



MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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VIA HAND DELIVERY

Hon. Joseph D. Morelle
Majority Leader
New York State Assembly
Legislative Office Building 926
Albany, NY 12248

March 2, 2018

Dear Majority Leader Morelle:

On behalf of the Motion Picture Association of America, Inc. (“MPAA”) and our member companies,¹ I want to thank you and your counsel for meeting with me and my colleagues Vans Stevenson and Ed Bogdan in Albany Feb. 14 regarding the right of publicity legislation pending before the New York Assembly. To follow up, we thought it would be helpful to clarify and expand upon certain important First Amendment issues that arose at the meeting, to facilitate continuing dialogue on the critical evaluation that is essential to any legislative undertaking at the state or federal level that impacts expressive conduct. The freedoms guaranteed by the First Amendment are fundamental to the creative process that the MPAA’s members engage in every time they make a motion picture or television program. And those freedoms are jeopardized by potentially overbroad right of publicity laws that would effectively grant individuals the ability to block portrayals of them that they may dislike.

As you know, New York has become a world leader in motion picture and television production, which is responsible for over 90,000 jobs and \$10 billion in wages paid to residents of the Empire State. This is in part due to the generous tax incentives provided by the state of New York—a program you have long supported, and for which we and our members are deeply grateful. However, it is also due in part to the robust protections for free speech that New York has guaranteed to creators, including producers of motion pictures and television programs. The MPAA’s members routinely invest hundreds of millions of dollars in a single movie, or several million in a single television

¹ Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

episode—but they won’t if an overbroad right of publicity statute threatens court orders or penalties that would effectively bar distribution. More importantly, this is not just an issue of money. This is about whether the law should give individuals the ability to block—that is, to censor—any portrayal they do not approve. Granting individuals such power would radically restrict storytellers’ constitutionally-protected freedom. We would be left with only milquetoast portrayals approved by their subjects, and without the provocative, controversial, colorful, and entertaining works about real people and events that make up a significant portion of today’s motion picture and television landscape.

We remain gravely concerned that the changes being considered by the legislature to New York’s venerable privacy statute, N.Y. Civ. Rts. L. §§50/51, would restrict the ability of our members to tell stories about and inspired by real people and events. Such restriction is simply not permitted—not by the First Amendment to the United States Constitution, not by Section 8 of the New York Constitution, and not by decades of well-settled case law in New York and around the nation in which courts have barred right of publicity claims in the context of motion pictures, television shows, and other expressive works. Attention to these free speech issues is particularly crucial as the legislature considers the creation of a so-called “digital avatar” right—a novel concept that, even if crafted narrowly and with a high degree of precision, risks effectively banning storytelling techniques that are clearly protected by the First Amendment. An avatar right might even prohibit some of the highly creative and innovative storytelling techniques used in the Oscar-winning film *Forrest Gump*, in which computer-generated imagery (“CGI”) technology was used to create the impression that the “Forrest” character played by Tom Hanks interacts with real historical figures such as Presidents Kennedy, Johnson, and Nixon. Any new avatar right must not—indeed, consistent with the U.S. and New York Constitutions, may not—interfere with the ability to engage in such storytelling.

As further explained below, the United States and New York Constitutions both treat fictional works of entertainment as fully protected by the First Amendment. Moreover, New York courts have properly interpreted §§50/51 to apply only to uses in “advertising” and “trade” (merchandise)—and **not** to First Amendment-protected expressive works like books, plays, newspapers, and the motion pictures and television programs that MPAA’s members create. It is this combination of constitutional protection, a narrow, carefully-drafted statute, and proper interpretation by the courts, that has guaranteed our members the creative freedom to tell stories of all types, including stories about and inspired by real people and events, without being chilled by litigation—or even just the threat of lawsuits—by individuals unhappy about the way they are depicted on screen. As the U.S. Supreme Court has stated, “self-censorship” resulting from legal threats to speech is “hardly less virulent for being” the result of private action, as opposed to direct government regulation. *Smith v. California*, 361 U.S. 147, 154 (1959).

New York attracts creators—including filmmakers—from around the world who come there to tell their stories. To maintain its well-deserved reputation as the global beacon of creativity and freedom, it must carefully safeguard the First Amendment rights of these creators against all threats, including overbroad right of publicity laws. Below, we explain in some detail how the First Amendment applies to motion pictures and television programs, and how right of publicity and similar laws, particularly those

pertaining to digital avatars, must be carefully drawn to avoid conflict with the principles of free speech that New York has long, and rightfully, respected.

