

Right of Publicity

Contributing editor
Rick Kurnit



2019

GETTING THE
DEAL THROUGH 

Right of Publicity 2019

Contributing editor

Rick Kurnit

Frankfurt Kurnit Klein & Selz PC

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Preface

Right of Publicity 2019

Ninth edition

Getting the Deal Through is delighted to publish the ninth edition of *Right of Publicity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 Brazil.

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.gettingthedealthrough.com.

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.

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 editor, Rick Kurnit of Frankfurt Kurnit Klein & Selz PC, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
September 2018

Austria

Isabella A Hoedl

Isabella A Hoedl

Sources of law

1 Is the right of publicity recognised?

Austrian law recognises the right of publicity. However, the right of publicity is not codified in just one article of Austrian law; rather, there exists a bundle of rights deriving from different national codes that can be invoked to defend one's right of publicity and the commercial appropriation of an individual's identity.

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

As a civil law jurisdiction, Austria's principal legal source is legislation, which is also interpreted by case law. Legislation and case law are influenced by the legislation of the EU and the case law of the European Court of Justice, as well as the European Court of Human Rights (ECHR).

Sections 16, 43 and 1330 of the Austrian Civil Code, section 78 of the Austrian Copyright Act and sections 6 to 8 of the Austrian Media Law are the essential legal grounds to claim the right of publicity. These sections of the law are supplemented by case law of the ECHR on the European Convention on Human Rights, in particular article 8, the 'right to respect for private and family life'.

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

The right of publicity (ie, claiming revocation, omission, abolition or removal, publication of judgment and, in the case of fault, compensation for damages, including lost profit and the restitution of immaterial damages) is enforced in the courts.

Depending on the basis for the legal claim, either civil courts or criminal courts are entitled to rule on the case. All claims based on the Civil Code and the Copyright Act are handled in civil courts, while all claims based on the Media Law are handled in criminal courts.

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

The right of publicity is recognised per se and enforced by direct application of the respective sections of the legislation mentioned in question 2. Since no entire code on the right of publicity exists, the different rules to enforce this right are spread across different national codes and cover, for instance, the Copyright Act, the Unfair Competition Act, the Austrian Civil Code and the Media Act.

Existence of right

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

The right of publicity applies to all aspects of an individual. The scope therefore covers pictures or photographs of the person, but also his or her voice, or any other special characteristics that are unique to the individual. However, under certain circumstances even a corporation is entitled to rely upon this right to defend its well-known name and likeness against unauthorised use.

Section 16 of the Civil Code constitutes the basic rule for personal rights and therefore also the right of publicity. Based on this general rule, additional rules were enacted to provide specific rules to rely upon if, for instance, the unauthorised use of a name or a photograph occurred.

Section 43 of the Civil Code regulates the right to use one's name. In addition to individuals, corporations and legal entities are entitled to rely upon section 43 to pursue the unauthorised use of their company name. Since sections 16 and 43 of the Civil Code (dating from 1811) still contain archaic language, the courts are continually challenged to interpret the original wording with case law, making these sections an applicable rule of law to rely upon today. In recent years, courts have construed these sections to include a violation of domain names and have, again, bridged the gap between centuries-old legal code and modern technology.

Section 78 of the national Copyright Act can only be invoked by individuals. This section of the law does not provide a legal basis for corporations or legal entities. Sections 6 to 8 of the Media Law can only be relied upon by individuals. A prerequisite for the invocation of these sections is the publication of a report or news coverage in a medium (newspaper, magazine, online, etc), and that this report or news coverage violated the personal rights of the individual who could be identified in the coverage by the public.

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

No. Generally there is no requirement of prior commercial use of their identity; the right exists independently of the commercial use.

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

Yes. The right of publicity can be claimed regardless of the nationality of an individual.

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?

There is no registration and, therefore, no registration fee payment is required for protection of the right. Also, no publication notice is required for the protection of the right.

