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

5650

2015-2016 Regular Sessions

I N S E N A T E

May 22, 2015

Introduced by Sen. DeFRANCISCO -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil rights law and the civil practice law and rules, in relation to the right of publicity

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 article 3-A to read as follows:

ARTICLE 3-A

RIGHT OF PUBLICITY

SECTION 30. DEFINITIONS.
31. PROPERTY RIGHT ESTABLISHED.
32. PROHIBITED USES.
33. CONSENT.
34. EXEMPTIONS FROM USE RESTRICTIONS.
35. APPLICABILITY.
36. REMEDIES.
37. ENFORCEMENT OF RIGHTS.

S 30. DEFINITIONS. AS USED IN THIS ARTICLE:

1. "COMMERCIAL PURPOSE" MEANS THE USE OF OR REFERENCE TO ANY ASPECT OF AN INDIVIDUAL'S PERSONA IN ANY OF THE FOLLOWING MANNERS: (A) ON OR IN CONNECTION WITH THE OFFERING FOR SALE OR SALE OF A PLACE, A PRODUCT, MERCHANDISE, GOOD, SERVICE OR BUSINESS; (B) FOR ADVERTISING OR PROMOTING THE PURCHASE OR SALE OF A PRODUCT, MERCHANDISE, GOOD, SERVICE OR BUSINESS; AND (C) FOR THE PURPOSE OF PROMOTING TRAVEL.

2. "DECEASED INDIVIDUAL" MEANS ANY NATURAL PERSON WHO DIED A DOMICILIARY OF THE STATE OF NEW YORK ON OR AFTER, OR WITHIN SEVENTY YEARS PRIOR TO, THE EFFECTIVE DATE OF THIS ARTICLE.

3. "PERSON" MEANS A NATURAL PERSON, CORPORATION, PARTNERSHIP, LIMITED LIABILITY CORPORATION, LIMITED LIABILITY PARTNERSHIP, TRUST, ESTATE OR OTHER LEGAL ENTITY.

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

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4. "PERSONA" MEANS THE NAME, PORTRAIT, PICTURE, VOICE, SIGNATURE, PHOTOGRAPH, IMAGE, LIKENESS OR DISTINCTIVE APPEARANCE, GESTURE, MANNERISMS OR OTHER INDICIA OF A DECEASED INDIVIDUAL.

5. "WORK OF FINE ART" MEANS:

(A) A VISUAL RENDITION INCLUDING, BUT NOT LIMITED TO, A PAINTING, DRAWING, SCULPTURE, MOSAIC, VIDEOTAPE, OR PHOTOGRAPH;

(B) A WORK OF CALLIGRAPHY;

(C) A WORK OF GRAPHIC ART INCLUDING, BUT NOT LIMITED TO, AN ETCHING, LITHOGRAPH, SERIGRAPH, OR OFFSET PRINT;

(D) A CRAFT WORK IN MATERIALS INCLUDING, BUT NOT LIMITED TO, CLAY, TEXTILE, FIBER, WOOD, METAL, PLASTIC OR GLASS; OR

(E) A WORK IN MIXED MEDIA INCLUDING, BUT NOT LIMITED TO, A COLLAGE, ASSEMBLAGE, OR WORK CONSISTING OF ANY COMBINATION OF PARAGRAPHS (A), (B), (C) OR (D) OF THIS SUBDIVISION.

S 31. PROPERTY RIGHT ESTABLISHED. A PROPERTY RIGHT EXISTS IN A DECEASED INDIVIDUAL'S PERSONA FOR SEVENTY YEARS AFTER THE DEATH OF THE INDIVIDUAL.

S 32. PROHIBITED USES. NO PERSON SHALL USE FOR COMMERCIAL PURPOSES IN THIS STATE, THE PERSONA OF ANY DECEASED INDIVIDUAL WITHOUT HAVING FIRST OBTAINED THE WRITTEN CONSENT OF THE PERSON OR PERSONS IDENTIFIED IN SECTION THIRTY-THREE OF THIS ARTICLE AND WHO OWNS MORE THAN FIFTY PERCENT OF THE RIGHTS IN THE DECEASED INDIVIDUAL'S PERSONA, OR AS OTHERWISE PROVIDED IN THIS ARTICLE.

