New York State Bar Association
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Memorandum on the Proposed Amendments to New York Civil Rights Law, Sections 50 and 51 from the Committee on Media Law of the New York State Bar Association

Media #3 June 5, 2018

S. 5857-A By: Senator Savino
A. 8155-A By: M. of A. Morelle
Senate Committee: Judiciary
Assembly Committee: Rules
Effective Date: 180th day after it shall have become a law

AN ACT to amend the civil rights law, in relation to the right of publicity; and to amend the civil practice law and rules, in relation to the timeliness of commencement of an action for violation of the right of publicity.

LAW & SECTION REFERRED TO: Section 50 of the civil rights law.

COMMITTEE ON MEDIA LAW

The New York State Legislature last spring introduced into both the Assembly and Senate, a bill that would have dramatically modified New York Civil Rights Law, Sections 50 and 51, which currently provide for a right of privacy under New York State law.[1] The New York State Bar Association Committee on Media Law, which consists primarily of lawyers specializing in First Amendment and media law and litigation, had then, and continues to have, serious concerns about the complex and vital First Amendment issues raised by the wholesale revision of New York State law being proposed by these bills. We were and remain concerned about the content of the bills, but also that the Legislature has acted without the benefit of full and public hearings or other opportunities at which all aspects of the proposed changes could be vetted, and the myriad of interested individuals and viewpoints could be aired.

We believe that modifications to law that implicate free expression, whether Sections 50 and 51 or other, should be undertaken with great care, and with a serious eye towards the degree to which they will impact on all forms of expression. Where an amendment to the law will upend over one hundred years of history, and will remove potentially substantial amounts of material from the public space, those changes should

[1] The bill was introduced into the Assembly as A. 8155-A. The companion bill in the Senate was S. 5857-A

be done with precision and as narrowly as possible with benefit of wide public input. Granting individuals additional rights to control their persona, which the bills introduced last spring would do, has to be understood as having the consequence of burdening, and potentially censoring, the rights of all others in society to speak and publish about them.

Indeed, as to the specific rights at issue here, it has been the experience of many members of this Committee that such rights are often mis-used in attempts to control the public narrative about the subject individual – that is, to control news reporting and storytelling so that the individual is presented in the way he/she wants, or the way in which the individual's heirs would prefer that he/she be remembered.

The Committee has undertaken to review in short form the history of New York Civil Rights Law, Sections 50 and 51, and to try to set out the basis of the Committee's most fundamental concerns about the direction the suggested changes would take New York law.

A bedrock from which we start is that New York State has long had a robust view of the protection it affords speech and press, in all of the multiplicity of media and formats. The New York State Constitution, Article I, Section 8, and this state's laws, to date, have been enacted and applied in ways found to be highly protective, and intentionally so. Two clear examples of the New York State Legislature's concrete means of providing a robust environment for speech and press come out of libel law.

When major news organizations based in New York State were under existential threat from libel litigation in the 1960's as a result libel litigation in southern states arising out of their reporting on the civil right movement, New York State took the lead in limiting the applicability of its libel laws to out of state media, in hopes that other states would follow New York's lead.[2]

More recently, in 2008, when Americans generally and New Yorkers specifically, were threatened with libel judgments coming out of courts outside of the United States with legal systems that afforded far less protection for speech than that of New York State, the Legislature enacted the Libel Tourism Protection Act, effectively barring enforcement of such judgments in New York courts.[3]

These provisions exist among others in New York law to protect the news and information gathering processes and the widest range of expression, nonfiction and fiction, in all manner of medium in New York State – and among these provisions are Sections 50 and 51 of the Civil Rights Law.

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[2] N.Y. C.P.L.R. § 302. See, ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 15-8 (4th ed. 2012) (noting that the statute was "intended 'to avoid unnecessary inhibitions on freedom of speech or the press' ") (citing 2 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE § 302.15 (2d ed. 2004)).

[3] N.Y.C.P.L.R. § 302(d).

