

Two sides of the same coin

While the idea of image rights is relatively young, Russia has developed a clear approach to publicity and related rights

The idea of image rights is relatively young. The term 'publicity rights' was allegedly coined by US judge Jerome Frank in 1953 during one of the first cases of its kind to be examined by a court.

An awareness of these rights reached Russia several years later. Article 514 of the Civil Code 1964 addressed the right of a person to allow his or her image to be published in the media. At that time, the provision had little to do with the commercial aspects of image rights; its main consideration was to safeguard an individual from the unauthorised public display of his or her image. In 2007 Article 514 was amended and expanded to Article 152.1. The essence of Article 514 was retained in Article 152.1, although its scope was expanded considerably.

This law did not distinguish between the commercial and non-commercial exploitation of an individual's image; however, the commercial aspect soon became obvious. By then, advertising was big business, with strong competition in the market. Celebrities and other well-known individuals were keen to earn money by being portrayed on television and billboards.

The other purpose of this provision (ie, to safeguard a person from the unauthorised public display of his or her image) remains important, but has yielded some ground to the commercial element. Images can be used for commercial purposes only with the permission of the portrayed person. Non-commercial use seems to be unauthorised in all cases, in that it always occurs against the will of the depicted person.

There is only one limitation to an individual's image rights. A person cannot prohibit the display of his or her image if this is done in the interests of the state or the public, or in a public place. The law does

not clarify what constitutes state or public interests. A past Supreme Court ruling explained that state or public interests exist where there is a threat to the state or where there is some public demand which can be met by displaying the image. Cases where such interests exist shall be examined and decided in court should a conflict arise.

Taking pictures of a person in a public place is permitted if the person's image is not the main component of the picture. In other words, the portrayal of the person should not dominate the picture. Such cases are perhaps the least clear cut. For example, if a person's image were captured by a photographer at a public gathering (eg, an event at a club) and the picture found its way into the media, the portrayed person would need to obtain an expert opinion before making a claim. It is possible that the purpose of the picture was to show the event or the venue interior, and that the person's image comprises only a minor detail of the picture. However, if the person's image attracts attention, one may assume that the picture was taken with the specific aim of attracting more visitors to the venue. In such cases, the affected person may claim compensation or demand that use of the image be discontinued.

The consent of the person portrayed is not required if the person agreed to be pictured in exchange for payment. In such circumstances, a contract should be executed between the parties.

Russian law considers image rights as belonging to the domain of non-material rights (ie, personality rights being beyond the scope of proprietary rights). This conclusion is supported by the following:

- Article 152.1 is contained in the section of the Civil Code entitled "Non-material values and their protection", which indicates the nature of image rights; and

- The Supreme Court and Supreme Commercial Court unambiguously stated in their ruling of Plenary Session 29, dated March 26 2009, that the image rights named in Article 152.1 do not fall within the scope of the exclusive rights established in Part IV of the Civil Code, which covers the rights to the results of IP-related activity and means of individualisation. This statement, though correct, is not exhaustive.

Even though images concern non-material rights, a published image may lead to material rights. Images of famous people are often used to advertise products, which directly points to the commercial use of a person's image rights. There are a few cases in Russian judicial practice involving the violation of image rights. In one of these cases, an actor entered into a contract with an advertising agency to advertise the services of a bank. The contract set strict limitations on the use of the actor's image. According to the contract, the actor had approval over the pictures taken during the photo session in order to eliminate any pictures that he considered to be inappropriate. Other contractual limitations included a list of cities where the advertisements were approved to be placed. There was a special proviso in the contract that the pictures could not be used in Moscow or St Petersburg – something that the advertisement agency had guaranteed. All of the provisions of the contract were violated. Consequently, the actor initiated a court action.

These types of conflict are on the rise as product endorsement increases. Sometimes pictures of a young person (eg, a fashion model) are taken on the promise of concluding a contract after the fact, but are then used indiscriminately, taking

advantage of the person's naivety and lack of experience.

If a person poses for pictures in exchange for payment, it is assumed that he or she concluded a contract and that his or her rights can be protected by initiating a court action in connection with the breached contract.

If an individual's image rights were violated by way of the unauthorised use of a picture, the main recourse available is to file court proceedings for the protection of that person's business reputation and dignity and compensation for moral damages.

A new phenomenon which has recently emerged is the unauthorised placement of images on the Internet. It is possible to contest such practices, but it is not easy. A court action would be most appropriate in such circumstances. [WTR](#)



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