



MMLC Group 

北京铭辉达知识产权代理有限公司

Lawyers and Consultants

BEIJING
709, Tower W3
The Towers
No.1 East Chang An Avenue
Dongcheng District 100738
Beijing, China
北京东城区东长安街1号东方广场东方经贸城
西三办公楼709室, 邮编100738
writer's p: +86 10 8515 1091
f: +86 10 8515 1089
w: mmlcgroup.com

“The Right of Publicity under Chinese Law”

*Matthew Murphy and Joyce Chng
MMLC Group
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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 for commercial purpose, such as use on merchandise or in advertisements. The expansive growth of publicity rights, from being almost non-existent 50 years ago to widely accepted today, reflects increased concern that, without protection, an individual's identity can be used and abused by third parties in connection with advertising, promotions, products and other commercial activities. However, there is an inherent tension between publicity rights and the ability of businesses and other entities to freely engage in advertising, entertainment and other forms of commercial expression. Therefore, in many jurisdictions, such as China, Australia, and the United States, a balance has to be struck between these competing issues.

The complexity of the right of publicity is compounded by developments in both technology and popular culture. The global information revolution, such as the Internet, social networking, reality television and viral advertising, creates a world that crowns more individuals than ever before as celebrities, yet at the same time gives companies more media avenues to engage in unauthorized exploitation. However, no unifying body of international law exists on the right of publicities. Unlike other intellectual property fields such as copyright, trademark and patent law, there are no international treaties or conventions. Therefore, a wide spectrum of protection is offered by the various jurisdictions around the world.

China

The right of publicity is recognised in China. However, China does not have a singular definition for what constitutes the right of publicity. In practice, it is protected through an array of laws and

BEIJING
With support offices in Brisbane and Sunshine Beach
Matthew Murphy Ellen Wang Hong Mei Yu Du
Xia Yu Sarah Xuan Fei Dang
Partners and Associates in the MMLC Group are admitted to practice law in China, Australia and Europe (UK)

regulations. The right of publicity is provided for under the following Chinese laws and regulations:

1. the General Principles of the Civil Law, in particular Articles 99-101 and 120, which provides for the right of personal name, the right of portrait and the right of reputation, and remedies for infringement of these rights;
2. the Civil Procedure Law;
3. the Supreme People's Court Opinions on Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China, in particular Articles 139, 150 and 151, which provide that the use of someone's portrait without authorization in advertisements, trademarks, decorating show windows for a commercial purpose shall be identified as an infringement of the right of portrait, resulting in compensation for the victims;
4. the Advertising Law, in particular Articles 33 and 69, which provide that the use of someone's name or image in advertising must be with written consent, otherwise it will constitute a violation;
5. the Tort Liability Law, in particular Articles 2, 15 and 20, which provides for a right to name, reputation, honor, portrait and privacy, eight methods to assume tort liabilities, and the calculation of compensation;
6. the Trademark Law, in particular Articles 13 (2), 15, 30, 32 and 45, which constitute a system for the protection of unregistered marks;
7. the Anti-Unfair Competition Law;
8. the Copyright Law; and
9. the State Administration for Industry and Commerce Provisions on Prohibiting Unfair Competition Acts of Imitation of Names, Packaging or Decoration Specific to Well-Known Products.

Currently, Article 5 of the Anti-Unfair Competition Law offers protection over the right of publicity by prohibiting unfair methods involving another's registered mark; name, package, decoration of the famous or noted commodities; business or personal name; certificate of attestation, and mark of fame. Although recently a revised version of the Anti-Unfair Competition Law has been released, the protection given for the right of publicity remains predominantly the same, and is employed often to protect unregistered marks, images, packaging, and more, as something akin to the common law tort of passing off in China.

