

Right of Publicity 2020

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Right of Publicity 2020

Contributing editors**Rick Kurnit and Edward Rosenthal**

Frankfurt Kurnit Klein & Selz PC

Lexology Getting The Deal Through is delighted to publish the tenth edition of *Right of Publicity*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Mexico.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Rick Kurnit and Edward Rosenthal of Frankfurt Kurnit Klein & Selz PC, for their assistance with this volume.



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Contents

Global overview	3	Mexico	32
Rick Kurnit and Edward Rosenthal Frankfurt Kurnit Klein & Selz PC		Vanessa Romero and Mauricio Moreno Cannizzo, Ortíz y Asociados, SC	
Canada	5	Russia	37
Hatty Reisman Reisman Law Offices Professional Corporation		Yulia Yarnykh Gowling WLG	
Germany	13	Spain	44
Marcus von Welser Vossius & Partner		Enrique Armijo Chávarri and María Cadarso Elzaburu	
Greece	19	United Kingdom	53
Persa E Lampropoulou Anagnostopoulos		Paul Jordan and Sean Ibbetson Bristows LLP	
India	24	United States	59
Vaishali Mittal Anand and Anand		Rick Kurnit and Edward Rosenthal Frankfurt Kurnit Klein & Selz PC	

Mexico

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SOURCES OF LAW

Right of publicity

1 | Is the right of publicity recognised?

Yes, the right of publicity is recognised by the Mexican laws.

Principal legal sources

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

At the federal level, right of publicity is recognised in the following laws:

- the Mexican Constitution;
- the Federal Civil Code (the CCF);
- the Federal Copyright Law (the Copyright Law);
- the Industrial Property Law; and
- the Federal Law for the Protection of Data in Possession of Subject Parties (the Data Privacy Law).

Furthermore, there are different laws in Mexico that refer to the right to an image, such as the Regulatory Law of the first paragraph of article 6 of the Constitution on the rebuttal right, and the General Law on the Rights of Children and Adolescents.

At the local level (ie, within the states of Mexico, including Mexico City), right of publicity is recognised in several laws. The following are some of the laws applicable in Mexico City; however, this should not be understood as an exhaustive analysis of all the states:

- article 6 of the Political Constitution of Mexico City;
- the Law on Civil Liability for the Protection of Private Life, Honour and Self-Image (the CDMX Law);
- the Law for the Protection of Data in Possession of Subject Parties of Mexico City; and
- some criminal codes of the states of Mexico.

Enforcement

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

In the case of a publicity right violation in Mexico, it is possible to initiate an administrative, civil or criminal proceeding. The authority that will have jurisdiction to analyse and resolve the infringement or violation to the right of publicity, will depend on the legal strategy to be followed to protect it; however, in general terms, we can mention the following:

- the Mexican Institute of Intellectual Property (IMPI);
- the National Copyright Authority.
- federal or local civil judge;
- criminal judge;
- National Institute for Transparency, Access to Information and Data Protection (INAI); and
- local institutes on personal data protection.

Other relevant rights

4 | Are there other rights or laws that provide a claim based on use of a person's name, picture, likeness or identifying characteristics?

No additional laws to those mentioned in question 2, provide a claim based on use of a person's name, picture, likeness or identifying characteristics.

In connection to other rights, it is important to mention that pursuant to the Industrial Property Law, the image, the identifiable voice, the portrait and the signatures of persons may be registered as trademarks and assigned to third parties; and in the case of a violation on a right of publicity, it might be possible to initiate a civil lawsuit an indemnification arguing moral damage (see question 15).

EXISTENCE OF RIGHT

Protectable aspects

5 | What aspects of a person's identity are protectable under the right of publicity?

The following are the aspects that each law set forth in question 2 protects under the right of publicity.

