

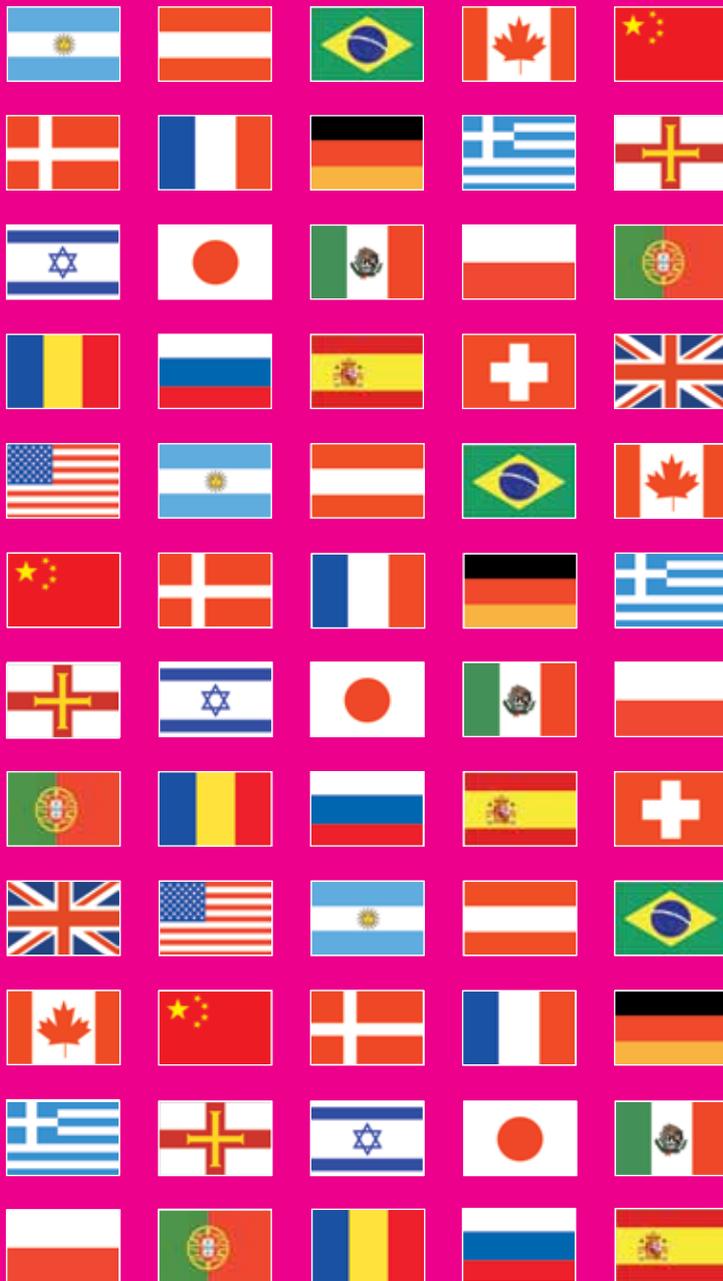


# Right of Publicity

in 21 jurisdictions worldwide

# 2014

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# Israel

## Daniel Lerner and Idit Potok

Luthi & Co

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### Sources of law

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

The right of publicity (a person's right to control the commercial use of his or her name, image, voice, etc) is recognised by Israeli law, although it is not explicitly recognised in Israeli legislation.

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

As mentioned, there is no specific statutory basis for the right of publicity. It is currently protected under the broad terms of the Israeli Unjust Enrichment Law.

The first case law addressing the right of publicity based the right on section 2(6) of the Protection of Privacy Law, 5741-1981, which states that 'the use of one's name, title, image or voice, for the sake of benefits' is an invasion of privacy.

However, in Civil Appeal 8483/02 *Aloni Ltd et al v Ariel McDonald's*, PD, 58(4) 314, rendered in March 2004 (*McDonald's*), the Supreme Court held that in previous cases the right of publicity was erroneously based; the Protection of Privacy Law was not meant to provide protection in such a case. The roots of the protection of the right of publicity are indeed in the Protection of Privacy Law. However, the right of publicity is different from the right to privacy; the right of publicity is an economic right that protects an individual's financial-commercial interest, while the right to privacy protects an individual's mental-emotional interest.

