7 than one individual or personality.

8 (d) Section -5 shall not apply to the owners or
9 employees of any medium used for advertising, including but not
10 limited to newspapers, magazines, radio and television stations,
11 online service providers, billboards or other devices, who,
12 without prior notice that the use would constitute an
13 infringement under this chapter, have published or disseminated
14 any advertisement or solicitation that would constitute an
15 infringement under this chapter, unless the infringement was
16 part of an advertisement or solicitation promoting the services
17 of the advertising medium itself.

18 (e) This chapter shall not apply to a use or authorization
19 for use of an individual or personality's name that is merely
20 descriptive and used fairly and in good faith only to identify
21 or describe something other than the individual or personality,
22 such as, without limitation, to describe or identify a place, a



1 legacy, a style, a theory, an ownership interest, or a party to
2 a transaction, or to accurately describe the goods or services
3 of a party.

4 (f) This chapter shall not apply to the use of an
5 individual or personality's name, voice, signature, or likeness
6 when the use of the individual or personality's name, voice,
7 signature, or likeness is an insignificant, de minimis, or
8 incidental use.

9 (g) This chapter shall not apply to the distribution,
10 promotion, transfer, or license of a photograph or other
11 material containing an individual or personality's name, voice,
12 signature, photograph, or likeness to a third party for use in a
13 manner which is lawful under this chapter, or to a third party
14 for further distribution, promotion, transfer, or license for
15 use in a manner which is lawful under this chapter.

16 § -8 Procedure for identifying transferees, licensees,
17 or assignees; requirement to seek damages or relief. (a) An
18 assignee or transferee of publicity rights shall have the right
19 to make a publicity rights trade name registration. To obtain
20 the benefit of the protection of this section, the assignee or
21 transferee shall keep the publicity rights trade name
22 registration in force and shall diligently maintain the accuracy



1 of the information in the publicity rights trade name
2 registration.

3 (b) Publicity rights of a deceased person that were not
4 previously assigned or transferred shall be part of the deceased
5 person's estate and shall be administered by the personal
6 representative of the deceased person as personal property of
7 the deceased person. On or before closing of probate of a
8 deceased person's estate, the publicity rights of the deceased
9 person shall vest in the transferees of the personal property of
10 the estate in conformity with the deceased person's will or
11 probate order. If publicity rights are not expressly addressed
12 by the terms of the will or a probate order, and if a publicity
13 rights trade name registration is not in effect at the time of
14 the relevant assignment or license, after probate closes, any
15 one of the transferees of the personal property of the deceased
16 person's estate shall have the right to assign or license the
17 publicity rights of the deceased person, and a valid license
18 from any of the transferees of the personal property of the
19 deceased person's estate shall constitute a complete defense to
20 any infringement action under this section.

21 (c) Any person seeking to license publicity rights from a
22 living person shall have the right to presume that a living



1 individual or personality has the right to assign or license the
2 individual or personality's publicity rights unless there is a
3 publicity rights trade name registration for that individual or
4 personality. If there is a publicity rights trade name
5 registration for that individual or personality, the person
6 seeking to license publicity rights shall inform the living
7 person in writing that an assignment or license shall be sought
8 from the holder of the publicity rights trade name registration
9 before entering into the assignment or license.

10 (d) If there is a publicity rights trade name registration
11 for a given individual or personality, any person seeking to
12 license publicity rights for that individual or personality
13 shall have the right to presume that the holder of the publicity
14 rights trade name registration has the right to assign or
15 license the individual or personality's publicity rights and a
16 valid license from the registered holder of the publicity rights
17 trade name registration shall constitute a complete defense to
18 any infringement action under this section.

19 (e) A person commits an offense if the person signs,
20 manually or via electronic means, a document the person knows is
21 false in any material respect with the intent that the document
22 be delivered or transmitted to the director of commerce and



1 consumer affairs in connection with a publicity rights trade
2 name registration under this section. An offense under this
3 subsection shall be a class C felony and may carry a fine not to
4 exceed \$10,000.

5 (f) A person commits a misdemeanor if the person
6 negligently and without intent to defraud signs, manually or via
7 electronic means, a document that is false in any material
8 respect with intent that the document be delivered or
9 transmitted to the director of commerce and consumer affairs in
10 connection with a publicity rights trade name registration under
11 this section. Commission of a misdemeanor under this subsection
12 may carry a fine not to exceed \$2,000.

13 (g) Any person who knowingly makes a false or fraudulent
14 representation or declaration in connection with a publicity
15 rights trade name registration pursuant to this section shall be
16 liable for all damages sustained as a result of the false or
17 fraudulent publicity rights trade name registration as
18 determined by a court of competent jurisdiction."

19 SECTION 3. If any provision of this Act, or the
20 application thereof to any person or circumstance is held
21 invalid, the invalidity does not affect other provisions or
22 applications of the Act, which can be given effect without the



1 invalid provision or application, and to this end the provisions
2 of this Act are severable.

3 SECTION 4. This Act shall take effect upon its approval.

