



National  
Coalition  
Against  
Censorship

## Statement of Opposition

### Re: A.8155-A (Morelle) / S.5857-A (Savino) Creating a Right of Publicity for Living and Deceased Persons

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This legislation would establish a new, expansive “right of publicity” under the state’s Civil Rights Law. The bill would also broadly expand the circumstances in which the use of an individual’s persona or image would give rise to civil liability.

Existing New York law prohibits the unauthorized use of a person’s name or image for commercial purposes. It appears that the intent of A.8115-A is to broaden the scope of existing law in order to reach the commercial use of person’s name or image as they may appear on modern media platforms, and to enhance the enforceability of this law when violated.

However, the bill seriously overreaches.

The proposed right of publicity, as enforced, would have the effect of penalizing, or otherwise inhibiting, constitutionally protected speech and expression on matters of public concern. Journalists, video and graphic artists, and bloggers would face legal jeopardy for addressing matters of public concern, as would not-for-profit organizations that disseminate fundraising materials that identify public figures and address issues of public interest.

The bill, if enacted in law, would generate a flood of litigation.

**Lawmakers must reject this legislation.**

The right of publicity, as defined in the bill, broadly prohibits the use of a person’s “name, voice, signature and likeness”<sup>1</sup> for the “purposes of trade or for the purposes of fund raising or solicitation of donations”<sup>2</sup> without first obtaining the written consent of the person, or of the person’s successors or persons to which the right of publicity has been assigned.

The scope of this right is expansive and open ended: a person’s “likeness” is defined to include an “image, digital replica, photograph, painting, sketching, model diagram or other recognizable representation of an individual’s face or body.”<sup>3</sup> The right of publicity also applies to a “characteristic” of a person, which is defined to mean “a distinctive appearance, gesture or mannerism recognized as an identifying attribute of an individual.”<sup>4</sup>

The right to control commercial use of one’s persona is well established in New York law. Article 5 of the state’s Civil Rights Law sets forth a right of privacy in one’s “name, portrait, or picture,” and prohibits the unauthorized use “for advertising purposes, or for the purposes of trade.”<sup>5</sup> Over the last century, the courts have upheld this right as a constraint upon the appropriation of a person’s identity without permission for another’s financial gain.<sup>6</sup>

However, placing legal constraints upon the use of an individual’s name or image in the commercial arena implicates constitutional protections of speech and expression. Courts have therefore interpreted such law narrowly, in deference to the broad protections afforded freedom of speech under the First Amendment to the U.S Constitution and its analog in the New York State Constitution.<sup>7</sup>

The proposed legislation fails to abide by these constitutional principles. The bill imposes a sweeping restriction upon speech and expression. Those provisions in the bill that would carve out exceptions for protected speech only exacerbate the constitutional infirmities.

- The exception in the bill regarding speech and expression related to news and matters of public interest are vague and imprecise. These exceptions are insufficient to protect constitutionally protected speech from the restrictions the bill would impose. In seeking to codify the types of protected speech that would be exempted from prohibitions related to the right of publicity – e.g., a “public affairs broadcast,” an “account of public interest,” a “political campaign” – the bill creates a minefield of potential First Amendment violations.

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<sup>1</sup> A.8155-A, Section 1 (1) (amending Section 50 of the Civil Rights Law).

<sup>2</sup> A.8155-A, Section 4 (4) (amending Section 50 of the Civil Rights Law).

<sup>3</sup> *Supra* n. 1

<sup>4</sup> *Id.*

<sup>5</sup> N.Y. Civ. Rights Law §§ 50-51 (L.1909, c. 14).

<sup>6</sup> *See, e.g.,* Restatement (Third) of Unfair Competition § 46, *Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity* (1995) (“One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability...”; in Comment, “principal historical antecedent of the right of publicity is the right of privacy” (mentioning, as underlying case for enactment of statute, *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902)); and including N.Y. Civ. Rights Law §§ 50-51 among “[s]tate statutes recognizing a right of publicity or analogous right[.]”).

<sup>7</sup> Messenger case and/or string

- The bill would place an unacceptable burden on newsworthy speech and commentary that involves public figures. The First Amendment protects communications on matters of public concern, including mentions and representations of public or “newsworthy” figures.<sup>8</sup> By requiring a speaker or creator of content to seek prior approval from a person whose right of publicity may conceivably be compromised, the bill places far too great a burden on constitutionally protected speech.
- The proposed right of publicity undermines the constitutional rights of non-profit organizations to engage in fundraising communications that address matters of importance to the public. It is in the corporate mission of many not-for-profit organizations to educate and inform the public regarding important matters of public policy. This type of communication – conveyed in newsletters and through social media – often includes a request from the recipient for financial support. This bill places the public interest mission of non-profit organizations in conflict with the restraint upon communications that may mention a political figure or other persons in the news.

This legislation has been introduced, and amended, with great haste in the closing weeks of the legislation session. The bill is fundamentally misguided as a matter of law and public policy.

Lawmakers must reject A.8155-A/S5857.

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<sup>8</sup> Cite Messenger, others?