History of Section 50/51

The New York State Legislature enacted the current privacy statute, Sections 50 and 51 of the New York Civil Rights Law, in direct response to *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902) – a case in which the defendant used the plaintiff's picture, without authorization, in traditional commercial advertising. The defendant in *Roberson* created 25,000 copies of lithographic print advertisements for flour. These advertisements included photographs of the plaintiff without her permission. The New York Court of Appeals reluctantly concluded that Ms. Roberson had no claim under New York law as it then stood. *Id.* at 556 (the law at the time provided no "so-called 'right of privacy'" and "the doctrine [could not] be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.").

"The Legislature responded [to *Roberson*] by enacting the Nation's first statutory right to privacy, now codified as sections 50 and 51 of the Civil Rights Law." *Howell v. N.Y. Post Co., Inc.*, 81 N.Y.2d 115, 123 (1993); *Foster v. Svenson*, 128 A.D.3d 150, 155, (1st Dep't 2015) ("Public outcry over the perceived unfairness of *Roberson* led to a rapid response by the New York State Legislature."). The right of privacy in New York is exclusively a creature of statute and there is no common law right in the State.[4]

Given that the privacy statute has its roots in a case about traditional advertising, and the plain language limits the statute's scope to purposes of "advertising" or "trade," courts in New York have, with but few exceptions, interpreted Section 51 narrowly to apply to such traditional commercial purposes – but not to works that have broader social purposes, whether fictional or nonfictional in all mediums. As the New York Court of Appeals put it in *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433 (1982), the statute

> was drafted narrowly to encompass *only the commercial use of an individual's name or likeness and no more*. Put another way, the Legislature confined its measured departure from existing case law to circumstances akin to those presented in *Roberson*.

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[4] Although the Second Circuit suggested in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953), that a common law right of publicity exists in New York, the New York Court of Appeals has expressly rejected the idea that any common law right to privacy or publicity exists outside of Sections 50 and 51. *See Messenger*, 94 N.Y.2d at 441 ("New York does not recognize a common law right of privacy."); *Stephano v. News Group Publ'ns*, Inc., 64 N.Y.2d 174, 183 (1984) ("Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which, as noted, is exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity.").

Id. at 439 (emphasis added); *Messenger v. Gruner + Jahr Print. & Publ'g*, 94 N.Y.2d 436, 441 (2000) ("recognizing the Legislature's pointed objective in enacting Sections 50 and 51, we have underscored that the statute is to be narrowly construed and strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person" (citation and quotation marks omitted)); *Finger v. Omni Publ'ns Int'l, Ltd.*, 77 N.Y.2d 138, 141-142 (1990) (The statute "prohibit[s] the use of pictures, names or portraits for advertising purposes or for the purposes of trade only, and nothing more.") (internal quotations and citations omitted)

From this history, courts have narrowly construed the degree to which the right of privacy can transgress upon speech. For example, the Court of Appeals has "made clear that these sections do not apply to reports of newsworthy events or matters of public interest. This is because a newsworthy article is not deemed produced for the purposes of advertising or trade." *Messenger*, 94 N.Y.2d at 441; *see also Howell*, 81 N.Y.2 at 123 ("Although the statute itself does not define the terms 'advertising' or 'trade' purposes, courts have consistently held that the statute should not be construed to publications concerning newsworthy events or matters of public interest. This is both a matter of legislative intent and a reflection of constitutional values in the area of free speech and free press.") (citations omitted). The Court further explained that "'newsworthiness' is to be broadly construed [to] include[ ] not only descriptions of actual events but also articles concerning political happenings, social trends or any subject of public interest." *Messenger*, 94 N.Y.2d at 441-42 (citations omitted). The Court has "time and again held that, where a plaintiff's picture is used to illustrate an article on a matter of public interest, there can be no liability under sections 50 and 51 unless the picture has no real relationship to the article or is an advertisement in disguise. *Id.* at 442-43 (citations omitted).

