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Bill Analysis

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Primary Sponsors: Reps. Mathews and Hillyer

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SUMMARY

Ohio Right of Publicity Law

- Expands Ohio's Right of Publicity Law by eliminating the requirements that an individual's persona have commercial value and that the unauthorized use be for a commercial purpose in order for there to be a violation of the law.
- Prohibits the unauthorized use of a modified facsimile of an individual's persona if a reasonable trier of fact would confuse the modified facsimile and the individual.
- Allows the notifications required to initiate a right of publicity lawsuit to be sent by email rather than by mail or newspaper publication.
- Specifies that exceptions to the law that otherwise authorize the use of an individual's persona in literary work, dramatic work, historical work, audiovisual work, or musical work do not apply to audiovisual works that include a modified facsimile of an individual's persona.

Deepfake recordings

- Prohibits a person, without written consent, to prepare, produce, or develop a malicious deepfake recording of an individual's voice, image, or likeness to distribute, exhibit, or exchange with others.
- Prohibits a person from recklessly distributing any malicious deepfake recording.
- Defines a "deepfake recording" as any visual or audio media in an electronic format, video recording, or sound recording that is created or altered in a manner such that it falsely appears to be an authentic record of the actual speech or conduct of an individual depicted in the media or recording.

- Defines a “malicious deepfake recording” as a deepfake recording created or altered by, or on behalf of, a person that intends to cause harm to another person due to the false nature of the speech or conduct recorded or depicted therein.
- Provides exceptions to the prohibition under the bill for certain malicious deepfake recordings that include a disclaimer or for those that would cause a reasonable person to believe that the material is unauthentic.
- Specifies that a malicious deepfake recording that is pornographic or that falsely depicts or records the speech or conduct of an individual who is under the age of 17 is prohibited by the bill regardless of whether it includes a disclaimer.
- Authorizes an individual injured by a malicious deepfake recording and a consumer of a deepfake recorder to sue the person that violates the bill’s provisions in a civil action.
- Allows for additional statutory damages in a civil action if the crime of extortion is involved in connection with the malicious deepfake recording, regardless of whether there has been a conviction of or a plea of guilty for the crime of extortion.
- Specifies that a person commits the crime of extortion (a third degree felony) when a person distributes, exhibits, or exchanges a malicious deepfake recording that falsely depicts or records the speech or conduct of another individual with the purpose to obtain something of value or to induce another to do an unlawful act.

DETAILED ANALYSIS

Ohio Right of Publicity Law

Background

Ohio’s Right of Publicity Law designates the right to use an individual’s persona as a property right. Currently, the law prohibits the unauthorized use of an individual’s persona, such as the individual’s name, voice, signature, photograph, image, likeness, and distinctive appearance, if it has commercial value and if it is used for a commercial purpose. Continuing law prohibits the unauthorized use of the person’s persona during any of the following periods of time:

1. During the individual’s lifetime;
2. For 60 years after the individual’s death;
3. For ten years after the death of a deceased member of the Ohio National Guard or the U.S. armed forces.¹

¹ R.C. 2741.01 and 2741.02.

Extension to facsimiles and noncommercial situations

The bill eliminates the requirement that the individual's persona have commercial value or that the use is for a commercial purpose in order to constitute a violation of the law. The bill also prohibits the unauthorized use of a modified facsimile of an individual's persona wherein a reasonable trier of fact would confuse the modified facsimile and the individual. The bill does not define "facsimile," but Black's Law Dictionary defines the term as "[a]n exact copy, preserving all the marks of the original."²

Notification requirement

Under continuing law, before initiating a civil lawsuit for a violation under the Right to Publicity Law, a person that 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 lawsuit, if they are living, by mail addressed to the last known address of that individual. The person must also notify any person to whom the individual's right of publicity has been transferred, by mail, or if the mailing address is not known, by newspaper publication. The bill authorizes the use of email to meet these notification requirements.³

Exceptions

Continuing law provides for several exceptions to the Right of Publicity Law. One of those exceptions allows for the use of an individual's persona in literary work, dramatic work, fictional work, historical work, audiovisual work, or musical work, other than advertisements. The bill specifies that this exemption does not apply to an audiovisual work with a modified facsimile of an individual's persona wherein a reasonable trier of fact would confuse the modified facsimile and the individual. Under the bill, audiovisual works that include such a facsimile would be subject to the law.⁴

Deepfake recordings

Prohibitions

The bill prohibits unauthorized preparation, production, development, distribution, exhibition, or exchange of malicious deepfake recordings. A "deepfake recording" is defined in the bill as any visual or audio media in an electronic format, video recording, or sound recording that is created or altered in a manner that it falsely appears to be an authentic record of the actual speech or conduct of an individual depicted in the media or recording. A "malicious deepfake recording" is defined as a deepfake recording created or altered by, or on behalf of, a

² R.C. 2741.01(A) and (D), 2741.02(A) and (B), and 2741.05(A); and Black's Law Dictionary, "[facsimile](https://thelawdictionary.org/)," which can be found at <https://thelawdictionary.org/>, search term "facsimile."

