

Intellectual Property & Technology Law Journal

Edited by the Technology and Proprietary Rights Group of Weil, Gotshal & Manges LLP

VOLUME 33 • NUMBER 2 • FEBRUARY 2021

New Year Brings Expanded Protections for Publicity and Privacy Rights Under New York Law

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New York's governor, Andrew M. Cuomo, has signed a bill¹ into law that makes significant amendments to New York's Civil Rights Law, which codifies rights of publicity and privacy in the State.

In addition to adding a long-anticipated post-mortem right of publicity, the bill also prohibits unauthorized use of digital replicas of deceased celebrities and creates a new private cause of action prohibiting the publication of digitally fabricated sexually explicit depictions of an individual (such as those that are utilized in "deep fakes").

The new law will be effective on May 30, 2021 and will not apply retroactively.

This article summarizes key points and takeaways of the new law.

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POST-MORTEM RIGHT OF PUBLICITY

The New York Civil Rights Law prohibits the unauthorized use of a person's name, voice, or likeness for commercial purposes. For the first time in New York State, the new amendment recognizes a right of publicity for the deceased.

In particular, the law creates a new right of publicity for any "deceased performer" (defined as one who was domiciled in New York at the time of death and whose livelihood was to regularly engage in acting, singing, dancing, or playing a musical instrument), or "deceased personality" (defined as one who lived in New York at the time of death and whose name, voice, signature, photograph or likeness has commercial value at the time of his or her death).

This post-mortem right is transferable and descendible and will allow the estates of deceased individuals who died on or after March 30, 2021 to protect the exploitation of their likenesses for 40 years after the person's death. Notably, in order to bring a cause of action under the statute, the deceased's estate must register their rights with the New York Secretary of State.

The amended statute also expressly prohibits the unauthorized use of a deceased performer's "digital replica," defined as "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,” if such use is likely to deceive the public into thinking the use was authorized by the deceased person or its successor.

The law explicitly exempts a number of activities from liability under this new cause of action, such as digital remastering of an individual’s previously recorded performance.

The statute also provides that the use of a “conspicuous disclaimer” explaining that the use of the performer’s persona in the digital replica has not been authorized precludes a finding that the public is likely to be deceived by such unauthorized use, thus precluding liability.

The new amendment also codifies a number of exceptions to post-mortem rights that have long been recognized by the courts as exceptions to rights of publicity, such as use in works that are in the public interest, or are educational, newsworthy, political, commentary, criticism, parody, or satire, and use in literary and other artistic works.

In addition to an award of injunctive relief, potential liability for violation of the post-mortem rights of publicity may include statutory damages in the amount of \$2,000, or compensatory damages plus any profits attributable to the unauthorized use, and punitive damages.

UNLAWFUL PUBLICATION OF SEXUALLY EXPLICIT DEPICTIONS OF INDIVIDUALS

The bill also amends the New York Civil Rights Law to create a private right of action for the unlawful dissemination or publication of a sexually explicit depiction of any individual who, as a result of digitization, appears to be engaging in sexual conduct in which the person did not in fact participate. This measure applies to any natural person, not only celebrities. However, it is significant in light of the increasingly problematic use of “deep fakes” that superimpose a celebrity’s face on a sex worker’s body.

An individual has a cause of action against any person who (a) disseminates or publishes such sexually explicit material, and (b) knows or reasonably should have known that the individual depicted in

the material did not consent to its creation, disclosure, dissemination or publication. The bill provides that an individual depicted in such materials may only be found to have consented if the consent is provided in writing under particular conditions set forth in the statute.

A person may be liable for dissemination and publication of such unauthorized materials even if he did not participate in the creation or development of such materials. A disclaimer that the use is without consent will also not preclude liability.

There are certain exceptions to liability, including publication or dissemination for purposes of reporting, law enforcement, legal proceedings, or in connection with a matter of public concern.

However, the law expressly states that such sexually explicit material shall not be considered of newsworthy value simply because the depicted individual is a public figure.

Liability for a violation of this new cause of action includes injunctive relief, punitive damages, compensatory damages, and reasonable court costs and attorney’s fees. The statute of limitations is three years after dissemination or publication of the sexually explicit material, or one year from the date a person discovers or reasonably should have discovered such dissemination or publication.

IN SUM

While the new post-mortem right of publicity in New York is a long-awaited and significant development, the 40-year protection remains more narrow than those in some other states, where rights may be protected for up to 100 years after death. It also limits application to celebrities who were domiciled in New York at the time of their death, unlike other state laws that do not limit protection to celebrities who died within those states.

The New York law also does not apply retroactively to allow for protection for celebrities who passed away prior to March 30, 2021. Given that rights of publicity still vary from state to state, companies who use a deceased (or living) celebrity’s name or likeness must remain mindful of the nature and geographic scope of their use. Any rights granted prior to a celebrity’s death would not be affected by this new law.

Perhaps the most significant impact of New York's new law are the protections against the publication and dissemination of digitally fabricated sexually explicit materials.

This new cause of action will provide much welcomed protection to celebrities and other individuals who are the victims of deep fakes and other nefarious digital content and will also require

publishers of adult materials to increase their safeguards with respect to consent of an individual's likeness in sexually explicit digital content.

Note

1. Senate Bill S5959D, <https://www.nysenate.gov/legislation/bills/2019/s5959>.

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Number 2, pages 12–13, with permission from Wolters Kluwer, New York, NY,
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