- CCF: a person's honour, private life and self-image.
- Copyright Law: individual's image understood as his or her representation through any material support, such as painting, sculpture or photography, among others, but not as the opinion, concept or idea that is held of a person'
- Data Privacy Law: personal data (ie, any information concerning an identified or identifiable physical person, including his or her image). Furthermore, this Law grants special protection to personal data that for its nature is considered sensitive (ie, the personal data that affects the most intimate sphere of a person, or the improper use of which may cause discrimination or a serious risk to the person), especially the personal data that may reveal aspects such as racial or ethnic origin, present or future health condition, genetic information, religious, philosophical and moral beliefs, union membership, political opinion and sexual preference.
- Regulatory Law of the first paragraph of article 6 of the Constitution on the rebuttal right: a person's honour, private life or image.
- General Law on the Rights of Children and Adolescents: honour, image or reputation of children and adolescents.
- Mexico City Constitution: name, image, reputation, recognition, identity and legal personality of a person, group or community.
- CDMX Law: the identifiable reproduction of a person's physical features on any material support.

- Law for the Protection of Data in Possession of Subject Parties of Mexico City: image as personal data in the same terms as the Data Privacy Law.
- Some criminal codes of the states of Mexico: a person's honour and reputation.

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

No, this is not a requirement under Mexican law.

Foreign citizens

7 | May a foreign citizen protect a right of publicity under the law of your jurisdiction?

Due to the territorial application of Mexican laws, the citizenship of the individual is irrelevant. Foreign citizens are entitled to the protection of their right of publicity on the same terms as Mexican nationals or citizens.

Registration requirements

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

Registration or public notice is not required to protect the right of publicity. Notwithstanding the foregoing, for it to be considered as a trademark before the IMPI, the image, identifiable voice, portrait or signatures of persons must be registered with the IMPI.

Protection after death

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

In terms of the Copyright Law, the rights of portrayed persons will last 50 years after their death. In copyright matters, both the individuals and their successors are entitled to bring the respective action before the National Copyright Authority.

With regard to the protection of personal data of deceased persons, the person who proves to have a legal interest, pursuant to the applicable laws, may exercise the rights granted by the applicable laws, provided that the owner of the rights has faithfully expressed his or her will in this regard or that there is a court order for such effect.

In civil matters, an action for moral damages can only be brought by the victim's heirs when the victim has attempted the action while alive. There is a special case provided for in article 674 of the Civil Code for the state of Quintana Roo, which provides that when the image of a person or spouse, or a person living with him or her as a spouse, his or her ascendants, descendants or collateral to the fourth degree reproduced or exhibited without a lawful purpose, the judicial authority shall order the suspension of the reproduction or exhibition, without prejudice to the responsibility of the author or authors of the reproduction or exhibition.

OWNERSHIP OF RIGHT

Transferring

10 | Can the right be transferred? In what circumstances?

In civil matters, rights are not transferable. In this regard, it is important to note that article 6 of the CDMX Law states that personality rights are inalienable (ie, non-transferable). In copyright matters, the rights of the

person portrayed are transferable and the owners of the corresponding rights are the ones who can authorise the use and publication of the relevant portrait. In trademark matters, they can be transferred.

Licensing

11 | Can the right be licensed? In what circumstances?

In civil matters, rights are not licensable. In this regard, it is important to note that article 6 of the CDMX Law states that personality rights are inalienable (ie, non-transferable). In copyright matters, the rights of the person portrayed are transferable and the owners of the corresponding rights are those who can authorise the use and publication of the relevant portrait. In trademark matters, they can be licensed.

Infringement

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

In copyright and trademark matters, the owners of the corresponding rights, to whom the rights have been transmitted through any legal act, are the ones who can exercise legal actions relating to the protection of the right of publicity.

Post-mortem rights

13 | If post-mortem rights are recognised, are they limited to natural heirs or can they be enforced under a contract by an assignee or left to an entity?

In civil matters the action for moral damage can only be brought by the heirs of the victim when the victim has attempted the action in life.

In copyright and trademark matters, the assignee or acquirer of the corresponding rights may be any individual or entity to whom the rights have been transmitted by any legal act, including a contract or a will.

Concerning personal data rights, the exercise of post-mortem rights is limited only to natural heirs, but to any person who proves to have a legal interest according to the applicable laws.

