



June 11, 2015

MEMORANDUM IN OPPOSITION
Senate Bill No. 5650/ Assembly Bill No. 7904

The American Society of Media Photographers (“ASMP”) is strongly opposed to S.5650/A.7904, which would grant a seventy-year retroactive and descendible right of publicity to all deceased residents of New York State, regardless of their celebrity status. This proposed legislation would cause serious detrimental economic impact to the image licensing industry in New York State (a multi-billion dollar industry worldwide) and unconstitutionally deprive photographers and videographers of their Constitutionally guaranteed right to exploit their property and copyright interests in their still and moving images.

The American Society of Media Photographers (ASMP) is a 501(c)(6) not-for-profit trade association, established in 1944 to protect and promote the interests of professional photographers who earn their livings by making photographs, both still and motion, and related imaging fields. It is one of the most active professional photographers' trade associations in the United States and is the leading organization of its kind. There are approximately 7,000 members of ASMP representing literally every aspect of professional photography. Many images published in magazines, newspapers, news broadcasts, textbooks, brochures, or in advertisements, in print and on-line, were licensed by members of ASMP. New York is home to over 1,000 of our members, and all ASMP members, regardless of location, serve a crucial role in supplying publishers, media companies and advertisers located within New York with images that reflect our world, art and culture.

New York, as the center of the media industry, has always erred in favor of protecting the First Amendment rights of those who own, license and publish visual images. There is no basis for New York to substantially expand the breadth of its statutory right of privacy/publicity, which for many years has served as a model for other states, and create a burdensome and retroactive statute that will have a crippling and chilling effect on expressive speech. This proposed legislation would require the owners of valid federal copyrights in photographs that depict any person domiciled in New York State who died since 1945 to obtain permission from their heirs for any use that is deemed to be a “commercial purpose.”

The proposed legislation is not limited to celebrities but applies to anyone who died as a New York domiciliary and is depicted in an image or audiovisual recording. As no descendible right of publicity has previously existed, these deceased persons have never specifically transferred this right. Instead of heirs inheriting these rights, it is more likely that a corporation, with no interest in New York State, and whose only interest is exploiting publicity rights and restricting photographers from contractually dealing with preexisting images, would benefit from this newly created retroactive right. Photographers would suddenly lose a right they have had for more than 100 years, which would constitute an unconstitutional taking.

Further, the language of this bill is ambiguous and vague, and thus invites unnecessary and burdensome litigation. Application of the defined term “commercial purpose” would dispense with over 100 years of judicial interpretation of what constitutes “advertising and trade purposes” under the 1903 enacted NY Civil Rights Law § 50 & 51. Most importantly, the language in Section 34 *Exemptions on Use Restrictions* is ambiguous and fails to provide a clear exemption for expressive works. Even worse, it describes the exemption for expressive works as instances where the work **“does not contain an image or likeness that is primarily commercial, not transformative and is not otherwise protected by the First Amendment to the United States constitution or New York state constitutuion”**. Unfortunately, the bill fails to define what would make an image or an individual’s likeness “primarily commercial” or “transformative,” and it would force the creator of an expressive work to establish that the work is constitutionally protected. The proposed legislation unconstitutionally restricts the use of visual images and other expressive works and would have a chilling affect on image creators and those that rely on access to visual imagery in creating new works.

The proposed legislation would certainly increase the costs and burdens of licensing images, thereby requiring increased fees and burdensome approvals for previously permitted uses. Photographers would likely bear the burden of researching whether a deceased individual’s domicile was New York State, and if so, locating the owner of their publicity right and securing approval, which may never be possible. These individuals and companies can ill afford these costs, and the end result would be fewer images licensed, and fewer jobs in New York State.

The unintended consequences of departing from over 110 years of clear law is too great to justify merely satisfying the desire of a few celebrities’ agents who want to unreasonably exploit photographers and the licensing of their images on which they rely for their livelihoods. The chilling effect would be immediate and overwhelming.

For the above stated reasons, ASMP, on behalf of its members, strongly oppose S.5650/A.7904 and urges that it not be passed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Victor S. Perlman", written in a cursive style.

Victor S. Perlman
Managing Director and General Counsel