

New York Passes Postmortem Right of Publicity Statute

On November 30, 2020, New York Governor Andrew Cuomo signed a new [right of publicity statute](#) into law, which will take effect 180 days after enactment. The law allows successors in interest of deceased “performers” and “personalities” to sue for the unlicensed use of their “digital replica,” name, likeness, or other identifiers.

Current New York Statutory Right of Privacy

Under New York’s existing right to privacy law, “any person whose name [or likeness] is used within [New York] for advertising [or trade] purposes without . . . written consent” can sue for an injunction and damages. See [NY CRL § 51](#). Thus, the right to privacy statute embodies a kind of proxy right of publicity; that is, a cause of action for the unauthorized use of one’s name or likeness. But because the existing law addresses *privacy* concerns (which dissipate at death), the rights conferred do not extend postmortem. Also, New York courts have held that the state’s law affords no common law right of publicity—the statutory grant is exclusive.

New Postmortem Rights

Rights of publicity are of particular consequence in New York and California due to the number of celebrities residing in those states. The new statute brings New York’s right of publicity closer to that of California, which has recognized postmortem rights of publicity since 1985. Under the new law, successors in interest of “personalities” and “performers” who pass away after the statute takes effect in May 2021 will have a cause of action for certain forms of unauthorized exploitation.

Qualified “personalities” are New York domiciled individuals whose name, voice, signature, photograph, or likeness has commercial value at the time of (or because of) their death. The statute prohibits unauthorized use of such identifiers within forty years of a personality’s death. Qualified “performers” are domiciled in New York at the time of their death and had, for gain or livelihood, regularly acted, sang, danced, or played a musical instrument. Unauthorized use of a deceased performer’s “digital replica,” a computer-generated electronic performance in which an individual does not actually perform, but that is so realistic that a reasonable observer would believe it was an actual performance,” is prohibited under the statute. Unlike the postmortem rights of a “personality,” this postmortem right attached to a “performer” does not expire. Parties in violation of the law will be liable for the greater of (1) compensatory damages or (2) \$2,000 statutory damages, plus any profits attributable to the unauthorized use. Punitive damages are also available.

In the past, similar bills have failed to pass in part due to First Amendment concerns. The new statute includes several exceptions intended to mitigate those concerns. For instance, use of a deceased personality’s name, voice, photograph, or likeness will not violate the law if used in a play, book, magazine, newspaper, musical work, work of visual art, or work of political, public, or educational value. Likewise, a deceased performer’s digital replica may be used in parodies, satire, commentary, criticism, works of political or newsworthy value, and the like. And news, public affairs, and sports programs are not liable for using a name, signature, photograph, or likeness. With these broad exceptions, the statute appears targeted toward unauthorized commercial endorsements or misleading digital lookalikes. The statute also includes a cause of action for the dissemination or publication of sexually-explicit digitized depictions of any natural person.

New Considerations

Celebrities and other recognizable individuals domiciled in New York should carefully consider their new posthumous rights. “The rights recognized . . . are property rights, freely transferable or descendible.” Thus, performers and personalities may want to supplement their estate plans or commercialize these rights while they are still alive.

Advertisers and other content creators should be careful not to run afoul of the expanded right of publicity. While the statute provides broad exceptions for newsworthy or artistically valuable work, the protection dissipates for use “so directly connected with [sponsorship, advertising,] or product placement as to constitute a use for which consent is required.” Further, similar to California, the New York Secretary of State will create a public database whereby successors in interest and licensees of deceased personalities’ rights may register their interests. Those rightsholders do “not have a cause of action . . . for a use . . . that occurs before the successor in interest or licensee registers a claim of the rights.” Accordingly, successors in interest who wish to protect the commercial value of these rights should register them as a matter of course, and parties wishing to license a deceased personality’s rights will be able to review the registry to find the appropriate party to contact regarding permissions.

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