The Florida Senate

PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Commerce Committee

BILL: CS/SB 116

INTRODUCER: Commerce Committee and Senator Atwater

SUBJECT: Armed Forces Member/Use of Name

DATE: March 7, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pardue	Skelton	MS	**Favorable**
2.	Gordon	Cooper	CM	**Fav/CS**
3.				
4.				
5.				
6.				

I. Summary:

This Committee Substitute (CS) prohibits the unauthorized use of the name or image of a member of the armed forces for the purpose of trade or for any commercial or advertising purpose. In the case of a deceased member, prior consent to use the name or image must be received from the surviving spouse, personal representative, or the closest living relative. The CS provides that any person who violates this prohibition commits a misdemeanor of the first degree. The CS does not apply to the name, portrait, photograph, or image of an historical figure who has been deceased for 50 years or more.

The CS does not appear to have a significant fiscal impact.

This CS creates an undesignated section of Florida Statutes.

II. Present Situation:

In recent years, several state legislatures have either enacted or proposed laws that would limit the use, without consent, of a military person's name, image, portrait, and/or picture for certain commercial purposes. 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 such legislation. However, such legislation targets only the use of a *deceased* soldier's name, image, portrait and/or picture for advertising or the solicitation of patronage by a

business;[1] these measures do not prohibit the use of a soldier's name, image, portrait and/or picture for all commercial purposes.

Right to Privacy and Right of Publicity

Florida jurisprudence characterizes the right to privacy as "the right to be let alone, to live one's life free from unwarranted publicity, and to live in a community without being held up to public gaze if one does not want to be."[2] This right to privacy is a personal one which may not be enforced after death.[3] A cause of action to enforce the right also may not be assigned to others or maintained by others, including members of the individual's family.[4] There are four types of invasion of privacy that are recognized in this state: intrusion, public disclosure of private facts, portraying an individual in a false light in the public eye, and appropriation (the unauthorized use of a person's name or likeness to obtain some benefit).[5] Florida Statutes explicitly prohibit the last form of an invasion of privacy—appropriation—and provide a civil remedy for a violation of the statute.

The right of publicity[6] stems from the right to privacy, and is the "right of an individual to control the commercial value of his name and likeness and to prevent their unauthorized exploitation by others."[7] Florida's commercial misappropriation law in s. 540.08, F.S., protects this right, and states, "No person shall 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 the person. Others who can give consent for such use include an agent authorized in writing to license the commercial use of the person's name or likeness or, in the case of a deceased person, an agent authorized in writing, or the surviving spouse or children of the person. This statute provides a civil cause of action for failure to obtain consent. As interpreted by Florida caselaw, the statute guards against using or appropriating a person's name or image to directly promote a commercial product or service.[8]

While celebrities and other public figures have come to rely on the right of publicity to protect them from the intrusion of others, this right is not iron-clad. The newsworthiness exception

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[1] While Oklahoma and Lousiana have enacted such legislation, similar bills are pending in at least the following states: Arizona, Georgia, North Dakota and Texas.

[2] *See*, 19A Fla. Jur. 2d. Defamation and Privacy Section 207. (Citations omitted).

[3] *See*, 19A Fla. Jur. 2d, Defamation and Privacy Section 211. (Citations omitted).

[4] *See*, *id*.

[5] *Gannett, Co., Inc. v. Anderson*, 947 So. 2d 1 (Fla. 1st DCA), relying on, *Cason v. Baskin*, 155 Fla. 198 (Fla. 1945).

[6] This right was first outlined in *Haelan Laboratories, Inc. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953) which examined several cases involving athletes photographs. The judge there wrote, "…in addition to a right of privacy….a man has a right in the publicity value of his photograph….This right might be called a 'right of publicity.'" *Id.* at 868.

[7] Vicky Gerl Neumeyer, *The Right of Publicity And Its Descendibility*, 7 U. Miami Ent. & Sports L. Rev. 287, Spring 1990, p. 1.

