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THE NEW PRIVACY LAW, WHICH CAME INTO EFFECT IN 2006, ENHANCES THE PROTECTION OF THE RIGHTS TO PRIVACY AND PUBLICITY UNDER THE FEDERAL CIVIL CODE AND THE COPYRIGHT LAW

Traditionally, the protection of names and images has been an important part of IP law in Mexico. Trademark and unfair competition law protect names and designs (including the names and likenesses of individuals) used as trademarks or service marks, or other trade symbols. Similarly, copyright law protects works of authorship, as well as the name of the persons who authored the works (moral rights of paternity). However, trademark and copyright law do not explore issues relating to the names and likenesses of individuals that go beyond the limits dictated by the general principles of IP law.

LEGISLATION

In Mexico, the Federal Civil Code protects the right to privacy. The code provides remedies against moral damage suffered by an individual as a result of illicit acts affecting his or her “sentiments, affections, beliefs, decorum, honour, reputation, private life, configuration or physical aspects, or the opinion that others have of [him or her]”. A defendant that is found liable for moral damages must indemnify the plaintiff, whether or not the defendant is also found liable for objective, contractual or extra-contractual damages.

In addition, the Copyright Law provides for a limited right of publicity – generally called the right of image – which protects the physical likeness of individuals, as

captured in photographs, paintings or drawings. In accordance with the law, all individuals (not just celebrities) can oppose the use of their image. This right is patrimonial in nature; it can be assigned to third parties or disposed of. Curiously, the law does not define the terms of protection of this right and does not seem to provide any time limits. However, the law provides for an administrative cause of action against unauthorized use of an individual's image. Even though the term 'image' is not defined, the law suggests that the word 'image' means 'portrait'.

CASE LAW

The courts have considered the issue of moral damage under the Federal Civil Code, as well as the right of image under the Copyright Law. In *Solís v Radiomovil Dipsa SA de CV* (Case 642/99), the plaintiff was hired by the defendant to record four short phrases for use as instructions or commands in connection with mobile phones. The plaintiff later filed a civil action against the defendant seeking \$5 million in damages based on:

- the performing artist's rights under the Copyright Law; and
- the moral damage provision of the Federal Civil Code.

The plaintiff requested the payment of royalties for the public performance of her vocal 'interpretations'. In addition, the plaintiff argued that the defendant had used the recordings of her voice in an attempt to exploit her personal rights under the Federal Civil Code. The court ruled in favour of the defendant on the following grounds, among others:

- The phrases recorded by the plaintiff were not a work of authorship within the meaning of the Copyright Law. Therefore, the plaintiff was not considered to be an artist.
- Even assuming that the plaintiff was the performer of a work, she received full consideration for the services rendered.
- The plaintiff was unable to show that, by using the recordings of her voice, the defendant had infringed her moral rights.

NEW PRIVACY LAW

The federal district's local congress passed legislation to protect the personalities and likenesses of individuals, effective as of 2006. The new statute is entitled the Law on Civil Liability for the Protection of the Right to Private Life, Honour and Image in the Federal District (the Privacy Law). The statute introduced a systematized set of norms to protect the names, images, honour and intimacy of individuals, thereby improving the existing regime under the Federal Civil Code.

The Privacy Law aims to strike a balance between privacy and personality rights on the one hand, and the freedom of speech, the right to information and the right to inform on the other. Personality rights include:

- the right to privacy, honour and likeness (which applies to individuals residing in the federal district); and
- the right to keep one's private life secret.

Personality rights apply mainly to individuals, but have also been found to apply to corporations in certain cases.

The right to privacy is closely associated with the notion of 'private life'. Under the law, 'private life' refers to all activities that are not destined to be public and that have no direct impact on society. Third parties should not have access to the sphere of privacy of individuals (in particular, their families, domiciles, possessions and activities performed in private). The right to intimacy, which is linked to the right to privacy, protects activities carried out in private. Under the law, it is prohibited to publish private data without consent or by illegal means. The Privacy Law introduced the concept of 'honour', which is very technical and difficult to apply in practice. The law defines 'honour' as the evaluation of an individual's socio-ethnic status based on his or her reputation or fame. The notion of honour also includes the individual's 'estimable feelings'.

Under the law, the publication of disparaging or offensive information is allowed in the context of literary, artistic, scientific or professional criticism, or when such publication is necessary to comply with a duty or to enforce a right, provided that such information is not published for offensive purposes.

However, the law prohibits the publication of insulting or insidious information that causes unjustified damage to the honour or dignity of a person.

In contrast to the Copyright Law, the Privacy Law protects a person's likeness or image from a personal standpoint. 'Likeness' is defined as the reproduction in a tangible medium of a person's identifiable physical features. Under the law, individuals have rights over their own image and, accordingly, may authorize or prohibit the 'fixation' or 'divulgence' of their image. 'Tangible media' include films, pictures and photographs. An individual whose image has been published without his or her consent, thereby damaging his or her reputation, may file suit before the competent local court in the federal district in order to obtain:

- the cessation of the abusive or unfair practice; and
- an award of damages.

However, the law does not protect:

- celebrities pictured during public ceremonies or events, in places that are open to the public or on occasions that are of public interest;
- celebrities whose likenesses are used in cartoons and sketches, among other things, in accordance with 'social usage' (this concept is ambiguous and is not defined in the statute); and
- individuals who appear by accident in pictures of a public event or in the news.

An individual whose rights have been infringed may file a judicial action seeking moral damages. The plaintiff has the burden of proving infringement and, accordingly, must show that:

- his or her rights under the Privacy Law have been infringed;
- such infringement has resulted from an illicit act; and
- there is a causal relationship between both events.

The court will assess:

- the acts allegedly committed by the defendant;
- the personal conditions of the plaintiff (eg, age and social status); and
- the intent to inflict damage.

Such actions must be filed within two years of the date on which the violation occurred. If found guilty, the defendant will be required to publish the decision and bear the costs of the plaintiff. The medium in which the court's decision is published must be the same as that in which the infringing information was communicated.

If it is not possible to publish the decision, the court will order the defendant to pay a fine not exceeding \$1,600. Should the offence be repeated or continue, the court may impose a further fine of up to an additional 50%. Breach of the Privacy Law cannot be punished with imprisonment.

First-instance court decisions may be appealed. Appeal decisions may also be appealed by virtue of an *amparo* claim (ie, a constitutional proceeding intended to protect a citizen's constitutional rights).

Chapter III of the Privacy Law sets forth rules for public servants, who are not entitled to rely on the rights provided by the law, unless they can demonstrate the existence of 'effective malice' on the part of the defendant. However, the law does not define this concept, merely stating that 'effective malice' occurs where:

- the defendant knowingly disclosed false information;
- the defendant disclosed information without checking whether it was true or false; or
- the defendant disclosed information with the sole purpose of causing harm or damage.

The legislature included this exemption on the grounds that the activities of public servants are carried out mainly in public places and are of public interest.

CONCLUSION

Despite its limitations, the Privacy Law has improved the former civil law regime. The civil law theory of 'moral damage' has been enhanced by a new set of legal rules which impose certain restrictions on the right to free speech. The Privacy Law also helps to differentiate between the use of an individual's likeness from a personal and from a commercial angle, the latter being governed by the provisions of the Copyright Law. However, the legislature must now address the inconsistencies and ambiguities of the publicity rights system under the Copyright Law.