

Right of Publicity

Contributing editor
Jonathan D Reichman



2016

GETTING THE
DEAL THROUGH 

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DEAL THROUGH 

Right of Publicity 2016

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Sources of law

1 Is the right of publicity recognised?

Although there is no right of publicity as a legal concept in the Russian legal system that is understood as the right to control the commercial use of one's identity in common law jurisdictions, there are various personal non-property rights that are related or close to the right of publicity.

Thus, in Russia, individuals, *inter alia*, have a right to their name, personal security, personal and family privacy and personal dignity, and are protected against any unauthorised use of their image. An individual's personal data is also under protection.

There are also some other non-property rights and non-material values relating to the right of publicity that are protected by law in Russia (honour and good name, business reputation, etc).

The right to a name and the right to one's image are those most related to the right of publicity. In some cases, Russian legislation provides specific regulation of the use of an individual's signature (covered later in this chapter). A list of the personal rights related to the right of publicity is indicated in question 8.

2 What are the principal legal sources for the right of publicity?

The principal legal sources for the right of publicity are the Constitution of the Russian Federation and a number of state laws.

International treaties that are ratified by the parliament related to the right of publicity are also included in the Russian legal system, and shall prevail if there is any conflict with legislation of the Russian Federation.

3 How is the right enforced? Which courts have jurisdiction?

The right of publicity may be enforced through the courts of general (non-commercial) jurisdiction by individuals.

An individual who would like to protect his or her right of publicity must file an action with a local district court. It will be considered a general (non-commercial) civil jurisdiction matter. A company must file a claim with a commercial court if it wants to protect any of its rights related to the use of its name, etc.

Protection against the unauthorised use of an individual's name, pseudonym, image and signature registered as a trademark can be enforced by filing a claim with the Federal Service for Intellectual Property, Patents and Trademarks of the Russian Federation (Rospatent).

All court decisions in Russia are enforced via a system of court bailiffs.

4 Is the right recognised *per se*, or by reference to other laws?

As outlined above, there is no legal concept of the right of publicity in Russia, and the right of publicity is not recognised *per se*. The right is recognised by reference to other laws, including the Constitution, the Civil Code of the Russian Federation and a number of state laws.

Existence of right

5 Who has or is entitled to the right of publicity?

Any individual is entitled to the right of publicity. Trade names and brand or business names of companies are regarded as property rights by Russian law and are regulated by the Civil Code as the intellectual property of a company.

6 Do individuals need to commercialise their identity to have a protectable right of publicity?

There is no requirement for individuals to commercialise their identity to have their non-property rights protected by law. Some of the mentioned rights belong to an individual by birth (name, personal and family security, personal dignity, etc), while other rights may arise in connection with specific actions (eg, creation of an artwork under a pseudonym, creation of a trademark or service mark, inventions).

7 Can a foreign citizen have a protectable right of publicity?

Yes. Any individual, including citizens of Russia, foreign citizens and stateless individuals, can protect their right of publicity in the Russian Federation.

8 What is protected under the right of publicity?

The following are protected:

- name and pseudonym;
- image (likeness);
- signature;
- personal data;
- personal dignity, security, privacy;
- honour; and
- good name.

The law is silent on the point of whether the voice or personal distinctive attributes of an individual are protected. It is worth noting that an individual's voice can be protected as intellectual property, but only where the individual sings a song, reads out a poem or performs any other vocal work.

9 Is registration or public notice required for protection of the right? If so, what is the procedure and what are the fees for registration or public notice?

Generally, registration or public notice is not required for protection of the right unless the right relates to some intellectual property objects (trademarks or service marks).

However, sole entrepreneurs (as well as companies by virtue of an individual's consent) may benefit from registration of their names, pseudonyms or their derivatives (eg, in the form of graphic or three-dimensional symbols) and portraits, as well as facsimile (signature) as trademarks. To register a trademark, an application must be filed with Rospatent. The minimum registration fee is approximately US\$650 (this includes one class of goods or services), plus US\$50 per each additional class. Usually the registration takes 12 to 15 months, unless additional documents are requested by the authority.

Regarding an individual's name, Russian legislation provides that the name is registered by the office of civil registration following the individual's birth. Formally, this means that a person whose birth has not been registered may not enforce his or her right to the name, as such individual may fail to prove his or her name to the court. However, such cases are rare, as civil registration is the procedure triggering any further civil, and other, rights of an individual.

10 Does the existence, or the extent, of the right depend on where the individual lives or has lived?

The right of publicity is recognised and protected irrespective of the place where an individual lives or has lived. The right is protected across the entire territory of the Russian Federation and applies to all categories of citizens (citizens of Russia, foreign citizens and stateless individuals).

