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Effective from May 20 2006, the Federal District's local congress (the Federal District of Mexico comprises part of Mexico City's metropolitan area) passed legislation to protect the human personality and likeness. The statute was entitled Law of Civil Liability for the Protection of the Right to Private Life, Honour and Image in the Federal District (the Privacy Law). The purpose of the statute was to introduce a systematized set of norms addressing the name, image, honour and intimacy of persons, improving the existing regime of the Federal Civil Code.

BEYOND TRADE MARK AND COPYRIGHT LAW

By tradition, names and images have been an important subject matter of IP law. In keeping with this, trade mark and unfair competition laws have protected names and designs, including names of flesh and bone persons or their likenesses, used as trade or service marks or other trade symbols. Similarly, copyright law has protected titles of works-of-authorship and the names of persons authoring the works (the moral right of paternity). However, neither trade mark nor copyright laws have explored issues with reference to the name or likeness of people that would go beyond the limits dictated by the general principles of IP law.

In Mexico, Article 1916 of the Federal Civil Code protects the right of privacy. The rule states a remedy against the "moral damage" for the harm inflicted to persons, triggered by illicit acts, affecting the "sentiments, affections, beliefs, décor, honour, reputation, private life, configuration, or physical aspects or the consideration that others have of that person". Defendants that are responsible for moral damage are required to indemnify the plaintiffs in monetary terms, whether or not they have also been the subjects of objective liability, contractual or extra-contractual. Article 1916 was conceived to foster values that are inherent to human personality and that cannot prescribe, be renounced

or placed in commerce. On the other hand, the Copyright Law stipulates a limited publicity right in article 87, generally called the “right of image”, that would shield persons’ physical likeness as captured in portraits (photographs, paintings or drawings). In accordance with Article 87, common people – not just celebrities – can oppose the publication of their portraits or their use in general. The right is patrimonial in nature and can be assigned to third parties or can generally be disposed of. Curiously, the law does not define a term of protection and seems to be indefinite in time. Article 231 (II) of the Copyright Law provides an administrative cause of action against the non-authorized use of the “image” of a person and although the term was not defined, it appears that the law understands the meaning of the word “image” to mean “portrait”.

Courts have rendered some precedents regarding the “moral damage” remedy of the Civil Code as well as the “image” right of the Copyright Law. In *Patricia Álvarez Solís v Radiomovil Dipsa, SA de CV Exp 642/99, Juicio Ordinario Civil, Juzgado 39 Civil, Secretaría “B”*, a lady hired by the defendant to record four short phrases for use as instructions or commands in connection with mobile phones filed a civil damages action for \$5 million, based on performing artist rights in the Copyright Law and the moral damage provision of the Civil Code. The plaintiff claimed royalties for the public performance that the defendant was making of her fixed vocal “interpretations”. Likewise, the plaintiff argued that the defendant used her voice in an attempt to exploit the personal rights envisaged by the Civil Code, thus producing a moral damage. The Court decided in favour of the defendant, considering among other substantive factors that: 1) the phrases that the plaintiff had recorded were not a work-of-authorship in terms of the Copyright Law – they were rather functional language – and that she had not been an artist as a result; 2) even assuming that the plaintiff was the performer of a work she would have acted under agreement and received full consideration for the services that she rendered; and 3) the plaintiff was unable to show that by using the recordings of her voice the defendant had perpetrated illicit acts and thus infringed her moral rights.

The Privacy Law searches for a balance between privacy and personality rights and freedom of speech, right to information and right to inform (Articles 1, 4 and 8). Personality rights are the moral patrimony of persons including, on the one hand, rights of privacy, to the honour and the likeness of individuals – residing in the Federal District – and on the other hand, the affection that people have for others, their affection for particular goods as well as the right to

keep secret their private life (Article 3). Personality rights are recognized in favour of individuals principally, although they have been also recognized for corporations, where applicable (Article 6).

CONTENT OF THE PRIVACY LAW

The right of privacy is closely associated with the notion of private life. And by private life the law understands everything that is not destined for public activities and that has no direct impact on society. Third parties should not have access to people's sphere of privacy and, in particular, to their family, domicile, papers, possessions or the activities that they perform in private places. The right to intimacy is another concept that the statute employs in connection with the right of privacy, to protect activities in a private environment and ensure that the person performing them does not disclose them. Private data is protected if published without consent or by illegal means in general (Articles 9 to 12).

