

ACT 28

S.B. NO. 1005

A Bill for an Act Relating to Publicity Rights.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act 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 right of publicity protects a person, his or her successors-in-interest, assignees or other transferees or licensees, from the unauthorized appropriation of the person's name, voice, signature, likeness, or other commercially valuable attributes in connection with the sale, marketing, advertising, or packaging of goods and/or services. While protecting the "right of publicity", this Act provides exemptions from the need for authorization with respect to certain important, legitimate, and/or constitutionally protected activities.

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

**"CHAPTER
PUBLICITY RIGHTS**

§ -1 **Definitions.** As used in this chapter, unless the context clearly requires otherwise:

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

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

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

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

“Individual” means a natural person, living or dead.

“Likeness” means an image, photograph, painting, sketching, model, diagram, or other recognizable representation of an individual’s face or body, and includes, in the case of a personality, a characteristic.

“Name” means the actual or assumed name, or nickname, of a living or deceased individual that is intended to identify that individual.

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

“Personality” means any individual whose name, voice, signature, likeness, or other attribute of their personality has commercial value, whether or not that individual uses the individual’s name, voice, signature, likeness, or other attribute of their personality on or in products, merchandise, goods, or for purposes of marketing, advertising, selling, or soliciting the purchase of products, merchandise, goods, or services.

“Photograph” means any photograph or photographic reproduction, still or moving, or any videotape, online or live television transmission, of any individual, in which the individual is readily identifiable.

“Publicity rights trade name registration” means a registration with the department of commerce and consumer affairs of a trade name under chapter 482, using the department’s procedures for trade name registration, wherein the trade name shall consist of the assigning individual or personality’s full legal name and the words “publicity rights”, preferably in all capital letters. In administering publicity rights trade name registrations under this chapter, the department shall be exempt from:

- (1) Any liability in excess of that which the department would have for a trade name registration, other than a “publicity rights trade name registration”;
- (2) Any duty to decide between competing registrants or the rights established by registration; and
- (3) Any duty to construe the meaning of any provision of this chapter; provided that the duties under paragraphs (2) and (3) shall be duties of the courts of competent jurisdiction.

“Signature” means a handwritten or otherwise legally binding form of an individual’s name, written or authorized by that individual, that distinguishes the individual from all other individuals.

§ -2 Property right in use of name, voice, signature, or likeness. Every individual or personality has a property right in the use of the individuals or personality’s name, voice, signature, and likeness. The right shall continue to exist for a fixed period of time after death, as prescribed in section -4. This right shall be freely transferable, assignable, and licensable, in whole or in part, by any otherwise permissible form of inter vivos or testamentary transfer, including without limitation a will or other testamentary instrument, trust, contract, community property agreement, or cotenancy with survivorship provisions or payable-on-death provisions, whether the will or other testamentary instrument,

trust, contract, community property agreement, or cotenancy document is entered into or executed by the deceased individual or personality or by any subsequent owner of the deceased individual's or personality's rights as recognized by this chapter; or, if none is applicable, then the owner of the rights shall be determined under the laws of intestate succession applicable to interests in intangible personal property. The right exists whether or not it was commercially exploited by the individual or the personality during the individual or the personality's lifetime. The right does not expire upon the death of the individual or personality, regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death or otherwise recognizes a similar or identical property right. This chapter is intended to apply to all individuals and personalities, living and deceased, regardless of place of domicile or place of domicile at time of death. In the case of a deceased individual or personality, the rights recognized under this chapter shall be deemed to exist at the time of death of any deceased individual or personality or subsequent successor of their rights for the purpose of determining the person or persons entitled to these property rights as provided for in section -3.

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

- (1) Except where a right recognized by this chapter was transferred or assigned before the deceased personality's death by means of any contract or trust instrument, a right recognized by this section shall be owned by the person entitled to the right under the deceased individual's or personality's last will and testament or, if none, then by the beneficiaries or heirs under the laws of intestate succession applicable to interests in intangible personal property generally of the individual or personality's domicile, regardless of whether the law of the domicile of the deceased individual or personality, at the time of death, or thereafter, recognizes a similar or identical property right; or
- (2) If the deceased individual or personality transferred or assigned any interest in a right recognized by this chapter during the individual or personality's life by means of any contract or trust instrument, then the interest so transferred or assigned shall be held as follows:
 - (A) If the transferred or assigned interest was held in trust, in accordance with the terms of the trust;
 - (B) If the transferred or assigned interest is subject to a cotenancy with any survivorship provisions or payable-on-death provisions, in accordance with those provisions;
 - (C) If the transferred or assigned interest is subject to any contract, including without limitation an exclusive license, assignment, or a community property agreement, in accordance with the terms of the applicable contract or contracts; or
 - (D) If the interest has been transferred or assigned to a third person in a form that is not addressed in this section, by the individual or personality, or the successor, heir, or other valid transferee of the living or deceased individual or personality, then the interest may be transferred, assigned, or licensed by that third person, in whole or in part, by any otherwise permis-

sible form of inter vivos or testamentary transfer or, if none is applicable, under the laws of intestate succession applicable to interests in intangible personal property of the third person's domicile, regardless of whether the law of the domicile of the deceased third party, at the time of death, or thereafter, recognizes a similar or identical property right.

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

§ -4 Right is exclusive for individuals and personalities. (a) For individuals, except to the extent that the individual may have transferred, assigned, or licensed a right recognized by this chapter, the rights protected in this chapter are exclusive to the individual, and are exclusive to the persons entitled to the rights under section -3 for a period of seventy years after the death of the individual, including to the extent that the persons entitled to the rights under section -3 may have transferred, assigned, or licensed these rights to others.

