

New York's Post-Mortem Right of Publicity Goes into Effect

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What is the Right of Publicity?

The Right of Publicity refers to a type of intellectual property, created by state law, which protects an individual's right to control the commercial use of his or her identity.¹ Most states recognize a right of publicity in some form or another, either by statute or common law, but exactly what and who is covered varies from state to state.²

For example, Kentucky's Right of Publicity statute merely protects the "name and likeness"³ of an individual, whereas Illinois' statute provides much broader protection that covers other elements of an individual's persona, such as: "any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice."⁴

While some states limit protection to specific groups, such as soldiers,⁵ or those with commercially valuable identities,⁶ several states have broad protections covering all living persons.⁷ In fact, many states, including California,⁸ have gone even further by extending what is known as a "post-mortem publicity right," which provides protection to deceased individual's estates as well. Having a post-mortem right acknowledges that one's commercial value often exists well beyond one's life and allows one's estate to recoup damages if one's identity is appropriated after death.

New York's Current Right of Publicity Law

Until now, New York stood in sharp contrast to California and other post-mortem states, and limited its protection to the living. New York's Right of Publicity Statute,⁹ which was written in 1903 and was the first state publicity law in the US,¹⁰ provides both civil and criminal penalties against anyone who uses the "name, portrait, picture, or voice" of any "living person" for advertising purposes or for the purposes of trade without written consent.

While the statute was innovative at the time of its inception, New York performers, celebrities, and their estates have long argued that it needed to be updated for modern times to provide stronger protections against a wider variety of appropriations and allow for post-mortem rights.

¹ J. Thomas McCarthy and Roger E. Schechter, 1 Rights of Publicity and Privacy § 1:3 (2d ed).

² See Jennifer Rothman, *Rothman's Roadmap to the Right of Publicity*, <https://www.rightofpublicityroadmap.com> (last visited May 27, 2021) (featuring an interactive map which explains the Rights of Publicity in each state).

³ [KY. REV. STAT. ANN § 391.170.](#)

⁴ [765 ILL. COMP. STAT. 1075.](#)

⁵ [ARIZ. REV. STAT. ANN. § 12-761.](#)

⁶ [42 PA. CONS. STAT. § 8316.](#)

⁷ See, e.g., [WIS. STAT. § 995.50.](#)

⁸ [CAL. CIV. CODE § 3344.](#)

⁹ [N.Y. CIV. RIGHTS LAW § 50. Right of Privacy](#) and [N.Y. CIV. RIGHTS LAW § 51. Action for Injunction and For Damages.](#)

¹⁰ New York State does not have a Common Law Right of Publicity.

However, their lobbying efforts were often met with resistance from others in the artistic community who worried that a stronger right of publicity law would encroach upon First Amendment rights. For example, those in the film, television, and theater industries worried about their ability to tell stories and make documentaries if they could not invoke the name and likeness of the person whose story they wished to tell. Photographers and artists were concerned over their ability to use images of celebrities in their works, and reporters and publishers worried that a strong right of publicity law would inhibit their ability to report news about celebrities.

After years of back and forth negotiations and several compromises, both sides put forth a bill proposal, which Governor Cuomo signed into law on November 30, 2020. The result is N.Y. Civ. Rights Law § 50-f¹¹ which became effective on May 29, 2021, and establishes a post-mortem Right of Publicity in New York while making significant efforts not to encroach on the First Amendment. It supplements the existing law, but does not have retroactive effect.

What is the Protected Under New York's New Right of Publicity Law?

1) Post-Mortem Rights for Use on and in Connection with Products, Merchandise, Goods and Services

The new Right of Publicity law holds liable anyone who uses a deceased person's "name, voice, signature, photograph, or likeness" on products, merchandise, or goods, or in advertising or selling products, merchandise, goods, or services, without the consent of the deceased or their estate within 40 years after the person dies.

The right only applies if the deceased individual was domiciled in New York at the time of his or her death and if the individual's name, voice, signature, photograph, or likeness has commercial value at the time of his or her death or because of his or her death.

By limiting the statute in this way, presumably it would not apply to everyday individuals who lack some sort of celebrity or public figure status, or to the rare person who only achieves some degree of fame worthy of commercial value more than 40 years after his or her death.

Additionally, while the rule extends slightly broader protection than what already existed by protecting one's "name, voice, signature, photograph, or likeness" as opposed to just one's "name, portrait, picture, or voice," its applicability is greatly limited by the many carve-outs it contains for the First Amendment.

