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**REPORT ON LEGISLATION BY THE  
COMMITTEE ON COMMUNICATIONS & MEDIA LAW  
AND THE ART LAW COMMITTEE**

**A.8155-A**

**S.5857-A**

**M. of A. Morelle**

**Sen. Savino**

AN ACT to amend the civil rights law, in relation to the right of publicity; and to amend the civil practice law and rules, in relation to the timeliness of commencement of an action for violation of the right of publicity

**THIS BILL IS OPPOSED**

The Communications and Media Law Committee and Art Law Committee of the New York City Bar Association write to express strong opposition to the pending bill that would create a post-mortem right of publicity, lasting for 40 years after death, without even the pretense that the possibility of such post-mortem rights incentivizes the living in any significant (or positive) way. Nothing in the bill indicates why heirs should get a 40-year windfall. The bill also substantially expands liability for the uses of people's identities, covering uses of a person's "likeness," including "name, voice, and signature." Statutory damages of \$750 per incident are afforded. The bill would apply without regard to whether a use is for profit or not for profit.

With certain exceptions, 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," without the written permission of such person's heirs, estate or licensees. Such a right extends for 40 years (and the provision may be retroactive).

A similar (but far less reaching) bill was opposed by the City Bar in 2010.<sup>1</sup> The considerations outlined in the 2010 Report are just as weighty now as they were seven years ago, and fully justify opposition to the proposed bill. The present bill raises even further concerns, for both procedural and substantive reasons.

At a minimum, the bill requires far more deliberation and debate, neither of which sufficiently can occur in the last few weeks of session. New York is the home of the entertainment industries, and enormous reliance interests result from the hundred-year history of the right of privacy embodied in Sections 50 and 51 of the Civil Rights Law. New York law as

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<sup>1</sup> Available at <http://www.nycbar.org/pdf/report/uploads/20071923-CommentonS6790ProhibitingtheUseofDeceasedCelebrities.pdf>.

embodied and long applied under sections 50 and 51 of the Civil Rights Law should not be fundamentally altered without significantly more public discussion.

Not only would the bill add provisions creating a post-mortem right of commercial appropriation; it would repeal Civil Rights Law section 51, notwithstanding that its meaning has become clear as courts have applied it for decades, removing New York's historic "right of privacy" language and replacing it with a very different "right of publicity" that would for the first time be protected as "personal property." Neither scholars, experts, nor the affected industries who make reference to deceased entertainers and artists have even begun to analyze the myriad ways in which the switch from a "right of privacy" to a descendible "right of publicity" would change the world in which they operate and its existing rules.

The proposed bill would allow anyone or anyone's estate to sue in New York under New York law, so long as the use applied "to an act or event that occurs within New York," and regardless of whether the law in their domicile or home country provides for a right of publicity and/or post mortem right. New York would move from not having a post-mortem right of publicity at all, to potentially the right of publicity capital of the world.

Breaking from the long tradition in which New York's right against commercial misappropriation applied only to uses for purposes of commerce or trade, the bill provides that for actions seeking damages or injunctive relief, without regard to whether the use or activity is for profit or not-for-profit." Had it been in effect, the bill would have prevented, for 40 years after President Roosevelt's death, the March of Dimes' use of photographs of President Roosevelt in connection with fundraising. The use by not-for-profits (in fundraising or other development efforts) of photographs of Osama bin Laden or the pilots of the aircraft used on 9/11, to raise funds for terrorism's victims, would be subject under this bill to civil actions in New York by the perpetrators' families.

There is a great deal more in the bill worth looking at carefully, including but not limited to, the provisions concerning statute of limitations; licensing provisions; the entire structure for post mortem rights; specific inclusion of nonprofit fundraising; and the "exceptions" clause which currently is a pastiche from California and other jurisdictions, with a problematic reference to "transformative" that would create a wasps' nest of future disputes.

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.

On the basis of the position reflected in our 2010 report and the considerations above, the Committees oppose enactment of this legislation.

Communications & Media Law Committee  
Charles S. Sims, Chair

Art Law Committee  
Steven R. Schindler, Chair

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