(b) For personalities, except to the extent that the personality may have transferred, assigned, or licensed a right recognized by this chapter, the rights protected in this chapter are exclusive to the personality, and are exclusive to the persons entitled to the rights under section -3 for a period of seventy years after the death of the personality, including to the extent that the persons entitled to the rights under section -3 may have transferred, assigned, or licensed the rights to others.

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

§ -5 Infringement of right; use without consent; profit or not for profit. Except as provided in section -7, any person who uses or authorizes the use of a living or deceased individual or personality's name, voice, signature, or likeness, on or in goods, merchandise, or services entered into commerce in this state, or for purposes of advertising products, merchandise, goods, or services, or for purposes of fund-raising or solicitation of donations, or if any person disseminates or publishes advertisements in this state that contain a living or deceased individual or personality's name, voice, signature, or likeness, without express or implied consent of the owner of the right, has infringed a publicity right under this chapter. An infringement may occur under this section without regard to whether the use or activity is for profit or not for profit.

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

(b) Any person who infringes a right granted by this chapter shall be liable for the greater of \$10,000 or the actual damages sustained as a result of the infringement, and any profits that are attributable to the infringement and not taken into account when calculating actual damages; provided that each search of an individual's name on an internet search engine shall be exempt from the statutory damages identified in this subsection. To prove profits under this subsection, the injured party or parties may submit proof of gross revenues attribut-

able to the infringement, and the infringing party may be required by the court to provide evidence of the infringing party's deductible expenses. For the purposes of computing statutory damages, the use of a name, voice, signature, or likeness constitutes a single act of infringement regardless of the number of copies made or the number of times the name, voice, signature, or likeness is displayed.

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

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

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

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

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

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

- (1) Single and original works of fine art, including but not limited to photographic, graphic, and sculptural works of art that are not published in more than five copies;
- (2) A literary work, theatrical work, musical composition, sound recording, radio program, motion picture, television program or other audiovisual work, magazine article, news story, public affairs report, or sports broadcast or account, or materials related to a political campaign, when the use does not inaccurately claim or state an endorsement by the individual or personality;
- (3) An advertisement or commercial announcement for a use permitted by subsection (a) or (g) or paragraph (1) or (2);

- (4) An advertisement, commercial announcement, or packaging for the sale, distribution, broadcast, performance, or display of a literary, musical, cinematographic, or other artistic work, or the recording or copy thereof, using the name, voice, signature, or likeness of the writer, author, composer, director, actor, or artist who created the work, where the individual or personality has expressly or impliedly consented to the use of the individual or personality's name, voice, signature, or likeness on or in connection with the initial or any subsequent sale, distribution, performance, or display thereof; and
- (5) The advertisement or sale of a rare or fine product, including but not limited to books, which incorporates an original signature of the author.
- (c) It shall not constitute a defense to an infringement action under this chapter that the use of an individual or personality's name, voice, signature, or likeness includes more than one individual or personality.
- (d) Section -5 shall not apply to the owners or employees of any medium used for advertising, including but not limited to newspapers, magazines, radio and television stations, online service providers, billboards or other devices, who, without prior notice that the use would constitute an infringement under this chapter, have published or disseminated any advertisement or solicitation that would constitute an infringement under this chapter, unless the infringement was part of an advertisement or solicitation promoting the services of the advertising medium itself.
- (e) This chapter shall not apply to a use or authorization for use of an individual or personality's name that is merely descriptive and used fairly and in good faith only to identify or describe something other than the individual or personality, such as, without limitation, to describe or identify a place, a legacy, a style, a theory, an ownership interest, or a party to a transaction, or to accurately describe the goods or services of a party.
- (f) This chapter shall not apply to the use of an individual or personality's name, voice, signature, or likeness when the use of the individual or personality's name, voice, signature, or likeness is an insignificant, de minimis, or incidental use.
- (g) This chapter shall not apply to the distribution, promotion, transfer, or license of a photograph or other material containing an individual or personality's name, voice, signature, photograph, or likeness to a third party for use in a manner which is lawful under this chapter, or to a third party for further distribution, promotion, transfer, or license for use in a manner which is lawful under this chapter.

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

(b) Publicity rights of a deceased person that were not previously assigned or transferred shall be part of the deceased person's estate and shall be administered by the personal representative of the deceased person as personal property of the deceased person. On or before closing of probate of a deceased person's estate, the publicity rights of the deceased person shall vest in the transferees of the personal property of the estate in conformity with the deceased person's will or probate order. If publicity rights are not expressly addressed by the terms of the will or a probate order, and if a publicity rights trade name registration is not

in effect at the time of the relevant assignment or license, after probate closes, any one of the transferees of the personal property of the deceased person's estate shall have the right to assign or license the publicity rights of the deceased person, and a valid license from any of the transferees of the personal property of the deceased person's estate shall constitute a complete defense to any infringement action under this section.

(c) Any person seeking to license publicity rights from a living person shall have the right to presume that a living individual or personality has the right to assign or license the individual or personality's publicity rights unless there is a publicity rights trade name registration for that individual or personality. If there is a publicity rights trade name registration for that individual or personality, the person seeking to license publicity rights shall inform the living person in writing that an assignment or license shall be sought from the holder of the publicity rights trade name registration before entering into the assignment or license.

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

(e) A person commits an offense if the person signs, manually or via electronic means, a document the person knows is false in any material respect with the intent that the document be delivered or transmitted to the director of commerce and consumer affairs in connection with a publicity rights trade name registration under this section. An offense under this subsection shall be a class C felony and may carry a fine not to exceed \$10,000.

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

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

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

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

(Vetoed by Governor and veto overridden by Legislature on July 15, 2009.)