



TACIR

The Tennessee Advisory Commission
on Intergovernmental Relations



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MEMORANDUM

TO: Commission Members

FROM:  Synnise Roehrich-Patrick
Executive Director

DATE: 20 November 2014

SUBJECT: Civil Remedies for Invasion of Privacy—Draft Report for Review and Comment

The attached draft Commission report, prepared in response to House Bill 1855 by Representative Ryan Williams (Senate Bill 1840 by Norris), which was sent to the Commission by the House Civil Justice Committee of the 108th General Assembly, is submitted for review and comment. If passed, the bill would have expanded current common-law rights to sue for invasions of privacy by creating a new civil cause of action for capturing or attempting to capture an image, recording, or impression by using a visual or auditory enhancing device. The bill would also have strengthened existing law in certain cases by creating harsher penalties for physically trespassing with the intent to capture an image or recording, assaulting or falsely imprisoning someone for the purpose of capturing an image or recording, and directing or inducing another person to do one of the above, including the new cause of action. Legislation similar to House Bill 1855 was introduced in 2011 but failed to make it out of committee.

Current law provides a number of remedies for invasion of privacy, but because no cases have raised the issue, it is impossible to know whether courts would extend these remedies to "virtual" invasions of privacy. Moreover, these remedies allow recovery only for actual losses and, under the most egregious circumstances, punitive damages. Punitive damages would have been explicitly authorized by the bill but were capped at three times actual damages. The bill would also have provided for payments of the profits to the aggrieved party if the image, recording, or impression were captured for commercial purposes, regardless of whether it was ever used, a remedy that seems to have been designed more to benefit persons whose actual damages are substantial, such as celebrities or other public figures.

There is some concern about the application of the bill to the media, but while the *use* of a broadly drafted law to restrict the media's free press rights might be unconstitutional, that use will not render the law itself unconstitutional. The bill as drafted provides penalties against

third-party publishers under certain circumstances, a provision that appears to have been drafted with First Amendment cases in mind, but an amendment adopted in committee would have exempted the “established news media,” a form of discrimination that raises Fourteenth Amendment equal protection issues—as well as First Amendment “identity of the speaker” issues, especially since *Citizens United v. FEC*—and likely renders that amendment unconstitutional. Regardless, the bill included a severability clause that would save the broader bill if either of these provisions were found unconstitutional.