Moreover, according to Article 100 of the General Principles of Civil Law, the unauthorized use of a citizen's portrait for profit is prohibited. This law is meant to protect citizens by preventing another party from capitalizing on a person's likeness or image without proper consent. For example, in *Liu v. Jing Pin Guo Wu Newspaper*, Decree #8744, Liu Xiang, a famous Chinese athlete who won a gold medal in the 110 metre hurdle race at the 2004 Olympic games, sued Jing Pin Guo Wu Newspaper for infringing his portrait rights after it used a picture of him without his permission to advertise the opening of a new department store. The court found at second instance that Liu's personality and image suffered commercial infringement (Jing Pin Guo Wu Newspaper obtained commercial benefit through using Liu's portrait), therefore he was awarded with a public apology and compensation of RMB 20,000 for mental anguish.

Collective units also benefit from the right of publicity: for example, the Beijing No.1 Intermediate People's Court ruled that the use of certain images of the honour guard of the Three Services of the Chinese People's Liberation Army by a Shenzhen company in its advertisement materials constituted an infringement upon the rights of name and image of those honour guards. The Court thus ordered the company to cease the infringement, make a public apology and pay RMB 80,000 in compensation to the honour guards.

Certain limitations allow for near-unrestricted exploitation of another's portrait, encapsulated in China's fair-use exception. Under the fair-use doctrine, a celebrity or individual's image or portrait may be used to report newsworthy subjects, such as historical events or other notable occurrences. This exception is limited to a subjective requirement that care be exercised at all times when displaying the portrait or image. While this concept has not been adjudicated, it has been concluded that all action should be taken to preserve and respect any portrait or image. Also, another exception includes the consent of the owner, which includes voluntary participation or participation upon invitation to a public event. This is deemed to constitute implicit consent to use the participant's name or image in the relevant news reports of the public event, unless defamation or slander is involved. For example, in *Ye Long Jiang v Yunnan Changji Real Estate Development Co Ltd and the Spring City Evening News in 2008*, Ye attended the auction of VIP cards for real estate developed by Changji, and successfully obtained a VIP card in the auction. The court held that Spring City Evening News' descriptive use of Ye's name and image in a news report concerning the auction, and Changji's publication of the news report, did not constitute infringement. The court reasoned that Ye voluntarily attended the auction and gave various interviews to the media during the event. The court therefore concluded that he at least had knowledge of subsequent publication, and that he implicitly consented to the publication of his name and image.

Finally, the right of publicity is protected by the Advertising Law of the People's Republic of China (2015 Revision), which contains in Article 33 that any advertiser or advertising operator shall, if using the names or images of others in advertising, obtain in advance the written consent of others; and in Article 69 which states that an advertiser, advertising operator or advertisement publisher, who, in violation of the provision of the Advertising Law, commits the right-infringing act of using the names and images of others without consent in advertising shall bear civil responsibility. Under the revised Advertising Law, celebrity endorsers will be responsible for false claims in advertising. However, children under age 10 cannot endorse products at all. The Reality TV Show "Where Are We Going, Dad?", a TV program where famous dads take their kids to remote locations, have won endorsement deals on milk, travel and educational products. China's relevant authorities have considered the importance of child celebrities' real childhood, therefore they have limited advertising of child celebrities in the amended Advertising Law.

A wide range of remedies is available under the laws and regulations of China in relation to the right of publicity. According to Article 120 of the Civil Law, if such rights are infringed, the owner may require cessation of the infringement, rehabilitation of reputation, elimination of adverse effect or an apology. In judicial practice, the courts usually order offenders to terminate their infringement and make proper compensation, and may order the offenders to publicly apologise. An apology is typically made by releasing a formal apology in one or more newspapers, with the cost borne by the offender. Claims for damages are usually classified into two types: compensation for moral damages and compensation for property loss. However, the amount of compensation received is usually significantly less than what is claimed. The following cases indicate the extent of damages that can be awarded:

1. A case involving Yao Ming, a famous former NBA player, was awarded RMB 1 million by the Hubei Higher People's Court;
2. Liu Xiang, a hurdle champion, claimed RMB 1.25 million of compensatory damages, which included RMB 250,000 in moral damages and RMB 1 million in defendants' illegal gains, for infringement of his right of image by a magazine and related entities, and was only awarded RMB 20,000 in moral damages; and
3. Zhao Yazhi, an actress from Hong Kong, claimed RMB 1 million, including economic loss of RMB 950,000 and moral damages of RMB 50,000, for infringement of her right of name and image by a cosmetic company and was awarded RMB 250,000.

