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Bill Analysis
Legislative Service Commission

Sub. S.B. 54*
123rd General Assembly
(As Reported by S. Judiciary)

Sens. Carnes, Latta, McLin, Mumper

BILL SUMMARY

- Creates a right of publicity in an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance (*persona*).
- Specifies that the right of publicity is transferable and descendible, specifies the methods of transferring that right, and specifies the persons who may grant consent to use an individual's persona for commercial use.
- Creates a cause of action for the unauthorized commercial use of an individual's persona, specifies who may bring that type of action, and specifies that the injured party may recover actual damages or at the election of the plaintiff statutory damages between \$2,500 to \$10,000 plus punitive and exemplary damages if applicable.
- Allows the court in an action of that type to award reasonable attorney's fees, court costs, and other reasonable expenses of the action, to award treble damages in certain cases, to order temporary or permanent injunctive relief, and to order the impoundment or destruction of specified items.
- Provides a four-year statute of limitations for bringing an action for the unauthorized commercial use of an individual's persona.

* *This analysis was prepared before the report of the Senate Judiciary Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

CONTENT AND OPERATION

Operation of the bill

Overview

The bill enacts a new chapter in the Revised Code, Chapter 2741. The chapter creates a "right of publicity" in an individual's "persona," meaning that a person has a property right in their own individual set of unique characteristics that they may both use for a commercial purpose and prohibit others from using for a commercial purpose. The Chapter allows the right of publicity to be both transferable and descendible, creates a cause of action for the unauthorized commercial use of an individual's persona, and provides a four-year statute of limitations for the cause of action. In addition, the terms defined for the Chapter include "persona," "commercial purpose," "name," "right of publicity," "trier of fact," and "written consent."

Right to the use of an individual's persona for commercial purposes

Under the bill, a person may not, without permission, use any aspect of another individual's (the target) persona for a commercial purpose during the target individual's lifetime or for a period of 75 years after the date of the target individual's death. A person is permitted to use a target individual's persona for a commercial purpose during the target individual's lifetime and after the date of the target individual's death if the person first obtains the written consent to use the target individual's persona from a specified person (see "Persons authorized to consent to the use of a persona," below). A person is also permitted to use the target individual's persona for a commercial purpose after the individual's death if the name of the target individual was the name of a business entity or a trade name at the time of death. (R.C. 2741.02(A) and (B).)

The bill provides that, unless otherwise provided for in an agreement between a person who had the right to grant consent to use the target individual's persona and a person who received consent to use the target individual's right of publicity, the consent obtained before the death of the target individual remains valid after the target individual's death. (R.C. 2741.02(C).)

The bill also states that the use of an aspect of an individual's persona in connection with any news, public affairs, or sports broadcast or account does not constitute a use for which consent is required. Additionally, the use of an aspect of an individual's persona in connection with a political campaign, when that use is also in compliance with Ohio Election Laws, does not constitute a use for which consent is required. (R.C. 2741.02(D).)

The bill provides that liability for the commercial use of a persona and for the failure to obtain consent for the commercial use of a persona do not apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, transit ads, and global communications networks unless it is established that the aforementioned owners or employees had knowledge of, or acted in reckless disregard, in failing to acquire knowledge of the unauthorized use of a persona. (R.C. 2741.02(E).)

Coverage of the chapter

Except as otherwise provided in the bill (see "**Exceptions to the chapter,**" below), the bill provides that the new chapter on "persona" that it creates applies only to the following: (1) the right of publicity in the persona of the target individual whose domicile or residence is in this state on or after the bill becomes effective and (2) the right of publicity in the persona of a target individual who died on or after January 1, 1998, and whose domicile or residence on their date of death was in this state (R.C. 2741.03).

