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Image Rights in Overview: Can the Mexican Legal System Tackle Deepfakes?

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I. PART ONE: Self Image under Mexican Law

A. Issues

There is indeed image rights protection under Mexican laws. However, protection was “framed” over rules without a systematic structure and that have mostly grown apart from doctrinal principles and standards. Protection has been essentially granted by independent statutes that do not talk each other. Sometimes the statutes overlap, are inaccurate or are technically inconsistent. Deepfakes has become a new global problem that has challenged the laws of Mexico and other countries. As they stand, systems do not offer the best legal solutions against deepfakes. This article will analyze if Mexican laws are consistent and strong enough to protect self image or if they need reform.

B. Fundamentals

1. Moral Heritage and Personality Rights

Generally, self image is dual and therefore, divided into pecuniary and personal or moral rights. Initially, the Mexican view is that personal rights are “personalismos” -personal to farther extent-, subjective, non-renounceable and non-transferable. They have developed mainly as an opposition right. Doctrine and jurisprudence include in the definition of personality rights, those related to physical and psychologic integrity of people. All of that represents the moral heritage of persons. Doctrine discusses whether personal rights can be inherited or if they end after the death of the person. The main position is that they cannot be inherited, but sometimes they can be transmitted mortis causa. Image rights are included within the exception.

Mexico subscribes the theories about heritage, as a container of all rights of persons, whether individuals or companies. Heritage is conformed by different kind of goods and assets. Some are tangible and some other intangible; some are strictly personal and some other pecuniary or economical. Image rights and in general, personality rights, are dual. Image rights are a species of personality or moral right. However, they have a pecuniary side also. People trade or brand with identities, whether physical likeness or voice, ideology, believes, life stories or other elements. On the other hand, third parties may trade with the identity of a given person, image being one of its components. Accordingly, self image rights catch a glimpse of commercial expression, outside the strictly personal aspect.

In some way or the other, countries around the world observe and recognize the duality. For example, the US has conceived the figures of right of privacy and right of publicity. Right of privacy is an old legal institution in the US, created to protect individuals against intrusions in their private life, dignity or personal integrity. Appropriation of name and likeness is part thereof. Right of publicity addresses rights of individuals in commercial contexts. It aims at preventing that third parties profit from using the persona of an individual. In particular, it protects celebrities against the non-authorized commercial use of their identity, including name and image. Mexican law mixes personality rights, whether pecuniary or moral, with a commercial right, that is not well defined. The dividing line between pecuniary and commercial is unclear. The statutes involved overlap. Substantive rights are caught in a complex jumble of actions and proceedings. The situation is confusing. Let's embrace why.

2. Recognition of Self Image as Subject-Matter of Protection.

The image of persons can be fixed or reproduced in drawings, paintings, photographs or recordings, that are distributed -published in physical media- or communicated to the public in intangible media. The distributor or disseminator of persons' images or whoever makes them available to the public, as fixed or reproduced, often pursues the making of a profit. On the other hand, individuals whose image is portrayed in pictures want to take control how they are used. They sometimes say yes, with or without asking for payment and thereby, without the need of seeking a license. But sometimes they say no and refuse to grant conformity, for reasons related with their honor or intimacy.

Legal protection starts with the recognition that self image is a human right -a personality or individual right or a special right of identity-. Other rights of identity include the right of honor, privacy, integrity and freedom. The scope of identity rights is thereby far-reaching. International treaties as well as local constitutions protect personal rights, being self image one aspect thereof. For example, the International Covenant of

Civil and Political Rights -articles 16, 17 and 19- and the American Convention of Human Rights -article 11-, deal with rights of honor, intimacy and dignity. Self image is not mentioned in any of the treaties, but countries aggregate it extensively.

The Constitution of Mexico addresses personality rights' in at least one provision. Article 6 deals with freedom of expression and provides as an exemption, that an idea or statement as expressed by someone, does not criminally attempt against honor or the intrusion into private life. Like international treaties, the Mexican Constitution does not mention self image as a human right, but still regards it implicitly. Civil law is another form of protecting the self image of people. Personal rights are basically protected by virtue of civil law. An example of that is the figure of moral damage in the Civil Code.