Ownership of right**11 Can the right be transferred? In what circumstances?**

As opposed to property rights, such as exclusive rights on a trademark or an artwork, an individual's right to his or her name and image and other non-property rights are unalienable and cannot be transferred in any other way to any company or individual. However, third parties can use an individual's right to his or her name and image if the use is properly formalised. Should another person or a company wish to use an individual's image or name, the individual's consent should be sought and is sufficient. According to Russian law this consent is not treated as a licence agreement, even in the case when an individual receives compensation for giving such consent. Use of trademarks or service marks is regulated via agreements registered by Rospatent (the competent authority in such cases).

12 Can the right be licensed? In what circumstances?

No. The individual's right to his or her name and image and other non-property rights cannot be licensed under Russian law. Licensing applies to intellectual property objects only.

13 If the right is sold or licensed, who may sue for infringement?

This is applicable to intellectual property rights only; see questions 11 and 12.

14 How long does protection of the right last?

The protection of non-property rights, such as right to the name or image of an individual, lasts during his or her lifetime. In some cases, the right of publicity may be enforced after the individual's death by his or her family members.

15 Is the right protected after the individual's death? For how long? Must the right have been exercised while the individual was alive?

Some of the non-property rights belonging to individuals during their lifetime can be exercised after their death by their survivors or close family members. The image of an individual is protected against unauthorised use after the individual's death regardless of whether the right has been exercised while that individual was alive. The protection of an individual's image lasts as long as there is at least one surviving child, spouse or parent of that individual.

The name, pseudonym, image and signature of the individual are protected against unauthorised use as a trademark as long as there is at least one living survivor of the individual. Such protection can be exercised regardless of whether the right has been exercised while the individual was alive.

16 If post-mortem rights are recognised, who inherits the rights upon the individual's death? How is this determined?

Although the rights outlined in question 15 are protected after the individual's death, non-property rights cannot be inherited following the individual's death pursuant to Russian legislation. Protection is provided only in the event that the above rights are not used in an authorised manner.

The inheritors are entitled to protect the individual's name, pseudonym, image and signature against an unauthorised use as a trademark.

The children, spouse and parents of the individual are entitled to protect the individual's image after his or her death.

17 Can the right be lost through the action or inaction of its owner?

No; non-property rights of an individual cannot be lost through action or inaction or in any other way.

18 What steps can right owners take to ensure their right is fully protected?

An individual does not have to take any steps to ensure his or her right of publicity is protected as it is not registrable. However, monitoring the register of applications for trademarks and other intellectual property objects as well as observing press and advertising may be useful for detection of the unauthorised use of one's name, pseudonym, image, signature and personal data.

As various contracts are formalised at the discretion of parties of commercial relations (except for cases when the provision is stipulated by the imperative norms, which are few), it is strongly recommended that individuals who give their consent for the exploitation of their distinctive attributes carry out the following:

- provide limitations on the use of their distinctive attributes in the contracts;
- provide that valid consent is always subject to fulfilment by the other party of all its obligations under the contract; and
- impose an obligation on another party to strictly refrain from certain actions that are outside the scope of limitations for the use of distinctive attributes.

Infringement**19 What constitutes infringement of the right?**

Any of the following actions may constitute infringement of the rights related to the right of publicity:

- registration or use of an individual's name, pseudonym or its derivative, image or facsimile (or signature) as a trademark without the consent of the individual or his or her successors;
- use of an individual's name or pseudonym as a business designation (name of the shop, restaurant, etc) that gives the impression that the business establishment belongs to an individual when it does not in fact. For example, use of the name of a celebrity as a restaurant's name (or as a part thereof) may be misleading and imply that the restaurant belongs to or is run by the celebrity;
- exploitation of an individual's name or pseudonym in other forms and ways in creative, business or other economic activities without the consent of the individual;
- publication and further use of an individual's image, fixed in a photograph, video or artwork without consent of such individual or his or her child and spouse after his or her death (or parents, in the case of absence of children and spouse);
- unlawful collection or publication of information about an individual's private life that violates his or her personal or family privacy, without consent, constitutes a criminal act punishable by law;
- unlawful usage of information about an individual's private life in an artwork, if such usage violates one's interests; and
- collection, publication, circulation, disclosure and other actions in respect of the individual's personal data without an individual's express consent.

20 Is an intent to violate the right necessary for a finding of infringement?

No; intent to violate the right is not a requisite as it is a strict liability offence.

21 Does secondary liability exist for the right? What actions incur such liability?

No. Russian legislation is silent on the issue of secondary liability for infringing the right of publicity, and there are no court rulings on this matter.