Australia

In Australia, the right of publicity is not currently found in any statute or codified in any piece of legislation. Therefore, if one's name, image, or likeness is being used without authority, the unauthorized use may be halted by relying on the law of defamation, the *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)), *State Fair Trading Acts* where applicable, and the law of passing off.

Under defamation laws, the publication of a person's photograph without consent is not in itself proof of defamation. The unauthorized use of the image would need to lower the public's opinion or the person, cause the person to be shunned or avoided, or expose the person to hatred, contempt or ridicule. For example, in *Ettingshausen v Australian Consolidated Press*, where the act involved was the publication of naked photos of Andrew Ettingshausen, the court found the photograph led him to be ridiculed because it showed his genitals to readers of a magazine with widespread readership, and accepted the publication lowered the public's estimation of Ettingshausen by implying he had authorized the taking and publication of the photograph. Therefore, it may be difficult in protecting one's right of publicity through defamation laws as the legal threshold to proving the elements of defamation is quite high.

The *Australian Consumer Law* and the equivalent sections of the *State Fair Trading Acts* prohibit misleading or deceiving commercial conduct. Therefore, to prevent the unauthorized use of an image under the law, it is necessary to show that the use of the image would mislead or deceive the public. The relevant sections include section 18, which provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Also, section 29 provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply of use of goods or services make a false or misleading representation:

- a. that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- b. that services are of a particular standard, quality, value or grade;
- c. that goods are new;
- d. that a particular person has agreed to acquire goods or services;
- e. that purports to be a testimonial by any person relating to goods or services;
- f. concerning (i) a testimonial by any person or (ii) a representation that purports to be such a testimonial relating to goods or services;
- g. that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits;
- h. that the person making the representation has a sponsorship, approval or affiliation;
- i. with respect to the price of goods or services;
- j. concerning the availability of facilities for the repair of goods or of spare parts for goods;
- k. concerning the place of origin of goods; or
- l. concerning the need for any goods or services.

The mere use of a person's image is unlikely to be found to mislead or deceive unless that person is a celebrity or well-known endorser of products. When a person is well known by the public as an endorser of products, the unauthorized use of his or her image in connection with a product may constitute misleading and deceptive conduct if the public is lead to believe that the celebrity is endorsing the product. For example, in *Talmax Pty Ltd v Telstra Corporation Ltd*, the Olympic swimmer Kieran Perkins successfully sued Telstra for the unauthorized use of his image in an advertisement when it used a photograph of Perkins wearing a swimming cap bearing the Telstra logo, accompanied by a statement promoting its services in preference to those offered by Optus. The court held that the use of the photograph together with the statement inferred that Perkins

preferred Telstra's services to that of Optus, when in fact he had not made a statement about his preference. Therefore, his status as a celebrity known by the public as an endorser of a variety of products assisted the court to find that Telstra's conduct was misleading and deceptive.

Finally, the law of passing off is designed to protect a business against a deceptive misappropriation of its reputation by a third party, usually a competitor. To succeed in an action for passing off, the plaintiff must establish the subsistence of some reputation on its part, and a misrepresentation by the defendant which causes or is likely to cause damage to the plaintiff. As the subsistence of a reputation is required to successfully establish passing off, the law is of limited use for the average person in the street. For example, in *Henderson v Radio Corp Pty Ltd*, the Hendersons, who were two well-known professional ballroom dancers successfully sued in passing off when their photograph was used without permission on the cover of a ballroom dancing record. The court accepted that Radio Corp had falsely represented some affiliation between the Henderson and its record, and by using the photograph, the record company had denied the Hendersons the potential to exploit their image for their own gain.

United States of America

In the United States, the right of publicity is a state law-based right and recognition of the right can vary from state to state. The current count is 38 states with some form of common law precedent, and 22 states with some form of Right of Publicity statute, including Alabama, Arizona, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. In those states that recognise the right of publicity, it is treated as a unique proprietary right distinct from other personal and proprietary rights.

