

VA ST s 8.01-40  
Code 1950, s 8.01-40

TEXT

CODE OF VIRGINIA  
TITLE 8.01. CIVIL REMEDIES AND PROCEDURE.  
CHAPTER 3. ACTIONS.  
ARTICLE 3. INJURY TO PERSON OR PROPERTY.  
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s 8.01-40 Unauthorized use of name or picture of any person; exemplary damages; statute of limitations.

A. Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

B. No action shall be commenced under this section more than twenty years after the death of such person.

CREDIT

(Code 1950, s 8-650; 1977, c. 617.)

NOTES, REFERENCES, AND ANNOTATIONS

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REVISORS' NOTE

The first sentence of former s 8-650 was transferred to s 18.2-216.1 since its import is purely penal. The civil remedy retained

in s 8.01-40 A was expanded by removing the restriction that the unauthorized use must pertain to a Virginia resident. Subsection A

was otherwise rewritten without material change in substance.

Subsection B establishes a twenty-year limitation period which begins upon the death of the person whose name is misused.

Cross references. -- For rules of court on equity procedure, see Rules 2:1 through 2:21. For rules governing actions in personam for money, see Rules 3:1 through 3:18.

Law Review. -- For comment, "The Case for a Broader Right of Privacy in Virginia," see 7 Wm. & Mary L. Rev. 127 (1966). For

survey of Virginia law on torts for the year 1976-77, see 63 Va. L. Rev. 1491 (1977). For 1995 survey of civil practice and procedure, see 29 U. Rich. L. Rev. 897 (1995).

- I. Decisions Under Current Law.
- A. General Consideration.
- II. Decisions Under Prior Law.

- I. Decisions Under Current Law.

- A. General Consideration.

Constitutionality. -- Subsection A of this section, as applied to the facts of the instant case-- plaintiff's name was

prominently featured in real estate flyer-- is not constitutionally invalid under either the free-speech provisions of the First

Amendment to the federal Constitution or the applicable provisions of Va. Const., Art. I, s 12. Town & Country Properties, Inc. v.

Riggins, 249 Va. 387, 457 S.E.2d 356 (1995).

This section is in derogation of the common law. Falwell v. Penthouse Int'l, Ltd., 521 F. Supp. 1204 (W.D. Va. 1981).

And therefore must be strictly construed. Falwell v. Penthouse Int'l, Ltd., 521 F. Supp. 1204 (W.D. Va. 1981).

Virginia recognizes no right of privacy other than that specifically conferred by this section.

Falwell v. Penthouse Int'l, Ltd.,

521 F. Supp. 1204 (W.D. Va. 1981).

Protective mantle extends to celebrities. -- Ordinary citizens are entitled to the protective mantle of this section, and persons in a celebrity status should receive no less coverage in this respect. *Town & Country Properties, Inc. v. Riggins*, 249 Va. 387, 457 S.E.2d 356 (1995).

Limitation period for actions under subsection A. -- Subsection A is aimed at preventing the appropriation, without consent, of an individual's name or likeness while he is alive and for 20 years after he dies. It creates in an individual a species of property right in their name and likeness. Consequently, the limitation period contained in subsection B of s 8.01-243 should be applied. *Lavery v. Automation Mgt. Consultants, Inc.*, 234 Va. 145, 360 S.E.2d 336 (1987).

Subsection B is a cutoff statute, not a statute of limitation. -- The legislature intended subsection B to be a cutoff statute, and, as such, to operate as an outside time period in which true statutes of limitations would operate and beyond which no suit based on subsection A could be maintained. The General Assembly in enacting subsection B was not setting a time period within which suit must be brought, instead, it was providing a cutoff point after which suit could not be brought. *Lavery v. Automation Mgt. Consultants, Inc.*, 234 Va. 145, 360 S.E.2d 336 (1987).

Notwithstanding the characterizations of subsection B of this section made by the revisors the revisor's notes under ss 8.01-228 and 8.01-243, subsection B of this section is not the statute of limitations applicable to a cause of action under subsection A. *Lavery v. Automation Mgt. Consultants, Inc.*, 234 Va. 145, 360 S.E.2d 336 (1987).

Use of New York decisions in construing section. -- This section is substantially similar to s 51 of the New York Civil Rights Law, and the U.S. Court of Appeals for the Fourth Circuit would look to the New York courts for guidance in construing the Virginia privacy statute. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), rev'd on other grounds, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988).

