



June 12, 17

VIA EMAIL

Memorandum in Opposition

IN OPPOSITION TO: A.08155 (Morelle/Weinstein)

SUBJECT: A.08155, amending New York State's civil rights law Section 50/51,

Dear Members of the New York State Assembly and Senate:

The Electronic Frontier Foundation writes in opposition to A.08155, which establishes the right of publicity for both living and deceased individuals; provides that an individual's name, voice, signature and likeness is the personal property of the individual and is freely transferable and descendible; provides for the registration with the department of state of such rights of a deceased individual; and establishes a 1 year statute of limitations for commencing a cause of action for the violation of such right."

The Electronic Frontier Foundation (EFF) is a nonprofit civil liberties advocacy organization that has worked for over twenty-five years to protect free speech rights through impact litigation, participation in the regulatory process, and grassroots advocacy. As part of our work, we have filed amicus briefs in state and federal courts around the country regarding the impact that an overly broad right of publicity can have on freedom of expression. EFF has more than 35,000 active dues paying members.

First, we are concerned that this bill was introduced less than two weeks ago and that it has not received the careful review it deserves. As explained below, this bill may have significant impact on the expressive rights of individuals, activists, journalists, and companies around the United States. We understand that the bill includes some protections for free speech and the press, but we fear these exemptions are inadequate. At the very least, the bill should not go further without public hearings and ample opportunity for input from all affected parties.

Second, we believe that the bill is deeply flawed. As an organization that has been repeatedly involved in litigation concerning the balance between publicity rights and free speech, we have seen how publicity rights can be abused to inhibit and punish legitimate activities. For example, publicity rights claims have been used to threaten fine art, parody, criticism, satire and other expressive activity that targets or merely refers to public figures. Publicity rights are unique in both their indeterminate breadth and their potential to be used to silence criticism or dissent. For example, while copyrights protect original expression and patents protect new inventions, publicity rights have been invoked regarding basic facts

and inherent personal attributes, such as a person's name, likeness, voice, or other personal characteristics. *See Facenda v. NFL Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008) (use of plaintiff's voice); *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007) (use of ballplayers' names and statistics). Indeed, publicity rights have been asserted where a defendant has done nothing more than remind us of a celebrity, or simply mention her name. *See White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (reversing dismissal of publicity rights claim because robot in dress and wig turning letters "evoke[d]" Vanna White's identity); *Lohan v. Perez* (Pitbull), Case 2:11-cv-05413 Doc 11 (E.D.N.Y. Mar. 12, 2012) (asserting right of publicity claim based on fleeting mention of celebrity's name in a rap lyric). These remarkably broad rights have been asserted against a wide array of First Amendment speakers, including artists, filmmakers, and politicians, as well as publishers of everything from political biographies to comic books, and even baseball statistics. *See, e.g., Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860 (1979) (film depicting fictionalized biography of Rudolph Valentino); *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (book and film depicting a founder of the Black Panthers); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001) (use of player statistics and depictions of their playing styles in documentaries, game day programs, and websites). Some of these plaintiffs have prevailed; others have not. But whether a plaintiff prevails or not, the risk of liability and the cost of defending against a lawsuit are themselves enough to chill expression.

This legislation was proposed just last week, leaving EFF and other watchdog groups (not to mention legislators) with limited opportunity to fully analyze the bill. Based on our initial review, however, we agree with Professor Jennifer Rothman conclusion that this bill has significant problems. These include:

- 1) Reframing the Right of Publicity as a Property Right Rather Than a Privacy Right: The bill reframed a well established privacy right into a freely transferable publicity right, contrary to decades of New York jurisprudence and the origins of the right itself. Publicity right were originally and properly construed as a narrow subspecies of privacy rights, designed to prevent unfair commercial exploitations of one's likeness. *See Groucho Marx Productions, Inc. v. Day & Night Co., Inc.*, 689 F.2d 317 (2d Cir. 1982). The new bill wrenches the right free of its historical roots and turns it instead into a full-fledged property right – something it was never meant to be. What is more, the bill would allow claims to be brought even where the use is not-for-profit – including claims for exemplary damages.
- 2) Dramatically Expanding of the Scope of the Right: The bill expands the right of publicity to include uses of a person's likeness, including any characteristic that could identify a person, including "gestures" and "mannerisms." As noted above,

expansive notions of publicity rights have been used to shut down all manner of otherwise lawful speech. New York should not embrace this dangerous trend. What is worse, the bill would give a cause of action to anyone whose “identity” was used in New York – as opposed to limiting its scope to those who are domiciled there. At a minimum, this will create a massive burden for New York courts, with insufficient corresponding benefit to New York citizens.

- 3) Expanding of the Term of the Right: As noted, the right of publicity is a recent offshoot of privacy law that gives a person the right to limit the public use of her name, likeness and/or identity for commercial purposes like an advertisement. The original idea made sense: using someone’s face to sell soap or gum, for example, might be embarrassing for that person and she should have the right to prevent it. A post-mortem right, however, means your heirs can invoke the right long after you are dead and, presumably, in no position to be embarrassed by any sordid commercial associations. In other words, it turns a privacy right into a money-making machine that can be targeted at all kinds of activities. There is no reason why a celebrity’s heirs should be able to control the control virtually any invocation of the celebrity for decades after they have passed.
- 4) Inadequate Protections for Speech: The initial proposed text of the bill attempts to ameliorate some of these potential negative effects of the bill through a series of proposed exemptions. We appreciate that effort, but we fear it is insufficient. First, the prospect of litigation over the meaning of these exemptions will chill even speech that falls within their boundaries – particularly given that the overall bill invites litigation involving parties who aren’t even U.S. residents, much less New York residents. Second, we understand that SAG-AFTRA has proposed an amendment that would undermine the limited protections these exemptions offer.

This legislation is too important and far-reaching to be rushed through without careful review and public debate. We urge you to give it the thoughtful consideration and full hearing it deserves, and we would be happy to participate in that process.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Corynne McSherry', with a long horizontal line extending to the right.

Corynne McSherry