

HOUSE BILL REPORT

ESHB 1074

As Passed Legislature

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

Brief Description: Protecting personality rights.

Sponsors: By House Committee on Law & Justice (originally sponsored by Representatives Sheahan, Costa, Hatfield and Constantine).

Brief History:

Committee Activity:

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

Floor Activity:

Passed House: 2/17/97, 96-1;

Passed House: 1/16/98, 87-2.

Senate Amended.

House Concurred.

Passed Legislature.

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 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 Bill: The bill creates a personal property right in the use of a person's 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 has a property right in the use of his or her name, voice, signature, photograph, or likeness. 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." Washington will recognize a property right in the use of the name, voice, signature, photograph, or likeness of any deceased personality, including personalities who died after January 1, 1948.

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.

The property right may be assigned or licensed, 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.

How Long The Right Lasts: The property right of a deceased individual lasts for 10 years after the individual dies.

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, without getting written or oral, expressed or implied consent, uses or authorizes the use of an individual's or personality's name, voice, signature, photograph, or likeness in the following ways:

- (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; or
- (d) by publishing or disseminating infringing advertisements in the state.

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.

Individuals or personalities may not bring a class action against an alleged infringer.

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 claim that 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;
- (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; and
(k) when the use is considered insignificant or incidental.

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.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute: 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).