



June 8, 2018

VIA EMAIL

### **Memorandum in Opposition**

IN OPPOSITION TO: Assembly Bill 8155-B, Senate Bill 5857-B (Right of Publicity)

Dear Members of the New York State Assembly and Senate:

The Electronic Frontier Foundation (EFF) writes in opposition to Assembly Bill 8155-B and Senate Bill 5857-B, which would alter decades of New York law by establishing a right of publicity for deceased individuals. If enacted, this legislation would have significant impact on the expressive rights of individuals, activists, journalists, and companies around the United States.

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 38,000 active members, including more than 2,000 in the State of New York.

The bills are deeply flawed. Our concerns include:

- 1) Reframing the Right of Publicity as a Property Right Rather Than a Privacy Right: The bills remake a well-established privacy right into a freely transferable property right, contrary to decades of New York jurisprudence. Publicity rights were originally and properly construed as a narrow subspecies of privacy rights, designed to prevent unfair commercial exploitations of one's own likeness. *See Groucho Marx Productions, Inc. v. Day & Night Co., Inc.*, 689 F.2d 317 (2d Cir. 1982). The new proposal wrenches the right free of these historical roots and turns it instead into a full-fledged property right – something it was never meant to be.
- 2) Pressuring heirs to commercialize the image of deceased relatives: In a large estate, an inheritable and transferable right of publicity may add to the tax burden and thus lead heirs with no choice but to pursue advertising deals or some other commercial venture.
- 3) Creation of an unprecedented worldwide right: The bills would turn the State of New York into a litigation destination for celebrities from all over the world.

- 4) Unconstitutionally vague provisions: The bills includes a provision prohibiting use of a digital replica in a “pornographic work.” But the proposed legislation does not include a definition of pornographic work and that term does not have a settled legal meaning (and appears to be broader than the First Amendment obscenity standard). Many works of art include R-rated depictions of real persons, including public figures who died within 40 years of the film being produced. These include award-winning motion pictures such as *Henry and June*, *Behind the Candelabra*, *Before Night Falls*, and *Milk*. The bills’ vague statutory language will likely chill creative works protected by the First Amendment.
  
- 5) Targeting non-profit uses: The bills would allow claims to be brought “without regard to whether the use or activity is for profit or not-for-profit” potentially chilling a wide range of non-profit speech and activism inspired by deceased individuals. Worse, the bills would allow exemplary damages for non-profit uses that cause no economic harm.

These are just some of the many problems with the current proposed legislation.<sup>1</sup>

A broad coalition of companies and free speech advocates opposes these changes to New York’s right of publicity. Indeed, the coalition is so broad that it has brought together groups such as EFF and the MPAA, which hold opposing views on a wide range of other policy issues. This legislation is too important and far-reaching to be rushed through this session without careful review and public debate. We urge you not to support Assembly Bill 8155-B or Senate Bill 5857-B.

Sincerely,



Daniel Nazer  
Senior Staff Attorney

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<sup>1</sup> Right of publicity expert Professor Jennifer E. Rothman has outlined some additional objections. See *New York Right of Publicity Bill Resurrected Again* (June 6, 2018), available at <https://www.rightofpublicityroadmap.com/news-commentary/new-york-right-publicity-bill-resurrected-again>.