

STATE OF NEW YORK

5959--B

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

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:

1 Section 1. Section 50 of the civil rights law is renumbered section
2 50-f and a new section 50 is added to read as follows:

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

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

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

12 3. "Digital replica" means a newly created, original computer-generat-
13 ed or electronic performance of a living or deceased individual's like-
14 ness or voice in a separate and newly created, original expressive sound
15 recording or audiovisual work that depicts the likeness or voice of the
16 individual being portrayed. A digital replica is included within an
17 individual's portrait. A digital replica does not include the elec-

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

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1 tronic reproduction, computer generated or other digital re-mastering of
2 an expressive sound recording or audiovisual work of a person's
3 original or recorded performance.

4 4. "Secretary" means the secretary of state.

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

8 6. "Expressive sound recording or audiovisual work" includes an audio-
9 book, interactive game, live performance, movie, radio or television
10 program, song, or like media if it is fictional, nonfictional, or
11 musical entertainment.

12 7. "Individual" means a natural person.

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

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

19 10. "Person" means any natural person, firm, association, partnership,
20 corporation, company, syndicate, receiver, common law trust, conserva-
21 tor, statutory trust, or any other entity by whatever name known or
22 however organized, formed or created, and includes not-for-profit corpo-
23 rations, associations, educational and religious institutions, political
24 parties, and community, civic or other organizations.

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

27 12. "Right of privacy" means a personal right, which protects against
28 the unauthorized use of a living individual's name, portrait or picture,
29 voice, or signature for advertising purposes or purposes of trade with-
30 out written consent and the mental, emotional, or reputational injuries
31 sustained, extinguished upon death.

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

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

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

43 16. "Visual work" includes:

44 a. A visual rendition including, but not limited to, a painting, draw-
45 ing, video, sculpture, mosaic, or photograph; or

46 b. A work of calligraphy; or

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

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

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

54 § 50-f. Right of privacy and right of publicity. [~~A person, firm or~~
55 ~~corporation that uses for advertising purposes, or for the purposes of~~
56 ~~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

1 (f) intestate succession. The right to publicity of an individual
2 dying intestate shall be distributed under the laws of intestate
3 succession, and the rights and remedies of this article may be exercised
4 and enforced by a person or persons who possess at least a fifty-one
5 percent interest of the individual's right of publicity. Such persons
6 shall make a proportional accounting to, and shall act at all times in
7 good faith with respect to, any other person in whom the rights being
8 enforced have vested.

9 2. The rights established by the provisions of this article pertaining
10 to the right of publicity shall also be freely transferable or descendi-
11 ble by any subsequent owner of the deceased individual's right to
12 publicity as recognized by this article. Nothing in the provisions of
13 this article pertaining to the right of publicity shall be construed to
14 render invalid or unenforceable any contract entered into by a deceased
15 individual during his or her lifetime by which the deceased individual
16 assigned the rights, in whole or in part, to use his or her right of
17 publicity as defined in this article.

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

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

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

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

47 7. No action shall be brought under the provisions of this article
48 pertaining to the right of publicity by reason of any use of a deceased
49 individual's right of publicity occurring after the expiration of the
50 duration of the right of publicity as provided in section fifty-g of
51 this article. Furthermore, no action may be brought under the provisions
52 of this article pertaining to the right of publicity for a violation of
53 a deceased individual's right of publicity that occurs one year after
54 the anniversary of a deceased individual's death unless the claim is
55 registered. However, an action may be brought under the provisions of
56 this article pertaining to the right of publicity for a violation of a

1 deceased individual's right of publicity for any subsequent publication,
2 manufacturing, distribution, or sale or use in violation of a deceased
3 individual's right of publicity once a claim has been registered.

4 8. If there is a right of publicity registration for a deceased indi-
5 vidual, any person seeking to license the right of publicity for the
6 individual shall have the right to rely upon such registration and post-
7 ing and thereby presume that the person who has registered and posted
8 his or her claim on the secretary's public internet website has the
9 right to assign or license the deceased individual's right of publicity.
10 The registration and posting of a person's claim to a deceased individ-
11 ual's right of publicity on the secretary's public internet website
12 shall constitute a defense to an action brought under the provisions of
13 this article pertaining to the right of publicity.

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

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

28 § 50-i. No abrogation of rights and remedies. Nothing contained in the
29 provisions of this article related to the right of publicity shall be
30 deemed to abrogate or otherwise limit any rights or remedies otherwise
31 conferred by federal or state law.

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

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

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

41 (a) news, public affairs or sports broadcast, including the promotion
42 of and advertising for a public affairs or sports broadcast, an account
43 of public interest or a political campaign;

44 (b) in:

45 (i) a play, book, magazine, newspaper, musical composition, visual
46 work, work of art, audiovisual work, radio or television program if it
47 is fictional or nonfictional entertainment, or a dramatic, literary or
48 musical work;

49 (ii) a work of political, public interest or newsworthy value includ-
50 ing a comment, criticism, parody, satire or a transformative creation of
51 a work of authorship; or

52 (iii) an advertisement or commercial announcement for any of the works
53 exempted under this article; or

54 (c) fundraising purposes by not-for-profit radio and television
55 stations licensed by the federal communications commission of the United

1 States, or by not-for-profit advocacy organizations if the use is for
2 commentary or criticism;

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

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

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

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

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

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

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

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

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

41 (iii) de minimis or incidental; or

42 (iv) the broadcasting or streaming of a sound recording or audiovisual
43 work that is an electronic reproduction, computer generated or other
44 digital re-mastering of a person's original or recorded performance.

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

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

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

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

53 (iii) for purposes of commentary or criticism.

54 5. Limited immunity. The owners or employees of any medium used for
55 advertising including, but not limited to, newspapers, magazines, radio
56 and television networks and stations, cable television systems, bill-

boards, and transit advertising, who make unauthorized use of an individual's persona or digital replica 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 actual knowledge by prior notification 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

1 artistic productions which he or she has sold or disposed of with such
2 [~~name, portrait, picture or voice~~] persona used in connection therewith.

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

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

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

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

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

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

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

41 1. A contract made by an infant or made by a parent or guardian of an
42 infant, or a contract proposed to be so made, under which (a) the infant
43 is to perform or render services as an actor, actress, model, dancer,
44 musician, vocalist or other performing artist, or as a participant or
45 player in professional sports, [~~or~~] (b) a person is employed to render
46 services to the infant in connection with such services of the infant or
47 in connection with contracts therefor, or (c) the infant is bound to an
48 exclusive licensing contract beyond twenty-one months for use of their
49 persona for advertising purposes or purposes of trade, as defined by the
50 civil rights law, may be approved by the supreme court or the surro-
51 gate's court as provided in this section where the infant is a resident
52 of this state or the services of the infant are to be performed or
53 rendered in this state. If the contract is so approved the infant may
54 not, either during his minority or upon reaching his majority, disaffirm
55 the contract on the ground of infancy or assert that the parent or guar-
56 dian lacked authority to make the contract. A contract modified, amended

1 or assigned after its approval under this section shall be deemed a new
2 contract.

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

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