

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1159
Forces for Business Purposes
SPONSOR(S): Grimsley
TIED BILLS:

Unauthorized Use of the Name or Image of a Member of the Armed
IDEN./SIM. BILLS: CS/SB 116

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Military & Veterans' Affairs</u>	<u>5 Y, 0 N</u>	<u>Shaffer</u>	<u>Camechis</u>
2) <u>Government Efficiency & Accountability Council</u>	<u></u>	<u></u>	<u></u>
3) <u>Policy & Budget Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Since 1967, Florida law has prohibited the use of a person's name or likeness "for purposes of trade or for any commercial or advertising purpose" without express consent of the person or the person's lawful representative. This provision has long been interpreted by the courts to prohibit the unauthorized use of a person's name or likeness to directly promote a product or service because of the way that the use associates the person's name or personality with something else. The current law lists specific exceptions to the prohibition, including exceptions for uses protected by the First Amendment of the United States Constitution. The statute creates a civil cause of action against any person violating the statute, and allows the courts to award a prevailing plaintiff damages for any loss or injury, reasonable royalties, and punitive damages.

The Florida courts have long recognized the right of privacy, and the tort of common law invasion of privacy, both of which provide protections for the use of private individuals' names and images in certain circumstances.

This bill prohibits "use of the name or image of a member of the armed forces for the purpose of advertising goods or services, or for solicitation of patronage by a business enterprise" without the service member's consent. Use of the name or image of a service member killed in the line of duty is also prohibited unless prior consent is obtained from the surviving spouse, personal representative, or closest living relative by blood or marriage. Violation of the prohibition is a first degree misdemeanor punishable by up to 1 year in jail or a \$1,000 fine.

This bill may have an indeterminate but minimal fiscal impact on state and local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility: This bill imposes a criminal penalty for using the name or image of a member of the armed forces for commercial purposes without consent.

B. EFFECT OF PROPOSED CHANGES:

CURRENT SITUATION

Background

Sales of t-shirts and other merchandise with the names and/or pictures of deceased service members, particularly those killed in the recent Iraq War, have prompted the introduction of legislation to prohibit these activities. In recent years, several state legislatures¹ have either enacted or proposed laws that would limit the use, without consent, of service members' and former or deceased service members' names, images, portraits, and/or pictures for certain commercial purposes. In addition, similar legislation has been filed in the U.S. Congress.²

Current Florida Statutory Prohibitions on Unauthorized Use of Name or Image

The Florida Statutes have prohibited the unauthorized use of a persons name or image for commercial purposes since 1967. Under, s. 540.08, F.S., the "commercial misappropriation law", a person may not publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose, the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:

- Such person; or
- Any other person, firm or corporation authorized in writing by such person to license the commercial use of her or his name or likeness; or
- If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of her or his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of her or his surviving spouse and surviving children.

A person's "surviving spouse" is defined as the person's surviving spouse under the law of her or his domicile at the time of her or his death, whether or not the spouse has later remarried; and a person's "children" are her or his immediate offspring and any children legally adopted by the person. Consent must be given on behalf of a minor by the guardian of her or his person or by either parent.

The provisions of the commercial misappropriation law do not apply to:

- The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;

¹ Oklahoma has passed similar legislation; Louisiana passed a memorial urging Congress to pass similar legislation; similar bills are pending in at least the following states: Arizona, Georgia, and Texas. North Dakota has legislation pending that proposes a study to review the issue.

² Oklahoma Congressman Dan Boren recently introduced H.R. 269 in the U.S. Congress, which provides prohibitions similar to those proposed in this bill and legislation proposed in other states. H.R. 5772 and H.R. 5755 were proposed in 2006.

- The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof; or
- Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.
- Use of the name or likeness of a person occurring 40 years after the death of such person.

If the required consent is not obtained, the person whose name, portrait, photograph, or other likeness is used, or any person, firm, or corporation authorized by the person in writing to license the commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give consent may bring a civil action to enjoin unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

The remedies provided for in the commercial misappropriation law are in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of her or his privacy.

