

THE RIGHT TO OWN IMAGE IN THE NEW ROMANIAN CIVIL CODE

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***ABSTRACT.** IMAGE, A REPRESENTATION OF THE PHYSICAL FEATURES OF THE PERSON AND AN EXTERNAL DIMENSION OF THE HUMAN BEING, CANNOT BE REPRODUCED OR PUBLISHED WITHOUT THE AUTHORIZATION OF THE PERSON THEY REPRESENT. THIS POSSIBILITY OF THE PERSON IS INCORPORATED IN THE RIGHT IMAGE, WHICH IS PROTECTED BY LAW LIKE ANY RIGHT OF THE PERSON, IN THE NEW ROMANIAN CIVIL CODE AS THE RIGHT TO OWN IMAGE [1].*

***KEY WORDS:** THE RIGHT TO OWN IMAGE; THE CONSENT; THE REPRODUCTION OF A PERSON THROUGH PHOTOGRAPHY, FILM, DRAWING; THE MEMORY OF THE DECEASED.*

1. The Concept.

First meeting in case law, legal regulation of the right image was required by the need to protect the freedom, privacy and even personal security.

Under the new Romanian Civil Code: "(1) Everyone has the right to his own image; (2) In the exercise of the right to their own image, it may prohibit or prevent reproduction, in any manner, physical appearance or his voice or the use of such reproduction"- *Article 73 – The Right to Own Image.*

In the juridical literature, the legal nature of the right image is described differently. According to an opinion, it has the nature of a property right. In another opinion, the image of the person is an extra-patrimonial good (the image may not be contained by general pledge of the creditors, but may be the subject-matter of a contract for consideration); according to the German doctrine and to Anglo-American jurisprudence, the right to image is founded on copyright (copyright over their individual natural features); juridical French doctrine considered that the right to image is a right of personality, a right primordial, as regulated by the New Romanian Civil Code like the right to life, health, physical and mental integrity, honour and reputation, the right to privacy - *Article 58 of the New Civil Code.*

Image right person involves the prerogative to fix the own image through self-portrait, self sculpture, photography self and others, the power to prohibit others to do so, and the power to exploit its own image through reproduction. The image as an emanation of the human body, it may not be alienated, but unlike the human body, the holder of the

image (image source) may assign its use even with consideration.

Also, the holder of the image may agree that his image to be used as a model for a work of art. Image-reproduction, encompassing vision of the artist, is a work of art, a good distinct source image and the artist is the owner of the exploitation of the work.

It is true that the right to own image is not perfectly aligned to the general features of the personality rights because the image may be sold, but on the other hand it is not a patrimonial good [2]. In the legal literature, it spoke of a shift of the right to image, from an absolute to a relative right, that in the future, this right will be replaced with the right to dignity and the image for information will be a long time an ambiguous and approximate right.

2. The Consent. Any reproduction of a person through photography, film, drawing, internet etc. is made with the consent of that person [3]. Consent is given for a certain use of their image (capture, broadcasting) and is presumed to be given on the correct image of the person and not a distorted representation. Evidence acquisition of the rights photographer is not equal to the evidence of the consent of the right holder [4].

The right to own image is a monopoly that excludes anywhere uptake and representation of a person, so to award damages it's not necessary that the photograph to have offensive or insulting.

For the public persons who appear in a public place, the consent is tacit [5], if publication of that image is useful for presenting a current. Also, it is not necessary consent of the persons belonging to a public event or certain professionals (model, television commentator) if their image is inherent profession and not exceeding context of contract.

According to the *Article 76 NCC* entitled *The Presumption of Consent*, consent is presumed and not need a written agreement when the pictures or the information are made available to individuals or legal entities by the one referred to in these images, if he knows that they operate in the public information.

Until proven guilty, presumption of consent applies in the circumstances mentioned in that text and regards not only privacy but also the right to own image and voice. Expressing agreement to use its own image is a manifestation of will, whose validity is assessed according to the rules of the contract. Thus, their consent must be uncorrupted; for capturing the image of the minor [6] or of the person under judicial interdiction requires the authorization of the legal representative [7]. Consent given is revocable, like any legal acts regard human body, of course, with compensation if appropriate; revocation can occur until the publication of the image.

