IP News: Senate Bill S5959D

New York Extends Its Right of Publicity and Penalizes Sexually Explicit Deepfakes

By:Howard G. Zaharoff
January 06, 2021

INTRODUCTION

On November 30, 2020, Governor Andrew Cuomo signed Senate Bill S5959D, effective on May 29, 2021, to amend New York law in two ways. First, the bill establishes the right of publicity for certain deceased individuals, and second, it provides a private right of action for unlawful dissemination or publication of certain sexually explicit depictions. Although limited in scope, this new law offers increased protections for individuals' rights to their name, likeness, and reputation.

POST-MORTEM RIGHT OF PUBLICITY

Background and Scope

The "right of publicity" refers to the right of individuals to control the use of their name and likeness for commercial and other valuable purposes. *See* S.B. 5959D, 2019-2020 Leg. Sess. (N.Y. 2020). "Likeness" is defined broadly under New York law, and can include an individual's voice, signature, photograph, or any representation intended to convey the essence or idea of the individual. *See Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 261 (1984).* A *post-mortem* right of publicity extends this right to the deceased's heirs and assigns and is generally considered a freely transferable property right. This means that designated successors may prevent the commercial use of a deceased individual's name or likeness without consent. Since the 1980s, more than 20 states have recognized a post-mortem right of publicity, New York being the latest.

The first section of the bill adds Civil Rights Law § 50-f, which creates a new post-mortem right of publicity extending for 40 years after death for "deceased performers" and "deceased personalities" who die when domiciled in New York, § 50-f(1)(a)-(b), provided they transferred the right or have heirs,. Deceased performers include actors, singers, dancers, or musicians, and deceased personalities are individuals whose name, voice, signature, photograph, or likeness has commercial value. *Id.* Deceased individuals are considered to be domiciled in New York if they (i) intended for New York to be their permanent home, (2) had a permanent home in New York, or (iii) intended to return to New York after being away; however, individuals may only be domiciled in one state. *See* New York State Government. New York has long protected a living individual's right of publicity, but this addition to the civil rights laws allows for successors to claim damages if this right is violated after an individual's death.

Successors who wish to claim commercial use without consent regarding a deceased personality must first register their claim with the Secretary of State (and uses that occur before registration are not actionable). § 50-f(7). There is no such registration requirement for bringing a right of publicity claim on behalf a deceased performer. Statutory remedies include (i) compensatory damages of at least $2,000, plus (ii) any profits from the unauthorized use of the deceased individual's name or likeness and (iii) the possibility of punitive damages. § 50-f(2)(c)(i)-(iii).

Limitations and Exceptions

The bill lays out several important limitations.

First, the law is not retroactive, so § 50-f will only apply to personalities and performers who pass away on or after May 29, 2021. S.B. 5959D § 3. Additionally, these new post-mortem rights only last for 40 years after death. § 50-f(8). This is relatively short when compared with the length of time provided under similar laws of celebrity-laden states such as California, which protects an individual's right of publicity for 70 years after death. *See* National Law Review.

Second, for deceased personalities the new law only prohibits unauthorized use of their name or likeness for advertising, selling, or soliciting *purchases of products or services*. § 50-f(2)(b), while for deceased performers the law only prohibits *digital replica* use (in scripted fiction or live music) that is *likely to deceive* the public into thinking the use is endorsed by the deceased. *Id.* (Note: if the work and related advertisements contain a conspicuous disclaimer stating that the digital replica has not been authorized, the use will not be considered deceptive. § 50-f(2)(b).) This means that unconsented use of a deceased individual's image or likeness will not necessarily violate the new law. Rather, a party seeking to enforce a post-mortem right of publicity must prove that the use was for commercial purposes or had a misleading effect on the public as described in the law. § 50-f(2)(d)(iv).

Finally, the law seeks to maintain First Amendment rights by establishing certain exceptions. Thus, it is not unlawful:

- to use a deceased personality's name or likeness in a literary work; a musical work or composition; a visual work or art piece; a work of political, public interest, educational or newsworthy value; an audio or audiovisual work; or a radio or television program. § 50-f(2)(d)(i).
- to use a deceased performer's name or likeness if the work is parody, satire, commentary or criticism; a work of political or newsworthy value; a representation of the deceased as him or herself, except in a live performance; minimal or incidental use; or use in an advertisement of any of the foregoing. § 50-f(2)(d)(ii).
- to use a name r likeness in connection with any news, public affairs, or sports program or account, or any political campaign. § 50-f(2)(d)(iii).

