

STATE OF NEW YORK

5857--B

Cal. No. 1131

2017-2018 Regular Sessions

IN SENATE

May 3, 2017

Introduced by Sens. SAVINO, AKSHAR, ALCANTARA, AVELLA, CROCI, HAMILTON -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- 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

AN ACT to amend the civil rights 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. "Deceased individual" means any individual, including his or her
7 persona, who has died.

8 2. "Digital replica" means a computer-generated or electronic reproduc-
9 tion of a living or deceased individual's likeness or voice that real-
10 istically depicts the likeness or voice of the individual being
11 portrayed. A digital replica is included within an individual's
12 portrait.

13 3. "Secretary" means the secretary of state.

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

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

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

LBD11325-06-8

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

3 7. "Person" means any natural person, firm, association, partnership,
4 corporation, company, syndicate, receiver, common law trust, conserva-
5 tor, statutory trust, or any other entity by whatever name known or
6 however organized, formed or created, and includes not-for-profit corpo-
7 rations, associations, educational and religious institutions, political
8 parties, and community, civic or other organizations.

9 8. "Persona" means, individually or collectively, the name, portrait
10 or picture, voice, or signature of an individual.

11 9. "Right of privacy" means a personal right, which protects against
12 the unauthorized use of a living individual's name, portrait or picture,
13 voice, or signature for advertising purposes or purposes of trade with-
14 out written consent, extinguished upon death.

15 10. "Right of publicity" means an independent property right, derived
16 from and independent of the right of privacy, which protects the unau-
17 thorized use of a living or deceased individual's name, portrait or
18 picture, voice, or signature for advertising purposes or purposes of
19 trade without written consent.

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

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

25 § 50-f. Right of privacy and right of publicity. [~~A person, firm or~~
26 ~~corporation that uses for advertising purposes, or for the purposes of~~
27 ~~trade, the name, portrait or picture of any living person without having~~
28 ~~first obtained the written consent of such person, or if a minor of his~~
29 ~~or her parent or guardian, is guilty of a misdemeanor.] 1. For the
30 purposes of the right of privacy, a living individual's persona shall
31 not be used for advertising purposes or purposes of trade without
32 obtaining the written consent of such person, or if a minor of his or
33 her parent or guardian.~~

34 2. For the purposes of the right of publicity, a living or deceased
35 individual's persona is personal property, freely transferable or
36 descendible, in whole or in part by contract or by means of any trust or
37 testamentary instrument, whether such contract, trust or testamentary
38 instrument was entered into or executed before or after the effective
39 date of this subdivision. Such right of publicity shall not be used for
40 advertising purposes or the purposes of trade without obtaining the
41 written consent of the individual, his or her successors or assigns as
42 provided for in the provisions of this article pertaining to the right
43 of publicity. In the case of a minor, written consent must first be
44 obtained of his or her parent or guardian for the purposes of an exclu-
45 sive or non-exclusive license as limited by section 35.03 of the arts
46 and cultural affairs law. A parent or guardian is prohibited from
47 assigning a minor's right of publicity, and such assignments shall be
48 unenforceable. Nothing in this section shall limit any other rights such
49 minor may have.

50 § 3. The civil rights law is amended by adding three new sections
51 50-g, 50-h and 50-i to read as follows:

52 § 50-g. Duration of an individual's right of publicity. Every individ-
53 ual's right of publicity shall continue to exist for forty years after
54 his or her death, and does not expire upon the death of the individual.

55 § 50-h. Methods of transfer and conveyance. 1. The rights recognized
56 under the provisions of this article pertaining to the right of public-

1 ity are freely transferable and descendible, in whole or in part, by the
2 following:

3 (a) contract;

4 (b) license;

5 (c) gift;

6 (d) trust;

7 (e) testamentary document. The rights shall vest in the persons enti-
8 tled to the right of publicity under the testamentary instrument of the
9 deceased individual effective as of the date of that individual's death.
10 In the absence of an express transfer in a testamentary instrument of
11 the deceased individual's right of publicity, a provision in the testa-
12 mentary instrument that provides for the disposition of the residue of
13 the deceased individual's assets shall be effective to transfer the
14 rights recognized under this article in accordance with the terms of
15 that provision; and

16 (f) intestate succession. The right to publicity of an individual
17 dying intestate shall be distributed under the laws of intestate
18 succession, and the rights and remedies of this article may be exercised
19 and enforced by a person or persons who possess at least a fifty-one
20 percent interest of the individual's right of publicity. Such persons
21 shall make a proportional accounting to, and shall act at all times in
22 good faith with respect to, any other person in whom the rights being
23 enforced have vested.

24 2. The rights established by the provisions of this article pertaining
25 to the right of publicity shall also be freely transferable or descendi-
26 ble by any subsequent owner of the deceased individual's right to
27 publicity as recognized by this article. Nothing in the provisions of
28 this article pertaining to the right of publicity shall be construed to
29 render invalid or unenforceable any contract entered into by a deceased
30 individual during his or her lifetime by which the deceased individual
31 assigned the rights, in whole or in part, to use his or her right of
32 publicity as defined in this article.

