



Dennis M. Papp

*Bill Analysis*  
Legislative Service Commission

## **S.B. 263**

127th General Assembly  
(As Introduced)

Sens. **Buehrer, Gardner, Mumper, Cates, Schuring, Carey, Schuler, Faber, Goodman**

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### **BILL SUMMARY**

- Prohibits a person from using any aspect of a deceased soldier's persona for a commercial purpose without obtaining the written consent to use the deceased soldier's persona for a commercial purpose from the deceased soldier or from the deceased soldier's spouse or next of kin.
- Specifies that a violation of the prohibition is the offense of "using a deceased soldier's persona for a commercial purpose," a misdemeanor of the first degree.
- Specifies that the prosecution of an offender for a violation of the prohibition does not prohibit a person described in an existing law regarding the right of publicity in an individual's persona from bringing a civil action against the offender pursuant to that provision for acts that are the basis of the violation of which the offender was convicted.

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### **CONTENT AND OPERATION**

#### **Prohibition, penalty, and non-preclusion of civil action**

The bill prohibits a person from using any aspect of the "persona" of a "deceased soldier" for a "commercial purpose" without obtaining the "written consent" to use the deceased soldier's persona for a commercial purpose from the deceased soldier or from the deceased soldier's spouse or next of kin (see "Definitions," below, for definitions of the terms in quotation marks). A violation of the prohibition is the offense of "using a deceased soldier's persona for a commercial purpose," a misdemeanor of the first degree. (R.C. 2927.05(B) and (C).)

The bill specifies that the prosecution of an offender for a violation of the prohibition described in the preceding paragraph does not prohibit a person described in existing R.C. 2741.06 (not in the bill; see **COMMENT 1**) from bringing a civil action against the offender pursuant to that section for acts that are the basis of the violation of which the offender was convicted (R.C. 2927.05(D)).

### **Definitions**

The bill provides that, as used in its provisions:

(1) "Commercial purpose" means the use of or reference to an aspect of an individual's persona in any of the following manners (R.C. 2927.05(A), by reference to existing R.C. 2741.01, which is not in the bill): (a) on or in connection with a place, product, merchandise, goods, services, or other commercial activities not expressly exempted under R.C. Chapter 2741., (b) for advertising or soliciting the purchase of products, merchandise, goods, services, or other commercial activities not expressly exempted under R.C. Chapter 2741., (c) for the purpose of promoting travel to a place, or (d) for the purpose of fundraising.

(2) "Persona" means an individual's name (which means the actual, assumed, or clearly identifiable name of or reference to a living or deceased individual that identifies the individual), voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value (R.C. 2927.05(A), by reference to existing R.C. 2741.01, which is not in the bill).

(3) "Written consent" includes written, electronic, digital, or any other verifiable means of authorization (R.C. 2927.05(A), by reference to existing R.C. 2741.01, which is not in the bill).

(4) "Deceased soldier" means an officer or enlisted member of the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, the Reserve Forces of the United States, the Ohio National Guard, the Ohio Military Reserve, or the Ohio Naval Militia who dies as a result of injuries sustained in the line of duty (R.C. 2927.05(A)).

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### **COMMENT**

1. Existing R.C. 2741.06, which is not in the bill, authorizes the following persons to bring a civil action to enforce the rights set forth in R.C. Chapter 2741., which provides protections to an individual regarding the use of his or her persona (see **COMMENT 2** for a summary of the provisions of the Chapter): (a) a person or persons, including an individual whose right of publicity is at issue, who collectively own all of an individual's right of publicity, subject to any licenses

regarding that right of publicity, (b) a person, including a licensee of an individual's right of publicity, who is expressly authorized in writing by the owner or owners of an individual's right of publicity to bring a civil action, or (c) except as otherwise expressly provided in an agreement transferring an aspect of an individual's right of publicity and subject to the provisions described in the second succeeding paragraph, a person to whom ownership or any portion of ownership of an individual's right of publicity has been transferred. Before bringing the civil action, a person who owns less than all of an individual's right of publicity must notify the individual whose right of publicity is the subject of the proposed action, if living. The person also must notify any persons to whom the individual's right of publicity has been transferred of the proposed civil action.

The individual whose right of publicity is the subject of the civil action, and any person to whom ownership of that 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 of the civil action or 60 days from the date of publication of that notice by giving written notice of the objection to the person proposing the civil action. If the individual or transferee does not so object to the civil action, the individual or transferee is forever barred from objecting to that action. A person may not bring a civil action under this provision if a person or persons, including the individual whose right of publicity is the subject of the proposed civil action, who collectively own more than 50% of the individual's right of publicity object to the proposed civil action.

A person, other than a licensee of an individual's right of publicity, who owns less than all of an individual's right of publicity and who brings a civil action under R.C. Chapter 2741. must account to any other person owning an interest in that right of publicity to the extent of 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.

