New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Memorandum in Opposition

COMMITTEE ON MEDIA LAW

Media Law #1 May 22, 2019

A. 5605

By: M. of A. Weinstein
Assembly Committee: Judiciary
Effective Date: 180th day after it shall have become a law

AN ACT to amend the civil rights law, in relation to the right to privacy and the right of publicity; and to amend the civil practice law and rules, in relation to the timeliness of commencement of an action for violation of the right of publicity.

LAW AND SECTION REFERRED TO: Section 50 of the civil rights law and section 215 of the civil practice law and rules.

THE COMMITTEE ON MEDIA LAW OPPOSES THIS LEGISLATION

The New York State Legislature last session introduced into both the Assembly and Senate a bill that would have dramatically modified New York Civil Rights Law, Sections 50 and 51, which currently provide for a right of privacy under New York State law. The New York State Bar Association Committee on Media Law (the "Committee"), which consists primarily of lawyers specializing in First Amendment and media law and litigation, was among a number of organizations which expressed serious reservations and concerns about the complex and vital First Amendment issues raised by the wholesale revision of New York State law being proposed by these bills. The bill was not taken up in the Senate before the session ended.

This session, A. 5605 is a somewhat modified version of those bills. We are pleased to see that one very significant aspect of the bills from last session has been eliminated from this new version: the Assembly bill this term continues to codify the "right of privacy" under New York State law. In lieu of deleting "right of privacy" from the bill, a "right of publicity" was added to the current Assembly bill.

We remain concerned about the content of the bill, however, and also that the Legislature has acted without the benefit of full and public hearings or other opportunities at which all aspects of the proposed changes could be vetted, and the myriad of interested individuals and viewpoints could be aired. The impact of this bill will be felt by virtually every individual and organization that speaks, writes, photographs, films, draws, creates in the arts or letters in any medium, in the commercial, non-commercial and non-profit world. With so very many New Yorkers' rights at stake, it deserves a full and very thoughtful consideration.

Granting individuals additional rights to control their "persona," which the bill would do, would have the consequence of burdening, and potentially censoring, the rights of all others in society to speak and publish about them.

Indeed, as to the specific rights at issue here, it has been the experience of many members of this Committee that such rights are often mis-used in attempts to control the public narrative about the subject individual – that is, to control news reporting and storytelling so that the individual is presented in the way he/she wants, or the way in which the individual's heirs would prefer that he/she be remembered.

The Committee has undertaken here to set out the basis of the Committee's most fundamental concerns about the direction the suggested changes would take New York law.

A bedrock from which we start is that New York State has long had a robust view of the protection it affords speech and press, in all of the multiplicity of media and formats. The New York State Constitution, Article I, Section 8, and this state's laws, to date, have been enacted and applied in ways found to be highly protective of expression, and intentionally so. The most recent example of the New York State Legislature's concrete means of providing a robust environment for speech and press came out of libel law.

In 2008, when Americans generally and New Yorkers specifically, were threatened with libel judgments coming out of courts outside of the United States with legal systems that afforded far less protection for speech than that of New York State, the Legislature enacted the Libel Tourism Protection Act, effectively barring enforcement of such judgments in New York courts.[1]

That law exists among others in New York law to protect the news and information gathering processes and the widest range of expression, nonfiction and fiction, in all manner of medium in New York State – and among these provisions are Sections 50 and 51 of the Civil Rights Law.

But as with these other provisions, this bill would not just affect news organizations, or even the media as a whole. It would have impact on the entire creative community in this State, for profit and not-for-profit, as well as ***anyone*** who exercises freedom of expression in the State.

Discussion

The Committee has reviewed Assembly Bill A05605 and it has identified a number of specific comments and concerns discussed below.

One: Limit the rights created by Sections 50-51 to New York domiciliaries.

[1] N.Y.C.P.L.R. § 302(d).

