



# Right of Publicity

in 22 jurisdictions worldwide

# 2013

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# Japan

**Chie Kasahara**

Atsumi & Sakai

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## Sources of law

**1** Is the right of publicity recognised?

Yes.

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

There is no statutory source for the right of publicity. The right of publicity is recognised through judicial precedents.

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

The right is enforced in the form of an injunction, compensation and collection of the infringing goods.

District courts, high courts and the Supreme Court have jurisdiction.

If the dispute relates to civil intellectual property within the jurisdiction of the Tokyo High Court, then the Intellectual High Court, established in April 2005 as a special branch of the Tokyo High Court, would hear the case at second instance.

**4** Is the right recognised per se, or by reference to other laws?

The right is recognised by reference to the Constitution, the Civil Code, the Copyright Act, or a combination of the three.

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## Existence of right

**5** Who has or is entitled to the right of publicity?

Persons of distinction or celebrities such as actors, sportspersons, singers or performers are entitled to the right of publicity.

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

No; it is not always necessary for individuals to commercialise their identity to have a protectable right of publicity.

**7** Can a foreign citizen have a protectable right of publicity?

Yes. For example, the following have all successfully asserted their publicity rights in Japan:

- Mark Lester (Tokyo District Court, 26 June 1976);
- Steve McQueen (Tokyo District Court, 2 October 1981);
- King Crimson (Tokyo District Court, 21 January 1998 and Tokyo High Court, 24 February 1999); and
- Bae Yong Joon (Tokyo District Court, 21 October 2010).

**8** What is protected under the right of publicity?

Names, likenesses and signatures may be protected.

However, there is no judicial precedent or academic opinion regarding the protection of a person's voice or persona, so these may not be protected.

**9** Is registration required for protection of the right? If so, what is the procedure and what are the fees for registration?

No.

**10** Does the existence, or the extent, of the right depend on where the individual lives or has lived?

No. So long as the person who asserts the right of publicity can put a financial value on his or her presence, then the right may be protected under Japanese law. Foreign judgments or arbitral awards, or both, that are not against the public policy limitations of the Civil Code may be enforced in Japan via the prescribed procedure. On the other hand, some foreign judgments may not be enforced. For instance, since there is no concept of punitive damages in Japan, a punitive damages award rendered in the US is not enforceable in Japan.

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## Ownership of right

**11** Can the right be transferred? In what circumstances?

Yes. Many actors and singers enter into management agreements with agents or entertainment production companies that provide management, and the right is transferred to such agents or companies in accordance with the management agreement.

Transferability of publicity rights is in fact currently a topic of debate. However, on 25 February 2008 the Intellectual Property High Court at least partially admitted transferability of publicity rights in relation to a dispute between professional baseball players and their baseball teams (Heisei 18 (ne) No. 10072).

Recently, the Tokyo District Court (on 28 April 2010) denied a talent management agency ownership of an actor's right of publicity in a case where the agency and the actor had entered into an agreement giving the agency joint ownership of the actor's right of publicity, and the actor later used his name and made appearances for a food service business unrelated to his activities as an actor through the agency.

Based on a recent Supreme Court judgment on 2 February 2012, (Heisei 21 (ju) No. 2056) in connection with the *Pink Lady* case (please see below 27), which judged that the right originates from a personal right (which is not transferrable in principle), the transferability of publicity rights is not easily accepted. The above Supreme Court judgment has raised questions in relation to transferability.

**12** Can the right be licensed? In what circumstances?

Yes. The right is usually licensed for advertisement, production and distribution of products including character goods, music CDs and DVDs.

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

The individual who has licensed his or her right may sue for infringement. Also, the purchaser of the licence or the licensee may have a residual right to sue for infringement depending on the situation.

Generally and historically, Japanese courts have not easily accepted licensees' or agents' standing to sue because the subject of the right under the substantive law (ie, the celebrity) should sue for infringement instead, although there is often a need to conceal the real name and address of the individual (for example, a young female idol) from the infringer. In practice, the celebrity and the entertainment production company to which the celebrity belongs often both sue for infringement so that the celebrity can maintain the lawsuit even in the event that the court rejects the standing of the entertainment production company.

**14** How long does protection of the right last?

There is no set period of protection in Japan; 30 years, 50 years and indefinite periods of protection have all been proposed for new legislation.

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

Protection of the right after the individual's death has been under discussion, but currently does not exist in Japan.

In a lawsuit known as the *Doi Bansui* case (Yokohama District Court, Heisei 1 (wa) No. 581), the descendant of a famous poet asserted infringement of right of publicity of the late poet, the court ruled that the poet did not have the right of publicity to begin with as poets do not control their name like a celebrity who uses his or her name in order to attract an audience. Therefore, it is unclear whether those who do actually have a right of publicity continue to have these rights protected even after death.