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

The right of publicity continues to be protected after the right owner's death. The prerequisite for the continuing protection is that the legitimate interests of his or her relatives are affected. The law defines the term 'relatives' in section 77 of the Copyright Code as the right owner's spouse or significant other, as well as relatives, in ascending and descending line. The spouse or significant other and relatives in the ascending and descending line in the first degree are entitled to lifelong protection. Protection of all other relatives is limited to 10 years after the right owner's death.

Legitimate interests of the spouse, significant other or relatives are affected if, for instance, the publication of the photograph of the deceased means that his or her memory is disparaged.

There is no obligation to have had the right of publicity exercised while the individual was alive. The right of publicity is considered a personal right that neither requires registration nor prior use to be enforceable.

Ownership of right

10 Can the right be transferred? In what circumstances?

The right of publicity is considered to be a personal right, and therefore cannot be transferred from the rights holder to another person.

11 Can the right be licensed? In what circumstances?

If the name of a celebrity or a person of public interest could be registered as a trademark, a licence to use the trademark could be drafted. Based on trademark law, the extent of such licences could vary according to the scope of protection maintained by the rights holder.

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

Generally, the right of publicity cannot be sold. However, as laid out above, the right could be licensed as a trademark. Depending on the terms of the licensing contract of the trademark, the licensee might be entitled to sue for infringement on behalf of the licensor.

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?

Even though post-mortem rights are recognised in the law, the right itself cannot be inherited. Rather, the right owner's spouse or significant other, as well as his or her relatives, are entitled to enforce the right if their legitimate interests, or the legitimate interests of the original right owner, are violated (this could be the case, for instance, if the right owner had, during his or her lifetime, not given permission for the use of his or her photograph in connection with an advertising campaign or for the publication of the photograph, which affects the legitimate interests of the remaining relatives).

The right to enforce the post-mortem right of publicity is explicitly limited to the relatives, even if they are not heirs to the estate of the deceased. Alternatively, an heir who is not a relative to the deceased is under no circumstances entitled to enforce the post-mortem right of publicity.

The right cannot be enforced under a contract by an assignee and cannot be left to an entity.

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

The right of publicity is considered a personal right that is, like the right to freedom, generally awarded to every individual at the time of birth. Since celebrity status is obviously acquired over the passage of time, the right of a celebrity to control the use of his or her photographs and likeness, etc, in advertising campaigns does require some prior action on the part of the individual. In other words, to claim the right of publicity, the celebrity must have achieved a status in which his or her position is generally known.

Since there is no requirement for registration of the right of publicity, there are also no additional requirements (other than actually being a celebrity or a person of public interest) to claim this right.

Infringement

15 What constitutes infringement of the right?

The right of publicity is considered to be infringed if, for instance, the owner of the right has not given his or her prior consent to the commercial use of his or her photograph or picture, name, voice or any other particular characteristic that would enable the public to recognise the respective individual, and if, for example, the publication of that individual's picture or photograph violates his or her legitimate interest.

In one case, the Austrian Supreme Court held that a violation of the right to use one's photograph exists, even though the facial expressions of that individual were not recognisable (Austrian Supreme Court 4 Ob 5/89). It was held that, even though the facial expressions might have been made unrecognisable, there were sufficient additional elements that enabled the public to recognise the celebrity.

Even the use of a photograph showing the individual from behind can make it possible for the public to recognise the person owing to certain particularities shown in the photograph. In other words, merely putting a blank over the individual's eyes, for example, does not make the individual unrecognisable; a particular hairstyle or posture can

provide the public with the necessary information to identify the celebrity (Austrian Supreme Court 4 Ob 5/89).

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

None are excluded.

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

No. Generally, no intent is necessary to find an infringement of the right.

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. In fact, a decision handed down in March 2016 held a media-publishing agency liable for reusing photographs that were published on Facebook. The plaintiff in this case publicly posted her own photograph on Facebook. The defendant, a media-publishing agency, used the photograph and published it on its website without copyright notice. Additionally, the defendant used the photograph in a manipulated form in a video, suggesting in the accompanying text the plaintiff's particular sexual orientation.