The bill provides that any individual, including those holding post-mortem rights of publicity, could sue in New York State courts under New York laws regardless of where they are domiciled, or, in the case of those holding the post-mortem right of publicity created in the bill, "regardless of whether the law of the domicile, residence or citizenship of the individual at the time of death or otherwise recognizes a similar or identical property right."

It is both startling and deeply disturbing to see New York seek to undermine the laws and policies of sister states and indeed, countries around the world, by authorizing individuals and the heirs of anyone in the world to come to New York State and take advantage of its laws even if they are totally different from those of their domiciliary state. Not only living individuals from around the world can take advantage of New York courts and New York law, but estates can seek enforcement of post-mortem rights regardless of whether such rights exist under the law of the domicile of the deceased at death and where their estate resides. Virtually no other jurisdiction makes such an "all-comers" offer to the world.

For New York, of all states, to allow this is not only startling, but directly contrary to the position it has taken in other speech related contexts, the most recent of which is New York's enactment of the Libel Tourism Protection Act. New York State was in the forefront of enacting a Libel Tourism Protection Act that barred litigants from around the world from enforcing judgments obtained outside of New York in New York courts if the free expression rules in their jurisdiction did not rise to the level of ours. In enacting this law New York State upheld this state's centuries old tradition of protecting free expression to its utmost.

Does New York now wish to run roughshod over the free expression of its own and everyone else's citizens by allowing the estates of celebrities to enforce controls on expression that are inconsistent with the expression rights afforded elsewhere? It would be ironic, indeed, if the estate of Princess Diana, to which England does not afford a "right of publicity" however denominated, could come to New York and sue when no U.K resident could enforce a U.K. libel judgment in New York.

Just as New York has not wanted the speech and creative work of its citizens to be held hostage to laws that limit what New Yorkers can say and publish, produce and distribute consistent with our state laws, we should be very wary of establishing New York as providing the tools of censorship under the guise of publicity and privacy for the world. How will New York respond to the criticism that it allows anyone to come here, dead or alive, to litigate to prevent others from using their names and likenesses?

Moreover, it will likely require substantial additional resources by the New York State court system were New York to become the "right of publicity" or privacy capital of the world. And those resources would be used to allow celebrities with no real nexus to New York State, through threats and litigation, to undermine if not censor outright the ability of New Yorkers and New York entities to speak, publish, create and distribute content and expression.

Two: There is no case made for post-mortem rights, and it could do great harm to New Yorkers.

We do not recommend the addition of post-mortem rights for the newly created "right of publicity." It must be recognized that the addition of rights for celebrities -- or in the case of postmortem rights, their heirs and the various third parties that manage publicity rights – reduces the rights to speak and publish afforded to all others in New York, individuals and entities.

Creating a postmortem right of publicity will remove from the working vocabulary of our State's citizenry images and ideas that have existed and been utilized historically. It will affect, among others, artists, photographers, graphic designers, filmmakers, digital software creators – those that are established and those that are start-up or small. It will no doubt result in additional costs to the creative and expressive community. It may render useless creations that have been seen, sold, and distributed for decades. And it surely will provoke disputes and litigation as to what is now no longer in the public realm.

What is uncertain is what public benefit such a system would bring. We are not aware of any public policy justification for imposing new burdens for the use of celebrity names and images on a wide array of New York businesses and individuals for the sole benefit of the heirs of those celebrities, whose identities are currently unknown, and the third parties – managers, corporate licensing operations, lawyers, etc. -- that will be engaged in the process.

We believe that at the least the Legislature should have very public hearings on an issue of such Constitutional import, allowing its constituents to testify and to hear testimony as to why such a significant change to an over century old statute is needed in this State. At a minimum, the Legislators should be clear and thorough in providing the hard evidence that they see supports this expansion of rights given to celebrities and their heirs.[2]

Three: **Creating a "personal property" could harm those who own it.**

If the Legislature believes the case can be made for the expansion of rights to celebrities and their heirs, it need not be, and we would suggest that it not be, characterized as "personal property." The creation of a property right has risks for those who claim it. It would potentially provide the means for a celebrity to lose the ability to control his or her own name and likeness in bankruptcy, divorce proceedings, to managers, and others as a result of ill-advised contracts.[3]

---

[2] To date there has been very little evidence that anyone but celebrities' heirs benefit to any serious degree from postmortem rights of publicity. And even as to celebrities, not infrequently those who benefit most had little relationship to the celebrity, or were agents and other third party corporations and individuals on the business side of the celebrity life.