Recommended actions

14 | Are there any actions that rights owners should take to ensure their rights are fully protected?

There are no actions provided under Mexican laws to ensure additional protection of the right of publicity. However, in relation to trademarks, registration titles issued by the IMPI have a term of 10 years. Renewal is required before the expiry of each trademark title.

INFRINGEMENT

Right infringement

15 | What constitutes infringement of the right?

In civil matters, the right of publicity shall be deemed to have been violated if moral damage occurs to a person's honour, private life, and self-image. Those who offend such rights shall be liable for moral damage (damage that a person suffers to his or her feelings, affections, beliefs, decorum, honour, reputation, private life, physical configuration, and appearance, or in the consideration that others have of themselves). The responsible party must repair the moral damage through economic compensation in addition to the material damage caused.

In copyright matters, the right shall be considered infringed if the image of a person is used without the person's authorisation or that of his or her successors when it is made for direct or indirect profit. In terms of the Copyright Law, the authorisation to use or publish a portrait of a person may be revoked by the person who granted it, who, if

applicable, will be liable for any damages that such revoking may cause. When, in exchange for consideration, a person allows him or herself to be portrayed, it is presumed that he or she has given his or her consent and will not have the right to revoke it, if it is used in the terms and for the purposes agreed upon.

In general terms, for the laws trying to protect personal data, non-compliance occurs if the controller (ie, the individual or private entity that decides on the treatment of the personal data):

- does not designate a person or department that will attend the requests of owners of the personal data in relation to their rights under the law;
- does not provide a privacy notice to the owners of the personal data;
- does not establish and maintain administrative, technical and physical security measures that protect personal data against any damage, loss, alteration, destruction, use, access or unauthorised treatment, and communicate to the owners of the personal data the breaches of such measures that significantly affect pecuniary or moral rights; and
- in the case of transferring personal data to third parties, does not communicate to third parties the terms and conditions of the privacy notice by which the owners of the personal data accepted the treatment of their personal data.

Excluded formats

16 | Are certain formats of intellectual property excluded from claims based on the right of publicity? What is the legal basis of the exclusions?

In copyright matters, an exception to consent is when the photograph is taken in a public place and for informative or journalistic purposes.

Infringement claim requirements

17 | Is knowledge or intent to violate the right necessary for a finding of infringement?

No, neither the knowledge nor the intention is relevant for considering that the right to publicity has been violated.

Liability of media

18 | Does liability extend to media publishing content created by an advertiser and website operators publishing posts by third parties? Does republishing or retweeting or other social media propagation of existing content give rise to liability?

Yes. Regardless of the person engaging in the conduct considered as a violation of the right of publicity, such conduct shall be punishable. The character of advertiser, website operator, user of social media republishing or tweeting content will not be relevant to the determination of liability. Notwithstanding the foregoing, it is important to remember that in civil matters the violation of the right of publicity occurs when moral damage has been caused (ie, the violation is regulated according to the moral damage caused by the action, whether it was performed by the content creator or any other party), and it is regulated based on its effects; thus, if non-compliance with the right of publicity does not generate any consequences, the action will not be considered as a violation of the right of publicity.

REMEDIES

Available remedies

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

In copyright matters, the Copyright Law provides for the imposition of fines ranging from 1,000 to 5,000 days of units of measure and updating (UMA), which has recently substituted the minimum wage and is currently (during 2019) worth 84.49 Mexican pesos. Furthermore, an additional fine of up to 500 UMAs will be applied to anyone who persists in the infringement.

If the violation of the right of publicity causes moral damage (civil matters), the party responsible for the damage must rectify this by economic compensation, regardless of the material damage caused. The amount of compensation will be determined by the judge taking into account the violated rights, the degree of liability, and the economic situation of the party responsible and the victim.

