STATE OF NEW YORK

5959--A

2019-2020 Regular Sessions

IN SENATE

May 16, 2019

Introduced by Sens. SAVINO, HARCKHAM, JACKSON -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- committee discharged and said bill committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the civil rights law and the arts and cultural affairs law, in relation to the right of privacy and the right of publicity; and to amend the civil practice law and rules, in relation to the timeliness of commencement of an action for violation of the right of publicity

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 50 of the civil rights law is renumbered section 50-f and a new section 50 is added to read as follows:

§ 50. Definitions. For the purposes of sections fifty-f, fifty-g, fifty-h, fifty-i and fifty-one of this article, the following terms shall have the following meanings:

1. "Authorized representative" means an attorney, talent agent, or personal manager authorized to represent the individual, or if the individual does not have an attorney, talent agent, or personal manager, a labor union representing performers in audiovisual work.

2. "Deceased individual" means a natural person who has died while domiciled in the state of New York.

3. "Digital replica" means 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. A digital replica is included within an individual's portrait.

4. "Secretary" means the secretary of state.

5. "Fund-raising" means an organized activity to solicit donations of money or other goods or services from persons or entities by an organization, company or public entity.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD05914-05-9

6. "Expressive sound recording or audiovisual work" includes an audiobook, interactive game, live performance, movie, radio or television program, song, or like media if it is fictional, nonfictional, or musical entertainment.

7. "Individual" means a natural person.

8. "Name" means the actual or assumed name, or nickname, of a living or deceased individual that identifies that individual.

9. "Nude" means the realistic display of genitals, pubic area, anus, a female's post-pubescent nipple or areola, including the use of technology to depict the body parts of another as being those of the individual or to impose nude body parts onto the individual.

10. "Person" means any natural person, firm, association, partnership, corporation, company, syndicate, receiver, common law trust, conservator, statutory trust, or any other entity by whatever name known or however organized, formed or created, and includes not-for-profit corporations, associations, educational and religious institutions, political parties, and community, civic or other organizations.

11. "Persona" means, individually or collectively, the name, portrait or picture, voice, or signature of an individual.

12. "Right of privacy" means a personal right, which protects against the unauthorized use of a living individual's name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent and the mental, emotional, or reputational injuries sustained, extinguished upon death.

13. "Right of publicity" means an independent property right, derived from and independent of the right of privacy, which protects the unauthorized use of a living or deceased individual's name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent and the pecuniary loss sustained.

14. "Sexual acts" means masturbation, sexual intercourse, oral or anal sexual conduct, penetration of, or with, an object, bestiality, or transfer of semen onto the individual.

15. "Signature" means a handwritten or otherwise legally binding form of an individual's name, written or authorized by that individual, which distinguishes the individual from all other individuals.

16. "Visual work" includes:

a. A visual rendition including, but not limited to, a painting, drawing, video, sculpture, mosaic, or photograph; or

b. A work of calligraphy; or

c. A work of graphic art including, but not limited to, an etching, lithograph, serigraph, or offset print; or

d. A craft work in materials including, but not limited to, a collage, assemblage, or work consisting of any combination of paragraphs a, b and c of this subdivision.

§ 2. Section 50-f of the civil rights law, as renumbered by section one of this act, is amended to read as follows:

§ 50-f. Right of privacy and right of publicity. [~~A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.~~] 1. For the purposes of the right of privacy, a living individual's persona shall not be used for advertising purposes or purposes of trade without obtaining the written consent of such person, or if a minor of his or her parent or guardian. A contract to create a sexually explicit digital depiction, as defined by subdivision four of section fifty-one

of this article must include a general description of the depiction and the expressive audiovisual work in which it will be incorporated. An individual has two business days to revoke written consent for a sexually explicit digital depiction unless:

(a) the individual was given no less than forty-eight hours to review the terms of consent prior to signing it; or

(b) the individual's authorized representative provided written approval of the terms of consent.

The written notice of revocation shall be sent to the person in person or by sending a revocation by mail, courier, electronic transmission or facsimile to the person's last known address.

2. For the purposes of the right of publicity, a living or deceased individual's persona is personal property, freely transferable or descendible, in whole or in part by contract or by means of any trust or testamentary instrument, whether such contract, trust or testamentary instrument was entered into or executed before or after the effective date of this subdivision. Such right of publicity shall not be used for advertising purposes or the purposes of trade without obtaining the written consent of the individual, his or her successors or assigns as provided for in the provisions of this article pertaining to the right of publicity. In the case of a minor, written consent must first be obtained of his or her parent or guardian for the purposes of an exclusive or non-exclusive license as limited by section 35.03 of the arts and cultural affairs law. A parent or guardian is prohibited from assigning a minor's right of publicity, and such assignments shall be unenforceable. Nothing in this section shall limit any other rights such minor may have.

