

SB 175 – AS INTRODUCED
2011 SESSION

11-1031
05/01

SENATE BILL **175**

AN ACT regulating the commercial use of a person's identity.

SPONSORS: Sen. Odell, Dist 8; Sen. Houde, Dist 5; Rep. Chandler, Carr 1; Rep. Daniels, Hills 6

COMMITTEE: Commerce

ANALYSIS

This bill prohibits, with certain limited exceptions, the commercial use of a person's identity without prior authorization for such use.

Explanation: Matter added to current law appears in *bold italics*.

Matter removed from current law appears ~~in brackets and struck through~~.

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

11-1031
05/01

STATE OF NEW HAMPSHIRE
In the Year of Our Lord Two Thousand Eleven

AN ACT regulating the commercial use of a person's identity.

Be it Enacted by the Senate and House of Representatives in General Court convened:

I Purpose. The legislature finds that:

I. A person's right to control the commercial use of his or her identity, sometimes called the "right of publicity," is a critically important property and privacy right that has been widely recognized in the United States, including by the courts of this state.

II. In addition to that judicial recognition, several states have enacted legislation codifying this right to ensure clear and consistent protection against unauthorized commercial use of a person's identity. The adoption of similar legislation in New Hampshire will cement New Hampshire's rightful place as a protector of individual rights.

III. This act will codify this right for living people and make clear that individuals who are domiciled in New Hampshire at the time of death retain a protectable right regarding the commercial use of their identities that is descendible to their heirs or successors.

IV. This act will respect the New Hampshire constitution and the United States Constitution by balancing the right to control the commercial use of one's name and/or likeness against the rights to freedom of expression. As such, the right recognized and protected under this chapter is subject to a number of specified statutory exemptions for expressive conduct.

2 New Chapter; Commercial Use of Individual Identity. Amend RSA by inserting after chapter 359-J the following new chapter:

CHAPTER 359-K
COMMERCIAL USE OF INDIVIDUAL IDENTITY

359-K:1 Definitions. In this chapter:

I. "Person" means any natural person.

II. "Identity" means a person's name, professional name, nickname, signature, photograph, image, likeness, voice, or any other attribute that serves to identify the person to an ordinary, reasonable viewer or listener.

359-K:2 Recognition of the Right to Control Commercial Use of Identity. Every person has the right to control the commercial use of his or her identity.

359-K:3 Transferability. The right to control the commercial use of one's identity is a property right that is freely transferable during and after a person's life and is descendible, in whole or in part, by means of a written contract, gift, or assignment or a will, trust or other testamentary instrument, executed before or after the enactment of this chapter, and by the original holder or his or her successor-in-interest, or by intestate succession. In the absence of an express transfer in a testamentary instrument of the right to control commercial use of a person's identity, a provision in a testamentary instrument that provides for the disposition of the residue of the deceased person's assets shall be effective to transfer that right in accordance with the terms of that provision.

359-K:4 Duration and Termination.

I. The right protected under this chapter endures for a term consisting of the life of the person plus 70 years after his or her death, regardless of whether the person commercially exploits the right during his or her lifetime.

II. A person's right under this chapter shall be deemed to have existed prior to the enactment of this chapter, and at the time of the death of the original holder or his or her successor-in-interest, whether that death occurs before or after the enactment of this chapter, for the purpose of determining entitlement to the right.

III. The right protected under this chapter terminates if its holder dies without having transferred or devised it, either during his or her life or through a will, trust or other testamentary instrument, and there are no surviving natural persons to whom the right can pass by intestate succession.

359-K:5 Authorization For Use Required.

I. Any use of a person's identity during the term of the right protected under this chapter, on or in products, merchandise, or goods, or for the purpose of advertising, marketing, selling, or soliciting purchases of products, merchandise, good or services, requires the written authorization of that person or his or her successor-in-interest.

II. Any such use without written authorization is prohibited.

359-K:6 Exceptions. This chapter shall not apply to the following:

I. Use of a person's identity in an attempt to portray, describe, impersonate, or refer to that person in any of the following informational or expressive works, regardless of length or format, appearing in any medium now known or hereafter devised, provided that the work does not in and of itself constitute a commercial advertisement for a product, merchandise, goods, or services:

(a) A news, public affairs, public interest, or sports broadcast or account.

(b) A play, book, story, graphic novel, article, editorial, commentary, or other similar written or theatrical work.

(c) A speech.

(d) A musical composition or musical lyrics.

(e) A radio program, sound recording, or other similar audio work.

(f) A documentary, motion picture, television program, or other similar audiovisual work.

(g) An original work of art.

(h) Any work used in connection with any political campaign.

II. Use of a person's image in a photograph that does not single the person out as an individual, but rather depicts the person as a member of a group or the public, provided that the person is not named or otherwise identified in connection with the use of the photograph.

III. Truthful identification of a person as the author or composer of, or creative contributor to, a work or a performer of a recorded performance, under circumstances in which the work or recorded performance is otherwise lawfully reproduced, exhibited, or broadcast, and was lawfully recorded.

IV. Promotional materials, advertisements, or commercial announcements for a use described in paragraph I, II, or III, provided that the use of the person's identity in such promotional materials, advertisements, or announcements is substantially related to the promoted, advertised, or announced use of that same person's identity.

V. Use of a person's identity in connection with the efforts of a government agency to promote travel and tourism in this state, portray historical events, or commemorate persons or physical sites that are significant in the history of this state, except where the use is directly connected with commercial sponsorship by a non-governmental agency; provided, however, that if a government agency intends to have photographs taken at a public event for use pursuant to this paragraph, the government agency shall, if practical, announce or otherwise inform the public, or request the sponsor of the event to announce or otherwise inform the public, that photographs may be taken that can be used in materials for the promotion of travel and tourism in this state without permission from the person photographed.

359-K:7 Remedy: Enforcement.

I. The right protected under this chapter may be exercised and enforced by any one person or entity who holds, or persons or entities who together hold, more than a 1/2 interest in the right.

II. Any use of a person's identity that occurs in violation of this chapter is subject to:

(a) Injunctive relief to prevent or restrain the prohibited use; and

(b) An action at law for any injuries or damages sustained by reason of the prohibited use.

III. In any suit brought to enforce the right protected under this chapter, the plaintiff may recover an amount equal to the greater of \$2,500 or actual damages incurred as a result of the prohibited use and any profits that are attributable to the prohibited use but not otherwise taken into account in computing actual damages. In establishing profits attributable to a prohibited use, the plaintiff shall be required to present proof only of the gross revenue attributable to use the defendant shall be required to prove his, her, or its deductible expenses.

IV. Any plaintiff that prevails in an action to enforce the right protected under this chapter shall be entitled to recover reasonable attorney's fees and expenses.

V. No owner or employee of any medium used for advertising is liable pursuant to this chapter for any prohibited use of a person's identity in an advertisement promoting the goods or services of a third party unless it is established that the owner or employee had actual knowledge that the use was unauthorized and the owner or employee did not create the advertisement.

359-K:8 Applicability. The prohibitions set forth in this chapter apply only to unauthorized use of a person's identity occurring on or after January 1, 2012.

359-K:9 Preservation of Common Law Rights and Remedies. The rights and remedies provided for in this chapter shall be in addition to and not in limitation of rights and remedies under the common law.

3 Effective Date. This act shall take effect January 1, 2012.