S T A T E O F N E W Y O R K

3217--A

2011-2012 Regular Sessions

I N S E N A T E

February 14, 2011

Introduced by Sen. GOLDEN -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the civil rights law, in relation to prohibiting the use of the persona of a deceased personality

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

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

S 50-F. USE OF THE PERSONA OF A DECEASED PERSONALITY PROHIBITED. 1. NO PERSON, FIRM OR CORPORATION SHALL USE FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE IN THIS STATE, THE PERSONA OF ANY DECEASED PERSONALITY WITHOUT HAVING FIRST OBTAINED THE WRITTEN CONSENT OF THE PERSON OR PERSONS IDENTIFIED IN SUBDIVISION FOURTEEN OF THIS SECTION WHO HAVE REGISTERED THEIR CLAIM OF RIGHTS PURSUANT TO SUBDIVISION SEVENTEEN OF THIS SECTION AND WHO OWN MORE THAN FIFTY PERCENT OF THE RIGHTS IN THE DECEASED PERSONALITY'S PERSONA, OR AS OTHERWISE PROVIDED IN THIS SECTION.

2. AS USED IN THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

A. "PERSONA" MEANS THE NAME, INCLUDING LEGAL AND PROFESSIONAL NAME, PORTRAIT, VOICE AND/OR PICTURE OF A NATURAL PERSON.

B. "DECEASED PERSONALITY" MEANS ANY NATURAL PERSON WHO: (1) DIED A DOMICILIARY OF THE STATE OF NEW YORK ON OR AFTER, OR WITHIN SEVENTY YEARS PRIOR TO, THE EFFECTIVE DATE OF THIS SECTION; AND (2) WHOSE PERSONA WAS OF COMMERCIAL VALUE AT THE TIME OF HIS OR HER DEATH, WHETHER OR NOT THE INDIVIDUAL USED HIS OR HER PERSONA FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE DURING HIS OR HER LIFETIME.

3. NOTHING IN THIS SECTION SHALL BE READ AS PROHIBITING THE USE OF A DECEASED PERSONALITY'S PERSONA THAT OCCURS AFTER THE EXPIRATION OF

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

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SEVENTY YEARS FOLLOWING THE DEATH OF THAT DECEASED PERSONALITY. NOR SHALL ANYTHING IN THIS SECTION BE READ AS CREATING LIABILITY OR GIVING RISE TO ANY REMEDY FOR ANY ACTIONS OR CONDUCT INVOLVING THE USE OF A DECEASED PERSONALITY'S PERSONA THAT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THIS SECTION.

4. THE WRITTEN CONSENT SPECIFIED IN SUBDIVISION ONE OF THIS SECTION SHALL NOT BE REQUIRED IN CONNECTION WITH THE USE OF A DECEASED PERSONALITY'S PERSONA FOR OTHER THAN ADVERTISING PURPOSES OR THE PURPOSES OF TRADE.

5. FOR PURPOSES OF THIS SECTION, THE FOLLOWING INFORMATIONAL OR EXPRESSIVE WORKS, REGARDLESS OF LENGTH OR FORMAT, APPEARING IN ANY MEDIUM NOW KNOWN OR HEREAFTER DEVISED, SHALL NOT BE CONSIDERED TO HAVE USED A DECEASED PERSONALITY'S PERSONA FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE, SO LONG AS SUCH WORKS DO NOT CONSTITUTE AN ADVERTISEMENT, ENDORSEMENT OR SOLICITATION FOR THE SALE OR PURCHASE OF A PRODUCT, ARTICLE OF MERCHANDISE, GOOD OR SERVICE:

