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**Memorandum Opposing Assembly Bill A.5605 and S.5959**

I am writing to **oppose** the proposed right of privacy and right of publicity bills as currently drafted, Senate Bill No. 5959 (introduced May 16, 2019) and Assembly Bill No. A05605 (amended and reintroduced June 6, 2019). I am a Professor of Law and the Joseph Scott Fellow at Loyola Law School, at Loyola Marymount University in Los Angeles. I am an elected member of the American Law Institute, an affiliated fellow with the Yale Information Society Project at Yale Law School, 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.

Both of these bills are complicated, and the proposed changes to New York law extensive. I hope that these comments will be helpful both in the consideration of the passage of these bills, but also in any potential revisions to them.

There are many promising improvements in these bills from the earlier assembly version (reintroduced in February), and many good intentions, but also many new problems and dangers erected in these drafts. This should greatly worry the bills' sponsors and lead you to withdraw or vote against the bills in their current form.

Separate from the dangers created in this draft that I will discuss further in this memorandum, the bill is unnecessarily complicated, and at times seems contradictory with itself. Given the many areas in which the bill is unclear, it would engender great uncertainty in New York law, likely decades of litigation as to what it even means, and would likely have many unanticipated and unintended consequences that would undercut the aims of the legislation.

So, while I applaud the efforts by the involved senators and staff to improve on the prior versions of the bill, I hope that the New York State Senate and Assembly recognize that these bills are not yet ready for serious consideration.

I will focus my comments in this memorandum on four main areas of concern: (1) the proposed redefinitions of the right of privacy and right of publicity, (2) the creation of transferable rights under New York law; (3) the convoluted, unclear, and likely unconstitutional approach to providing speech protections; and (4) the proposed postmortem provisions.

## I. Unique and Troubling Proposed Redefinitions of the Right of Privacy and Right of Publicity under New York Law

These bills redefine what the right of privacy means under New York law, and create a novel definition of the right of publicity (and the right of privacy) that **no** other state has adopted, and for which there are no existing precedents within or outside New York for courts or content creators to rely on going forward in interpreting the law.

The newly proposed definition of the "right of publicity" is as a right that survives death (for up to 40 years if registered), and that is "an independent property right, derived from and independent of the right of privacy, which protects the unauthorized use of a living or deceased individual's name, portrait or picture, voice or signature for advertising purposes or purposes of trade without written consent **and the pecuniary loss sustained**." (emphasis added)

The newly proposed definition of the "right of privacy" is limited to the living, and is defined as a "personal right, which protects against the unauthorized use of a living individual's name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent **and the mental, emotional, or reputational injuries sustained**." (emphasis added)

I have emphasized the key additions that fundamentally alter how we understand these rights, because they create problems for figuring out what these bills would do.

As an initial matter, I do not think it wise (or necessary) to sever the long-joined-at-the-hip rights of privacy and publicity in New York, and at least in this version doing so causes more harm than good. If one of the central motivations for seeking a new law is to provide a postmortem right of publicity this could be accomplished with more targeted language that does not produce uncertainty for the living, as this version does.

The anomalous definitions of the rights of publicity and privacy dangerously sever economic and noneconomic interests, and complicate claims and recoveries for injuries that stem from the exact same use of a person's identity. And, of the utmost concern, the proposed changes potentially leave many potential plaintiffs out in the cold, particularly ordinary citizens who would have claims under today's New York law but may be denied them under the new law.

For example, suppose Facebook authorizes (and profits from) the use of a young woman's name and likeness in a sponsored advertisement for Coca-Cola on the platform—something it has done in the past and been sued for. Now suppose that this person, we can call her Abigail, doesn't suffer "mental, emotional, or reputational injuries" as a result of the use. Nevertheless, she finds it outrageous that her name and likeness were used in an advertisement for soda without her permission. This is in fact the paradigmatic violation of the right of privacy and right of publicity under New York law, dating back to 1903 and the law passed in the wake of the much-criticized decision in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902) (denying Abigail Roberson a claim when her likeness was used in an advertisement for flour). Under today's law, Abigail would have a claim against Facebook and Coca-Cola, but she would **not** under the proposed bills. Her (newly defined) *right of privacy* would not be violated.