The Supreme Court also ruled that in cases of infringement of the right of publicity, the correct cause of action comes from the Unjust Enrichment Law, 5739-1979, section 1 of which states that 'whoever received, not by way of lawful right, an asset, service or other benefit ('the beneficiary') from another person ('the benefactor'), must return the benefit to the benefactor, and if specific restitution is not possible or is unreasonable – must pay him its worth'. Thus, whoever commercially uses a person's identity without his or her explicit consent is unjustly enriched.

Since the *McDonald's* case is the leading case concerning the right of publicity in Israel, we will revert to it further below. The facts of this case are briefly as follows.

The Israeli franchisee of McDonald's Corporation produced an advertisement in response to a Burger King advertisement that featured basketball player Ariel McDonald. In the McDonald's advertisement, part of an interview with Mr

McDonald, which had been published in *Tel Aviv* magazine, is mentioned; in this interview, Mr McDonald is quoted as saying that he preferred eating at McDonald's. Unlike the interview published in *Tel Aviv*, the McDonald's advertisement was made without Mr McDonald's consent.

Burger King immediately cancelled its agreement with Mr McDonald, who consequently suffered loss of earnings. As a result, Mr McDonald filed a claim against McDonald's Corporation in which he argued, inter alia, that McDonald's Corporation infringed his right to privacy and had been unjustly enriched by the use of his name.

The Tel Aviv District Court accepted Mr McDonald's claim, but the Supreme Court reversed the decision and rejected Mr McDonald's claim (incidentally, the Supreme Court accepted McDonald's Corporation's counterclaim relating to trademark infringement).

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

Individuals who feel that their right of publicity has been infringed should file a civil action (the cause of which is unjust enrichment) with the competent court according to the rules of territorial and material jurisdiction. In Israel, material jurisdiction is determined by the remedy being sought.

If the remedy being sought is solely monetary, claims for 2.5 million shekels or less are filed with the magistrates' court, while claims for more than 2.5 million shekels are filed with the district court.

If the financial value of the claim cannot be estimated or if an injunction is sought, the claim is filed with the district court.

When both injunction and monetary relief of 2.5 million shekels or less are sought, then the claim must be split; the claim for the monetary relief is filed with the magistrates' court and the claim for injunction is filed with the district court. However, when the cause of action is based upon one of the intellectual property laws specified in section 40 of the Courts Law (Consolidated Version), 5744-1984, the claim will not be split and is filed with the district court (the Unjust Enrichment Law is not specified in said section).

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

See question 2.

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**Existence of right**


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

In the *McDonald's* case, the Supreme Court held that everyone is entitled to the right of publicity, although non-celebrities may find it more difficult to show that their identity has any economic value, and that therefore their economic interest was harmed.

In Civil Case 6157/04 *David ('the best') Dvash v Adler, Chomsky & Warshavsky*, rendered in November 2006, (*Dvash*), the Jerusalem District Court addressed the questions of the extent and application of the right of publicity. The Court held that to establish the right of publicity, the plaintiff had to prove that his unique characteristics bore economic value.

The existence of economic value depends upon the existence of public interest. In this context, the 'public' does not have to be the general public; it may also be a certain sector, provided that the publication in question explicitly addresses this sector (within which the person is known), whether solely or as part of the general public. If the person is known within a certain sector but the publication addresses the public in general, without explicitly addressing that specific sector, there is no economic value to that person's identity.

Nonetheless, in Civil Case 20901/08 *Roman Minkin v Co Op Israel – Supermarket Chain Ltd and others*, rendered in February 2011, the Magistrate's Court in Jerusalem accepted a claim for infringement of the right of publicity made by a non-celebrity whose identity bears no apparent economic value. In that case, a chain of supermarkets used a picture of one of its clients – Mr Minkin – in a campaign. Although Mr Minkin agreed, for a certain payment, to participate in the campaign by letting his picture appear in a certain branch of the chain in Jerusalem, the chain of supermarkets used his picture in a much broader manner (eg, in calendars, in newspapers and other branches of the chain) without Mr Minkin's consent. The Court accepted the claim for restitution by virtue of the Unjust Enrichment Law, in an amount equal to the appropriate use fees. To the best of our knowledge, this case is a unique case rendered by a lower instance court, with no comprehensive discussion, while from a subsequent case rendered by a district court (Civil Case 1637/08 *Hadas Govrin and others v Switch Fitness Clubs Ltd and others*, rendered in October 2011) it seems that proving economic value – albeit low – is essential.