§ 3. The civil rights law is amended by adding three new sections 50-g, 50-h and 50-i to read as follows:

§ 50-g. Duration of an individual's right of publicity. Every individual's right of publicity shall continue to exist for forty years after his or her death, and does not expire upon the death of the individual.

§ 50-h. Methods of transfer and conveyance. 1. The rights recognized under the provisions of this article pertaining to the right of publicity are freely transferable and descendible, in whole or in part, by the following:

(a) contract;

(b) license;

(c) gift;

(d) trust;

(e) testamentary document. The rights shall vest in the persons entitled to the right of publicity under the testamentary instrument of the deceased individual effective as of the date of that individual's death. In the absence of an express transfer in a testamentary instrument of the deceased individual's right of publicity, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased individual's assets shall be effective to transfer the rights recognized under this article in accordance with the terms of that provision; and

(f) intestate succession. The right to publicity of an individual dying intestate shall be distributed under the laws of intestate succession, and the rights and remedies of this article may be exercised and enforced by a person or persons who possess at least a fifty-one percent interest of the individual's right of publicity. Such persons shall make a proportional accounting to, and shall act at all times in

good faith with respect to, any other person in whom the rights being enforced have vested.

2. The rights established by the provisions of this article pertaining to the right of publicity shall also be freely transferable or descendible by any subsequent owner of the deceased individual's right to publicity as recognized by this article. Nothing in the provisions of this article pertaining to the right of publicity shall be construed to render invalid or unenforceable any contract entered into by a deceased individual during his or her lifetime by which the deceased individual assigned the rights, in whole or in part, to use his or her right of publicity as defined in this article.

3. If any deceased individual does not transfer his or her rights under this section by contract, license, gift, trust or testamentary document, and there are no surviving persons as described in paragraph (f) of subdivision one of this section, then the property rights associated with the deceased individual's right of publicity shall terminate.

4. Upon the first anniversary of the deceased individual's death, any person claiming to be a successor in interest who possesses at least fifty-one percent interest in the right of publicity of a deceased individual under this article or a licensee of a deceased individual's right of publicity shall register that claim with the secretary on a form prescribed by the secretary and upon payment of a fee of one hundred dollars. A rights holder may voluntarily register the claim at any time prior to the one-year anniversary of the deceased individual's death. The form shall include the name and date of death of the deceased individual, the name and address of the claimant, the basis of the claim, and a sworn affidavit under penalty of perjury as to the rights claimed. Claims registered under this registry and information regarding such successors in interest to the deceased individual's right of publicity shall be public records.

5. Upon receipt and after filing of any document pursuant to this section, the secretary shall post the document along with the entire registry of persons claiming to be successors in interest to the deceased individual's right of publicity or a registered licensee under this section upon an internet website developed by the secretary for such purpose. The secretary may reproduce by digital or other means any of the filings or documents and destroy the original filing or document.

6. The secretary is authorized to promulgate such regulations as he or she shall deem necessary to implement the provisions of subdivisions four and five of this section.

7. No action shall be brought under the provisions of this article pertaining to the right of publicity by reason of any use of a deceased individual's right of publicity occurring after the expiration of the duration of the right of publicity as provided in section fifty-g of this article. Furthermore, no action may be brought under the provisions of this article pertaining to the right of publicity for a violation of a deceased individual's right of publicity that occurs one year after the anniversary of a deceased individual's death unless the claim is registered. However, an action may be brought under the provisions of this article pertaining to the right of publicity for a violation of a deceased individual's right of publicity for any subsequent publication, manufacturing, distribution, or sale or use in violation of a deceased individual's right of publicity once a claim has been registered.

8. If there is a right of publicity registration for a deceased individual, any person seeking to license the right of publicity for the individual shall have the right to rely upon such registration and post-

ing and thereby presume that the person who has registered and posted his or her claim on the secretary's public internet website has the right to assign or license the deceased individual's right of publicity. The registration and posting of a person's claim to a deceased individual's right of publicity on the secretary's public internet website shall constitute a defense to an action brought under the provisions of this article pertaining to the right of publicity.

