

Illegal use the own image right in virtual space

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Abstract

Image plays a vital role in modern society. The significance of the person's image is expressed in the civil law through the legislative or jurisprudential recognition of the protection autonomy of a person's image in relation to protecting other aspects of their personhood. Since the image consists of the person's representation, identification of the person appears to be an obvious and sufficient condition for awarding protection. The civil law approach based on the right to a private life or the right of personality is expressed mainly either through a duality reflection of the extra-patrimonial and patrimonial attributes to one's own image or through the recognition of a single right with a dual nature. In present, the popularity explosion of social media application, besides the benefits offered by the total remove of communication barriers, generated some disputes regarding to the practising and the defens of the own image which is one of many rights of the human personality. In this way, this study encourage to reflect at this problem to see how we can practice and protect this right.

Keywords: the rights of personality, image protection, limits, social media.

JEL Classification: K15, K24

1. General aspect

The rights of personality are rights inherent to the quality of human person. These rights belong to any individual by the very fact that he is a human being. Undoubtedly, every person living in society has individual beings and social beings. From the simple fact that we live, we breathe - from the first cry to the last breath - we have the feeling that we have rights, innate rights in our being, and feel that every human being naturally has the same rights. On the other hand, we try to feel that each is unique and, at the same time, that we are different, that our situation is particular, our singular condition, each according to its age, gender, family, origin, nationality, profession, religion. Perhaps, for this reason, common language often avoids the word equality, and when invoked is used in a curative sense of condemnation of discrimination. There is an ambivalence between the notions of individual, subject and person: the individual is at the same time unique and similar, the subject is simultaneously sovereign and enslaved, the person is both flesh and spirit². It is true that all men are equal in nature, equally free, equally noble³. But

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² A. Supiot, *Homo Juridicus*, Rosetti Publishing House, Bucharest, 2011, p. 70.

³ E. Le Roy, *Les Africains et l'Institution de la Justice. Entre mimetismes et metissages*, Dalloz, 2004, pp. 231-233.

nature has marked differences between them, and it can be said that if everyone is equal, they are not identical. " Genetically, people are not identical either.

Specialty literature⁴ has shown that the rights of personality are prerogatives in which the holder is recognized as being able to enjoy and defend the essential attributes inherent in his person. Characters of personality rights are determined by their belonging to non-patrimonial personal rights. Thus, the rights of personality are non-transmissible, insensible, inappropriate, can not be exercised by a representative, are impregnable and opposable erga omnes. In order to determine the rights of personality, we will have to take into account the constitutional provisions, the Civil Code, the Universal Declaration of Human Rights, the European Convention on Human Rights and those enshrined in the Charter of Fundamental Rights of the European Union. Thus, the many rights of personality include the right to one's own image.

2. Genesis and legal protection of the right to own image

The privileged land of manifestation of the rights of personality is the right to one's own image. The legal protection of the right to one's own image is imperative because the message transmitted by the person's physical image is one of the most powerful forms of expression and is inseparable from the subject he represents. From the historical perspective, the first values that subscribe to the rights of personality were the particular life, the person's image and the prerogative of mood over his own body. The evolution of the personality rights has been marked by several factors: on the one hand, the increased attention given to man, viewed as a detached individual and, on the other hand, the impact of modern technology on his rights. Thus, regarding the right to their own image, the first decisions that evoke this right of the individual are contemporary to the emergence and development of the photographic technique that made it possible to reproduce the physical features. Etymologically speaking⁵, the image is the physical appearance of a person or a good, that is, the visible appearance of an individual or thing. So the image is the visible size of a person or a good. It distinguishes between the "source image" and the "reproduction image", the latter materializing in a graphic representation of the forms of a being or a good (drawing, painting, sculpture, photography, film, etc.). Obviously, reproduction is not confused with the subject of reproduction, although there is a close relationship between them⁶.

⁴ O. Ungureanu, C. Munteanu, *Civil Law. The persons in the regulation of the new Civil Code*, 2nd edition, Hamangiu Publishing House, Bucharest, 2013, p. 44.

