## New York's Right to Publicity and Deepfakes Law Breaks New Ground

### By Matthew F. Ferraro and Louis W. Tompros

New York Governor Andrew M. Cuomo has signed a path-breaking law addressing synthetic or digitally manipulated media. The law has two main components.

First, the law establishes a postmortem right of publicity to protect performers' likenesses – including digitally manipulated likenesses – from unauthorized commercial exploitation for 40 years after death.

Second, the law bans nonconsensual computer-generated pornography (often called deepfake pornography) – highly realistic false images created by artificial intelligence ("AI").[1]

With this law, New York becomes the first state in the nation to explicitly extend a person's right of publicity to computer-generated likenesses, so-called digital replicas. Professional actors and the Screen Actors Guild ("SAG-AFTRA") have pushed for this law for years to protect their likenesses from unauthorized postmortem use, especially as technology has advanced and actors have begun to appear in movies years after their deaths.[2]

New York also joins four other states that have outlawed certain kinds of deepfakes related either to pornography or to elections. Taken together, these laws, and the roughly 30 bills currently pending or passed in state houses across the country and the U.S. Congress on deepfakes, show that manipulated media is fast becoming a government-regulated field.

### Extending the Right of Publicity

New York's new law (S5959/A5605C), introduced by Assemblywoman Helene E. Weinstein and State Senator Diane Savino and adopted unanimously,[3] is the culmination of three years of effort by New York lawmakers to amend the state's civil rights laws to protect performers' likenesses after their death.[4]

The law establishes essentially two postmortem rights to publicity. First, the law extends a general right of publicity after death to what it terms a "deceased personality" – anyone domiciled in New York State at the time of death whose general likeness "has commercial value at the time of his or her death, or because of his or her death," regardless of whether that person used his or her likeness for commercial purposes during

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life.[5] It prohibits the use of such a person's "name, voice, signature, photograph, or likeness, in any manner" for commercial purposes without prior consent of the decedent's heirs or similar assignees.[6]

This right, which extends for 40 years after the death of the deceased personality,[7] is not enforceable until a successor in interest to the decedent's likeness registers a claim with the New York Secretary of State (a "registration prior to enforcement" requirement similar to federal copyright).[8]

Second, the law bars the use of "a deceased performer's *digital replica* in a scripted audiovisual work as a fictional character or for the live performance of a musical work" if that use "is likely to deceive the public into thinking it was authorized" by the rights holder.[9] Unlike the deceased personality provision, the digital replica section applies only to professional artists and performers: Under the law, a "deceased performer" is a decedent domiciled in New York at the time of death who was "regularly engaged in acting, singing, dancing, or playing a musical instrument."[10]

A digital replica is 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 a reasonable observer would believe it is a performance by the individual being portrayed and no other individual."[11] The digital "remastering" of sound recordings or audiovisual work does not constitute a digital replica.[12]

Notably, the law provides a safe harbor: If the digital replica carries "a conspicuous disclaimer" that its use was not authorized by the rights holder, then the use "shall not be considered likely to deceive the public into thinking it was authorized," and, thus, no liability would attach.[13]

Violators of either rights would be liable for compensatory and punitive damages.[14]

In a nod to what Governor Cuomo's office called "longstanding First Amendment protections,"[15] the law contains a number of exceptions to both rights. There are broad fair-use-type exceptions for the postmortem use of likenesses for works of parody or criticism, or of educational or newsworthy value.[16] However, if a claimant can prove that the unauthorized use of a "deceased personality's" likeness was "so directly connected" with a product, good or service "as to constitute an act of advertising" by the deceased personality, then a claim could succeed notwithstanding these exceptions.[17]

The law also exempts from liability advertisers who carry advertisements that violate this law, unless the advertisers had "actual knowledge by prior notification of the unauthorized use."[18] The law explicitly does not alter the immunities conferred by Section 230 of the Communications Decency Act.[19]

## Barring Nonconsensual Deepfake Pornography

New York's new law also bars what is commonly referred to as nonconsensual deepfake pornography – essentially placing a nonconsenting person's face on a nude body to create a pornographic image.

Nonconsensual deepfake pornography is a growing issue. According to a 2019 study, over 95 percent of all extant deepfake videos are of nonconsensual pornography.[20] Today, most of those videos are of famous female actors, but the technology menaces everyone's privacy. For example, in October 2020, researchers reported the discovery of a freely available online deepfake app that allowed users to create photo-realistic simulated nude images of nearly 700,000 women without their knowledge or consent.[21]

To address this concern, the New York law amends the state civil rights law to establish a private right action for the unlawful dissemination or publication of a "sexually explicit depiction of an individual."[22]

It affords a "depicted individual" the right to sue a person who discloses, disseminates or publishes "sexually explicit material related to the depicted individual," if the defendant "knows or reasonably should have known" that the depicted person did not consent.[23]

Critically in this context, a "depicted individual" means any individual who appears "as a result of digitization, to be giving a performance they did not actually perform," or that was performed by someone else and later altered.[24] And "digitization" means "to realistically depict" someone in the nude, with "computer-generated nude body parts," or engaging in sexual conduct.[25]

