New York State Bar Association
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Memorandum in Opposition

COMMITTEE ON MEDIA LAW

Media #2 June 16, 2015

S. 5650 By: Senator DeFrancisco
A. 7904 By: M. of A. Morelle
Senate Committee: Codes
Assembly Committee: Judiciary
Effective Date: One year after it shall have become a law

AN ACT to amend the civil rights law and the civil practice law and rules, in relation to the right of publicity.

LAW AND SECTIONS REFERRED TO: Article 3-A of the civil rights law

THE COMMITTEE ON MEDIA LAW OPPOSES THIS LEGISLATION

The New York Bar Association's Committee on Media Law (the "Committee") submits this memorandum in opposition to Senate Bill 5650 and Assembly Bill 7904, which would create a property right in a deceased individual's persona for 70 years after the person's death. The Committee's mission statement directs its members to "consider all questions of public importance pertaining to First Amendment rights, access, freedom of information, government open meetings laws, media ownership, libel and privacy, privilege, confidentiality, advertising, fair trial/free press, and others." Having considered this proposed legislation, the Committee concludes that the legal ambiguities created by the law, and the costs attendant thereto, far outweigh any benefit to the public, and thus the legislation should not be adopted. In short, the proposed legislation would create a boondoggle for litigators at the expense of the First Amendment, copyright holders, and a large swath of New York's media-related industries. Moreover, public policy counsels against passage of such an incongruous law.

The Proposed Law is Vague, and Its Implications Uncertain

The proposed law is too vague and unclear to provide the courts with an unambiguous path to enforce the statute. Such ambiguities and uncertainties have long resulted in protracted litigation, and same should be anticipated here. In the instant case, not only would an increase in litigation ensue, but the inequality in the statute would result in people being worth more dead than alive. From a public policy position alone, the survival of the individual should be treasured, rather than the rights of that person's heirs to collect from the deceased person's popularity.

Presently, the only law on the books approximating a "right of publicity" in New York is the codification of the right of privacy under New York Civil Rights Law § 51. "New York does not recognize a common-law right of privacy and Section 51 [of the Civil Rights Law] was enacted to 'provide a limited statutory right of privacy.'" *Messenger v. Gruner + Jahr Printing & Publishing*, 94 N.Y.2d 436, 441 (2000). "[T]he statute is to be narrowly construed and 'strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.'" *Id.*

This limited right has long been understood to be a purely personal right that is non-assignable and non-descendible. *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 589 F. Supp. 2d 331, 333 (S.D.N.Y. 2008); *Bowman Gum, Inc. v Topps Chewing Gum, Inc.*, 103 F. Supp. 944 (E.D.N.Y. 1952). Moreover, it is well settled that privacy-based rights, both in New York and across the country, terminate with the death of the privacy-holder. *See, e.g., Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979); *Nicholas v. Nicholas*, 83 P.3d 214, 228-29 (Kan. 2004); *see also* RESTATEMENT (SECOND) OF TORTS § 6521 (1977).

This legislation would alter the status quo, but would not amend Civil Rights Law § 51. Instead, the proposed legislation seeks to add a new, discrete right that is applicable only to the deceased. The proposed law defines persona, and the rights flowing from it, far broader than is set forth in Civil Rights Law § 51. The legislation creates liability for using "any aspect" of a deceased person's "persona" for "commercial" purposes. Remarkably, this new right would be broader than the rights presently conferred upon living individuals pursuant to Section 51 of the Civil Rights Law, as the definitions of both "persona" and "commercial purpose" in the proposed legislation encompass far greater conduct than the analogous standards contained in Civil Rights Law § 51.

The "justification" for the legislation sets forth that the bill provides for a "right of publicity" for deceased personalities and grants this property right to a deceased personality's estate for a term of seventy (70) years following their death". The proposed law is not a continuation of the existing law, but rather a new separate right created specifically for heirs that the living individual never had and could not license. The "justification" further notes that "New York's deceased personalities, in many instances, spent entire careers building reputations and bodies of work that are a property right that should not be extinguished with their passing." However, the right that the bill seeks to protect for living individuals does not exist to the extent set forth in the legislation. The law does not reward the individual during his/her lifetime, but rather it rewards those heirs fortunate to receive the rights.

Accordingly, the legislation would create an anomalous situation whereby a duly licensed use between a content creator and an individual may be broad enough to permit a specific use while the individual is alive, but becomes instantly too narrow upon the individual's death. There is no discernible benefit to New York or its citizen arising from such a scheme.

The result will be two divergent bodies of law governing the commercial use of name and likeness: one for the living, and one of the dead. This divergence will increase licensing costs, and inevitably lead to protracted litigation.

It is also foreseeable that there will be legal battles over when a person is truly dead, and whether the heirs of a celebrity made health care decisions based on financial motives. Neither of these scenarios benefit the citizens of New York.