⁵ Regarding the genesis of the right to their own image, it seems that the starting point was the case of Rachel. Actress with stage name Rachel was photographed on the deathbed without her consent or her relatives, and then the picture was published. The court of Sena admitted the action of the actress's relatives by stating that they can oppose this reproduction on the grounds of respect due to the doli of the family, thus damaging the pious affections of the offspring. Under German law, affirmation of the right to his own image began by publishing a photograph of Bismarck on the deathbed.

⁶ It should be noted that, within the meaning of Article 14 of Law no. 8/1996 on copyright and neighboring rights, reproduction means "the complete or partial realization of one or more copies of

The distinction between the "source image" and the "reproduction image" is necessary because the "reproduction image" must not necessarily be faithful to the "source image" (such as the caricature).

The right to one's own image is a component of the right to private life. The European Court of Human Rights has stated that⁷ "the right to image is a component of the right to privacy, governed by Art. 8 of the Convention, which aims to protect the identity of the person, the sphere of his intimate life, his personal relations, and his sexual freedom."

In national law this right is enshrined in art. 30 paragraph 6 of the Constitution and in Article 73 of the Civil Code. Article 30 paragraph 6 of the Constitution states: "Freedom of expression can not be prejudicial to the dignity, honor, the private life of the person or the right to his or her own image." Article 73 of the Civil Code also provides, in para. 1 that "every person has the right to his own image", while in paragraph 2 he states: "In the exercise of the right to its own image, it may prohibit or prevent the reproduction in any way of its physical appearance or its voice or, where appropriate, the use of such reproduction. The provisions of art.75 remain applicable".

As can be seen, the right to one's own image does not enjoy a legal definition, art. 73 paragraph 2, cited above, determining the content of the right in question by indicating the person's privacy aspects that the legislator has understood to protect.

Regarding the legal nature of the right to our own image, in the legal doctrine the views are divided. The doctrine⁸ states that this right is a property right, but this view was countered by the argument that a person is not the owner of his image. Also, the German doctrine and Anglo-American jurisprudence have established that the right that is the subject of the discussion would be based on copyright, talking about the individual's natural rights over their own traits. Finally, in another opinion⁹, which the Civil Code also enshrines, the right to one's own image is considered a personality right.

It must be accepted that there are situations where this right has, in addition to the nature of the personality right, the nature of patrimonial law. This is the case of a person who, through his professional activity, has made his image famous, such as cinema actors or mannequins, where the right to his own image is part of his heritage, being marketable. Image exploitation can be achieved by reproducing it (using photography, film, portrait, sculpture and other such processes) reproduction that can be the subject of the image contract.

a work, directly or indirectly, temporarily or permanently, by any means and in any form, including the realization any sound or audiovisual recording of a work and its permanent or temporary storage by electronic means."

⁷ C. Bîrsan, *European Convention on Human Rights. Comment on articles*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2010, p. 612.

⁸ Eugen Chelaru, *Civil Law. Individuals in NCC regulation*, 3rd edition, C.H. Back, Bucharest, 2012.

⁹ Marian Nicolae, Vasile Bîcu, George-Alexandru Ilie, Radu Rizoiu, *Drept civil. Persoanele*, Universul Juridic, Bucharest, 2016, pp. 52-53.

The right to their own image has created controversy in the literature and its autonomy. Some authors¹⁰ regard this right as a component of the right to privacy, while other authors¹¹ regard it as an autonomous right distinct from the right to privacy. Regardless of the opinion we are rallying for, we believe that the two rights complement each time the reproduction or publication captures the person's image in his private life. For example, publishing a photograph of a public figure for commercial or advertising purposes without the authorization of the person concerned is a violation of that person's right to the image and not a breach of privacy.