Courts in New York also have recognized that works of fiction do not fall within the privacy statute because they are not "advertising" or "trade."

- *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (1st Dep't 2001) (affirming dismissal of Section 51 challenge to television show *Seinfeld* because "works of fiction do not fall within the narrow scope of the statutory definitions of 'advertising' or 'trade'").

- *Hampton v. Guare*, 195 A.D.2d 366, 366 (1st Dep't 1993) (award-winning play, "Six Degrees of Separation," which was inspired by a real-life criminal scam involving the plaintiff, could not give rise to Section 51 claims because ***"****works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade'*") (emphasis added) (internal citation omitted).

- *Altbach v. Kulon*, 302 A.D.2d 655, 657 (3d Dep't 2003) (affirming dismissal of Section 51 challenge to an oil painting that caricatured a judge because "*artistic expressions – specifically a caricature and parody of plaintiff* in his public role as a town justice – [ ] *are entitled to protection under the First Amendment and excepted from [Section 51]*") (emphasis added).

- *Krupnik v. NBC Universal, Inc.*, No. 103249/10, 2010 WL 9013658, at *6 (Sup. Ct., N.Y. Cnty. Jun. 29, 2010) (dismissing Section 51 challenge to use of a picture of plaintiff in the movie *Couples Retreat* because "*New York courts have repeatedly ruled that use of a person's likeness in movies or other entertainment media* [. . .] *does not constitute use for advertising or purposes of trade, and are not actionable under section 51[.]*" (citing *Costanza*, 279 A.D.2d at 255; *Hampton*, 195 A.D.2d 366)) (emphasis added).

  These determinations are driven, in no small part, by First Amendment concerns. As courts in New York have recognized, the Legislature drafted the privacy statute "with the First Amendment in mind," (Foster, 128 A.D.3d at 156), and courts have relied on First Amendment protections when analyzing claims brought against works that are not clearly commercial speech. See, e.g., Lohan v. Perez, 924 F. Supp. 2d 447, 454 (E.D.N.Y. 2013) ("Courts interpreting the New York Civil Rights Law have concluded that 'pure First Amendment speech in the form of artistic expression . . deserves full protection, even against [another individual's] statutorily-protected privacy interests." (citation omitted) (alteration in original)); Altbach v. Kulon, 302 A.D.2d 655, 657 (3d Dep't 2003) ("defendant's flyers are artistic expressions – specifically a caricature and parody of plaintiff in his public role as a town justice – that are entitled to protection under the First Amendment and excepted from New York's privacy protections"); Hoepker v. Kruger, 200 F. Supp. 2d 340, 349 (S.D.N.Y. 2002) ("New York courts have taken the position in the right of privacy context that art is speech, and, accordingly, that art is entitled to First Amendment protection vis-à-vis the right of privacy.").

Courts also have recognized that it is not their role to weigh or judge the value of such works. The fact that a work, whether fictional or nonfictional, and regardless of medium, is expressive is sufficient to protect it from the reach of the privacy statute. As the First Department stated in a case dismissing a Section 51 claim against a novel and motion picture, affirmed by the Court of Appeals:

> [W]e may not import the role of literary or dramatic critic into our functioning as Judges in this case; and so for purposes of the law we may not reach a conclusion that the works of fiction involved in this litigation are not artistic or literary works. Whether they are creations of merit, whether they have value only as entertainment and no value whatever as opinion, information or education, pose questions which would require us to stake out those elusive lines that we have been warned not to attempt in the cases above cited. Whether "John Goldfarb, Please Come Home" is good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases. It is

> enough that the work is a form of expression "deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism; and we are not prepared to hold that exercise of the freedom in the instant circumstances infringes on rights which equity should protect.

Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 485 (1st Dep't 1965), *aff'd*, 15 N.Y.2d 940 (1965) (citations omitted).

