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2019-2020 Regular Sessions

IN SENATE

May 16, 2019

Introduced by Sens. SAVINO, BENJAMIN, 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 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Judiciary in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the civil rights law, in relation to establishing the right of publicity and to providing a private right of action for unlawful dissemination or publication of a sexually explicit depiction of an individual

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

1 Section 1. The civil rights law is amended by adding a new section
2 50-f to read as follows:

3 § 50-f. Right of publicity. 1. For purposes of this section:

4 a. "deceased performer" means a deceased natural person domiciled in
5 this state at the time of death who, for gain or livelihood, was regu-
6 larly engaged in acting, singing, dancing, or playing a musical instru-
7 ment.

8 b. "deceased personality" means any deceased natural person domiciled
9 in this state at the time of death whose name, voice, signature, photo-
10 graph, or likeness has commercial value at the time of his or her death,
11 or because of his or her death, whether or not during the lifetime of
12 that natural person the person used his or her name, voice, signature,
13 photograph, or likeness on or in products, merchandise, or goods, or for
14 purposes of advertising or selling, or solicitation of purchase of,
15 products, merchandise, goods, or services.

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

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1 c. "digital replica" means a newly created, original, computer-generated,
2 ated, electronic performance by an individual in a separate and newly
3 created, original expressive sound recording or audiovisual work in
4 which the individual did not actually perform, that is so realistic that
5 a reasonable observer would believe it is a performance by the individ-
6 ual being portrayed and no other individual. A digital replica does not
7 include the electronic reproduction, computer generated or other digital
8 remastering of an expressive sound recording or audiovisual work
9 consisting of an individual's original or recorded performance, nor the
10 making or duplication of another recording that consists entirely of the
11 independent fixation of other sounds, even if such sounds imitate or
12 simulate the voice of the individual.

13 d. "sound recordings" are works that result from the fixation of a
14 series of musical, spoken, or other sounds, but not including the sounds
15 accompanying a motion picture or other audiovisual work, regardless of
16 the nature of the material objects, such as disks, tapes, or other
17 phonorecords, in which they are embodied.

18 2. a. Any person who uses a deceased personality's name, voice, signa-
19 ture, photograph, or likeness, in any manner, on or in products,
20 merchandise, or goods, or for purposes of advertising or selling, or
21 soliciting purchases of, products, merchandise, goods, or services,
22 without prior consent from the person or persons specified in subdivi-
23 sion four of this section, shall be liable for any damages sustained by
24 the person or persons injured as a result thereof.

25 b. Any person who uses a deceased performer's digital replica in a
26 scripted audiovisual work as a fictional character or for the live
27 performance of a musical work shall be liable for any damages sustained
28 by the person or persons injured as a result thereof if the use occurs
29 without prior consent from the person or persons in subdivision four of
30 this section, if the use is likely to deceive the public into thinking
31 it was authorized by the person or persons specified in subdivision four
32 of this section. A use shall not be considered likely to deceive the
33 public into thinking it was authorized by the person or persons speci-
34 fied in subdivision four of this section if the person making such use
35 provides a conspicuous disclaimer in the credits of the scripted audi-
36 ovisual work, and in any related advertisement in which the digital
37 replica appears, stating that the use of the digital replica has not
38 been authorized by the person or persons specified in subdivision four
39 of this section.

40 c. In any action brought under this section:

41 i. the person who violated the section shall be liable to the injured
42 party or parties in an amount equal to the greater of two thousand
43 dollars or the actual damages suffered by the injured party or parties,
44 as a result of the unauthorized use, and any profits from the unauthor-
45 ized use that are attributable to such use and are not taken into
46 account in computing the actual damages.

47 ii. in establishing profits under this subdivision, the injured party
48 or parties shall be required to present proof only of the gross revenue
49 attributable to the unauthorized use, and the person who violated this
50 section is required to prove his or her deductible expenses.

51 iii. punitive damages may also be awarded to the injured party or
52 parties.

53 iv. the prevailing party or parties in any action under this section
54 shall also be entitled to attorney's fees and costs.