[3] An October 2005 article by Jody C. Campbell, titled "Who Owns Kim Basinger? The Right of Publicity's Place in the Bankruptcy System, " 13 J. Intell. Prop. L. 179 (2005) poignantly explains the shortcomings of

Four: **Exceptions must be clear, cover all claims under Sections 50-51, and be media, speaker and subject matter neutral.**

If there is to be an amended Sections 50 and 51, we would favor an "exceptions" provision, but one that covers not just a "right of publicity," but right of privacy as well. But, such a provision needs to be drafted carefully to cover the range of mediums and formats in use today and tomorrow, and consistent with current New York law, should protect the widest range of subject matter by the widest range of speakers and publishers.

The exceptions must be unambiguous as to their scope and categorical in their protection.

The categorical exemptions must be broad enough to include expressive works dealing with *any* topic of interest to the public. It must steer clear of requiring judges to evaluate the quality or contribution to society of the speech at issue, as judges in New York have acknowledged is not their role.

Nor should any speaker in New York State be left out. Individuals, advocates for human rights and civil rights, photographers and graphic designers and visual artists of all varieties, writers, individuals engaged in creating blogs or YouTube channels, biographers and docudrama writer. The list is long and varied, but all are protected by the First Amendment and the New York State Constitution, and the Legislature should be protective of all of them as well.

In today's digital age, it must cover all forms of media. It is clearly not sufficient to extend protections only to traditional publication forms like books, magazines, newspapers or broadcast or even "digital." The language must be flexible enough to include all of the means of expression that exist today but also the as-yet-unknown mediums for expression in the future.

Of some note is that educational uses are not included specifically in the bill. As the mediums change in the social and entertainment and general informational environment, so they change in the educational arena as well and should not be left vulnerable by any amendment or additions to the law.

Also those entities that offer for license content on behalf of still and motion content creators should have a clear exemption to freely license content, and to aggregate and

---

allowing such a right to be transformed into "property" transferred. The article addressed Ms. Basinger's 1993 bankruptcy filing after losing a lawsuit arising out of her withdrawal from the film "Boxing Helena". Ms. Campbell noted that after filing for reorganization, Ms. Basinger converted the bankruptcy filing to a liquidation due to the unreasonable demands of a creditor which was seeking the appointment of a third-party to exercise control over whether Ms. Basinger should accept certain roles or even be permitted to start a family. Forced association and involuntary servitude are but two of the many concerns associated with the disassociation of a person's right of publicity and right of dignity that a "property" right can entail.

display it in the service of that, without risk of running afoul of the conflicting and ambiguous language of the proposed "exceptions" section.

The "exceptions" section in the bill as proposed does not meet these concerns. Moreover, it is needlessly complex and suffers from ambiguities and conflicting terms that at times threaten to render the section internally inconsistent and meaningless.

One example: Section 51(2)(a) exempts from liability "news, public affairs or sports broadcast, including the promotion of and advertising for a public affairs or sports broadcast, an account of public interest or a political campaign." One might ask why only "broadcast" is identified as exempted. It is but one medium in what is now a long list of media used to communicate with the public, including cable and digital, which are not included. In the upcoming years, there may turn out to be other type of media as well.

In addition, however, the clause seems to then exempt "the promotion of and advertising for" a different line up of content.

The ambiguities in this section of the proposed bill left the distinct likelihood that each case may pose questions of what is covered, and what is not, to be answered through a patchwork of judicial decisions. Such a prospect would be an extraordinary burden on the many in this state who create and distribute content, not to mention the state's courts and judges.

