

A10800 Summary:

BILL NO A10800

SAME AS No Same As

SPONSOR Rules (Weinstein)

COSPNSR Dinowitz, Gunther, Englebright, Weprin, Arroyo, Nolan, DenDekker, Rosenthal L, Gottfried, Braunstein, D'Urso, Fahy, Hevesi, Jaffee, Stirpe, Taylor

MLTSPNSR

Add 50-f & 52-c, Civ Rts L

Establishes the right of publicity and provides for a private right of action for unlawful dissemination or publication of a sexually explicit depiction of an individual.

A10800 Actions:

BILL NO A10800

07/10/2020 referred to judiciary

A10800 Committee Votes:

A10800 Floor Votes:

There are no votes for this bill in this legislative session.

A10800 Memo:

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A10800**SPONSOR:** Rules (Weinstein)**TITLE OF BILL:**

An act to amend the civil rights law, in relation to establishing the right of publicity and to providing a private right of action for unlawful dissemination or publication of a sexually explicit depiction of an individual

PURPOSE OF BILL:

To create a right of publicity for deceased individuals and a registry to publicly post such interests upon thereby giving notice to people who may seek to use an individual's right of publicity in New York State for advertising purposes, or for the purposes of trade. In addition, this bill addresses the ability of technology to create digital avatars and makes regulations regarding their use.

SUMMARY OF PROVISIONS:

Section 1 - new Civil Rights Law § 50- f- definition of terms

Section 2 - new Civil Rights Law § 52-c - private right of action

Section 3 - 180 day effective date

JUSTIFICATION:

The term "Right of Publicity" originated in the United States Court of Appeals for the Second Circuit in 1953 in Haelan Laboratories v. Topps Chewing Gum to describe the right of individuals to control the use of their name and likenesses for commercial and other valuable purposes. Since then, more than half of the states have granted rights of publicity to individuals either through the common law or by statute.

The Right of Publicity refers to every individual's inherent right to control the commercial use of his or her personal characteristics, which can include name, portrait or picture, voice or signature, each a part of an individual's persona. Recently, in Lohann v. Take Two (Lohan v Take-Two Interactive Software, Inc. 2018 NY Slip Op 02208 Decided on March 29, 2018 Court of Appeals Fahey, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.), the Court stated that "A computer generated image may constitute a "portrait" within the meaning of N.Y. Civ. Rights Law 50 and 51, but the disputed images in the video game central to this matter were not recognizable as Lindsay Lohan, and therefore, Lohan's complaint was properly dismissed."

The most critical function of the Right of Publicity is control. The Right. of Publicity, even though it is a property right, is not merely a property asset, like a painting or real estate, for estate tax purposes. The Right of Publicity ensures that if a person, or that person's successor in interest, does not seek to commercialize the right, they are not compelled to do so.

This bill provides for a post mortem right of publicity for forty years after the death of an individual, allowing successors in interest to provide notice of such interest through a public registration and posting maintained by the New York Secretary of State. Along with providing for a post mortem, right of publicity the bill also has exclusions consistent with constitutionally protected freedom of speech.

Finally, the Right of Publicity created through this legislation applies to acts that occur within New York State.

In conclusion, this bill is balanced in protecting essential first amendment rights consistent with current law while maintaining the current status of the right of privacy law and still providing protections for an individual's right of publicity, whether they are a child or an adult, during life and for forty years after death.

LEGISLATIVE HISTORY:

New bill; similar to A.5605B (2020) - Passed Assembly

EFFECTIVE DATE:

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

A10800 Text:

STATE OF NEW YORK

10800

IN ASSEMBLY

July 10, 2020

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Weinstein, Dinowitz, Gunther, Englebright, Weprin, Arroyo, Nolan, DenDekker, L. Rosenthal, Gottfried, Braunstein, D'Urso, Fahy, Hevesi, Jaffee, Stirpe, Taylor) -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil rights law, in relation to establishing the right of publicity and to providing a private right of action for unlawful dissemination or publication of a sexually explicit depiction of an individual

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 section
2 50-f to read as follows:

3 § 50-f. Right of publicity. 1. For purposes of this section:

4 a. "deceased performer" means a deceased natural person domiciled in
5 this state at the time of death who, for gain or livelihood, was regu-
6 larly engaged in acting, singing, dancing, or playing a musical instru-
7 ment.

8 b. "deceased personality" means any deceased natural person domiciled
9 in this state at the time of death whose name, voice, signature, photo-
10 graph, or likeness has commercial value at the time of his or her death,
11 or because of his or her death, whether or not during the lifetime of
12 that natural person the person used his or her name, voice, signature,
13 photograph, or likeness on or in products, merchandise, or goods, or for
14 purposes of advertising or selling, or solicitation of purchase of,
15 products, merchandise, goods, or services.