S 33. CONSENT. THE WRITTEN CONSENT REQUIRED BY THIS ARTICLE SHALL BE EXERCISABLE BY THE PERSON OR PERSONS WHO COLLECTIVELY OWN MORE THAN FIFTY PERCENT OF THE RIGHTS IN THE DECEASED INDIVIDUAL'S PERSONA IN ACCORDANCE WITH SUBDIVISION ONE OF SECTION THIRTY-FIVE AND SECTION THIRTY-SIX OF THIS ARTICLE. REASONABLE RELIANCE UPON SUCH WRITTEN CONSENT SHALL BE A DEFENSE IN ANY ACTION BROUGHT UNDER THIS ARTICLE.

S 34. EXEMPTIONS FROM USE RESTRICTIONS. THE WRITTEN CONSENT SPECIFIED IN SECTION THIRTY-TWO OF THIS ARTICLE SHALL NOT BE REQUIRED IN CONNECTION WITH THE USE OF A DECEASED INDIVIDUAL'S PERSONA FOR OTHER THAN COMMERCIAL PURPOSES OR FOR A USE THAT IS PERMITTED UNDER THE LAWS OF THE CONSTITUTION OF THE UNITED STATES OR THE STATE OF NEW YORK. FOR PURPOSES OF THIS SECTION, THE FOLLOWING TYPES OF USES REGARDLESS OF LENGTH OR FORMAT, APPEARING IN ANY MEDIUM NOW KNOWN OR HEREAFTER DEVISED, SHALL NOT BE CONSIDERED TO HAVE USED A DECEASED INDIVIDUAL'S PERSONA FOR COMMERCIAL PURPOSES SO LONG AS SUCH USES DO NOT CONSTITUTE AN ADVERTISEMENT, ENDORSEMENT OR SOLICITATION FOR THE SALE OR PURCHASE OF A PRODUCT, ARTICLE OF MERCHANDISE, GOOD OR SERVICE, OTHER THAN FOR THE WORK ITSELF AND THE WORK DOES NOT CONTAIN AN IMAGE OR LIKENESS THAT IS PRIMARILY COMMERCIAL, NOT TRANSFORMATIVE AND IS NOT OTHERWISE PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION OR NEW YORK STATE CONSTITUTION:

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

2. A WORK OF POLITICAL OR NEWSWORTHY VALUE CONCERNING PUBLIC INTEREST, INCLUDING A TELEVISION BROADCAST OR AN ARTICLE, EDITORIAL OR COMMENTARY IN A MAGAZINE, NEWSPAPER, NEWSLETTER OR OTHER PERIODICAL;

3. AN ORIGINAL MUSICAL COMPOSITION, MUSICAL SOUND RECORDING OR OTHER SIMILAR MUSICAL WORK;

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

5. AN ORIGINAL WORK OF FINE ART OR A WORK OF FINE ART REPRODUCTION.

S 35. APPLICABILITY. 1. THE RIGHTS RECOGNIZED UNDER THIS ARTICLE ARE EXPRESSLY MADE RETROACTIVE AND SHALL BE DEEMED TO HAVE EXISTED AT THE TIME OF DEATH OF ANY INDIVIDUAL WHO DIED WITHIN SEVENTY YEARS PRIOR TO

