HB179

197086-1

By Representatives Robertson, Estes, Stringer, Reynolds, Polizos and Ball

RFD: Judiciary

First Read: 19-MAR-19
SYNOPSIS: Under existing common law, a plaintiff may file a claim for commercial misappropriation of likeness, which occurs when a defendant appropriates a plaintiff's likeness to the commercial benefit of the defendant.

This bill would establish a statutory right to file a misappropriation of likeness claim.

This bill would provide that an individual's right to likeness exists during his or her lifetime and for 20 years after his or her death, and provides a procedure for its termination.

This bill would provide civil remedies and criminal penalties for violations.

Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, prohibits a general law whose purpose or effect would be to require a new or increased expenditure of local funds from becoming effective with regard to a local
governmental entity without enactment by a 2/3 vote unless: it comes within one of a number of specified exceptions; it is approved by the affected entity; or the Legislature appropriates funds, or provides a local source of revenue, to the entity for the purpose.

The purpose or effect of this bill would be to require a new or increased expenditure of local funds within the meaning of the amendment. However, the bill does not require approval of a local governmental entity or enactment by a 2/3 vote to become effective because it comes within one of the specified exceptions contained in the amendment.

A BILL
TO BE ENTITLED
AN ACT

Relating to civil practice; to establish a statutory right to misappropriation of likeness claims; to provide civil remedies; to provide criminal penalties; and in connection therewith would have as its purpose or effect the requirement of a new or increased expenditure of local funds within the meaning of Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended.
BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. As used in this section, the following terms shall have the following meanings:

(1) DEFINABLE GROUP. An assemblage of individuals existing or brought together with or without interrelation, orderly form, or arrangement, including, but not limited to, a crowd at a sporting event, a crowd in a street or public building, the audience at a theatrical or stage production, or a sports team.

(2) INDIVIDUAL. A human being, living or dead.

(3) LIKENESS. The plaintiff's name, voice, signature, photograph, or likeness, in any manner.

(4) PERSON. A firm, association, partnership, corporation, joint stock company, syndicate, receiver, common law trust, joint stock company, syndicate, receiver, common law trust, conservator, statutory trust, or any other concern by whatever name known or however organized, formed, or created, and includes not-for-profit corporations, associations, educational and religious institutions, political parties, and community, civic, or other organizations.

(5) PHOTOGRAPH. A photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any individual, in which the individual is readily identifiable.

a. An individual shall be deemed readily identifiable from a photograph when one who views the
1 photograph with the naked eye can reasonably determine that
2 the individual depicted in the photograph is the same
3 individual who is complaining of its unauthorized use.
4
  b. If the photograph includes more than one
5 individual so identifiable, then the individual or individuals
6 complaining of the use shall be represented as individuals
7 rather than solely as members of a definable group represented
8 in the photograph. The following are examples which a
9 definable group includes, but is not limited to:
10 1. A crowd at any sporting event.
11 2. A crowd in a street or public building.
12 3. The audience at a theatrical or stage production.
13 4. A sports team.
14
  c. An individual or individuals shall be considered
15 to be represented as members of a definable group if they are
16 represented in the photograph solely as a result of being
17 present at the time the photograph was taken and have not been
18 singled out as individuals in any manner.
19
  Section 2. (a) Every individual has a property right
20 in the use of his or her likeness. An individual may commence
21 an action for misappropriation of likeness against a defendant
22 by proving all of the following:
23
    (1) The defendant's knowing use of the plaintiff's
24 likeness.
25
    (2) The appropriation of the plaintiff's likeness to
26 the defendant's advantage, commercially or otherwise.
(3) Lack of the plaintiff's consent or, in the case of a minor, lack of the consent of the minor's parent or legal guardian.

(4) Injury to the plaintiff.

(b)(1) A defendant who violates subsection (a) is liable for any damages sustained by the plaintiff as a result of the violation. In addition, the defendant shall be liable to the plaintiff in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by the plaintiff as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing the profits of the defendant, the plaintiff is required to present proof only of the gross revenue attributable to the unauthorized use, and the defendant is required to prove his or her deductible expenses. Punitive damages may also be awarded to the plaintiff. The prevailing party in an action under this section shall be entitled to attorney's fees and costs.

(2) If an individual whose property right in the use of his or her likeness is violated is a member of the Armed Forces of the United States, the plaintiff in the action is entitled to recover three times the amount to which the plaintiff is entitled to recover under subdivision (1).

(c) If the trier of fact determines that the use of an individual's likeness by a defendant in an advertisement or other publication was only incidental, and not essential, to
the purpose of the publication in which it appears, there shall be a rebuttable presumption that the failure to obtain the consent of the plaintiff was not a knowing use of the plaintiff's name or likeness.

(d) For purposes of this section, the use of a plaintiff's likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, does not constitute a use for which consent is required as provided under subsection (a).

(e) Nothing in this section applies to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television stations, billboards, and transit ads, who have published or disseminated any advertisement or solicitation in violation of this act, unless it is established that the owners or employees had knowledge of the unauthorized use of the individual's likeness, as prohibited by this section.

Section 3. In addition to the civil remedies in Section 2, an individual who misappropriates the likeness of another, as provided in subsection (a) of Section 2, is guilty of a Class A misdemeanor.

Section 4. (a) An individual's property right in the use of his or her likeness, as provided in Section 2, is freely assignable and licensable and does not expire upon the death of the individual holding the right. The property right is descendible to the executors, assigns, heirs, or devisees of the individual.
(b) The property rights provided for in this act are exclusive to the individual, subject to the assignment or licensing of the rights as provided in subsection (a), during the individual's lifetime and to the executors, heirs, assigns, or devisees for a period of 20 years after the death of the individual.

(c)(1) Commercial use of an individual's likeness by the individual or, if the individual is deceased, by an executor, assignee, heir, or devisee of the individual, shall maintain the property right as the exclusive property of the executor, assignee, heir, or devisee until the right is terminated as provided in subdivision (2).

(2) The exclusive right to commercial use of the property right is terminated by proof of the non-use of the likeness of an individual for commercial purposes by an executor, assignee, heir, or devisee of the individual for a period of two years subsequent to the expiration of the 20-year period following the individual's death, as provided in subsection (b).

Section 5. (a) In a misappropriation of likeness action under this act, the court may enjoin the unauthorized use of an individual's name or likeness. The court may authorize the seizure of all unauthorized property, items, and instrumentalities used in connection with the violation of the individual's rights. Property, items, and instrumentalities seized pursuant to the enforcement of an injunction under this
act shall be liquidated and used to satisfy statutory damages, if damages are recovered by the individual.

(b) At any time while an action under this act is pending, the court may order the impounding of materials claimed to have been made or used in violation of the individual's rights. The court may enjoin the use of all originals, digital copies or images, plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which the materials may be reproduced.

(c) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all materials found to have been made or used in violation of the individual's rights, and of all originals, digital copies or images, plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which the materials may be reproduced.

(d) Any remedy provided for by this act is cumulative and shall be in addition to any others provided for by law.

Section 6. Although this bill would have as its purpose or effect the requirement of a new or increased expenditure of local funds, the bill is excluded from further requirements and application under Amendment 621, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, because the bill defines a new crime or amends the definition of an existing crime.
Section 7. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.