16 c. "digital replica" means a newly created, original, computer-gener-
17 ated, electronic performance by an individual in a separate and newly
18 created, original expressive sound recording or audiovisual work in
19 which the individual did not actually perform, that is so realistic that
20 a reasonable observer would believe it is a performance by the individ-
21 ual being portrayed and no other individual. A digital replica does not
22 include the electronic reproduction, computer generated or other digital
23 remastering of an expressive sound recording or audiovisual work

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

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1 consisting of an individual's original or recorded performance, nor the
2 making or duplication of another recording that consists entirely of the
3 independent fixation of other sounds, even if such sounds imitate or
4 simulate the voice of the individual.

5 d. "sound recordings" are works that result from the fixation of a
6 series of musical, spoken, or other sounds, but not including the sounds
7 accompanying a motion picture or other audiovisual work, regardless of
8 the nature of the material objects, such as disks, tapes, or other
9 phonorecords, in which they are embodied.

10 2. a. Any person who uses a deceased personality's name, voice, signa-
11 ture, photograph, or likeness, in any manner, on or in products,
12 merchandise, or goods, or for purposes of advertising or selling, or
13 soliciting purchases of, products, merchandise, goods, or services,
14 without prior consent from the person or persons specified in subdivi-
15 sion four of this section, shall be liable for any damages sustained by
16 the person or persons injured as a result thereof.

17 b. Any person who uses a deceased performer's digital replica in a
18 scripted audiovisual work as a fictional character or for the live
19 performance of a musical work shall be liable for any damages sustained
20 by the person or persons injured as a result thereof if the use occurs
21 without prior consent from the person or persons in subdivision four of
22 this section, if the use is likely to deceive the public into thinking
23 it was authorized by the person or persons specified in subdivision four
24 of this section. A use shall not be considered likely to deceive the
25 public into thinking it was authorized by the person or persons speci-
26 fied in subdivision four of this section if the person making such use
27 provides a conspicuous disclaimer in the credits of the scripted audi-
28 ovisual work, and in any related advertisement in which the digital
29 replica appears, stating that the use of the digital replica has not
30 been authorized by the person or persons specified in subdivision four
31 of this section.

32 c. In any action brought under this section:

33 i. the person who violated the section shall be liable to the injured
34 party or parties in an amount equal to the greater of two thousand
35 dollars or the compensatory damages suffered by the injured party or
36 parties, as a result of the unauthorized use, and any profits from the
37 unauthorized use that are attributable to such use and are not taken
38 into account in computing the compensatory damages.

39 ii. in establishing profits under this subdivision, the injured party
40 or parties shall be required to present proof only of the gross revenue
41 attributable to the unauthorized use, and the person who violated this
42 section is required to prove his or her deductible expenses.

43 iii. punitive damages may also be awarded to the injured party or
44 parties.

45 d. For purposes of this subdivision:

46 i. it shall not be a violation of paragraph a of this subdivision if
47 the work is a play, book, magazine, newspaper, or other literary work;
48 musical work or composition; work of art or other visual work; work of
49 political, public interest, educational or newsworthy value, including
50 comment, criticism, parody or satire; audio or audiovisual work, radio
51 or television program, if it is fictional or nonfictional entertainment;
52 or an advertisement or commercial announcement for any of the foregoing
53 works.

54 ii. it shall not be a violation of paragraph b of this subdivision if
55 the work is of parody, satire, commentary, or criticism; works of poli-
56 tical or newsworthy value, or similar works, such as documentaries,

1 docudramas, or historical or biographical works, regardless of the
2 degree of fictionalization; a representation of a deceased performer as
3 himself or herself, regardless of the degree of fictionalization, except
4 in a live performance of a musical work; de minimis or incidental; or an
5 advertisement or commercial announcement for any of the foregoing works.

6 iii. it shall not be a violation of this section if the use of a name,
7 voice, signature, photograph, or likeness occurs in connection with any
8 news, public affairs, or sports program or account, regardless of
9 format, medium or means of transmission, or any political campaign.

10 iv. it shall not be a violation of this section if the use is of a
11 name, voice, signature, photograph, or likeness in a commercial medium
12 solely because the material containing the use is commercially sponsored
13 or contains paid advertising or product placement, or includes within it
14 a use in connection with a product, article of merchandise, good, or
15 service. Rather, it shall be a question of fact whether or not the use
16 of the deceased personality's name, voice, signature, photograph, or
17 likeness was so directly connected with the commercial sponsorship or
18 with the paid advertising or product placement as to constitute a use
19 for which consent is required under this subdivision.