A. A PLAY, BOOK, STORY, GRAPHIC NOVEL, OR OTHER LITERARY OR THEATRICAL WORK;

B. AN ARTICLE, EDITORIAL, COMMENTARY, MAGAZINE, NEWSPAPER, NEWSLETTER OR OTHER PERIODICAL;

C. A MUSICAL COMPOSITION;

D. A RADIO PROGRAM, SOUND RECORDING, OR OTHER SIMILAR AUDIO WORK;

E. A DOCUMENTARY, MOTION PICTURE, TELEVISION PROGRAM OR OTHER SIMILAR AUDIOVISUAL WORK;

F. A PHOTOGRAPH OR POSTER, OR REPRODUCTION THEREOF;

G. AN ORIGINAL WORK OF ART, ART REPRODUCTION, OR OTHER SIMILAR WORK;

H. A WORK OF POLITICAL OR NEWSWORTHY VALUE;

I. A NEWS, PUBLIC AFFAIRS, PUBLIC INTEREST OR SPORTS BROADCAST OR ACCOUNT;

J. ANY WORK USED IN CONNECTION WITH ANY POLITICAL CAMPAIGN;

K. A CALENDAR OR GREETING CARD;

L. A TEE-SHIRT WHERE THE PORTRAIT OR PICTURE OF A DECEASED PERSONALITY APPEARS ON THE TEE-SHIRT ITSELF, AND NOT AS PART OF ANY HANG TAG OR OTHER LABEL;

M. ANY OTHER EDITORIAL, ARTISTIC OR EXPRESSIVE WORK; OR

N. ANY ADVERTISEMENT, PROMOTION OR COMMERCIAL ANNOUNCEMENT FOR ANY OF THE PRECEDING WORKS.

IN THE CASE OF ALL WORKS IDENTIFIED IN PARAGRAPHS A THROUGH N OF THIS SUBDIVISION, THE WRITTEN CONSENT SPECIFIED IN SUBDIVISION ONE OF THIS SECTION SHALL NOT BE REQUIRED.

6. NO PERSON OR ENTITY POSSESSING RIGHTS OR TITLE, HOWEVER HELD, IN A WORK ENCOMPASSING ANY ASPECT OR ASPECTS OF A DECEASED PERSONALITY'S PERSONA SHALL BE RENDERED LIABLE UNDER THIS SECTION FOR LICENSING OR OTHERWISE AUTHORIZING THE USE OF SUCH WORK BY A THIRD PARTY, OR FOR DISPLAYING IMAGES OF SUCH WORK AS AVAILABLE FOR LICENSE OR SIMILAR USE BY A THIRD PARTY, SO LONG AS SUCH PERSON OR ENTITY DOES NOT (I) KNOW AND INTEND THAT THE THIRD PARTY PLANS TO USE SUCH WORK TO ENGAGE IN AN UNAUTHORIZED USE OF THE DECEASED PERSONALITY'S PERSONA AS PROHIBITED BY THIS SECTION, OR (II) DOES NOT WARRANT OR REPRESENT THAT THE THIRD PARTY MAY USE THE LICENSED OR AUTHORIZED ASPECT OF THE DECEASED PERSONALITY'S PERSONA FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE WITHOUT FIRST OBTAINING THE WRITTEN CONSENT REQUIRED BY SUBDIVISION ONE OF THIS SECTION. IN THE EVENT THAT SUCH THIRD PARTY LICENSEE WISHES TO USE ANY ASPECT OF A DECEASED PERSONALITY'S PERSONA ENCOMPASSED IN SUCH WORK FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE, WITHOUT THE PRIOR KNOWLEDGE AND INTENT OF THE LICENSING OR AUTHORIZING PERSON OR ENTITY,

IT SHALL BE THE SOLE RESPONSIBILITY OF THE THIRD PARTY LICENSEE TO OBTAIN THE WRITTEN CONSENT REQUIRED BY SUBDIVISION ONE OF THIS SECTION.

