GETTING THE DEAL THROUGH

Right of Publicity

in 17 jurisdictions worldwide

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Global Overview

Jonathan D Reichman*

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The right of publicity is the right of an individual to control the use of his or her name, likeness or other personal attribute (voice, signature, etc) for commercial purposes, such as for use on merchandise or in advertisements. The right is often considered to be a form of, or related to, the right of privacy, which is the right of an individual to control the use of his or her personal attributes for any public purpose. However, in recent years the right of publicity has been recognised as a unique form of property governed by its own rules and principles.

The expansive growth of publicity rights, from being almost non-existent 50 years ago to widely accepted today, reflects increased concern that, absent protection, an individual's identity can be used and abused by third parties in connection with advertising, promotions, products and other commercial activities. As the following chapters make clear, however, critical issues in the field, such as what forms of identity should be protected, how long protection should last and how protection should be applied in various commercial contexts are addressed differently in different jurisdictions. These questions are thorny because of the inherent tension between publicity rights and the ability of businesses to freely engage in advertising, entertainment and other forms of commercial expression. In multiple jurisdictions, including many of those surveyed in this book, the right to freedom of speech and expression – even for purely commercial purposes – is highly valued. Therefore, countries have been understandably reluctant to limit free speech through the creation of a new personal right.

The complexity of these issues is compounded by developments in both technology and popular culture. The global information revolution – as reflected in such phenomena as the internet, social networking, reality television and viral advertising – creates a world that crowns more individuals than ever before as 'celebrities' (even if only for Andy Warhol's proverbial 15 minutes of fame), yet at the same time gives companies more media avenues than ever before to engage in unauthorised exploitation. However, despite these global challenges, and the potential for an individual in country A to have his or her identity misappropriated halfway around the world in country B, no unifying body of international law exists on the right of publicity. Unlike other intellectual property fields such as copyright, trademark and patent law, there are no international treaties or conventions. As a result, a wide spectrum of protection is offered by the various jurisdictions around the world. In the United States, a wide spectrum of differences even exists between individual states.

These significant differences arise between countries because there are, at the core, different philosophies behind protecting the right of publicity. Some countries, such as the US, view the right as a commercial property interest to be exploited and traded at will; others, such as France, view it as a fundamental personal right that cannot be severed from the individual. Still others, such as Spain, adopt both approaches. (These different philosophies are also reflected, to a significant extent, in historically different approaches to copyright law.) In practical terms, those jurisdictions viewing publicity rights as property often give greater freedoms to individuals who want to monetise their identities, whereas those viewing the right as personal usually reduce these freedoms while nevertheless affording individuals the ability to protect themselves and reassert their authority if a user or licensee acts contrary to their vision.

Of the 17 jurisdictions surveyed, five recognise the right of publicity as a distinct per se right, independent of other rights; 11 jurisdictions offer analogous protections but regard the right as cobbled together from other laws; and one, the United Kingdom, offers no express recognition at all. However, even beyond these three categories distinctions predominate. This publication attempts to help the reader understand those distinctions while drawing lines of similarity where they exist.

Probably no aspect of publicity rights is more varied than the scope of protection offered. All jurisdictions protect an individual's name and likeness, but that is where the similarity ends. For example, Japan protects an individual's signature; France protects an individual's title of nobility, family motto and heraldic signs; Romania protects an individual's marital status; and Albania protects the memory of a deceased person.

Some jurisdictions have protections that are somewhat vague and open-ended. For example, in Israel, any characteristic that 'belongs to a person uniquely' is protected, although the paucity of court decisions leaves this phrase vague. In Brazil, any 'physical, psychological, or moral characteristic' is protected; and in South Africa the law protects an individual's 'dignity'. Other countries, including Argentina, Austria, Greece, India and Spain, as well as certain US states, grant protection for any element of a persona that serves to identify a person in the minds of the public.

Another major area of distinction is whether the right can be licensed and sold. Some jurisdictions, such as Greece, India, Japan, Mexico, Romania and the US, allow the right to be both freely licensed and transferred in accordance with the laws of private property. Other jurisdictions, such as Austria, allow neither (except through trademark rights). The remaining surveyed jurisdictions allow the right to be licensed but not to be transferred. Thus, in these latter jurisdictions, an individual can never truly part with the rights to his or her identity. Spain, which adopts both the property and personal approaches, allows an individual to sell the 'commercial' rights to his or her identity but not the 'constitutional' rights.

A further area of distinction among jurisdictions is the length of protection for the right. While virtually all surveyed countries grant protection throughout the life of the individual, several jurisdictions, including Austria, Brazil, France, Germany, Mexico, Spain and Romania, as well as some US states, allow the right

to continue after death and to be controlled by the individual's heirs. This is known as post-mortem protection. In Germany, some aspects of the right (ie, those considered to be linked to an individual's right of privacy) end at death, while the more commercial aspects subsist for 10 years after death. In Romania, only the rights that protect an individual's image and his or her correspondence are protected post-mortem, and these rights survive 20 years after death. In Mexico, the right subsists 50 years after death. In the US, the availability of post-mortem protection varies among the states and is one of the most contested aspects of American right of publicity law. New York – a commercially prominent state that is home to many celebrities – does not recognise any post-mortem protection, while California (the other 'celebrity capital' of America) grants protection for 70 years after death. In some countries, such as Greece and Japan, the term of protection is unknown because the laws have never been tested.

