

New York Post-Mortem Statutory Right of Publicity Set to Take Effect

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by Sarah Robertson



A new post-mortem right of publicity bill that was signed into law by Governor Cuomo on November 30, 2020, will soon take effect on May 29, 2021. The new law recognizes post-mortem rights of publicity in New York for the first time.

Broadly speaking, no right of publicity exists at the federal level and so those rights must be gained through state statutes and/or common law. Under the present regime, New York protects living people against the unauthorized use of their personality (i.e., their name, portrait, picture and voice) through its right of privacy statute, Sections 50 and 51

of New York's Civil Rights Law - Article 5. This is actually the longest standing right of publicity law for the living in the U.S., having been originally passed in 1903. But the rights conferred in New York have, until now, disappeared at death, similar to many other U.S. states.

Under the new law these rights will finally be granted in New York through the passing of a new provision in Section 50 of New York's Civil Rights Law - Section 50-F. This new section adds two types of rights – a more traditional post-mortem right of publicity granted to deceased personalities, and a second, more unusual provision related to digital replicas (such as holograms) applicable to deceased performers.

Who qualifies for post-mortem rights?

Two types of deceased individuals (not corporations) – a “deceased personality” and a “deceased performer”- qualify for post-mortem protection under the new law.

A “deceased personality” is a natural person who is domiciled in New York at the time of their death and *whose name, voice, signature, photograph, or likeness has commercial value either at the time of their death or because of their death*. So a deceased personality need not have commercialized their personality or identity prior to their death in order to qualify for protection if the way in which they die makes them famous.

A “deceased performer” is also a natural person who dies domiciled in New York but who, at the time of death was *regularly engaged in acting, singing, dancing or playing a musical instrument*. Athletes would not fall under the definition of “deceased performer,” and it's unclear whether retired or amateur performers would qualify.

For both categories, only those who pass away after the new statute takes effect in May 2021 are protected.

What rights do they get?

Under the new law, a deceased personality can protect their name, voice, signature, photograph or likeness against the use of these on or in products, merchandise or goods (or for purposes of advertising or selling, or soliciting purchases of these or services), without prior consent. This right is akin to protection against false endorsement, and is viewed as narrower than that given to the living, who are protected against uses of their persona for “for advertising purposes or for the purposes of trade” more broadly. Based on this, advertising or trade uses other than those specifically listed, such as uses in creative works, are likely allowed.

Deceased performers are protected against the unauthorized use of their digital replica in a scripted audiovisual work as a fictional character (such as a movie), or in live musical performances (such as a concert), without consent, if the public is likely to be misled into thinking it was an authorized use. But a conspicuous disclaimer in the credits of a scripted audiovisual work and making clear that the use of the digital replica was unauthorized will avoid liability.

How long do the new post-mortem rights last?

The length of protection is 40 years after death. This is less than states such as California, which provides protection for 70 years, but more than other states such as Tennessee, which has an initial 10 year term.

Free speech considerations

A major obstacle to passing rights of publicity laws are First Amendment concerns. The new law robustly addresses free speech concerns by permitting a number of fair uses such as parodies, satires, criticism or commentary, news, and historical works. It also permits uses in literary and other artistic works, and works that are newsworthy, educational or in the public interest. It also excludes uses in sports programs among other uses. Some exceptions to these exceptions apply.

What else? Transferability, Descendibility and Registration

The new law also makes explicit that the post-mortem publicity rights granted are freely transferable and descendible. It also provides a mechanism for owners of a deceased person's rights to register their claim with the New York Secretary of State in order to be able to bring a claim.

Looking ahead

This new law is viewed favorably by celebrities, unions such as SAG-AFTRA and others who have advocated for years for New York to come into line with other states, and to prescribe by statute rights not otherwise recognized under New York common law.

As the law goes into effect, it may result in a narrower expansion of rights than anticipated, given its various limitations as written. So it remains to be seen how meaningful the law is in practice and whether other legal avenues commonly relied upon to protect celebrities after death, such as trademark protection under the Lanham Act, confer stronger and broader rights overall.