

SENATE No.

The Commonwealth of Massachusetts

PRESENTED BY:

Stanley C. Rosenberg

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act Relative to the Right of Publicity.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Garrett J. Bradley	3rd Plymouth
Stephen J. Buoniconti	Hampden
Gale D. Candaras	First Hampden and Hampshire
Stanley C. Rosenberg	Hampshire and Franklin
Denis E. Guyer	2nd Berkshire

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO THE RIGHT OF PUBLICITY.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1: Chapter 214 of the General Laws is hereby amended by striking out Section 3A and
2 inserting in place thereof the following section:-

3 Section 3A. The Right to Publicity.

4 (a) The following definitions shall apply to this Section:

5 "Commercial Use" (1) the use of an individual's identity in any medium and in any manner in connection
6 with (i) the offering for sale, sale, promotion, or advertising of a product, merchandise, good, or service,
7 (ii) fundraising, or (iii) other purposes of trade. Whether such a use is commercial shall be determined
8 without regard to whether it is for profit or not for profit. Use of an individual's identity is not a
9 commercial use solely because the material or medium containing such use is commercially sponsored or
10 contains advertising. It is a question of fact whether or not the use of the individual's identity is so
11 directly connected with the commercial sponsorship or with the advertising as to constitute a commercial
12 use.

13 (2) Without limiting what other uses may be determined not to be commercial, it is not a commercial use
14 of any individual's identity (i) to publish, print, display, or use the individual's identity as part of any bona
15 fide news report or commentary having a legitimate public interest or as part of an artistic or expressive
16 work, such as a live performance, work of fine art, literary work, theatrical work, musical work, film,
17 television, radio, or the like, except where the use is directly connected with advertising or another
18 commercial use as defined in (1), above; (ii) to use a photograph depicting the individual as a member of

19 the public where the individual is not named or similarly identified in connection with the use of the
20 photograph; or (iii) to provide a medium through which a commercial use is made, unless it is established
21 that the person had knowledge of the commercial use or unless the use was intended to promote the
22 medium itself.

23 "To exercise" the right of publicity means to make a commercial use of an individual's identity or to
24 consent in writing to such commercial use by another person or persons.

25 "Identity" means any attribute of an individual that identifies that individual, including, without
26 limitation, a name, likeness, voice, signature, or any distinctive appearance, gesture, or mannerism.

27 "Individual" means a natural person, living or deceased.

28 "Licensee" means any person who has written consent to make commercial use of an individual's identity
29 from the individual or the other person or persons authorized to exercise the individual's right of publicity
30 in subsection (c)(2).

31 "Name" means any legal, professional, or other name, including, without limitation, an assumed name or
32 nickname, by which an individual is known or that is intended to identify that individual.

33 "Person" means any individual, firm, association, partnership, corporation, joint stock company, limited
34 liability company, syndicate, receiver, common law trust, conservator, statutory trust, or any other
35 concern or entity by whatever name known or however organized, formed, or created, and includes not-
36 for-profit corporations, associations, educational and religious institutions, political parties, campaign
37 committees, and community, civic, or other organizations.

38 "Successor-in-interest" means any person with an interest in an individual's right of publicity as provided
39 in subsection (c)(1) as an assignee, transferee, legatee, executor, administrator, personal representative,
40 heir-at-law, distributee, guardian, conservator or otherwise. "Successor-in-interest" does not mean the
41 individual or a licensee.

42 (b) Recognition of the right of publicity. Every individual has a property interest known as the right of
43 publicity, which is the exclusive right to control commercial use of the individual's identity during the
44 individual's lifetime and for seventy-five (75) years after the individual's death, unless terminated earlier
45 under subsection (c)(4).

46 (c) Transferability; Exercise; Termination.

47 (1) Notwithstanding any applicable law to the contrary, an individual's right of publicity is freely
48 transferable and descendible, in whole or in part, including, without limitation, by any form of inter vivos

49 or testamentary transfer or by intestate succession, except that no interest in the right of publicity shall
50 escheat to any state, commonwealth, or other jurisdiction.

51 (2) An individual's right of publicity may be exercised or enforced only by (i) the individual, (ii) the
52 person as successor-in-interest or licensee granted such power, or (iii) the persons controlling as
53 successors-in-interest or licensees granted such power, in the aggregate, more than one-half of the
54 interests in the individual's right.

55 (3) All persons with an interest in an individual's right of publicity shall make annual accountings to each
56 other of all revenues generated from exercising and enforcing the right of publicity including, without
57 limitation, from any recovery in a civil action and all expenses incurred in connection with such exercise
58 and enforcement. Such persons may vary their rights and obligations under this paragraph by written
59 agreement.

60 (4) A deceased individual's right of publicity will terminate (i) if at any time there is no successor-in-
61 interest or (ii) upon proof that no successor-in-interest or licensee has made commercial use of the
62 individual's identity for any continuous period of five (5) years occurring after the individual's death.

63 (d) Infringement; Civil action; Remedies.

64 (1) Infringement. Any commercial use of an individual's identity, other than by the person or persons
65 authorized to exercise the individual's right of publicity in subsection (c)(2), shall constitute an
66 infringement of the right of publicity.

67 (2) The person or persons authorized to enforce an individual's right of publicity in subsection (c)(2) may
68 bring a civil action against any person who has infringed or is infringing the individual's right of
69 publicity, to prevent and restrain the infringement, including on a preliminary basis, and to recover
70 damages as described in paragraphs (3) and (4) of this subsection (d).

71 (3) Damages for infringement shall be awarded in an amount equal to the greater of (i) \$1,000 or (ii) The
72 actual damages suffered as a result of the infringement plus any profit attributable to the infringement that
73 is not taken into account in computing the actual damages. In establishing such profit, the injured person
74 or persons alleging infringement must prove only the gross revenue attributable to the infringement, and
75 the infringer must prove any deductible expenses.

76 (4) If the infringer has knowingly infringed the individual's right of publicity, the court, in its discretion,
77 may award enhanced damages in an amount not to exceed three times the damages described in paragraph
78 (3) of this subsection.

79 (5) When an action under this section is pending, the court may, in its discretion, (i) order that any
80 materials claimed to have been made or used in the infringement of the individual's right of publicity be
81 impounded and (ii) enjoin the use of any articles of tangible personal property or media, including but not
82 limited to plates, molds, masters, tapes, and film negatives, used to reproduce those materials.

83 (6) As part of a final judgment or decree, the court may order the destruction or other reasonable
84 disposition of all materials made or used in the infringement and of any articles of tangible personal
85 property or media used to reproduce those materials.

86 (7) In any action under this section the court may order the infringer to pay reasonable costs, including
87 attorneys' fees, incurred in connection with the enforcement of an individual's right of publicity.

88 (e) This section shall supercede and control notwithstanding any other general or special law to the
89 contrary.