PRIVATE RIGHT OF ACTION FOR SEXUALLY EXPLICIT "DEEP FAKES"

Background and Scope

The second part of this new law adds to New York's Civil Rights code, which already prohibited certain residential videos and intimate images, a private right of action against "unlawful dissemination or publication of a sexually explicit depiction of an individual." § 52-c. A depicted individual is anyone – *not* limited to personalities or performers – who, as a result of digitization or realistic altering, appears to be giving a sexually explicit performance that they did not actually perform. § 52-c(1)(a). Such realistic digitization is also known as a "deepfake," which is a video or image of an individual that has been digitally altered to depict someone else's face, body, or likeness. Because deepfakes can appear so realistic, there is a worrisome potential for reputational damage if a deepfake is published.

The new law provides a depicted individual with a cause of action against a person who discloses, disseminates, or publishes such sexually explicit material when the person knows or reasonably should have known that the depicted individual did not consent to its creation, disclosure, dissemination, or publication. § 52-c(2)(a). Additionally, the law provides a number of remedies for depicted individuals, including injunctive relief, punitive damages, compensatory damages, and reasonable court costs and attorney's fees. § 52-c(5).

This section of the law makes it clear that unlike in the right of publicity context, it is not a defense to include a disclaimer in sexually explicit materials or deepfakes, even if the disclaimer states that such material was not authorized or created by the depicted individual. § 52-c(2)(b). The law does allow depicted individuals to consent to dissemination of sexually explicit material, but only if they knowingly and voluntary sign a written agreement that describes both the material and the work in which it will appear. § 52-c(3)(a). Consent can be rescinded three days after signing such an agreement if the individual provides written notice, unless the individual was given at least three days to review the agreement, or if the individual's attorney, agent, or manager also signed. § 52-c(3)(b).

Limitations and Exceptions

There are two narrow exceptions under this part of the legislation. First, persons can disseminate sexually explicit material if they are reporting unlawful activity, exercising law enforcement duties, or disclosing the material for legal proceedings. § 52-c(4)(a)(i). Second, if the material is a matter of legitimate public concern, a work of political or newsworthy value, or if disclosure or criticism is otherwise constitutionally protected, then dissemination is not prohibited. § 52-c(4)(a)(ii). However, the sexually explicit material cannot be considered newsworthy solely because the depicted individual is a public figure. *Id.*

Finally, depicted individuals must bring their claim by the later of (i) three years from dissemination of the sexually explicit material, or (ii) one year after they discover or should have reasonably discovered that the material was disseminated. § 52-c(6).

IMPLICATIONS

Governor Cuomo commented on the new law, stating "[i]n the digital age, deceased individuals can often fall victim to bad actors that seek to capitalize on their death and profit off of their likeness after they pass away – that ends today." He calls the legislation an "important step in protecting the rights of deceased individuals" and creating a safer and fairer New York. Senator Diane Savino, one of the bill's sponsors, remarked that "this legislation will protect artists and their image both today and after their death for years to come" and will help to guard individuals from having their reputations damaged by deepfakes.

Although the new legislation enhances New Yorkers' rights to protect their names and likenesses, the extended right of publicity under this law has many exceptions, and the private right of action for sexual material is limited to digitally manipulated content. Still, individuals seeking to use a deceased individual's name or likeness for commercial purposes should be aware of the restrictions under the first section of this law, and individuals victimized by a sexual deepfake in New York should appreciate they may have new remedies under the second section of this law.

CONCLUSION

These additions to New York's civil rights law provide increased protections for deceased personalities and performers who wish to control the use their name and likeness after death, and also reflect growing concern over an individual's reputation in the digital age. The limitations and exceptions of this new law are likely to be debated and perhaps even litigated once the law takes effect in May. Those seeking to use an individual's name and likeness for commercial purposes, as well as those looking to protect their own image or reputation, should be aware of the restrictions and rights described in this legislation. For more information about this topic, please contact Howard Zaharoff.

The author would like to acknowledge the contributions to this article by and give thanks to Natalie Gallego, Northeastern University School of Law (NUSL) 2021.