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June 23, 2017

Senator Diane Savino
New York State Senate

Assemblyman Joseph D. Morelle
Majority Leader
New York State Assembly

Assemblywoman Helene Weinstein
New York State Assembly

Re: S. 5857/A.8155 Right of Publicity Bill

Dear Senator Savino, Assemblyman Morelle, and Assemblywoman Weinstein:

I write to you as Executive Director of [the Authors Guild](http://theauthorsguild.org), the nation's oldest and largest professional organization for writers. In addition to providing support for our members (including legal advice on contracts, copyright, right of publicity, and libel), we advocate for the economic interests and free speech rights of all American authors. I am writing about S. 5857/A.8155, the bill that would create a new right of publicity in New York State.

We learned of S. 5857/A.8155 only last week, as did many other stakeholders. We thank you for agreeing to put the bill on hold until the next legislative session, and for your willingness to hear from us and others who may be affected by the bill. We would greatly appreciate being included in further conversations on the bill, as it could have a major adverse impact on the ability of authors to write about or even allude to real people, in both fiction and nonfiction, up to 40 years after death, unless the language is considerably tightened up.

We have grave concerns about the bill as drafted. It has the potential to cause great harm to our society's knowledge-base and to stifle speech in the State of New York—and nationwide, given that standing would be based on a given work's publication in the State and not the domicile of the injured party.

As a democratic society, it is incumbent that authors be free to write without restraint about public figures, including politicians, celebrities, and others who have entered the public eye for any reason. Already, it is far too easy for those who are portrayed in books or articles in a manner they don't like to prevent publication by threatening to sue on shaky claims of right of privacy/publicity violations or libel. In our day-to-day work representing authors, we see in a concrete way how these threats of litigation work directly to suppress speech. Even where the plaintiff has only the mirage of a valid claim, the threat of litigation is enough to suppress publication because the author simply cannot afford to defend a lawsuit. Even if the publisher's insurance would cover the suit, the author is virtually always still liable for the deductible, which can reach or even exceed \$200,000. It is out of the question for the vast majority of authors to

take on that kind of financial risk. Our [2015 survey](#) shows that the median income for full-time authors in 2015 was a mere \$17,500.

Any ambiguity in the law can be and will be taken advantage of as a sword to suppress speech. The draft bill (the version we reviewed is attached) must be revised to remove ambiguity as to what rights are protected and what the exceptions are. Apart from some substantive concerns that we have, noted below, the language in several areas needs to be more precise and more closely tailored to the problems the bill seeks to address in order to prevent the law from interfering with the free speech rights of creators. As it reads currently, it is opening the floodgates to massive amounts of abusive litigation (or threatened litigation) in the State of New York. We outline some of our most urgent concerns below.

- Including “a characteristic” as a protectable indicia of identity has the potential to open the floodgates of litigation. “Characteristic” is defined as a “distinctive appearance, gesture or mannerism recognized as an identifying attribute of an individual.” The breadth of possible human “gestures and mannerisms” is unlimited. Including “characteristics” will allow claims by anyone who is known by anyone to use a certain gesture or mannerism to bring suit for another’s use of the same. It essentially creates an intellectual property right in gestures, mannerisms, and also appearance—the latter of which is particularly unclear, since image is already covered by the right of publicity. Is it meant to cover a “look” or “style”? If so, we object strenuously, as anything beyond a person’s actual identity must be left in the public domain. No one should be able to monopolize a certain style.
- Defining the “Right of publicity” to include “the right of privacy,” without defining the right of privacy (such as by reference to existing law) expands the possible scope of the right of privacy.
- The proposed amendment to Section 51 of the civil rights law will allow non-domiciles of the State to bring action under the new law in the case of “an act or event that occurs within New York.” Since most media are distributed on a nation-wide basis, this will invite forum shopping. Anyone who wants to stop publication of a book in which they are mentioned might sue under this statute in New York, regardless of domicile. We object to the inclusion of this provision.
- Section 51.2 provides for exceptions, but it is unclear what these exceptions apply to. We understand the exceptions are intended to completely exempt from the right of publicity any “play, book, magazine, newspaper, musical composition, visual work, work of art, audiovisual work, radio or television program if it is fictional or nonfictional entertainment, or a dramatic, literary or musical work.” If so, it should be moved to Section 50 or needs to expressly state that it is modifying the right provided for in Section 50. Placing it in Section 51 otherwise can be interpreted to mean that the exceptions apply only to those provisions on remedies in Section 51.
- Further, it seems backwards to exempt most media out of the law, rather than expressly state in Section 50 what types of works it is meant to address (e.g., audiovisual works). Having a broad right that exempts certain media creates a number of questions on the face of the legislation.

- Most importantly, Section 51.2 reads as though all of subsections (a)–(d) are applicable in each case. That means that a book, for instance, is exempt only if it is “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.” If that was not the intent, then an “or” must be inserted between 2(a) and (b), and (c) and (d) should be moved to a new section.
- If the intent of the bill is to protect performers, then why not limit those protected to performers? As drafted, it covers all persons, whether or not public figures or otherwise publicly known. The right of publicity is a right that adheres to the commercially exploitable value that individuals have developed in their identity. The draft bill vastly expands the reach of the right of publicity if it has no limitations on who can bring a claim.
- Last, the Authors Guild believes that the right of publicity is a personal right and should not survive death, especially in the case of political and other public figures.

We are extremely grateful for your attention to this. We look forward to working on this important legislation with you, and are available for consultation.

Best Regards,

A handwritten signature in black ink, appearing to read "Mary Rasenberger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mary Rasenberger
Executive Director
The Authors Guild

cc:

Bob Bergin
Counsel to Assemblyman Morelle

Nadia Gareeb
Counsel to Assemblywoman Weinstein

Amy Maggs
Associate Counsel
New York State Assembly