22 What defences exist to an infringement claim?

There are some limited defences available for a defendant who is accused of having infringed an individual's right to their image. Article 152(1) of the Civil Code states that it is not necessary to obtain the consent of an individual for publication and further exploitation of an individual's image in the following circumstances:

- where the use of the image is necessary for state, social or other public interests;

Update and trends

There have been some positive trends in the protection of the right of publicity. Although this area of law is still undeveloped in Russia, the number of claims to protect the right of publicity has substantially increased, and courts are beginning to award higher financial compensation. Courts still only award compensation for moral losses related to the infringement of the right of publicity; they very rarely award compensation for commercial losses if a claimant has failed to duly prove his or her damages.

Russian courts have started to appreciate the commercial nature of the use of an individual's distinctive attributes, such as his or her image and name. This has triggered the recognition that the right to use someone's image obtained under a contract may be limited (by the territory and terms and purposes of use (eg, only in advertising of certain products or only on the internet or television)).

These positive trends have given rise to the latest amendments introduced to the Civil Code, which state that an individual's name can be used in creative, business or other economic activities of other individuals and companies provided the express consent of the individual is received.

- where the image of a person was obtained in a place open for free visiting or at a public event (meetings, congresses, conferences, concerts, presentations, sports competitions, etc), except in cases where the image is the main object of a photo shoot or is used as the main object for other purposes; and
- where an individual's image in a photograph, video or artwork was obtained due to that individual willingly posing for such a photograph, video or artwork, after giving his or her consent or receiving remuneration for the use.

These defences would not apply if there was unauthorised use of the individual's image as a trademark. A trademark can be used under a licence agreement only.

The use of an individual's name as a business designation (name of a shop, restaurant, etc) may theoretically be permitted when consent was obtained from an individual who has exactly the same name as the claimant. However, due to the absence of court practice on this point, there is no legal certainty that the court would consider that the use of business designation does not violate an individual's rights only due to sufficient similarity in the names.

Remedies

23 What remedies are available to an owner of the right of publicity against an infringer? Are monetary damages available?

The remedies depend on the nature of a right, type and the consequences of infringement, and are generally the following:

- putting a person into the position he or she was in prior to the infringement (eg, by removing outdoor advertising containing unauthorised exploitation of an individual's image);
- prohibition of actions infringing or threatening to infringe the right (eg, destruction of infringing materials);
- compensation of losses, including compensatory damages and loss of profit;
- compensation of moral loss (rather limited according to current case law); and
- claiming invalidation of an infringing trademark and cancellation of the trademark registration.

An individual can claim for compensation of moral loss if it has been incurred due to the action violating his or her personal non-property rights. The court could take into account the extent of physical and moral suffering connected with the personal features of the individual to whom the damage has been done.

Although a violation of an individual's right of publicity is the violation of non-property rights, an individual can also claim for compensation of actual losses, including damages (eg, expenses for medical care) and the loss of profit that is understood as the profit that an individual could have earned, if his or her right was not infringed. The loss of profit that may be

incurred by a celebrity through an unauthorised exploitation of that celebrity's image may be equal or close to the commercial value of exploitation of the image. The individual should duly prove the damages in court.

24 Is there a time limit for seeking remedies?

According to article 208 of the Civil Code, the limitation period does not apply to claims for the protection of personal non-property rights, with the exception of those cases stipulated by the law. Therefore, there is no time limit for seeking remedies for infringement of the right of publicity in Russia. However, there is a time limit of three years for some claims related to the infringement of the right of publicity, for example, claims for compensation of damages related to the infringement of the right of publicity. If the term of three years applies, then it is calculated from the moment when a person has known, or should have known, about the violation of his or her right, but in any case cannot be longer than 10 years from the date of the violation of the right.

25 Are attorneys' fees and costs available? In what circumstances?

Yes; attorneys' fees and costs are recoverable. However, taking into account court practice, the amount recovered tends to be very small (generally varying between 7,000 and 100,000 roubles).

26 Are punitive damages available? If so, under what conditions?

Punitive damages are available where they are stipulated by the contract between the parties. However, the court may reduce the amount of punitive damages if it finds them to be out of proportion compared with the actual consequences of the infringement.

27 What significant judgments have recently been awarded for infringement of the right?

In 2011, the Moscow Arbitration Court did not satisfy a claim by a company in proceedings against Rospatent that refused to register a trademark identical to the pseudonym 'ZOTOB', an author well known in Russia. The claimant tried to prove that the name of the author is not well known in Russia. However, the Court stated that the extent of the author's popularity and his pseudonym shall not affect his right to object to the registration of the trademark without his consent.

