STATE OF NEW YORK

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2019-2020 Regular Sessions

IN SENATE

May 16, 2019

Introduced by Sens. SAVINO, BENJAMIN, CARLUCCI, 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 -- reported favorably from said committee and committed to the Committee on Finance -- 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:

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

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

a. "deceased performer" means a deceased natural person domiciled in this state at the time of death who, for gain or livelihood, was regularly engaged in acting, singing, dancing, or playing a musical instrument.

b. "deceased personality" means any deceased natural person domiciled in this state at the time of death whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, or because of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature,

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

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photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services.

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

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

2. a. Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision four of this section, shall be liable for any damages sustained by the person or persons injured as a result thereof.

b. Any person who uses a deceased performer's digital replica in a scripted audiovisual work as a fictional character or for the live performance of a musical work shall be liable for any damages sustained by the person or persons injured as a result thereof if the use occurs without prior consent from the person or persons in subdivision four of this section, if the use is likely to deceive the public into thinking it was authorized by the person or persons specified in subdivision four of this section. A use shall not be considered likely to deceive the public into thinking it was authorized by the person or persons specified in subdivision four of this section if the person making such use provides a conspicuous disclaimer in the credits of the scripted audiovisual work, and in any related advertisement in which the digital replica appears, stating that the use of the digital replica has not been authorized by the person or persons specified in subdivision four of this section.

c. In any action brought under this section:

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

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

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

d. For purposes of this subdivision:

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

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

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

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

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

3. The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract, license, gift, or by means of any trust or any other testamentary instrument. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights in his or her name, voice, signature, photograph, or likeness, 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 rights recognized under this section in accordance with the terms of that provision. The rights established by this section shall also be freely transferable or descendible by contract, license, gift, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights as recognized by this section. Nothing in this section shall be construed to render invalid or unenforceable any

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

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

5. Subject to subdivisions three and four of this section, the rights under this section 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 rights under this section. 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.

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

7. a. Any person claiming to be a successor in interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the secretary of state on a form prescribed by the secretary of state and upon payment of a fee, which the secretary of state shall set by rule. The form shall be verified and 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. A successor in interest to the rights of a deceased personality under this section or a licensee thereof shall not have a cause of action for a use prohibited by this section that occurs before the successor in interest or licensee registers a claim of the rights.

b. Upon receipt and after filing of any document under this section, the secretary of state shall 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 secretary of state's internet website.

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

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

9. Nothing in this section shall apply to the 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 advertisements, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that the owners or employees had actual knowledge by prior notification of the unauthorized use of the deceased performer's digital replica or deceased personality's name, voice, signature, photograph, or likeness as prohibited by this section.

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

11. This section shall apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in this state. For purposes of this section, acts giving rise to liability shall be limited to the use, on or in products, merchandise, goods, or services, or the advertising or selling, or soliciting purchases of, products, merchandise, goods, or services prohibited by this section.

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

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

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

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

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

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

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

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

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

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