Unlike the postmortem right to publicity provision, placing a disclaimer on the sexually explicit material saying it was unauthorized is no defense to liability for deepfake pornography.[26] The law also requires consent from the depicted individual to be in writing.[27]

There are, however, exceptions. There is no liability if the sexually explicit material is disclosed in the course of reporting on unlawful activity or through the justice system[28] and if the material is a matter of "legitimate public concern," of political or newsworthy value, or constitutionally protected commentary – so long as the material is not considered noteworthy "solely because the depicted individual is a public figure."[29] The law also does not disturb the immunities conferred by Section 230 of the Communications Decency Act.[30]

Victims may seek injunctive relief, punitive and compensatory damages, and reasonable attorneys' fees and costs.[31]

A victim has three years from the dissemination of the sexually explicit material or one year from discovery, whichever is later, to bring a claim.[32]

The New York law takes effect on May 29, 2021.[33]

## Growing Regulations on Deepfakes

In adopting this new law, New York joins four other states that since 2019 have adopted laws to regulate deepfakes or manipulated media in some form.

New York's prohibition on nonconsensual deepfake pornography most closely resembles California's October 2019 law that likewise provides for a private right of action against a person who intentionally distributes a pornographic photograph or video of a depicted individual without that person's consent, under specified conditions. The California law, which was also backed by SAG-AFTRA, similarly defines "depicted individual" to include someone "who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered depiction."[34]

Also in October 2019, California enacted a law to provide political candidates a private right of action against anyone who distributes certain deepfakes (called "materially deceptive audio or visual media") within 60 days of an election that are intended to injure a candidate's reputation or deceive voters.[35]

In 2019, Virginia amended its criminal law to make it a Class 1 misdemeanor, punishable by up to a year in jail and a fine of $2,500,[36] for someone to distribute a nonconsensual explicit image or video "created by any means whatsoever that depicts another person," including a digital depiction.[37]

Maryland amended its prohibition on child pornography to include among illegal images a "computer-generated image that has been created, adapted, or modified to appear as an actual and identifiable child."[38] The law was changed to address "deepfakes" and "developing technology which has permitted pornographers to utilize computers to create images and videos in which the naked eye is unable to identify that the image is not that of an actual child."[39]

Finally, Texas in 2019 became the first state in the nation to make it a misdemeanor to create and distribute deepfake videos intended to harm candidates for public office or influence elections.[40]

More such laws will likely follow. About 10 other states and the U.S. Congress are considering bills aimed at deepfakes or manipulated media. In the wake of New York's law, other states may also now establish postmortem rights of publicity that explicitly protect performers from the unauthorized use of their digitally manipulated images. Indeed, in 2019, Louisiana legislators voted on a right of publicity bill, which was also supported by SAG-AFTRA,[41] that was similar to New York's but failed to pass in a close vote.[42]

Media outfits, technology companies, app developers and talent should prepare for the field of manipulated and deepfake media to become increasingly regulated. In particular, in light of New York's new law, Empire State artists and their representatives should prepare appropriate testamentary documents to register their interests with the Secretary of State, to take advantage of the postmortem protections that will soon come to life.

## Notes

1. Press Release, Governor Cuomo Signs Legislation Establishing a "Right to Publicity" for Deceased Individuals to Protect Against the Commercial Exploitation of Their Name or Likeness, OFFICE OF GOV. CUOMO (Nov. 30, 2020), *https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-establishing-right-publicity-deceased-individuals-protect*; S5959D (New York), *https://www.nysenate.gov/legislation/bills/2019/s5959.*

2. *See* Dave McNary, *SAG-AFTRA Commends Gov. Andrew Cuomo for Signing Law Banning 'Deep Fake' Videos*, VARIETY (Nov. 30, 2020), *https://variety.com/2020/film/news/sag-aftra-commends-andrew-cuomo-deep-fake-videos-1234842715/*; Jill Serjeant, *James Dean Set to Appear in a Movie Six Decades After His Death, Horrifying Fans*, REUTERS (Nov. 6, 2019), *https://www.reuters.com/article/us-people-james-dean/james-dean-set-to-appear-in-a-movie-six-decades-after-his-death-horrifying-fans-idUSKBN1XG34A.*

3. S5959D (New York) (see "Votes"), *https://www.nysenate.gov/legislation/bills/2019/s5959*; A5605C (New York) (see "Votes"), *https://www.nysenate.gov/legislation/bills/2019/a5605/amendment/c.*

4. S5959D (New York), *https://www.nysenate.gov/legislation/bills/2019/s5959* (the New York legislature considered but did not adopt similar bills previously in 2017 (S5857/A8155) and in 2018 (DS5857B)).