Nor would the (newly defined) *right of publicity* provide her relief. Because as an ordinary citizen who does not commercialize her identity, she has not sustained a "pecuniary loss" as a result of the use, she will have **no** claim whatsoever. Abigail should have a claim here, and does today, but the proposed bill would likely obliterate such actions.

Similarly, it is not clear what must be shown to demonstrate the required "pecuniary loss" to make out a right of publicity claim. Does this mean that only those who are commercializing a person's identity (or that of a deceased person) can bring claims? And can they only bring claims if they can prove a pecuniary loss? Not lost opportunities or lost potential profits, but an actual pecuniary loss? Hard to tell what is intended here, and this standard may leave out even actors and celebrities who cannot demonstrate that they suffered actual financial losses as a result of the use. This too affords public figures and celebrities **far less** protection than the current law provides.

I also note that the redefinition of the right of privacy may mean that many more privacy-based claims will fall to First Amendment defenses as the new definition places them squarely within the reach of the Supreme Court's decisions in *Hustler v. Falwell* and *Time v. Hill* in which the Court limited the enforcement of reputational and emotional-distress related claims. Again, I suspect that this is the opposite of what was intended by the drafters.

Given the bills' novel definitions of privacy and publicity, it is also not clear how decisions made under the old Section 50 (and 51) would apply to claims brought under the new "right of publicity" claim, or even the new "right of privacy" claim. This should itself be a major stumbling block to passage of these proposed bills because of the uncertainty it would engender for content creators and litigants.

## II. Danger of Transferability

Both proposed bills would make the rights to a person's "name, voice, signature and likeness," **transferable** for the very first time in New York.

I appreciate that both drafts improve on earlier versions by limiting the ability to transfer children's rights of publicity to third parties forever. But this doesn't alter the fact that both bills would leave other living individuals at risk of losing ownership of our own names, likenesses, and voices. Children are not the only ones who need protection from this danger.

As I have warned, if the right of publicity is made freely transferable—something not currently allowed under New York law, but that this bill would do—creditors could take ownership of a person's identity. For example, if a celebrity declared bankruptcy, then her creditors could take ownership of her publicity rights. Similarly, ex-spouses could take an ownership interest in a person's identity when assets of the marriage are split. The bill does not address these possibilities. (I note that Illinois, which created a transferable right of publicity, specifically bars creditors from owning other's rights in their own identities.)

Even purportedly voluntary transfers should be barred or limited rather than enabled by New York law. Allowing the free transferability proposed in this bill will place at risk aspiring actors,

musicians, and models, who are all particularly vulnerable to signing away their rights of publicity for a chance of getting representation, or a record deal, or doing a photo shoot. Unions can step in to help, but not every deal or transaction is governed by union deals. The NCAA has already asked student-athletes to transfer those rights to them as a condition of receiving their scholarships and playing college-level sports. In addition, these transfers apply to everyone, including ordinary citizens who might discover that online terms of service could transfer ownership of our names, and likenesses to Facebook without any ability to reclaim these rights. The proposed bills allow this dangerous set of affairs, while existing New York law does not.

New York should lead us away from this abyss rather than into it.