Among the states that have recognised the right of publicity, the key states are New York and California, as these states are the most domiciles of most American celebrities, and consequently their laws receive the greatest attention and scrutiny. Also, three states – namely, Arizona, Louisiana and Oklahoma – have criminal right of publicity statutes, making it a misdemeanour to infringe the right of publicity of current or former members of the armed services.

A few states (California, Oklahoma, Texas and Nevada) also allow for the registration of one's right of publicity to obtain a post-mortem right (typically the decedent's heirs) to fully exercise and enforce it. Registration usually involves filling a form with the state's secretary of state and paying a nominal filing fee, for example USD \$10 in California. Nevada's statute requires the successor-in-interest of a decedent's post-mortem right of publicity to register his or her ownership claim within six months of reasonably becoming aware of an unauthorised use of such right. California's and Oklahoma's statutes require the successor-in-interest to register his or her ownership claim in order to obtain monetary damages against an infringer, and such damages are not recoverable for any violation that occurs before registration. Texas's statute only requires registration if the owner of the right elects to exercise it in the first year following the individual's death. Without such registration, the executor of the estate can exercise the right, notwithstanding the decedent's intent to have passed the right on to another party, and the true owner must wait until a year after death.

The rationale underlying the right of publicity is rooted in both privacy and economic exploitation. The rights are based in tort law, and the four causes of action are:

1. intrusion upon physical solitude;
2. public disclosure of private facts;
3. depiction in a false light; and
4. appropriation of name and likeness.

The elements typically comprising the right of publicity are referred to as ‘name, image and likeness’. However, this trifecta varies from state to state. In Indiana, where they have taken an expansive view, the right of publicity refers to the property interest inherent in an individual’s name, voice, signature, photograph, image, likeness, distinctive appearance, gestures or mannerisms.

The right of publicity is often confused with its more recognised cousins in the intellectual property family, such as copyright and trademark. For example, while copyright and the right of publicity are different in principle, in practice, complications arise as they can simultaneously be implicated in a single usage. An advertisement featuring a celebrity’s picture may require authorisation from the photographer for the copyright use, and from the celebrity for the right of publicity use. Because these are wholly distinct claims with independent parties charged with standing to assert them, federal copyright laws generally will not pre-empt a state-based right of publicity claim.

Protection of trademarks is governed by the federal Lanham Act, which provides protection where a person’s identity is used for false designations of origin, false descriptions, and forbidden dilution. Specifically, section 2(c) of the Lanham Act (15 USC section 1052(c)) prohibits the registration as a federal trademark of a living individual’s name, portrait or signature without such individual’s consent. Also, another federal statute lending its protection is under 15 USC section 8131 (part of the 1999 Anti-cybersquatting Consumer Protection Act), which provides that when a living individual’s name has been registered as an internet domain name by another party without his or her consent, such individual can sue to cancel the domain name, or to have it transferred to his or her possession.

Right of publicity claims are often paired with Lanham Act claims, usually alleging the defendant had made false or misleading statements implying the plaintiff’s endorsement of or affiliation with a production or service. For example, in *Burck v. Mars*, street entertainer Robert the ‘Naked Cowboy’ Burck sued Mars and its marketing agency for depicting on two oversized video billboards in Times Square a blue M&M dressed like the Naked Cowboy. He made two claims, firstly, alleging the defendants violated his right of publicity under New York law, which prohibits the use of anyone’s name, portrait, picture, or voice in advertising without written permission, and secondly, he claimed that the Cowboy M&M in the video billboard violated the Lanham Act by falsely suggesting he had endorsed or agreed to be associated with M&M candy.