It should be noted that the voice is also an attribute of the personality, which is why it is subject to a right subject to the same regime as the physical appearance. As a result, it is forbidden both the recording, reproduction and diffusion of a person's voice, and the imitation of his voice, in conditions likely to create confusion among persons or in a way that could be prejudicial to him¹². In determining the facts which may infringe the right to our own image, we must also refer to the exemplary provisions of Article 74 of the Civil Code, according to which it is forbidden to capture or use the image or the voice of a person in a private space without his consent and the use in bad faith of name, image, voice or likeness to another person. In order to defend his / her right to his or her own image, the holder may oppose the reproduction of his / her portrait by any means or, where appropriate, the use of such reproduction. The prohibition primarily concerns those who shoot or shoot a person, be it in a space reserved for his private life, or even in a public space where he or she carries on a private activity such as participation at a religious event¹³.

3. Consent

Regardless of the fact that it treats the right to a picture distinct from the respect of private or integrated life, a certain element constantly appears in the judgments of the judgments - the consent required for the reproduction of the image. Reproducing a person through a photograph, film, drawing, internet, requires the consent of that person. Consent to a person does not necessarily mean that he is given to others. In all cases, consent is presumed to be given for the capture and distribution of a correct image of the person, and not for a distorted representation. The one who reproduces the image must prove the subject's agreement, it is not enough to have acquired the rights of the photographer; moreover, the consent given to the image does not mean the agreement given to broadcast it. It should be noted that art. 88 of the Law no. 8/1996 on copyright and related rights stipulates that the use of a work containing the portrait of a person may be made only with the authorization of the

¹⁰ Eugen Chelaru, *Civil Law. Individuals in NCC regulation*, 3rd edition, C.H. Beck, Bucharest, 2012.

¹¹ O. Ungureanu, C. Munteanu, *Civil Law. The persons in the regulation of the new Civil Code*, 2nd edition, Hamangiu Publishing House, Bucharest, 2013.

¹² Eugen Chelaru, *Civil Law. People*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2012, p. 39.

¹³ G. Cornu, *Droit civil. Introductions. Les personnes. Les biens*, 12th ed., Montcrestien, Paris, 2005, p. 250.

person represented in that portrait. The author, owner or owner thereof is not entitled to reproduce or use it without the consent of the represented person or his / her successors for 20 years after the death of the represented person.

This consent may be express or tacit, but it is not presumed. The agreement is tacit for public figures who appear in a public place if the publication of that image is useful for illustrating an actuality. Apart from these assumptions, the right to the image allows any person to oppose the dissemination, without his express consent, of his image which is an attribute of personality; it can not be remembered that the public has voluntarily renounced a sphere of intimacy as wide as the others. So, any person, regardless of his notoriety, has an exclusive right over his image and use. Assuming a public function does not automatically mean that the person in question has accepted any disclosure of her privacy behavior.

According to our work in the field of works, unless otherwise stated, consent is not necessary if the person represented in the portrait is a model profession or has received a remuneration to post. Consent is also not required for the use of a work that contains the portrait of a generally known person, and whether the portrait was executed in the course of its public acts or of a person whose representation is only a detail of a work representing a gathering, or a public event¹⁴.

Article 76 the Civil Code, with the marginal title The Presumption of Consent, stipulates that when the person to whom the information or material relates himself makes available to a natural or legal person who is aware of his activity in the field of informing the public, the consent to use them is presumed, without the need for a written agreement. Thus, the text invoked governs the presumption of consent that runs until the contrary in the situations mentioned in the text; the presumption is to apply not only to private life but also to the right to the image and to one's own voice. In our doctrine, two exceptions to the principle of express consent are formulated: a) the agreement is presumed to capture the image, while the person participates in certain public events; (b) the authorization is presumed to capture and / or disseminate the image while the person pursues his profession or a public activity; Naturally, presumptions will not work if the person in question refuses to fix or diffuse the image. Of course, the consent given by a person to use his image must be unvarnished; legal acts on the image are subject to capacity requirements.

In the case of capturing the image of the minor, as well as the one under judicial interdiction, the authorization of the legal representative is required. These people need additional protection in terms of privacy and right to the image. Consent once is revocable, like legal acts on the human body, of course, with the application of indemnities; revocation may occur until the moment the image is published.