This view hardly is surprising given the strong protections that the New York State Constitution provides and the value that New York, as the creative capital of the world, places on expression. New York, as

> a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. That tradition is embodied in the free speech guarantee of the New York State Constitution . . . [which] reflect[s] the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment.

Immuno, A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 249 (1991) (holding, in defamation context, that the protections of Article I, Section 8 of New York State's constitution can exceed federal First Amendment protections).

Discussion

The media and creative communities, for profit and not-for-profit, as well as ***anyone*** who exercises freedom of expression in the State, have been able to produce and publish and speak while relying on the over hundred-year history of the right of privacy embodied in Sections 50 and 51 of the Civil Rights Law. It has been consistently held to be the exclusive law of privacy for this state. Wholesale revision of these sections – and specifically, recasting it as something other than the right of privacy -- could well undermine that century long history and indeed, create consequences quite unintended by the Legislature. We therefore urge it remain the "right to privacy" and restraint before modifying New York privacy law as embodied in and long applied under Sections 50 and 51 of the Civil Rights Law.

To the extent the Legislature believes that specific changes are required in this area, we would ask that they be made either in separate provisions without modification of the language of Sections 50 and 51, or in as surgically precise and limited fashion as possible.

Because of the concern that the Legislature not disturb the historical position of Sections 50 and 51 as the State's law of privacy, we urge that any additional issues, including the creation of a postmortem right of publicity were one to be considered – as

to which, however, this Committee is not recommending -- be done in separate provision leaving the right of privacy intact in Sections 50 and 51.[5]

The Committee has reviewed the bill that was introduced last term, and it has identified a number of specific comments and concerns discussed below that address conceptual, rather than detailed, issues.

One: First and foremost, as noted above, we would ask the Legislature to not redefine or rename the rights protected under Sections 50 and 51, but allow them to remain a "right of privacy." The potential for mischief by undermining the settled law of privacy in this state is hardly justified or necessitated by what we understand from the bills is being sought. We do not believe that the Legislature intends to create the potential havoc, countless lawsuits, and the unsettling of law in such a significant way.

Two: We do not recommend the addition of post-mortem rights. It must be recognized that the addition of rights to celebrities -- or in the case of postmortem rights, their heirs and the various third parties that manage publicity rights – reduces the rights to speak and publish afforded to all others in New York, individual and entities. We believe that at the least the Legislature should have very public hearings on an issue of such Constitutional import, allowing its constituents to testify and to hear testimony as why such a significant change to an over century old statute is needed in this State.

Creating a postmortem right of publicity will remove from the working vocabulary of our State's citizenry images and ideas that have existed and been utilized historically. It will affect, among others, artists, photographers, graphic designers, filmmakers, digital software creators – those that are established and those that are start-up or small. It will no doubt require additional costs to the creative and expressive community. It may render useless creations that have been seen, sold, distributed for decades. And it surely will provoke disputes and litigation as to what is now no longer in the public realm.

What is uncertain is what public benefit such a system would bring. We are not aware of any public policy justification for imposing new burdens for the use of celebrity names and images on a wide array of New York businesses and individuals for the sole benefit of the heirs of those celebrities, whose identity are currently unknown, and the

[5] We understand that the union that represents performers in audio/visual media, SAG-AFTRA, is deeply concerned with what they perceive as the possibility that their performers, and specifically celebrity performers whose names and likenesses and talents have value to a production, might be recreated without their consent in future audio/visual works by technological means and passed off as the original. No one is unsympathetic to the concept of a given star performer being replicated and an audience being duped by a technologically created clone. This issue, however, can be dealt with in a separate and discreet provision of law without wholesale replacement of Sections 50 and 51 as New York's right of privacy law.

third parties – managers, corporate licensing operations, lawyers, etc. -- that will be engaged in the process.

Three: Consistent with our concern that the status of Sections 50 and 51 as a "right of privacy" not be disturbed, we urge that if a postmortem right were to be created that it be put in a separate provision apart from the current Sections 50 and 51.