THE EFFECTIVE DATE OF THIS ARTICLE AND, EXCEPT WHERE SUCH RIGHTS WERE PASSED, TRANSFERRED OR ASSIGNED PRIOR TO SUCH DECEASED INDIVIDUAL'S DEATH BY MEANS OF ANY WRITTEN 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 INDIVIDUAL EFFECTIVE AS OF THE DATE OF HIS OR HER DEATH. IN THE ABSENCE OF A TRANSFER IN A TESTAMENTARY INSTRUMENT OF THE PERSONA OF A DECEASED INDIVIDUAL RECOGNIZED UNDER THIS SECTION, 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 DECEASED INDIVIDUAL'S PERSONA IN ACCORDANCE WITH THE TERMS OF THAT PROVISION. IF NO SUCH CONTRACT, TRUST OR TESTAMENTARY INSTRUMENT EXISTS OR EXISTED AT THE TIME OF THE DEATH OF THE DECEASED INDIVIDUAL, THEN SUCH RIGHTS SHALL BE DEEMED TO HAVE PASSED IN ACCORDANCE WITH THE LAWS OF INTESTACY IN EFFECT AT THE TIME OF THE DECEASED INDIVIDUAL'S DEATH, PROVIDED, HOWEVER, THAT IF THERE ARE OR WERE AT THE TIME OF THE DECEASED INDIVIDUAL'S DEATH NO SURVIVING NATURAL PERSONS TO WHOM SUCH RIGHTS WOULD HAVE PASSED BY INTESTATE SUCCESSION, THEN SUCH RIGHTS SHALL TERMINATE OR SHALL HAVE BEEN DEEMED TO HAVE TERMINATED.

2. A DECEASED INDIVIDUAL'S PERSONA IS PERSONAL PROPERTY, FREELY TRANSFERABLE OR DESCENDABLE, 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 ARTICLE.

3. NOTHING IN THIS SECTION SHALL BE CONSTRUED AS PROHIBITING THE USE OF THE DECEASED INDIVIDUAL'S PERSONA THAT OCCURS AFTER THE EXPIRATION OF SEVENTY YEARS FOLLOWING THE DEATH OF THAT DECEASED INDIVIDUAL. NOR SHALL ANYTHING IN THIS SECTION BE CONSTRUED AS CREATING LIABILITY OR GIVING RISE TO ANY REMEDY FOR ANY ACTIONS OR CONDUCT INVOLVING THE USE OF A DECEASED INDIVIDUAL'S PERSONA THAT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THIS ARTICLE.

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

(B) THIS ARTICLE SHALL NOT PROHIBIT THE USE OF THE DECEASED INDIVIDUALS' PERSONA TO ACCURATELY IDENTIFY THEIR PLACE OF BURIAL.

5. NO PERSON POSSESSING RIGHTS OR TITLE, HOWEVER HELD, IN A WORK ENCOMPASSING ANY ASPECT OR ASPECTS OF A DECEASED INDIVIDUAL'S PERSONA SHALL BE LIABLE UNDER THIS ARTICLE 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 DOES NOT: (A) KNOW OR INTEND THAT THE THIRD PARTY PLANS TO USE SUCH WORK TO ENGAGE IN AN UNAUTHORIZED USE OF THE DECEASED INDIVIDUAL'S PERSONA AS PROHIBITED BY THIS ARTICLE; OR (B) DOES NOT WARRANT OR REPRESENT THAT THE THIRD PARTY MAY USE THE LICENSED OR AUTHORIZED ASPECT OF THE DECEASED INDIVIDUAL'S PERSONA FOR COMMERCIAL PURPOSES WITHOUT FIRST OBTAINING THE WRITTEN CONSENT REQUIRED BY SECTION THIRTY-TWO OF THIS ARTICLE. IN THE EVENT THAT SUCH THIRD PARTY LICENSEE INTENDED TO USE ANY ASPECT OF A DECEASED INDIVIDUAL'S PERSONA ENCOMPASSED IN SUCH WORK FOR COMMERCIAL PURPOSES WITHOUT THE PRIOR KNOWLEDGE AND INTENT OF THE LICENSING OR AUTHORIZING PERSON, IT SHALL BE THE SOLE RESPONSIBILITY OF THE THIRD PARTY LICENSEE TO OBTAIN THE WRITTEN CONSENT REQUIRED BY SECTION THIRTY-TWO OF THIS ARTICLE.

