

Amendment to SB 175

Amend RSA 359-K:3 as inserted by section 2 of the bill by replacing it with the following:

359-K:3 Transferability. The right to control the commercial use of one's identity is a property right that is freely transferable and descendable, in whole or in part, during and after a person's life by means of (1) a written contract, license, conveyance, 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 (2) by intestate succession occurring before or after the enactment of this chapter. 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.

Amend RSA 359-K:4 as inserted by section 2 of the bill by inserting after paragraph III the following new paragraph:

IV. The right protected under this chapter, insofar as it extends beyond a person's death, applies only to any person who died a domiciliary of the state of New Hampshire. With regard to any person still living, this paragraph shall not be construed to alter or expand the in personam jurisdiction or choice of law principles to be applied in an action brought under this chapter.

Amend RSA 359-K:5, I as inserted by section 2 of the bill by replacing it with the following:

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, goods or services, requires the written authorization, including by electronic means, of that person or his or her successor-in-interest.

Amend RSA 359-K:6 as inserted by section 2 of the bill by replacing it with the following:

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, and provided further that the work is not a videogame or other similar digital or electronic device:

(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.

(i) An article, editorial, commentary, magazine, newspaper, periodical, or other work of political or newsworthy value.

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 identifiable in connection with the use of the photograph.

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

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

V. Use of a person's identity in promotional material or an advertisement for a news reporting or an entertainment medium that:

(a) Uses such identity solely as originally contained in all or part of a past or future edition of the medium's own broadcast or publication; and

(b) Does not convey or reasonably suggest that the person endorses the news reporting or entertainment medium.

VI. Use of a person's identity in promotional material or an advertisement for an aggregator of news reporting and/or entertainment content that:

(a) Uses such identity solely as originally contained in all or a part of the content of any news medium or entertainment medium available via the aggregator to the aggregator's customers; and

(b) Does not convey or reasonably suggest that the person endorses the news and/or entertainment aggregator. As used in this paragraph, the term "aggregator" means a party who receives content not of its own creation from others which it transmits or otherwise provides to others.

VII. 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 use, benefit, or sponsorship by a nongovernmental 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.

VIII. Use of a person's identity that is merely descriptive and used in good faith solely for the purpose of referring to products, merchandise, goods, or services that have been marketed, advertised, or sold by means of an authorized use of that person's identity, or the facilitation of the same.

Amend RSA 359-K:7, III-V as inserted by section 2 of the bill by replacing them with the following:

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, and the defendant shall be required to prove his, her, or its deductible expenses.

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

V. No owner, employee, or provider of any medium used for the distribution, transmission, or aggregation of advertising, news reporting, and/or entertainment content 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, employee, or provider had actual knowledge that the use was unauthorized and the owner, employee, or provider did not create the advertisement.

VI. Nothing in this chapter may be construed to impose liability for offering the transmission, routing, or providing of connections for communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material sent or received.

Amend RSA 359-K as inserted by section 2 of the bill by deleting RSA 359-K:9