Moreover, it need not be, and we would urge that it not be, characterized as "personal property." While that view derives from our concern about the potential myriad of unintended consequences from any change in this area of law, we would note that the creation of a property right has risks for those who claim it as well. It would potentially provide the means for a celebrity to lose the ability to control their own name and likeness in bankruptcy, divorce proceedings, to managers, and others ill-advised contracts.[6]

Four: The need for resisting changes, or adopting ones only in the most narrow and precise fashion, is perhaps most evident in the "definitions" section in the proposed legislation. Those bills expanded the definition of what constituted protectable attributes of an individual from "name, portrait and picture" as currently provided for in Section 50 to a long list of attributes, a number of which were dangerously imprecise. The consequence of such imprecision is to threaten the ability to distribute swaths of previously protected speech, the creation of new speech, and the potential for costly litigation for celebrities as well as those seeing to speak or publish.

Furthermore, the vagueness of the definitions, especially in a statute that is all about expression, could violate due process rights, the constitutional risk whenever "people of ordinary intelligence" must guess at meaning. Definitions that are not clear can trap the innocent without fair warning.[7]

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[6] An October 2005 article by Jody C. Campbell, titled "Who Owns Kim Basinger? The Right of Publicity's Place in the Bankruptcy System, " 13 J. Intell. Prop. L. 179 (2005)[6] poignantly explains the shortcomings of allowing such a right to be transformed into "property." transferred. The article addressed Ms. Basinger's 1993 bankruptcy filing after losing a lawsuit arising out of her withdrawal from the film Boxing Helena. Ms. Campbell noted that after filing for reorganization, Ms. Basinger converted the bankruptcy filing to a liquidation due to the unreasonable demands of a creditor which was seeking the appointment of a third-party to exercise control over whether Ms. Basinger should accept certain roles or even be permitted to start a family. Forced association and involuntary servitude are but two of the many concerns associated with the disassociation of a person's right of publicity and right of dignity that a "property" right can entail.

[7] See Johnson v. United States, 135 S.Ct. 2551, 576 U.S. ___ (2015); Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); Chatin v. Coombe, 186 F.3d 82 (2nd Cir. 1999)

For example, the bills introduced at the top of Section 50, "Definitions," the concept of "characteristic," defined to include "a distinctive appearance, gesture or mannerism" that is "recognized as an identifying attribute of an individual."

Among the issues this term would raise is how and by what standards would the law apply to recognize a "distinctive appearance, gesture or manner"? How and by what standard would it be determined whether something is recognized as an "identifying attribute" for a given individual, including the likely instances off more than one celebrity (and especially those with local followings) having the same or similar "characteristic? "

This kind of imprecise addition to the statute is an invitation for litigation any time a celebrity wishes to chill less than flattering depiction, satire, parody, or other speech that they contend suggests them. And the fact that there will no doubt be protection under constitutional law, if not statutory, for such uses will not protect those who cannot afford to litigate for their right to express themselves.

The inclusion of "characteristic" also raises significant questions as to who would own the protected rights in an appearance, gesture or mannerism.

For example, is a gesture or the expression of a "signature line" made famous by in a play or TV show or motion picture owned by the actor himself or by the author who holds the copyright in the work from which the line is drawn or by the director who instructed the activity? A "signature line" may be the result of many who can claim an ownership right to it.

Even a great actor, who is given a script, outfitted in a costume, had makeup applied and hair styled, and then given direction in a production, should not via a right of publicity be able to claim exclusive ownership to any or all aspects of the character he plays. The Copyright Act vests the derivative rights in the expression fixed in tangible form to the author/copyright holder, not to the person who may be publicly associated with the character as a result of a performance. To allow otherwise would deprive the copyright holder of the ability to exploit the character.[8]

A "distinctive appearance" that is asserted as an identifying attribute of an individual the result of the effort of the individual, maybe, for example, the efforts of a stylist, a costumer, a hair-stylist, or a tattoo artist.