This provision has long been interpreted by the courts to prohibit the unauthorized use of a person's name or likeness to directly promote a product or service because of the way that the use associates the person's name or personality with something else.³ In 2002, a federal court in Florida noted that "[t]he names, likeness, and other indicia of a person's identity are used 'for the purposes of trade'... if they...are placed on merchandise marketed by the user".⁴ However, in 2005, the Florida Supreme Court noted that an interpretation that the statute absolutely bars the use of an individual's name without consent for any purpose would raise grave questions as to its constitutionality.⁵ The court also noted that the common usage of the term "commercial" in the commercial misappropriation context is limited to the promotion of a product or service and that "expressive works", such as a motion picture or work of art, should be protected by the First Amendment.⁶

Department of Defense Regulations

The U.S. Department of Defense (DOD), Joint Ethics Regulation 5500-7R, s. 3-209, prohibits DOD employees, in their official capacities, from stating or implying endorsement of a nonfederal entity, event, product, service, or enterprise. DOD employees include any active duty member of the Army, Navy, Air Force or Marine Corps and any Reserve or National Guard member while performing official duties. Purely personal, unofficial volunteer efforts to support fundraising outside the federal government workplace are not prohibited where the efforts do not imply DOD endorsement.⁷

Constitutional Protection

The Florida courts have long recognized the right of privacy, violation of which is redressed by the courts. The right of privacy is defined as the right of an individual to be let alone and to live a life free from unwarranted publicity. However, the court has also noted that:

[T]he right of privacy has its limitations. Society also has its rights. The right of the general public to the dissemination of news and information must be protected and conserved. Freedom of speech and of the press must be protected....'The right of privacy does not prohibit the publication

³ Tyne v. Time Warner Entertainment Co., L.P., 901 So.2d 802, 807 (Fla. 2005).

⁴ Lane v. MRA Holdings, LLC, 242 F.Supp.2d 1205 (M.D.Fla.2002).

⁵ Tyne v. Time Warner Entertainment Co., L.P., 901 So.2d 802, 807 (Fla. 2005); quoting Valentine v. C.B.S., Inc., 698 F.2d 430 (11th Cir.1983).

⁶ Tyne v. Time Warner Entertainment Co., L.P., 901 So.2d 802, 809 (Fla. 2005).

⁷ DOD 5500.7R, s.3-300, a (1).

of matter which is of legitimate public or general interest. At some point the public interest in obtaining information becomes dominant [] over the individual's desire for privacy. It has been said that the truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest.⁸

Common Law Tort of Invasion of Privacy

In 1996, the Florida Supreme Court established the four categories included within the common law tort of invasion of privacy: (1) appropriation-the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion-physically or electronically intruding into one's private quarters; (3) public disclosure of private facts-the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye-publication of facts which place a person in a false light even though the facts themselves may not be defamatory.⁹

One of the wrongs constituting the tort of invasion of privacy is appropriation, that is, the unauthorized use of a person's name or likeness to obtain some benefit, or, as otherwise stated, the commercial exploitation of the property value of one's name, or the unwarranted appropriation or exploitation of one's personality. The elements of common-law invasion of privacy based on the commercial misappropriation of a person's likeness coincide with the elements of the unauthorized publication of a name or likeness in violation of the s. 540.08, F.S., the Florida commercial misappropriation statute.¹⁰ The remedies provided under the statute are in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of his or her privacy.

The Florida courts also recognize the tort of invasion of privacy by public disclosure of private facts,¹¹ and define the tort as follows: One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not a legitimate concern to the public.

EFFECT OF PROPOSED CHANGES

This bill prohibits use of the name or image of a member of the armed forces for the purpose of advertising goods or services, or for solicitation of patronage by a business enterprise, without the service member's consent. Use of the name or image of a service member killed in the line of duty is also prohibited unless prior consent is obtained from the surviving spouse, personal representative, or closest living relative by blood or marriage. Violation of the prohibition is a first degree misdemeanor punishable by up to 1 year in jail¹² or a \$1,000 fine.¹³

The bill defines the term "member of the armed forces" as an officer or enlisted member of the Army, Navy, Air Force, Marine Corps, or Coast Guard including members of the National Guard, United States Reserve Forces, and any member who was killed in the line of duty.

