

1 HB179
2 197086-1
3 By Representatives Robertson, Estes, Stringer, Reynolds,
4 Polizos and Ball
5 RFD: Judiciary
6 First Read: 19-MAR-19

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8 SYNOPSIS: Under existing common law, a plaintiff may
9 file a claim for commercial misappropriation of
10 likeness, which occurs when a defendant
11 appropriates a plaintiff's likeness to the
12 commercial benefit of the defendant.

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

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

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

21 Amendment 621 of the Constitution of Alabama
22 of 1901, now appearing as Section 111.05 of the
23 Official Recompilation of the Constitution of
24 Alabama of 1901, as amended, prohibits a general
25 law whose purpose or effect would be to require a
26 new or increased expenditure of local funds from
27 becoming effective with regard to a local

1 governmental entity without enactment by a 2/3 vote
2 unless: it comes within one of a number of
3 specified exceptions; it is approved by the
4 affected entity; or the Legislature appropriates
5 funds, or provides a local source of revenue, to
6 the entity for the purpose.

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

14
15 A BILL
16 TO BE ENTITLED
17 AN ACT
18

19 Relating to civil practice; to establish a statutory
20 right to misappropriation of likeness claims; to provide civil
21 remedies; to provide criminal penalties; and in connection
22 therewith would have as its purpose or effect the requirement
23 of a new or increased expenditure of local funds within the
24 meaning of Amendment 621 of the Constitution of Alabama of
25 1901, now appearing as Section 111.05 of the Official
26 Recompilation of the Constitution of Alabama of 1901, as
27 amended.

1 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

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

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

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

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

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

26 a. An individual shall be deemed readily
27 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.

1 (3) Lack of the plaintiff's consent or, in the case
2 of a minor, lack of the consent of the minor's parent or legal
3 guardian.

4 (4) Injury to the plaintiff.

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

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

25 (c) If the trier of fact determines that the use of
26 an individual's likeness by a defendant in an advertisement or
27 other publication was only incidental, and not essential, to

1 the purpose of the publication in which it appears, there
2 shall be a rebuttable presumption that the failure to obtain
3 the consent of the plaintiff was not a knowing use of the
4 plaintiff's name or likeness.

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

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

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

22 Section 4. (a) An individual's property right in the
23 use of his or her likeness, as provided in Section 2, is
24 freely assignable and licensable and does not expire upon the
25 death of the individual holding the right. The property right
26 is descendible to the executors, assigns, heirs, or devisees
27 of the individual.

1 (b) The property rights provided for in this act are
2 exclusive to the individual, subject to the assignment or
3 licensing of the rights as provided in subsection (a), during
4 the individual's lifetime and to the executors, heirs,
5 assigns, or devisees for a period of 20 years after the death
6 of the individual.

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

13 (2) The exclusive right to commercial use of the
14 property right is terminated by proof of the non-use of the
15 likeness of an individual for commercial purposes by an
16 executor, assignee, heir, or devisee of the individual for a
17 period of two years subsequent to the expiration of the
18 20-year period following the individual's death, as provided
19 in subsection (b).

20 Section 5. (a) In a misappropriation of likeness
21 action under this act, the court may enjoin the unauthorized
22 use of an individual's name or likeness. The court may
23 authorize the seizure of all unauthorized property, items, and
24 instrumentalities used in connection with the violation of the
25 individual's rights. Property, items, and instrumentalities
26 seized pursuant to the enforcement of an injunction under this

1 act shall be liquidated and used to satisfy statutory damages,
2 if damages are recovered by the individual.

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

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

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

20 Section 6. Although this bill would have as its
21 purpose or effect the requirement of a new or increased
22 expenditure of local funds, the bill is excluded from further
23 requirements and application under Amendment 621, now
24 appearing as Section 111.05 of the Official Recompilation of
25 the Constitution of Alabama of 1901, as amended, because the
26 bill defines a new crime or amends the definition of an
27 existing crime.

1 Section 7. This act shall become effective
2 immediately following its passage and approval by the
3 Governor, or its otherwise becoming law.