55 d. For purposes of this subdivision:

1 i. it shall not be a violation of paragraph a of this subdivision if
2 the work is a play, book, magazine, newspaper, or other literary work;
3 musical work or composition; work of art or other visual work; work of
4 political, public interest, educational or newsworthy value, including
5 comment, criticism, parody or satire; audio or audiovisual work, radio
6 or television program, if it is fictional or nonfictional entertainment;
7 or an advertisement or commercial announcement for any of the foregoing
8 works.

9 ii. it shall not be a violation of paragraph b of this subdivision if
10 the work is of parody, satire, commentary, or criticism; works of poli-
11 tical or newsworthy value, or similar works, such as documentaries,
12 docudramas, or historical or biographical works, regardless of the
13 degree of fictionalization; a representation of a deceased performer as
14 himself or herself, regardless of the degree of fictionalization, except
15 in a live performance of a musical work; de minimis or incidental; or an
16 advertisement or commercial announcement for any of the foregoing works.

17 iii. it shall not be a violation of this section if the use of a name,
18 voice, signature, photograph, or likeness occurs in connection with any
19 news, public affairs, or sports program or account, regardless of
20 format, medium or means of transmission, or any political campaign.

21 iv. it shall not be a violation of this section if the use is of a
22 name, voice, signature, photograph, or likeness in a commercial medium
23 solely because the material containing the use is commercially sponsored
24 or contains paid advertising or product placement, or includes within it
25 a use in connection with a product, article of merchandise, good, or
26 service. Rather, it shall be a question of fact whether or not the use
27 of the deceased personality's name, voice, signature, photograph, or
28 likeness was so directly connected with the commercial sponsorship or
29 with the paid advertising or product placement as to constitute a use
30 for which consent is required under this subdivision.

31 e. In relation to a violation of paragraph a of this subdivision, if
32 a work that is protected under paragraph d of this subdivision includes
33 within it a use in connection with a product, article of merchandise,
34 good, or service, this use shall not be exempt under paragraph d of this
35 subdivision, notwithstanding the unprotected use's inclusion in a work
36 otherwise exempt under paragraph d of this subdivision, if the claimant
37 proves that this use is so directly connected with a product, article of
38 merchandise, good, or service as to constitute an act of advertising,
39 selling, or soliciting purchases of that product, article of merchan-
40 dise, good, or service by the deceased personality without prior consent
41 for the use under paragraph a of this subdivision from the person or
42 persons specified in subdivision four of this section.

43 3. The rights recognized under this section are property rights, free-
44 ly transferable or descendible, in whole or in part, by contract,
45 license, gift, or by means of any trust or any other testamentary
46 instrument. In the absence of an express transfer in a testamentary
47 instrument of the deceased personality's rights in his or her name,
48 voice, signature, photograph, or likeness, a provision in the testamen-
49 tary instrument that provides for the disposition of the residue of the
50 deceased personality's assets shall be effective to transfer the rights
51 recognized under this section in accordance with the terms of that
52 provision. The rights established by this section shall also be freely
53 transferable or descendible by contract, license, gift, trust, or any
54 other testamentary instrument by any subsequent owner of the deceased
55 personality's rights as recognized by this section. Nothing in this
56 section shall be construed to render invalid or unenforceable any

1 contract entered into by a deceased personality during his or her life-
2 time by which the deceased personality assigned the rights, in whole or
3 in part, to use his or her name, voice, signature, photograph, or like-
4 ness.

5 4. The consent required by this section shall be exercisable by the
6 person or persons to whom the right of consent, or portion thereof, has
7 been transferred in accordance with subdivision three of this section,
8 or if no transfer has occurred, then by the person or persons to whom
9 the right of consent, or portion thereof, has passed in accordance with
10 subdivision five of this section.

11 5. Subject to subdivisions three and four of this section and notwith-
12 standing section 4-1.1 of the estates, powers and trusts law, after the
13 death of any person, the rights under this section shall belong to the
14 following person or persons and may be exercised, on behalf of and for
15 the benefit of all of those persons, by those persons who, in the aggre-
16 gate, are entitled to more than a one-half interest in the rights:

17 a. the entire interest in those rights belongs to the surviving spouse
18 of the deceased personality unless there are any surviving children or
19 grandchildren of the deceased personality, in which case one-half of the
20 entire interest in those rights belongs to the surviving spouse.