20 e. In relation to a violation of paragraph a of this subdivision, if
21 a work that is protected under paragraph d of this subdivision includes
22 within it a use in connection with a product, article of merchandise,
23 good, or service, this use shall not be exempt under paragraph d of this
24 subdivision, notwithstanding the unprotected use's inclusion in a work
25 otherwise exempt under paragraph d of this subdivision, if the claimant
26 proves that this use is so directly connected with a product, article of
27 merchandise, good, or service as to constitute an act of advertising,
28 selling, or soliciting purchases of that product, article of merchan-
29 dise, good, or service by the deceased personality without prior consent
30 for the use under paragraph a of this subdivision from the person or
31 persons specified in subdivision four of this section.

32 3. The rights recognized under this section are property rights, free-
33 ly transferable or descendible, in whole or in part, by contract,
34 license, gift, or by means of any trust or any other testamentary
35 instrument. In the absence of an express transfer in a testamentary
36 instrument of the deceased personality's rights in his or her name,
37 voice, signature, photograph, or likeness, a provision in the testamen-
38 tary instrument that provides for the disposition of the residue of the
39 deceased personality's assets shall be effective to transfer the rights
40 recognized under this section in accordance with the terms of that
41 provision. The rights established by this section shall also be freely
42 transferable or descendible by contract, license, gift, trust, or any
43 other testamentary instrument by any subsequent owner of the deceased
44 personality's rights as recognized by this section. Nothing in this
45 section shall be construed to render invalid or unenforceable any
46 contract entered into by a deceased personality during his or her life-
47 time by which the deceased personality assigned the rights, in whole or
48 in part, to use his or her name, voice, signature, photograph, or like-
49 ness.

50 4. The consent required by this section shall be exercisable by the
51 person or persons to whom the right of consent, or portion thereof, has
52 been transferred in accordance with subdivision three of this section,
53 or if no transfer has occurred, then by the person or persons to whom
54 the right of consent, or portion thereof, has passed in accordance with
55 subdivision five of this section.

1 5. Subject to subdivisions three and four of this section, the right
2 to publicity of an individual dying intestate shall be distributed under
3 the laws of intestate succession, and the rights and remedies of this
4 article may be exercised and enforced by a person or persons who possess
5 at least a fifty-one percent interest of the individual's right of
6 publicity. Such persons shall make a proportional accounting to, and
7 shall act at all times in good faith with respect to, any other person
8 in whom the rights being enforced have vested.

9 6. If any deceased personality does not transfer his or her rights
10 under this section by contract, or by means of a trust or testamentary
11 instrument, and there are no surviving persons as described in subdivi-
12 sion five of this section, then the rights set forth in subdivision two
13 of this section shall terminate.

14 7. a. Any person claiming to be a successor in interest to the rights
15 of a deceased personality under this section or a licensee thereof may
16 register that claim with the secretary of state on a form prescribed by
17 the secretary of state and upon payment of a fee, which the secretary of
18 state shall set by rule. The form shall be verified and shall include
19 the name and date of death of the deceased personality, the name and
20 address of the claimant, the basis of the claim, and the rights claimed.

21 A successor in interest to the rights of a deceased personality under
22 this section or a licensee thereof shall not have a cause of action for
23 a use prohibited by this section that occurs before the successor in
24 interest or licensee registers a claim of the rights.

25 b. Upon receipt and after filing of any document under this section,
26 the secretary of state shall post the document along with the entire
27 registry of persons claiming to be a successor in interest to the rights
28 of a deceased personality or a registered licensee under this section
29 upon the secretary of state's internet website.

30 c. Claims registered under this subdivision shall be public records.

31 8. An action shall not be brought under this section by reason of any
32 use of a deceased personality's name, voice, signature, photograph, or
33 likeness occurring after the expiration of forty years after the death
34 of the deceased personality.

35 9. Nothing in this section shall apply to the owners or employees of
36 any medium used for advertising, including, but not limited to, newspa-
37 pers, magazines, radio and television networks and stations, cable tele-
38 vision systems, billboards, and transit advertisements, by whom any
39 advertisement or solicitation in violation of this section is published
40 or disseminated, unless it is established that the owners or employees
41 had actual knowledge by prior notification of the unauthorized use of
42 the deceased personality's name, voice, signature, photograph, or like-
43 ness as prohibited by this section.

44 10. The provisions of this section are in addition to, but shall not
45 supersede, any other rights or remedies available in law or equity.

46 11. This section shall apply to the adjudication of liability and the
47 imposition of any damages or other remedies in cases in which the
48 liability, damages, and other remedies arise from acts occurring direct-
49 ly in this state. For purposes of this section, acts giving rise to
50 liability shall be limited to the use, on or in products, merchandise,
51 goods, or services, or the advertising or selling, or soliciting
52 purchases of, products, merchandise, goods, or services prohibited by
53 this section.