We agree that a section that states the exceptions to the ability to sue under Sections 50 and 51, or any new provisions were any to be created, could be a positive addition to the law. But it will only be positive if the legislature makes clear that all works of expression, in whatever form and concerning whatever subject, save those that are explicitly advertising in nature, are categorically exempt.[4]

Five: The statute of limitations should not be a "discovery rule."

The statute of limitations for Sections 50 and 51 has been significantly changed, and in a manner that will invite litigation. The statute of limitations in the current Civil Rights Law is one year from the date of injury. This has been the law in New York State since at least as early as 1962. The current Assembly bill would modify this statute of limitations to provide that the one year would run from "the date of discovery of the injury to the plaintiff or from the date through the exercise of due diligence such injury should have been discovered by the plaintiff, whichever is earlier." It is a so-called "discovery rule." And it will result in countless litigations when plaintiffs have failed to meet the one year date for filing a lawsuit.

The "discovery rule" is a distinct exception to the general statute of limitations law that exists in New York law. It has been adopted for cases where a foreign object was left in a patient's body, or in cancer cases where there has been a mistaken diagnosis. Right of

[4] The Committee would be willing to provide a draft of an "exceptions" clause that we believe would be clear, medium neutral, and capable of encompassing future media.

privacy and right of publicity are hardly claims such as these. They are akin to defamation or personal injury, and, as a consequence, the statute of limitations should run from the date of injury.[5]

Six: Specific inclusion of nonprofit organizations and their fundraising is bad policy and open to Constitutional challenge.

The bill as introduced would specifically include nonprofit organizations and their fundraising as subject to claims for what would be the newly created "right of publicity." It is inconceivable to us that the Legislature means to put at risk for litigation the many advocacy and social service, human rights and civil rights organizations, religious, political, civic, and other categories of nonprofit organizations that might identify celebrities and public figures from all areas in their newsletters and other materials, and even in specific fundraising materials.

In the 1960's, Commissioner L.B. Sullivan of Montgomery, Alabama sued the New York Times and a number of clergymen for libel over an ad that appeared in the newspaper seeking funds to support Dr. Martin Luther King and his efforts on behalf of desegregation. It led to the landmark, truly Constitutionally ground-breaking, decision by the United States Supreme Court in New York Times v. Sullivan in 1964. Were the bill as proposed beome the law of New York, Commissioner Sullivan would now sue not for libel, but for the violation of a "right of publicity."

Commissioner Sullivan's lawsuit resulted in the Supreme Court articulating broad protection for defendants in libel litigation against public officials under the First Amendment. We believe that New York State should resist the temptation to allow modern Commissioner Sullivans to prevent nonprofits or any individual or entity from using their names or likenesses in arguing their political or social causes. Threats of litigation alone can chill many in the nonprofit world (and indeed, publications and speakers of modest means, whether for-profit or not-for-profit). The State of New York should be sensitive to not handing a cudgel to those who would try to limit criticism of them, even if it is included in an appeal for funds. Again, this could end up providing protection to the likes of tyrants and terrorists from abroad.

We would note in this context that many, if not all, publications in all media, seek subscribers and underwriters and "members" in the context of their communications on a regular basis. Magazines have cards that drop from their pages offering subscriptions. Newspapers have house ads offering subscriptions. The line between content in a nonprofit's newsletter and its "ask" for support may be as thin. But the ability to bring down nonprofits, or dramatically chill them, lies in statutes that invite litigation against them.

[5] Moreover, at least with respect to a post mortem right, because there may be uncertainty as to who controls the rights in an estate, the question of "discovery" is a question of whose discovery. This provision is a recipe for unlimited litigation.

Seven: The bill may conflict with existing New York State trust and estate laws.

