

STATE OF NEW YORK

5196

2013-2014 Regular Sessions

IN SENATE

May 14, 2013

Introduced by Sen. DeFRANCISCO -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil rights law, in relation to the right of publicity

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The civil rights law is amended by adding a new article 3-A
2 to read as follows:

3 ARTICLE 3-A
4 RIGHT OF PUBLICITY

5 Section 30. Definitions.

- 6 31. Property right established.
7 32. Prohibited uses.
8 33. Consent.
9 34. Exemptions from use restrictions.
10 35. Applicability.
11 36. Remedies.
12 37. Enforcement of rights.

13 § 30. Definitions. As used in this chapter:

- 14 1. "Commercial purpose" means the use of or reference to any aspect of
15 an individual's persona in any of the following manners: (a) on or in
16 connection with the offering for sale or sale of a place, a product,
17 merchandise, good, service or business; (b) for advertising or promoting
18 the purchase or sale of a product, merchandise, good, service or busi-
19 ness; and (c) for the purpose of promoting travel.
20 2. "Deceased individual" means any natural person who died a domicili-
21 ary of the state of New York on or after, or within seventy years prior
22 to, the effective date of this article.
23 3. "Person" means a natural person, corporation, partnership, limited
24 liability corporation, limited liability partnership, trust, estate or
25 other legal entity.

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

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1 4. "Persona" means the name, portrait, picture, voice, signature,
2 photograph, image, likeness or distinctive appearance, gesture, manner-
3 isms or other indicia of a deceased individual.

4 5. "Work of fine art" means:

5 (a) a visual rendition including, but not limited to, a painting,
6 drawing, sculpture, mosaic, videotape, or photograph;

7 (b) a work of calligraphy;

8 (c) a work of graphic art including, but not limited to, an etching,
9 lithograph, serigraph, or offset print;

10 (d) a craft work in materials including, but not limited to, clay,
11 textile, fiber, wood, metal, plastic or glass; or

12 (e) a work in mixed media including, but not limited to, a collage,
13 assemblage, or work consisting of any combination of paragraphs (a)
14 through (d) of this subdivision.

15 § 31. Property right established. A property right exists in a
16 deceased individual's persona for seventy years after the death of the
17 individual.

18 § 32. Prohibited uses. No person shall use for commercial purposes in
19 this state, the persona of any deceased individual without having first
20 obtained the written consent of the person or persons identified in
21 section thirty-three of this article and who own more than fifty percent
22 of the rights in the deceased individual's persona, or as otherwise
23 provided in this article.

24 § 33. Consent. The written consent required by this article shall be
25 exercisable by the person or persons who collectively own more than
26 fifty percent of the rights in the deceased individual's persona in
27 accordance with subdivision one of section thirty-five and section thir-
28 ty-six of this article. Reasonable reliance upon such written consent
29 shall be a defense in any action brought under this article.

30 § 34. Exemptions from use restrictions. The written consent specified
31 in section thirty-two of this article shall not be required in
32 connection with the use of a deceased individual's persona for other
33 than commercial purposes or for a use that is permitted under the laws
34 or the Constitution of the United States or the state of New York. For
35 purposes of this section, the following types of uses regardless of
36 length or format, appearing in any medium now known or hereafter
37 devised, shall not be considered to have used a deceased individual's
38 persona for commercial purposes so long as such uses do not constitute
39 an advertisement, endorsement or solicitation for the sale or purchase
40 of a product, article of merchandise, good or service, other than for
41 the work itself:

42 1. A play, book, graphic novel or other literary or theatrical work;

43 2. A work of political or newsworthy value concerning public interest,
44 including a television broadcast or an article, editorial or commentary
45 in a magazine, newspaper, newsletter or other periodical;

46 3. An original musical composition, musical sound recording or other
47 similar musical work;

48 4. A documentary, film, motion picture, television program or other
49 similar audiovisual work; or

50 5. An original work of fine art or a work of fine art reproduction.

51 § 35. Applicability. 1. The rights recognized under this article are
52 expressly made retroactive and shall be deemed to have existed at the
53 time of death of any individual who died within seventy years prior to
54 the effective date of this article and, except where such rights were
55 passed, transferred or assigned prior to such deceased individual's
56 death by means of any written contract or trust instrument, shall be

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1 deemed to have vested in the person or persons entitled to these rights
2 under the testamentary instrument of the deceased individual effective
3 as of the date of his or her death. In the absence of a transfer in a
4 testamentary instrument of the persona of a deceased individual recog-
5 nized under this section, a provision in the testamentary instrument
6 that provides for the disposition of the residue of the deceased indi-
7 vidual's assets shall be effective to transfer the deceased individual's
8 persona in accordance with the terms of that provision. If no such
9 contract, trust or testamentary instrument exists or existed at the time
10 of the death of the deceased individual, then such rights shall be
11 deemed to have passed in accordance with the laws of intestacy in effect
12 at the time of the deceased individual's death, provided, however, that
13 if there are or were at the time of the deceased individual's death no
14 surviving natural persons to whom such rights would have passed by
15 intestate succession, then such rights shall terminate or shall have
16 been deemed to have terminated.

17 2. A deceased individual's persona is personal property, freely trans-
18 ferable or descendible, in whole or in part, by contract or by means of
19 any trust or testamentary instrument, whether such contract, trust or
20 testamentary instrument was entered into or executed before or after the
21 effective date of this article.

