



**Memorandum in Opposition to New York Assembly Bill A08155B
(Right of Publicity)**

June 8, 2018

NBCUniversal submits this memo in opposition to Assembly Bill A08155B, which would seriously jeopardize our ability to tell stories about real people. Expressive works like television shows and films are entitled to full First Amendment protection, and those engaged in the creation and distribution of those works should not face the specter of frequent and drawn-out litigation to vindicate that protection. Yet the bill's overbreadth and ambiguities would invite exactly that sort of litigation over works that depict real people and events, the prospects of which will unconstitutionally chill our ability to create those valuable works. The bill's serious flaws include the following:

BILL MAKES CONTENT CREATION IN NEW YORK SIGNIFICANTLY MORE RISKY THAN OTHER JURISDICTIONS

- The bill creates a new “Right of Publicity” that will coexist with New York’s existing “Right of Privacy.” During lifetime an individual would have *both* a “personal” “Right of Privacy” *and* a “Right of Publicity” that is confusingly described as an “independent property right derived from and independent of the right of privacy” -- *both of which protect against the same thing*: “unauthorized use” of “name, portrait, picture, voice or signature for advertising purposes or purposes of trade.” Yet, there is no indication of whether the decades of state and federal jurisprudence that exempt expressive works from application of the existing Right of Privacy statute are also to be applied to the new “Right of Publicity,” even though most living plaintiffs will predictably sue on both rights. This is a complete recipe for court confusion and will create uncertainty for creators and distributors, making content creation and distribution in New York significantly more risky than elsewhere for a very long time.

LACK OF NYS DOMICILE CREATES CONFLICTS ACROSS STATE & INTERNATIONAL LINES

- The bill permits claims in the name of living and deceased individuals worldwide, even if the law of the jurisdiction in which the individual resides or was domiciled at death would not permit such claims. This would lead to conflicts across state and international lines over the rights and remedies to be applied to a particular alleged violation. There is no good reason for New York to increase the burdens on its already overtaxed court system to provide remedies to non-New York citizens that will be inconsistent with potential parallel suits over the same violations in their home jurisdictions.

UNCERTAIN STATUS OF CREATIVE WORKS UNDER THE BILL WILL CHILL CREATIVITY AND INVESTMENT

- The exceptions in the bill barring lawsuits over depictions in expressive works apply only to Right of Publicity claims and do not apply to the existing Right of Privacy. That entirely unjustified omission would put New York far out of step with all modern corresponding state statutes which have clear statutory exemptions for uses in books, movies, television programs, news broadcasts, and similar works.

BILL CREATES UNPRECEDENTED RESTRICTIONS ON CREATIVITY AND TECHNOLOGICAL INNOVATION WITHOUT TIME FOR ANALYSIS OF THE IMPLICATIONS

- The bill creates an unprecedented new category of protection for “digital replicas” of living or deceased individuals. These provisions have potentially far-reaching implications, yet there is scant time left in the session for New York’s legislators to explore and consider them. NBCUniversal respectfully disagrees that there is an actual pressing problem involving unauthorized “digital replicas” of people that warrants rushed legislative intervention. In addition, this portion of the bill suffers from significant flaws, including:
 - The section heading appears to limit the provision’s scope to use of a digital replica “*for purposes of trade in an expressive work,*” although the body of the section makes no reference to either “purposes of trade” or “expressive work.”
 - Even more confusingly, to be actionable the “digital replica” must simultaneously create the impression that the individual is “performing the activity *for which he or she is known,*” but “in the role of a *fictional character.*”

These ambiguities are virtually guaranteed to result in years of litigation over whether biopics depicting performers, musicians or athletes may be created using special effects technologies, creating an unconstitutional chilling effect on uses of innovative new technologies in films or television shows.

New York law already vindicates the rights of individuals whose personas are used for commercial purposes without their permission. In attempting to expand those rights, the proposed bill unconstitutionally restricts core creative expression, and will chill investment in works that tell important stories about real people and real events. For the foregoing reasons, NBCUniversal respectfully **opposes** the proposed bill and urges a “**No**” vote.