MEMORANDUM IN OPPOSITION
Assembly Bill 8155B (Morelle)
Right of Publicity

The Entertainment Software Association ("ESA") and its member companies oppose the recent amendment to Assembly Bill 8155B ("A.8155B"), which is fraught with deficiencies and inconsistencies that would burden New York courts and jeopardize the First Amendment rights of the creators and distributors of motion pictures, television programs, books, video games, and other expressive works. We respectfully urge members of the Legislature to vote no on final passage of the bill.

ESA is a national organization whose members publish computer and video games for video game consoles, personal computers, handheld and mobile devices, and the Internet. The video game industry contributes significantly to the New York economy. The state is home to 228 video game companies.[1] As of 2015, these companies employed 4,500 individuals, with the average compensation exceeding $100,000 annually.[2] That same year, the video game industry contributed $936 million to the state's economy.[3]

In recent years, plaintiffs have increasingly targeted right of publicity claims at expressive works. Plaintiffs have included the late Panamanian dictator Manuel Noriega, who sued over the use of his persona in a video game, the estate of John Dillinger that sued in Indiana over the use of his name in a video game, and the estate of Rudolph Valentino that sued over the use of his name and likeness in a motion picture. Although the defendants prevailed in those cases, other courts have declined to dismiss such claims at the outset, causing creators to incur substantial economic burdens. For example, New York-based video game maker Take-Two Interactive was recently forced to spend more than $1 million defending itself against two right of publicity lawsuits brought by actress Lindsay Lohan and reality star Karen Gravano, even though the New York State Court of Appeals summarily dismissed the claims. *Lohan v. Take-Two Interactive Software, Inc*., 31 N.Y.3d 111, 120 (2018); *Gravano v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 988, 990 (2018). The proliferation of these lawsuits has a "chilling effect upon the exercise of First Amendment rights," which "may derive from the fact of the prosecution [of a lawsuit], unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). Put differently, because "the costs of a successful defense can be the same or greater than what the damage awards would have been," *Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1110, 1142-1143 (9th Cir. 2003), publishers "will tend to become self-censors" unless they "are assured freedom from the harassment of lawsuits[.]" *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966).

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[1] *Video Games in the 21st Century: Economic Contributions of the US Entertainment Software Industry, New York* (February 2017), *available at* http://www.theesa.com/article/u-s-video-game-industry-expands-50-states-supporting-220000-jobs-30-4-billion-revenue/.
[2] *Id.*
[3] *Id.*

A.8155B will have exactly such a chilling effect. The bill vastly and unjustifiably expands existing publicity rights in New York, contains woefully insufficient protections for the creators of expressive works, and has no mechanisms to deter frivolous litigation. These defects threaten to make New York a haven for meritless claims brought by plaintiffs from all over the world.

For more than 100 years, New York plaintiffs have obtained relief under the state's existing right of privacy statute. With over a century of case law interpreting the statute, this area of the law is well established and need not be amended. A.8155B nonetheless attempts to do so and fatally fails. The bill would create a new, separate right of publicity that is unlimited by an individual's domicile, residency, or lifetime, extending 40 years after death. Consequently, individuals from all over the United States and the world, as well as their heirs, representatives, and others—such as creditors, managers, and agents—could and would bring claims in New York, even if they have no connection to New York and even if they would have no right to bring such a claim where the individual lives or lived. Many jurisdictions, such as England, have no post-mortem publicity right at all. And, as discussed below, most states have far more robust expressive works exemptions than A.8155B. Plaintiffs who cannot silence creators and distributors of expressive works in those jurisdictions will simply file suit in New York.

Perhaps most stunningly, A.8155B expands existing publicity rights by creating a new violation for the use of a "digital replica" in a manner that "is intended to create, and that does create, the clear impression that the individual represented by the digital replica is performing, the activity for which he or she is known, in the role of a fictional character." The bill contains a similar prohibition specific to athletes. It is difficult to make heads or tails of this confusing, ambiguous language. For a violation to occur, must the individual be known for portraying a fictional character, or be known as an actor who happens to be portrayed as a fictional character, or something else? And, what does it mean for an impression to be "clear"? This language is incomprehensible and unconstitutionally vague; it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008).