22 3. Nothing in this section shall be construed as prohibiting the use
23 of the deceased individual's persona that occurs after the expiration of
24 seventy years following the death of that deceased individual. Nor shall
25 anything in this section be construed as creating liability or giving
26 rise to any remedy for any actions or conduct involving the use of a
27 deceased individual's persona that occurred prior to the effective date
28 of this article.

29 4. This article shall not prohibit the use of a deceased individual's
30 persona to accurately identify that deceased individual as the author of
31 or contributor to a work or as the performer of a recorded performance,
32 under circumstances in which the work or recorded performance is other-
33 wise lawfully used, reproduced, exhibited or broadcast.

34 5. No person possessing rights or title, however held, in a work
35 encompassing any aspect or aspects of a deceased individual's persona
36 shall be liable under this article for licensing or otherwise authoriz-
37 ing the use of such work by a third party, or for displaying images of
38 such work as available for license or similar use by a third party, so
39 long as such person does not: (a) know or intend that the third party
40 plans to use such work to engage in an unauthorized use of the deceased
41 individual's persona as prohibited by this article; or (b) does not
42 warrant or represent that the third party may use the licensed or
43 authorized aspect of the deceased individual's persona for commercial
44 purposes without first obtaining the written consent required by section
45 thirty-two of this article. In the event that such third party licensee
46 intended to use any aspect of a deceased individual's persona encom-
47 passed in such work for commercial purposes without the prior knowledge
48 and intent of the licensing or authorizing person, it shall be the sole
49 responsibility of the third party licensee to obtain the written consent
50 required by section thirty-two of this article.

51 6. Unless otherwise agreed to in writing, only the persons who actual-
52 ly authorize, provide for services, manufacture or otherwise create an
53 advertisement, product, article of merchandise, good or service embody-
54 ing a deceased individual's persona shall be responsible for obtaining
55 the written consent required by section thirty-two of this article. A
56 distributor or transmitter of such an advertisement, product, article of

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1 merchandise, good or service shall not be liable for any violation of
2 this article, unless such distributor or transmitter intentionally
3 engages in an unauthorized use of a deceased individual's persona as
4 prohibited by this article, knowing that such use requires consent.

5 § 36. Remedies. In the event the consent required in section thirty-
6 two of this article is not obtained, any person having the right to give
7 such consent as provided in section thirty-two of this article, may
8 bring an action to enjoin such unauthorized use for commercial purposes,
9 and to recover damages for any loss or injury sustained by reason there-
10 of, including an amount which would have been a reasonable royalty, and
11 punitive or exemplary damages.

12 § 37. Enforcement of rights. Any action to enforce the provisions of
13 this article shall be subject to the one-year limitation period set
14 forth in subdivision three of section two hundred fifteen of the civil
15 practice law and rules.

16 § 2. Subdivision 3 of section 215 of the civil practice law and rules
17 is amended to read as follows:

18 3. an action to recover damages for assault, battery, false imprison-
19 ment, malicious prosecution, libel, slander, false words causing special
20 damages, [~~or~~] a violation of the right of privacy under section fifty-
21 one of the civil rights law or a violation of the right of publicity
22 under article 3-A of the civil rights law;

23 § 3. Severability. If any clause, sentence, paragraph, section or part
24 of this act shall be adjudged by any court of competent jurisdiction to
25 be invalid, such judgment shall not affect, impair or invalidate the
26 remainder thereof, but shall be confined in its operation to the clause,
27 sentence, paragraph, section or part thereof directly involved in the
28 controversy in which such judgment shall have been rendered.

29 § 4. This act shall take effect one year after it shall have become a
30 law.

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S5196

SPONSOR: DEFRANCISCO

TITLE OF BILL: An act to amend the civil rights law, in relation to the right of publicity

PURPOSE:

Provides that a property right exists in a deceased individual's persona for seventy years after the death of the individual.

SUMMARY OF PROVISIONS:

Section 1 - Amends the Civil Rights Law by adding a new article 3-A

Adds a new section 30 - Definitions.

Adds a new section 31 - Property right established.

Adds a new section 32 - Prohibited uses.

Adds a new section 33 - Consent.

Adds a new section 34 - Exemptions from use restrictions.

Adds a new section 35 - Applicability.

Adds a new section 36 - Remedies.

Adds a new section 37 - Enforcement of rights.

Section 2 - Amends subdivision 3 of section 215 of the Civil Practice Laws and Rules to add a violation of this right of publicity to a list of actions to recover damages.

Section 3 - Provides for a savings clause to prevent impairment of the act.

Section 4 - Effective date.

JUSTIFICATION:

This bill provides for a "right of publicity" for deceased personalities and grants this property right to a deceased personality's estate for a term of seventy (70) years following their death.

This right of publicity would safeguard the significant and cherished right of deceased personalities in New York while simultaneously protecting the First Amendment considerations of interested parties and

businesses.

This balanced approach will provide important protections against commercial exploitation of the name, portrait, picture, voice, signature, photograph, image, likeness, bodies of work or similar

matters relating to a deceased personality. This legislation also limits the enforcement of the prohibitions outlined in the bill to seventy (70) years following the death of a personality.

New York's deceased personalities, in many instances, spent entire careers building reputations and bodies of work that are a property right that should not be extinguished with their passing. This property right should also be protected after their passing and may be transferred by written contract or testamentary instrument.

This bill would protect the legitimate and authorized commercial use of the right of publicity for deceased individuals while providing protections from unscrupulous individuals or entities attempting to commercially exploit.

LEGISLATIVE HISTORY:

New bill

FISCAL IMPLICATIONS:

None to the State

EFFECTIVE DATE:

This act shall take effect one year after it shall become a law.
