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DIFFERENCE
For you, your brands,
our marketing industry

January 12, 2018

Senator Diane Savino
New York State Senate

Majority Leader Joseph Morelle
New York State Assembly

New York State Legislature
Legislative Office Building
Albany, New York 12247

Dear Senator Savino and Majority Leader Morelle:

I am writing on behalf of the Association of National Advertisers (ANA) to express our serious concerns about several of the provisions of S.5857A and A.8155 (collectively the “Bills”) which would make substantial changes in the right of privacy/right of publicity in New York State. As currently drafted, the legislation could cause serious harm to our members in the marketing and advertising community, many of whom are based in New York and the vast majority of whom transact significant amounts of business within the state. We would appreciate the opportunity to discuss these concerns with you as the legislation proceeds.

Our major concern is the massive expansion of the scope of the right of publicity to reach far beyond the confines of the state and even the United States. Unlike similar right of publicity statutes in other jurisdictions, the proposed Bills would grant the successors-in-interest to a decedent’s right of publicity the ability to assert an action under this law, regardless of the decedent’s domicile at his or her time of death. So long as an estate pays a \$50 registration with the New York Secretary of State, they would have the right for 40 years to litigate against a marketer, broadcaster or media outlet even though the deceased person never set foot in the state.

This could lead New York courts, which are already over-burdened, to be inundated with claims asserted by those with no connection to New York. Moreover, it personally impacts the ANA membership by subjecting all national advertising campaigns to potential suit within the state, regardless of where the decedent was domiciled. The threat of litigation could chill advertising, and therefore business, within the state. We believe it is critical that a domicile requirement be added to the Bills.

In addition, the registry requirement, a critical component of the new framework contemplated by the Bills, is unclear with respect to who must register and who is exempted from registration. With such uncertainty, the registry will not function as contemplated, exposing even those who are diligently attempting to comply with the statute to litigation. A statute that disproportionately impacts the members of ANA and others within the advertising and media community cannot be allowed to be left so uncertain. Substantial sums are invested in national advertising campaigns and should one inadvertently violate the statute, severe harm could be inflicted.

The Bills substantially expand the scope of the post-mortem right of publicity to include not just an individual's name or picture, but also his or her "characteristics" and "likeness." These are vague terms that would likely end up as a question of fact for a jury. Further, for purposes of the registry, how would a marketer be able to ascertain the "characteristic" or "likeness" of the individual that would be covered? The complications and vagaries of these terms when applied to a post-mortem right and a registry raise serious concerns and uncertainties for marketers.

Finally, the Bills would combine the right of privacy and the right of publicity into a single law. We know that some legal scholars believe this could open up the courts to common law tort claims such as a false light privacy claim.

A. 8155 and S. 5857 raise a number of major issues and should not be enacted as currently drafted. We appreciate your careful consideration of our views and would appreciate the opportunity to discuss our concerns about the Bills.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Jaffe". The signature is fluid and cursive, with the first name "Dan" and last name "Jaffe" clearly distinguishable.

Dan Jaffe
Group EVP, Government Relations
Association of National Advertisers

The ANA (Association of National Advertisers), which is based in New York City, makes a difference for individuals, brands, and the industry by advancing the interests of marketers and promoting and protecting the well-being of the marketing community. Founded in 1910, the ANA provides leadership that advances marketing excellence and shapes the future of the industry. The ANA's membership includes nearly 1,000 companies with 15,000 brands that collectively spend or support more than \$250 billion in marketing and advertising annually. The membership is comprised of more than 700 client-side marketers and nearly 250 Associate Members, which include leading agencies, law firms, suppliers, consultants, and vendors. For more information visit: www.ana.net