



THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America

Memo in Opposition to New York Assembly Bill 5605-A and Senate Bill 5959-A (Weinstein/Savino, Right of Publicity)

We believe that Assembly Bill 5605-A and Senate Bill 5959-A threaten the rights of creators, distributors and retailers of First Amendment-protected material. They will have a chilling effect on biographies, historical fiction and discussions of current events by authors and playwrights in books, movies, graphic novels, plays and other media. The trade associations and other organizations that comprise Media Coalition have many members throughout the country, including New York: authors, publishers, booksellers and librarians as well as producers and retailers of recordings, films, videos and video games.

The legislation would create a complicated and confusing new right of publicity for the life of a person plus 40 years post-mortem by adding a separate section to the existing New York Civil Rights Law §50 and §51, which provides a right of privacy. The right of publicity would bar the use of a person's name, portrait or picture, voice, or signature (collectively, their persona) without written consent in advertising or for the purposes of trade (or fundraising). The right is a property right that can be transferred and is inheritable. While the right is limited to uses in advertising and for the purposes of trades, there is a statutory exception to the right for expressive works in a news, public affairs or sports broadcast, a work of entertainment, dramatic, literary or musical work, an account of public interest or a political campaign in a variety of media and types of communication.

However, the right of publicity treats digital replicas (computer generated or electronic reproduction) differently from other media. The right applies to an expressive work if it is intended to create the impression that the person is performing the activity he or she is known for in the role of a fictional character, a musical or an athletic performance. There is a different narrower exception to the right for certain non-commercial uses of digital replicas in parody, satire, commentary, or criticism; and, works of political, public interest, newsworthy value or similar works, including a documentary. The bills then create another category of use for digital replicas in a "pornographic" audio-visual work. These images can be published only with the consent of the person whose persona is being used, even in expressive works. For this content, there is narrow exception for a matter of "legitimate purpose," whatever that vague term means, and for some news or commentary.

Generally, the right of publicity protects individuals against the unauthorized commercial use of their persona. While it is important to prevent the exploitation of an individual's identity, any legislation that does so must include robust protections for the First Amendment rights of creators, producers, and distributors of expressive works that include real-life individuals' names or likenesses, including motion pictures, television programs, books, magazine articles, music, video games and works of art. Importantly, these works enjoy full constitutional protection

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regardless of whether they are sold, rented, loaned or given away, and whether they are intended to entertain or to inform (or both).

The new right of publicity will have a serious chilling effect on the creators and distributors of speech by inviting expensive and frivolous lawsuits. The legislation sweeps away 100 years of case law by creating a separate right of publicity with different sets of rules for different kinds of media and content. While New York courts have been protective of the First Amendment in interpreting New York Civil Rights Law §50 and §51, the amended language in the bills makes uncertain the value of this body of law. The creation of the new right will force speakers to defend their works by re-litigating many of the legal questions that have been considered settled law. Even if the courts ultimately hold that the prior case law interpreting the right of privacy applies to the new right of publicity, it will take a great amount of time and substantial financial resources to reach that result.

We are particularly concerned that the bills will replace a well-developed body of law that includes strong protections for expressive works with a statutory exception that varies depending on the type of media and content. The new language undermines the clarity of the protections developed over decades of rulings by the New York courts and will cause uncertainty for speakers. The protection for non-commercial speech in the bill will depend not only on the type of media and content but also an assessment by a fact-finder about what is a “reasonable impression,” the speaker’s intent and the mindset of their audience.

The legislation must have a single broad and unambiguous exception for non-commercial uses to spare creators the burden and expense of lawsuits that target their exercise of their First Amendment rights. Such an exception allows producers and distributors of content to avoid expensive litigation brought by a person, their heirs or estate that is unhappy with their portrayal in a book, movie, article or show. Without the exemption, such litigation will have a substantial chilling effect on their constitutionally protected speech even if the speaker is likely to be ultimately vindicated. This threat is not hypothetical; the number of right of publicity claims targeting expressive works has risen in recent years, with pernicious effects on the exercise of free speech.

In 2013, a soldier who believed the main character in *The Hurt Locker* was based on his life sued the author of a magazine article that was the basis of the movie, the screenwriter, the movie producer and the magazine that published the article, claiming violations of his right of publicity. His claim was dismissed, but only after four years of expensive litigation. In 2017, Olivia de Havilland sued FX and the producers of the mini-series *Feud* for violating her right of publicity because she did not like how she was portrayed. Again, the defendants prevailed but only after the case went all the way to the California Supreme Court.

Legislation to create a new right of publicity separate from the existing right of privacy in §50 and §51 increases the risk of these lawsuits. This will add to the concern of a publisher or movie producer about the cost of litigation when deciding to publish an unflattering biography or make a critical film about important public figures such as Richard Nixon, Henry Kissinger, Ted Kennedy or the Rockefellers. A lawsuit filed by the subject of the speech or their heirs could take years to decide and cost hundreds of thousands of dollars, or more. Even the threat of costly and prolonged litigation can prompt self-censorship by producers and distributors of biographies,

historic fiction, documentaries and other important discussions. The bill creates an additional risk for a producer of a film, video or performance about an actor or musician if content uses a computer-generated image to recreate a part of the story. Such content could be deemed a digital replica and subject to the right of publicity even if it is a non-commercial use. If it is a digital replica and the content is deemed “pornographic work,” it is subject to the right with an even more limited exception for expressive works.

The risk of costly litigation against the creators and distributors of First Amendment-protected speech is compounded by the broad jurisdictional reach of the legislation. If this legislation is enacted, any act or event occurring in New York would be enough to confer standing to bring an action under the right of publicity in New York courts. So any book that is sold or movie that is exhibited in the state can give rise to a claim. It would allow plaintiffs to sue for damages in New York, even if none of the parties is a resident or citizen of the state.

Finally, if the legislature intends to address uses of a person’s name, portrait, voice or signature in certain media or context, we believe the best course is to do so in a narrow bill that directly addresses those concerns rather than creating a new and distinct right without ample time for a full vetting in the legislative process. At the very least, any legislation must have a single broad and unambiguous exception for expressive uses to protect creators and producers of speech from the burden and expense of lawsuits that target their exercise of their First Amendment rights.

If you would like to discuss further our concerns about this bill, please contact David Horowitz at 212- 587-4025 #3 or at horowitz@mediacoalition.org.

Again, we urge you to protect the First Amendment rights of all New Yorkers and oppose or amend A.B. 5605-A and S.B. 5959-A.