In June 2012, the Basmanny District Court of Moscow awarded financial compensation to Anatoly Wasserman, a famous Russian intellectual and celebrity, who proved that a T-shirt manufacturer infringed his right of publicity by publishing his modified image on T-shirts without his express consent. Mr Wasserman's claim exceeded 600,000 roubles, but the court awarded 100,000 roubles. The core of the dispute was that the manufacturer tried to prove that the used image did not belong to Anatoly; however, experts confirmed that it was him. It is notable that the amount of compensation was higher than the average amount of 10,000 to 15,000 roubles that has previously been awarded in similar cases.

In October 2012, the Babushkinsky District Court of Moscow awarded financial compensation of 300,000 roubles to a famous Russian singer, Alla Perfilova (stage name Valeriya), for the unauthorised use of her photograph in advertising. The defendant, a plastic surgery clinic, used the celebrity's photo on its website without her express consent.

In a dispute resolved by Presnenskiy District Court of Moscow in May 2014 concerning the claim of Russian pop singer Stas Mikhailov against the television channel TNT and the producer of the comedy film *Dublyor*, the claimant proved that his parody character portrayed by Russian actor Aleksandr Reva in the film had violated his personal right to the image. However, the court awarded quite a low compensation of 100,000 roubles.

Previously, in April 2013, Savelovskiy District Court of Moscow satisfied another claim of Stas Mikhailov against the Russian newspaper Express Gazette. The published article contained information on the singer's private life and was accompanied by photographs of him without his consent, thus violating his personal rights to his image and private life. The awarded sum of approximately 300,000 roubles was recently reduced by the court of appeal to approximately 100,000 roubles. There were several similar cases concerning claims from celebrities with similar awards in 2013. The total sum of approximately 900,000 roubles was awarded against News Media, the company that founded Izvestiya, under various claims from singers Valery Meladze and Elena Hruleva (whose stage name is Elena Vaenga) and actor Sergey Bezrukov.

Litigation**28 In what forum are right of publicity infringement proceedings held?**

Proceedings connected with infringement of the right of publicity are generally brought in district civil courts at the first instance (article 24 of the Civil Procedural Code).

29 Are disputed issues decided by a judge or a jury?

The disputed issues are decided by a judge.

30 To what extent are courts willing to consider, or bound by, the opinions of other national or foreign courts that have handed down decisions in similar cases?

The Russian courts follow interpretations of law given by the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation.

The constitutional interpretation of laws given by the Constitutional Court is obligatory to all courts, citizens, organisations, and state and municipal authorities.

The interpretations of law given by the Supreme Court have a direct effect on the lower courts. The Russian courts usually consider the opinions of the Supreme Court of the Russian Federation as binding.

The Russian courts do not take into account the decisions of any foreign courts due to the absence of the respective legal ground for considering such judgments.

31 Is preliminary relief available? If so, what preliminary measures are available and under what conditions?

Preliminary relief is available only in the form of a preliminary injunction, obtained in the court prior to a final judgment. The most frequently used measure is an intermediary injunction, such as a temporary prohibition to use an individual's image or name (eg, in advertising or on products). However, given that the necessary condition of an intermediary injunction is the impossibility of or complications in enforcing the judgment, the probability of obtaining a preliminary injunction depends on the actual

circumstances of a given case. For example, if a person's image is used in advertising without his or her consent and the person would like to prohibit further use, then an execution of the court's award would be highly likely without any preliminary injunction. On the other hand, if a person has all the necessary evidence to prove the proposed unauthorised use of his or her image, then a temporary prohibition of such use would be more likely. As a rule, it is difficult to obtain a preliminary injunction from a court.

32 What avenues of appeal are available in main proceedings or preliminary injunction proceedings? Under what conditions?

Judgments shall come into force within one month after the day a judge has made a final judgment, unless appealed against. Both defendants and plaintiffs may file an appeal before the judgment comes into legal force on certain grounds.

If one of the parties of litigation is still not satisfied with the judgment, it may be further revised in the courts of third instance, which are the presidiums of a region's courts, and then in the Supreme Court of the Russian Federation.

33 What is the average cost and time frame for a first instance decision, for a preliminary injunction, and for appeal proceedings?

The legal cost of litigation includes attorneys' fees and costs, and a state duty. The level of attorneys' fees may vary significantly from lawyer to lawyer and the region of Russia where the dispute takes place. For example, attorneys' fees in Moscow may reach 300,000 roubles (or higher) per court instance. The state duty paid by an individual for enforcement of his or her right of publicity is 300 roubles; however, the state duty that should be paid in connection with claiming for monetary compensation is higher and depends on the sum claimed.

Court proceedings may take from six months to several years. First instance proceedings generally take more time than appeals (appeals usually take about two or three months), and the whole length of litigation depends on various factors (complexity of the dispute, the number of participants, the volume of the evidence, etc). If a final judgment is overturned, the case may be directed by the higher court for a new trial.

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