In relation to the protection of personal data, INAI, pursuant to the Data Privacy Law, is authorised to impose the following sanctions: a warning to the responsible party to carry out the acts requested by the owner of the personal data; or a fine of 100 to 320,000 UMAs. Furthermore, if the infringements persist repeatedly, an additional fine ranging from 100 to 320,000 UMAs will be imposed. In the case of infringements committed in the processing of sensitive data, sanctions may increase by up to twice the previously mentioned amounts. On the other hand, the Data Privacy Law foresees that they may incur:

- between three months and three years' imprisonment to a person who, being authorised to process personal data for profit, causes a breach of security to the databases under their custody; or
- between six months and five years' imprisonment for a person who, to achieve an undue profit, processes personal data through deception, taking advantage of the error of the owner or the person authorised to transmit the data.

The foregoing also consider that in the case of sensitive personal data, the sanctions mentioned above will be doubled.

With respect to the CDMX Law, it sets forth that the reparation of the damage will include the publication or disclosure of the condemning ruling, at the expense of the defendant, in the media and format where the facts or opinions that constituted the affectation to the moral patrimony were disseminated, and that in no case the sanctions derived from the damage to the moral patrimony will be of criminal nature. When the damage cannot be compensated, compensation shall be set taking into consideration the greater or lesser disclosure that the unlawful act had, the personal conditions of the victim and the other circumstances of the case, and in no case shall the amount of compensation exceed 350 days of UMAs, not including expenses and costs. Finally, it should be noted that if recidivism occurs within one year, the judge may impose up to one half again of the maximum amount of compensation.

Time limits

20 | Is there a time limit for seeking remedies?

Generally, two years from the date on which the damage was caused.

Attorneys' fees

21 | Are attorneys' fees and costs available? In what circumstances?

Attorneys' fees and costs are variable.

Punitive damages

22 | Are punitive damages available? If so, under what conditions?

In general terms, punitive damages in Mexico are not applicable. However, it is important to mention that the Supreme Court of Mexico, through the ruling on direct *amparo* 30/2013, accepted the application of the figure of punitive damages, broadening the method to quantify the scope of moral damages. This criterion is not yet mandatory for judicial authorities in Mexico since it cannot be considered as jurisprudence.

Preliminary relief

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

Yes, in matters of copyright, the Copyright Law regulation establishes that the interested party may request that the authority take any of the measures aimed at preventing or avoiding the infringement of copyright or related rights, and take appropriate action. Likewise, the holders of copyright and related rights, their representatives and the entities to which they have entrusted the administration of their rights, may request the competent judicial authority set the precautionary measures foreseen in the Federal Code of Civil Procedures; that is:

- an order to cease actions or activities that are causing or will necessarily cause imminent and irreparable harm;
- an order to perform acts or actions the omission of which has caused or will necessarily cause imminent and irreparable harm;
- the withdrawal from the market or securing of instruments, goods, copies and products directly related to the irreparable harm that has been caused, is causing or will necessarily be caused; and
- any other measure that the judge deems appropriate aimed at protecting rights and interests.

Concerning the protection of personal data, INAI, pursuant to the Data Privacy Law, may order the responsible party to carry out the acts requested by the owner.

Damages measures

24 | What are the measures of damages?

In civil matters, the amount of compensation will be determined by the judge, taking into account the violated rights, the degree of liability, the economic situation of the party responsible, and the victim.

In copyright matters, the reparation of material or moral damages as well as compensation for damages for violation of the rights conferred by Copyright Law may in no case be less than 40 per cent of the retail price of the original product or of the original provision of any type of services that involve violation of any or some of the rights protected by law. The judge with an expert's hearing shall determine the amount of the reparation of the damage or of the indemnity for damages in those cases in which it is not possible to determine it.

Pursuant to the CDMX Law, the valuation of the damage to the moral patrimony must be made taking into account the personality of the victim, the age, socioeconomic position and public or private nature, the nature of the illicit act, the objective gravity of the damage, and the greater or lesser disclosure. In terms of such Law, in no case shall the amount of compensation exceed 350 UMAs without including expenses and costs.