I. MOTION PICTURES ARE FULLY PROTECTED BY THE FIRST AMENDMENT'S GUARANTEE OF FREE SPEECH

As an initial matter, there is no doubt that the First Amendment's free speech protections extend to motion pictures. As the U.S. Supreme Court stated in 1952, films are "a significant medium for the communication of ideas" entitled to full First Amendment protection. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). That remains true when the motion picture at issue is a pure work of entertainment. *Id.* at 502 ("[t]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as inform"); *Winters v. New York*, 333 U.S. 507, 510 (1948) (both entertainment and news are fully protected by the First Amendment because "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right"); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news.").

II. MOTION PICTURES ARE NON-COMMERCIAL SPEECH

During our discussion, you expressed the belief that the use of an individual's likeness in a motion picture is a "commercial" use, entitled to lesser First Amendment protection, because the producer seeks to profit from the project. While the term "commercial" may, in common parlance, encompass all moneymaking endeavors, the use of this term in the context of the First Amendment is entirely different and quite limited. Under First Amendment law, "commercial speech" is limited to advertising and promotional speech. *See Tyne v. Time Warner Entm't Co.*, 901 So.2d 802, 806-09 (Fla. 2005) (collecting cases on this point from around the country and concluding that "the common usage of the term 'commercial' in the commercial misappropriation and right of publicity context is indeed limited to the promotion of a product or service," and does not extend to "expressive work[s]" like the motion picture at issue in that case).

Speech that conveys ideas, information, or stories (in the form of motion pictures, artwork, news stories, or other means), instead of selling goods or services, is "expressive," whether that speech earns its creator money or not. As the U.S. Supreme Court stated in the seminal *Joseph Burstyn, Inc.* case:

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

343 U.S. at 501–02. Thus, courts in right of publicity cases involving expressive works such as motion pictures consistently hold that these uses are **non**-commercial under First

Amendment law. As the New York Appellate Division put it in a seminal case rejecting a right of publicity claim based on a use in a novel and motion picture, “It is at once apparent, when we deal with the content of a book or motion picture, that we deal with no ordinary subject of commerce.” *Univ. of Notre Dame Du Lac*, 256 N.Y.S.2d at 306. Rather, courts interpreting the word “commercial” in the context of right of publicity claims have consistently held that that term applies only to uses in advertisements and on consumer merchandise (*e.g.*, mugs, t-shirts, etc.).

III. THE FIRST AMENDMENT LIMITS RIGHT OF PUBLICITY LAW

The First Amendment’s free speech guarantee provides extraordinary freedom for creators of expressive works, including by protecting the ability of creators to use the names and likenesses of real people. Right of publicity statutes are content-based laws—laws that “target speech based on its communicative content—which are “presumptively unconstitutional” and can survive only by meeting the exacting strict-scrutiny standard. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). They may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *Id.* Thus in the *Sarver* case, the U.S. Court of Appeals for the Ninth Circuit, applying strict scrutiny, rejected a right of publicity claim brought by an individual who alleged that he was portrayed without his consent in the Oscar-winning motion picture *The Hurt Locker*. 813 F.3d at 903, 905 (The “First Amendment...safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.”); *see also Frazier v. Boomsma*, No. CV07-08040, 2007 WL 2808559 at *15 (D. Ariz. Sept. 27, 2007) (right of publicity is a content-based restriction on protected speech, subject to strict scrutiny).

To avoid running afoul of the First Amendment, modern right of publicity statutes contain express exemptions for expressive works like motion pictures and television shows.² These express exemptions enshrine in the law the freedom of the MPAA members and others to use names and images of living and dead persons in creating their works. Those exemptions preserve the ability of studios to make motion pictures such *The Social Network*, which used Mark Zuckerberg’s name and events from his life, or *Forrest Gump*, which incorporated clips of Presidents Kennedy, Johnson, and Nixon to imagine these important figures interacting with a fictional character. Simply put, the

²*See, e.g.*, Cal. Civ. Code §3344.1(a)(2) (exempting “audiovisual work[s]” (among other expressive works) from the scope of the statute); 765 Ill. Comp. Stat. Ann. 1075/35 (exempting uses in “film, radio, television, or other audio, visual, or audio-visual work[s]”); Al. Code § 6-5-773 (exempting uses in an “expressive work, such as a live performance, work of art, literary work, theatrical work, musical work, audiovisual work, motion picture, film, television program, radio program or the like.”); Ark. Code Ann. § 4-75-1110 (exempting uses in an “audiovisual work, radio or television program if it is fictional or nonfictional entertainment.”).

right of publicity statutes that currently exist have been carefully crafted to give creators freedom in creating expressive works.³