It appears that s. 540.08, F.S., currently protects the names and images of military personnel in a manner consistent with this bill and to the extent permissible under the U.S. Constitution. That section does not, however, impose a criminal penalty for violations as does this bill. This bill imposes a criminal penalty for violations, but it is uncertain that the provisions of the bill are sufficient to support a criminal prosecution for violation of the law created by the bill.

⁸ Cape Publications, Inc. v. Hitchner, 549 So.2d 1374, 1377 (Fla. 1989); quoting Cason v. Baskin, 20 So.2d 243, 251 (1944) (quoting 41 Am.Jur. 935).

⁹ Allstate Ins. Co. v. Ginsberg, 863 So.2d 156 (Fla. 2003).

¹⁰ Lane v. MRA Holdings, LLC, 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

¹¹ Doe v. Univision Television Group, Inc., 717 So.2d 63 (Fla. 3rd DCA 1998); See Cape Publications, Inc. v. Hitchner, 549 So.2d 1374, 1377 (Fla. 1989), appeal dismissed, 493 U.S. 929, 110 S.Ct. 296, 107 L.Ed.2d 276 (1989).

¹² s. 775.082, F.S.

¹³ s. 775.083, F.S.

It appears that this bill will not affect a service member's ability to bring a civil lawsuit alleging violation of his or her right of privacy, invasion of privacy, or commercial misappropriation under s. 540.08, F.S.

C. SECTION DIRECTORY:

Section 1. Prohibits use of the name or image of a member of the armed services under certain circumstances; imposes a criminal penalty for violations; provides a definition of a member of the armed services.

Section 2. Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures: The bill appears to have an indeterminate but minimal fiscal impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: The bill appears to have indeterminate but minimal fiscal impact.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: This bill may result in a small number of additional prosecutions, which may have an insignificant fiscal impact on the state and local governments responsible for paying the costs of prosecutions and incarcerating violators.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable because this bill does not appear to require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other: None.

B. RULE-MAKING AUTHORITY: This bill does not affect any agency required to adopt administrative rules pursuant to ch. 120, F.S., the Florida Administrative Procedure Act.

C. DRAFTING ISSUES OR OTHER COMMENTS: The activity this bill seeks to prohibit appears to be prohibited by current law, specifically s. 540.08, F.S., which was first enacted in 1967. That section does not, however, impose a criminal penalty for violations. This bill imposes a criminal penalty but it is unclear whether the provisions of the bill are sufficient to support a criminal prosecution for violation of the new law without extensive judicial interpretation.

Adria Harper, Director of the First Amendment Foundation, offered the following comment in response to a staff request: "It is our understanding that the statute you cite, Section 540.08, F.S., already

prohibits the type of activity provided by the bill. Thus, HB 1159 is redundant and could result in a conflict with the current law and presumably, unintended litigation.”

On March 20, 2007, Adria Harper, Director of the First Amendment Foundation, indicated that “[i]t is our position that the amendment is redundant and raises serious constitutional issues”.

D. STATEMENT OF THE SPONSOR: The sponsor did not submit a statement.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 21, 2007, the Committee on Military & Veterans’ Affairs unanimously adopted a strike-all amendment to the bill to make drafting revisions, replace the penalty provision with a provision providing for civil penalties, and provide for use of the name or image of historical figures. The new civil provision provides a civil cause of action to a person from whom consent is required against any person using a name, portrait, photograph, or other image in violation of the law. In such action, the plaintiff shall be entitled to:

- An injunction preventing further use of the name, portrait, photograph, or other image without consent. In such action, damage to the plaintiff shall be presumed and it is not necessary for the plaintiff to prove irreparable harm.
- A judgment in the amount of the gross revenue received by the defendant in connection with use of the name, portrait, photograph, or other image in violation of this section.

The amendment also specified that the law does not apply to the name, portrait, photograph, or image of an historical figure who has been deceased for 50 years or more.

On March 20, 2007, Adria Harper, Director of the First Amendment Foundation, indicated that “[i]t is our position that the amendment is redundant and raises serious constitutional issues”.