C. Secondary Laws

Self image is directly referenced in two federal and a number of local statutes. The two federal statutes are the Copyright Law and the Federal Civil Code. The local statutes are the local Civil Codes, that govern in each of the states of the Mexican republic. Likewise, the Law of Civil Liability for the Protection of the Right to Private Life, Honor and Self Image, of Mexico City -Law of Civil Liability-, is of local jurisdiction. Some comments about the statutes will follow next.

1. Civil Codes

Right of image is recognized in the civil codes of some states of the Mexican federal republic. In some others, image rights are part of personality rights. However, the Civil Code of Mexico City, that at the same time is of federal jurisdiction, included self image, in the bundle of rights, only after an amendment that Congress made of the Civil Code in the year of 2007. Article 1916 of said statute, as reformed, conceives a personality right action called "moral damage". It actually defines as moral damage, behavior that attempts against the "sentiments, affections, beliefs, decor, honor, reputation, private life, configuration, physical aspects or any consideration that others may have of a person".

From reading the various paragraphs of article 1916 of the Civil Code, it appears that said provision prevents that people are dishonored or discredited or that their private life is trespassed or abused. Self image is protected if by using the same the user offends or defaults someone. On the other hand, it is not protected when used or exploited commercially. Protection is quite limited with respect to substantive rights and legal actions.

As to actions and remedies, article 1916 provides an action for "repairing damages" in virtue of economic compensation of "material" or "objective" sort. The judge has authority to set the amount of the compensation, following standard criteria. In case of actions against honor or private life, the judge can dictate that the infringer publishes an extract of the resolution.

Lastly, article 1916 sets forth an exemption against moral damage actions, when a publisher reproduces information that is accurate or is not responsible for the accuracy of third parties' information. This exemption is a good addition to the article's text.

2. Law of Civil Liability

The Congress of Mexico City adopted in 2006, a special statute of public order entitled "Law of Civil Liability for the Protection of the Right to a Private Life, Honor and Self Image in Mexico City" -Civil Liability Law-. The Civil Liability Law represents an improvement with respect to the Civil Codes, from procedural and substantive standpoints. The law was built over the perspective that personality -non-pecuniary-rights, including image rights, are inherent to the moral heritage of persons. Moral heritage is the subject-matter of protection, which is a notion broader in scope than the more limited moral damage concept of the Civil Code. The approach of moral heritage is more technical and consistent, as it enhances the substantive essence of personality, which the Civil Code does not. In keeping with this, the Civil Liability Law grants protection to self image, as a personality right that at the same time is the subject-matter of moral heritage. The protection afforded speaks against the "abuse of the right of information and freedom of speech". The law targets principally communicators, who abuse their freedom of speech or right to inform others, when presenting to the public information that involves the self image of a given person. Communicators can be journalists or producers of tv shows, documentaries or films, who refer to real people in their projects. And in support of their productions, they use image, voice or other identity features. The Law of Civil Liability protects the foregoing, making clear that protection is afforded for the non-pecuniary aspect of personality. Economic rights are kept aside of that discussion.

The Law of Civil Liability is much more a technical and profound piece of legislation than the Civil Code. It addresses personality rights from a deeper perspective. It is better structured from any angle conceivable: subject-matter; scope of protection; rights conveyed; remedies, actions and sanctions; exceptions of rights and so on. Accordingly, the Law provides an introductory chapter, to induct the subject-matter and scope of protection, personality rights and the rights of honor, private life and self image. Also, the law provides ad hoc chapters for the three specific rights. Lastly, it grants general chapters related to actions, remedies and sanctions.