It is no surprise, then, that courts have consistently held that the First Amendment limits the scope of right of publicity claims (including those styled as misappropriation or privacy claims), and protects fictional or semi-fictional works from claims seeking to limit the use of a real person's name or image. For example, the New York Appellate division properly rejected a claim under §§50/51 based on fictional novel and film that referred to the plaintiffs. *See Univ. of Notre Dame Du Lac v. Twentieth Century Fox Film Corp.*, 256 N.Y.S.2d 301, 306, *aff'd*, 15 N.Y.2d 940 (1965). And in *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860 (1979), the California Supreme Court rejected a right of publicity claim brought by actor Rudolph Valentino's heirs, based on a biographical film that told a fictionalized version of Valentino's life story.⁴ Similarly, in *Tyne v. Time Warner Entm't Co.*, 901 So.2d 802 (Fla. 2005), the Supreme Court of Florida held that the First Amendment prevented application of Florida's commercial misappropriation statute to *The Perfect Storm*, a film that dramatized the disappearance of a fishing boat and crew in a powerful storm. In a well-reasoned opinion that has been cited by many other courts, the court held that applying Florida's misappropriation statute to the movie would "raise[] a fundamental constitutional concern," and observed that other courts "have similarly concluded that works such as the picture in the instant case would be protected by the First Amendment and that they do not constitute a commercial purpose." *Id.* at 808, 809.

Other courts consistently have reached the same result. *See, e.g., Sarver v. Chartier*, 813 F.3d 891, 905-06 (9th Cir. 2016) (First Amendment barred a right of publicity claim based on alleged use of Army sergeant's identity and life story in *The Hurt Locker*); *Polydoros v. Twentieth Century Fox Film Corp.*, 79 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997) (fictional film inspired by screenwriter's childhood experiences protected by First Amendment); *Matthews v. Wozencraft*, 15 F.3d 432, 438 n.5 (5th Cir. 1994) (First Amendment protected use of persona in novel); *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) (interpreting Oregon law, consistent with First Amendment principles, as precluding right of publicity claim based on use of Ginger Rogers' name in title of fictional movie about two dancers); *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723, 730-31 (E.D. Mich. 2000) (holding, in light of First Amendment concerns, that

³ This is not to say that the First Amendment shields content creators from all claims related to their works. Expressive works are subject to defamation and invasion of privacy claims, among others, and the MPAA's members take seriously their obligation to comply with living persons' rights to guard their reputation and privacy.

⁴ Chief Justice Bird's frequently cited and highly influential concurring opinion in *Guglielmi*, which explains in detail why a right of publicity claim cannot lie in the context of an expressive work, commanded the support of four justices (a majority) of the California Supreme Court, and has been cited favorably in subsequent decisions of that court. *See Comedy III Prods., Inc. v. Saderup*, 25 Cal. 4th at 396 n.7 (2001); *Winter v. D.C. Comics*, 30 Cal. 4th 881, 887-88 (noting Court's approval of *Guglielmi* in *Comedy III*).

Michigan’s misappropriation law did not apply to a docudrama miniseries about the Temptations), *aff’d*, 267 F.3d 457, 461-62 (6th Cir. 2001); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D. Pa. 1996) (use of the plaintiff’s likeness in docudrama about the Black Panther Party was “for the purpose of First Amendment expression” and thus not actionable under Pennsylvania right of publicity law); *Rosemont Enters., Inc. v. McGraw-Hill Book Co.*, 85 Misc. 2d 583, 587 (Sup. Ct. N.Y. Cty. 1975) (rejecting misappropriation claims based on fictional biography of Howard Hughes).⁵

IV. THE CONSTITUTION BARS AN AVATAR RIGHT TO THE EXTENT IT IMPINGES ON FIRST AMENDMENT RIGHTS

With these important background principles in mind, I now wish to turn to the reasons why the First Amendment limits a so-called avatar right, especially as applied to the use in a motion picture of a digital avatar representing a deceased person.

The ability to use digital effects to create or alter a person’s image must be seen for what it is—the latest iteration in a long line of technologies used by motion picture studios and others to lend realism to what the audience sees onscreen. Studios have always been free to depict real living and dead people realistically in their motion pictures and television shows. It goes without question that a studio may use a real person’s actual image (*e.g.*, clips of interviews with real individuals in the end credits of *I, Tonya*), use an actor to portray a living or dead person (*e.g.*, Michelle Williams as Marilyn Monroe in *My Week with Marilyn*; Claire Foy as Queen Elizabeth II in *The Crown*), and use prosthetics and makeup to make an actor more resemble the real person he or she is portraying (*e.g.*, Gary Oldman as Winston Churchill in *The Darkest Hour*; Nicole Kidman as Virginia Woolf in *The Hours*). And while it may be newer, the digital avatar is only one, and only the latest, of the tools used by studios to lend realism to their works. If Gary Oldman can put on a prosthetic to portray Winston Churchill, a movie studio must also be able to use digital effects in post-production to make Mr. Oldman’s face even more closely resemble him. And under the law, there is no difference between such a portrayal and one in which a body-double dons a motion-capture suit to help effects artists animate a wholly digitally-created Winston Churchill.