In practice, however, the successors of some deceased celebrities do require that their approval is sought and that they receive the payment of royalties from those wishing to use the photos or recorded images of the celebrities. Many television stations, television production companies and publishers do obtain such approval and pay royalties.

**16** If post-mortem rights are recognised, who inherits the rights upon the individual's death? How is this determined?

Post-mortem rights are currently not recognised under Japanese law, although post-mortem rights have been under discussion.

In fact one lawsuit, in which heirs of the rights of a famous singer who had a big hit claimed compensation against the deceased singer's agent asserting that the management agreement between the late singer and the agent terminated several years after the late singer's death, was decided by the Tokyo District Court (on 15 March 2011) in favour of the heirs and that the agent should cease use of the publicity of the singer and also that the agent should compensate the heirs to the amount received by the agent in relation to the publicity of the singer from when the agreement terminated.

On the other hand, in one dispute, regarding the publicity of famous racehorses, the Nagoya District Court judged (on 19 January 2000) that the financial value of famous racehorses' names should be protected within the broad category of publicity rights and that even after the horse's death, as long as there is a financial value attached to the name of the horse, the owner of this publicity

right may have a claim for compensation for infringement of such publicity right. The Nagoya High Court supported the judgment on 8 March 2001.

However, the Second Branch of the Supreme Court dismissed the judgments of these lower courts on 13 February 2004. The Supreme Court denied the possibility of an injunction and compensation based on the infringement of publicity of *res* (ie, something that is not a natural person). It judged that the use of the name of *res* is protected by the Japanese Trademark Law, Copyright Act and Unfair Competition Prevention Act, in accordance with the provisions of such acts, and that exclusive legal protection without any legislation cannot be accepted.

Based on this judgment of the Supreme Court, because there is no legislation regarding publicity rights in Japan, post-mortem rights of publicity are not accepted as a legal right, although there is no Supreme Court judgment regarding the post mortem rights and there is possibility that a court may recognise post mortem rights to some extent in relation to natural persons.

**17** Can the right be lost through the action or inaction of its owner?

No. However, if the owner ceases to request that his or her approval is sought for the use of his or her photo or image and the payment of royalties for such use, then others are more likely to use the publicity, making enforcement more difficult from a practical standpoint.

**18** What steps can right owners take to ensure their right is fully protected?

Not relevant.

**Infringement****19** What constitutes infringement of the right?

The use of the name, likeness or signature of the right holder without the approval of the right holder constitutes infringement.

**20** Is an intent to violate the right necessary for a finding of infringement?

No.

**21** Does secondary liability exist for the right? What actions incur such liability?

No.

**22** What defences exist to an infringement claim?

Use in news reports may constitute defence against an infringement claim. The limited use of photos and names with reasonable purpose and extent may constitute the defence (please see the precedent outlined in question 27).

**Remedies****23** What remedies are available to an owner of the right of publicity against an infringer? Are monetary damages available?

The available remedies are injunction and the collection of infringing goods.

Monetary damages are available.

**24** Is there a time limit for seeking remedies?

There is a time limit for seeking remedies; generally this is three years from the date of the infringement in accordance with Civil Code (the restriction of period for damages in tort).

Essentially, the right to demand compensation for damages in tort is extinguished by prescription (such as statute of limitations) if it is not exercised by the victim or his or her legal representative within three years from the time that he or she comes to know of the damage and the identity of the perpetrator.

**25** Are attorneys' fees and costs available? In what circumstances?

Yes. However, in practice it is rare that amounts awarded by a judgment will cover attorneys' fees and costs.

**26** Are punitive damages available? If so, under what conditions?

No.

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

The Supreme Court made a ruling on the right of publicity for the first time on 2 February 2012, in a lawsuit known as the *Pink Lady* case (Tokyo District Court, Heisei 19 (wa) No. 20986 and Intellectual Property High Court, Heisei 20 (ne) No. 10063), a previously famous duo of female singers claimed compensation for infringement of their right of publicity against a weekly magazine publisher for women that published monochrome photographs of them in an article regarding a diet programme.

The Tokyo District Court (on 4 July 2008) and the Tokyo High Court (on 27 August 2009) decided in favour of the publisher. The High Court judged that whether the use of the names and likenesses of the celebrities infringed the right of publicity or not should be decided based on whether the asserted infringer had used such name or likeness due to recognising their attractiveness to customers. Considering the purpose and the condition of use of the photographs, the Court judged that the defendant did not infringe the right of publicity due to the following:

- it had used monochrome photographs;
- the size of the photos used;
- the ratio of the photos used to that of the article; and
- the contents of the article.

The Supreme Court ruled that:

- a name, likenesses, etc, are a symbolic representation of a person, and a person has a right to prevent others from using such name and likeness, etc, which derive the origin from personal rights without permission;
- likenesses, etc, may have value in promoting the sales of goods in some cases, and the right to use such value shall be called the right of publicity; and

- this right of publicity is based on the commercial value of a likeness, etc, and may construct a content of personal rights.