For additional resources on these concerns, please see Chapter 6 of my book, and an article I wrote on this subject, *The Inalienable Right of Publicity*, 101 Georgetown Law Journal 185 (2012). For a brief overview, you might wish to read an op-ed that I wrote titled "Only Robin Wright Should Own Robin Wright," accessible at https://reason.com/volokh/2018/05/09/only-robin-wright-should-own-robin-wrigh. Two recent lectures that I gave in New York that addressed this topic and that have been published may be of particular interest on this subject as well. The first at Columbia Law School, *The Right of Publicity's Intellectual Property Turn*, published at 42 Colum. J.L. & Arts 277 (2019), and the second at Cardozo School of Law, *The Right of Publicity: Privacy Reimagined for New York?* that focuses specifically on New York law and is published at 36 Cardozo Arts & Entertainment L.J. 573 (2018).

## III. Confusing and Complicated Exemptions Set Up First Amendment Problems

The bills have many exemptions directed at protecting free speech, but then also have exceptions to these exemptions, and then exceptions to those exceptions, making these provisions very difficult to discern, and far more complicated than the straightforward exemptions provided by other state right of publicity statutes.

The bill provides exemptions from liability for uses in news, public affairs and sports broadcasts, an "account of public interest," political campaigns, plays, books, magazines, newspapers, musical compositions, visual works, works of art, audiovisual works, radio or television programs deemed to be entertainment, and dramatic, literary or musical works. The exemptions also apply to works of political, public interest or newsworthy value, including "comment, criticism, parody, satire or a transformative creation of a work of authorship." The reference to transformative creations may be trying to hint at support for California's transformative work analysis for determining First Amendment defenses in right of publicity cases, but it is hard to be sure given the language used. The legislature should be explicit if it intends to adopt this approach.

The provision exempts advertising for news and sports broadcasts, and those in political campaigns, but does not exempt advertising for artistic works. This differs from the standard exemptions for the advertising of such works that most other state statutes provide. This is a serious failing of the bill and likely runs afoul of the First Amendment. It means that it could be a violation of a person's right of publicity to advertise that a movie or book is about a particular person.

The bill then has an exception to the exemption for expressive works when a "digital replica" is used in an expressive audio visual or audio work or sound recording. Here the exemption applies when the digital replica appears to give the "clear impression that the professional actor represented by the digital replica is performing, the activity for which he or she is known, in the role of a fictional character" or gives the "clear impression that the professional singer, dancer, or musician represented by the digital replica is performing, the activity for which he or she is known, in such musical work;" or gives the "clear impression that the professional or college athlete represented by the digital replica is engaging in an athletic activity for which he or she is known."

These provisions are overly specific, and ultimately are both too broad and too narrow. Why limit the claim to "professional actors," "professional singers," and "athletes"? Is this simply a case of who had their representatives in the room? Because there is no logical basis to limit the provision solely to these three categories.

Also, how broadly or narrowly should we understand the term "activity for which he or she is known"? Would this leave out a well-known actor when a digital replica is made of her singing because she is known for acting, not singing? Would these provisions mean that a YouTube sensation who talks about and shows his adorable cat wouldn't have a claim if replicated in a film? If not, why not? And the inclusion of athletes seems different as the digital replicas would not be replacing live sporting events. This unusual specificity calls into question the legitimacy and constitutionality of the provisions.

I note that the highest court of New York already suggested in *Lohan v. Take-Two Interactive Software*, 31 N.Y.3d 111 (2018), that digital avatars used in videogames (and by extension films) would fall within the scope of current right of privacy and publicity protections under state law. The court expressly held that a "computer generated image may constitute a portrait within the meaning of the law [Civil Rights Law §§ 50 and 51]." *Id.* at 117, 122. There therefore does not seem to be a need for a new law to cover this territory, and certainly the proposed provision would do more harm than good both for likely plaintiffs and content creators.

As if the draft bill were not already too complicated, there is then an exception to the exception to the exemption for the digital replicas. The exclusion from the exemption for liability for audiovisual and audio works that include digital replicas doesn't apply if the use is "for purposes of parody, satire, commentary, or criticism," or is "in a work of political, public interest, or newsworthy value, or similar work, including a documentary, regardless of the degree of fictionalization," or if the use is "de minimis or incidental." In other words, if it is any of those things we are back in a use that is exempted from liability.

