

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 366

Short Title: Right to Publicity. (Public)

Sponsors: Senators Rand; and Hoyle.

Referred to: Judiciary I.

March 4, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO PROHIBIT THE UNAUTHORIZED USE OF AN INDIVIDUAL'S RIGHT TO
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 Article to read:

7 "Article 41B.

8 "Right to Publicity.

9 **"§ 41B-1. Short title.**

10 This Article shall be known as the Right to Publicity Act.

11 **"§ 41B-2. Definitions.**

12 The following definitions apply in this Article:

13 (1) Commercial purpose. – The use of an aspect of an individual's personality as
14 follows:

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, or services, or for promoting
19 commercial 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 has been used for a commercial purpose during the
23 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 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.

35 (4) Photograph. – Any photograph or photographic reproduction, still or
36 moving, or any videotape or live television transmission, of any person, such
37 that the person is readily identifiable. An individual shall be deemed to be



1 readily identifiable from a photograph when one who views the photograph
2 with the naked eye can reasonably determine the identity of the individual
3 depicted in the photograph.

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

6 **"§ 41B-3. Right to publicity.**

7 (a) Methods of Transfer and Conveyance. – The rights recognized under this Article are
8 freely transferable and descendible, in whole or in part, by the following:

9 (1) Contract.

10 (2) License.

11 (3) Gift.

12 (4) Trust.

13 (5) Testamentary document. – The rights shall vest in the persons entitled to the
14 right of publicity under the testamentary instrument of the deceased
15 individual effective as of the date of that person's death. In the absence of an
16 express transfer in a testamentary instrument of the deceased individual's
17 right to publicity, a provision in the testamentary instrument that provides
18 for the disposition of the residue of the deceased individual's assets shall be
19 effective to transfer the rights recognized under this Article in accordance
20 with the terms of that provision.

21 (6) Intestate succession. – The right to publicity of an individual dying intestate
22 shall be distributed under the laws of intestate succession, and the rights and
23 remedies of this Article may be exercised and enforced by a person or
24 persons who possess at least a one-half interest of the individual's right to
25 publicity. Such persons shall make a proportional accounting to, and shall
26 act at all times in good faith with respect to, any other person in whom the
27 rights being enforced have vested. The person or persons enforcing the rights
28 shall account to any other person in whom the right has vested.

29 (b) Successor's Transference. – The rights established by this Article shall also be freely
30 transferable or descendible by any subsequent owner of the deceased individual's right to
31 publicity as recognized by this Article. Nothing in this Article shall be construed to render
32 invalid or unenforceable any contract entered into by a deceased individual during his or her
33 lifetime by which the deceased individual assigned the rights, in whole or in part, to use his or
34 her personality.

35 (c) Limitation on Right to Publicity. – No action shall be brought under this Article by
36 reason of any use of a deceased individual's right to publicity occurring after the expiration of
37 70 years after the death of the deceased individual. Failure to use a deceased individual's right
38 to publicity for any period of time during the 70 years after the death of the deceased individual
39 shall not limit enforcement of an action of a claim registered under G.S. 41B-6.

40 **"§ 41B-4. No unauthorized use of right of publicity for commercial purposes.**

41 (a) Prohibition. – Any person who knowingly uses another individual's personality for
42 commercial purposes without obtaining prior consent shall be liable for any damages sustained
43 by the person or persons to whom the right of publicity belongs. The consent required by this
44 section shall be exercisable by the following:

45 (1) The individual.

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

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

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

50 (b) Multiple Subject Photographs. – If an individual is portrayed with others for
51 commercial purposes without consent, the individual to whom the right of publicity belongs

1 shall be represented individually rather than solely as a member of a definable group
2 represented in the photograph. Nothing in this section shall be interpreted to preclude a
3 photograph taken of a definable group that contains an individual solely as a result of that
4 individual being present at the time the photograph was taken if that individual has not been
5 singled out in any manner.

6 **"§ 41B-5. Applicability.**

7 (a) Residence. – This Article applies to an act or event that occurs within North
8 Carolina, regardless of a personality's domicile, residence, or citizenship.

9 (b) Exceptions. – Consent for use of another individual's right to publicity shall not be
10 required for the following:

11 (1) A play, book, magazine, newspaper, musical composition, radio or television
12 program, single and original work of art, work of political or newsworthy
13 value, audiovisual work other than a video game, or an advertisement or
14 commercial announcement for any of these works, if it is fictional or
15 nonfictional entertainment, or a dramatic, literary, or musical work.

16 (2) Any news, public affairs, or sports broadcast or account.

17 (3) Use of the right to publicity of a deceased individual where the licensee or
18 successor in interest has failed to register a claim of right under G.S. 41B-6
19 until such time as a claim of right has been registered.

20 (c) Limited Immunity. – Owners or employees of any medium used for advertising,
21 including, but not limited to, newspapers, magazines, radio and television networks and
22 stations, cable television systems, billboards, and transit ads, by whom any use of an
23 individual's right to publicity for commercial purposes in violation of this section is published
24 or disseminated, shall not be liable unless it is established that the owners or employees had
25 knowledge of the unauthorized use as prohibited by this Article.

26 **"§ 41B-6. Registration.**

27 (a) Claim of Right. – Any person claiming to be a successor in interest to the right of
28 publicity of a deceased individual under this Article or a licensee of a deceased individual's
29 right of publicity shall register that claim with the Secretary of State on a form prescribed by
30 the Secretary of State and upon payment of a fee of five dollars (\$5.00). The form shall be
31 verified and shall include the name and date of death of the deceased individual, the name and
32 address of the claimant, the basis of the claim, and a sworn affidavit as to the rights claimed.
33 Claims registered under this successor shall be public records.

34 (b) Archiving and Access. – Upon receipt and after filing of any document under this
35 section, the Secretary of State shall post the document along with the entire registry of persons
36 claiming to be successors in interest to the personality rights of a deceased individual or a
37 registered licensee under this section upon an Internet Web site. The Secretary of State may
38 microfilm or reproduce by other techniques any of the filings or documents and destroy the
39 original filing or document.

40 (c) Removal. – The microfilm or other reproduction of any document may be destroyed
41 by the Secretary of State 70 years after the death of the individual named therein. The Secretary
42 of State shall remove any document of claim from the Internet Web site upon showing of a
43 court order that a person claiming to be a successor in interest has no property rights in the right
44 of publicity of the deceased.

45 **"§ 41B-7. Remedies.**

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

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

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

50 Actual damages shall include any profits from the unauthorized use that are attributable to the
51 use. In establishing such profits, the injured party is required to present proof only of the gross

1 revenue attributable to such use, and the person who violates this Article is required to prove
2 that person's deductible expenses.

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

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

8 (d) Statute of Limitations. – An action under this Article shall be brought within three
9 years of a violation of G.S. 41B-4.

10 (e) Other Remedies. – The remedies provided for in this section are cumulative and
11 shall be in addition to any others provided by law."

12 **SECTION 2.** This act becomes effective January 1, 2010, and applies to actions or
13 events on or after that date. The rights recognized under this Article are expressly made
14 retroactive and shall be deemed to have existed at the time of death of any deceased individual
15 who died prior to January 1, 2010.