

HOUSE BILL REPORT

HB 1074

As Reported By House Committee On:

Law & Justice

Title: An act relating to the protection of personality rights.

Brief Description: Protecting personality rights.

Sponsors: Representatives Sheahan, Costa, Hatfield and Constantine.

Brief History:

Committee Activity:

Law & Justice: 1/21/97, 1/31/97 [DPS].

HOUSE COMMITTEE ON LAW & JUSTICE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Sheahan, Chairman; McDonald, Vice Chairman; Sterk, Vice Chairman; Costa, Ranking Minority Member; Constantine, Assistant Ranking Minority Member; Carrell; Cody; Kenney; Lantz; Radcliff; Sherstad and Skinner.

Staff: Trudes Hutcheson (786-7384).

Background: Washington courts have acknowledged that the right to privacy may include protection from the unauthorized appropriation of a person's name or likeness. However, the courts have not specifically or expressly addressed such a particular right. Other states, such as California and Texas, recognize a person's right not to have his or her identity misappropriated for commercial purposes without the person's consent.

Defamation laws are closely linked to the right of privacy, and protect a person from another's intentional false communication that is published or publicly spoken and that injures the person's reputation or good name.

Federal copyright laws protect a person's original works of authorship. Trademark laws protect a person's registered trademark. A trademark, such as a name or symbol, is used to distinguish goods made or sold by a particular person. A person may reserve an exclusive right to use a trademark and may sue any other person who uses the trademark without his or her consent.

Summary of Substitute Bill: A person has a personal property right in the use of his or her name, voice, signature, photograph, or likeness. Anyone using another's name, voice, signature, photograph, or likeness for commercial purposes without the person's consent may be civilly liable to the owner of the right.

Who Owns The Right: Every individual residing in Washington has a property right in the use of his or her name, voice, signature, photograph, or likeness in any medium, in any manner. Likeness includes clear representations of an individual's face, body, distinctive appearance, gestures, or mannerisms.

If an individual's name, voice, signature, photograph, or likeness has commercial value, the individual is considered a personality.— The personality has a property right in the use of his or her name, voice, signature, photograph, or likeness in any medium, in any manner, whether or not the personality resides in Washington. Washington also recognizes a property right in the use of the name, voice, signature, photograph, or likeness of any personality who died after January 1, 1945.

The right is exclusive to the individual or personality during the individual's or personality's lifetime.

The property right exists whether or not an individual made commercial use of it while the individual was alive.

How The Right May Be Used And Passed On: The property right may be transferred, assigned, or licensed, in whole or in part, while the individual or personality is alive, or may descend through a will. Absent a will, the right is distributed to the heirs the same way other property rights are distributed by state law. If there are no heirs, the right terminates.

Owners of a deceased individual's or personality's right may make use of the right, on behalf of and for the benefit of all the owners, when those with more than a one-half interest in the right consent to the use.

How Long The Right Lasts: The property right of a deceased individual lasts for 10 years after the individual dies. However, the right could expire sooner if those who have obtained it do not make commercial use of it for a period of three consecutive years.

The property right of a deceased personality lasts for 75 years after the personality dies, whether or not those who have obtained the right make commercial use of it.

How One Infringes On Another's Right: A person infringes on an owner's right if the person does not get prior written consent of the owner, and the person uses or

authorizes the use of a living or deceased individual's or personality's name, voice, signature, photograph, or likeness in any medium, in any manner:

- (a) on or in products entered into commerce in this state; or
- (b) for purposes of advertising products or services; or
- (c) for purposes of fund-raising or solicitation of donations.

In addition, it is an infringement if any person knowingly transports such products into the state or disseminates or publishes such advertisements in the state, without prior written consent of the owner of the right.

It is not a defense that a photograph includes more than one individual or personality. However, an individual or personality who sues the infringer must do so on his or her own behalf, as opposed to part of the group, and cannot merely rely on the fact that the individual is part of a famous group to prove that he or she is a personality.

An infringement may occur regardless of whether the use or activity is for profit or not for profit.

Remedies: A person whose rights have been infringed may bring an action for damages and obtain an injunction to restrain any continual infringement. The court may order that the materials made or used in the infringement be impounded and destroyed.

The person infringing on the right is liable for either \$1,500 or actual damages sustained, and any profits attributable to infringement, whichever is larger. The prevailing party may recover reasonable attorney fees, expenses, and court costs.

Exceptions: It is not an infringement if a person uses an individual's name, voice, signature, photograph, or likeness in the following ways:

- (a) in connection with matters of cultural, historical, political, religious, educational, newsworthy, or public interest;
- (b) for the purposes of commentary, criticism, satire, or parody;
- (c) in single and original works of fine art that are not published in more than five copies, and any advertisement for those works;
- (d) in literary, theatrical, or musical work and any advertisements for those works;
- (e) in a film, radio, television or online program, magazine article, public affairs report, or sports broadcast or account, and any advertisements for those works;
- (f) in any political campaign when the use does not inaccurately suggest the individual or personality endorses the campaign;

- (g) in any advertisement or commercial or packaging for a literary, musical, cinematographic, or other artistic work when the author or creator of the work consented to the use of his or her name, voice, signature, photograph, or likeness with the initial sale, distribution, performance or display of the work;
- (h) in any advertisement or sale of rare or fine products that incorporate the signatures of the authors or artists;
- (i) if the use of an individual's or personality's name is used, in good faith, merely to describe or identify a thing; and
- (j) if the use is in connection with matters of cultural, historical, political, religious, educational, newsworthy, or public interest, and the use is in the form of a paid advertisement, so long as the principle purpose of the advertisement is to comment on the matter.

Owners or employees of any medium that is used for advertising, such as newspapers or magazines, will not be liable for advertisements that infringe upon another's rights, unless the advertisement was intended to promote the medium itself.

Substitute Bill Compared to Original Bill: The substitute bill explicitly states that common carriers are liable if they knowingly transport infringing goods. The original bill did not contain the knowingly- element.

The substitute bill limits the liability of owners and employees of mediums used for advertisements, such as newspapers and magazines, by making them liable for infringing advertisements only when such advertisements were intended to promote the medium itself. The original bill made owners and employees liable for other people's infringing advertisements if the owners or employees knew the advertisements were infringing.

The substitute bill provides that it is not an infringement if a person uses, in good faith, another's name for the purposes of merely describing or identifying a thing. It also protects certain uses when the uses appear in the form of paid advertisements, provided that those uses would otherwise have been protected (such as a political commentary published in a newspaper as a paid advertisement).

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: People will now have the right to control whether their names or images are used for commercial purposes. Endorsements have become very valuable.

Artists and businesses will consider which states offer personality rights when determining where to live. The exceptions are broad enough to protect First Amendment rights. The bill has a good objective, but it may place too much liability on owners and employees of newspapers, because it is difficult for all the employees of a newspaper to know when an advertisement is infringing on another's right.

Testimony Against: The bill is over-inclusive and affects incidental uses. It will interfere with free speech and the fair use of names, pictures, voices, or gestures.

Testified: Yale Lewis, Washington State Bar Association (pro); Rowland Thompson, Allied Daily Newspapers (pro, with amendments); Richard White, Washington Music Industry Coalition (pro); and Jorgen Bader, attorney (con).