The court explicitly held that the mere publishing of one's photograph on Facebook does not include the person's consent to use that photograph in another medium – in other words, the unauthorised republishing of the photograph was not permitted.

Remedies

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

The owner of the right of publicity has several remedies available against the infringer of his or her right, depending on what legal grounds he or she decides to use.

If the claim is based on the Civil Code, the Copyright Act, or both, the rights owner can claim omission, abolishment, publication of judgment and, in the case of fault, the payment of damages, including the payment of immaterial damages.

Monetary damages are available if the economic interests of a celebrity were violated, and can be claimed on the basis of section 1041 of the Civil Code if the degree of popularity of the celebrity has reached a monetary value and this value was taken advantage of without prior permission.

It is also possible to request the rendering of accounts to properly prepare a claim for monetary damages. Once the defendant has rendered its accounts, the plaintiff can then prepare or adapt its claim for monetary damages more accurately.

If the claim is based on the Media Law, the owner of the right is entitled to claim monetary compensation for the humiliation suffered in the course of newspaper coverage. The monetary damages are supposed to cover the immaterial damage (ie, the libel) that occurred with the coverage in the media. On the one hand, the Media Law sets certain caps for the amounts of monetary damages that can be awarded in these proceedings, and on the other, it requests the court to take the actual facts (eg, the publication volume of the medium, the extent and amount of distributed samples and the economic existence of the owner of the respective medium) into consideration when setting the monetary damages amount. The amounts set by the Law range from €20,000 to €100,000, depending on the severity of the violation and the impact on the individual, the geographic scope of the publication and all the general facts of the case.

While the Law gives the courts broad scope for awarding monetary damages, case law to date has shown that judges rarely award the highest amount of damages.

20 Is there a time limit for seeking remedies?

More than one provision exists for the protection of the right of publicity. The time limit depends on the law or one of three codes that a party

can base its claim upon. Since all three codes base the time limits on specific factors, only a general overview of the time limits can be given.

The Civil Code provides for time limits that vary from one year (eg, slander and libel) to three years (eg, actual physical attacks), depending on the conduct and the underlying facts.

The Copyright Act provides for time limits varying from three years (eg, monetary compensation) to 30 years (eg, omission and abolition).

According to section 32 of the Media Law, the time limit for seeking relief under the Law is one year after the distribution of the coverage media. For offences that are punishable with more than three years' imprisonment, the Law provides a three-year statute of limitations, also starting with the distribution of the coverage media.

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

If the plaintiff wins the proceeding in its entirety, attorneys' fees and costs can be recovered in their entirety from the losing party. The calculation of the fees and costs to be recovered is based on the Austrian Attorneys' Tariff (which sets the limits for every individual writ, court session, appeal, etc).

If the plaintiff loses, the defendant is entitled to claim the compensation of its attorneys' fees and costs in its entirety, based again on the limits set in the Attorneys' Tariff.

If there is a partial win and a partial loss, the fees and costs are counter-calculated according to the actual winning or losing percentage of each party. In this case, each party may have to bear its own costs with no compensation being recoverable from the other side.

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

As a general rule, there are no punitive damages available under Austrian law.

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

Preliminary relief is available, the measure in the preliminary proceeding being the issuance of a preliminary injunction to bar the defendant from the continuing unauthorised conduct or use of the celebrity's name, picture and so on. No request for monetary compensation is granted in preliminary proceedings. In addition, no request that would induce an irreversible status for the defendant will be granted in preliminary proceedings, on the grounds that the preliminary proceeding is supposed to be a fast-track proceeding to provide the plaintiff with virtually instant relief from the unauthorised conduct of the defendant. If, however, the main proceeding would result in a different outcome, the preliminary measure needs to be lifted immediately, which could not happen if permanent changes had been ordered.

24 What are the measures of damages?

The different measures of damages depend on the actual claim that was filed.

If the claim was based on the Civil Code or the Copyright Act, then monetary damages will be calculated on the actual damage caused, which could be the value of the licence, which a legitimate licensee would have paid. In either case, monetary damages can only be claimed if the degree of popularity of the celebrity had reached a monetary value and this value was taken advantage of without prior permission.