³ R.C. 2741.06(B).

⁴ R.C. 2741.09(A)(1)(a).

person that intends to cause harm to another person due to the false nature of the speech or conduct recorded or depicted therein.⁵

The bill prohibits a person, without written consent of the depicted individual, from doing either of the following:

1. Prepare, produce, or develop any malicious deepfake recording of an individual's voice, image, or likeness to distribute to, exhibit to, or exchange with others;
2. Offer to distribute, exhibit, or exchange with others a malicious deepfake recording.

In addition, the bill prohibits a person from recklessly distributing any malicious deepfake recording.⁶

Exceptions

Disclaimer

A malicious deepfake recording is not considered a violation of the bill's provisions if it includes a disclaimer in a conspicuous place that states that the media or recording has been materially altered in a manner that renders it fictionalized and inauthentic, and it identifies the name and contact information of the entity that is responsible for creating or distributing the media. A malicious deepfake recording that is a political or campaign advertisement must include such a disclaimer to be exempt from the prohibition in the bill.⁷

Material seems inauthentic

If the malicious deepfake recording is not a political or campaign advertisement and it appears in a context that would cause a reasonable person to believe that the material is inauthentic, such as in a parody or fictionalized movie, then it is also not a violation of the bill's prohibition, regardless of whether it includes a disclaimer.⁸

Pornographic or underage material

None of the exceptions above apply to any malicious deepfake recording that is pornographic or that falsely depicts or records the speech or conduct of an individual who is under the age of 17, regardless of whether it includes a disclaimer or seems inauthentic.⁹

⁵ R.C. 2742.01(A) and (B).

⁶ R.C. 2742.02(A) and (B).

⁷ R.C. 2742.02(C)(2).

⁸ R.C. 2742.02(C)(1).

⁹ R.C. 2742.02 (D).

Civil action

Remedies

An individual injured by a malicious deepfake recording that does not meet the bill's exceptions may sue the person that violates the prohibition within four years after the alleged violation for any of the following:

1. Either actual damages or, at the election of the plaintiff, statutory damages in an amount between \$2,500 and \$10,000, as determined by the trier of fact, taking into account the willfulness of the violation, the harm to the individual in question, and the ability of the defendant to pay a civil damage award;
2. Punitive or exemplary damages, if applicable;
3. Temporary or permanent injunctive relief.¹⁰

In addition to the remedies described above, if the plaintiff establishes by a preponderance of the evidence that the defendant committed the crime of extortion in relation to a malicious deepfake recording, regardless of whether there has been a conviction of or plea of guilty of the crime of extortion, the court must additionally award the plaintiff statutory damages based on the amount the defendant extorts or attempts to extort from the plaintiff whose voice, image, or likeness is used in the deepfake recording. The amount of statutory damages must be determined subject to the following limitations:

- If the value of the thing of value or valuable benefit involved in the violation is less than \$1,000, the amount of statutory damages cannot exceed \$2,500.
- If the value of the thing of value or valuable benefit involved in the violation is \$1,000 and less than \$7,500, the amount of statutory damages cannot exceed \$5,000.
- If the value of the thing of value or valuable benefit involved in the violation is \$7,500 and less than \$150,000, the amount of statutory damages cannot exceed \$10,000.
- If the value of the thing of value or valuable benefit involved in the violation is \$150,000 or more, the amount of statutory damages cannot exceed \$15,000.¹¹

The court may also award the prevailing party reasonable attorney's fees, court costs, and reasonable expenses associated with the civil action. As part of a final judgment, a court may order the destruction or other reasonable disposition of a malicious deepfake recording, including by requiring the defendant to take affirmative steps to cause others to take down the malicious deepfake recording and by requiring the defendant to indemnify the plaintiff for any past or future expenses associated with the plaintiff's efforts to have the malicious deepfake

¹⁰ R.C. 2742.03(A) and (C).

¹¹ R.C. 2742.03(B).

recording removed or destroyed. The trier of fact must include any profits derived from, and attributable to, a violation in calculating the award of actual damages.¹²

The remedies described above are in addition to any other remedies provided for by state or federal statute or common law.¹³

Standing

Under the bill, any person that purchases a deepfake recording, while holding a good-faith belief that the recording is authentic, may commence a civil action in a court of competent jurisdiction against a person who violates the prohibition under the bill for either (1) treble the amount of the actual economic damages or (2) at the direction of the plaintiff, statutory damages in the amount of \$250.¹⁴

Crime of extortion

The bill specifies that a person commits the crime of extortion, a third degree felony, when a person distributes, exhibits, or exchanges a malicious deepfake recording that falsely depicts or records the speech or conduct of another individual with the purpose to obtain something of value or to induce another to do an unlawful act.¹⁵

HISTORY

| Action | Date |
|------------|----------|
| Introduced | 12-21-23 |

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¹² R.C. 2742.03(D), (E), and (F).

¹³ R.C. 2742.04(A).

¹⁴ R.C. 2742.04(B).

¹⁵ R.C. 2905.11.