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

In light of the *Dvash* case, it seems that individuals do not have to commercialise their identity to have a protectable right of publicity. In said case, the Jerusalem District Court ruled that the plaintiff's right of publicity was infringed even though the plaintiff chose not to commercialise his identity. This was because, according to the Court's impression, the plaintiff did not complain against the use of his identity per se (for example, he did not argue that he was forced into the public eye against his will or that he wanted to be 'left alone'), but rather against the manner of the use, for which he wanted to be compensated.

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

Yes; a foreign citizen can have a protectable right of publicity. In the *McDonald's* case, for example, the plaintiff was an American citizen, and this fact did not derogate from his right of publicity (in fact, the question of his citizenship was not even raised).

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

As derived from section 2(6) of the Protection of Privacy Law (the original, albeit erroneous, source of the right), a person's image, name and voice are protected under the right of publicity.

In the *Dvash* case, the Jerusalem District Court broadened the scope of the right by ruling that the extent of the right of publicity should not be narrowly interpreted and that, in order to find which of one's characteristics is protected under the right of publicity, a uniqueness test should be applied (ie, whether the plaintiff managed to prove that the used characteristic belonged to him or her uniquely). If the answer is positive, then such unauthorised use of this characteristic constitutes an infringement of the right of publicity.

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

There is no registry for the protection of the right.

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

Where the individual lives or has lived has no effect on the existence or the extent of the right of publicity. Israeli courts also protect the rights of persons who reside outside Israel. Indeed, in the above-mentioned *McDonald's* case, most of the litigation occurred after Mr McDonald had left Israel, after he ceased to play for an Israeli basketball team.

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**Ownership of right**


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

The issue of the transferability of the right of publicity has not been addressed in detail by the Israeli courts. However, since the right of publicity is an economic right (unlike the right to privacy, which is considered to be personal), it is acceptable that the right of publicity be transferred.

The circumstances in which this right can be transferred are yet to be set.

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

Similarly to the issue of the transferability of the right, the licensing of the right of publicity has not been addressed in detail by the Israeli courts. As it is an economic right, however, it can be licensed to third parties.

The circumstances in which this right can be licensed are yet to be set.

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

Since the issues of transferability and licensing of the right of publicity have not been addressed in detail by the Israeli courts, we can only assume, by way of analogy from other intellectual property laws, that where the right of publicity is sold, the new owner may sue for infringement.

In the case of a non-exclusive licence, the owner will probably have the right to sue. However, in the case of an exclusive licence it is not clear whether it is the owner (as in the Israeli Trademark Law) alone who may sue, or whether the exclusive licensee (as in the Israeli Copyright Law) will also have the right to sue.

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

In the *Dvash* case, the Jerusalem District Court held that the right of publicity is not limited by time.

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

This issue has not been addressed by the Israeli courts, but since the right of publicity is considered to be an economic right and unlimited by time, it is very likely that the right of publicity will be protected after an individual's death, as long as it has economic value.

The issue of whether the right should have been exercised while the individual was still alive has not been addressed by the courts, but we can presume that this would not be a necessary condition.

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

While this issue has also not been addressed by the Israeli courts, we can assume that the regular Law of Succession will apply. According to section 2 of the Law of Succession, 5725-1965, the heirs are those who inherit on intestacy or under a will.

On intestacy, in general, if the deceased is survived only by a spouse, such spouse takes all chattels. If the deceased is survived only by children, all chattels are divided between them. If the deceased is survived by both spouse and children (or their offspring), the spouse takes half of the chattels and the remainder is divided in equal shares among the children (or their offspring). The same applies if the deceased is survived by a spouse and parents.

If the deceased is survived by a spouse and siblings (or their offspring) the spouse takes two-thirds of the chattels and the remainder is divided in equal shares among the siblings (or their offspring). The same applies if the deceased is survived by a spouse and grandparents.

In any event, in the absence of a spouse the deceased's children take precedence over the deceased's parents, siblings and grandparents.

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

While this issue has not been addressed in detail by the Israeli courts, it has been established that by publishing a product, a person does not implicitly waive his or her right of publicity.