4. The limits of exercising the right to your own image

Public order and general interest limit the right of the person to prohibit the capture of his image and its reproduction. Thus, the recording and transmission of

¹⁴ Art. 88 para. 2 and 3 of Law no. 8/1996 on copyright and related rights, as subsequently amended and supplemented.

captured images on public roads (to overcome legal speeds or regularizing traffic) or the use of video-surveillance means by public authorities to protect the public institutions or to prevent or detect attacks on the security of persons and property in places exposed to the risks of aggression and theft, obviously when the law permits the use of these means. In all cases, video surveillance of public places must be carried out in such a way that no images can be viewed inside the dwellings or their entrances; At the same time, the public must be kept informed of the existence of the video surveillance system and the authorization or person responsible for its installation. It is also legitimate for a judicial investigation to reproduce the image of a person, without his consent, in order to preserve its morphological characteristics or in the case where a crime is found to be committed. Article 75 of the Civil Code regulates the limits of the rights of personality as follows: "It is not a violation of the rights set forth in this section, the touches of law or international human rights conventions and pacts to which Romania is a party. The exercise of constitutional rights and freedoms in good faith and in compliance with the international covenants and conventions to which Romania is a party does not constitute a violation of the rights provided for in this section."

Therefore, the interference of a public authority in the exercise of the right to the image is admitted only to the extent it is prescribed by law and whether it is a measure which, in a democratic society, is necessary for national security, public security, economic well-being protection of health or morals, or the protection of the rights and freedoms of others. A state action that interferes with the person's right to privacy must meet certain conditions, namely: the interference is prescribed by law, interference is necessary in a democratic society, the interference has a legitimate purpose.

5. Extinguishing the right to your own image

Because the person's image is only the form of the human body, it follows its fate and disappears with the person's death¹⁵. But the image of the inanimate body is protected in this quality. Section 4, Chapter II of the First Book of the Civil Code is entitled Respect for the person and after his death. Art.78 establishes that the deceased person is given respect for his memory as well as for his body and according to Art. 79 The memory of the deceased person is protected under the same conditions as the image and reputation of the living person. When touching the right

¹⁵ In one case (the French Court of Cassation, First Chamber, 15 February 2005), in which the photograph of a deceased person was used on a disc, his children demanded an indemnity for the use of the image for commercial purposes. They did not claim respect for their father's moral rights, but the exercise of patrimonial rights over the image of the deceased who had been passed on to them. The Court of Cassation reminded on this occasion the extinction of the right to action regarding the respect of privacy and the image with the death of the person.

to the image is likely to affect the feelings of the heirs and create personal injury, they will be entitled to a legitimate exercise of legal action¹⁶.

6. Illegal use the own image right in virtual space

Lately, it can be noticed that the social networks give us a lot of pictures with different people in situations not quite like, for example, images of public people detained or arrested. In principle, capturing a person's image (photographing) or using this image, including by distributing them on social sites, is prohibited without the prior consent of the person concerned. Also, in the case of minors, the aforementioned actions are prohibited without the prior consent of the legal representatives. From the *per a contrario* interpretation of the provisions of Article 73 paragraph 2 of the Civil Code it follows that a person may consent to the reproduction of his or her physical appearance or voice, but the consent given to a person does not mean that it is given to others. It should be stressed that in all cases, consent is presumed to be given for the capture and distribution of a correct image of the person, not for the deformed representation, the one who reproduces the image in this way must prove the agreement of the subject¹⁷. The right to one's own image allows anyone to oppose the dissemination, without his express consent, of his image, which, as has been shown, is an attribute of individuality, any person, regardless of his notoriety, having an exclusive right over his image and its use. Occupation of a public function does not automatically mean that the person concerned has accepted, from the outset, any disclosure of behavior in his private life.

An important aspect is that if the person in question gives his consent only for a specific situation, reproducing an image outside the context in which the consent was given may constitute a breach of the right to the image. Also, the image will not be used again, in the absence of the subject's current consent, even within the same publication.

Since the right to one's image excludes capture and use of a person's representation, it is not necessary for the damages to have the photo as offensive or offensive.