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[8] Arguably, the public at large and others who hold federal (or contract) rights would be harmed if George Reeves or Adam West (or their predecessors) would have been able to prevent the numerous manifestations of Superman and Batman in every type of product or advertisement that exists now, or if Phil Rizzutto and Harry Caray would have been prevented from exploiting their Holy Cow! catch phrases, merely because they were popularized by others before them. The Federal Copyright and Trademark statutes that govern these rights could be in conflict with the proposed legislation.

And, one claiming it may have drawn the gesture or the appearance from another in the past, from a common social gesture, or even from an involuntary gesture that is shared by others.

Indeed, expanding the scope of what is protected beyond what is already protected under Section 50 risks confusion on many levels, not the least is which are conflicts with existing copyright and trademark laws. [9]

And while we have focused in this paragraph on the insertion of "characteristic," in fact, each element of a claim that impinges on freedom of expression has to be questioned closely for clarity and for impact. The law of New York State and its traditions and policies truly demand no less.

We would urge that New York State retain the current definition which has had the benefit of adjudication in a number of decisions in New York courts and thus clarity both for those asserting a right of control, whether privacy or publicity, and those who wish to create or to distribute previously created content.

Five: Similarly, if there is to be an "exceptions" provision that makes clear what is not subject to a claim, such a provision needs to be drawn up carefully to cover the range of mediums and formats in use today and tomorrow. And in addition to the means of expression covered, New York has traditionally and should continue to protect the widest range of subject matter by the widest range of speakers and publishers.

The exceptions must be unambiguous as to their scope and categorical in their protection.

The categorical exemptions must be broad enough to include expressive works dealing with *any* topic of interest to the public. It must steer clear of requiring judges to evaluate the quality or contribution to society of the speech at issue, as judges in New York have acknowledged is not their role.

Nor should the exceptions be limited by medium. In today's digital age, it clearly is not sufficient to extend protections only to traditional publication forms like books, magazines, newspapers or broadcast or even "digital." The language must be flexible enough to include all of the means of expression that exist today but also the as-yet-unknown mediums for expression in the future.

Nor should any speaker in New York State be left out. Individuals, advocates for human rights and civil rights, photographers and graphic designers and visual artists of all varieties, writers, individuals engaged in creating blogs or YouTube channels,

[9] Right of publicity has sometimes been equated with intellectual property rights. And although we are not doing so here, we would note copyright law and patent law recognizes that prior art and pre-existing works cannot be usurped by a more famous or popular contemporary. It should not be true for right of publicity either.

biographers and docudrama writers…the list is long and varied, but all are protected by the First Amendment and the New York State Constitution, and the Legislature should be protective of all of them as well.

Of some note, and not included specifically in the bills, are educational uses. As the mediums change in the social and entertainment and general informational environment, so they change in the educational arena as well and should not be left vulnerable by any amendment or additions to the law.

The "Exceptions" section in the bill proposed last spring did not meet these concerns. Moreover, it was needlessly complex and suffered from ambiguities and conflicting terms that at times threatened to render the section meaningless and internally inconsistent. Two examples:

> 1. Section 51(2)(a) exempted from liability "news, public affairs or sports broadcast, including the promotion of and advertising for a public affairs or sports broadcast, an account of public interest or a political campaign." One might ask why only "broadcast" is exempted. Why is what is identified in the exemption for "the promotion of and advertising for" in that same section followed by a list that is not consistent with previously itemized "news, public affairs or sports broadcast?"
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> 2. The "exceptions" referred to a "a transformative creation," a concept that could mean a number of things within various bodies of law, but no one meaning that would not result in substantial number of lawsuits to refine.

The ambiguities in this section of the proposed bill left the distinct likelihood that each of these questions would be answered through a patchwork of judicial decisions. Such a prospect would be an extraordinary burden on the many in this state who create and distribute content.