The special chapter defines self image as “the reproduction in tangible medium of the identifiable physical features of a person”. The definition works, but evidences writing flaws. For example, the right verb should be fixation and not reproduction. Likewise, it is unclear whether the law includes the voice, signature or other elements that identify people, but are not physical. Lastly, it is restrictive when saying that reproduction is made in tangible media. People can authorize that their image is “captured” -a better word would again be “fixed”- and “spread” -analogous to transmitted or otherwise communicated to the public-. Illicit acts are that an image that is fixed or “captured” is then transmitted or communicated to the public -by intangible means- or published -by tangible means-. Commercializing with a fixed image in physical or non-physical media is viewed as an additional illicit act. A question would be though why commercial illicit acts, since the scope of the Law of Civil Liability does not address the pecuniary side of personality rights. In keeping with this, the question raises if it is technically possible that commercial illicit acts are pursued and sanctioned under the Law of Civil Liability? The answer seems “no”. Pursuant to remedies, the principal is injunctive relief. Economic compensatory or indemnity awards are potentially possible for repairing the wrong of using somebody's image. The judge can impose monetary compensation after pondering legal factors. The award is topped, in any event. However, it seems that other than compensation, full damage awards are not available under the Law of Civil Liability.

Making reference to the scope of the Law of Civil Liability, what would happen if the individual depicted in a picture is not the real character of a story? In Arjona, the Supreme Court found that “imitation” of someone's real image -like a celebrity, but not restricted to that-, is infringement of rights. In that case, a car maker recorded in an advertisement, an “imitator” singing as the artist Arjona. But, what would happen if in a film or documentary an actor “characterizes” or “interprets” a real person? The Copyright Law would not imply characterizing as use of an image. When an actress or actor are filmed or recorded, the law applicable is interpreters' neighboring rights and not right of image. Right of image is protection that rests for individuals other interpreters or performers.

Something interesting relates to limits and exemptions to personality rights. The Law of Civil Liability provides express exemptions for the three rights. Concerning self image, users can disseminate the same, without the need of consent, for journalism or informative purposes, when they do not denigrate the person involved. Users can employ the image of celebrities, who would need to proof “effective malice”, if they believe use affects them. Users are free to disseminate the image of real people involved in real situations or public places. The foregoing results from freedom of speech, but also from the Law of Civil Liability, expressly.

3. Copyright Law

The federal Copyright Law stipulates in article 87, that “the portrait of a person can be used or published with her express consent or with her representative’s or titleholder’s” consent. Article 87 can be interpreted as: i) the Copyright Law affording to “portraits” a certain kind of protection. It does not say what type of protection though. However, it cannot be the same for works-of-authorship; ii) there is thus for portraits no exclusive or property rights and no economic or moral rights like in copyrights. And since portrait rights are not intellectual property as such, it is unclear if they can technically be licensed or assigned; iii) if the maker of a portrait wants to publish it, she will bear an obligation to seek conformance from the individual portrayed iv) the individual portrayed can seek payment for granting authorization. She could also oppose or refuse against use without authorization; v) a person portrayed can publish or disseminate a portrait of her, if she gets authorization from the photographer, recorder, painter or artist; vi) portraits that are “used” or “published” need to have been fixed onto a photograph, video-recording, drawing or painting, without regard of the technology employed; vii) the scope of the word “publication” is wide enough to encompass commercial and non-commercial distribution of a fixed portrait; viii) the provision is silent whether protection is extended to communication to the public or other forms of non-tangible dissemination of a fixed portrait. However, public communication is a form of “using” portraits and is within the reach of protection as a result; x) as to mortis causa transfers, the law confers a term of 50 years after the death of the person portrayed. The foregoing means that, during that time, the heirs can give authorizations to users or refuse granting them. The portrait falls into public domain after 50 years of the portrayed person’s passing; xi) Mexican courts have inferred that “portrait” of a person is meant to be her “image”; xii) Likewise, Mexican Courts have resolved that “portrait” is not only a still picture, but also a film or recording; xiii) the Arjona issue related to “imitations” applies in connection with the Copyright Law, as well; xiv) under industrial Property Law, when used as trade symbols, portraits and images are entitled to trademark registration and exclusive rights.

