



June 8, 2017

### **Memorandum Opposing Assembly Bill A08155**

Dear Members of the New York State Assembly and Senate:

I am writing in response to Assembly Bill A08155, a right of publicity bill, which was introduced last week and seems poised to be rushed through the legislature before the session ends for the year. This letter offers my initial comments and provides reasons why rushing this bill through would be a big mistake. I would be happy to submit a more detailed analysis of the issues and to meet with any of you and to testify before the legislature with regard to any possible right of publicity of bill in the great state of New York.

New York's Right of Privacy, currently contained in Sections 50 and 51 of the Civil Rights Laws, was passed in 1903 and has been in place and working for more than 100 years. It is unwise to upset this longstanding legislation and case law in such a significant way without giving the legislation the hearings and consideration that such a dramatic change deserves. New York, along with California, is a particularly important state on such issues, not only because of its size, but also because of the large number of organizations, companies, and individuals likely to be affected by the adoption of such a law. A change in New York's law is not only likely to impact its own citizens, but also to have reverberations around the country. Commensurate with such stature, the state of New York owes itself, its citizens, and those of the rest of the country due care in considering, developing, debating and adopting such a new and wide-reaching right of publicity.

I am a Professor of Law and the Joseph Scott Fellow at Loyola Law School, Loyola Marymount University in Los Angeles, California. I have also been a faculty member at Washington University School of Law in St. Louis, Missouri. I am an elected member of the American Law Institute and an affiliated fellow at the Yale Information Society Project at Yale Law School.

I am nationally recognized for my work in the intellectual property field, and am the leading voice on issues involving the right of publicity. My blog and website, *Rothman's Roadmap to the Right of Publicity*, [www.rightofpublicityroadmap.com](http://www.rightofpublicityroadmap.com), is the go-to source for content creators, lawyers, and business people who need to sort through the complex issues involved in this area of law. I have published numerous articles on the topic, and have a forthcoming book on the topic, tentatively titled, *The Right of Publicity: Privacy Reclaimed for a Public World*, to be published in the Spring of 2018 by Harvard University Press.

The proposed bill that I reviewed is posted on my website, although I have recently been sent a proposed amendment offered by SAG-AFTRA that would undermine the speech-protective exemptions of the proposed bill entirely and set up a conflict with both the First Amendment and federal copyright law.

As time is apparently of the essence, I want to briefly highlight several of my concerns with the current draft and urge you to delay moving forward with any bill on the subject until you can fully consider all of the issues and draft a more carefully considered piece of legislation.

Some of these concerns are as follows:

- **The Bill Eliminates Current Privacy Laws in New York**

Assembly Bill A08155 turns what used to be a “right of privacy” into a “right of publicity” that is a freely transferable property right in a person’s “name, voice, signature, or likeness.” The bill appears to eliminate the right of privacy in New York and replace it with a right of publicity. This sea-change is troubling and calls into question the more than 100 years of case law all decided under the privacy statute. The status of privacy itself in New York would be jeopardized if the bill passes.

Such a change is likely to undermine privacy protection in the state, while at the same time creating great uncertainty (and lots of litigation) about what sorts of uses of people’s identities are allowed, and what are not allowed.

- **The Bill Dangerously Expands Liability**

The bill greatly expands liability for uses of people’s identities. The proposal would expand liability from being limited solely to uses of a person’s “name, portrait, picture or voice” to cover uses of a person’s “likeness,” including uses of any “characteristic” that is “recognizable” of the person, including “gestures” and “mannerisms.”

This would be a big change in New York law, which has largely avoided the expansive readings of “persona,” and liability for the mere evocation of a person. The proposed legislation might allow *White v. Samsung*-like holdings in New York. In *White*, the Ninth Circuit Court of Appeals allowed liability merely for conjuring up in the minds of viewers Vanna White’s identity by showing a robot on the *Wheel of Fortune* set wearing a blonde wig and turning letters. This holding has been roundly criticized and has opened the door to actors preventing copyright holders from recasting roles, and making derivative works of their original shows. These are concerns that should be of particular interest to a state that is home to Broadway.

The proposed bill also expands liability beyond uses solely for purposes of “advertising” or “trade,” to include uses that are “not-for-profit,” putting a much greater swath of creative works and speech at risk.