The General Assembly has fixed the "knowingly used" standard for punitive damages in the type of action under this section. The Virginia Supreme Court shall not engage in judicial legislation by adding ingredients not specified in the statute. *Town & Country Properties, Inc. v. Riggins*, 249 Va. 387, 457 S.E.2d 356 (1995).

An individual holds a property interest in his or her reputation, which represents the individual's personal identity in the community and which is the thing of value in the individual's name. *Nossen v. Hoy*, 750 F. Supp. 740 (E.D. Va. 1990).

Use of candidate's name or picture by political organization. -- This section or its common-law counterparts in other states, may not be construed to prohibit political organizations from using a candidate's name or picture in a political campaign without his consent. Such an expansive interpretation of the law of tortious appropriation of name would trench on important freedoms secured

by the First Amendment. *Friends of Gramm v. Americans for Gramm*, 587 F. Supp. 769 (E.D. Va. 1984).

Interview in magazine not for trade or advertising purpose. -- Plaintiff minister's allegations that an interview conducted and published by defendant journalists and magazine invaded his privacy by commercializing his personality failed to state a claim upon which relief could be granted, since Virginia recognizes no common-law action for invasion of privacy, and the interview did not, as a matter of law, qualify as being for a trade or advertising purpose under this section. *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981).

"False light" invasion of privacy not actionable. -- Allegations that an interview conducted and published by defendant journalists and magazine invaded plaintiff minister's privacy by placing the plaintiff in a "false light" in the public eye failed to state a claim upon which relief could be granted, since Virginia recognizes no common-law action for invasion of privacy, and the acts complained of did not fall within the narrow purview of this section. *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981).

Where advertising parody of plaintiff published in defendants' magazine was not reasonably believable, and because it contained a disclaimer, publication of the parody did not constitute a use of plaintiff's name and likeness for purposes of trade. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), rev'd on other grounds, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988).

Plaintiff's name was used for advertising purposes in a manner forbidden by this section where plaintiff's ex-wife specifically directed the printer who set the type and distributed the real estate flyer "to make the words John Riggins bigger than the other words" and to make them "stand out." Plaintiff's name, therefore, was an integral part of the flyer and could not be deemed merely incidental to the flyer's clear commercial message. *Town & Country Properties, Inc. v. Riggins*, 249 Va. 387, 457 S.E.2d 356 (1995).

Applied in *Ward v. Connor*, 495 F. Supp. 434 (E.D. Va. 1980); *Brown v. ABC*, 704 F.2d 1296 (4th Cir. 1983).

## II. Decisions Under Prior Law.

Editor's note. -- The cases cited below were decided under corresponding provisions of former law. The term "this section," as used below, refers to former provisions.

No general right of privacy exists in the law of Virginia. *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977).

Except for the limited right conferred by this section. -- See *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977).

Making sworn statements resulting in arrest warrant. -- Plaintiff's actions in making sworn statements to the Commonwealth's attorney, resulting in the issuance of a warrant for the arrest of the defendant for felonious theft of an airplane, did not fall within the narrow purview of the limited right of privacy created by this section. *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977).

Code 1950, s 8.01-40  
VA ST s 8.01-40  
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VA ST s 18.2-216.1

Code 1950, s 18.2-216.1

TEXT

CODE OF VIRGINIA

TITLE 18.2. CRIMES AND OFFENSES GENERALLY.

CHAPTER 6. CRIMES INVOLVING FRAUD.

ARTICLE 8. MISREPRESENTATIONS AND OTHER OFFENSES CONNECTED WITH SALES.

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s 18.2-216.1 Unauthorized use of name or picture of any person; punishment.

A person, firm, or corporation that knowingly uses for advertising purposes, or for the purpose of trade, the name, portrait, or picture of any person resident in the Commonwealth, without having first obtained the written consent of such person, or if dead, of his surviving consort, or if none, his next of kin, or, if a minor, of his or her parent or guardian, as well as that of such minor, shall be deemed guilty of a misdemeanor and be fined not less than \$50 nor more than \$1,000.

CREDIT

(Code 1950, s 8-650; 1977, c. 624.)

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Cross references. -- As to suit for injunction and damages for unauthorized use of the name or picture of any person, see s 8.01-40.

Code 1950, s 18.2-216.1

VA ST s 18.2-216.1