To limit a creator’s ability to use a digital “avatar” in an expressive work, whether the person represented is alive or dead, is to make an unprecedented incursion into the First Amendment bulwarks built around expressive works. A statutory “avatar right” intended to protect the livelihoods of living actors, even if narrowly and carefully crafted, would face exacting First Amendment scrutiny and an uncertain outcome if challenged in litigation. Extending such a right in the post-mortem context would be even less likely to survive strict scrutiny. Proponents of a post-mortem avatar right have posited two

⁵ At one point during our meeting, it was suggested that the First Amendment does not apply to a right of publicity lawsuit between private parties, as distinct from direct regulation of speech by the government. To the contrary, the U.S. Supreme Court has clearly held that the First Amendment limits state tort lawsuits between private parties that seek to recover based on the defendant’s speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (rejecting argument that First Amendment did not limit libel plaintiffs’ claim because “this is a civil lawsuit between private parties”).

interests such a right would supposedly serve: first, to protect the reputation or so-called “dignitary” interests of the deceased actor; and second, to confer additional revenue on a deceased actor’s heirs. But neither of these interests is sufficient to overcome the presumption of unconstitutionality that inheres in any law—including right of publicity and similar laws—that restricts speech.

As to reputational or dignitary interests, such as those protected by defamation and privacy law, American law, including New York law, simply does not protect those interests after death. *See* Restatement (Second) of Torts § 560 (1977) (“there can be no defamation of the dead”); *Rose v. Daily Mirror*, 284 N.Y. 335, 337 (1940) (no cause of action under New York law for defamation by deceased person); *Rome Sentinel Co. v. Boustedt*, 43 Misc. 2d 598, 599, 252 N.Y.S.2d 10, 12 (Sup. Ct. 1964) (because the right of privacy under New York Law “is limited to the living, the cause of action may not be asserted by others after decedent's death”); *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Cir. 1977) (rejecting defamation and invasion of privacy claims by children of convicted and executed spies Julius and Ethel Rosenberg because such claims expire upon the death of the subject of the statements at issue).

As to financial interests, while it is understandable that heirs of deceased actors would like additional money, the desire to make more money is simply insufficient to overcome fundamental First Amendment rights. Thus in *Sarver*, the plaintiff’s desire for compensation for his alleged portrayal in *The Hurt Locker* was insufficient to overcome the filmmakers’ First Amendment rights. *See Sarver*, 813 F. 3d at 905-06. Indeed, the U.S. Supreme Court has held that the First Amendment must prevail over interests—such as grave national security concerns—that are orders of magnitude greater in importance than the financial position of actors’ heirs. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers case); *see also* Diane Leenheer Zimmerman, *Money As A Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. Rev. 1503, 1514, 1524 (2009) (stating that the strict scrutiny test “normally requires a clear showing of necessity for the protection of human life, public safety, or national security—not profit aggrandizement” and arguing that economic interests do not justify encroachment on First Amendment rights, except in highly unusual circumstances where denying a celebrity’s claim would result in “significant, highly particularized, and non-speculative” risk of “failure in the primary market for his talents”); *see also generally* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 125, 134, 178-236 (1993) (the main arguments advanced in favor of publicity rights “are significantly less persuasive than commonly believed,” and “publicity rights exact a higher cost in important competing values (notably, free expression and cultural pluralism) than has generally been appreciated”).

In conclusion, I wish to reiterate the fundamental importance to the MPAA’s members of preserving their First Amendment right to make motion pictures and television programs about and inspired by real people and events—a right that is threatened by overbroad right of publicity statutes and the lawsuits that inevitably flow from them. It is this right—a right against both crushing financial penalties and against censorship itself—that enables our members and other filmmakers to tell stories about

real people and events in motion pictures and television programs like *The Post* (The Washington Post's publication of the Pentagon Papers), *Dunkirk* (World War II battle), *I, Tonya* (Tonya Harding's ice skating career), *The Disaster Artist* (the making of the movie *The Room*), *Darkest Hour* (Winston Churchill's decisions during World War II), *All the Money in the World* (Kidnapping of John Paul Getty III), *Molly's Game* (Olympic-class skier who ran the world's most exclusive high-stakes poker game), and *The Crown* (Queen Elizabeth II and royal family), *The Social Network* (the origins of Facebook), *Citizen Kane* (the life of a media baron modeled on William Randolph Hearst), *Spotlight* (Boston Globe reporters' investigation into Catholic Church sex abuse scandal), *The King's Speech* (King George VI), and countless others.

We look forward to working with you and your staff to ensure that New York remains a location where those who wish to tell these stories remain free to do so. Please do not hesitate to contact me, or our advocate in Albany Ed Bogdan, should you or your counsel wish to discuss these issues further.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Ben Sheffner', with a long horizontal stroke extending to the right.

Benjamin S. Sheffner

cc: Vans Stevenson
Ed Bogdan
MPAA studio counsel