3. The Limits of the Right to Own Image. Exercising the right to their own image (and voice alike) has unlimited nature, the law governing a number of cases where intrusions are permitted in this territory intimately connected person. Such limitations are imposed by the need to balance between the right to privacy and right to information of citizens, which is achieved by the media and other public interests, too.

The limits of personality rights, among which is included the one that is the subject of this paper are provided in article 75 paragraph (1) and (2) NCC [8].

It should be noted that the premises of such limitations are found in Article 27 paragraph (2) - (4) of the Romanian Constitution, including the situations [9] where may derogate from paragraphs (1) according the domicile and residence are inviolable, but also and in the provisions of Article 8 (2) of the European Convention on Human Rights. This

latter piece of legislation established that everyone has the right to respect for his private and family life, his home and his correspondence, except in special circumstances [10].

According to Article 75 paragraph (1), the intrusions in the right to own image that are permitted by law or by international conventions and covenants on human rights to which Romania is a party is not a violation of privacy. In addition, paragraph (2) [11] thereof mention that no exercise of constitutional rights and freedoms in good faith and in compliance with the international conventions is not an infringement of personality and hence the privacy.

It is lawful recording and transmitting images captured on public roads (for speeding or traffic regulation) or using means of video surveillance by public authorities to protect public institutions or preventing or finding of harm to the security of persons and property in places at risk of bullying and theft, of course, when the law allows the use of these means. In all cases, the operations of video surveillance of public places must be made so that it cannot view images within housing or those of their entries; while the public must be kept informed about the existence of the video-surveillance and about the authorization or the person who is responsible for installing this system. Under the new Romanian Penal Code placement of the technical means of recording audio or video without the right is a offence - Article 226 paragraph (5).

In the same sense, is lawful as in a judicial investigation to proceed to reproduce the image of a person, without requiring consent, in order to preserve its morphological characteristics or where such an offense [12] is proven [13].

European Convention on Human Rights through Article 8 protects the individual of the person. States have the obligation to protect the privacy and right to own image under the Convention [14].

Freedom of expression is to another limit of the right to own image [15] and the scope of application of the freedom of information has a tendency to expand. Information covering, as pointed out, all areas of social, political, cultural, scientific, artistic, commercial, etc.

Protection of personality rights often comes in collision with the freedom of the press and with the right to public information. Since technically, there is no superiority between the right to own image and the fundamental right to information.

Therefore, jurisprudence weigh them for each case to verify that, given the circumstances, the right to own image will be rejected or not; of course will take into account of the principle of proportionality.

Moreover, the image shown to be accurate and legitimate, and choosing the image to be relevant in relation to information. The need to inform the public must often be a tolerance for the benefit of those who exercise their right to information; exercising the right to information, they should have, as said, a forced license rights. However, in all cases the principle of dignity must be rigorously respected.

Capturing an image of a person as an element of a crowd (image of a person caught in a public event) cannot be considered unlawful if the person's is not caught in the forefront of the whole image.

4. Extinction right to own image. The image of the person is only human body shape, so it follows its fate and disappears with the death of a person; will remain lifeless body image that is protected as such [16]. Especially that the protection of the dead body is regulated by law and thus it necessarily concerns and his image, the relatives of the

deceased may require sanctioning dead image reproduction based on their own right to privacy.

Although the right to image seems to be a real right, which could lead to the conclusion that it is transmitted *mortis causa*, however, qualifying it as a right of personality, so as personally subjective, it is not transmissible to heirs, he ceases at person's death. Where violations of the image affect their feelings of heirs and produced damages. These have a legal action. In the absence of express provision, French jurisprudence has admitted that the action in protecting the image of the deceased heirs is transmissible and rejecting the idea that the right to privacy disappears when the person's death [17].

