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REPORT ON LEGISLATION BY THE
COMMITTEE ON ART LAW
COMMITTEE ON COMMUNICATIONS & MEDIA LAW
COMMITTEE ON COPYRIGHT & LITERARY PROPERTY
COMMITTEE ON ENTERTAINMENT LAW

S.6790 **Senator Sampson**

AN ACT to amend the civil rights law, in relation to prohibiting the use of the persona of a deceased personality.

THIS BILL IS OPPOSED

The Art Law Committee, the Communications and Media Law Committee, the Copyright and Literary Property Committee, and the Entertainment Law Committee of the Association of the Bar of the City of New York write to express opposition to Senate Bill 6790 ("S.6790"), which would amend New York Civil Rights Law §§50 and 51 by creating a brand new "right of publicity" for deceased persons. The bill would prohibit the use "for advertising purposes" or "for the purposes of trade" of the "persona" – defined as the "name, portrait, voice and/or picture" – of any person who died 70 years before the effective date of the legislation or who dies on or after such effective date without the written permission of such person's heirs, estate or licensees. These rights would be granted retroactively to persons who are already dead and would last for 70 years after death.

New York Civil Rights Law §§ 50 and 51 have been on the books since 1903. These laws have always been strictly construed in New York, favoring the right to freely publish images of persons based on First Amendment principles and only restricting the publication in clear cases where the use of the personality's image or likeness is for purposes of advertising or trade.

Any amendment to Civil Rights Law §§ 50 and 51, laws that have generated over 100 years of precedent, should be made only for the most compelling reasons, which we submit are not present here. In creating a new right of publicity, the legislation suggests applications that could run headlong into decades of New York law and practice consistent with First Amendment principles and New York State's constitutional protections for speech. It would certainly generate litigation where none now exists and put undue stress on the exercise of creative and expressive activities.

There are a number of problems with S.6790, most notably the retroactive application of rights. Not only would the bill create a new class of complainants, but it would apply to uses created years before enactment of the legislation, making previously permissible activities suddenly subject to liability and interfering with rights created under existing contracts. Such retroactive application, particularly the burden on existing materials, is almost certainly legally impermissible, and grossly unfair. Take as an example the revival of Broadway shows such as *Fosse or Fiorello!* – musicals

which celebrate the lives and accomplishments of deceased persons. While the shows themselves may be exempt under the bill, it is not at all clear that the sale of T-shirts and other merchandise associated with advertising for the shows would be exempt under the bill. The restrictions that would be placed on such merchandise may very well threaten the economic viability of the shows altogether. Or, take as another example a "mom and pop" sports-themed restaurant which features menu items associated with and containing pictures of deceased athletes. If the bill passes, it will create onerous restrictions on the operations of these types of businesses, restrictions which do not now exist. These restrictions will generate litigation and may threaten the ability of these "mom and pop" shops to exist, as new rights afforded the estates of deceased persons will work to prohibit certain pre-existing uses altogether or result in additional costs (e.g., licensing fees) that cannot be borne by such businesses.

The bill would permit rightsholders to register their claim of rights before bringing any action under the statute, but such registration is not mandatory. There is no time period within which rightsholders must register. A rightsholder can – at any time, even years after a person's death – register a claim and subsequently initiate litigation for allegedly improper uses. An optional registration makes it difficult to determine who owns rights and can grant consent, placing an almost insurmountable burden on those who wish to use images and other identifying information of deceased individuals. The failure to register will carry no real meaning. Moreover, for those individual photographers, filmmakers and image licensing companies in New York State, the language as drafted is unclear as to whether a model release granting permission for advertising use executed during a person's lifetime will be upheld, directly impacting the ability of such individuals and entities to exploit the copyright in the images they own and represent.

In rightfully exempting certain "expressive works" from the consent requirement, S.6790 uses a new term without defining it: non-utilitarian expressive works. It is not clear what this term means or encompasses, which only serves to further confuse the issue, provide uncertainty and thus certainly chill expression and engender litigation. The proposed amendments to §§ 50 and 51 also would result in distinct rules for living persons and for deceased persons, which may result in unintended and unforeseen consequences. It is unclear whether the identified works that are exempt for deceased personalities are exempt for the living. Further, the danger of identifying certain exempt expressive works based on traditional forms of media such as theatre books and magazines is that the legislation will certainly overlook new forms of expression created in the future. As many forms of media are supported by advertising and will continue to do so in the future, the legislature should be wary of creating ambiguity which will lead to expensive permissions, unnecessary litigation and result in a chilling effect on new forms of works.

The Legislature should act with caution in this area, cognizant not only that New York is a state in which free speech and press have traditionally been a treasured value, but that §§ 50 and 51 were crafted and have been applied for many decades with an eye towards serving both the needs of citizens living in the State to protect themselves from being used in advertising for products and services and the needs of citizens to enjoy the benefits of free speech and press.

For these reasons, we oppose S.6790 and urge that it not be enacted into law.

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