If, on the other hand, the claim was based on the Media Law, this code itself sets caps to the maximum of the recoverable monetary amounts, ranging from €20,000 to €100,000.

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

A case of notable interest was adjudicated by the Austrian Supreme Court at the end of 2014. In this instance, the Unfair Competition Act was relevant because the two parties involved were media owners. The plaintiff claimed that a preliminary injunction should be issued against the defendant because of the defendant's illegitimate use of photographs showing the Austrian ski stars Manuel Hirscher and Anna Fenninger on the defendant publication's front page, without getting prior permission to do so. The plaintiff was the owner of the *Kronen Zeitung* newspaper; the defendant the owner of the *Österreich* newspaper. The parties were competitors. The plaintiff claimed that the defendant gained an unfair

Update and trends

The impact of the new General Data Protection Regulation (EU) 2016/679 for the right-of-publicity sector will become clear in the coming years. At this time, the use of photographs, in particular, has experienced a new wave of consent requirements, with professional photographers attempting to comply with the new rules. The full impact of the data protection regulation will be seen in due course. However, the regulations may not simplify legal matters causing judges to struggle, for example, on how to decide who can close, or dispose of, a social-media account belonging to a deceased person, leaving the issue of personality rights put on hold.

advantage over other media owners by using the photographs of the ski stars on the cover page to encourage customers to buy the newspaper, without paying royalties for the photographs and without obtaining permission from the Austrian Ski Association, which represents all skiers on the Austrian ski team in all matters.

The court of first instance granted the injunction, stating that the unauthorised use of photographs of well-known persons constitutes a violation of section 78 of the Copyright Act. A professional journalist must follow the professional code of conduct when researching photographs for his or her article and advertising purposes that benefits the newspaper itself. It is a generally accepted standard that all rights have to be secured contractually prior to use for advertising purposes. The commercial use of photographs without prior consent of the depicted person constitutes a violation of section 1 of the Unfair Competition Act.

The court of second instance dismissed the request for issuing a preliminary injunction, stating that the plaintiff did not present an exclusive right to use with regard to the photographs in question. It was not proven that the athletes had actually transferred their rights to the Austrian Ski Association and therefore the athletes should be the ones filing a lawsuit against the defendant, claiming either injunctive relief or any other legal remedy of their choice. The court held that granting injunctive relief for a competitor on the basis of the Unfair Competition Act, without proof that the plaintiff had permission from the athletes to prosecute their rights, would violate the athletes' personal rights of publicity and their choice on how to proceed against such unauthorised use.

The Austrian Supreme Court solved this issue by granting injunctive relief and distinguishing clearly between the Unfair Competition Act and the Copyright Act. It stated that the cited professional code of conduct when researching materials for an article must be observed by journalists under all circumstances. It is important to note that prominent athletes have no interest in their images being used without compensation to promote a newspaper's sales figures. There exists no public interest that outweighs the interest of the athletes. *Österreich's* self-promoting use of the pictures was therefore in violation of the journalist's professional code of conduct and caused the defendant to gain an unfair advantage over competitors who adhere to this code. The plaintiff's claim was exclusively based on the Unfair Competition Act and not on the personal rights granted by the Copyright Act. The athletes themselves were in no way limited in their right to pursue this matter on the basis of a violation of copyright or any other provision for the protection of their publicity rights.

The Supreme Court even went so far as to state that the prior Supreme Court ruling, Case 4 Ob 20/08 g, did not apply in this particular matter. The prior ruling involved the infringement of the right of publicity and centred on the question of whether the use of the photograph of a politician for advertising purposes was legitimate, and whether a competitor of the media owner, and not the politician herself, could file a claim against this unauthorised use of the photograph. The court ruled that the use of the politician's photograph for advertising purposes was not impermissible, per se. Only when the legitimate interests of the person are violated is the right of publicity considered infringed (Case 4 Ob 20/08 g).