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

38 4. Any person claiming to be a successor in interest to the right of
39 publicity of a deceased individual under this article or a licensee of a
40 deceased individual's right of publicity shall register that claim with
41 the secretary on a form prescribed by the secretary and upon payment of
42 a fee of one hundred dollars. The form shall include the name and date
43 of death of the deceased individual, the name and address of the claim-
44 ant, the basis of the claim, and a sworn affidavit under penalty of
45 perjury as to the rights claimed. Claims registered under this registry
46 and information regarding such successors in interest to the deceased
47 individual's right of publicity shall be public records.

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

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

4 7. No action shall be brought under the provisions of this article
5 pertaining to the right of publicity by reason of any use of a deceased
6 individual's right of publicity occurring after the expiration of the
7 duration of the right of publicity as provided in section fifty-g of
8 this article. Furthermore, no action may be brought under the provisions
9 of this article pertaining to the right of publicity for a violation of
10 a deceased individual's right of publicity unless the claim is regis-
11 tered. However, an action may be brought under the provisions of this
12 article pertaining to the right of publicity for a violation of a
13 deceased individual's right of publicity:

14 (a) for any violation that occurs prior to registration provided the
15 claim is registered within six months following the individual's death;
16 or

17 (b) for any subsequent publication, manufacturing, distribution, or
18 sale or use in violation of a deceased individual's right of publicity
19 once a claim has been registered.

20 8. If there is a right of publicity registration for a deceased indi-
21 vidual, any person seeking to license the right of publicity for the
22 individual shall have the right to rely upon such registration and post-
23 ing and thereby presume that the person who has registered and posted
24 his or her claim on the secretary's public internet website has the
25 right to assign or license the deceased individual's right of publicity.
26 The registration and posting of a person's claim to a deceased individ-
27 ual's right of publicity on the secretary's public internet website
28 shall constitute a defense to an action brought under the provisions of
29 this article pertaining to the right of publicity.

30 9. Any person who knowingly makes a false or fraudulent representation
31 in connection with a registration with the secretary to establish a
32 claim to a deceased individual's right of publicity pursuant to this
33 section shall be liable for any damages sustained as a result of the
34 false or fraudulent registration as determined by a court of competent
35 jurisdiction.

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

44 § 50-i. No abrogation of rights and remedies. Nothing contained in the
45 provisions of this article related to the right of publicity shall be
46 deemed to abrogate or otherwise limit any rights or remedies otherwise
47 conferred by federal or state law.

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

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

53 2. Right of publicity exceptions. For purposes of the right of public-
54 ity, consent for use of another individual's persona shall not be
55 required, except as otherwise provided in subdivisions three and four of
56 this section, when used in connection with the following:

1 (a) news, public affairs or sports broadcast, including the promotion
2 of and advertising for a public affairs or sports broadcast, an account
3 of public interest or a political campaign;

4 (b) in:

5 (i) a play, book, magazine, newspaper, musical composition, visual
6 work, work of art, audiovisual work, radio or television program if it
7 is fictional or nonfictional entertainment, or a dramatic, literary or
8 musical work;

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

12 (iii) an advertisement or commercial announcement for any of the works
13 described in paragraph (a) of this subdivision or this paragraph; or

14 (c) fundraising purposes by not-for-profit radio and television
15 stations licensed by the federal communications commission of the United
16 States, or by not-for-profit advocacy organizations if the use is for
17 commentary or criticism;

18 (d) use of the right of publicity of a deceased individual where the
19 licensee or successor in interest has failed to register and post a
20 claim of right under section fifty-h of this article, with the exception
21 of the safe harbor period listed in subdivision seven of section fifty-h
22 of this article, until such time as a claim of right has been registered
23 and posted as required under such section.

24 (e) Nothing in this section relating to the right of publicity shall
25 be deemed to abrogate or otherwise limit other rights or exceptions
26 otherwise conferred by state and federal case law interpretations as to
27 the applicability of sections fifty and fifty-one of this article made
28 prior to the effective date of the chapter of the laws of two thousand
29 eighteen which amended this section.

30 3. Digital replica for purposes of trade in an expressive work. (a)
31 Use of a digital replica, as defined in subdivision two of section fifty
32 of this article, of an individual shall constitute a violation if done
33 without the consent of the individual if the use is:

34 (i) in a scripted audiovisual or audio work, or in a live performance
35 of a dramatic work, in a manner that is intended to create, and that
36 does create, the clear impression that the individual represented by the
37 digital replica is performing, the activity for which he or she is
38 known, in the role of a fictional character; or

39 (ii) in a performance of a musical work, in a manner that is intended
40 to create, and that does create, the clear impression that the individ-
41 ual represented by the digital replica is performing, the activity for
42 which he or she is known, in such musical work; or

43 (iii) in an audiovisual work, in a manner that is intended to create,
44 and that does create, the clear impression that the athlete represented
45 by the digital replica is engaging in an athletic activity for which he
46 or she is known.