Significant case law

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

Two main judgments have been recently awarded concerning the right of publicity. On one hand, derived from direct *amparo* 48/2015, the Supreme Court of Mexico ruled that the protection and regulation of the right to an image in civil and copyright terms are valid since constitutionally there is no prohibition for the same subject matter to have double protection.

On the other hand, derived from the direct *amparo* 24/2016, the Supreme Court of Mexico decided that the Copyright Law does not allow the repair of violations of the right to one's image by means of a compensation for moral damage. However, since it is an immaterial right that can be commercially exploited, the Copyright Law does contemplate the possibility of claiming material damages for violations of the right to one's image.

LITIGATION

Relevant fora

26 | In what forum are right of publicity infringement proceedings held?

In civil matters, the competent authority may be a federal or local civil judge at the election of the claimant. In criminal matters, the local jurisdiction shall be competent through local criminal judges. In copyright matters, the jurisdiction is federal and the competent authority is the National Copyright Authority. In terms of personal data protection, the competent jurisdiction may be federal or local, depending on the location of the subjects who process the personal data.

Use of juries

27 | Are disputes decided by a judge or a jury? Are damages determined by a judge or a jury?

In Mexico, the figure of the jury is not applicable to protect the right of publicity. The damages will be determined by the competent authorities that, in civil matters, will be a federal or local civil judge at the election of the claimant.

Applicable law

28 | How is the choice of applicable law determined?

The Copyright Law and the Data Privacy Law are federal laws applicable in all the Mexican territory. In matters of moral damage (civil matters), criminal law and local provisions on protection of personal data, the applicable laws will be those of the states of Mexico where the action, omission or non-compliance occurs.

Consideration of foreign decisions

29 | 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?

Mexican courts are not bound by decisions of foreign courts. Notwithstanding the foregoing, it should be noted that, pursuant to article 1 of the Constitution, all persons in Mexico enjoy the human rights acknowledged in the Constitution itself and in the international treaties to which the Mexican state is a party, so that, although the opinions of foreign courts are not mandatory for Mexican authorities, the human rights recognised in international treaties are. With regard to the criteria of national courts, the Amparo Law, which regulates articles 103

and 107 of the Constitution, sets forth that jurisprudence (ie, the criteria determined by the judiciary) agreed by the Supreme Court of Mexico, whether in full session or not, is mandatory for the latter and also for circuit plenaries, the collegiate and unitary circuit courts, district courts, military and judicial courts of the common order of the states and Mexico City and administrative and labour courts, whether local or federal. The jurisprudence established by the circuit plenaries is mandatory for collegiate and unitary circuit courts, district courts, military and judicial courts of the common order of the federal states and Mexico City and administrative and labour courts, local or federal that are located within the corresponding circuit. The jurisprudence established by the collegiate circuit courts is mandatory for the bodies referred to above, except for the circuit plenaries and other collegiate circuit courts.

Appeals

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

The main means to appeal against resolutions arising in relation to the protection of right of publicity are:

- in administrative matters, nullity or annulment in the case of omission or irregularity of the elements and requirements required by article 3 of the Federal Law of Administrative Procedure;
- in civil matters, appeal before the superior of the relevant court; and
- *amparo* substantiated before federal courts to analyse the constitutionality of the act.

It is important to consider that the *amparo* is considered and substantiated as an independent trial and not as a second instance appeal.

Average cost and time frame

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

Costs and time frames are variable on a case-by-case basis.

UPDATE & TRENDS

Key developments of the past year

32 | Are there any emerging trends or upcoming legislation regarding the right of publicity in your jurisdiction?

In October 2017, an initiative was filed to the Federal Congress to incorporate three paragraphs in article 1916 of the CCF to state that:

It shall be a violation to the privacy or honour of a person without distinction as to origin, gender, disability, social status or health, religion, sexual preference, public service activity, or any other that threatens human dignity, any direct handling of her or his image, name or personal data, as well as any insulting or offensive manifestation in printed or electronic media that undermines her or his honour or reputation, is contrary to their rights or that puts them at risk.

This initiative has not been approved to date.

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