



THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

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

Memo in Opposition to New York Assembly Bill A08155 (Morrelle/Weinstein, Right of Publicity)

We believe that A.B. 8155 as referred favorably by the Codes Committee on June 14 threatens the rights of creators, distributors and retailers of First Amendment protected material. 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 manufacturers and retailers of recordings, films, videos and video games.

A.B. 8155 creates a right of publicity for the life of a person plus 40 years after death in a person's name, voice, signature or likeness. Likeness is defined to include a gesture or mannerism recognized as an identifying attribute of an individual. The right prevents the use of any aspect of these identifying traits for advertising purposes, for the purposes of trade or for fundraising or solicitation of donations. The original version of the bill provided a broad statutory exemption to the right for non-commercial speech. This clear and focused language protects free expression and discourages frivolous right of publicity claims, while preserving individuals' right to prevent the unauthorized use of their names and likenesses in advertising (other than for an expressive work) or on merchandise.

However, the bill was subsequently amended to insert an exception to the exemption that reads, "[a] work that includes a commercial use and replicates the professional performance or activities rendered by an individual, shall not be exempt under this subdivision where the replication is inextricably intertwined with the right of publicity of such individual."

The right of publicity protects individuals against the unauthorized commercial use of their names, likenesses, and similar attributes. 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 regardless of whether they are sold, rented, loaned or given away, and whether they are intended to entertain or to inform (or both).

The amended language undermines the clarity of the exemption and creates uncertainty for speakers. Rather than being able to rely on the unambiguous list of content and media that are not subject to the right, speakers will now be subject to a subjective assessment of what is "inextricably intertwined" or what amounts to replication without legislative definitions or case law to give guidance on their meaning.

An explicit exemption for non-commercial uses of speech is essential to protect artistic expression because the right of publicity law is already a legal morass. Courts have done little to

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clarify the law. The U.S. Supreme Court issued its only opinion addressing the right of publicity nearly forty years ago. That ruling addressed a television station's appropriation of a live entertainer's entire act (he was a human cannonball). The Court's opinion provides lower courts with no meaningful guidance because virtually all contemporary right of publicity cases arise from the use of an individual's name or likeness within an expressive work (for example, the use of Cardinal Bernard Law's name and likeness in the film *Spotlight* or Mark Zuckerberg's name and likeness in *The Social Network*). While New York courts have been protective of the First Amendment rights in interpreting New York Civil Rights Law §50 and §51, the amended language in A.B. 8155 leaves uncertain the value of these court precedents.

Since the case law is so muddled and conflicted, the broad and clear exemption for non-commercial speech in the original version of the bill is necessary to spare creators the burden and expense of lawsuits that target their exercise of their First Amendment rights. It would allow producers and distributors of content to avoid expensive litigation brought by a person, his or her heirs or their 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 eventually dismissed, but only after several years of expensive litigation. A publisher or movie producer would have to consider the cost of litigation when deciding to publish an unflattering biography or make a critical documentary about important public figures such as Martin Luther King, J. Edgar Hoover, Richard Nixon or the Rockefellers. A lawsuit filed by 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.

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.

We urge you to defeat A.B. 8155 to protect the First Amendment rights of all the people of New York.