In the aforementioned case, the Supreme Court explicitly stated that professional skiers, in particular those on the Austrian ski team, have a high commercial value. The use of any marketing material associated with such athletes is heavily regulated and subject to many restrictions. Any unauthorised use of images or pictures of well-known athletes is not permitted and violates the right of publicity. However, the court stated that politicians are to be treated differently. They do not have a comparable market value, and therefore a politician's right

of publicity is only considered infringed if a legitimate interest of that person is violated.

Litigation

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

If the plaintiff bases its claim on the Civil Code, the Copyright Act, or both, the claim must be filed in a civil court. If the plaintiff bases its claim on the Media Law, the judges of the criminal court will rule upon the pending issue. Generally, a certain number of judges in civil courts as well as criminal courts handle issues arising out of, or in connection with, right of publicity issues. The proceedings differ from a normal suit to a certain degree, since the burden of proof varies according to the different legal claims.

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

All disputes in connection with the right of publicity are decided by a judge. If the litigation value exceeds €50,000, a party can request that a panel of judges hear the issue and rule on it. There is no jury trial for civil matters in Austria.

28 How is the choice of applicable law determined?

The applicable law will be determined by the place where the infringement occurred.

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?

Even though the case law of other courts of the same or a lower level are not binding for the deciding judge, the deciding judge might still consider the opinions of fellow judges. However, this can cause a split between the different court districts, paving the way for a legal issue to be heard by the Austrian Supreme Court. Rulings of the Austrian Supreme Court are binding on the lower courts.

The rulings of the European Court of Justice and the European Court of First Instance are also binding. The national courts must abide by the interpretation and the rulings these courts have issued.

Additionally, the rulings of the ECHR have greatly influenced the national jurisprudence on media law.

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

Appeals are available in preliminary injunction proceedings as well as in main proceedings. Besides the formal requirements of timely filing and payment of a fee, which is calculated on the litigation value of the proceedings, there are also general requirements laid out in the rules of civil procedure and the rules of criminal procedure.

Generally, if the regional court rules in the first instance, the appeal is filed against its decision and is heard by the appellate court.

Moreover, there is also the possibility to file an appeal against the decision of the appellate court, which will be heard by the Austrian Supreme Court. In order to manage its caseload, the Austrian Supreme Court is split into multiple senates that will hear cases according to their area of speciality. Admission of an appeal to the Supreme Court must not be automatically granted. In some cases, the appellate court restricts the access, making it necessary for the respective party filing the appeal to argue its admissibility as well as the legal grounds for its appeal. The Supreme Court then rules on the admissibility of the appeal first and, only after granting its permission, asks the other party to submit a writ in defence.

In all proceedings (preliminary and main) the case will be heard by the same judges or senate. This means that a case that went all the way to the Supreme Court in the preliminary proceeding will be heard by the same judge, panel of judges or senate in the main proceeding. If the Supreme Court ruled on this issue in the preliminary proceeding, the courts of first and second instance will be bound by its ruling and are supposed to issue their opinion according to the ruling of the Supreme Court.

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

The average time frame for a preliminary injunction proceeding, in which appeals are filed all the way to the Supreme Court, is a minimum of six to eight months. The main proceedings take longer, and it also depends on whether the appellate court remands the case back to the first instance, which could happen more than once. Even if the case proceeds from the first to the second instance and then is heard by the Supreme Court, the average time frame will still cover one year.

Since no time limit exists for courts to rule in a particular case, it is difficult to predict an exact time frame. Depending on the individual judge's workload, the time frame might vary significantly.

The Austrian attorneys' guidelines on fees provides that all disputes involving intellectual property matters should have a litigation value of €43,200. It is possible to base a claim on a higher litigation value, if necessary. Lowering the litigation value below €30,000 is not recommended, since a litigation value below this amount would limit the right to file an appeal with the Supreme Court. Based on the litigation value, recuperation of attorneys' fees is calculated according to the Austrian Attorneys' Tariff.

Based on this litigation value, the average cost for a preliminary proceeding, and a main proceeding amounts to between €25,000 and €30,000.

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