

Turkey

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How to protect your most valuable rights: publicity and image

With millions of images shared online every day, striking a balance between the rights of the individual and freedom of expression is a complex task. Thankfully, various regulations can offer protection in the absence of specific publicity and image rights

Over the past two decades, the Internet and social media have transformed daily habits. While the benefits of these platforms cannot be underestimated, personal rights have become significantly easier to violate and the effects of infringement have become much more harmful. As a result, we need a more effective system for protecting publicity and image rights in the digital domain.

Principal legislation

Publicity and image rights have been described by various courts as the rights over all legal, physical and spiritual assets that an individual would find worthy of protection and cannot be disseminated without their consent. Thus, such rights can be defined under the umbrella term ‘personality rights’ and various regulations can be applied to help protect these.

Trademark Law

Although the Industrial Property Code (6769) makes no specific provision for publicity rights, its definition of ‘trademarks’ includes names. Therefore, most celebrities register their names as trademarks to prevent potential misuse. However, a trademark must have a distinctive function in order to be registrable. Therefore, while the names, portraits or other image rights of celebrities may meet such criteria, those of ordinary people are less likely to.

Alternatively, Article 6/6 of Industrial Property Code prescribes that a trademark application that contains a personal name, trade name, photograph, copyright or any other IP right will be rejected upon objection of the genuine rights holder. Thus, individuals can oppose and prevent the registration of a sign that refers to their publicity and image rights. Indeed,

the Turkish Trademark and Patent Office recently rejected a trademark application that included the portrait of famous painter Frida Kahlo based on Article 6/6.

Copyright Law – unfair competition rules

The Copyright Code provides various methods for an individual to protect against third-party use of their publicity rights for the purposes of advertising, business or activities of a similar nature. These protections extend broadly from the core of an individual’s identity to tangential elements that they may seek to protect (eg, their name, nickname, former name, pseudonym, voice, image or portrait).

According to Articles 84 and 86 of the Copyright Code, a sign, picture, sound, painting, portrait or photograph of a person cannot be used by a third party without the individual’s consent or within 10 years of their death. Rights holders and their successors are entitled to oppose any third party that uses, transmits, duplicates or disseminates a sign, picture or sound, or any kind of photograph or portrait, which is not deemed to be an artwork for commercial gain.

The legal basis for this stems from the unfair competition rules, which are regulated under the Turkish Commercial Code (6102). Unlike the general rule to benefit from protection based on unfair competition, a copyright infringer does not have to be commercially motivated. For instance, the mother of a famous actor cannot use her son’s childhood videos without his consent.

However, the Copyright Code provides exceptions for images of individuals who play a role in Turkish political or popular culture; images of parades, official ceremonies or general meetings attended

by the depicted individual; and radio and film news and images of daily events.

Moreover, according to Article 30/I of the Copyright Code, images can be used during criminal proceedings or for judicial purposes by the courts and other official authorities without consent. Plus, images may be reproduced and disseminated by public authorities or those under their instruction without the consent of the owner for public safety or judicial purposes. For instance, a photograph of a suspect may be published in a newspaper upon the order of the public prosecutor.

Civil Law

Pursuant to Article 24 of the Civil Law: “Anyone whose personal right is attacked unlawfully might claim protection against those who attack.” For example, using an image for commercial or defamation purposes other than to give or receive information is deemed to be an infringement of the right of personality. In other words, any use of an image without the consent of the person whose right of personality has been violated, a superior private or public interest, or an authority granted by law is against the law. Article 24 provides the following four reasons as grounds for lawful use:

- consent of the rights holder;
- an outstanding special benefit;
- an outstanding public interest; or
- exercise of a power granted by the law.

Even when consent has been given by the person in question, it must be within the scope of Article 23 of the Civil Code – that is, it must be in accordance with the law and must not be against morality. Consent cannot be given to disclose all of a person’s secrets or the most intimate matters



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regarding their family life, nor should disclosures be detrimental to their honour, reputation or dignity. Such disclosures will be considered unlawful even where consent has been given; however, the judge may decrease the amount of compensation or refuse to award compensation at all. Lawsuits other than compensation cases (eg, for suspension, prevention or detection) are unaffected by the issue of consent and can be initiated by the rights holder regardless.

Publicity rights versus freedom of press

Another issue that the system faces is the need to balance the individual's right to privacy with freedom of expression. Although freedom of the press and freedom of speech are protected as fundamental rights under the Constitution, they are limited when a party capitalises off the use of someone else's image or off content that is detrimental to their honour, reputation and dignity.

In a court action filed against a newspaper, a top Turkish football club sought damages following the distribution of posters bearing a photograph of one of its footballers, which had been taken during championship celebrations. The court accepted the claim and ordered the newspaper to pay material damages for the unauthorised use of the footballer's picture, even though it had been taken by the newspaper itself, on the grounds that such images are protected under the Copyright Code and unfair competition rules when it comes to commercial use. On appeal, the court decided that although the press enjoys freedom of reporting and freedom of expression, and the public has the freedom to be informed and receive news, media outlets should pay the utmost attention and act in line with the principle of proportionality so as not to harm the personal rights or commercial values of others. The court stated that when evaluating this proportionality, issues such as the right of the public to receive news, the news value of the information presented, whether the news is up to date and contains accurate information, and the method for obtaining such information should all be considered. In this case, the image was found to be infringing because the poster was used for commercial purposes rather than to inform the public.

Remedies for breach of publicity

According to Article 25 of the Civil Law and Article 84 of the Copyright Code on unfair competition, rights holders may request the determination, prevention and suspension of an infringement of personality rights – mere negligence on the part of the infringer will not be an acceptable excuse for such actions. Rights holders may also request the correction of an infringing statement, with the correction made public.

In addition, according to Article 25/3 of the Civil Law, a rights holder can file suit on the grounds of acting without a proxy and request that any earnings gained from the infringement be paid to them, as well as claiming any monetary and non-pecuniary damages, if applicable.

To receive pecuniary damages, the claimant must have suffered a financial loss. For instance, if the wedding pictures of a celebrity are published without their consent, they could demand compensation of their material loss based on the fee that they would have been paid if they had a contract or based on the actual profit of the infringer – whichever is higher.

If such financial damage cannot be proven, no compensation will be awarded. For instance, if a statement is made or a sensational news article is published regarding a person's private life (which falls under family privacy and cannot be disclosed through the media even with the individual's consent), the individual can claim non-pecuniary damages but cannot

claim financial compensation as no material damage has been caused by the disclosure.

Rights holders are also entitled to file an invalidation action based on Article 6/6 of the Industrial Property Code if their name, photograph or likeness has been registered as a trademark by a third party without their consent. For instance, the Turkish IP Court invalidated the trademark registration for CHAPLIN and the invalidation decision was approved by the Court of Appeals based on image rights.

Criminal offences

Pursuant to Article 134 of the Criminal Law, anyone who violates the privacy of an individual will be sentenced to imprisonment of between one and three years. If the individual's privacy has been violated through the recording of images or sounds, the penalty will be increased by up to three years. Anyone who unlawfully discloses images or sounds of a person will be sentenced to imprisonment of between two and five years. The same penalty will be imposed in the event that such images or sounds are broadcast in the media.

All kinds of information regarding an identified or identifiable natural person are considered to be personal data and any person who unlawfully gives, spreads or seizes personal data will be sentenced to imprisonment of between two and four years according to Article 17 of the Law on the Protection of Personal Data and Article 135 of the Criminal Law. **WTR**