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New York Passes Law Recognizing Post-Mortem Right of Publicity and Creating Private Right of Action for Sexually Explicit Deepfakes

December 14, 2020

Celebrities domiciled in New York State at the time of their death will soon have a transferable post-mortem right of publicity, bringing the law in New York closer in line to several other states, like California, that recognize such rights. On December 1, 2020, Governor Cuomo signed a bill into law that amends and expands New York's Civil Rights Law to add two sections: (1) Section 50-f, which newly recognizes rights of publicity for "deceased performers" and "deceased personalities" and (2) Section 52-c, which provides a new sword for "depicted individuals" to seek redress for use of their images in digitally manipulated sexual content without consent. We detail below some of the nuances to these new sections, which include complicated definitions and exemptions that are certain to be debated and eventually litigated when the law takes effect on May 29, 2021.[1]

Post-Mortem Right of Publicity

For more than 100 years, Sections 50 and 51 of New York's Civil Rights Law have protected the rights of living persons to control the commercial use of their name, portrait, picture or voice, but traditionally the heirs of celebrities domiciled in New York at the time of their death had to look to other laws—such as the Lanham Act, which imposes among other things a burden to demonstrate the use was likely to confuse a consumer—to protect post-mortem commercial use of a celebrity's likeness. While this new law is an expansion of rights, it is a narrow expansion, which also codifies many of the limitations courts have imposed on the right of publicity in balancing it with First Amendment concerns. Key limitations and features include:

- **Post-Mortem Rights Do Not Apply Retroactively:** Critically, the new law will only apply to performers and personalities who die on or after the law takes effect on May 29, 2021. Act, § 3.

- **Post-Mortem Rights Will Not Last in Perpetuity:** The new post-mortem rights of publicity only extend for forty years after death § 50-f(8). This is significantly shorter than post-mortem rights in that other celebrity-rich state, California, which affords celebrities post-mortem rights until seventy years after death. California Civil Code § 3344.1.
- **"Deceased Personalities" Will Have Transferable Post-Mortem Rights to Prevent Unauthorized Commercial Use of Their Likenesses:** Only New Yorkers whose "name, voice, signature, photograph, or likeness" has commercial value at the time of their death will have a private right of action for any commercial use of those characteristics without consent. §§ 50-f(1)(a), (2)(a). These rights are explicitly recognized to be freely transferable and descendible property rights—both by the deceased personality and any subsequent owner. § 50-f(3). The rights may terminate if not transferred and the personality dies intestate without any surviving heirs. § 50-f(6).
- **"Deceased Performers" Will Have Post-Mortem Rights to Prevent Unauthorized Digital Replicas**: New York actors, singers, dancers and musicians will have new post-mortem rights to prevent their "digital replicas" (e.g., a hologram) from being used in scripted audiovisual works and live musical performances without consent, if the public is likely to be misled into thinking it was an authorized use. But merely disclaiming such authorization "conspicuously" in the credits is a way to avoid liability, at least for a scripted audiovisual work. § 50-f(2)(b). These rights are transferable and descendible in the same manner as a deceased personality's rights.
- **Exemptions:** Section 50-f provides numerous exemptions to the rights granted therein, including that:
    - Unauthorized use in certain works will not lead to a violation, *unless* the claimant can prove that the work was so directly connected to a commercial purpose (*i.e.*, in connection with a product, merchandise, goods or services) that it constitutes advertising or solicitation by the deceased personality. § 50-f(2)(e). The list of works is long and varies for deceased personalities and deceased performers, but includes the usual suspects for First Amendment protection, such as literary works, works of political or newsworthy value, parody or satires, and advertisements for such works, among others. § 50-f(2)(d).
    - Mere use of a deceased personality's name, voice, signature, photograph or likeness in a medium that is sponsored or contains advertising does not constitute a violation, unless the use was "so directly connected" with the sponsorship or advertisement. § 50-f(2)(d)(iv). The contours of this

exemption are vague, but the intention, consistent with other provisions of the act, seems to be that the use will not be a violation unless it suggests that the deceased personality's likeness is being used to endorse the sponsor or advertised product.

- Companies who own advertising media, billboards for example, are shielded from liability unless they had "actual knowledge by prior notification" of the unauthorized use. § 50-f(9).

- **There Is a Registration Prerequisite for a Claim on Behalf of a Deceased Personality:** While Section 50-f(7) provides that the successor in interest or licensee of the rights "may" register them with the Secretary of State, the successor or licensee "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." *Id*. That means not only that registration is a prerequisite to filing suit, but that no liability will attach for uses that predate registration, providing a potential window for exploitation of the deceased personality's likeness in the period between the individual's death and registration. There is no registration available or required to pursue deceased performers rights.
- **Remedies:** Statutory remedies include compensatory damages in the minimum amount of $2,000 *plus* disgorgement of profits earned by the violator, as well as punitive damages. § 50-f(2)(c)(i). Other rights and remedies available in law or equity, such as an injunction, are also obtainable. § 50-f(10).

Private Action for Sexually Explicit Deepfakes

Unlike the right of publicity, the expansion of New York's Civil Rights Law to provide a private right of action against the dissemination of sexually explicit "deepfakes"—media in which a video or image of an individual has been digitally altered with someone else's face or body parts—is not limited to performers or personalities, as those terms are defined in the new right of publicity law. Instead, Section 52-c provides extensive remedies, including court costs and attorneys' fees, for any individual who, as a result of digitization (which is defined in the statute), appears to be engaging in a sexual act in material disclosed, disseminated or published by someone who knew or reasonably should have known that the individual did not consent to its creation, disclosure, dissemination or publication.

Exemptions to liability are narrow, with carveouts for the First Amendment and use in connection with law enforcement or court proceedings. § 52-c(4). But the disclaimer loophole afforded to would-be exploiters of a deceased personality's likeness is explicitly rejected for unauthorized deepfakes, § 52-c(2)(b). And the burden to obtain consent is high, requiring a knowing and voluntary written agreement "in plain language that includes a general description of the sexually explicit material and the audiovisual work in which it will be incorporated." § 52-c(3)(a). Even if such written agreement is obtained, consent may be withdrawn within three business days unless that amount of time was provided for the signatory to review the agreement before signing *or* the depicted individual's representative also signs the agreement. § 52-c(3)(b).

There is a three year statute of limitations, which accrues three years after dissemination or publication (not creation), but there is a one year discovery rule, which provides that an individual can bring suit within one year from the time the individual discovers or reasonably should have discovered the dissemination or publication.

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[1] Pursuant to Section 3 of the act, it takes effect 180 days after it becomes law.