We agree that a section that explicitly states the exceptions to the ability to sue under Sections 50 and 51, or any new provisions were any to be created, could be a positive addition to the law. But it will only be positive if the legislature makes clear that all works of expression, in whatever form and concerning whatever subject, save those that are explicitly advertising in nature, are categorically exempt.

Six: The bill introduced last spring included, specifically, nonprofit organizations and their fundraising as subject to claims for what the bill characterized as "right of publicity." It is inconceivable to us that the Legislature meant to put at risk for litigation the many advocacy and social service, human rights and civil rights organizations, religious, political, civic, and other categories of nonprofit organizations that might identify celebrities in their newsletters and other materials, and even in specific fundraising materials.

In the 1960's, Commissioner L.B. Sullivan of Montgomery, Alabama sued the New York Times and a number of clergymen for libel over an ad that appeared in the newspaper seeking funds to support Dr. Martin Luther King and his efforts on behalf of desegregation. It led to the landmark, truly Constitutionally ground-breaking, decision by the United States Supreme Court in New York Times v. Sullivan in 1964. Were the bill as proposed last spring be the law of New York, Commissioner Sullivan would now sue not for libel, but for the violation of a "right of publicity."

Commissioner Sullivan's lawsuit resulted in the Supreme Court articulating broad protection for defendants in libel litigation against public officials under the First Amendment. We believe that New York State should resist the temptation to allow modern Commissioner Sullivans to prevent nonprofits or any individual or entity from using their names or likenesses in arguing their political or social causes. Threats of litigation alone can chill many in the nonprofit world (and indeed, publications and speakers of modest means, whether for-profit or not-for-profit). The State of New York should be sensitive to not handing a cudgel to those who would try to limit criticism of them, even if it is included in an appeal for funds.

We would note in this context that many, if not all, publications in all media, seek subscribers and underwriters and "members" in the context of their communications on a regular basis. Magazines have cards that drop from their pages offering subscriptions. Newspapers have house ads offering subscriptions. The line between content in a nonprofit's newsletter and its "ask" for support may be as thin. But the ability to bring down nonprofits, or dramatically chill them, lies in statutes that invite litigation against them.

Seven: The bills introduced last spring provided that the post-mortem right of publicity created in the bills would be available to potential plaintiffs "regardless of whether the law of the domicile, residence or citizenship of the individual at the time of death or otherwise recognizes a similar or identical property right."

This Committee does not support the creation of a right, however denominated, that would extend beyond death. But, if such a post-mortem "right of publicity" is created we would urge that it should be available only to those who died as domiciliaries of the State of New York. It would be startling and disturbing if New York sought to undermine the laws and policies of sister states and indeed, countries around the world, by authorizing the heirs of anyone in the universe to come to New York State and take advantage of its post-mortem rights regardless of the law of their domicile at death and where their estate resides.

This is the same state that enacted a Libel Tourism Protection Act that barred litigants in England and elsewhere in the world from enforcing judgments here if the free expression rules in their jurisdiction did not rise to the level of ours. And New York State took the proper stand in doing so. It upheld the centuries old tradition of New York in protecting free expression to its utmost. Does New York now wish to run roughshod over the free expression of its own and everyone else's citizens by allowing the estates of celebrity to enforce controls on expression that are inconsistent with the expression rights

afforded elsewhere. It would be ironic if the estate of Princess Diana, to which England does not afford a "right of publicity" however denominated, could come to New York and sue when no U.K resident could enforce a U.K. libel judgment in New York.

Moreover, it may require substantial resources by the New York State court system were New York to become the "right of publicity" capital of the world. And those resources would be used to allow celebrities with no real nexus to New York State, through threats and litigation, to undermine if not censor outright New Yorkers and New York entities ability to speak, publish, create and distribute expression.