9. Any person who knowingly makes a false or fraudulent representation in connection with a registration with the secretary to establish a claim to a deceased individual's right of publicity pursuant to this section shall be liable for any damages sustained as a result of the false or fraudulent registration as determined by a court of competent jurisdiction.

10. Any document filed with the secretary, whether such document is a reproduction or an original, may be destroyed by the secretary forty-seven years after the death of the individual whose right of publicity has been registered therein. The secretary shall remove any document registered and posted upon the public internet website upon showing of a court order from a court of competent jurisdiction that a person claiming to be a successor in interest to a deceased individual's right of publicity has wrongfully registered such claim.

§ 50-i. No abrogation of rights and remedies. Nothing contained in the provisions of this article related to the right of publicity shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal or state law.

§ 4. Section 51 of the civil rights law, as amended by chapter 674 of the laws of 1995, is amended to read as follows:

§ 51. Action for injunction and for damages. 1. Applicability. The provisions of this article related to the right or privacy and the right of publicity apply to an act or event that occurs within New York.

2. Exceptions. Consent for use of another individual's persona shall not be required, except as otherwise provided in subdivisions three and four of this section as it relates to digital replicas, when used in connection with the following:

(a) 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;

(b) in:

(i) a 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;

(ii) a work of political, public interest or newsworthy value including a comment, criticism, parody, satire or a transformative creation of a work of authorship; or

(iii) an advertisement or commercial announcement for any of the works described in paragraph (a) of this subdivision or this paragraph; or

(c) fundraising purposes by not-for-profit radio and television stations licensed by the federal communications commission of the United States, or by not-for-profit advocacy organizations if the use is for commentary or criticism;

(d) use of the right of publicity of a deceased individual where the licensee or successor in interest has failed to register and post a claim of right under section fifty-h of this article, until such time as a claim of right has been registered and posted as required under such section.

(e) Nothing in this section relating to the right of publicity shall be deemed to abrogate or otherwise limit other rights or exceptions otherwise conferred by state and federal case law interpretations as to the applicability of this section and section fifty of this article made prior to the effective date of the chapter of the laws of two thousand nineteen which amended this section.

3. Digital replica for purposes of trade in an expressive work. (a) Use of a digital replica, as defined in subdivision three of section fifty of this article, of an individual shall constitute a violation if done without the consent of the individual if the use is:

(i) in an expressive audiovisual or audio work or sound recording, or in a live performance of a dramatic work, in a manner that is intended to create, and that does create, the reasonable impression that the professional actor represented by the digital replica is performing, the activity for which he or she is known, in the role of a fictional character; or

(ii) in an expressive audiovisual or sound recording, or in a live performance of a musical work, in a manner that is intended to create, and that does create, the reasonable impression that the professional singer, dancer, or musician represented by the digital replica is performing, the activity for which he or she is known, in such musical work; or

(iii) in an expressive audiovisual work, in a manner that is intended to create, and that does create, the reasonable impression that the professional or college athlete represented by the digital replica is engaging in an athletic activity for which he or she is known.

(b) Consent for the use of the digital replica of an individual as provided in the provisions of this article shall not be required if such use is:

(i) for purposes of parody, satire, commentary, or criticism;

(ii) in a work of political, public interest, or newsworthy value, or similar work, including a documentary, regardless of the degree of fictionalization in the work; or

(iii) de minimis or incidental.

4. Digital replica use in a pornographic work. (a) Use of a digital replica to create sexually explicit material in an expressive audiovisual work shall constitute a violation of the right of privacy if the use is intended to depict and does falsely depict an individual as performing in the nude or as engaging in sexual acts they did not perform.

(b) Consent shall not be required if such use is:

(i) in relation to a matter of legitimate public purpose; or

(ii) in a work of political or newsworthy value, or similar work; or

(iii) for purposes of commentary or criticism.

5. Limited immunity. The owners or employees of any medium used for advertising including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit advertising, who make unauthorized use of an individual's persona for the purpose of advertising or trade shall not be liable for such use under the provisions of this article unless it is established that such owner or employee had knowledge of the unauthorized use, through presence or inclusion, of the individual's persona in such advertisement or publication.