- **The Bill Provides Post-Mortem Rights without Sufficient Limits or Justifications**

New York has survived for more than 100 years without a post-mortem right of publicity. Performers, actors, models, and citizens of the state have thrived in its absence. Yet, this bill would provide a right that would last for 40 years after death.

It is true that approximately 25 states currently offer post-mortem rights in some form (some only to deceased soldiers), and that California, another home of a large number of celebrities with commercially valuable personalities that might generate post-death income, provides a 70 year post-death period of protection.

But just because some heirs and potential heirs, and SAG-AFTRA want such a right does not mean New York should offer one up. What justifies such a right? One need not reward the dead for their lifetime of achievements for which they were already compensated. The possibility of such post-mortem rights does not incentivize the living in any significant (or positive) way. Nor can the dead be offended by uses of their identities after they are gone.

It may be appropriate to provide a limited time post-death bar on commercialization that heirs could use narrowly to prevent crass uses of their loved ones. But why should heirs receive a 40-year windfall? As the battles over recently deceased musician Prince's estate demonstrate, the winners of the rights over the deceased's right of publicity may have little connection to the deceased, or at least none that merits their getting a monopoly in using his identity and reaping hundreds of millions of dollars that could instead be spread more equitably in this instance across Prince's fans and the public.

I note that Minnesota does not currently have a post-mortem right of publicity and when Prince's estate lawyers and others tried to push through a rushed bill to the Minnesota legislature, that legislature had the good sense to put the brakes on, slow things down and give themselves more time to consider the issues involved. If they determine that something needs to be done, they will be able to draft something that is more carefully thought-through and publicly debated.

Perhaps the most troubling aspect of the proposed post-mortem provision is that it applies to anyone whose identity is used in New York state—most post-mortem rights are limited to those who died domiciled in a particular state. (California's right is so limited.) Recently, Washington state and Hawaii have both added post-mortem provisions that apply to those who were not domiciled in the state at the time of death. Such a change in the massive market of New York state will open the floodgates to the heirs of the dead to sue in New York, including those who died in states and even countries, like England, that do not offer such rights to their deceased.

The provision also does not address the effect on previously-produced works that include deceased individuals, raising a host of unanswered concerns.

The provision also potentially leaves heirs with a massive estate tax bill that could force them to commercialize the deceased, even if that is not what the grieving surviving family members wish to do, nor what the dead person would have wanted.

### **•The Bill Jeopardizes the Very People it Seeks to Protect**

The new transferability of a person's right to her "name, voice, signature and likeness," is highly problematic. New York's current law likely does not allow transfers of a person's identity to a third-party. As I have written in *The Inalienable Right of Publicity*, 101 Georgetown Law Journal 185 (2012), allowing such transferability does not help identity-holders, but instead risks their losing control over their own names, likenesses, and voices to creditors, ex-spouses, record producers, managers and even Facebook.

**• The Proposed Exemptions are Insufficient, Muddled and the Proposed SAG-AFTRA Amendment Unacceptably Restricts Free Speech, and Newsworthy Uses in the Public Interest that Have Long Been Protected under New York Law**

Although the enumerated exemptions soften the blow of the otherwise broad reach of the proposed new right, at least in the context of news and expressive works, the bill does not define what it means by a “transformative creation.” Perhaps the bill seeks to import California’s First-Amendment based, transformativeness test. But this is a confused test that has generated conflicting interpretations and decisions across the country and much criticism. It should not be imported into New York law, and certainly not without a definition.

The proposed SAG-AFTRA amendment would undermine all of the speech-protective exemptions by making them inapplicable if the use infringes “upon traditionally licensed commercial uses” or replaces “professional performance or modeling services rendered in the entertainment or sports industries” or replicates “the same activity by which the individual achieved their fame or derives their income.” This appears to apply to almost all uses in which a professional performer could have been hired or paid, which could include virtually all uses in expressive works.

This proposed amendment would likely run afoul of the First Amendment and copyright law. It would unduly chill speech and generate massive litigation and uncertainty about the scope of the law. It also would likely lead to the federal courts deciding the scope of New York’s right of publicity law, rather than state courts.

In sum, a lot more thought and work needs to go into any proposed right of publicity in New York. I respectfully request that you do not rush A08155 through at the end of your legislative session and give it the robust, public, open debate that it deserves. It has taken more than one hundred years to develop the right of privacy in New York; it should not be unraveled in a single week. I am happy to be of service to you in the process and to address any questions you have about these comments.

Sincerely,

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