Even if the right to own image ceases when the person's life is over, the new Romanian Civil Code protects the respect due to the person after his death [18]. The respect owed the deceased on his memory and on his body - Article 78 NCC. The memory of the deceased is protected under the same conditions as the image and reputation of the person in life - Article 79.

Also, in the legal protection of the will of the deceased, any person can determine how their funerals and can dispose regard of his body after death. For those deprived of legal capacity or those with limited exercise capacity is necessary written consent of the parents or, where applicable, of the guardian. In the absence of express options deceased will be respected in order, will spouse, parents, descendants, collateral relatives up to the fourth degree inclusive, universal legatee or the mayor or village, town, city or sector in Bucharest whose jurisdiction the death occurred. In all cases it will take into account the religious affiliation of the deceased - Article 80.

5. Civil penalties regarding violations of the right to own image. According to Article NCC 252, any person has the right to protection of intrinsic human values such as life, health, physical and mental integrity, dignity, privacy, privacy, freedom of conscience, scientific, artistic, literary or technical [19]. Interference with these rights entail a pecuniary or non-economic. Although non-pecuniary damage, those concerning life, honour, reputation, dignity, bodily integrity, privacy, are virtually priceless pecuniary, law allows the granting of compensations for moral damage.

Article 253 establishes the defences which the individual person may exercise in the case of violation of its non-property rights. Article expressly establishes the right of injured or threatened with a infringement of his personal rights to ask anytime court: prohibit of the violation if it is imminent; infringements and banning them in the future if it still takes; finding that the offense made unlawful if disorder that created it still exist [20].

The Article 255 governing interim measures may be ordered by the court, at the request of the complainant, by way of presidential ordinance when there is a credible evidence that non-property rights are the subject of current or imminent unlawful action, action threatening to cause damage difficult to repair [21]. These measures are: a) to prohibition of the infringement or terminate its provisional; b) to take the necessary measures for the preservation of evidence.

If damages by means of written or audiovisual media, the court may order termination of the action producing damage if three additional conditions are met [22]: the applicant justify serious harm; action is not clearly justified; measure does not appear as disproportionate to the harm caused [23].

We note that the procedure of provisional measures under Article 255, paragraph (4) - (8) pays special attention to measures to limit their misuse. In this respect, restrict the

use of action that may prejudice by introducing bail and principle of compensation for damage caused by the applicant are likely to limit the use of these actions outside of reason given by the legislator.