7. UNLESS OTHERWISE AGREED TO IN WRITING, ONLY THE PERSONS OR ENTITIES WHO ACTUALLY AUTHORIZE, MANUFACTURE OR OTHERWISE CREATE AN ADVERTISEMENT, PRODUCT, ARTICLE OF MERCHANDISE, GOOD OR SERVICE EMBODYING A DECEASED PERSONALITY'S PERSONA SHALL BE RESPONSIBLE FOR OBTAINING THE WRITTEN CONSENT REQUIRED BY SUBDIVISION ONE OF THIS SECTION; A MERE DISTRIBUTOR OR TRANSMITTER OF SUCH AN ADVERTISEMENT, PRODUCT, ARTICLE OF MERCHANDISE, GOOD OR SERVICE SHALL NOT BE LIABLE FOR ANY VIOLATION OF THIS SECTION, UNLESS SAID DISTRIBUTOR OR TRANSMITTER INTENTIONALLY ENGAGES IN AN UNAUTHORIZED USE OF THE DECEASED PERSONALITY'S PERSONA AS PROHIBITED BY THIS SECTION, KNOWING THAT SUCH USE REQUIRES CONSENT.

8. THIS SECTION SHALL NOT PROHIBIT THE USE OF A DECEASED PERSONALITY'S PERSONA IN PROMOTIONAL MATERIAL OR AN ADVERTISEMENT FOR A NEWS REPORTING OR AN ENTERTAINMENT MEDIUM THAT:

A. USES ALL OR PART OF A PAST OR FUTURE EDITION OF THE MEDIUM'S OWN BROADCAST OR PUBLICATION; AND

B. DOES NOT CONVEY OR CANNOT REASONABLY BE UNDERSTOOD TO REPRESENT THAT THE DECEASED PERSONALITY ENDORSES THE NEWS REPORTING OR ENTERTAINMENT MEDIUM.

9. THIS SECTION SHALL NOT PROHIBIT THE USE OF A DECEASED PERSONALITY'S PERSONA IN PROMOTIONAL MATERIAL OR AN ADVERTISEMENT FOR AN AGGREGATOR OF NEWS REPORTING AND/OR ENTERTAINMENT CONTENT THAT:

A. USES ALL OR A PART OF THE CONTENT OF ANY NEWS MEDIUM OR ENTERTAINMENT MEDIUM AVAILABLE TO THE AGGREGATOR'S CUSTOMERS; AND

B. DOES NOT CONVEY OR CANNOT REASONABLY BE UNDERSTOOD TO REPRESENT THAT THE DECEASED PERSONALITY ENDORSES THE NEWS AND/OR ENTERTAINMENT AGGREGATOR. AS USED IN THIS SUBDIVISION, THE TERM "AGGREGATOR" MEANS A PARTY WHO RECEIVES CONTENT NOT OF ITS OWN CREATION FROM OTHERS WHICH IT TRANSMITS OR OTHERWISE PROVIDES TO OTHERS.

10. THIS SECTION SHALL NOT PROHIBIT THE USE OF A DECEASED PERSONALITY'S PERSONA TO ACCURATELY IDENTIFY THAT DECEASED PERSONALITY AS THE AUTHOR OF OR CONTRIBUTOR TO A WORK OR A PERFORMER OF A RECORDED PERFORMANCE, UNDER CIRCUMSTANCES IN WHICH THE WORK OR RECORDED PERFORMANCE IS OTHERWISE LAWFULLY REPRODUCED, EXHIBITED, OR BROADCAST.

11. A DECEASED PERSONALITY'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 IS ENTERED INTO OR EXECUTED BEFORE OR AFTER THE EFFECTIVE DATE OF THIS SECTION, BY THE DECEASED PERSONALITY OR BY ANY SUBSEQUENT OWNER OF THE DECEASED PERSONALITY'S PERSONA AS RECOGNIZED BY THIS SECTION.

