T 213.736.1000 | 919 Albany Street
F 213.380.3769 | Los Angeles, CA 90015-1211
www.lls.edu

Prof. Jennifer E. Rothman

LOYOLA
LAW SCHOOL | LOS ANGELES

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Memorandum Opposing Assembly Bill A8155B

I am writing to **oppose** the proposed bill, A8155B, as amended on June 5, 2018. I am a Professor of law and the Joseph Scott Fellow at Loyola Law School, Loyola Marymount University. I am an elected member of the American Law Institute, and a nationally recognized expert on the right of publicity—the subject of the proposed bill. I am the author of *The Right of Publicity: Privacy Reimagined for a Public World* (Harvard Univ. Press 2018), and of the leading website on right of publicity law, *Rothman's Roadmap to the Right of Publicity*, www.rightofpublicityroadmap.com.

A8155B is a complicated bill, introduced only this week toward the end of the legislative term without adequate opportunity to debate or fix its significant and troubling proposed changes to New York law. Generally speaking, my concerns are the addition of transferability, the threat to creative expression, and the ill-thought-out postmortem provision.

Here is a sampling of some of my many concerns with the proposed version of the bill:

Danger of Transferability

Although the amendment recognizes some of the dangers of creating a transferable right of publicity by, for the first-time, adding in a limit on transfers of children's rights of publicity so parents cannot sell off their children's identities forever, the bill completely fails to protect those over 18 years of age from the very same danger. The proposed bill would make the rights to a person's "name, voice, signature and likeness," **transferable** for the very first time in New York.

New York's current law does not allow transfers of a person's identity to a third-party. As I have written in *The Inalienable Right of Publicity*, 101 Georgetown Law Journal 185 (2012), and in my book, *The Right of Publicity*, allowing such transferability does not help the very people this bill seeks to protect. Instead, it risks their losing control over their own names, likenesses, and voices to creditors, ex-spouses, record producers, managers and even Facebook. A recent op-ed that I published also addresses some of these concerns. Jennifer E. Rothman, "Only Robin Wright Should Own Robin Wright," accessible at https://reason.com/volokh/2018/05/09/only-robin-wright-should-own-robin-wrigh.

Overbroad and Vague "Digital Replica" Provision Threatens Creative Expression

The bill adds a provision barring the use of "digital replica[s]." The provision is extremely broad, and potentially prohibits the recreation of performances in biographical pictures about real actors or athletes if the films include scenes of those characters performing roles or playing games—something standard in such films. This threatens the ability of creators to make biographical movies, videogames, and television shows about actors or athletes because even if those individuals are played by someone else, a viewer might think that the "individual

represented by the digital replica is performing" the activity—an activity that the person is known for doing. The provision also encompasses sound recordings and could prevent sound recordings that evoke a particular performer in the mind of listeners, something that would conflict with federal copyright law (which allows sound-alike recordings in some instances).

Although the digital replica provision suggests an exemption for works of "parody, satire, commentary or criticism," and works of "political, public interest, or newsworthy value," such as documentaries, it is not clear how this exemption would be applied to fictionalized biopics (such as, *Hidden Figures*, *The Hurt Locker*, or *Feud*), or in the context of sound recordings. This uncertainty would further chill speech and engender much litigation interpreting these vague and seemingly contradictory provisions.

The amendment also adds a provision apparently intended to address concerns over sexually explicit deepfakes, but does not define what it means by a "use in a pornographic work." This provision is unconstitutionally vague. If the provision were somehow enforceable, it could jeopardize movies, television series, and other works that include R or NC-17-rated sex scenes in the context of telling stories about real people.

The Bill Provides Post-Mortem Rights without Sufficient Limits or Justifications

New York has survived for more than 100 years without a post-mortem right of publicity. Performers, actors, models, and citizens of the state have thrived in its absence. This bill would provide a right that would last for 40 years after death, but the legislature has not established why one is needed.

States are solidly divided over the question of whether to provide postmortem rights of publicity, with only about half recognizing a postmortem right. And some states that do provide such a right, offer only a very narrow right (for example, limited only to deceased soldiers). The terms of postmortem rights even in states that recognize a broader right still vary widely—some states provide for a ten year duration, others thirty, and some terms are as long as one hundred years.

"Even states that are geographically close to New York have widely differing views on the subject. Massachusetts, for example, which based its right of privacy statute on New York's, does not provide a postmortem right. Connecticut does not seem to either, although one federal district court guessed that maybe the state would. Similarly, New Jersey does not have a postmortem right, although several federal courts have concluded that the state would recognize such a right . . . Pennsylvania does provide a statutory postmortem right of 30 years, but only for those who died domiciled in the state, and who were actively commercializing their identities at the time of death. Moving slightly further away from New York, Delaware, Rhode Island and Vermont have not recognized a postmortem right. So there is hardly a consensus in the Northeast on whether there should be a postmortem right in the first place. Clearly, New York is not an outlier by not providing such a right." Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, *Cardozo Arts & Entertainment Law Journal* (2018) (forthcoming).

The bill also fails to address the significant estate tax danger that can force the commercialization of the dead against both their and their families' wishes. This and other concerns led the state of Minnesota to reject a recent proposed bill to add a postmortem right of publicity in that state. A more targeted and narrower provision that focuses on the interests of

surviving relatives, addresses the estate tax issue, and takes seriously creators' and the public's right to engage with deceased public figures might be appropriate, but this bill misses the mark.

Destabilizing Effect

Although the amendment retains New York's current right of privacy—rather than striking it, as the prior draft bill did—it is not clear how the more than 100 years of stabilizing decisions under New York's Civil Rights Law Sections 50 and 51 would apply to the newly added "right of publicity" provisions for the living and deceased. This will create great uncertainty (and lots of litigation) about what sorts of uses of people's identities are allowed, and what are not allowed.

Summary

The proposed amendment would likely run afoul of the First Amendment and copyright law. It would unduly chill speech, and generate massive litigation and uncertainty about the scope of the law. A lot more thought and work needs to go into any proposed right of publicity in New York. I respectfully request that you vote **NO** on A8155B. I am happy to be of service to you in the process and to address any questions you have about these comments, or about drafting more directed legislation to specifically address postmortem rights, the digital avatar concern, and the taking of and dissemination of unauthorized, sexually explicit images.

Sincerely,

Jennifer E. Rothman

Jennifer E. Rothman
Professor of Law and Joseph Scott Fellow
Loyola Law School, Loyola Marymount University