5. N.Y. Civ. Rights § 50-f(1)(b) (as amended by S5959D).

6. N.Y. Civ. Rights § 50-f(2)(a) (as amended by S5959D).

7. N.Y. Civ. Rights § 50-f(2)(8) (as amended by S5959D).

8. N.Y. Civ. Rights § 50-f(7) (as amended by S5959D).

9. N.Y. Civ. Rights § 50-f(2)(b) (as amended by S5959D) (emphasis added).

10. N.Y. Civ. Rights § 50-f(1)(a) (as amended by S5959D).

11. N.Y. Civ. Rights § 50-f(1)(c) (as amended by S5959D).

12. N.Y. Civ. Rights § 50-f(1)(c) (as amended by S5959D).

13. N.Y. Civ. Rights § 50-f(2)(b) (as amended by S5959D).

14. N.Y. Civ. Rights § 50-f(2)(c)(i)–(iii) (as amended by S5959D).

15. Press Release, *Governor Cuomo Signs Legislation Establishing a "Right to Publicity" for Deceased Individuals to Protect Against the Commercial Exploitation of Their Name or Likeness*, OFFICE OF

GOV. CUOMO (Nov. 30, 2020), *https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-establishing-right-publicity-deceased-individuals-protect*.

16. N.Y. Civ. Rights § 50-f(2)(d)(i)–(iv) (as amended by S5959D).

17. N.Y. Civ. Rights § 50-f(2)(e) (as amended by S5959D).

18. N.Y. Civ. Rights § 50-f(9) (as amended by S5959D).

19. N.Y. Civ. Rights § 50-f(12) (as amended by S5959D).

20. Giorgio Patrini, *The State of Deepfakes 2019*, SENSITY (Oct. 7, 2019), *https://sensity.ai/mapping-the- deepfake-landscape/*.

21. Jane Lytvynenko & Scott Lucas, *Thousands of Women Have No Idea a Telegram Network Is Sharing Fake Nude Images of Them*, BUZZFEED NEWS (Oct. 20, 2020), *https://www.buzzfeednews.com/article/janelytvynenko/telegram-deepfake-nude-women-images-bot*. *See generally* Matthew F. Ferraro, Jason C. Chipman & Stephen W. Preston, *Identifying the Legal and Business Risks of Disinformation and Deepfakes: What Every Business Needs to Know*, 6 PRATT'S PRIVACY AND CYBERSECURITY LAW REPORT 142, 145 (2020), *https://www.wilmerhale.com/en/insights/publications/20200622-wilmerhales-ferraro-chipman-and-preston-explain-in-article-what-companies-should-know-about-disinformation*.

22. N.Y. Civ. Rights § 52-c (as amended by S5959D).

23. N.Y. Civ. Rights § 52-c(2)(a) (as amended by S5959D).

24. N.Y. Civ. Rights § 52-c(1)(a) (as amended by S5959D).

25. N.Y. Civ. Rights § 52-c(1)(b) (as amended by S5959D).

26. N.Y. Civ. Rights § 52-c(2)(b) (as amended by S5959D).

27. N.Y. Civ. Rights § 52-c(3)(a)–(b) (as amended by S5959D).

28. N.Y. Civ. Rights § 52-c(4)(a)(i) (as amended by S5959D).

29. N.Y. Civ. Rights § 52-c(4)(a)(ii) (as amended by S5959D).

30. N.Y. Civ. Rights § 52-c(10) (as amended by S5959D).

31. N.Y. Civ. Rights § 52-c(5) (as amended by S5959D).

32. N.Y. Civ. Rights § 52-c(6)(a)-(b) (as amended by S5959D).

33. S5959D, § 3.

34. AB-602 (California), Sept. 6, 2019, version, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB602*.

35. AB-730 (California), Sept. 10, 2019 version, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB730*.

36. Va. Code Ann. § 18.2-11(a), *https://law.lis.virginia.gov/vacode/title18.2/chapter1/section18.2-11/*.

37. Va. Code Ann. § 18.2-386.2(A), *https://law.lis.virginia.gov/vacode/18.2-386.2/*.

38. Md. Crim. Law § 11-208(a) (2), *https://casetext.com/statute/code-of-maryland/article-criminal-law/title-11-indecency-and-obscenity/subtitle-2-obscene-matter/section-11-208-possession-of-visual-representation-of-child-under-16-engaged-in-certain-sexual-acts*.

39. *In re S.K.*, 215 A.3d 300, 315 n.22 (Md., 2019).

40. SB 751 (Texas), *https://capitol.texas.gov/tlodocs/86R/billtext/html/SB00751F.htm*; *see also* Matthew F. Ferraro, Jason C. Chipman & Stephen W. Preston, *The Federal "Deepfakes" Law*, 3 JOURNAL OF ROBOTICS, ARTIFICIAL INTELLIGENCE AND LAW 229, 232 (2020), *https://www.wilmerhale.com/en/insights/publications/20200701-the-federal-deepfakes-law*.

41. Press Release, *Support Right of Publicity Laws in Louisiana*, SAG-AFTRA (Apr. 19, 2019), *https://www.sagaftra.org/support-right-publicity-laws-louisiana*.

42. H.B. 377 (Louisiana), *http://www.legis.la.gov/legis/ViewDocument.aspx?d=1121437*; LA HB 377, BILL TRACK 50 (May 8, 2019), *https://www.billtrack50.com/BillDetail/ 1111393*.

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