The opposition of the subject to the reproduction of his image is not opposed to those who reproduce another image in which that person is included without, however, being the subject of reproduction, such as the situation in which the reproduction depicts an anonymous set of which the subject example of a public event). However, such publication may become unlawful if a person has been cast in the foreground.

¹⁶ In the case of the publication in Paris Match of the photograph of the inanimate body of President F. Mitterand, the court admitted the transmission to the deceased's heirs of image protection, rejecting the idea that the right to respect for private life disappears at the time of the person's death.

¹⁷ Flavius Baias, E. Chelaru, R. Constantinovici, I. Macovei, *The New Civil Code. Commentary on articles*, 2nd ed., C.H. Beck Publishing House, Bucharest 2014, p. 90.

Like any right, the right to your own image can not be misused, its exercise being not absolute. So it is legal to reproduce the image of a person during judicial inquiries, but this must be done for a legitimate purpose¹⁸.

Photographing and use of a person's image is permissible even without the prior consent of the person when they are done in good faith in the exercise of other fundamental rights, such as the right to free expression.

Freedom of expression is a limit to the right to the image, the delimitation of the right to the image of the right to free expression is not a simple exercise, and the courts are often given the opportunity to carefully observe the limits of these fundamental rights when called upon to decide whether the use of a person's image satisfies the legal requirements or not.

The European Court of Human Rights has ruled, in its case law, that the judge must strike a fair balance between the right of that person and the public's right to information, a balance between competing interests or the criterion of contributing to a debate of general interest.

As a consequence, there are some main rules: photographing a person in a private space without his consent is basically prohibited, while the opposite is the situation of photographing or using the image of a person caught in a public place in the course of a public activity, in which case the use of the person's image without his consent does not violate the law unless it affects its reputation or dignity determined foremost.

We believe that the right to the image would suffer an unjustified restriction if it could be exercised only within the confines of private premises. Daily activities imply the person's movement and presence in public places and places, and considering that this choice is an option in accepting an exposure to the general public would lead to the forced conclusion that a person will be able to keep the initiation of his daily activities only if he would always remain in the security of a private space. In this respect, the Bucharest Court of Appeal also considered that "considering that public persons in public places necessarily carry out public activities would lead to a limitation of the legal provisions, as it would be equivalent to the protection of this category of persons only as long as they are in a private space, even if objectively they are forced to leave these spaces to carry out activities necessary for their private life¹⁹". Thus, taking pictures and using private-imagined

¹⁸ The European Court of Human Rights established, in its judgment in Case T-427/02 of 24 February 2009 in *Toma v. Romania*, that: "the images and the photograph representing the applicant were recorded by journalists at the Constanța police headquarters on 10 September 2002, a few hours after the person in question was caught in a flagrant offense in a parking lot on the outskirts of the city. The Court notes that the complainant's claim that journalists were summoned to police by police officers has not been denied by the Government and is confirmed by the evidence in the file, taking into account the circumstances of the arrest in question. The Court therefore considers that in the present case the conduct of police officers who called on journalists and authorized, without the applicant's consent, to register at the police headquarters - to broadcast them in the press - images of the latter, even at the time when the criminal prosecution begins, is an interference with the applicant's right to respect for his private life." See, www.avocat-tudor.ro, accessed on 03.10.2017.

¹⁹ Bogdan Halcu, Andreea Lisievici, *The right to image in the context of the distribution of photographs on social networks*, „Romanian Business Law Review” No. 11/2014.

images in public places are legal only if the recordings are used in good faith, which, as we have seen before, presupposes the existence of a legitimate interest, an interest which must exist only at the time of filming. We add that similar rules exist in other states such as, for example, France, where the situation in the car was sanctioned is the image of a person, caught in public, used without his consent in a context that seeks to give another dimension of the image, placing the individual in a different hypothesis than the original one.

It is clear that the most used social networking is Facebook being the most representative of the subject of the discussion. In principle, Facebook's policy is that users are responsible for the legality of posted content. However, the Facebook Community Standards provide that you can not share an image without the consent of the person in question. In fact, Facebook has also provided the possibility of resolving such a situation, so people who consider themselves injured by publishing an image without their consent have the ability to report images. When such reporting takes place, and Facebook finds that Facebook Standards have been violated, that image will be removed without requiring the user to share the image.

