

Commercial Use of Sportspersons' Image Rights

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Introduction

At present, the use of a person's image rights is a sensitive issue that concerns various branches of law, including intellectual property law and data privacy law. This issue becomes more crucial in view of the intensive development of technologies on data collection and exchange, as well as globalisation processes. It is especially crucial for sportspersons, whose images are widely used during transmissions of sport games (such as football, volleyball or hockey) via the television or the internet, the promotion of sport games and the advertising of consumer goods and services.

Companies seek to connect their products with the images of famous and successful sportspersons. As a rule, the sportspersons' image rights are controlled by the professional sports organisations for which they play and perform their activities.

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This article reviews in more detail the legal regulation of sportspersons' image rights (including general regulation), the main issues relating to this and how to solve them from a Russian law perspective.

Legal regulation of image rights

General regulation

According to Russian law,¹ each person, including a sportsperson, has the right of protection of their image, which includes photographs, video records or artworks in which they are depicted (the 'image right(s)'). This is a person's inalienable right protected by the law along with their honour, dignity, goodwill, privacy and other inalienable rights that belong to them by birth or by law (they are also referred to as intangible benefits). Such rights are inalienable and non-transferable.

Thus, under the image right, a person's image can be published and used by another person or legal entity only upon their consent, except for certain cases set out by the law. In particular, a person's consent is not required if:²

- their image is used in state, social or other public interests;
- their image has been obtained in a place with free access or at a public event (meetings, congresses, conferences, concerts, shows, sport competitions and similar events), except for cases when such an image is the main object of use; or
- they have been paid for modelling.

In the context of sports, the second exception is the most interesting one. According to this exception, if a person's image has been taken at a public event and is not used as a main object of use, it can be used without their consent.

However, the notion of 'the main object of use' is ambiguous. As per a ruling of the Supreme Court of the Russian Federation,³ a person's image on a photograph taken in a public place will not be treated as a main object of use if, in general, the photograph displays information about the public event where it was taken. This means, for example, that for a common video transmission of a sports event, such as a football game, containing images of sportspersons running across the field, there is no requirement to obtain

1 Clause 1, Art 152.1 of the Civil Code of the Russian Federation (Part One) No 51-FZ dated 30 November 1994 (the 'Civil Code').

2 *Ibid.*

3 Ruling of the Supreme Court of the Russian Federation No 25 'On Application by Courts of Some Provisions of Section I of Part One of the Civil Code of the Russian Federation' dated 23 June 2015 ('Ruling No 25'), Clause 45.

their consent. For such a transmission, the only requirement is to obtain permission from a respective sports event host.⁴

However, besides the transmission of sports events, there are many other ways to use sportspersons' images where such images can be treated as main objects of use, such as promotion of sport games or advertising. In such cases, there will be a requirement to obtain a sportsperson's consent.

Consent can be given orally, in writing or by means of actions implied by conduct (ie, such actions that evidence a person's will to give a consent),⁵ unless otherwise provided for by law.⁶ Consent may contain particular conditions specifying a procedure and limits of publication and use of an image (eg, duration of a consent, scope of use of an image).⁷

If consent has been given orally or by means of actions implied by conduct, it covers the use of an image to the extent and for the purposes that are clear from the situation in which it has been given.⁸

It is important to note that a person may revoke consent at any time.⁹ If that happens, the person or a legal entity that obtained such a consent may demand compensation for damages incurred by such revocation.¹⁰

After a person's death, their image can be used only on the consent of their children and surviving spouse; in their absence the consent of their parents is required;¹¹ in case of their death or absence, there is no need for any consent.¹²

Besides the general regulation of image rights, which is also applicable to sportspersons, there are some special guidelines with respect to sportspersons' image rights, under which the image rights are defined and considered in a rather broad sense.

Special regulation of sportspersons' image rights

Besides the general regulation of image rights provided by the Civil Code, there are the Guidelines on Directions of Improvement of Legal Regulation

4 Clause 5, Art 20 of Federal Law No 329-FZ 'On Physical Culture and Sport in the Russian Federation' dated 4 December 2007.

5 Clause 2, Art 158 of the Civil Code.

6 Ruling No 25, Clause 45.

7 *Ibid*, Clause 47.

8 *Ibid*.

9 *Ibid*, Clause 49.

10 *Ibid*.

11 Clause 1, Art 152.1 of the Civil Code.

12 Ruling No 25, Clause 49.

of Intellectual Property Rights in the Area of Physical Culture and Sports¹³ (the 'Guidelines') which contain some recommendations on sportspersons' image rights.

According to the Guidelines,¹⁴ the image rights are defined as the rights acquired by a person in their professional activities, which aim to protect their name, goodwill, privacy, other intangible benefits and results of intellectual activity.