Nine: While presumably the creation of a post mortem right of publicity, in addition to the existing rights of privacy provided by Sections 50 and 51, is for the benefit of celebrities and their heirs, there are some issues that estate lawyers should be consulted on related to the creation of an additional right. We would anticipate that one significant issue is that estates will have to pay taxes on the determined value of that right of publicity. It is an issue under litigation in connection with the estate of Michael Jackson, where the valuation is in dispute. This can have an impact on a relatively illiquid estate, and force commercialization that was unanticipated in order to meet the tax bill. [10]

Eleven: Were a post-mortem right to be created, the law should be cognizant of the fact that there is a great deal of creative expression in existence that might be affected by such a new right. There should be no instance in which a creative work of any form should suddenly become incapable of distribution or publication. We would urge the Legislature to be protective of the investments made in works of expression that might be undermined by a statute that affords celebrities a new means of control. All works in existence should remain free to be distributed.

Conclusion

There are numerous other provisions in the bill introduced last term that we have not noted in this memorandum but that are important to specific elements of the media and/ or individual artists, photographers, and speakers in the State. We have tried to limit our analysis here to broad and overarching themes, the most important of which is that any rights given to celebrities to control speech and expression about them is a limitation on the rights of others to speak and express themselves. There are numerous examples of celebrities trying to control their images through litigation or threats of litigation. And no doubt there are countless examples of intimidation and acquiescence by those who could not afford to fight.

[10] There are issues raised by the proposed sections on how a postmortem right would be registered and managed, including seemingly inconsistent provisions with existing New York law on estates and probate. The Committee has questions about a number of them, but would suggest that the Legislature convene a group of trust and estate lawyers, tax lawyers, and member of our Committee, to review these provisions for not only inconsistencies with existing New York law and practice, but practical operational considerations and tax consequences.

New York is home to media and creative industries, big and small. The state serves as the center for enormous national as well as regional and local news and public affairs operations, audiovisual production studios and numerous support operations (designers, costumers, wig makers, carpenters, electricians, truckers, camera operators, etc.), book publishers, magazine publishers, cable and digital operations. We have in this state the most robust creative talent in photography, theater, visual arts, music and, indeed, all art forms and countless venues that display and sell that creativity to the public. New York is home to a thriving and growing digital content and software industry. Every and all means by which humans communicate can be found in New York State, in large corporate entities down to sole proprietors and small and start-up businesses.

New York State is home to countless not-for-profits, whose activities are at risk from the bills introduced last spring. And, New York is home to millions of outspoken, public minded, civically and socially engaged residents who publish and speak countless words and images every day, and whose activities may well become subject to the provisions of any expansion of Sections 50 and 51 and/or its replacement with a "right of publicity."

We would urge the Legislature to not amend Sections 50 and 51 nor add to the laws of New York a "right of publicity" and certainly not to do so without significant public input that can amplify and bring into the discussion the concerns and potential impact on the myriad of parties at interest in the subject matter of Sections 50 and 51. That would include, at a minimum, the extensive media in the State, the theatrical community with producers and playwrights, authors and other creative artists, advocacy organizations and individuals whether for profit or nonprofit, the advertising industry, and State and federal constitutional experts in addition to unions and trade associations. We believe that many are unaware of the changes proposed in the bills.

New York Civil Rights Law Sections 50 and 51 have been on the books since 1903. These laws have been strictly construed in New York, favoring the right to freely publish about persons based on State Constitutional and First Amendment principles and only restricting the publication in clear cases where the use of the personality's image or likeness is for purposes of advertising or trade. It has been an important part of the legal structure in New York State that is designed to be speech and press protective as a matter of state policy and pride, and has served to encourage so many to come and work in this state in media and the creative arts. We would urge the Legislature to eschew wholesale changes to Civil Rights Law Sections 50 and 51, and even amend it only with careful weighing of the costs to this historical legal structure.

The members of this Committee of the New York State Bar Association would welcome an opportunity to discuss the issues with the Legislative members and their staff members, and are open to any questions that the Legislature might have regarding Sections 50 and 51 and right of publicity.