As such, in the *McDonald's* case, the Supreme Court ruled that Mr McDonald's participation in Burger King's advertisement did not give McDonald's Corporation carte blanche to use Mr McDonald's name or image. Nonetheless, the Court was willing to accept the use of Mr McDonald's name by McDonald's since it was done within the framework of an advertisement-in-reply to the Burger King advertisement in which Mr McDonald took part. The Court stated that, in such case, the right of publicity should not be considered absolute. The Court also mentioned another reason to avoid absoluteness – the fact that Mr McDonald's statements as brought in the McDonald's advertisement were actually spoken by Mr McDonald.

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

This issue has not been addressed by the Israeli courts, but it is advisable for right owners not to take any action that may be interpreted as a waiver of rights (eg, refraining from protesting against a continuous unauthorised use).

### Infringement

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

Commercial use without permission of a person's name, image, voice or any other unique characteristics that bear economic value infringes that person's right of publicity.

The cause of action in the event of such infringement is to be found in the Unjust Enrichment Law, which requires the plaintiff to establish the following elements:

- receipt of a benefit (eg, advancing the promotion of a product);
- enrichment of the beneficiary at the expense of the benefactor; and
- enrichment that is 'not by way of lawful right'.

In the *McDonald's* case, the Supreme Court stated that in such cases the enrichment is 'not by way of lawful right', since it involves infringing someone else's right of publicity and that constitutes an 'additional element' (see Leave to Appeal 5768/94, 5614/95, 993/96 *ASHIR Import Export & Distribution Ltd et al v Forum Accessories and Consumer Products Ltd et al*, PDY 52(4) 289 (*ASHIR*), in which the majority of the Supreme Court held that, for enrichment to be deemed to be 'not by way of lawful right' in the context of intellectual property, an 'additional element' to the unauthorised use of the right is required, such as bad faith or unfair competition).

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

As mentioned above, in the event of infringement of the right of publicity the cause of action is unjust enrichment, which requires the existence of an 'additional element' such as bad

faith or unfair competition. Thus, when the defendant is not aware of the plaintiff's right of publicity, liability will not be imposed upon it.

This was the case with some of the defendants in the *Dvash* case who were not familiar with the plaintiff prior to receiving the cease-and-desist letter. The Jerusalem District Court ruled that, since they were not aware of the plaintiff, they enjoyed the presumption of bona fide, and thus the additional element did not exist.

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

In light of the 'additional element' mentioned above, which requires mala fides conduct or, at least, knowledge, we can assume that secondary liability, when no intention is proved, shall not exist.

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

According to the provisions of section 2 of the Unjust Enrichment Law, the court may exempt the beneficiary from all or part of the obligation to make restitution if it finds that receipt of the benefit did not involve any loss to the benefactor, or that other circumstances render restitution unjust.

In the *McDonald's* case, the Supreme Court stated that in order to determine whether restitution was justified, the defendant's right to freedom of speech had to be taken into consideration, and thus the Court should avoid imposing liability where the defendant used someone's identity for the sake of satire or newsworthy purposes.

The same was established by the Jerusalem District Court in Civil Case 8206/06 *Captain R v Dr Ilana Dayan and Telad Jerusalem Studios Ltd* (not yet published), rendered in November 2009, which held that the use of a person's name, nickname, image, voice, personality or story for journalistic or newsworthy purposes – a use that is mostly non-commercial – should not be subject to the Unjust Enrichment Laws, even if such use has commercial aspects, such as increased ratings.

In the *McDonald's* case, the use of Mr McDonald's name was not made for journalistic or newsworthy purposes, and yet the Court exempted the defendant from liability due to the fact that using Mr McDonald's name was done in the framework of an advertisement-in-reply to a competitor's advertisement in which Mr McDonald had taken part, and that in such a case the Court should show tolerance of the defendant's actions.

As such, the particular circumstances of every case have to be taken into account.

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**Remedies**

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

Since the cause of action in the case of infringement of the right of publicity is unjust enrichment, the remedy is restitution, whether or not the infringer gained commercial or financial benefit.

In the *Dvash* case, the Jerusalem District Court ruled that the restitution should be equal to the 'appropriate licence fees'.

Where the right of publicity can be acquired legitimately, the appropriate licence fees should reflect the market value, otherwise they should reflect the profits gained. In any event, the court should avoid the case of 'effective taking' (that is, when the market value is considerably lower than the profits gained), as this can undermine the discouraging aim of the Unjust Enrichment Laws, and should prefer the profits gained. In addition, when determining the level of compensation, courts should take into consideration the costs incurred by the infringer in the final product or publication, which can be deducted from the compensation.