On the other hand, a celebrity's name or likeness, etc, may be used for media reports and comments on news; and has to accept such use. Use of a likeness, etc, without permission becomes an infringement and a tort only when the infringer intentionally uses the value to attract an audience or customers, for example:

- using the likeness, etc, itself as an object of appreciation;
- putting the likeness, etc, on to goods in order to differentiate them from other goods; and
- using the likeness, etc, to advertise goods, etc.

This Supreme Court judgment is one of the hottest issues among entertainment industry insiders. Since the court judged the origin of the right of publicity was a personal right (not a financial one), questions are now being raised about the transferability of the right, the rights of assignees or licensees, and injunctions based on this right.

In another lawsuit, an actress who licensed her publicity to advertise a cosmetic surgery clinic (and use of her name, photograph and comments on the advertisement) claimed damages against another clinic that took over the business and website of the original cosmetic surgery clinic and continued to use her publicity on its website despite termination of the licence agreement. The Tokyo District Court (on 24 December 2008) awarded emotional damages as well as financial damages regardless of depreciation of social value, because a holder of publicity rights may decide at his or her discretion whether he or she should appear on advertisements or not and such decision was ignored in this case.

On the other hand, in one lawsuit, known as the *Bae Yong Joon* case (Tokyo District Court, Heisei 21 (wa) No. 4331), a very popular Korean actor claimed compensation for infringement of his right of publicity against a publisher that published a special edition magazine in relation to his visit to Japan. The Court (on 21 October 2010) ruled that the publisher infringed his right of publicity and awarded financial damages in favour of Bae Yong Joon. However, the Court did not award emotional damages because his social value was not depreciated by the publishing and there was not sufficient evidence that he suffered emotional damages that were not already compensated by financial damages. In addition, the Court denied deemed damages, which should be applied *mutatis mutandis* pursuant to article 114 of Copyright Act, which provides deemed damages, because the right of publicity originates in moral right or personal right and the nature of the right is different from copyright.



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**Litigation**

**28** In what forum are right of publicity infringement proceedings held?

The proceedings are the same as a normal suit.

Japan's 50 district courts have territorial jurisdiction at first instance for cases in which the amount disputed exceeds ¥1.4 million (if the amount disputed in a case is less than ¥1.4 million, the summary courts may have jurisdiction; however, it is very rare that summary courts handle publicity cases).

Eight High Courts and the Intellectual Property High Court have territorial jurisdiction at second instance. The Supreme Court exercises appellate jurisdiction of final appeal and for appeals against a ruling as provided specifically in the codes of procedure.

A final appeal to the Supreme Court is permissible in the following instances in relation to civil cases:

- an appeal lodged against a judgment rendered in the first or second instance by a High Court;
- a direct appeal sought against a judgment rendered by a district court at first instance;
- an appeal filed with a High Court and transferred to the Supreme Court for certain special reasons; and
- a special appeal to the court of last resort against a judgment in a civil case rendered by a High Court as the final appellate court.

**29** Are disputed issues decided by a judge or a jury?

Disputed issues are decided by a judge or a panel of three judges.

As a rule, cases are handled by a single judge; however, a three-judge panel is required in the following instances:

- for cases in which the judges in each branch of a district court have decided (at their discretion) that the trial and decision should be made by a panel;
- for appeals against judgments in civil cases rendered by summary courts and appeals against orders and directions made at summary courts in civil cases; and
- for cases designated as requiring a panel by laws other than the court act, which provides the above.

**30** 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?

Courts will consider or refer to other national or foreign court decisions; however, they are not bound by these.

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

Preliminary relief may be available. In practice, however, it is rare that the right holder asks for preliminary relief unless there is a privacy issue in addition to the publicity issue.

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

The party who lost, in whole or in part, the case in an initial jurisdiction may appeal to the high court designated depending on the local jurisdiction.

Appeal to the Supreme Court is limited pursuant to civil procedure.

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

The average cost varies depending on the case, the attorneys and how the defendant asserts the case.

There is no regulation regarding attorneys' fees in Japan. If the amount of a dispute is ¥5 million, attorneys' fees for a preliminary injunction might range from ¥500,000 to ¥1 million, and official costs to be paid to the court would be ¥2,000. Attorneys' fees for a first-instance decision might range from ¥750,000 to ¥1.5 million, and official costs to be paid to the court would be ¥30,000. Attorneys' fees for appeal proceedings might range from ¥750,000 to ¥1.5 million, and official costs to be paid to the court would be ¥60,000.

The time taken to obtain a first-instance decision varies from one to one-and-a-half years. The time taken to obtain a preliminary injunction varies from a few days to one month, depending on the case, and the first appeal would take from one to two years.

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