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

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

51 (ii) in a work of political, public interest, or newsworthy value, or
52 similar work, including a documentary, regardless of the degree of
53 fictionalization in the work; or

54 (iii) de minimis or incidental.

55 4. Digital replica use in a pornographic work. Use of a digital
56 replica of an individual shall constitute a violation if done without

1 the consent of the individual if the use is in an audiovisual porno-
2 graphic work in a manner that is intended to create and that does create
3 the impression that the individual represented by the digital replica is
4 performing. Nothing in this section shall limit any other rights the
5 individual may have against any party relating to such pornographic
6 work.

7 5. Limited immunity. The owners or employees of any medium used for
8 advertising including, but not limited to, newspapers, magazines, radio
9 and television networks and stations, cable television systems, bill-
10 boards, and transit advertising, who make unauthorized use of an indi-
11 vidual's persona for the purpose of advertising or trade shall not be
12 liable for such use under the provisions of this article unless it is
13 established that such owner or employee had knowledge of the unauthor-
14 ized use, through presence or inclusion, of the individual's persona in
15 such advertisement or publication.

16 6. Action for injunction and for damages. Any person whose [~~name,~~
17 ~~portrait, picture or voice~~] persona is used within this state for adver-
18 tising purposes [~~or~~], for the purposes of trade without the written
19 consent first obtained as [~~above~~] provided [~~may~~] in the provisions of
20 this article is entitled to maintain an equitable action in the supreme
21 court of this state against the person[~~, firm or corporation~~] so using
22 his [~~name, portrait, picture or voice~~] or her persona, to prevent and
23 restrain the use thereof; and may also sue and recover damages for any
24 injuries sustained including an amount equal to the greater of seven
25 hundred fifty dollars or compensatory damages by reason of such use and
26 if the defendant shall have knowingly used such person's [~~name,~~
27 ~~portrait, picture or voice~~] persona in such manner as is forbidden or
28 declared to be unlawful by [~~section fifty~~] the provisions of this arti-
29 cle relating to the right of privacy or the right of publicity, the
30 [~~jury~~] finder of fact, in its discretion, may award exemplary damages.
31 [~~But nothing~~] A violation of an individual's right of privacy or right
32 of publicity may occur without regard to whether the use or activity is
33 for profit or not-for-profit.

34 7. No defense. It shall not constitute a defense to an action for
35 violation of an individual's right of privacy or right of publicity that
36 such violation includes more than one individual.

37 8. Use and transfer. Nothing contained in this article shall be so
38 construed as to prevent any [~~person, firm or corporation~~] individual or
39 person from selling or otherwise transferring any material containing
40 such [~~name, portrait, picture or voice~~] persona in whatever medium to
41 any user of such [~~name, portrait, picture or voice~~] persona, or to any
42 third party for sale or transfer directly or indirectly to such a user,
43 for use in a manner lawful under this article[~~, nothing~~].

44 9. Photographers. Nothing contained in this article shall be so
45 construed as to prevent any person[~~, firm or corporation~~] practicing
46 the profession of photography, from exhibiting [~~in or about his or its~~
47 ~~establishment~~] or displaying, including in a gallery or on an online
48 portfolio specimens of the work of such [~~establishment, unless the same~~
49 ~~is continued by such person, firm or corporation after written notice~~
50 ~~objecting thereto has been given by the person portrayed, and nothing~~
51 photographer, or from making specimens of the work available for licens-
52 ing purposes in so far as the licensed use does not violate this arti-
53 cle. A photographer shall not be liable if the use of the photograph was
54 not authorized by the photographer.

55 10. Manufacturers, writers, composers and artists. Nothing contained
56 in this article shall be so construed as to prevent any person[~~, firm or~~

1 ~~corporation~~ from using the ~~[name, portrait, picture or voice of]~~ perso-
2 na owned by, any manufacturer or dealer in connection with the goods,
3 wares and merchandise manufactured, produced or dealt in by ~~[him]~~ the
4 manufacturer which ~~[he]~~ has been sold or disposed of with such ~~[name,~~
5 ~~portrait, picture or voice]~~ persona used in connection therewith; or
6 from using the ~~[name, portrait, picture or voice]~~ persona of any author,
7 composer or artist in connection with his or her literary, musical or
8 artistic productions which he or she has sold or disposed of with such
9 ~~[name, portrait, picture or voice]~~ persona used in connection therewith.

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

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

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

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

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

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

45 § 6. Severability clause. If any clause, sentence, paragraph, subdivi-
46 sion, section or part of this act shall be adjudged by any court of
47 competent jurisdiction to be invalid, such judgment shall not affect,
48 impair, or invalidate the remainder thereof, but shall be confined in
49 its operation to the clause, sentence, paragraph, subdivision, section
50 or part thereof directly involved in the controversy in which such judg-
51 ment shall have been rendered. It is hereby declared to be the intent of
52 the legislature that this act would have been enacted even if such
53 invalid provisions had not been included herein.

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