THE MEDIA COALITION

DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association 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-b and Senate Bill 5857-b
(Morrelle/Savino, Right of Publicity)

We believe that A.B. 8155-b and Senate Bill 5857-b threaten the rights of creators, distributors and retailers of First Amendment protected material. It 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 amending New York Civil Rights Law §50 and §51, which provides a right of privacy. The bill bars the use of a person's name, portrait or picture, voice, or signature (collectively, their persona) without written consent in advertising or speech done for the purposes of trade (or fundraising). The right is a property right that can be transferred and is inheritable. The bill has an exception for the use of a persona without consent in news, public affairs or sports broadcast, an account of public interest or a political campaign in a variety of media and types of communication.

There is a different set of rules for the application to digital replicas. The right applies if a non-commercial use 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 exception to the right for certain non-commercial uses of digital replicas in parody, satire, commentary, or criticism, works of political, public interest, newsworthy value or similar works, including a documentary. The bills then creates another category of use for digital replicas in a "pornographic" audio-visual work. These images can only be published with the consent of the person whose persona is being used even in works that are not advertising or for the purposes of trade. There is no exception to this provision for non-commercial uses.

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 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 version of the bills will have a serious chilling effect on the creators and distributors of speech by inviting expensive and frivolous lawsuits. The legislation sweeps away

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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 the value of these court precedents uncertain. 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 including strong protections for non-commercial uses of a person's persona with a statutory exception that varies depending on the media and the content. The new language undermines the clarity of the protections as developed by the New York courts and creates uncertainty for speakers. The protection for non-commercial speech in the bill would depend on the type of media and content as well as an assessment by a fact finder about how their speech should be defined and a determination of their intent and the mindset of their audience.

A single broad and unambiguous exception for non-commercial uses is necessary to spare creators the burden and expense of lawsuits that target their exercise of their First Amendment rights. It 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. A publisher or movie producer would have to consider the cost of litigation when deciding to publish an unflattering biography or make a critical film about important public figures such as Martin Luther King, J. Edgar Hoover, Richard Nixon 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," it is subject to the right with no exceptions for non-commercial uses.

The risk to speakers from the lack of an exception for non-commercial uses of digital replicas in sexual material is exacerbated because the term "pornographic" is not defined in the legislation or by reference to a statute and it has no generally understood legal meaning, unlike "obscene." This lack of a definition may make the legislation unconstitutionally vague. It gives speakers no guidance to determine what speech requires consent from the person in the digital

replica. This vagueness is impermissible in a law limiting First Amendment guarantees. See *Baggett v. Bullitt*, 370 U.S. 360 (1964). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *See 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.'")

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 enacted, the New York right of publicity would apply to any act or event that occurs in New York. 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 specific uses of a person's name, portrait, voice or signature, 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 non-commercial 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 A.B. 8155-b and S.B. 5857-b.