The Privacy Law provides a concept of honour that is very technical and that will be hard to be reduced in practice. The law has defined it as the values that people have of other individuals, in social-ethical terms, comprising their good reputation and fame. The notion of honour also includes the estimation or "estimable feelings" that individuals have of their own (Article 13). Information shall not be disparaging, offensive or generally made in an attempt to impugn the honour or dignity of a person, despite being hurting, if it was rendered for literary, artistic, scientific or professional criticism or submitted in compliance of a duty or when enforcing a right, provided that it was not made for an offensive purpose. On the contrary, the law has included language against speech that is based on insulting or insidious information causing unjustified damage to the honour or dignity of any person.

Unlike the Copyright Law, the Privacy Law protects a person's "likeness" or "image" from a personal standpoint. Likeness has been defined as the reproduction over a tangible medium of a person's physical features that are identifiable (Article 16). Every person has rights over his/her own image and accordingly, shall be entitled to authorize or prohibit the "fixation" or "divulgation" (*sic*) of his/her image (Articles 16 to 19). The foregoing prohibitions will encompass reproduction of a person's likeness in films, pictures, photographs or other media (Article 26). Anybody being affected in

his/her reputation by a publication made of his/her image without consent, shall have the right to bring a claim with the competent local court in the Federal District, requesting the cessation of abusive or unfair practice and the awarding of possible damages (Article 29).

As an exception to the right of image or likeness the law does not protect: 1) people that are celebrities for the public service that they render, the status they have reached in connection with their professional or artistic lives, provided that their image is fixed in public ceremonies or events, in places that are open to the public or occasions that are of public interest; 2) celebrities whose likeness has been captured in cartoons, sketches or other forms, in accordance with "social usage" (which is a rather ambiguous concept that the statute did not define); and 3) persons that appear by accident in pictures or in graphical information of a public event or news (Articles 19 and 21).

Infringement of any of the above-cited rights will produce a so-called moral damage and the person being victimized can start judicial actions. The plaintiff has the burden of proving infringement and accordingly has to show that: 1) he/she suffered violation of any of the rights that the Privacy Law protects in his/her favour; 2) the violation was triggered as the result of an illicit act, and 3) a cause-effect relationship exists between both events. Upon receiving the claim the court will assess the violations of the defendant, the personal conditions of the plaintiff (age, social status, public or private condition, among others) as well as the possible intent to inflict damage. The statute of limitations for an action of this kind will be two years, starting from the date when the violation was caused (Articles 35 to 38). As a remedy the law requires the defendant to publish the decision and bear the corresponding costs. The medium that the defendant uses for the publication of the court's decision shall be the same as that used to communicate the disruptive statements. If it is not possible to make a public publication, the court will impose monetary sanctions to compensate the plaintiff that in no event shall exceed \$1,600. If the offence is repeated or continues, the judge can impose new fines for an increased amount of up to an additional 50%. Sanctions derived from infractions of the Privacy Law cannot include prison (Articles 39 to 43). Court decisions can be contested by means of appeal and the appeal decisions still be taken to collegiate courts by virtue of *Amparo* constitutional claims (Article 44).

Chapter III of the Privacy Law imposes *ad hoc* rules for public servants, who are not entitled to enforce the rights provided in the law, unless they can

demonstrate that the defendant acted under “effective malice”. The law does not define this concept and instead states that “effective malice” exists where: 1) the information was disclosed by knowing that it was false; 2) the information was disclosed without thinking whether it was false or true; or 3) the infringement was perpetrated with the sole purpose to trigger harm or damage (Articles 28 to 34). The legislator inserted the limitation rule for public servants since most of the activities that they perform occur in public places and are of public interest and since they can produce an impact on society.

CLARIFICATION STILL NEEDED

In conclusion, the Privacy Law, despite being limited in jurisdictional terms, has brought improvement to the pre-existing civil law regime of privacy and personality rights. The civil theory of moral damage has been largely enriched by a set of focused legal rules, referenced to the principles and notions dealing with the moral patrimony of persons and that have the mission to impose certain restrictions on the right of free speech. The Privacy Law will also be beneficial to clearly draw a line that divides people’s likeness from a personal and commercial angle, this latter reserved to the provisions set in the Copyright Law. However, the incipient publicity rights system of the Copyright Law will now require thorough analysis, to fix the various inconsistencies and ambiguities in portrait and image rights and the resulting enforcement provisions.