6. Actions for injunction and for damages. Any person whose [~~name, portrait, picture or voice~~] persona is used within this state for advertising purposes [~~or~~], for the purposes of trade without the written consent first obtained as [~~above~~] provided [~~may~~] in the provisions of

this article is entitled to maintain an equitable action in the supreme court of this state against the person[~~, firm or corporation~~] so using his [~~name, portrait, picture or voice~~] or her persona, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained including an amount equal to the greater of seven hundred fifty dollars or compensatory damages by reason of such use and if the defendant shall have knowingly used such person's [~~name, portrait, picture or voice~~] persona in such manner as is forbidden or declared to be unlawful by [~~section fifty~~] the provisions of this article relating to the right of privacy or the right of publicity, the [~~jury~~] finder of fact, in its discretion, may award exemplary damages. [~~But nothing~~] A violation of an individual's right of privacy or right of publicity may occur without regard to whether the use or activity is for profit or not-for-profit.

7. No defense. It shall not constitute a defense to an action for violation of an individual's right of privacy or right of publicity that such violation includes more than one individual.

8. Use and transfer. Nothing contained in this article shall be so construed as to prevent any [~~person, firm or corporation~~] individual or person from selling or otherwise transferring any material containing such [~~name, portrait, picture or voice~~] persona in whatever medium to any user of such [~~name, portrait, picture or voice~~] persona, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article[~~; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing~~].

9. Visual work. Nothing contained in this article shall be so construed as to prevent any person from exhibiting or displaying visual work, including in a gallery or on an online portfolio specimens of the work or from making the visual work available for licensing purposes in so far as the terms of the sale or license does not permit the user to violate this article.

10. Manufacturers, writers, composers and artists. Nothing contained in this article shall be so construed as to prevent any person[~~, firm or corporation~~] from using the [~~name, portrait, picture or voice of~~] persona owned by any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by [~~him~~] the manufacturer which [~~he~~] has been sold or disposed of with such [~~name, portrait, picture or voice~~] persona used in connection therewith; or from using the [~~name, portrait, picture or voice~~] persona of any author, composer or artist in connection with his or her literary, musical or artistic productions which he or she has sold or disposed of with such [~~name, portrait, picture or voice~~] persona used in connection therewith.

11. Copyright owners of a sound recording. Nothing contained in this section shall be construed to prohibit the copyright owner of a sound recording from disposing of, dealing in, licensing or selling that sound recording to any party, if the right to dispose of, deal in, license or sell such sound recording has been conferred by contract or other written document by such living person or the holder of such right. [~~Nothing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law.~~]

12. Termination of post mortem right of publicity. Nothing in the provisions of this article pertaining to the right of publicity shall be construed as prohibiting the use of the deceased individual's right of publicity that occurs after the expiration of forty years following his or her death. Nor shall anything in the provisions of this article pertaining to the right of publicity be construed as creating liability or giving rise to any remedy for any actions or conduct involving the use of a deceased individual's right of publicity that occurred prior to the effective date of the chapter of the laws of two thousand nineteen which amended this section.

13. Statute of limitations. Actions brought under the provisions of this article pertaining to the right of publicity shall be commenced within one year of the date of discovery of the injury to the plaintiff or from the date through the exercise of due diligence such injury should have been discovered by the plaintiff, whichever is earlier.

§ 5. The section heading and subdivision 3 of section 215 of the civil practice law and rules are amended to read as follows:

Actions to be commenced within one year: against sheriff, coroner or constable; for escape of prisoner; for assault, battery, false imprisonment, malicious prosecution, libel or slander; for violation of right of privacy or the right of publicity; for penalty given to informer; on arbitration award.

3. an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy or the right of publicity under [~~section fifty-one~~] article five of the civil rights law;

§ 6. Subdivision 1 of section 35.03 of the arts and cultural affairs law, paragraph (a) as amended by chapter 411 of the laws of 2013, is amended to read as follows:

1. A contract made by an infant or made by a parent or guardian of an infant, or a contract proposed to be so made, under which (a) the infant is to perform or render services as an actor, actress, model, dancer, musician, vocalist or other performing artist, or as a participant or player in professional sports, [~~or~~] (b) a person is employed to render services to the infant in connection with such services of the infant or in connection with contracts therefor, or (c) the infant is bound to an exclusive licensing contract beyond twenty-one months for use of their persona for advertising purposes or purposes of trade, as defined by the civil rights law, may be approved by the supreme court or the surrogate's court as provided in this section where the infant is a resident of this state or the services of the infant are to be performed or rendered in this state. If the contract is so approved the infant may not, either during his minority or upon reaching his majority, disaffirm the contract on the ground of infancy or assert that the parent or guardian lacked authority to make the contract. A contract modified, amended or assigned after its approval under this section shall be deemed a new contract.

§ 7. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 8. This act shall take effect on the one hundred eightieth day after it shall have become a law, and shall apply to all living individuals and deceased individuals who died on or after such date.