On a related point, the descendiblity of the proposed "right of publicity" is premised entirely upon an individual's status as a New York domiciliary. However, there is no articulated standard in this law for determining whether a particular individual was a New York domiciliary at the time of her death. Naturally, this could lead to forum shopping that will clog the already overworked New York courts, and result in costly and laborious choice of law analyses – analyses that will necessarily require the courts to speculate about each decedent's "intention to make [New York her] domicile" at the time of death, without the benefit of the decedent's testimony. *Rawstorne v. Maguire*, 265 N.Y. 204, 208 (1934). For celebrities with multiple residences, the analysis will amount to pure guesswork as to the legislation's applicability. While anticipating death, an individual should not need to worry whether they are going to die in the right state or not. In the event that death is unanticipated, as most are, is passing a law that will reward the heirs of someone who dies in the right place the proper motive?

Moreover, the definition of a "commercial purpose" contained in the bill may cover nearly all facets of radio, television, and network broadcasting, as well as any distribution of photographs and motion pictures – provided only that the content enters the borders of the State. As a result, content providers with national reach will be forced to conform to the laws of New York in order to transact business – a potentially impermissible restriction on interstate commerce. This too can result in uneven rulings interpreting the law.

The Law's Adverse Consequences are Numerous

Faced with the foregoing flaws, the legislation would need to serve a clearly articulable need to justify the costs and uncertainty it would create. There is no clear need for such a law. In reality, the legislation does the opposite by creating adverse consequences for many New York businesses, while benefiting few, if any, of its citizens. In fact, a person could die in New York with only heirs in New Mexico, and the citizens of New Mexico would receive far more benefits from the statute than the citizens of New York.

In addition, the "newsworthy exemption" is far too subjective, and is therefore likely to have a chilling effect on free speech. As drafted, the exemption applies to a work of "political or newsworthy value" concerning "public interest." Without further guidance, news editors around the country seeking to publish in New York will have to make their best guess as to what is of "political value" and what is in the "public interest." Faced with the high costs of litigation, an editor may be forced to err on the

side of quashing a story rather than engaging in the years of litigation that may be necessary to vindicate her interpretation of "newsworthy value" or "public interest." Strikingly, the radio industry is not included in the "newsworthy exemption" at all, making the threat to broadcast news even greater.

Furthermore, because the bill seeks to extend the "right of publicity" backward into time by seventy years, the proposed legislation would divest copyright holders in New York of valuable property. For example, a photographer with a copyrighted image of a deceased celebrity taken in 1975 can freely license that image today. However, if the legislation is passed, that same image cannot be fully cleared for use without the end user obtaining a license from the estate of the deceased celebrity. If the estate cannot be located, or is not agreeable, or seeks too high a rate of compensation, the estate can block the licensing of the image – thereby effectively divesting the photographer of his rights under the Copyright Act.

This unfortunate situation persists even if the photographer obtained a license or a waiver from the deceased celebrity at the time the photograph was taken because such a waiver or license may only apply to the rights owned by the celebrity under New York Civil Right Law § 51. As discussed, the scope and definition of the rights contained in the legislation are incongruous with the rights currently afforded to living persons under Section 51 of the Civil Right Law. Therefore, in our hypothetical, a license or waiver granted in 1975 is likely to be insufficient to permit future use of the photograph upon the death of the subject. As a result, artists will be left to argue, at great expense, that they are covered by the law's vague "work of fine art" exemption – putting artists, who previously enjoyed unfettered use of their work, on the horns of a dilemma: either risk litigation or forego exploiting their work.

Finally, New York broadcasters would be forced to vet all clearances obtained by their programmers and advertisers before proceeding to air. Stations offering air time for advertising would be required to make legal determinations whether the owner of the product making the advertisement has obtained all necessary rights. This process would require the broadcaster to determine whether, under estate law, and in compliance with Surrogate proceedings, the entity representing the deceased celebrity actually owns more than fifty percent of the rights of the deceased person's persona. Such an obligation would make it virtually impossible to air any advertisements without running the risk of a lawsuit. Local stations in particular simply do not have the resources to undertake such an onerous review. As a result, the litigation risk faced by broadcasters would likely be bundled into the cost of advertisements, leading to obvious market inefficiencies.

For all the foregoing reasons, as well as reasons submitted by other organizations with similar interests, the Committee strongly opposes S.5650/A.7904. The drastic break from New York's historical jurisprudence on the rights of privacy and publicity that would result from enactment of this bill should not be undertaken so swiftly, and without complete and utter clarity in text of the law. The apparent cost, ambiguity, and negative impact on free speech and intellectual property licensing created by the legislation

outweighs the limited benefit, if any, that the law might confer on a small subset of individuals living in New York State.

Based on the forgoing, the New York State Bar Association's Committee on Media Law **OPPOSES** this legislation.

Chair of the Committee: Lynn Oberlander, Esq.