

State of Alabama



Alabama Law Institute

Right of Publicity Act

March 2015

ALABAMA LAW INSTITUTE

www.ali.state.al.us

**Alabama State House
Suite 207
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7411
FAX (334) 242-8411**

**Law Center
Room 326
Post Office Box 861425
Tuscaloosa, Alabama 35486
(205) 348-7411
FAX (205) 348-8411**

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PREFACE

The Alabama Law Institute presents to the Bench and Bar of Alabama, for consideration and constructive criticism, the following proposed act.

Alabama has long recognized a common law right of publicity or the ability to exercise appropriate commercial control over one's name or likeness. Presently, this right is part of the tort of invasion of privacy.

This bill would statutorily define this right, the elements and scope of liability for its infringement, define the remedies available, and set forth defenses.

This bill would provide that there is a right of publicity in any indicia of identity of every person which endures for the life of the person and for fifty-five years after death. This right is freely transferable and descendable.

This bill would further provide for liability for persons who wrongfully use another person's indicia of identity whether or not for profit. This bill would also provide for defenses from liability under certain circumstances.

This bill would provide that if a person can establish by substantial evidence that his or her right of publicity has been violated would be entitled to a statutory damage in the amount of \$5,000 or actual damages at his or her election and any other damages available under Alabama law.

Will Hill Tankersley served as chairman and as the principal reporter of the drafting committee for the Institute.

Othni J. Lathram
Director

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Right of Publicity Act

Section 1. Definitions and Scope

As used in this chapter, the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise:

INDICIA OF IDENTITY. “Indicia of Identity” include those attributes of a Person that serve to identify that Person to an ordinary, reasonable viewer or listener, including but not limited to, name, signature, photograph, image, likeness, voice, or a substantially similar imitation of one or more of those attributes.

PERSON. A “Person” is a natural person or a deceased natural person.

RIGHT OF PUBLICITY. There is a “Right of Publicity” in any Indicia of Identity (both singular and plural) of every Person, whether or not famous, which right endures for the life of the Person and for fifty-five (55) years after his or her death, whether or not the Person commercially exploits the right during his or her lifetime. The right is freely transferable and descendible, in whole

or in part, and shall be considered property of a decedent's estate unless otherwise transferred.

Comment

This Act repeals only prior inconsistent common law on the unauthorized commercial use of a Person's Indicia of Identity, and no other form of the common law "right of privacy" is preempted hereby.

Section 2. Elements

Liability for Infringement of Right of Publicity.

(a) Except as provided herein, any Person or entity who uses or causes the use of a Person's Indicia of Identity, on or in products, goods, merchandise, or services entered into commerce in this State, or for purposes of advertising or selling, or soliciting purchases of, products, goods, merchandise, or services, or for purposes of fund-raising or solicitation of donations, or for false endorsement, without consent shall be liable under this chapter to such Person, or to a holder of such Person's rights.

(b) Liability may be found under this section without regard to whether the use is for profit or not for profit.

Comment

This Act is not intended to reach incidental, non-commercial and non-fundraising activities such as mere inclusion in group photographs or postings.

Section 3. Defenses

The Right of Publicity in this chapter shall not circumscribe the right to freedom of expression granted by the First Amendment to the United States Constitution and the Constitution of Alabama art. I, § IV.

Any action brought under this Act must be commenced within two years from the act or omission giving rise to the claim; provided that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided further, that in no event may the action be commenced more than four years after such act or omission giving rise to the claim.

Those who lawfully obtain authorized products containing Indicia of Identity are not liable under this section for their resale of such products.

Comment

Nothing in this Act will allow for an abridgement of free speech rights under the First Amendment of the United States Constitution and the Constitution of Alabama art. I, § IV. Protected uses may include, without limitation, plays and other theatrical performances and works; books, poems, and other literary works; films, documentaries, and other works of visual art; radio and television programs (excluding embedded commercial advertisements); magazine and newspaper articles, news reports, sports broadcasts or accounts, and other presentations having a current or historical public interest (excluding embedded commercial advertisements); musical compositions; and works of art.

Allison v. Vintage Sports Plaques, 136 F.3d 1443 (11th Cir. 1998) (adopting first sale doctrine defense in a right of publicity case).

Section 4. Remedies

A plaintiff, who establishes by substantial evidence that his or her Right of Publicity has been violated, shall be eligible to receive the following damages, remedies, and relief:

A. Monetary Relief. The measure of damages shall be:

(1) (A) Statutory damages in the amount of five thousand dollars (\$5,000) per case, or (B) compensatory

damages, including defendant's profits derived from such use. Plaintiff shall, within a reasonable time after the close of discovery, elect whether to claim statutory damages or to instead receive such monetary relief as the fact finder may independently determine to award in accordance with this section; and

(2) Any other damages available under Alabama law, including punitive damages. An election of statutory damages does not preclude the recovery of punitive damages if such damages are available under Alabama law.

B. Injunctive Relief. A violation of the statute is deemed to constitute irreparable harm for the purposes of injunctive relief.

Comment

The "per case" reference above only applies to a right of publicity claim and not to damages from other claims that may be part of the same case.