Regarding procedures, the Copyright Law confers to portrayed individuals the same type of actions, remedies and sanctions, available for authors. So, portrayed individuals can take administrative or civil actions, for seeking injunctions or damage awards -these latter whether preliminary or permanent-. The Copyright Law calls “Copyright Infractions in Commerce”, the administrative proceeding for enforcing copyright and self image patrimonial rights. The law understands for commercial exploitation of works or image of individuals, that users trade in commercial instances and obtain profits in connection with the distribution or dissemination of the same. Actually, it requires that infringers pay at least 40% of the revenues obtained from exploiting a work. The rationale behind the 40% rule is that infringers transmit to the copyright owner or portrayed individual, all

profits that resulted from exploiting a given work or image. It can be a sanction unfair for enforcing image rights though. Most of the time, pretending to fulfill the objective to compensate portrayed individuals of a single infringement and repair a given wrong, the 40% rule has put whole companies or businesses under bankruptcy threat. In addition to administrative and civil actions, the Copyright Law provides notice and take down actions and procedures. Notice and take down is an expeditious and effective system designed to enforce IP rights by removing works -or images- from digital networks. Lastly, criminal claims are not available for image rights.

The Copyright Law contemplates a specific exemption in connection with the use of portraits. Article 87 states that "consent is not needed -from the portrayed person-, when she is a minor part in a set of people or when the photo is taken in a public place and the purpose -of the publication or dissemination- is informative or journalistic". Some comments about the ad hoc exemption are: i) the reason behind the rule is granting journalists, documentarians or film or series makers a safe harbor to be able to document their work better; ii) it has to do with real persons extracted from real stories or based or inspired on real stories; iii) the notion of commercial exploitation fades in situations like in i) or ii); iv) general exemptions of the Copyright Law and Berne Convention, including the three-step-test, seem not apply to image rights; and v) in addition to exemptions, freedom of expression applies as a human and constitutional right. It is subject to balancing, as judges assess when disputes involve image rights and freedom of expression.

II. PART TWO: Deepfakes or Online Replicas: Realistic but False Depiction of Individuals using Technologies.

A. Deepfake Issues

Recently, the US Copyright Office released a report entitled "Copyright and Artificial Intelligence. Part 1: Digital Replicas". The Office makes a full analysis of the AI generative deepfake/replica problem. Actually, it defines the concept of "digital currency replica" and explains how it has become an issue affecting celebrities and individuals in general. The affectation has to do with "image alteration" of people and the "concern about the impact on individuals' livelihood and reputations". AI is a new expression of the symbiotic -and historic relationship between copyright and technology. As the Register of Copyright states: "History has shown that the copyright system is resilient and continues to evolve as needed".

Digital replicas deal with: i) AI-generated musical performances; ii) robocall personifications of political candidates; and iii) images in pornographic videos. Since none of that is addressed by existing laws, the US Copyright Office has called for new federal legislation "to protect individuals from the appropriation of their persona". The Copyright proposal is provided in a rather substantive way, with recommendations related to every aspect as required. The principal aspects deal with subject-matter, persons protected, terms of protection, infringing acts, secondary liability, licensing and assignment, first amendment concerns, remedies and relationship with state laws.

On July 11, 2024, US Congress introduced a bill to defeat abuse in the use of deepfakes. It was called the "Content Origin Protection and Integrity from Edited and Deepfaked Media Bill" or "COPIED Act". The subject-matter is to identify the source of AI generated deepfakes and be able to tag it. In accordance with the proposed legislation, platforms would be imposed an obligation to allow users to tag synthetic images with information about its origin. Deepfakes are defined as "synthetic content or synthetically modified content that appears authentic to a reasonable person and creates a false understanding or impression." In a press conference senators implied: "These measures give content owners -journalists, newspapers, artists, songwriters, and others- the ability to protect their work and set the terms of use for their content, including compensation". The bill is pending for approval.