[8] *See*, *Lane v. MRA Holdings, LLC*, 242 F.Supp.2d 1205 (M.D. Fla. 2002)(holding that a company which edited assembled video footage of young women exposing themselves in public places was not liable for common-law invasion of privacy for appropriating the likeness of the 17-year-old plaintiff since her likeness was not used to directly promote a product or service and she consented to the use and publication of her likeness); *see also, Tyne v. Time Warner Entm't Co., L.P.*, 204 F.Supp.2d 1338 (M.D.Fla.2002) (holding that the movie company that produced the "Perfect Storm" did not violate decedent fishermen's right of publicity as protected under s. 540.08, F.S., when his name and likeness were used because neither was used to directly promote a product or service).

recognizes that the First Amendment protects "the privilege to publish or broadcast facts, events and information related to public figures"[9] and "the privilege to broadcast news or other matters of public interest."[10]

Historical Names

Although the right of publicity has been successfully used by celebrities and prominent public figures and their descendants to protect their names and identities, the right usually does not protect famous historical names and identities. Generally, under trademark law, the name of a person who has achieved fame and distinction may be adopted as a trademark by someone unrelated to that person, provided the name is not descriptive of the quality or character of the article or a geographic name. The use of names such as Da Vinci, Julius Caesar, Michelangelo are names so widely recognized that they are almost exclusively associated with one historical figure.[11] Such names are generally treated as fanciful and arbitrary and, thus, available to anyone for their use.[12] Given this rationale, it appears that the names of deceased soldiers such as General Patton or David Crockett, whose names are both historical and widely-recognized would be similarly protected. However, in at least one case, the name of a Confederate general, when used as the name of a hotel, was not considered an arbitrary use of a famous historical name, and, therefore, not registrable as a trademark.[13] Therefore, it is unclear when one's name and identify become so historical and widely recognized that they may be used without the consent of the individual or his/her heirs (assuming the pertinent jurisdiction recognizes that such a right in a name or identity descends to an individual's family[14]).

Federal Prohibition Against Endorsements by Servicemembers

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 for a non-federal 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.[15]

III. Effect of Proposed Changes:

This CS prohibits the unauthorized use of the name or image of a member of the armed forces for the purpose of trade or for any commercial or advertising purpose. The CS provides for an

[9] *Campbell v. Seabury Press*, 614 F.2d. 395 (5th Cir. 1980).
[10] *Id.*
[11] *See*, McCarthy on Trademarks and Unfair Competition, Sec. 13:25 (4th Ed.); quoting, Lucien Piccard Watch Corp. v. Crescent Corp., 314 F. Supp. 329 (S.D.N.Y. 1970)(finding, in part, that using the term "Da Vinci" on merchandise would not cause a reasonable consumer to be confused about the origins of the product such that a trademark for the name should be refused).
[12] *See*, McCarthy, supra.
[13] *See, id.*, discussing, *In re Picket Hotel Co.*, 229 U.S.P.Q. 760 (1986)
[14] For a discussion of this issue, see *supra*, note 7.
[15] DoD 5500.7R, s.3-300, a (1).

exception if the member gives prior consent or, in the case of a deceased member, prior consent is received from the surviving spouse, personal representative, or closest living relative.

The CS 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.

The CS provides for a criminal violation. Any person who violates the prohibition commits a misdemeanor of the first degree punishable by up to 1 year in prison or a $1,000 fine.

The CS does not apply to the name, portrait, photograph, or image of an historical figure who had been deceased for 50 years or more.

The CS provides for an effective date of July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The First Amendment of the U.S. Constitution provides that Congress shall make no law that abridges the freedom of speech. The Supreme Court requires that the government shows a substantial justification for restricting this right if a law regulates the content of speech.

The CS's restriction on publishing and printing a service member's name or image may be a restriction on the content of speech. This restriction will likely not apply to news organizations since they enjoy the newsworthiness exception to the right of publicity. The restriction may, however, adversely affect people who use the names or images of service members on goods to protest or support war efforts.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

A small fiscal impact may result from prosecuting violators. However, this cost would be at least partially offset by the imposition of fines and court fees.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

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