



# MEDIA COALITION, INC.

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Merchants Association  
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. Recording Industry Association of America, Inc.

## Memo in Opposition to Assembly Bill 7904 and Senate Bill 5650

Media Coalition is concerned that Assembly Bill 7904 and Senate Bill 5650 do not provide adequate protection for expressive works and threaten the rights of creators, producers and distributors of First Amendment protected material. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including New York: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, home video and video games.

A.B. 7904 and S.B. 5650 create a right of publicity in an individual's name, voice, signature, image or likeness for any person deceased within the last 70 years who was domiciled in New York at the time of death. Section 34 of the bills provides an exception to the right for certain expressive uses. It protects artistic and creative works and allows books, plays, magazines, newspapers, music, film, radio, television and other media to use a living or deceased individual's name or likeness in a range of fictional and non-fictional works. This exception for non-commercial works is very similar to such exceptions that have been included in almost every recent state law granting a right of publicity. However, the expressive use protection in Section 34 is not available if it meets three conditions: "the work does not contain an image or likeness that is primarily commercial, not transformative and is not otherwise protected by the First Amendment to the United States Constitution or New York Constitution."

This limitation to the protection for expressive works in Section 34 will have a substantial chilling effect on First Amendment protected speech by increasing the likelihood that publishers, filmmakers and others will be forced to litigate to prove that their works do not contain images that are "primarily commercial," "not transformative" and are not protected by the Constitution of the United States or New York. The purpose of the list of exceptions in Section 34 is to avoid the threat of such costly litigation for creators and distributors of what is plainly non-commercial speech and not subject to the right of publicity. These additional conditions for relying on the protections of Section 34 mean that some non-commercial speech does not qualify for the statutory legal protections against frivolous litigation otherwise provided in the legislation. Instead, it requires a court to rule that the speech is not subject to the right of publicity because it does not meet the first two conditions or is not constitutionally protected speech.

As a result, these conditions will undoubtedly increase the likelihood of expensive litigation, which will have a chilling effect on First Amendment protected speech. The surviving family or estate of a deceased person that is unhappy with a book, movie, article or show can more credibly threaten to litigate over the use. The heirs of a noted public figure, upset about unsavory revelations, could force the publisher or producer to establish their First Amendment rights in court to distribute the work, rather than being able to rely on the list of exceptions in Section 34 to lessen the time and cost of the litigation. Such lawsuits can take years to decide

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and cost hundreds of thousands of dollars or more. The mere threat of costly and prolonged legal battle will lead to self-censorship by producers and distributors of biographies, histories, documentaries and other important social commentary who do not have the financial means to defend themselves in court. If the lesser protections for expressive works are included in the legislation, New York will encourage the heirs of a deceased person to try to establish that he or she was domiciled in the state to take advantage of the law.

The legislation may also be unconstitutionally vague because it does not define the terms “primarily commercial” and “not transformative.” There is no guidance in the legislation to determine whether material is “primarily commercial.” We do not know if this will be determined based on the image itself, the context of the use, any descriptions that accompany it or the medium in which it appears. Since these terms are core judgments used to determine whether speech is covered by the protections in Section 34, they must be clearly defined to give speakers advance notice of their obligations under the law. This lack of certainty may violate the Due Process Clause of the Constitution. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”).

Finally, the conditions placed on the artistic exception are unnecessary. The heirs to those deceased in the last 70 years already have full access to the courts to secure their rights. Many states that grant a statutory right of publicity have included in their laws a similar exception for artistic expression without any conditions. California’s right of publicity law for deceased persons has an almost identical exception as in this bill but without the conditions and it has not prevented those seeking to protect their legitimate right from having full access to state and federal courts in the state.

If you would like to discuss further our concerns about these bills, please contact me at 212-587-4025 #3 or at [horowitz@mediacoalition.org](mailto:horowitz@mediacoalition.org).

We urge you to protect the First Amendment rights of the creators, producers and distributors of media and the people of New York and reject or amend A.B. 7904 and S.B. 5650.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David Horowitz", with a stylized flourish at the end.

David Horowitz  
Executive Director