54 12. Nothing in this section shall be construed to limit, or to
55 enlarge, the protections that 47 U.S.C. § 230 confers on an interactive

1 computer service for content provided by another information content
2 provider, as such terms are defined in 47 U.S.C. § 230.

3 § 2. The civil rights law is amended by adding a new section 52-c to
4 read as follows:

5 § 52-c. Private right of action for unlawful dissemination or publica-
6 tion of a sexually explicit depiction of an individual. 1. For the
7 purposes of this section:

8 a. "depicted individual" means an individual who appears, as a result
9 of digitization, to be giving a performance they did not actually
10 perform or to be performing in a performance that was actually performed
11 by the depicted individual but was subsequently altered to be in
12 violation of this section.

13 b. "digitization" means to realistically depict the nude body parts of
14 another human being as the nude body parts of the depicted individual,
15 computer-generated nude body parts as the nude body parts of the
16 depicted individual or the depicted individual engaging in sexual
17 conduct, as defined in subdivision ten of section 130.00 of the penal
18 law, in which the depicted individual did not engage.

19 c. "individual" means a natural person.

20 d. "person" means a human being or legal entity.

21 e. "sexually explicit material" means any portion of an audio visual
22 work that shows the depicted individual performing in the nude, meaning
23 with an unclothed or exposed intimate part, as defined in section 245.15
24 of the penal law, or appearing to engage in, or being subjected to,
25 sexual conduct, as defined in subdivision ten of section 130.00 of the
26 penal law.

27 2. a. A depicted individual shall have a cause of action against a
28 person who, discloses, disseminates or publishes sexually explicit mate-
29 rial related to the depicted individual, and the person knows or reason-
30 ably should have known the depicted individual in that material did not
31 consent to its creation, disclosure, dissemination, or publication.

32 b. It shall not be a defense to an action under this section that
33 there is a disclaimer in the sexually explicit material that communi-
34 cates that the inclusion of the depicted individual in the sexually
35 explicit material was unauthorized or that the depicted individual did
36 not participate in the creation or development of the material.

37 3. a. A depicted individual may only consent to the creation, disclo-
38 sure, dissemination, or publication of sexually explicit material by
39 knowingly and voluntarily signing an agreement written in plain language
40 that includes a general description of the sexually explicit material
41 and the audiovisual work in which it will be incorporated.

42 b. A depicted individual may rescind consent by delivering written
43 notice within three business days from the date consent was given to the
44 person in whose favor consent was made, unless one of the following
45 requirements is satisfied:

46 i. the depicted individual is given at least three business days to
47 review the terms of the agreement before signing it; or

48 ii. if the depicted individual is represented, the attorney, talent
49 agent, or personal manager authorized to represent the depicted individ-
50 ual provides additional written approval of the signed agreement.

51 4. a. A person is not liable under this section if:

52 i. the person discloses, disseminates or publishes the sexually
53 explicit material in the course of reporting unlawful activity, exercis-
54 ing the person's law enforcement duties, or hearings, trials or other
55 legal proceedings; or

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1 ii. the sexually explicit material is a matter of legitimate public
2 concern, a work of political or newsworthy value or similar work, or
3 commentary, criticism or disclosure that is otherwise protected by the
4 constitution of this state or the United States; provided that sexually
5 explicit material shall not be considered of newsworthy value solely
6 because the depicted individual is a public figure.

7 5. In any action commenced pursuant to this section, the finder of
8 fact, in its discretion, may award injunctive relief, punitive damages,
9 compensatory damages, and reasonable court costs and attorney's fees.

10 6. A cause of action or special proceeding under this section shall be
11 commenced the later of either:

12 a. three years after the dissemination or publication of sexually
13 explicit material; or

14 b. one year from the date a person discovers, or reasonably should
15 have discovered, the dissemination or publication of such sexually
16 explicit material.

17 7. Nothing in this section shall be read to require a prior criminal
18 complaint, prosecution or conviction to establish the elements of the
19 cause of action provided for in this section.

20 8. The provisions of this section including the remedies are in addi-
21 tion to, and shall not supersede, any other rights or remedies available
22 in law or equity.

23 9. If any provision of this section or its application to any person
24 or circumstance is held invalid, the invalidity shall not affect other
25 provisions or applications of this section which can be given effect
26 without the invalid provision or application, and to this end the
27 provisions of this section are severable.

28 10. Nothing in this section shall be construed to limit, or to
29 enlarge, the protections that 47 U.S.C. § 230 confers on an interactive
30 computer service for content provided by another information content
31 provider, as such terms are defined in 47 U.S.C. § 230.

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