The image rights include the rights on commercial use of the name (including first name, surname, patronymic name, pseudonym and/or nickname), likeness, appearance and other aspects of a sportsperson's personal identity (eg, personal gestures, mini-choreographic movements and the personal slogans associated with a particular sportsperson, as well as their autograph).¹⁵ As is clear, the definition of image rights is very broad.

However, the Guidelines are not legally binding, and Russian law does not set out a significant legal mechanism for the protection of image rights, except for the right to claim compensation for moral harm in case of infringement of image rights (as described later). In view of that, most of the contracts between sports clubs and sportspersons in Russia are based on the international regulations and recommendations with regard to image rights.

For instance, the International Federation of Association Football (FIFA) sets out certain standards for contracts drawn up with professional football players with regard to image rights. Under the Professional Football Player Contract Minimum Requirements,¹⁶ there is a recommendation that 'the individual player may exploit his rights by himself (if not conflicting with clubs' sponsors/partners) whilst the Club may exploit the Players' image rights as part of a group and/or the whole squad'.

In Russia, this approach is generally used in contracts concluded between sports clubs and sportspersons. However, taking into account the lack of binding rules in this regard, sports clubs usually make attempts to protect their interests to the maximum degree and include in contracts provisions imposing significant restrictions on sportspersons' rights to use their images and oblige them to grant such rights to sports clubs on an exclusive basis.

Usually, under employment contracts with major Russian football clubs, players grant clubs the exclusive rights to use their names, images (including

13 Guidelines on Directions of Improvement of Legal Regulation of Intellectual Property Rights (Including Copyright and Neighbouring Rights) in the Area of Physical Culture and Sports approved by the Letter of the Ministry of Sports of the Russian Federation No ПИ-05-10/5493 dated 27 July 2017 (the 'Guidelines').

14 Guidelines, Ch II, Clause 4(3).

15 *Ibid*, Ch II, Clause 4(2) and Ch III, Clause 1(5).

16 Professional Football Player Contract Minimum Requirements dated 24 November 2008, Clause 6.1.

photo and video images), graphics and any other images for advertising and other purposes, without their consent or any remuneration, during the term of the contract. Moreover, clubs are provided with authorisation to transfer the rights to use the players' images to any third parties without the players' consent, while the players may not independently participate in advertising without the written consent of the respective clubs.

However, it should be noted that such contractual terms and conditions do not comply with Russian law and may not be enforced in the Russian courts owing to the following.

As aforementioned, under Russian law, the use of image rights is subject to certain restrictions owing to their legal nature as inalienable rights. In particular, they cannot be transferred (assigned) and consent to use such rights is limited by the right to publish and use an image. Besides, as aforementioned, a sportsperson may revoke consent at any time.

In this regard, strictly speaking, the aforementioned provisions of employment contracts on image rights are hardly enforceable in Russian courts. Moreover, the inclusion of such provisions in employment contracts is doubtful since image rights do not belong with employment relations.

Thus, when a sports club prepares a contract for a sportsperson in Russia, it is important to strike a balance between the interests of the club in the commercial use of the sportsperson's image and the sportsperson's inalienable rights to use their name and image. There is generally a recommendation to enter into a civil law contract wherein to set out particular intangible benefits covered by such a contract, including their legal nature in terms of Russian law.

Protection of image rights in case of infringement

In case of infringement of a sportsperson's image rights, they may file the following claims in court:

- claim on recovery of a monetary compensation for moral harm;¹⁷
- claim on removal from circulation and destruction (without any compensation) of material carriers containing their image;¹⁸
- claim on removal of their image from the internet, as well as suppression or prohibition of its further distribution on the internet.¹⁹

17 Civil Code, Art 151.

18 *Ibid*, Art 152.1, Clause 2.

19 *Ibid*, Clause 3.

In these cases, a claimant is required to prove the fact of publication and use of his/her image by a defendant, while a defendant is required to prove the legitimacy of such publication and use.²⁰

Moral harm means moral or physical suffering caused by actions or inaction:

- infringing on a person's intangible benefits (life, health, personal dignity, goodwill, privacy, personal and family secrets, etc.);
- violating a person's non-proprietary rights (the right to use their own name, copyright etc); or
- violating a person's proprietary rights.²¹

The amount of compensation for moral harm is determined by a court based on the degree of the defendant's guilt and other noteworthy circumstances, such as the degree of physical and moral suffering related to the individual characteristics of a claimant.²²

It is noteworthy that as an additional measure of protection some particular elements of sportspersons' image rights can be registered and protected as trade (service) marks ('trademark(s)'). Although this approach is not widely used in Russia, there are some prominent examples.

In particular, in September–October 2010 the Patent Office registered one trademark containing a signature of the Russian football player Andrey Arshavin, as well as two trademarks with respect to his name (in Russian and English) upon application of MAXITEX LLC,²³ of which one of the owners and the chief executive officer was Tatiana Arshavina (most likely, Andrey Arshavin's mother).²⁴ In February 2012 the exclusive rights on the trademarks were alienated to LEGENDA LLC, one of the owners of which was also Tatiana Arshavina.²⁵ However, the terms of registration of the respective trademarks expired on 31 August 2019. As of February 2020 they have not been extended.