12. THE RIGHTS RECOGNIZED UNDER THIS SECTION ARE EXPRESSLY MADE RETROACTIVE AND SHALL BE DEEMED TO HAVE EXISTED AT THE TIME OF DEATH OF ANY DECEASED PERSONALITY WHO DIED WITHIN SEVENTY YEARS PRIOR TO THE EFFECTIVE DATE OF THIS SECTION AND, EXCEPT WHERE SUCH RIGHTS WERE PASSED OR ASSIGNED PRIOR TO SUCH DECEASED PERSONALITY'S DEATH BY MEANS OF ANY CONTRACT OR TRUST INSTRUMENT, SHALL BE DEEMED TO HAVE VESTED IN THE PERSON OR PERSONS ENTITLED TO THESE RIGHTS UNDER THE TESTAMENTARY INSTRUMENT OF THE DECEASED PERSONALITY EFFECTIVE AS OF THE DATE OF HIS OR HER DEATH. IN THE ABSENCE OF A TRANSFER ELSEWHERE IN A TESTAMENTARY INSTRUMENT OF THE PERSONA OF A DECEASED PERSONALITY RECOGNIZED UNDER THIS SECTION, A PROVISION IN THE TESTAMENTARY INSTRUMENT THAT PROVIDES FOR THE DISPOSITION OF THE RESIDUE OF THE DECEASED PERSONALITY'S ASSETS SHALL BE EFFECTIVE TO TRANSFER THE DECEASED PERSONALITY'S PERSONA IN ACCORDANCE WITH THE TERMS OF THAT PROVISION.

13. IF NO TRANSFER OF SOME OR ALL OF THE RIGHTS RECOGNIZED UNDER THIS SECTION HAS OCCURRED IN ACCORDANCE WITH SUBDIVISION ELEVEN OR TWELVE OF THIS SECTION, THEN SUCH RIGHTS SHALL BE DEEMED TO HAVE PASSED IN ACCORDANCE WITH SECTION 4-1.1 OF THE ESTATES, POWERS AND TRUSTS LAW; PROVIDED, HOWEVER, THAT IF THERE ARE NO SURVIVING NATURAL PERSONS TO WHOM SAID RIGHTS PASS BY INTESTATE SUCCESSION, THEN SAID RIGHTS SHALL TERMINATE.

14. THE WRITTEN CONSENT REQUIRED BY THIS SECTION SHALL BE EXERCISABLE BY THE PERSON OR PERSONS WHO COLLECTIVELY OWN MORE THAN FIFTY PERCENT OF THE RIGHTS IN THE DECEASED PERSONALITY'S PERSONA IN ACCORDANCE WITH SUBDIVISIONS ELEVEN, TWELVE AND THIRTEEN OF THIS SECTION. RELIANCE UPON SUCH WRITTEN CONSENT PROVIDED BY THOSE WHO HAVE REGISTERED A CLAIM OF RIGHTS UNDER SUBDIVISION SEVENTEEN OF THIS SECTION SHALL BE A COMPLETE DEFENSE IN ANY ACTION BROUGHT UNDER THIS SECTION.

15. NOTWITHSTANDING ANY PROVISION OF THIS SECTION TO THE CONTRARY, IF AN ACTION WAS TAKEN PRIOR TO THE EFFECTIVE DATE OF THIS SECTION TO EXERCISE A DECEASED PERSONALITY'S PERSONA RIGHTS, UNDER THE LAWS OF ANY OTHER STATE, BY ONE OR MORE LIVING SPOUSE, CHILDREN OR GRANDCHILDREN (OTHER THAN A PERSON DISINHERITED BY THE DECEASED PERSONALITY IN A TESTAMENTARY INSTRUMENT), AND THE EXERCISE OF THOSE PERSONA RIGHTS WAS NOT CHALLENGED SUCCESSFULLY IN A COURT ACTION BY A PERSON DESCRIBED IN SUBDIVISION ELEVEN OF THIS SECTION, THAT EXERCISE SHALL NOT BE AFFECTED BY SUCH SUBDIVISION. IN SUCH A CASE, THE PERSONA RIGHTS THAT WOULD OTHERWISE VEST IN ONE OR MORE PERSONS DESCRIBED IN SUBDIVISION ELEVEN OF THIS SECTION SHALL VEST SOLELY IN THE SPOUSE, CHILDREN OR GRANDCHILDREN DESCRIBED HEREIN (OTHER THAN A PERSON DISINHERITED BY THE DECEASED PERSONALITY IN A TESTAMENTARY INSTRUMENT) FOR ALL FUTURE PURPOSES.

