STATE OF NEW YORK

8155--A

2017-2018 Regular Sessions

IN ASSEMBLY

May 31, 2017

Introduced by M. of A. MORELLE, WEINSTEIN -- read once and referred to the Committee on Judiciary -- reported and referred to the Committee on Ways and Means -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the civil rights law, in relation to 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. "Characteristic" means a distinctive appearance, gesture or mannerism recognized as an identifying attribute of an individual.

2. "Deceased individual" means any individual, including his or her name, voice, signature or likeness, regardless of the individual's place of domicile, residence or citizenship at the time of death or otherwise, who has died.

3. "Secretary" means the secretary of state.

4. "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.

5. "Individual" means a natural person, living or dead.

6. "Likeness" means an image, digital replica, photograph, painting, sketching, model, diagram, or other recognizable representation of an individual's face or body, and includes a characteristic. A digital replica is a computer-generated or electronic, photo-realistic reproduction of an individual's likeness, whether animated or static.

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

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

8. "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.

9. "Photograph" means any photograph or photographic reproduction, still or moving, or any videotape, online or live television transmission, of any individual, in which the individual is readily identifiable.

10. "Registration to establish a claim of right" means a registration by a person claiming to be a successor in interest in the right of publicity of a deceased individual with the department of state.

11. "Right of publicity" includes the right of privacy, and means an individual's name, voice, signature and likeness, individually and collectively known as his or her right of publicity.

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

§ 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~~] publicity for living and deceased individuals. [~~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.~~] A living or deceased individual's name, voice, signature and likeness, individually and collectively known as his or her right of publicity, 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 the chapter of the laws of two thousand seventeen which amended this section. Such right of publicity shall not be used 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 or, in the case of a minor, of his or her parent or guardian.

§ 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, regardless of whether the law of the domicile, residence or citizenship of the individual at the time of death or otherwise recognizes a similar or identical property right.

§ 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. Any person claiming to be a successor in interest to 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 fifty dollars. 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 unless the claim is registered and posted on the secretary's public internet website within forty years of such individual's death.

8. If there is a right of publicity registration for a deceased individual, any person seeking to license right of publicity for the individual shall have the right to rely upon such registration and posting 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 no property rights in the right of publicity of the deceased.

§ 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 of publicity apply to an act or event that occurs within New York, regardless of a deceased individual's domicile, residence or citizenship. Furthermore, the rights recognized under the provisions of this article pertaining to the right of publicity, shall be deemed to exist at the time of death regardless of the domicile, residence or citizenship of any deceased individual.

2. Exceptions. Consent for use of another individual's right of publicity as provided in the provisions of this article pertaining to the right of publicity shall not be required 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) 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.

(d) however, subject to the First Amendment of the United States Constitution and section eight of article one of the New York state constitution, a work that is exempt under this subdivision that includes a commercial use and replicates the professional performance or activities rendered by an individual, shall not be exempt under this subdivision where the replication is inextricably intertwined with the right of publicity of such individual.

3. Limited immunity. 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 ads, by whom any use of an individual's right of publicity for commercial purposes in violation of that individual's right of publicity is published or disseminated, shall not be liable under the provisions of this article pertaining to the right of publicity unless it is established that the owners or employees had knowledge of the unauthorized use as prohibited by the provisions of this article pertaining to the right of publicity.

4. Action for injunction and for damages. Any [~~person~~] individual either living or deceased whose [~~name, portrait, picture or voice~~] right of publicity is used within this state for advertising purposes [~~or~~], for the purposes of trade or for purposes of fund-raising or solicitation of donations, without the written consent first obtained as [~~above~~] provided [~~may~~] in the provisions of this article pertaining to the right of publicity is entitled to maintain an equitable action for violation of the individual's right of publicity in the supreme court of this state against the person[~~, firm or corporation~~] so using his [~~name, portrait, picture or voice~~] or her right of publicity, 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~~] right of publicity in such manner as is forbidden or declared to be unlawful by [~~section fifty~~] the provisions of this article relating to 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 publicity may occur without regard to whether the use or activity is for profit or not-for-profit with the exception of the use of an individual's right of publicity for fund-raising purposes by not-for-profit radio and television stations licensed by the Federal Communications Commission of the Untied States.

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

6. 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~~] right of publicity as provided in the provisions of this article relating to the right of publicity in whatever medium to any user of such [~~name, portrait, picture or voice~~] right of publicity, 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~~].

7. Photographers. 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~~] photographer, unless the same is continued by such person[~~, firm or corporation~~] after written notice objecting thereto has been given by the [~~person~~] individual portrayed[~~; and nothing~~].

8. 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~~] right of publicity 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~~] right of publicity used in connection therewith; or from using the [~~name, portrait, picture or voice~~] right of publicity 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~~] right of publicity used in connection therewith.

9. 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.~~]

10. 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 seventeen which amended this section.

11. 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~~] 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~~] **publicity** under [~~section fifty-one~~] **article five** of the civil rights law;

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