The story above tells what is happening in the US with regard to online digital replicas, at government and legislative levels. But, what will the rest of the world do? Is it a problem of international impact that will suggest the implementation of an international treaty? Or would reforms be preferred on a local level? Would the replica problem abroad be solved in a similar way as the US does? These are some questions that will come soon internationally.

B. US Ad Hoc Legislation

According to the recommendations by the Copyright Office, the proposed legislation to tackle online replicas should balance the following factors:

1. Subject Matter.

Implement legislation for digital replicas expressly. In particular those that are "so realistic" or "difficult to distinguish from authentic depictions". The issue expands the boundaries of image rights and thereby, protection of deepfakes should be differentiated, centered and narrowed down.

2. Persons Protected.

All individuals, not just “celebrities, public figures or those whose identities have commercial value”.

3. Term of Protection.

It should endure “at least for the individual’s lifetime”. If afforded postmortem, recommendation is adopting time limitations.

4. Infringing Acts.

“Distribution or making available of an unauthorized digital replica, but not the act of creation alone”. Not be “limited to commercial uses, as the harms caused are often personal in nature”. Actual knowledge would be required.

5. Secondary Liability.

That should apply, indeed. Also, the adoption of a safe harbor mechanism, so that online service providers “remove unauthorized digital replicas after receiving effective notice or otherwise obtaining knowledge that they are unauthorized”.

6. Licensing and Assignment.

Allow license and monetization of digital replica rights, “subject to guardrails, but not assign them outright”.

7. First Amendment Concerns.

Free speech should be mentioned in the statute. “Use of a balancing framework, rather than categorical exemptions, would avoid over breath and allow greater flexibility”.

8. Remedies.

Injunctive relief and monetary damages. Inclusion of statutory damages and attorney’s fees provisions. Criminal liability, under certain circumstances that are particularly grave.

9. Jurisdiction.

In the US, combining state and federal actions is complicated and challenging.

III. PART THREE: Should Mexico Change Legislation Also?

A. Crossing of Existing Legislation.

1. Civil Codes.

The restrictive approach of article 1916 of the federal Civil Code and the adoption, in 2006, of an ad hoc civil statute of wider reach, has stopped -or slowed down- plaintiffs from using the Civil Code for taking image right actions before courts in Mexico City. Article 1916 is in force but is quite inactive and thereby, it should be derogated, perhaps. On the other hand, actions outside Mexico City can only be taken at courts in each state, grounded on their own local Civil Codes.

2. Law of Civil Liability

The newer Law of Civil Liability has coexisted, since inception, with the older Civil Codes. Differences, if any, are not essential: The subject-matter is the same; the right and right holders

are the same; the actions, proceedings and remedies are all civil and thus the same. Contrasts are minor and subtle. From reading both texts, overlapping is a fact. The junior Law of Civil Liability of Mexico City preempts the senior Civil Code though. There is two rights for the same subject, but only one applies. Again, to avoid unnecessary repetitions, Congress ought to ponder abolishing article 1916.

3. Copyright Law

Inspired on European doctrines, portrait right of the Copyright Law was implemented by the legislator of 1943 -and has passed ever since to ulterior legislations-. The objective is filling the gap when in a creative process, artists depict the physical features of a person, in photos, recordings, drawings, designs or paintings. A portrayed person may not be happy that her image was used and that someone made money, without authorization or a share. Or if she approves exploitation, she may still want that the image is used in a manner that is respectful and non intimating. The addition of portrait rights to the Copyright Law has a more practical effect than technical. Remedies and sanctions are strong and thus suited against non-authorized commercial use of a self image. Remedies include injunctive relief and damages, whether preliminary or permanent. Likewise, the notice and take down proceeding is viable. The Copyright Law enforcement provisions have helped to achieve that purpose. The downside is that the substantive rights of the Copyright Law are the same as the rights of the Civil Codes and the Law of Civil Liability. They are all repetitive and essentially indistinguishable.

