MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Memorandum in Opposition to New York Assembly Bill A.8155B (Morelle, Right of Publicity)

June 8, 2018

The Motion Picture Association of America, Inc. ("MPAA") and its member companies[1] oppose A.8155B (the "Bill") as amended on June 5, 2018. Regrettably, the latest version of the Bill would restrict the ability of our members to tell stories about and inspired by real people and events. Such restriction is simply not permitted—not by the First Amendment to the United States Constitution, not by Section 8 of the New York Constitution, and not by decades of well-settled case law in New York and around the nation in which courts have barred right of publicity and similar claims in the context of motion pictures, television shows, and other expressive works. We respectfully urge members of the Legislature to vote no on final passage.

The MPAA's member studios are the major producers and distributors of motion pictures and television programs in the U.S. Many of these movies and television programs tell stories about, or inspired by, real people and events; *Citizen Kane*, *Spotlight*, *Knute Rockne, All American*; *The Hurt Locker*, *Snowden*, *Ray*, *Jackie*, *Raging Bull*, *The Social Network*, *Hidden Figures*, *Frost/Nixon*, *A Beautiful Mind*, and *The Help* are but a few examples in this genre. Filmmakers have the right under the First Amendment and existing New York case law to tell these stories, whether or not they have obtained consent from their subjects. It is thus critical that the Legislature not interfere with this right, including through amendments to N.Y. Civ. Rts. L. §§50/51, which has long been limited to uses in "advertising … or for the purposes of trade," and which must remain carefully cabined so as not to encompass uses in expressive works, including motion pictures and television programs.

The Bill proposes a radical—and unjustified—expansion of existing New York law in this area, which risks severely inhibiting the ability of the MPAA's members to tell stories about and inspired by real people and events. Among other flaws, the Bill:

- Lacks any domicile requirement. The absence of such a requirement would invite individuals from all over the U.S., and even from countries all over the world, to bring lawsuits in New York courts. This would overburden the already overworked New York

[1] Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

judicial system, and create conflicts with the laws of other states and nations, where right of publicity laws differ in significant respects.

- Would create a new property right designated as a "right of publicity" to exist alongside the "right of privacy." The new right of publicity would continue to exist 40 years past the individual's death. No justification has been offered for this new right, which could potentially be used to censor histories, biographies ("biopics"), and other fact-based works.

- Fails to include exemptions that would bar lawsuits based on the right of **privacy** over uses in expressive works (even though it includes such exemptions for the right of **publicity**). The lack of an expressive works exemption for the right of privacy is wholly unjustified, and would put New York far out of step with the many states that have enacted clear statutory exemptions from right of publicity/privacy claims for uses in books, movies, television programs, news broadcasts, and similar works.

- Would create new rights governing the use of "digital replicas" of actors, musical performers, and athletes. The wording of these provisions is extremely problematic and would unconstitutionally inhibit the ability to make "biopics" about actors, musical performers, and athletes.

- Create a new right intended to address the issue of "deepfakes" (sexually explicit videos in which mainstream celebrities' faces are digitally placed on the bodies of pornographic actors without the celebrities' consent). While MPAA agrees that the emerging "deepfake" problem deserves attention, the hastily-drafted provision in the Bill would result in unintended, harmful consequences and is likely unconstitutional. The provision governs uses in "pornographic work[s]," but the Bill does not define that term, which is extremely vague and lacks any accepted legal meaning. Also, there are no exceptions or limitations in the Bill that would exempt uses in clearly First Amendment-protected contexts including news reporting, commentary, and analysis.

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In conclusion, we must reiterate the fundamental importance to the MPAA's members of preserving their First Amendment right to make motion pictures and television programs about and inspired by real people and events—a right that is threatened by overbroad right of privacy/publicity legislation and the lawsuits that inevitably flow from them. It is this right—a right against both crushing financial penalties and against censorship itself—that enables the MPAA's members and other filmmakers to tell stories about real people and events in motion pictures and television programs like *The Post* (The *Washington Post*'s publication of the Pentagon Papers), *Dunkirk* (World War II battle), *I, Tonya* (Tonya Harding's ice skating career), *The Disaster Artist* (the making of the movie *The Room*), *Darkest Hour* (Winston Churchill's decisions during World War II), *All the Money in the World* (Kidnapping of John Paul Getty III), *Molly's Game* (Olympic-class skier who ran the world's most exclusive high-stakes poker game), *The Crown* (Queen Elizabeth II and the royal family), *The King's Speech* (King George VI), and countless others. The MPAA and its members—to ensure their ability to continue to make such works—thus **oppose** the Bill and urge a **no** vote.