This is unnecessarily convoluted and may be difficult to determine in advance of litigation—in contrast to the typical exemptions in other state statutes—which could significantly chill speech. If it is easy to figure out in advance, then that is likely because all of the works initially exempted—and then not exempted—would then be re-exempted, such as motion pictures. If that is the case, then why the multi-layer complexity?

## IV. Questions Raised by the Postmortem Right Provision

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 new right that would last for 40 years after death, but the legislature has not established why one is needed. Knowing why is important for determining whether New York should have one, and what it should look like.

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). And New York is not an outlier by not providing such a right. *See* Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, 36 Cardozo Arts & Entertainment at 593 (cataloguing treatment of postmortem rights in Northeast).

These bills add an important limitation on prior versions of the bill by limiting postmortem rights to those who died domiciled in New York. But some of the provisions in the draft are either unclear or seem to work against the best justifications for having a postmortem right.

The bills allow the deceased's chosen heirs to transfer away postmortem rights, even though the best argument for having such a right are the dignitary concerns of the survivors. Once the right is transferred away from those who are likely to be close family members or chosen stewards, the after-death rights shift to being purely about money-making. Such postmortem monetary interests should be narrower in scope and are already protected by existing state and federal unfair competition and false endorsement laws.

It is important to recognize that the granting of postmortem rights takes away the longstanding ability of the public to celebrate, comment on, and create new works with the identities of the deceased, whether it be statutes that honor deceased civil rights heroes, or in memoriam posters and t-shirts for a beloved singer. I have written about some of these concerns with regard to the creation of postmortem rights both in my book and a recent an op-ed about *The Market in Dead People*, accessible at https://reason.com/2018/05/10/the-market-in-dead-people.

One concern I raise in that op-ed is that the rights to aging and then dead celebrities may wind up in the hands of wholly unrelated companies that are making a windfall from the deceased at the public's expense without any associated benefit to the deceased's family or loved ones as is often imagined. New York could draft a law that extended postmortem rights but avoided that possibility.

The draft bills also continue to leave those who inherit such rights at risk of being forced to commercialize their loved one's identities even if that is not what they or the deceased would want. As I have written, because of the federal estate tax, if the right of publicity is considered property of the estate, it will be taxed at what is considered its highest and best use—which is judged to be a commercialized one. This is something the law should be drafted to address, but it currently does not.

One way of doing this might be to allow express termination of the right by the decedent, or a provision that allows for limits on commercialization by heirs. The bills add a good provision that allows for termination if there are no heirs either through intestate succession or via a will but does not seem to allow for an affirmative election to terminate or limit the right at the time of death.

**Summary**

There are many good intentions manifested in this bill, and many different objectives sought, but the draft as written may cause more harm than good. If New York is set on adding a postmortem right and express protections against the use of sexually explicit images, it might not want to open the can of worms it does with these draft bills. A better approach would be to simplify things and make separate individual bills targeted at these issues, as California has done. This would leave in place the right of privacy statute that is working and has worked for more than 100 years, while also addressing the current concerns.

These are complicated and important issues. And if New York truly wants to upend the laws that have been working and on the books for more than 100 years, the proposed legislation should solve more problems than it creates. Unfortunately, because these drafts do not do so I respectfully request that you vote **NO** on both the current Senate and Assembly versions of the bill.

If passed, the proposed legislation will hurt a wide variety of your constituents, from average New York citizens who don't want Facebook to use their faces to sell soda, to performers who don't want their managers to own them forever, to filmmakers trying to tell and promote stories about real people.

I am happy to be of service to you and to answer any questions you have about these comments, or about drafting either new versions of these bills, or legislation to specifically address postmortem rights, the digital avatar concern, and the taking of and dissemination of unauthorized, sexually explicit images.

Sincerely,

*/s/ Jennifer E. Rothman*

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