Besides, in October 2010, LEGENDA LLC registered a trademark containing Arshavin's image with his famous personal gesture (a forefinger near his lips).²⁶ The trademark is valid until June 2020.

20 Ruling No 25, Clause 48.

21 Ruling of the Supreme Court of the Russian Federation No 10 'Some Issues of Application of Legislation on Compensation for Moral Harm' dated 20 December 1994.

22 Civil Code, Art 151.

23 See <https://new.fips.ru/registers-web/action?acName=clickRegister®Name=RUTM> (trademarks No 418680, No 421510 and No 421511).

24 See <https://egrul.nalog.ru>

25 *Ibid.*

26 See <https://new.fips.ru/registers-web/action?acName=clickRegister®Name=RUTM> (trademark No 446527).

In March 2012, LEGENDA LLC also registered a trademark containing Arshavin's image as a cartoon character.²⁷ The trademark is valid until February 2021.

In 2017–2018, an image of the Soviet goalkeeper, Lev Yashin, was used in an official promotional poster for the 2018 FIFA World Cup.²⁸ On 16 May 2018, the Patent Office registered two trademarks (in Russian and English) with respect to that poster upon application of FIFA.²⁹

Thus, besides the remedies described previously, some sportspersons and sports organisations use trademarks as a preventive measure for protection of the respective image rights.

Disputes on sportspersons' image rights

In practice there are several highly discussed cases on the image rights of famous Russian sportspersons.

An illustrative example is a scandal that arose in 2003 due to the use of an image of the Russian cross-country skier and Olympic champion Yulia Chepalova by Adidas-Salmon (an official sponsor of the Cross-Country Skiing Federation of Russia).³⁰ Chepalova claimed that her image was used by Adidas-Salmon without her consent. However, as it turned out, such a provision was included in her contract. Despite a huge reaction in the media and various claims, the case was not initiated.

Arshavin was involved in a case in 2010.³¹ His image was used in a schoolbook without his consent. His representatives said that such usage was illegal. The schoolbook's publisher did not deny the allegations but said that the usage of his image was not intentional. The dispute was not brought to the court. Besides, his name was also commercially used on T-shirts without his consent.³² After these cases, Arshavin decided to protect his image rights by registering the respective trademarks (as described in the previous section).

27 See <https://new.fips.ru/registers-web/action?acName=clickRegister®Name=RUTM> (trademark No 456084).

28 See <https://rg.ru/2017/11/28/lev-iashin-stal-geroem-oficialnogo-plakata-chm-2018.html>

29 See <https://new.fips.ru/registers-web/action?acName=clickRegister®Name=RUTM> (trademarks No 656477 and No 656478).

30 See <https://grani-ru-org.appspot.com/Society/Sports/m.41440.html>; <https://www.kommersant.ru/doc/406816>

31 See <https://www.vesti.ru/doc.html?id=399563>

32 See <https://nn.aif.ru/sport/persona/521768>

Another case, in 2011, concerned Russian former boxer Nikolay Valuev.³³ His image was used without his consent in a promotional video screened in the Sovremennik cinema in the Penza region. Valuev filed a lawsuit on violation of his image rights and right to respect his honour and dignity. Even though the claim was well-grounded and stood a good chance of being settled in court, Valuev decided not to proceed with the lawsuit and dropped the case.

Conclusion

There are many legal issues concerning sportspersons' image rights that should be taken into account during their commercial use. Sportspersons and concerned companies should give much consideration to the appropriate legal grounds for such commercial use and should prepare the respective legal documents (consent or an agreement), which should contain the detailed regulation of various aspects of such commercial use. As an additional measure of protection, some elements of sportspersons' image rights can be registered as trademarks.

It should be noted that due to the dynamic spread of Covid-19 since December 2019, countries around the world have taken many restrictive measures in order to protect their citizens (inter alia, many sports games and events have been postponed or cancelled).

In the context of this article, it is noteworthy that the respective state authorities in Russia have started to scrutinise the advertising of pharmaceuticals that are allegedly efficient against Covid-19, in the absence of such indications in their instruction sheets (eg, Arbidol, Remantadin³⁴), as well as scrutinising disinformation related to Covid-19. In this regard, sportspersons should be careful when participating in such advertising, or when making statements related to Covid-19.

33 See https://www.dp.ru/a/2011/06/30/Nikolaja_Valueva_snjali_v_r; <http://penza-sport.com/news/5083-2011.html>

34 See <https://fas.gov.ru/news/29493> and <https://perm.fas.gov.ru/news/16026> last accessed on 20 April 2020.