In addition to the monetary remedy, courts may grant an injunction (see the *AShIR* case). However, granting an injunction – as with all equitable remedies – is subject to the court's discretion (the court will consider, inter alia, good faith, delay and blamelessness). Where monetary compensation satisfies the plaintiff, there may be no justification to grant an interim injunction. In any event, the option of receiving compensation shall not prevent the granting of an interim injunction – the question is whether the monetary remedy constitutes an appropriate compensation (see Civil Appeal 2287/00 *Shoham Machinery Ltd et al v Shmuel Harar et al* (not published)).

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

In the absence of a specific provision in the Unjust Enrichment Law, the limitation period is set by the Limitation Law 1958, which sets a limitation period of seven years from the date of the emergence of the cause of action. The Limitation Law also points out specific cases in which the limitation period can be extended (eg, where the person in question is a junior or where there are guardianship issues).

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

The court usually orders attorneys' fees and costs to be paid to the winning party. This is carried out in accordance with section 511 of the Civil Procedure Regulations, 5744-1984, which stipulates that at the end of a proceeding, the court may order the litigant to pay the other party's attorneys' fees and costs (which usually include expenses lawfully recorded in the court file). Should the court order costs, it may set the amount at its discretion.

While deciding on attorneys' fees and costs, the court may take into consideration the parties' behaviour, and if it is found that a party unnecessarily lengthened the hearings by way of false claims or otherwise, it has the discretionary power, regardless of the trial outcome, to order that party to pay the proceedings' costs or the trial costs in favour of the other party or the Treasury, or both (see section 514).

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

Section 1 of the Unjust Enrichment Law enables courts to rule in favour of compensating the plaintiff by way of restitution. This Law does not mention punitive damages (as opposed to

section 183(c) of the Patent Law, 5727-1967, or section 31(a) of the Consumer Protection Law, 5741-1981). Nonetheless, the courts' authority to award, in appropriate cases, punitive damages during civil proceedings is recognised by case law. The circumstances in which punitive damages are awarded are unique and rare (such as strong impingement of constitutional rights and where it can act as a deterrent when criminal law does not apply) because they are considered to be a double sanction for the offender and a double compensation for the injured. As such, they are not common in the civil procedure.

The courts have yet to set the exact circumstances in which punitive damages shall be awarded, although they define general criteria that will lead to punitive damages (eg, intentional or malicious tort, such as assault, encroachment and libel and, in civil proceedings, following a criminal conviction). The courts do not deny the possibility of awarding punitive damages for unintentional offences, such as negligence; however, this will occur only in severe and extreme circumstances when the tortfeasor's action was committed with 'quasi-intent' or was on the verge of malice, and where standard tort damages would not be sufficient to convey the loathing that the court feels for the tortfeasor's action (see Civil Appeal 1080/07 *The bequest of the late 'John Doe' et al v Israeli Police et al* (not published)).

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

#### **Captain R v Dayan and Telad Jerusalem Studios**

Civil Case (Jerusalem) 8206/06 *Captain R v Dr Ilana Dayan and Telad Jerusalem Studios Ltd* (not yet published) rendered on 7 December 2009: Captain R is a company commander who was then in charge of a military post in the Rafiah area in the Gaza Strip. He filed suit following an investigative report edited and presented by Ilana Dayan in the framework of her television programme *Uvda* (Facts). The report was carried out following a military operation in which a 14-year-old girl, a Rafiah resident, was shot to death. This operation attracted media attention and an indictment was filed against the plaintiff at a military tribunal.

A few hours after the indictment was filed, the report was broadcast on *Uvda*. The plaintiff claimed that the report was slanderous and was a kind of judgment against him. He believed that the broadcast report was one-sided and tendentious, based on collected raw material that was leaked, edited falsely and tampered with, and broadcast for the purpose of enhancing the broadcaster's rating. The plaintiff added other causes of action such as unjust enrichment, since Telad (the production company behind *Uvda*) profited from broadcasting this report, and it is this part of the judgment that is relevant; the Honourable Judge Noam Sohlberg (of the Jerusalem District Court) ruled that in view of judicial policy, it is not possible to enforce the Unjust Enrichment Laws on the publishing of a journalistic report.