Finally, several jurisdictions that treat the right of publicity as personal (rather than as property) grant a decedent's close relatives an additional right, which is akin to post-mortem protection, namely protection from statements or publications that would dishonour the decedent's family. These relatives may only enforce the right if they can prove that their own interests were also directly affected. The right subsists for the lifetime of any qualifying relative.

In litigation for the infringement of publicity rights, the remedies available to a plaintiff vary in accordance with local civil practice. Virtually every jurisdiction awards the plaintiff injunctive relief and monetary damages if infringement has been proven. However, certain jurisdictions, such as Austria, France, Greece and Spain, also provide for publication of the judgment, while other jurisdictions, such as India and the US, allow for punitive damages.

In some areas of right of publicity law the similarities among jurisdictions outweigh the differences. For example, virtually all the surveyed jurisdictions exempt uses of an individual's identity for purposes of news reporting and public affairs. Such exemptions reflect the common belief that, while an individual's persona has value, protection must sometimes yield to the freedom of expression. For example, in Germany the Constitution protects the freedom of the arts and the press, and publicity rights must defer to them. Austria applies an express balancing test, asking whether the public's interest in use of an individual's identity (for example, in a magazine picture) outweighs the individual's interest in controlling it. In Spain, the image of an individual can be used if such individual is a public official at a public event or if the image is 'accessorial' to a news story. In France, facts in the public domain and of newsworthy expression are exempt from right of publicity protection, although the exemption is limited if the material is indecent and violates the individual's dignity. Albania provides constitutional protections for free expression, as well as exceptions for information that proves corruption or other crimes, and in the US, the Federal Constitution protects freedom of expression. However, some American courts have held that commercial speech (such as advertising) is not protected as strongly as non-commercial speech (such as newspaper articles), and therefore the use of an individual's identify in an advertisement, for example, may not be entitled to this constitutional protection.

Unfortunately, the dividing line between exempted versus non-exempted speech is often blurry, as reflected in each jurisdiction's efforts to draw the line in its own way. In Japan, for example, the 'reasonable' use of pictures is allowed, but there is limited guidance as to the meaning of this term. In Spain, the use of an individual's persona in an image is allowed if the use meets 'social norms at the time' – another ambiguous phrase. And in the US, courts have struggled when attempting to determine whether expression is 'commercial' or 'non-commercial'.

Another similarity among the vast majority of the surveyed jurisdictions is that they do not require an individual to register his or her publicity right as a prerequisite to enforcing it. (However, a few jurisdictions do require registration for post-mortem rights.) This policy reflects the fact that, as with copyright law (but in contrast to, for example, patent law), most jurisdictions reject formalities as a condition to right of publicity protection. Thus, it is a right that automatically belongs to all individuals as a matter of law. Furthermore, virtually all jurisdictions grant the right to any individual without any requirement that the individual actively commercialise his or her identity. There are some exceptions, and a few jurisdictions treat the right of publicity differently for a celebrity than for the average person. In Israel, for example, the Supreme Court has held that a plaintiff must show that his or her identity possesses economic value. Therefore, while every Israeli citizen technically has a right of publicity, protection is more limited for those individuals unable to prove such value. In Japan, the right applies only to 'persons of distinction' – in other words, celebrities and other people widely known by society.

A few jurisdictions expand protection beyond individuals. For example, in South Africa, certain elements of the right are accorded to all 'legal persons', including companies, partnerships and other organisations created by law. This is a minority viewpoint, although similar laws can be found in certain other countries that treat the right as property rather than personal. Thus, in Austria, a corporation can rely on the right of publicity to take action against certain infringements of its name, while in several US states, musical groups have been held by courts to possess a right of publicity.

Some jurisdictions deny the right to non-citizens. Hence, in India, foreign individuals are not entitled to the constitutional protections governing the rights of privacy and publicity, although they still receive certain statutory rights. In the US, courts are divided over whether foreign individuals possess the right, particularly if the individuals reside in countries that do not recognise the right.

All of the surveyed jurisdictions are similar in that they allow other forms of intellectual property protection (ie, beyond the right of publicity itself) to be invoked against identical or similar acts of infringement. For example, an individual can secure copyright protection for a photograph or drawing of his or her likeness. Furthermore, famous individuals can often register their names or images as trademarks. Such trademark protection has certain unique advantages over right of publicity law. For example, trademark protection can potentially last indefinitely, in contrast to right of publicity protection, which lasts for the individual's lifetime or, at most, a fixed number of years thereafter.

Relative to other forms of intellectual property protection, the right of publicity is still in its infancy. While the laws of the surveyed jurisdictions provide different levels and types of protection, all reflect the growing view that an individual's identity, and the unique elements that comprise it, possess intrinsic commercial value that the individual should be allowed to control. We respectfully hope that this international survey will assist legal practitioners and legislatures as they grapple with this fascinating and burgeoning field.

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