Sections 50 and 51 of the New York Civil Rights Law governs the right of publicity, and makes it a crime punishable by up to six months in jail to use for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without have first obtained the written consent of such person. Therefore, the court decided in accordance with the plain language of the statute, the Cowboy M&M was not a picture or portrait of a living person, and that the statutory right of publicity does not extend to fictitious characters adopted or created by celebrities. Therefore, Burck’s right of publicity claim was dismissed. However, in accordance with section 43(a) of the Lanham Act, it creates liability for any living person who, on or in connection with any goods or services uses in commerce false or misleading representation of fact, which is likely to cause confusion or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person. Therefore, the court allows section 43(a) to proceed as some consumers might view the Cowboy M&M as an endorsement of M&M’s by Burck. Therefore, where the right of publicity may fail in protecting such claims, the Lanham Act is offered as an alternative to protect one’s name, image or likeness.

Like a trademark, the right of publicity can function as a quality assurance to a consumer, especially if a celebrity or his/her estate maintains self-imposed quality standards and exercises discretion in licensing publicity rights. Also, proprietors of both trademark and publicity rights seek to prevent others from reaping unjust rewards by appropriation of the mark or celebrity's fame. In a false endorsement claim, courts will typically consider eight factors originally found in *Polaroid Corp. v. Polarad Elect. Corp.* in order to determine the likelihood of consumer confusion:

1. the strength of his mark;
2. the degree of similarity between the two marks;
3. the proximity of the products or services;
4. the likelihood that the prior owner will bridge the gap;
5. actual confusion;
6. the defendant's good faith in adopting its own mark;
7. the quality of the defendant's product; and
8. the sophistication of the buyers.

Most states with a right of publicity statutes provide exemptions from liability for certain activities. For example, California's statute has express exceptions for the unauthorised use of an individual's name, likeness and so forth in connection with news, public affairs, sports broadcasts or accounts and political campaigns. New York's statute does not contain express exceptions, but the statute only prohibits unauthorised uses for 'advertising purposes or for the purposes of trade', and therefore all other uses are exempted. Tennessee's statute is even more limited, prohibiting only uses in advertisements or solicitations, and Wisconsin's statute only prohibits the 'unreasonable' use of an individual's identity.

The plaintiff in a right of publicity case may seek compensatory damages, punitive or exemplary damages and injunctive relief (both preliminary and permanent). Some states, such as Indiana, Ohio, Tennessee and Washington, also allow the plaintiff to seek the destruction of infringing materials. Many, but not all, state courts have imposed injunctions that are nationwide in scope, even covering those jurisdictions that do not expressly recognise the right of publicity.

The Supreme Court of the United States has reviewed the right of publicity once, in the case of *Zacchini v. Scripps-Howard Broadcasting*, where a famous 'human cannonball' was involved who objected to his entire 15-second performance being televised on the local news. The value of his act depended on the public's desire to witness the event, so televising the event detracted from the demand of people willing to pay to see the act. The court recognised Zacchini's right of publicity and rejected the Broadcasting Company's First and Fourteenth Amendment defences, and noted the decision was not merely to ensure compensation for the performer; rather, it was to provide an economic incentive for him to make the investment required to produce a performance of interest to the public.

Further famous cases include:

- *Midler v. Ford Motor Co and Waits v. Frito-Lay, Inc.* where both involved similar fact patterns in that both Bette Midler and Tom Waits declined to lend their distinctive voices to advertising jingles for two prominent manufacturers, who then proceeded to find sound-alike performers who could duplicate the vocal timbre and styling of Bette Midler and Tom Waits, both who eventually prevailed on right of publicity claims;
- *White v. Samsung Electronics America, Inc.* where Samsung utilised a robot that looked and acted like Vanna White, which was deemed an infringement because Samsung had deliberately pawned the image and popularity of White and because White was readily identifiable from the context of the use; and
- *Motschenbacher v. R.J. Reynolds Tobacco Co.* where it was significant in that the case did

not involve the name or image of a famous individual being implicated, but rather involved an advertising use of a distinctive race car that was identifiable as belong to a specific driver, which was deemed infringing because of the unequivocal association that the public could make between the phrase and the car, and the famous individual associated.

Conclusion

Relative to other forms of intellectual property protection, the right of publicity is still in its infancy, especially in China and Australia. While the laws of different 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. Therefore, the use of a celebrity's name, image or likeness in any commercial endeavour should be carefully scrutinised to ensure compliance with the applicable publicity laws.