It should be noted that there is a situation in which the terms and conditions of use of a particular social networking network provide the appearance that users grant network owners the right to use the posted pictures²⁰. Following is well known, there are few people who, prior to using a particular social network, are also documenting the terms and conditions of the network. This may be the case where a person's images are used by the owners of that social network, and the person in question will invoke the right to his / her own image, we can unlawfully say that he / she has given consent to their use by accepting the terms and conditions imposed by that social network.

The High Court of Cassation and Justice has determined²¹ that Facebook is a public space. Thus, the situation is clear if the Facebook user has opted to make his posts public. Basically, in such a situation, when a user distributes something on Facebook with a public audience setting, the dissemination of information is unlimited.

What raises issues is when the user has limited audience setting only to friends. In a decision of the Mureş Court of Appeal, the judges ruled that "Facebook's Facebook social network can not equate, from the aspect of controlling the broadcast messages, with an electronic mailbox, and the personal Facebook profile, even if it is only accessible to friends, that is to say, to a small group of people, it is also public that any of the friends can share the information posted by the owner of the page, a matter the applicant knew. "In other words, in the court's view, the setting of limited audience to friends does not alter the advertising of distributed content, on the grounds that any of those friends can redistribute the content in question. Thus, by publishing an image, regardless of whether it has opted for limited audience only to friends, the user knows the image can be redistributed, which is why he can not

²⁰ <http://www.facebook.com/communitystandards>, accessed on 03.10.2017.

²¹ By Decision no. 4546/27 November 2016.

invoke the right to his own image given that we can say we are in the case of tacit consent.

However, we believe that this issue can be resolved by restricting the user's audience so that the redistribution is technically eliminated and, as a consequence, would result in the content being no longer public. However, we reiterate that the person whose right has been violated must have sound and legal grounds to claim that the right to his / her own image has been violated. This should not be in any of the cases described above, otherwise it may be an abusive or even unlawful exercise of the right which is the subject of the discussion.

7. Conclusions

The legal characters that emerge from the right to their own image are rooted in the legal characters of the personality rights. These are absolute rights and all other persons, as an indefinite passive subject, have a general and a negative obligation to refrain from any act or fact that might undermine the right of the active subject, that is, they have the obligation to do nothing nature to violate or hinder the exercise of the rights of personality, in this case the right to own image.

Referring to the non-transmissibility of personality rights, we can attribute this character to the right to image. Since it is non-transferable it is understood that it is not likely to change the holder. This means that the death of the person is extinguished and is not passed on to the heirs. On the other hand, because it operates with moral interests and is not susceptible to pecuniary evaluation, they are not inflated by the economic mechanisms. This right is notable precisely because it is not an economic good, so it can not be pursued by the creditors of that person. This right is also impressively extinctive and opposable *erga omnes*. However, these characters must sometimes be viewed with nuances: there are interferences between personality rights (which are extra-patrimonial rights) and patrimonial rights. Indeed, the law recognizes the validity of conventions relating to the rights of personality (the exploitation of the image, the voice, the name) so that there is a growing patrimony of these rights.

However, the right to the image has a dual nature. On the one hand, it is a right of personality, in a strict sense, which attracts from the point of view of its protection, the legal regime of the category to which it belongs. On the other hand, in the case of a person who, through his professional activity, has made his image famous, such as cinema actors or mannequins, the right to image is part of his heritage and is marketable. In these latter cases, the person is granted a monopoly over the exploitation of his image.

So, virtual space in general and social networks in particular, in addition to the many advantages that it offers us, can often put us in a situation that is not at all pleasant. Therefore, it is very important that when we make the decision to use a particular social network, let us know in advance about the terms and conditions of use. Also, if we use a different network, we need to be very careful about the content of our posts because we can not invoke a breach of the right to the image as we have

not done the minimum of diligence to let us know about the character of the posts on which we do. So we recommend caution and diligence in using social networks that are so present in everyone's lives.

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