New York State Broadcasters Association, Inc.
Memo in Opposition to Right of Publicity Bills
S.5959 & A.5605

On behalf of the New York State Broadcasters Association, Inc. we must respectfully express our opposition to the above referenced bills. We opposed earlier versions of this legislation. Unfortunately, the new version of the bill contains many of the same flaws. The legislation will cause irreparable harm to our 450 member radio and television stations that serve communities throughout the Empire State, as well as the major broadcast networks. We have numerous concerns, but will highlight a few below.

THE "DIGITAL REPLICA" PROVISION THREATENS ALL VIDEO AND AUDIO ENTERTAINMENT ON EVERY BROADCAST STATION IN NEW YORK

The legislation creates a new category of liability where an entity uses a "digital replica" of a living or deceased person without written consent. Digital replica is defined as *"a computer generated or electronic reproduction of a living or deceased individual's likeness or voice that depicts the likeness or voice of the individual being portrayed."* The term is extremely broad, and would seem to encompass any digital reproduction, including digitally re-mastered work.

Moreover, the digital replica provision is intended to create liability when used for entertainment purposes. Indeed the digital replica provision would apply to "an expressive audiovisual or audio work or sound recording or in a live performance of a dramatic work."

Copyright laws protect songwriters. Broadcasters are able to play music and videos on broadcast stations by licensing the work through professional rights organizations such as BMI and ASCAP. Congress, through the copyright law, has intentionally not established a system for paying performers for materials broadcast over traditional radio and television stations. Congress has long recognized that broadcast stations provide billions of dollars in publicity for broadcasting music. Performers are paid through the record companies. The so called "performance fee" for broadcasting was considered and rejected by Congress numerous times. More recently, federal copyright law has been amended to create performance fees for music that has been streamed.

The digital replica provisions of the legislation essentially create a performance fee at the state level. Even though not entitled to a copyright fee, performers will now be able to sue every

radio and broadcast station in the state for playing their music. The issue is compounded because the bill is retroactive. The estate of any performer who died in the past 40 years could bring a lawsuit. This means recordings of noted performers such as Prince, Frank Sinatra, Debbie Reynolds, Tom Petty, Luciano Pavarotti may all have to be pulled off radio because stations may now be subject to lawsuits from their estates for playing a digitally re-mastered recording of their music. Because this applies not only to deceased artists, but living artists, this will affect all music broadcast or streamed. It could even affect Christmas carols.

Thus even in cases where broadcasters have obtained the necessary copyright licenses to broadcast music, every song played could now require the written consent from the performer. The failure to obtain such consent may result in a "collateral" attack on current licensing agreements under state law. Creating such a performance right is in direct conflict with Federal Copyright law.

Similar concerns exist for video content. Video is often copied and digitally re-mastered. Many movies have been "colorized." Movies and TV shows are often copied from "video tape" and "digitized." Just about every TV show and movie could create new liability. Any fictional or non-fictional account of anyone could be subject to a civil action under the proposed amendments.

The bills must include language to clarify that broadcast stations and networks are not liable to a performer for broadcasting or streaming audio or video recordings, including digitally re-mastered works, where the broadcaster has secured the rights to broadcast such material under federal copyright law.

NEW YORK'S BROADCASTERS SHOULD BE NOTIFIED IN ADVANCE

There is no question this legislation will give rise to a cottage industry for "right of publicity trolls." Unfortunately, much of the content that is provided over the media today is produced in other states and even foreign countries. Many of these content providers have no idea about the law in New York. Broadcasters are often contractually bound to broadcast the advertisements and entertainment shows. Their ability to delete programs is severely limited. Moreover with thousands of advertisements and hundreds of entertainment show broadcast weekly, they are unable to delete content before it's initially broadcast.

Under Section 51 of the current law, a professional photographer may exhibit the image of a person in a gallery and is not liable. "unless the same is continued ...after written notice objecting thereto has been given by the person portrayed." Given the practical realities of broadcasting, we believe this concept should be extended to broadcasters. Persons litigating for right of privacy or right of publicity should be required to send a "cease and desist" notice to broadcast stations and their program suppliers. Liability would attach only if the stations continued to broadcast such materials after receiving notice.

THE LEGISLATION FUNDAMENTALLY ALTERS THE RIGHT OF PRIVACY IN NEW YORK

The right of privacy in New York is governed by §50 and §51 of the NY Civil rights laws. The new version of the bill fundamentally changes New York law creating a right of privacy and a new right of publicity for the living. It also creates a new *post mortem* right of publicity. These profound changes in the law alter more than a century of legal precedent. THE LANGUAGE OF THIS BILL HAS NOT BEEN VETTED. One of the leading legal experts on the right of privacy and publicity, Prof. Jennifer Rothman, said it best:

> "Whether you are in favor of more expansive right of publicity laws or against them, you should not want this bill to proceed. Whether you are an average citizen who doesn't want Facebook using your face to sell soda, or a performer who doesn't want your manager to own you forever, or someone trying to make a film that refers to real people, you should be contacting your senators and assembly members to tell them to vote against this mixed up bill that will only make things worse for each person than under current New York law."

See: https://www.rightofpublicityroadmap.com/news-commentary/new-york-assembly-revises-right-publicity-bill-match-flawed-senate-version.
There has never been a hearing, or a legislative roundtable on the language of these new bills. An issue of this significance should never be rushed.

Radio and television broadcasters across New York take pride in serving their local communities. When there is a blizzard or a flood, we are there providing life-saving information. We are responsible for billions of dollars in economic activity and provide for employment for thousands of New Yorkers. We should not have to do business under a constant litigation threat from estates representing individuals that have never set foot in New York.

Respectfully submitted,

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