

# Legislative Analysis

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## RIGHT OF PUBLICITY ACT

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### House Bill 5567

Sponsor: Rep. Pam Byrnes

Committee: Judiciary

Complete to 7-22-08

## A SUMMARY OF HOUSE BILL 5567 AS INTRODUCED 12-13-07

Generally speaking, the "right of publicity" refers to the right of an individual to control the commercial use of his or her name, likeness, and persona. Using an individual's name, likeness, and/or persona without proper authorization for a commercial use - such as in a television commercial or magazine advertisement - can result in a lawsuit under common law.

House Bill 5567 would create a statutory right of publicity more expansive than Michigan's common law to protect certain property rights in attributes of a "personality" that have commercial value, extend those rights post-mortem, recognize transfers of those rights, provide exceptions for certain purposes and entities, and provide remedies for violations of the protections.

The bill would not supersede a right or privilege recognized under any other law applying to a news reporting or entertainment medium (for example, First Amendment freedom of the press rights). The rights and remedies provided under the bill would be in addition to any other rights and remedies provided by law.

### Application

The right of publicity created under the bill would apply to "personalities", defined to mean a living or deceased individual whose name had commercial value, whether or not he or she used or authorized the use of his or her right of publicity for a commercial purpose during his or her lifetime.

The "right of publicity" would mean the right to control commercial use of a personality's attributes as provided in the bill. "Attribute" would mean an individual's name, voice, signature, image, likeness, or persona and would include distinctive characteristics of the individual's appearance, gestures, or mannerisms. "Commercial purpose" would mean the use of a personality's attribute on or in connection with a product, good, service, or commercial activity for the purpose of fund-raising, advertising, or soliciting purchases.

A personality would have a transferable property interest in his or her right of publicity for his or her lifetime plus 50 years.

## Liability

Doing any of the following during the personality's lifetime or within 50 years of his or her death without the consent of the personality or any person to whom the personality's right of publicity had been lawfully transferred would make the person liable in a civil action:

- Use an attribute of a personality for a commercial purpose.
- Create or cause to be created any goods, merchandise, or other materials incorporating an attribute of a personality (e.g., tee shirt, commemorative plate).
- Knowingly transport or cause to be transported into or within the state any such goods, merchandise, or materials.
- Knowingly cause advertising or promotional material featuring an attribute of a personality to be published, distributed, exhibited, or disseminated.

A person who violates the above would be liable for actual damages, including profits derived from the unauthorized use, or \$1,000, whichever was greater; this amount would be tripled if the violation was willful, knowing, or intentional. The plaintiff would bear the burden of proof as to the gross revenue attributable to the unauthorized use and the defendant would bear the burden of proof as to any expenses deductible from the gross profits.

## Remedies

A personality (or person to whom the personality's right of publicity has been transferred) could bring a civil action for a violation described above for damages, equitable relief, or both. A person holding a 50 percent or greater interest in a personality's right of publicity could exercise and enforce the rights and remedies provided in the bill and would be required to account to any other person who held a fractional interest in those rights.

An injunction could not be granted by a court against a news reporting or entertainment medium that had contracted with a person for the publication or broadcast of an advertisement and that incorporated the advertisement in tangible form into material that had been prepared for broadcast or publication. "News reporting or entertainment medium" would mean a medium that published, broadcasted, or disseminated advertising in the normal course of its business, such as a newspaper, magazine, radio or television network or station, or cable television station.

A court could order the impoundment of any goods, merchandise, or other materials alleged to have been made or used in violation of the bill's provisions for any period that an action under the act was pending. Impounded materials could include plates, molds, matrices, masters, tapes, negatives, or other items from which the goods and such are manufactured or reproduced. As part of a final judgment, the court could order the destruction or other reasonable disposition of items manufactured or used in violation of the bill.

The court would have to award reasonable attorney fees, costs, and expenses to the prevailing party in the action.

### Affirmative defense

It would be an affirmative defense to an action that a person had implied consent for the use or that the use was incidental, fictional, transformative, or parody.

### Exceptions

A right of publicity would not be created in any of the following:

- The use of a personality's attributes in a literary or theatrical work, musical composition, film, or radio or television program.
- Material having political or newsworthy value.
- An original work of fine art.
- Promotional material or advertising for a news reporting or entertainment medium, if it used all or part of past material from the medium's own broadcast or publication and did not convey or suggest that the personality endorsed the news reporting or entertainment medium.
- The use of a personality's name to truthfully identify the personality in connection with work of the personality.
- Use of a personality's attributes in connection with the broadcast or reporting of an event or topic of general or public interest.
- An advertisement or commercial announcement for a use described above.

### **FISCAL IMPACT:**

House Bill 5567 would have an indeterminate, but likely negative, fiscal impact on the judiciary. Expectedly, the judiciary will see an increase in its caseload and administrative duties due to the introduction of a new civil action, but the difference is likely to be negligible.

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