Specifically, the statute does not apply if the work is a literary, musical, or visual work, a work of political or public interest, or a work of educational or newsworthy value. It also does not apply to any audio or visual work or radio or television program for entertainment, or where the use occurs in any news, public affairs, or sports program, or in any political campaign.

By framing the statute in this way, it is hard to imagine any example of when it could apply other than in the narrow circumstances of using the deceased individual's identity for commercially advertising or selling goods or services and, even then, not all uses will be prohibited.

If a person's name, voice, signature, photograph, or likeness is used in a commercial medium which happens to contain paid advertising, product placement, or includes within it a use in

¹¹ [N.Y. CIV. RIGHTS LAW § 50-f.](#)

connection with a product or service, it is not necessarily a per se violation of the law. Rather, the statute requires further determination as to whether the use was “so directly connected with the commercial sponsorship or with the paid advertising or product placement as to constitute a use for which consent is required.” This subjective framework is likely to take years of litigation before case law establishes its metes and bounds.

2) Protections Against the Use of Digital Replicas

Additionally, the statute provides a section dealing exclusively with post-mortem rights as it pertains to digital replicas to address the growing use of artificial intelligence (AI) and computer-generated imagery (CGI) to bring deceased performers back to life in hologram concerts.¹²

As the statute defines it, a digital replica refers to “a newly created, original, computer-generated, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform” that is so realistic that people may believe it is the actual individual performing.

Under the new rule, any person who uses a “deceased performer’s”¹³ digital replica “in a scripted audiovisual work as a fictional character” or “for the live performance of a musical work” without consent is liable if the use is likely to deceive the public into thinking it was authorized. However, in both cases, use of a digital replica is allowed if the person making use provides a “conspicuous disclaimer” in the credits or advertisement stating that the digital replica is unauthorized.

The deception requirement as well as the permissible use of a disclaimer takes much of the bite out of the rule.

Additionally, the statute makes clear that “electronic reproductions, computer generated or other digital remastering of audiovisual works that contain an individual’s original or recorded performance” as well as the “duplication of another recording that consists of entirely independent fixation of other sounds, even if such sounds imitate or simulate the voice of the individual” are not considered digital replicas and thus allowed.

Further, there are accommodations made in the statute for the First Amendment. The use of a digital replica is allowed in a work of parody, satire, commentary, or criticism. It is also allowed in works of political or newsworthy value, documentaries, docudramas, and historical or biographical works, as well as in connection with the news, public affairs, sports, or political campaigns.

At the end of the day, what remains is a very thin measure of protection available only in limited circumstances.

¹² Patrick Buckley, *The Hologram Concert- How AI is Helping to Keep Music Alive*, TELEPHONICA TECH (February 26, 2021) <https://business.blogthinkbig.com/the-hologram-concert-how-ai-is-helping-to-keep-music-alive> (discussing the use growing trend of hologram concerts using the examples of Whitney Houston, Michael Jackson, Amy Winehouse, Tupack, and Roy Orbison).

¹³ [N.Y. CIV. RIGHTS LAW § 50-f\(1\)\(a\)](#). The statute defines a “deceased performer” as a “deceased natural person domiciled in this state at the time of death who, for gain or livelihood, was regularly engaged in acting, singing, dancing, or playing a musical instrument.”

If the law has such narrow application, why does it matter?

Despite the new rule's narrow application, many see it as a win for both sides.

With regards to the First Amendment, the law clearly spells out many means of permitted uses of identities, including detailing exactly what is permitted with regards to the burgeoning area of digital replicas.

And for those individuals with valuable commercial identities, finally having a post-mortem right in the circumstances where the law does apply may be tremendously valuable for the estates of those whose identities are appropriated.

The statute provides that a person who violates the new law can be liable for the greater of \$2,000 or the compensatory damages suffered by the injured party because of the unauthorized use. Additionally, the injured party may receive any profits attributable to the unauthorized use and may be awarded punitive damages as well. Because some commercial identities are so valuable, damages could easily add up.

As such, owning post-mortem rights may become desirable intellectual property. New York post-mortem rights are freely transferable by contract, license, trust, or will. However, to be able to bring a claim, successors in interest must first register the right with the New York Secretary of State, which becomes a matter of public record, thus enabling the artistic and business communities to determine who owns the rights to any individual whose identities they are considering using in their works.

Only time will tell exactly how the law will be implemented, but at least for now, New York finally has a post-mortem right.