REFERENCES

- [1]. "Right Image" is a simplified form of the correct phrase "right on the image." New Civil Code uses the phrase "right to his own image" as the Constitution.
- [2]. In our doctrine was held that the right to self-image is more mixed right side it has a heritage - "Image fixed on a support is measured in money, negotiate the art, advertising, and photography market"(O. Ungureanu, C. Juguastu, *Civil Law. The Persons*, Rosetti Publishing House, Bucharest, 2003, pp. 46-48).
- [3]. Regulating the victim's consent is a novelty in Romanian criminal law (art. 22 par. 1 C.p.), which is determined by the individual's rights to have some values that law gives them as an expression of freedom enjoyed by a State law. For details, see E. G. Simionescu *The consent of the injured party, justified cause in criminal law*, Annals of the University "Constantin Brancusi" from Targu-Jiu, Legal Sciences Series, no. 1/2014, p. 50.
- [4]. Article 88 of Law no. 8/1996 establishes that the use of a work that contains a portrait of a person can be made only with the consent of the person represented in that portrait. The author, owner or possessor shall not have the right to reproduce or to use it without the consent of the person represented or successors, for twenty years after the death of the person represented (for details, see C.R. Romițan, "Moral Rights for Author", Legal Publishing House, Bucharest, 2007, p 137-138)
- [5]. In some cases, the importance of the protected social value and risks of committing abuses, consent must be in the form prescribed by law. For details, see E. G. Simionescu, *Criminal Law. General Part 1*, Didactic and Pedagogic Publisher, Bucharest, 2014, p. 127.
- [6]. For details on the concept of a minor child and see, E. G. Simionescu, *The Minor. Subject Criminal Law*, Didactic and Pedagogic Publisher, Bucharest, 2014, pp. 10-14.
- [7]. According to Article 22 of Law no. 272/2004, the child has the right to protect its public image.
- [8]. The content of Article 75 of the NCC is as follows: (1) Encroachments that are permitted by law or international conventions and covenants on human rights to which Romania is a party is not a violation of the rights provided in this section. (2) The exercise in good faith of constitutional rights and freedoms and respect international pacts and conventions to which Romania is a party does not constitute a violation of the rights provided for in this section.
- [9]. For example, the execution of an arrest warrant or a court order; removing a risk to life, physical integrity or property of a person; protect national security or public order; preventing the spread of an epidemic.
- [10]. Paragraph (2) of Article 8 of the Convention provided that it is interference by a public authority in the exercise of this right except to the extent that it is required by law and constitutes a democratic society, a necessary for national security, public safety or the economic well-being of the country, prevention of disorder and prevention of crime, protection of health or morals, rights and freedoms of others.
- [11]. The requirements of paragraph (2) are cumulative. Good faith in the exercise of constitutional rights and freedoms shall be interpreted in conjunction with the observance of the covenants and conventions to which Romania is a party, and the jurisprudence of the courts with responsibilities for verifying compliance, rule that is consistent with Article 20 of the Constitution.
- [12]. For details on the concept of crime, see E. G. Simionescu, *The concept of offence in the new Criminal Code*, AGORA International Journal of Juridical Sciences, no. 3/2013, pp. 169-179.
- [13]. In criminal law, violations of privacy by photographing, capturing images or recording, listening with technical or audio recording of a person in a dwelling or outbuilding of it, according to art. 226 paragraph (3) of the new Criminal Code is not an offense: a) by the person who attended the meeting in which the injured person was captured sounds, conversations and images, if a legitimate interest; b) whether the injured person acted explicitly intended to be seen or heard by the

- perpetrator; c) if the perpetrator surprise a crime or contribute to proving an offense; d) if caught public facts that have significance to the community and public disclosure advantages outweigh the damage caused to the person.
- [14]. In *Peck v. United Kingdom* the European Court established a violation of Article 8 of the Convention.
The applicant argued that disclosure of the municipal council of footage through a closed circuit television images representing his suicide attempt, is a violation of his right to privacy; although the applicant agrees that images are allowed rapid intervention police, which saved his life, however, he complained about the dissemination of public television channels, which has been recognized by many people that knew him.
- [15]. Article 10 of the European Convention on Human Rights.
- [16]. According to Article 58 paragraph (2)NCC, these rights are not transferable. However, Article 226 paragraph (1) NCC provides that an action to restore the personal right violated may be continued or started after the death of the injured person, by the spouse or any of the relatives of the deceased in a straight line, by any collateral relatives up to the fourth degree. Action to restore the integrity of the memory of a deceased person can be initiated by those referred to in paragraph (1).
- [17]. B. Beignier, “Libertes et droits fondamentaux”, 15-e edition, Dalloz, 2009, p. 255 (note - Tribunalul Paris, 13 ian. 1997, Recueil Dalloz 1997 – the statement published in Paris Match to photograph the body of President F. Mitterand).
- [18]. Chapter II – “Respect Due to the Human”, Title II – “Individuals”, Book I – “About People”.
- [19]. Scientific, artistic, literary, and technical work strictly is not strictly related to person, but we believe that the legislature included it in this category given the broader non-property rights protection.
- [20]. V. Terzea, “The New Civil Code”, Volume I, annotated with doctrine and jurisprudence, Universe Publishing Legal, Bucharest, 2011.
- [21]. “The New Civil Code. Notes. Correlations. Explanations”, CH Beck Publishing House, Bucharest, 2011, p 182.
- [22]. the other two: 1. unlawful, actual and imminent action; 2. proceedings tend to create a damage difficult to repair.
- [23]. In this way it was intended to avoid the intervention of the judge's private censorship - C.T. Ungureanu, ”Civil Law. General Part. The Persons in the Regulation of the New Civil Code”, Hamangiu Publishing, Bucharest, 2012, pp. 45.