21 b. the entire interest in those rights belongs to the surviving chil-
22 dren of the deceased personality and to the surviving children of any
23 dead child of the deceased personality unless the deceased personality
24 has a surviving spouse, in which case the ownership of a one-half inter-
25 est in rights is divided among the surviving children and grandchildren.

26 c. if there is no surviving spouse, and no surviving children or
27 grandchildren, then the entire interest in those rights belongs to the
28 surviving parent or parents of the deceased personality.

29 d. the rights of the deceased personality's children and grandchildren
30 are in all cases divided by representation.

31 6. If any deceased personality does not transfer his or her rights
32 under this section by contract, or by means of a trust or testamentary
33 instrument, and there are no surviving persons as described in subdivi-
34 sion five of this section, then the rights set forth in subdivision two
35 of this section shall terminate.

36 7. a. Any person claiming to be a successor in interest to the rights
37 of a deceased personality under this section or a licensee thereof may
38 register that claim with the secretary of state on a form prescribed by
39 the secretary of state and upon payment of a fee, which the secretary of
40 state shall set by rule. The form shall be verified and shall include
41 the name and date of death of the deceased personality, the name and
42 address of the claimant, the basis of the claim, and the rights claimed.
43 A successor in interest to the rights of a deceased personality under
44 this section or a licensee thereof shall not have a cause of action for
45 a use prohibited by this section that occurs before the successor in
46 interest or licensee registers a claim of the rights.

47 b. Upon receipt and after filing of any document under this section,
48 the secretary of state shall post the document along with the entire
49 registry of persons claiming to be a successor in interest to the rights
50 of a deceased personality or a registered licensee under this section
51 upon the secretary of state's internet website.

52 c. Claims registered under this subdivision shall be public records.

53 8. An action shall not be brought under this section by reason of any
54 use of a deceased personality's name, voice, signature, photograph, or
55 likeness occurring after the expiration of forty years after the death
56 of the deceased personality.

1 9. Nothing in this section shall apply to the owners or employees of
2 any medium used for advertising, including, but not limited to, newspa-
3 pers, magazines, radio and television networks and stations, cable tele-
4 vision systems, billboards, and transit advertisements, by whom any
5 advertisement or solicitation in violation of this section is published
6 or disseminated, unless it is established that the owners or employees
7 had actual knowledge by prior notification of the unauthorized use of
8 the deceased personality's name, voice, signature, photograph, or like-
9 ness as prohibited by this section.

10 10. The provisions of this section are in addition to, but shall not
11 supersede, any other rights or remedies available in law or equity.

12 11. This section shall apply to the adjudication of liability and the
13 imposition of any damages or other remedies in cases in which the
14 liability, damages, and other remedies arise from acts occurring direct-
15 ly in this state. For purposes of this section, acts giving rise to
16 liability shall be limited to the use, on or in products, merchandise,
17 goods, or services, or the advertising or selling, or soliciting
18 purchases of, products, merchandise, goods, or services prohibited by
19 this section.

20 12. Nothing in this section shall be construed to limit, or to
21 enlarge, the protections that 47 U.S.C. § 230 confers on an interactive
22 computer service for content provided by another information content
23 provider, as such terms are defined in 47 U.S.C. § 230.

24 13. a. A defendant to an action under this section may move to dismiss
25 the complaint within sixty days of service of the complaint or any later
26 date the court deems proper. The court shall set a hearing on the motion
27 within thirty days of service of the motion, if practicable. The court
28 shall grant such motion unless the court determines that the plaintiff
29 has established that the action was commenced or continued with a
30 substantial basis in fact and law or is supported by a substantial argu-
31 ment for the extension, modification or reversal of existing law. Such
32 determination shall not be admissible in evidence at any later stage of
33 the action or in any subsequent action and shall not affect any burden
34 or degree of proof otherwise applicable.

35 b. In making its determination, the court shall consider the plead-
36 ings, affidavits stating the facts upon which the liability or defense
37 is based, and oral argument, but shall not conduct a further evidentiary
38 hearing absent exceptional circumstances.

39 c. The court shall award the prevailing party any attorney's fees
40 incurred due to the motion, unless the court finds that the non-prevail-
41 ing position on the motion has substantial merit.