The digital replica section is also unconstitutional in that it threatens the ability of creators to make biographical movies, television shows, and video games about actors or athletes because even if an individual is played by an actor, a viewer might think that the individual is "performing[] the activity"—an activity that the person is known for doing. As a consequence, innumerable expressive works protected by the First Amendment may be vulnerable to legal attack in New York. A biography of a deceased athlete would be unlawful if the athlete's depiction were created with computer enhancements for historical accuracy. The 2016 Oscar-nominated film *Hidden Figures*, which recreated the activities of its subjects, three African-American women mathematicians who worked for NASA beginning in the 1960s, would be at risk. As would the Emmy Award-winning television series *People v. O.J. Simpson: American Crime Story*, which arguably created the "clear impression" that the attorneys in the O.J. Simpson criminal case were lawyering, "the activity for which [they are] known." Films like *The Post*, *Spotlight*, *The Big Short*, *The Hurt Locker*, *Argo*, *A League of Their Own*, and many others similarly depict individuals doing activities for which they are known, and thus may perversely be excluded from the bill's expressive works exemption. This will undoubtedly have a chilling effect on the creation and distribution of expressive works in New York.

To avoid this effect, most state statutes (and all recently enacted statutes) contain robust expressive works exemptions.[4] For this reason, in 2015, Arkansas Governor Asa Hutchinson vetoed right of publicity

[4] *See, e.g.,* Ohio Rev. Code Ann. § 2741.09(A)(1)(a) (exempting use of a person's name or likeness in a "literary work, dramatic work, fictional work, historical work, audiovisual work, or musical work regardless of the media in which the work appears or is transmitted"); Nevada Stat. § 597.790(1) (exempting use of a person's name or likeness "in a

legislation that failed to include an adequate expressive works exemption. Although A.8155B ostensibly includes such an exemption, it is insufficient. For example, the exemption indefensibly applies only to the right of publicity, not the right of privacy. And yet, as New York's highest court held just this year, "courts have cabined [the right of privacy] to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest guaranteed by the First Amendment." *Lohan*, 31 N.Y.3d at 120. By failing to recognize and incorporate these principles, the bill threatens these protections.

Worse, the exemptions that apply to the right of publicity in A.8155B do *not* apply to the use of a "digital replica." Instead, a digital replica is exempt only in specified, narrower circumstances. The narrower exemption may leave unprotected works like the video game *President Forever 2012*, which allows users to simulate the 2012 presidential election and features Barack Obama, Mitt Romney, Newt Gingrich, and Herman Cain, as well as *Conflict: Desert Storm*, which allows users to simulate battles from the first Gulf War. Under the proposed bill, the individuals depicted in those works (and their heirs and representatives) might have the right to bar the use of their names and likenesses or to condition such use on payment of a license fee and/or a more positive portrayal. Such a result would be antithetical to free expression and raise significant First Amendment concerns.[5]

The flaws in the proposed legislation would not be as troubling if the bill contained provisions to deter meritless litigation—such as a requirement that plaintiffs who file frivolous suits pay the attorneys' fees incurred by prevailing defendants. Discouraging even meritless claims is essential because litigation itself has a chilling effect. "[W]here particular speech falls close to the line separating the lawful and the unlawful," a speaker who "knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Consider Take-Two, which was forced to simultaneously litigate two meritless cases through three levels of the New York court system at great cost. *See Lohan*, 31 N.Y.3d 111; *Gravano*, 31 N.Y.3d 988. If such claims become *more* prevalent, as they will under A.8155B, companies like Take-Two may well consider minimizing their New York footprint or doing business elsewhere.

A.8155B is the most recent in a slate of attempts to expand New York's protections for personality rights. But it is also one of the most concerning. We respectfully submit that New York, one of the world's largest media and entertainment meccas, should not enact a right of publicity bill that so plainly undermines constitutionally protected expression

For all of these reasons, we strongly oppose A.8155B and respectfully urge a no vote.

play, book, magazine article, newspaper article, musical composition, film, or a radio, television or other audio or visual program").