According to Judge Sohlberg, one must distinguish between using a person's name, nickname, image or voice for the sake of making commercial profits or for the purpose of newsworthy publishing, namely informing the public and exchanging ideas, outlooks and opinions. The Court ruled that the defendant's use was journalistic. Even if such a use may have economic aspects, the economic interest behind programmes such as the

programme in question is irrelevant in relation to the public interest in the publishing of a newsworthy report. The public interest obliges us to view such abstract assets (ie, a person's name, nickname, image or voice) as a public property rather than private, propriety-like assets for the sake of unjust enrichment when it concerns a journalistically newsworthy use. Classifying newsworthy stories as public property is necessary to ensure freedom of communication, freedom of expression and the free exchange of information.

The parties appealed against this decision, and particularly against the part relating to the defamation cause of action, and the appeal was accepted in this regard. However, the parties did not address the part of the District Court judgment relating to the unjust enrichment cause of action, and therefore the District Courts decision in this context remained unchanged (Civil Appeal 751/10 *John Doe v Dr Ilana Dayan and Telad Jerusalem Studios Ltd*).

A further hearing is currently being held before the Supreme Court.

#### **Hava Koren v Shay Israeli**

Civil Case (Haifa) 534-08 *Hava Koren v Shay Israeli* (not yet published), which was rendered on 11 March 2010, dealt with a claim for damages as a result of the use of the voice of the plaintiff (a professional announcer) without her consent on the defendant's internet site. The plaintiff claimed that the use of her voice by the defendant was tantamount to passing off, misleading description, an invasion of privacy and unjust enrichment.

As to the claim of unjust enrichment, the Honourable Judge Ron Sokol (of the Haifa District Court) ruled that the defendant had benefited, even if only marginally so. Since no evidence was brought to show the extent of the use of the plaintiff's voice and since the claim of passing off was accepted, the Court did not have to address this question in detail. Furthermore, the Court denied the plaintiff's claim of invasion of privacy since she did not claim mental damage or any non-financial damages as a result of the unauthorised use of her voice and her only concern was getting financial gain for this use.

#### **Keshet Broadcasting v Biran et al**

Civil Motion (Tel Aviv) 2160/09 *Keshet Broadcasting Ltd et al v D Ilan Biran et al* (not yet published), which was rendered on 11 July 2010, dealt with the defendants' motion to reject in limine the claim filed against them following the publication on *Uvda* of a report relating to the lack of regulation on the part of the health ministry regarding sex therapy using surrogate partners in Israel.

The story focused on the plaintiff's activity; he owns sex therapy clinics and treats his patients, inter alia, with surrogate partners. He claimed that he was presented as a sex maniac abusing women for sexual purposes. The plaintiff did not file his claim based on slander but on Unjust Enrichment Law grounds. The Honourable Judge Anat Baron (of the Tel Aviv District Court) determined that, under the circumstances, the plaintiff could not get relief by way of the Unjust Enrichment Law and therefore ordered the claim to be struck out.

The Court stated its position that defamation laws create a negative arrangement as to the application of the Unjust Enrichment Law where it apparently relates to published

defamation as stated in section 1 of the Law, and no responsibility was determined according to this Law. Nevertheless, the Court indicated that it does not express its position as to the possibility of supplementing the defamation laws by way of the Unjust Enrichment Law where responsibility was determined according to the defamation laws.

However, even if the defamation laws do not negate the application of the restitution principle as stated in the Unjust Enrichment Law, the Court still believed that in the circumstances the plaintiff did not have any right to this cause of action. Thus, since the freedom of speech is essential to enable a democratic regime, any publication that is apparently slanderous does not in itself constitute an unacceptable conduct that fulfils the 'additional element' (see question 20) unless, if after addressing alleviations and interpretations as determined in the defamation laws, it was set that it relates to a forbidden publication.

According to the Court, this is even more the case when it relates to a journalistic publication dealing with a matter of public interest. The Court also addressed the plaintiff's claims that the defendants unjustly enriched themselves at his expense while unlawfully using his right of publicity. The Court rejected the plaintiff's claim, while stating that the right of publicity affords celebrities a monopolistic control of the use of their images for commercial purposes and sales promotion. A greater monopolistic control would unequally harm the public interest in its freedom of speech.

#### **Proportsia PMC Ltd et al v Dr Dov Klein**

Civil Appeal (Tel Aviv) 15667-11-11 *Proportsia PMC Ltd et al v Dr Dov Klein* (Nevo), which was rendered on 29 July 2013, dealt with the defendants' appeal against the decision of the Magistrate's Court, which accepted Dr Klein's claim for damages as a result of unauthorised use of his name as a keyword in Google Adwords.

