New York State Bar Association
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Memorandum in Opposition

COMMITTEE ON MEDIA LAW

Media Law #1 June 28, 2010

S. 8373-A By: Senator Sampson
Senate Committee: Rules
Effective Date: One year after becoming law

AN ACT to amend the civil rights law, in relation to prohibiting the use of the persona of a deceased personality

LAW AND SECTION REFERRED TO: Section 50-f of the Civil Rights Law

THE COMMITTEE ON MEDIA LAW OPPOSES THIS LEGISLATION

Overview

The New York State Bar Association's Committee on Media Law (the "Committee") writes to strongly oppose Senate Bill 8373-A ("S.8373-A"), which would add a new section to Article 5 of the New York Civil Rights Law, Section 50-f, creating a "right of publicity" for deceased persons. 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" —of any person who died within 70 years before the effective date of the legislations, or who dies on or after such effective date without the written permission of such person's heirs, estate or licensees. These rights would be granted retroactively to persons who are already dead and would last for 70 years after death. Currently, the right of publicity in the state is grounded solely in New York Civil Rights Law §§50 and 51, and related case law, and the right is afforded only to living persons.

Granting post-mortem publicity rights is a concept of dubious constitutionality that would create a morass of uncertainty regarding permissible uses of deceased individuals' personas and will undoubtedly chill protected speech. The proposal will certainly create a new class of complainants, generate litigation where none now exists and, despite its exemptions, put undue stress on the exercise of creative and expressive activities. The bill accomplishes little or promotes few, if any, of the policy goals that a right of publicity is purportedly designed to serve, and creates significant practical difficulties for media entities both in and outside New York State. Finally, the proposed section is unnecessary because deceased individuals are already sufficiently protected by federal trademark laws.

Discussion

The New York Civil Rights Law §§50 and 51, which were enacted in 1903, create a limited right to persons to control the commercial value of their image during their lifetimes, and have always been strictly construed in New York courts favoring the free speech rights under the First Amendment of the United States Constitution and Article I, Section VIII of the New York State Constitution. Courts have only restricted publication under these laws in clear cases where the use of the personality's image or likeness is for purposes of advertising or trade. They have also limited any encroachment of these provisions on free speech by consistently holding that the state does not recognize a right of publicity beyond that contained in Sections 50 and 51.

The creation of post-mortem publicity rights under proposed Section 50-f, however, would upset this delicate balance. Even as a restriction on commercial speech, these new rights do not meet the requirement under the First Amendment, announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), that such restrictions further a "substantial government interest." In fact, given that publicity rights exist to encourage creativity and the development of talent, it is difficult to fathom how the posthumous extension of these rights furthers any governmental interest at all, as if individuals will be motivated to nurture a public persona so that as many as 70 years after they die their heirs can reap the economic rewards.

Rather than serving a "substantial government interest," the proposed new section appears to be a private hand-out for the benefit of a few, which nonetheless will impose significant burdens on the ability of publishers, broadcasters and artists to legitimately portray public and private individuals in their work, and thus engage in First Amendment-protected speech.

There are a number of problems with S.8373-A. Listed below are some of the more troubling aspects of the Bill for the Committee:

1. **The Retroactive Applicability of Rights –** Not only would the bill create a new class of complainants, but it would apply to uses created years before enactment of the legislation, making previously permissible activities suddenly subject to liability and interfering with rights created under existing contracts. Such retroactive application, particularly the burden on existing materials, is almost certainly legally impermissible, and grossly unfair. For example, media productions, like revival Broadway shows celebrating the lives and accomplishments of deceased persons, may become economically unfeasible under the new law, as it is not all that clear that the sale of merchandise associated with advertising for the productions would be exempt under the bill.

2. **The Vagueness of the Rights –** S.8373-A would cast doubt on the legal viability of a variety of expressive works. Unable to predict how a particular use will be interpreted, a publisher, broadcaster or artist may well decide that their use of a celebrity's image 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. Similarly, those required to obtain consent before including a deceased's persona in their work may instead forego such use, even at the risk of great artistic, informational or literary value, rather than bear the burdensome task of identifying and getting consent from the deceased's heirs, often many years after the subject's death.

3. **Optional Registration of Rights –** The bill would permit, but does not require, rights holders to register their claim of rights unless they want to bring any action under the statute. Thus, a rights holder can, even years after a person's death, register a claim and subsequently initiate litigation for allegedly improper uses. This makes it difficult to determine who owns rights and has the power to grant consent, placing an almost insurmountable burden on those who wish to use images and other identifying information of deceased individuals. The failure to register will carry no real meaning. Moreover, for those individual photographers, filmmakers and image-licensing companies in New York State, the language as drafted is unclear as to whether a model release granting permission for advertising use executed during a person's lifetime will be upheld, directly impacting the ability of such individuals and entities to exploit the copyright in the images they own and represent.

4. **Different Treatment of Living and Deceased Persons –** The proposed Section 50-f also would result in different and distinct rules for living persons and for deceased persons, which may result in unintended and unforeseen consequences. It is also generally unclear whether the identified works that are exempt for deceased personalities are exempt for the living, given that Section 50-f as proposed in S.8373-A and Sections 50 and 51 both start with the same language prohibiting use without consent "for advertising purposes or for purposes of trade."

5. **Exemptions Will Always Lack Sufficient Breadth –** The danger of identifying certain exempt expressive works based on traditional forms of media such as theatre books and magazines is that the legislation will certainly overlook new forms of expression created in the future. As many forms of media are supported by advertising and will continue to do so in the future upon technological platforms not yet developed, the legislature should be wary of creating ambiguity which will lead to expensive permissions, unnecessary litigation and result in a chilling effect on new forms of works. Further, even if an exemption is made for the wide range of newsworthy, artistic, and other speech and creation that should be protected, it is inevitable that litigation will follow from unflattering portrayals of deceased persons, with the result that the threat of such lawsuits from disgruntled heirs will undoubtedly chill protected speech. Such a result would be contrary to the core principles of the First Amendment, and thus constitutionally vulnerable.

Several matters of trusts and estates law would also require attention in the event that a posthumous right of publicity is created in New York. In Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F.Supp.2d 309 (S.D.N.Y. 2007), for example, the court concluded that "property not owned by the testator at the time of his death is not subject to disposition by will," strongly suggesting that any posthumous right of publicity cannot

be applied retroactively as a matter of law and would be grabbed by persons other than those the dead celebrity had intended to be his or her beneficiaries.

Finally, it bears mentioning that deceased celebrities already receive significant protection from federal trademark laws. The name "Marilyn Monroe," for example, is a federal-registered trademark, providing a potential basis for infringement claims against unauthorized uses. Relief may also exist under Section 43(a) of the Lanham Act, which imposes liability for the unauthorized use of a celebrity's persona in connection with goods or services, where the use is likely to cause confusion as to the celebrity's affiliation or association with, or approval of, such goods and services. 15 U.S.C. § 1125 (2006); Linda J. Wank & Elisabeth H. Cavanagh, *The Lasting Effect of Star Power*, N.Y.L.J., Sept. 17, 2007, S1. These existing protections are likely to weigh heavily in any First Amendment balancing under the *Central Hudson* test.

A "right of publicity" for deceased persons as proposed in S.8373-A would be flawed and constitutionally questionable. The proposal makes little policy sense, and poses a number of unnecessary practical difficulties for the vast press, publishing, audiovisual, digital, and creative industries and individuals in New York State. The Committee strongly opposes its passage.

Based on the foregoing, the New York State Bar Association Committee on Media Law **OPPOSES** this legislation.