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A8836 **M. of A. Weinstein**
S6005 **Senator Golden**

AN ACT to amend the civil rights law in relation to the right of privacy and publicity

THIS BILL IS OPPOSED

The Committee on Communications and Media Law (the "Committee") of the Association of the Bar of the City of New York strongly opposes this Bill, which would amend New York Civil Rights Law §§50 and 51 to provide a "right of publicity" for deceased persons. Specifically, the Bill would criminalize the use "for advertising purposes" or "for the purposes of trade" of the "name, portrait, voice, signature or picture" of any person who died on or after January 1, 1938 without the written permission of such person's heirs, estate, or distributees. These rights would be granted retroactively to persons who are already dead and would last in perpetuity. The Bill suffers from many shortcomings. As drafted, it is likely unconstitutional. It would severely restrict the ability of New York media entities, including the Members of the Committee, to portray deceased private and public figures in their work. The Bill also makes no sense from a policy standpoint. It provides a right in perpetuity to deceased persons that would accomplish little, if any, of the policy goals that a right of publicity is purportedly designed to serve. Finally, as drafted, the Bill poses a significant number of practical difficulties. It should not be passed.

Discussion

The breadth of the right provided under the Bill is staggering and, as a result, it violates both the First Amendment of the United States Constitution and Article I, Section VIII of the New York State Constitution. The Bill broadly prohibits the use of any person's name, portrait, voice, signature, or picture for purposes of advertising and trade. While the current Assembly version provides an "exception" for uses that appear in a "play, book, magazine, newspaper," or the like, the exception does not apply if a claimant can demonstrate that the use is "so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product." This "exception" does not clearly cover all First Amendment protected uses and, because it is so vague, will undoubtedly chill First Amendment protected speech about matters of public interest. For instance, a publisher, broadcaster, or artist, unable to predict how a particular use will be interpreted, may well decide that the use is too "close to the line" and that it is safer to avoid the possibility of criminal penalties and costly litigation than to speak freely. Such a result would be constitutionally intolerable as it is contrary to the core principles of the First Amendment. The Senate version of the Bill is no better, as it does not even attempt to provide an exception for First Amendment protected uses. Under either version of the Bill, litigation will inevitably follow from unflattering, but newsworthy or artistic, portrayals of deceased persons, and the threat of

such lawsuits from disgruntled heirs will undoubtedly chill the speech of media organizations, such as those represented on the Committee, in reporting on matters of public interest.

The Bill has other problems as well. Under the Senate version, there is no exception for advertising any journalistic or creative works. As drafted, the Senate Bill puts any person who sells or advertises such a work at risk of being prosecuted or sued. In its current form, for example, both the Assembly and Senate version of the Bill may well outlaw an advertisement for a newspaper or magazine that contained a picture of a prior edition with a dead celebrity or politician on its cover. Moreover, the Bill contains no exception for those who publish, broadcast, or otherwise disseminate another person's advertisement even where the publisher has no knowledge that the advertisement violates the Bill. It will undoubtedly chill speech about matters of public interest and, given its overbreadth, is unconstitutional.

The overbreadth of the Bill is perhaps best illustrated by the fact that it places no time limitation on the rights granted. We are aware of no legitimate policy goals that would be served by extending rights of publicity indefinitely into the future. Even copyright and patent protection is constitutionally required to be granted only for limited periods of time. U.S. Constitution, Article I, Section 8. Without such limits, the policy interests served by providing protection for such intellectual property — e.g., incentivizing individual creativity — are not furthered. If inventions and particular forms of expression *never* entered into the public domain, our Founders recognized that creativity would be stifled. The same, of course, is true with the right of publicity. None of the policy goals that the right of publicity is said to further — e.g., preventing unjust enrichment or encouraging celebrities to develop positive public personae

— will in fact be accomplished by providing a right of publicity to descendents of an individual that will last indefinitely.

It is not surprising then, that no state has ever provided a right of publicity as broad as that proposed by the Bill here. Few states provide for descendible rights of publicity at all. Of those that do, none provides the kind of limitless right envisioned by the Bill. The only state that does not put an express time limit on descendible rights of publicity — Tennessee — provides that such rights are terminated by proof of their non-use for commercial purposes for any 2-year period after the ten years following the person's death. *See* Tenn. Code § 47-25-1104(b)(2) (2007). New York should not be the only state to provide limitless protection.

The Bill's retroactive application also raises constitutional problems. As drafted, it would criminalize ongoing uses that are not currently illegal. Sellers of Hollywood/sports memorabilia and of historical artifacts would likely go out of business. Indeed, it would become a crime to sell a famous deceased person's autograph without permission of that person's heirs *even if that person consented to it being sold before he or she died*. Letters from or photos of deceased presidents or other historical figures who died on or after January 1, 1938 could not be sold without permission of the deceased person's heirs, even if lawfully obtained by collectors who paid large sums of money for the items with the understanding that they could sell them as they please. As a result, the Bill may well violate Article I, § 10, cl. 1 of the United States Constitution ("No State shall . . . pass any . . . Law impairing the obligation of contracts.").

Furthermore, as a matter of trusts and estates law, it is not even clear that the right in question here *can* be granted retroactively. A recent New York court decision, *Shaw Family Archives*

Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939(CM), 2007 U.S. Dist. LEXIS 35674 (S.D.N.Y. May 2, 2007) strongly suggests that it cannot as a matter of law without major changes in New York trusts and estates law.

The Bill also presents several other practical concerns. Among other things, the Bill is ambiguous about who is empowered to grant the consent required for use of a deceased person's likeness. The language of the Bill says that written consent must be obtained from "such person's residuary or other legatees, devisees, distributees or the successors in interest thereof." Does that mean — as it appears to — that *all* heirs must consent? What if the heirs disagree? Given the lack of time limitations in the Bill, it is conceivable that, in the future, a person would be required to seek the consent of heirs of persons who died more than one hundred years ago. In such a case, it may be next to impossible even to *find* all heirs, let alone obtain their consent. There is no legitimate purpose served by imposing such extreme burdens on persons selling historical artifacts.

The Bill is likely unconstitutional, makes little policy sense, and poses a number of practical difficulties. The Committee strongly opposes its passage.

This report was written in conjunction with the New York State Bar Association.