Dr Klein is a well-known plastic surgeon. Proportsia is a chain of clinics providing plastic surgery services. Proportsia used Google Adwords to publish and promote its website, and in this framework it bought the keywords 'Dr. Klein' (these words did not appear in the sponsored search results). Dr Klein claimed to be entitled to damages for this unauthorised use of his name based, inter alia, on the provisions of the Protection of Privacy Law and the Unjust Enrichment Law. The Honourable Judge Hannah Inon (of the Tel Aviv Magistrate's Court) accepted Dr Klein's claim, but the Tel Aviv District Court reversed the decision and rejected his claim. The Honourable Judge Gideon Ginat (of the Tel Aviv District Court) ruled that the use of one's name as a keyword per se does not infringe one's rights; the plaintiff further needs to indicate an 'additional element'. In this case, such additional element was not argued or proved. The Honourable Judge further ruled that a person who commercializes his or her name cannot seek protection under the Protection of Privacy Law.

#### **Litigation**

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

See question 3.

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

Disputed issues are decided by a judge. There is no jury in the Israeli law system.

**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?

In the *McDonald's* case (which is the leading case concerning the right of publicity in Israel and, in fact, is only the second time the Supreme Court has addressed this issue), the Supreme Court extensively quoted from American case law, especially in the context of the justification for the right of publicity.

Nonetheless, the Israeli law system is an independent system and is not bound by the opinions of other foreign courts (subject to the possibility to enforce or recognise a foreign judgment under the Foreign Judgments Enforcement Law, 5718-1958).

In terms of the national courts, in Israel the binding precedent rule applies; that is, a rule laid down by a court shall guide any lower court. A rule laid down by the Supreme Court shall bind any court other than the Supreme Court (section 20 of the Basic Law: The Judiciary).

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

The Israeli courts have yet to address preliminary relief on the ground of infringement of the right of publicity.

However, in principle, a person can apply for preliminary relief and under certain circumstances even a provisional remedy, namely an interim injunction in the frame of a cause of action of unjust enrichment (as held in the *AShIR* case). According to section 362 of the Civil Procedure Regulations, the court must be convinced when granting a provisional remedy based on apparently reliable evidence that there is a cause of action and that all the conditions for granting the requested provisional remedy are fulfilled. The court must consider the parties' balance of convenience (namely, the damage the plaintiff may sustain if no provisional remedy is granted compared with the damage the defendant, and also a third party, may sustain if it is granted), decide if the motion was filed in a bona fide manner, and whether granting provisional remedy is necessary and appropriate in the circumstances and is not disproportionate.

It should be noted that even though a motion for provisional remedy is conditional on the filing of a statement of claims, the court is entitled to grant an interim injunction even before a statement of claims is filed if it is convinced that it is justified in the circumstances (for example, in cases where any delay may be crucial). The validity of the injunction is conditional upon the filing of the claim within seven days.

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

It is possible to appeal a final decision to a higher instance. Such appeal must be filed within 45 days from the day the decision was rendered.

If the first appeal is heard in a district court it may be possible to appeal the decision before the Supreme Court, provided that the court allows it. The leave to appeal may be granted by

the court that handed down the decision (the leave to appeal will be stated in the decision), and if such leave to appeal is not granted, a party must file a motion for leave to appeal to a higher instance. Such a motion must be filed within 30 days from the day the decision was rendered.

If a leave to appeal is granted, the appeal must be filed within 30 days from the day the leave to appeal was granted. In such case of a 'second appeal', as per the Leave to Appeal 103/82 *Haifa car park Ltd v Matsat Or Ltd*, PD 36(3)123, leave to appeal will be granted mainly when it concerns:

- questions of legislative importance;
- contradictory decisions of lower courts where no case law has been set by the highest appellate court and where it is necessary to have a unified case law; and
- matters of material legal importance and matters of public importance (ie, cases in which the legal importance is far broader than the private dispute between the two parties).

It is also possible to appeal a decision in preliminary injunction proceedings, providing that the court allows it, in the manner explained above.

**33** 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 first instance decision is around two to four years, depending on how complicated the case is. The time frame for a preliminary injunction decision is usually a few weeks to a few months. Appeal proceedings may take two to four years.

It is very difficult to estimate the costs involved in these proceedings; such costs will depend on the scale of the case and the attorneys conducting it.

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