B. Similar or Disimilar?

On the substantive side, differences among the statutes is not important or relevant. For example: i) the names of the rights. While the Civil Codes and the Law of Civil Liability call them “self image rights”, the Copyright Law calls them “portrait rights”; ii) self image represents one of three personality rights of the Law of Civil Liability. The Copyright Law does not hold neither honor nor private life. On the procedural end, contrasts are greater; iii) rights under the Copyright Law are limited to 50 years after death. The civil statutes are silent in that respect. They include: i) Copyright Law grants to portrayed individuals an economic right that leads to administrative or civil damages actions. Not the Law of Civil Liability; ii) the Law of Civil Liability is more systematic, by giving definitions, rights and exemptions. However, it is not an enforcement mechanism against fakes. iii) under the Copyright Law, portrayed individuals can seek injunctions -preliminary or definitive- and monetary damages -including the 40% rule-. They can also ask for notice and take downs; iv) In conformance with the Civil Codes and the Law of Civil Liability, they are entitled to compensation, but not to injunctions or damages. Also, they cannot take notice and take downs; v) the 40% rule seems to be excessive and unequal, in detriment of users.

C. Exemptions.

As explained above regarding exemptions: i) the federal Civil Code provides an exemption allowing a publisher to disseminate information about real people, but needs to be accurate; ii) the Law of Civil Liability allows that users spread the image of someone for journalist or informative purposes. Celebrities need to show “effective malice”; and iii) the Copyright Law permits journalists or producers to publish or disseminate photos or recordings of individuals that are a minor part of a set of people. The exemptions of the three statutes, partially ensure fair use of self images, under circumstances dealing with the right to inform. It would be ideal, though, that users find in the Copyright Law and the Law of Civil Liability, every exemption required to guarantee their freedoms. It also would work that the Copyright Law affords standard copyright and Berne Convention exemptions, including the three-step-test. Any healthy legal regime providing rights and actions require adequate exemptions for securing a proper balance of rights.

D. Mexican Laws and Deepfakes.

Making online replicas is a new form of using the self image of people. They involve not only using the image of someone, but transforming, changing, alternating, distorting or moving the same into newer or diverse scenarios or contexts. As reported by the US Copyright Office, the issue of digital replicas transcends the boundaries of right of image. In principle, American laws seem not to protect online replicas and pertinent

laws would require reform. On the other hand, Mexican laws appear not to stand in the need of variation. Enlarging the scope of Arjona could become the solution. Deepfakes could be seen as a newer step after imitation, that courts undertake against use of transformed images. Replicas have a similar effect than imitations. In both cases, the image is not used as such, but as it was altered. In addition to Copyright Law actions, replicas in Mexico may require honor and intimacy rights' actions. The need of a second local action is a given, depending if infringement is committed in Mexico City or in any state. And it does not help that the Law of Civil Liability is of local jurisdiction. Enforcement of rights in digital environments require that laws and actions expand to federal and even international levels. Pursuant to proceedings, the Copyright Law offers notice and take down actions as well as injunctive relief and damages. It also provides fair use solutions to balance rights. Teeth are sharp to bite fakers. Concerning tagging, nothing has transpired at the Mexican Congress to discuss the identify and source of AI generated deepfakes.

E. Changes Needed -If Any-.

Laws are subjects that can always be improved, to give answer to legal questions, considering cultural and other factors. The principal purpose is creating a scope that fits all potential hypothesis. Facts repeat occasionally, but that is not the normal trend or situation. Newer stuff will come up and require review before existing norms. Changes to rules are justified only when they no longer fulfill their purpose. That said, Mexican laws protecting self-image are technically imperfect, but they still work, especially when fakers infringe rights. Anyway, portrayed individuals are required to take actions under two statutes, for enforcing the full spectrum of rights against online replicas. That is certainly impractical. In the end, the Mexican system may require reforms. The size and complexity of the deepfakes problem demands that actions are simple to the most.



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