16. THE REMEDIES FOR ANY VIOLATION OF THIS SECTION SHALL BE LIMITED TO THOSE SPECIFIED IN SECTION FIFTY-ONE OF THIS ARTICLE, AND THE EXCEPTIONS TO LIABILITY SPECIFIED IN SECTION FIFTY-ONE OF THIS ARTICLE SHALL LIKEWISE BE APPLICABLE TO ANY ASSERTED VIOLATION OF THIS SECTION.

17. ANY PERSON OR PERSONS CLAIMING TO BE A SUCCESSOR-IN-INTEREST TO THE RIGHTS IN A DECEASED PERSONALITY'S PERSONA UNDER THIS SECTION, OR A LICENSEE THEREOF, MAY REGISTER A VERIFIED CLAIM WITH THE SECRETARY OF STATE OF THE STATE OF NEW YORK ON A FORM PRESCRIBED BY SUCH SECRETARY, WHICH SHALL INCLUDE THE NAME AND DATE OF DEATH OF THE DECEASED PERSONALITY, THE NAME AND ADDRESS OF THE CLAIMANT, THE BASIS OF THE CLAIM, AND THE RIGHTS CLAIMED. AS SOON AS SHALL BE PRACTICABLE, THE SECRETARY OF STATE SHALL CREATE A SYSTEM WHICH ALLOWS, UPON RECEIPT AND AFTER FILING OF ANY DOCUMENT UNDER THIS SECTION, SUCH SECRETARY TO POST THE DOCUMENT ALONG WITH THE ENTIRE REGISTRY OF PERSONS CLAIMING TO BE A SUCCESSOR-IN-INTEREST TO THE RIGHTS OF A DECEASED PERSONALITY OR A REGISTERED LICENSEE UNDER THIS SECTION UPON THE DEPARTMENT OF STATE WEBSITE, PROVIDED THAT INSTEAD OF THE NAME AND ADDRESS OF THE CLAIMANT, THE CLAIMANT MAY REQUEST THAT THE CONTACT LISTED ON THE WEBSITE BE THE DESIGNATED REPRESENTATIVE OR AGENT. CLAIMS REGISTERED UNDER THIS SUBDIVISION SHALL BE PUBLIC RECORDS; SUCH REGISTRATION SHALL BE PRIMA FACIE EVIDENCE OF THE VALIDITY OF THE REGISTRATION AND OF THE FACTS STATED IN THE REGISTRATION. THE COST FOR FILING SHALL BE ONE HUNDRED DOLLARS. THE SECRETARY OF STATE SHALL PROMULGATE REGULATIONS FOR CARRYING OUT THE PROVISIONS OF THIS SUBDIVISION.

18. NO SUCCESSOR-IN-INTEREST TO THE RIGHTS OF A DECEASED PERSONALITY UNDER THIS SECTION, NOR ANY LICENSEE THEREOF, MAY FILE OR MAINTAIN AN ACTION FOR A USE PROHIBITED BY THIS SECTION THAT OCCURS BEFORE THE SUCCESSOR-IN-INTEREST OR LICENSEE REGISTERS A CLAIM OF RIGHTS UNDER SUBDIVISION SEVENTEEN OF THIS SECTION.

19. IF NO CLAIM OF RIGHTS TO THE PERSONA OF A DECEASED PERSONALITY HAS BEEN VALIDLY REGISTERED UNDER SUBDIVISION SEVENTEEN OF THIS SECTION BY ANY PERSON OR PERSONS COLLECTIVELY OWNING MORE THAN FIFTY PERCENT OF THE RIGHTS, ANY PERSON WISHING TO USE SUCH DECEASED PERSONALITY'S PERSONA, INCLUDING FOR ADVERTISING PURPOSES OR FOR THE PURPOSES OF TRADE, MAY DO SO WITHOUT VIOLATING THIS SECTION.

20. ANY ACTION TO ENFORCE THIS SECTION SHALL BE SUBJECT TO THE ONE-YEAR LIMITATION PERIOD SET FORTH IN SUBDIVISION THREE OF SECTION TWO HUNDRED FIFTEEN OF THE CIVIL PRACTICE LAW AND RULES.

S 2. If any clause, sentence, paragraph, 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, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

S 3. This act shall take effect one year after it shall have become a law.