42 d. All disclosure proceedings in the action shall be stayed upon the
43 filing of a notice of motion made pursuant to this subdivision. Except
44 upon good cause shown, the stay shall remain in effect until notice of
45 the entry of the order ruling on the motion and through the pendency of
46 any appeals.

47 § 2. The civil rights law is amended by adding a new section 52-c to
48 read as follows:

49 § 52-c. Private right of action for unlawful dissemination or publica-
50 tion of a sexually explicit depiction of an individual. 1. For the
51 purposes of this section:

52 a. "depicted individual" means an individual who appears, as a result
53 of digitization, to be giving a performance they did not actually
54 perform or to be performing in a performance that was actually performed
55 by the depicted individual but was subsequently altered to be in
56 violation of this section.

b. "digitization" means to realistically depict the nude body parts of another human being as the nude body parts of the depicted individual, computer-generated nude body parts as the nude body parts of the depicted individual or the depicted individual engaging in sexual conduct, as defined in subdivision ten of section 130.00 of the penal law, in which the depicted individual did not engage.

c. "individual" means a natural person.

d. "person" means a human being or legal entity.

e. "sexually explicit material" means any portion of an audio visual work that shows the depicted individual performing in the nude, meaning with an unclothed or exposed intimate part, as defined in section 245.15 of the penal law, or appearing to engage in, or being subjected to, sexual conduct, as defined in subdivision ten of section 130.00 of the penal law.

2. a. A depicted individual shall have a cause of action against a person who, discloses, disseminates or publishes sexually explicit material related to the depicted individual, and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation, disclosure, dissemination, or publication.

b. It shall not be a defense to an action under this section that there is a disclaimer in the sexually explicit material that communicates that the inclusion of the depicted individual in the sexually explicit material was unauthorized or that the depicted individual did not participate in the creation or development of the material.

3. a. A depicted individual may only consent to the creation, disclosure, dissemination, or publication of sexually explicit material by knowingly and voluntarily signing an agreement written in plain language that includes a general description of the sexually explicit material and the audiovisual work in which it will be incorporated.

b. A depicted individual may rescind consent by delivering written notice within three business days from the date consent was given to the person in whose favor consent was made, unless one of the following requirements is satisfied:

i. the depicted individual is given at least three business days to review the terms of the agreement before signing it; or

ii. if the depicted individual is represented, the attorney, talent agent, or personal manager authorized to represent the depicted individual provides additional written approval of the signed agreement.

4. a. A person is not liable under this section if:

i. the person discloses, disseminates or publishes the sexually explicit material in the course of reporting unlawful activity, exercising the person's law enforcement duties, or hearings, trials or other legal proceedings; or

ii. the sexually explicit material is a matter of legitimate public concern, a work of political or newsworthy value or similar work, or commentary, criticism or disclosure that is otherwise protected by the constitution of this state or the United States; provided that sexually explicit material shall not be considered of newsworthy value solely because the depicted individual is a public figure.

5. In any action commenced pursuant to this section, the finder of fact, in its discretion, may award injunctive relief, punitive damages, compensatory damages, and reasonable court costs and attorney's fees.

6. A cause of action or special proceeding under this section shall be commenced the later of either:

a. three years after the dissemination or publication of sexually explicit material; or

1 b. one year from the date a person discovers, or reasonably should
2 have discovered, the dissemination or publication of such sexually
3 explicit material.

4 7. Nothing in this section shall be read to require a prior criminal
5 complaint, prosecution or conviction to establish the elements of the
6 cause of action provided for in this section.

7 8. The provisions of this section including the remedies are in addi-
8 tion to, and shall not supersede, any other rights or remedies available
9 in law or equity.

10 9. If any provision of this section or its application to any person
11 or circumstance is held invalid, the invalidity shall not affect other
12 provisions or applications of this section which can be given effect
13 without the invalid provision or application, and to this end the
14 provisions of this section are severable.

15 10. Nothing in this section shall be construed to limit, or to
16 enlarge, the protections that 47 U.S.C. § 230 confers on an interactive
17 computer service for content provided by another information content
18 provider, as such terms are defined in 47 U.S.C. § 230.

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