Allowable means to grant or transfer consent to use the target individual's right of publicity

The bill provides that the right of publicity in the target individual's persona is freely transferable and descendible, in whole or in part, by any of the following means: (1) contract, (2) license, (3) gift, (4) trust, (5) will, or (6) intestate succession. The intestate succession law that applies is the applicable intestate succession law of the state administering the majority of the real and personal property of the target individual who died intestate, regardless of whether that state recognizes the right of publicity as a property right. (R.C. 2741.04.)

Persons authorized to consent to the use of a persona

Unless otherwise expressly provided in an agreement transferring an aspect of an individual's right of publicity, only the following persons may grant consent to use the target individual's persona for commercial use: (1) a person or persons, including the target individual, who collectively owns more than 50% of the right of publicity, subject to the terms of any other existing licenses regarding that right of publicity, and (2) a person, including a licensee of the individual's right of publicity, who is expressly authorized in writing to grant consent by a person named in (1), above.

A person specified in (1) or (2), above, may do both of the following: (1) grant a person consent to use all or part of a target individual's right of publicity

and (2) limit, restrict, or place conditions on how a person to whom consent is granted may use the target individual's right of publicity. (R.C. 2741.05.)

Civil actions for improper use of an individual's persona: liability and the statute of limitations

A person who improperly uses a target individual's persona is liable under the bill in a civil action to the person injured by that improper use for the following: (1) actual damages INCLUDING any profits derived from and attributable to the unauthorized use of an individual's persona, (2) at the election of the injured person and in lieu of actual damages, statutory damages of \$2,500 to \$10,000, in the discretion of the trier of fact taking into account the willfulness of the violation, the harm to the persona, and the ability of the defendant to pay the award, and (3) if applicable under existing law, punitive or exemplary damages. When assessing damages under (1), the trier of fact must include any profits a person derived from and attributable to the unauthorized commercial use of the target individual's persona in calculating the award of actual damages. Each party to the action has the right to a jury trial of the action, to be asserted pursuant to the Rules of Civil Procedure. (R.C. 2741.07(A) and (B).)

Under the bill, an action for improper persona use must be brought within four years after a violation of the law regulating the use of an individual's persona (R.C. 2741.07(C)).

Civil actions for improper use of an individual's persona: remedies

The bill provides that a court, when an improper use of an individual's persona is found, may do any of the following: (1) award the prevailing party reasonable attorney's fees, court costs, and reasonable expenses associated with the civil action, (2) award treble damages against a party who has knowledge of or acted in reckless disregard in failing to acquire knowledge of unauthorized use, (3) order temporary or permanent injunctive relief, and (4) order the impoundment, on terms the court deems reasonable, of both of the following during the pendency of the civil action: (a) products, merchandise, goods, or other materials alleged to have been made or used improperly and (b) plates, molds, and matrices, or the specific violative portions of masters, tapes, negatives, digital recordings, electronic media, or other items from which products, merchandise, goods, or other materials may be manufactured or reproduced. As part of a final judgment, a court may order the destruction or other reasonable disposition of items described in (4), above. (R.C. 2741.07(D) and (E).)

The bill also provides that the remedies provided for in the bill are in addition to any other remedies provided for by state or federal statute or common law (R.C. 2741.08).

Civil actions for improper use of an individual's persona: who may bring the action

The bill permits the following persons to bring a civil action to enforce the rights set forth above: (1) a person or persons, including the target individual, who collectively own all of the right of publicity at issue, subject to any licenses regarding that right of publicity, (2) a person, including a licensee of a target individual's right of publicity, who is expressly authorized in writing by the owner or owners of the right of publicity at issue to bring a civil action, and (3) unless otherwise expressly provided in an authorized agreement and subject to a right of objection discussed below, a person to whom ownership or any portion of ownership of an individual's right of publicity has been transferred. (R.C. 2741.06(A).)