While presumably the creation of a post mortem right of publicity, in addition to the existing rights of privacy provided by Sections 50 and 51, is for the benefit of celebrities and their heirs, there are some issues that estate lawyers should be consulted on related to the creation of an additional right. We would anticipate that one significant issue is that estates will have to pay taxes on the determined value of that right of publicity. It is an issue under litigation in connection with the estate of Michael Jackson, where the valuation is in dispute. This can have an impact on a relatively illiquid estate, and force commercialization that was unanticipated in order to meet the tax bill. [6] [7]

Eight: **Existing expressive works should be protected.**

Were a post-mortem right to be created, the law should be cognizant of the fact that there is a great deal of creative expression in existence that might be affected by such a new right. There should be no instance in which a creative work of any form should suddenly become incapable of distribution or publication. We would urge the Legislature to be protective of the investments made in works of expression that might be undermined by a statute that affords celebrities a new means of control. All works in existence should remain free to be distributed.

Conclusion

There are numerous other provisions in the bill introduced this term that we have not noted in this memorandum but that are important to specific members of the media community and/or to individual artists, photographers, and speakers in the State. We have tried to limit our analysis here to broad and overarching themes and concerns. We must emphasize that any rights given to celebrities and others to control speech and expression about them is a limitation on the rights of others to speak and express themselves. There are numerous examples of celebrities trying to control their images through litigation or threats of litigation. And no doubt there are countless examples of intimidation and acquiescence by those who could not afford to fight.

New York is home to media and creative industries, big and small. The state serves as the center for enormous national as well as regional and local news and public affairs operations, audiovisual production studios and numerous support operations (designers, costumers, wig makers, carpenters, electricians, truckers, camera operators, etc.), book publishers, magazine publishers, cable and digital operators, and various new

[6] There are issues raised by the proposed sections on how a postmortem right would be registered and managed, including seemingly inconsistent provisions with existing New York law on estates and probate.

[7] Moreover, the statute as proposed would give rights to suspected heirs instead of the executors or administrators designated by the decedent in a will. Oftentimes, testators choose people they believe to be responsible to handle their affairs after death. The proposed statute changes that model and instead vests rights in people who could end up binding an estate in situations not favored by an executor or administrator.

media that the state has taken steps to attract. We have in this state the most robust creative talent in photography, theater, visual arts, music and, indeed, all art forms and countless venues that display and sell that creativity to the public. New York is home to a thriving and growing digital content and software industry. Every and all means by which humans communicate can be found in New York State, in large corporate entities down to sole proprietors and small and start-up businesses.

New York State is home to countless not-for-profits, whose activities are at risk from the bills introduced last spring. And, New York is home to millions of outspoken, public minded, civically and socially engaged residents who publish and speak countless words and images every day, and whose activities may well become subject to the provisions of any expansion of Sections 50 and 51 and/or the addition of a right of publicity with postmortem rights.

We would urge the Legislature to not add a "right of publicity" to the laws of New York and certainly not to do so without significant public input that can amplify and bring into the discussion the potential impact on the myriad of parties at interest in the subject matter of Sections 50 and 51. That would include, at a minimum, the extensive media in the State, the theatrical community with producers and playwrights, authors and other creative artists, advocacy organizations and individuals whether for profit or nonprofit, the advertising industry, and State and federal constitutional experts in addition to unions and trade associations. We believe that many may be unaware of the changes proposed in the bills and the real impact this will have on them.

New York Civil Rights Law Sections 50 and 51 have been on the books since 1903. These laws have been strictly construed in New York, favoring the right to freely publish and produce content about individuals based on State Constitutional and First Amendment principles and, as a rule, only restricting the publication in clear cases where the use of a person's image or likeness is for purposes of advertising or trade. It has been an important part of the legal structure in New York State that is designed to be speech and press protective as a matter of state policy and pride and has served to encourage so many to come and work in this state in media and the creative arts. We would urge the Legislature to amend these laws only with careful weighing of the costs and disruption to this historical legal structure.

The members of this Committee of the New York State Bar Association would welcome an opportunity to discuss the issues with the Legislative members and their staff members, and are open to any questions that the Legislature might have regarding Sections 50 and 51 and right of publicity.

Based on the forgoing, the NYSBA's Committee on Media Law **OPPOSES** this legislation.