6. UNLESS OTHERWISE AGREED TO IN WRITING, ONLY THE PERSONS WHO ACTUALLY AUTHORIZE, PROVIDE FOR SERVICES, MANUFACTURE OR OTHERWISE CREATE AN ADVERTISEMENT, PRODUCT, ARTICLE OF MERCHANDISE, GOOD OR SERVICE EMBODYING A DECEASED INDIVIDUAL'S PERSONA SHALL BE RESPONSIBLE FOR OBTAINING THE WRITTEN CONSENT REQUIRED BY SECTION THIRTY-TWO OF THIS ARTICLE. A DISTRIBUTOR OR TRANSMITTER OF SUCH AN ADVERTISEMENT, PRODUCT, ARTICLE OF MERCHANDISE, GOOD OR SERVICE SHALL NOT BE LIABLE FOR ANY VIOLATION OF THIS ARTICLE, UNLESS SUCH DISTRIBUTOR OR TRANSMITTER INTENTIONALLY ENGAGES IN AN UNAUTHORIZED USE OF A DECEASED INDIVIDUAL'S PERSONA AS PROHIBITED BY THIS ARTICLE, KNOWING THAT SUCH USE REQUIRES CONSENT.

S 36. REMEDIES. IN THE EVENT THE CONSENT REQUIRED IN SECTION THIRTY-TWO OF THIS ARTICLE IS NOT OBTAINED, ANY PERSON HAVING THE RIGHT TO GIVE SUCH CONSENT AS PROVIDED IN SECTION THIRTY-TWO OF THIS ARTICLE, MAY BRING AN ACTION TO ENJOIN SUCH UNAUTHORIZED USE FOR COMMERCIAL PURPOSES, AND TO RECOVER DAMAGES FOR ANY LOSS OR INJURY SUSTAINED BY REASON THEREOF, INCLUDING AN AMOUNT WHICH WOULD HAVE BEEN A REASONABLE ROYALTY, AND PUNITIVE OR EXEMPLARY DAMAGES.

S 37. ENFORCEMENT OF RIGHTS. 1. ANY ACTION TO ENFORCE THE PROVISIONS OF THIS ARTICLE 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 AND MAY ONLY BE COMMENCED IN CONNECTION WITH AN UNAUTHORIZED USE FOR COMMERCIAL PURPOSES THAT OCCURS ON OR AFTER THE EFFECTIVE DATE OF THIS ARTICLE.

2. NOTWITHSTANDING ANY PROVISION OF THIS ARTICLE TO THE CONTRARY, IF AN ACTION WAS TAKEN PRIOR TO THE EFFECTIVE DATE OF THIS ARTICLE TO EXERCISE RIGHTS RECOGNIZED UNDER THIS SECTION RELATING TO A DECEASED INDIVIDUAL WHO DIED WITHIN SEVENTY YEARS PRIOR TO THE EFFECTIVE DATE OF THIS ARTICLE BY A PERSON ENTITLED TO INHERIT THE DECEASED INDIVIDUAL'S PROPERTY UNDER THE LAWS OF INTESTACY IN EFFECT AT THE TIME OF THE DECEASED INDIVIDUAL'S DEATH, OTHER THAN A PERSON WHO WAS DISINHERITED BY THE DECEASED INDIVIDUAL IN A TESTAMENTARY INSTRUMENT, AND THE EXERCISE OF THOSE RIGHTS WAS NOT CHALLENGED SUCCESSFULLY IN A COURT ACTION BY A PERSON DESCRIBED IN SECTION THIRTY-THREE OF THIS ARTICLE, THAT EXERCISE SHALL NOT BE AFFECTED BY SECTION THIRTY-THREE OF THIS ARTICLE. IN SUCH A CASE, THE RIGHTS THAT WOULD OTHERWISE VEST IN ONE OR MORE PERSONS DESCRIBED IN SECTION THIRTY-THREE OF THIS ARTICLE SHALL VEST SOLELY IN THE PERSON OR PERSONS DESCRIBED IN THE LAWS OF INTESTACY, OTHER THAN A PERSON DISINHERITED BY THE DECEASED INDIVIDUAL IN A TESTAMENTARY INSTRUMENT, FOR ALL FUTURE PURPOSE.

S 2. Subdivision 3 of section 215 of the civil practice law and rules is amended to read as follows:

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 under section fifty-one of the civil rights law OR A VIOLATION OF THE RIGHT OF PUBLICITY UNDER ARTICLE 3-A OF THE CIVIL RIGHTS LAW;

S 3. Severability. 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 4. This act shall take effect one year after it shall have become a law.