Before bringing a civil action, a person who owns less than all of a target individual's right of publicity must notify the target individual, if living, by regular mail addressed to the last known address of that individual. The person also must notify any persons to whom the target individual's right of publicity has been transferred of the proposed civil action by the following means: (1) regular mail addressed to the last known address of each transferee and (2) if the address of the transferee is not known, by publication in a newspaper of general circulation in the county where the target individual resides or, in the case of a deceased target individual, in the county where the target individual's estate has been or would have been admitted to probate. The target individual and any person to whom ownership of that target individual's right of publicity has been transferred may object to the proposed civil action within 20 days from the date of the mailing of the notice or 60 days from the date of publication by giving written notice of the objection to the person proposing the civil action. If the target individual or other eligible person does not timely object to the civil action, the objection is forever barred. A person may not bring a civil action under the bill if an objection is made to the civil action by the target individual or other persons who collectively own more than 50% of the target individual's right of publicity. (R.C. 2741.06(B) and (C).)

Under the bill, a person, other than a licensee of the target individual's right of publicity, who owns less than all of the right of publicity at issue, who brings a civil action under the bill, and who is successful in the action must compensate any other person owning an interest in that right of publicity in amounts proportionate

to the other person's interest with respect to any net recovery in a civil action less the person's costs of collection and reasonable attorney's fees (R.C. 2741.06(D)).

Exceptions to the chapter

The new chapter that regulates the use of an individual's persona does not apply to any of the following (R.C. 2741.09(A)):

(1) (a) A literary work, dramatic work, fictional work, historical work, audiovisual work, or musical work regardless of the media in which the work appears or is transmitted, other than an advertisement or commercial announcement not otherwise exempt, (b) material that has political or newsworthy value, (c) original works of fine art, and (d) an advertisement or commercial announcement for a use permitted above;

(2) The use of an individual's name to truthfully identify the individual as the author of or contributor to a written work or the performer of a recorded performance under circumstances in which the written work or the recorded performance is otherwise lawfully reproduced, exhibited, or broadcast;

(3) The use of an aspect of an individual's persona in connection with the broadcast or reporting of an event or topic of general or public interest;

(4) The use of the persona of an individual solely in the individual's role as a member of the public if the individual is not named or otherwise singled out as an individual.

The bill states that the new chapter on the use of an individual's persona does not affect rights or privileges recognized under the Ohio Constitution or the United States Constitution. (R.C. 2741.09(A) and (B).)

Definitions

The bill defines the following terms for purposes of the new chapter on the use of an individual's persona (R.C. 2741.01):

"Persona" means an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance if any of these aspects have commercial value.

"Commercial purpose" means the use of an aspect of an individual's persona in any of the following manners: (1) on or in connection with a place, product, merchandise, goods, services, or commercial activities, (2) for advertising or soliciting the purchase of products, merchandise, goods, or services or other

commercial activities not expressly exempted under the bill, or (3) for the purpose of fundraising.

"Name" means the actual, assumed, or clearly identifiable name of or reference to a living or deceased individual that identifies the individual.

"Right of publicity" means the property right in an individual's persona to use the individual's persona for a commercial purpose.

"Trier of fact" means the jury or, in a nonjury action, the court.

"Written consent" includes written, electronic, digital, or any other verifiable means of authorization.

COMMENT

Section 2 of the bill states that the enactment of Chapter 2741. of the Revised Code by the bill does not abrogate the common law relating to privacy as recognized by the Ohio courts in *Zacchini v. Scripps-Howard Broadcasting Co.* (1978), 54 Ohio St.2d 286; *Zacchini v. Scripps-Howard Broadcasting Co.* (1976), 47 Ohio St.2d 129, *rev'd on other grounds*, (1977), 433 U.S. 562; *Vinci v. American Can Co.* (Cuyahoga Cty. 1990), 69 Ohio App.3d 727; and *Bajpayee v. Rothermich* (Franklin Cty. 1977), 53 Ohio App.2d 117.

HISTORY

| ACTION | DATE | JOURNAL ENTRY |
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| Reported, S. Judiciary | --- | --- |

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