Existing R.C. 2741.07, which is not in the bill, provides that a person who violates R.C. 2741.02 (see **COMMENT** 2(a), below) is liable in a civil action to the person injured by the violation for the following: (a) actual damages, including any profits derived from and attributable to the unauthorized use of an individual's persona for a commercial purpose determined as described below, (b) at the election of the plaintiff and in lieu of actual damages, statutory damages in the amount of at least \$2,500 and not more than \$10,000, as determined in the discretion of the trier of fact, taking into account the willfulness of the violation, the harm to the persona in question, and the ability of the defendant to pay, and (c) if applicable pursuant to the existing law that governs punitive and exemplary damages, punitive or exemplary damages. An action under this provision must be brought within four years of a violation of R.C. 2941.02. A court in which an

action under this provision is brought may: (a) award the prevailing party reasonable attorney's fees, court costs, and reasonable expenses associated with the civil action, (b) award treble damages against a party identified in R.C. 2741.02(E) who has knowledge of the unauthorized use of the persona as prohibited by that section, (c) order temporary or permanent injunctive relief, or (d) order the impoundment, on terms the court considers reasonable, of both of the following during the pendency of a civil action under this section: (i) products, merchandise, goods, or other materials alleged to have been made or used in violation of R.C. 2741.02, or (ii) 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 the preceding sentence.

2. The provisions of existing R.C. Chapter 2741., other than the civil action and damage provisions described above in **COMMENT 1**, provide protections to an individual regarding the use of his or her persona as follows:

(a) Existing R.C. 2741.02 specifies that, except as otherwise described below, a person cannot use any aspect of an individual's persona for a commercial purpose during the individual's lifetime or for a period of 60 years after the date of the individual's death. A person may use an individual's persona for a commercial purpose during the individual's lifetime if the person first obtains the written consent to use the individual's persona from a person specified in R.C. 2741.05 (see **COMMENT 2(d)**, below). If an individual whose persona is at issue has died, a person may use the individual's persona for a commercial purpose if: (i) the person first obtains the written consent to use the individual's persona from a person specified in R.C. 2741.05 who owns the individual's right of publicity, or (ii) the name of the individual whose persona is used was the name of a business entity or a trade name at the time of the individual's death. Generally, a consent obtained before the death of an individual whose persona is at issue remains valid after the individual's death.

For purposes of the provisions described in the preceding paragraph: (i) a use of an aspect of an individual's persona in connection with any news, public affairs, sports broadcast, or account does not constitute a use for which consent is required as described in that paragraph, and (ii) a use of an aspect of an individual's persona in connection with any political campaign and in compliance with R.C. Title XXXV does not constitute a use for which consent is required as described in that paragraph.

The owners or employees of any medium used for advertising by whom any advertisement or solicitation in violation of the provisions described above is published or disseminated are not liable under R.C. 2741.02 or 2741.07 unless it is

established that those owners or employees had knowledge of the unauthorized use of the persona as prohibited by this section.

(b) Existing R.C. 2741.03 provides that, except as otherwise described in **COMMENT 2(f)**, below, R.C. Chapter 2741. applies only to the following: (i) the right of publicity in the persona of an individual whose domicile or residence is in Ohio on or after November 22, 1999, and (ii) the right of publicity in the persona of an individual who died on or after January 1, 1998, and whose domicile or residence was in Ohio on the date of the individual's death.

(c) Existing R.C. 2741.04 provides that the right of publicity in an individual's persona is freely transferable and descendible, in whole or in part, by means of contract, license, gift, trust, will, or operation of the laws of intestate succession applicable to the state administering the majority of the real and personal property of an individual who died intestate, regardless of whether that state recognizes the right of publicity as a property right.

(d) Existing R.C. 2741.05 provides that, except as 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 an individual's persona for a commercial purpose: (i) a person or persons, including the individual whose right of publicity is at issue, who collectively own more than 50% of the individual's right of publicity, subject to the terms of any licenses regarding that right of publicity, or (ii) a person, including a licensee of the individual's right of publicity, who is expressly authorized in writing to grant consent by a person or persons specified in the clause (i) of this sentence. A person or persons specified in the preceding sentence may grant a person or persons consent to use all or part of an individual's right of publicity for a commercial purpose, or may limit, restrict, or place conditions on how a person or persons to whom consent is granted pursuant to this section may use an individual's right of publicity.

(e) Existing R.C. 2741.08 specifies that the remedies provided in R.C. Chapter 2741. are in addition to any other remedies provided by state or federal statute or common law.

(f) Existing R.C. 2741.09 specifies that R.C. Chapter 2741. does not affect rights or privileges recognized under the Ohio Constitution or U.S. Constitution, and does not apply to any of the following:

(i) 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 a non-exempt advertisement or commercial announcement; material that has political or newsworthy value; original works of

fine art; or an advertisement or commercial announcement for a use permitted by another provision described in this paragraph.

(ii) 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;

(iii) 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;

(iv) 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;

(v) A use of an individual's persona by an institution of higher education if the individual is or was a student at, or a member of the faculty or staff of, the institution of higher education, and the use of the individual's persona is for educational purposes or for the promotion of the institution of higher education and its educational or institutional objectives.

(vi) A use of the persona of an individual that is protected by the First Amendment to the U.S. Constitution as long as the use does not convey or reasonably suggest endorsement by the individual whose persona is at issue.

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## **HISTORY**

<b>ACTION</b>	<b>DATE</b>
Introduced	12-11-07

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