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**PROBLEMS IN LEGAL REGULATION OF PERSONAL IMAGE
USE ON THE INTERNET**

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Abstract

Currently, personal images are widely used on the Internet, a global information and telecommunication network. Universal access and simplicity of publishing create conditions for unlawful use of personal appearance in the digital space, which may lead to infringement of rights not only of the person whose appearance is fixed in the image, but also of a person who created such image by means of their creative work. The article analyses the concept, content and legal nature of a person's right to their image and determines its place in the system of objects of civil rights. A provision is substantiated on a dual nature of the right to the personal image. Study of provisions of Russian civil legislation made it possible for the authors to identify a number of deficiencies in legal regulation that impede efficient implementation of protective function of law in the area in question. Propositions and recommendations have been developed aimed at optimizing the mechanism of protection of subjective right of a person to their image. The article substantiates preferableness of a written consent form for publication and use of personal image on the Internet. A proposition has been formulated to correct the legally defined list of circumstances that do not require obtaining personal consent for use of image by excluding the case of posing for a fee. It is proposed to supplement the legally defined scope of persons authorized to provide consent for using an image of a deceased person with some categories of close relatives.

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Keywords: Personal image, appearance, consent, Internet, nontangible benefit.



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1. Introduction

Expanded accessibility to the global network, increased importance of online services and web sites for organization of various social interactions, increased popularity of social networking sites among various population groups lead to increase in all types of wrongdoing in the Internet space, including in the area of use of personal images. Existence of this problem has been noted by both Russian (Poliakova & Akulova, 2015; Postnikova, 2018) and foreign (Cheung, 2009; Kim, Jeong, Kim, & So, 2011; Külçü & Henkoğlu, 2014; Şerbu & Rotariu, 2015) legal experts. This is caused by wide availability of images, ease of publishing, profitability of their use on the net (including in advertising), lower probability of detection of unlawful use and identification of perpetrator, as well as possibility to hide the fact of unlawful use by deleting the information from the net.

2. Problem Statement

The regulatory foundation for protection of the right to personal image in the current Russian legislation is Article 152.1 of the Civil Code of the Russian Federation (hereinafter – CCRF), brevity of which does not always provide for effective protection of the right to personal image, even taking into account available legal precedents and interpretations of the court of last resort and especially in the case of image use on the Internet. Regulations of the current civil legislation do not include definitions of the terms “personal image” and “appearance”, do not explain the content of the right to personal image, do not allow determining the place of the phenomena in question in the system of objects of the civil rights and, as a result, selecting and implementing relevant methods for protection of infringed rights. The mechanism of protection of the right to personal image provided by legislators does not specify form and content of a consent to publication and use of image; the exclusionary list for the rule on necessity to obtain personal consent for image use is formulated incorrectly; the scope of persons authorized to give consent for use of an image of a deceased person is defined too narrowly.

3. Research Questions

The subject of this research is a set of problems related to definition of the legal nature of the right to personal image, publication and use of personal image on the Internet, selection and implementation of protective measures in case of infringement on the subjective right to an image.

4. Purpose of the Study

The purpose of this study is to analyze provision of the civic legislation of the Russian Federation, legal precedents, doctrinal sources dedicated to the issue of protecting the personal images with the aim of developing a system of measures to optimize the protection mechanism for the right to personal image which was unlawfully published and used on the Internet.

5. Research Methods

Methodological foundation of the study in legal regime of personal image are general scientific methods of analysis and generalization of regulatory and empirical materials, specific scientific methods, namely, systemic-structural, formal-logical, and method of legal prediction and modeling.

6. Findings

Currently, the existing Russian legislation has no legal definition of the “personal image”. Thus, it is quite natural that scholarly literature contains different positions on this matter (Badamshin, Sabirov, & Nabiullin, 2018; Mazaev, 2016). The authors agree with the opinion of those authors who point out a necessity to delimit the concepts of “personal appearance” (individual and inimitable external appearance of an individual) and “personal image” (as an image that captures person's appearance) (Gavrilov, 2015; Zakharenko 2016). Such an approach allows drawing a conclusion on the complex nature of civil rights to the personal image. On the one hand, the object of this right may be included with nontangible benefits, as appearance belongs exclusively to a private person (citizen) from the moment of their birth, is inalienable and serves as a means of their individualization (Omarova, 2017). It is supported by the position of the legislator, who included the regulation for personal image protection (Article 152.1 of the CCRF) into Chapter 8 “Nontangible Benefits And Their Protection”. Indeed, unlawful use of personal image (that is, in violation of item 1 Article 152.1 CCRF) assumes certain attempting to such intangible benefit as personal appearance and may also involve other intangible benefits (personal inviolability, personal privacy, personal and family secret, etc.).

On the other hand, image of personal appearance bears similarities to objects of copyright, in particular, in most cases it is a result of creative activity and has an objective form of representation (Süli, 2019). Such opinion is indirectly expressed in clarification by the Supreme Court of the Russian Federation that contains a notion of applicability of Article 1268 CCRF on the basis of analogy with protection of the right to personal image; this article is in the section covering the intellectual properties, exclusive rights and copyright.

The Article 152.1 of the CCRF sets a general rule for persons using an image of another person, the essence of which is that it is necessary to obtain consent from the depicted person. The rest of the article is dedicated to listing exclusions from this rule and consequences of noncompliance.

In the plain meaning, the consent is an active expression of personal will by means of a positive answer to a third person's question on possibility to use the person's image, permittance to perform relevant action, e.g., to publish the image on the Internet. The personal consent serves as a relevant legal foundation for publishing (Erdos, 2017). By its legal nature, the consent to use of personal image is a transaction (item 46 of the Resolution of Plenum of the Supreme Court of the Russian Federation dated 23.06.2015, no. 25). As the Article 152.1 of the CCRF does not include a notion of a form in which the consent shall be given, one should be guided by general provisions on the form of transactions, on the basis of content of which, the content may be oral (by exchange of words or implicative conduct) or written. At the same time, it is necessary to concur with the opinion of those authors, who believe that the written form of consent is preferable from the evidentiary point of view (Vishnepolskaia, 2013; Zakharenko, 2016).

Position of the Plenum of the Supreme Court of the Russian Federation is worth of support, where publishing of the personal image by a person on the Internet with no access restriction in and of itself does not give other persons a right to use the image without obtaining a consent from the depicted person. At the same time, the Plenum of the Supreme Court of the RF is of opinion that circumstances of publishing the personal image on the Internet on behalf of the person may serve as a consent, for example, if this is provided for by the terms of use of a web site. However, Internet resources do not always provide users with complete information on subsequent use of photographic images and video recordings published by the users, the terms of use are often in a form that is inaccessible to layperson's comprehension, besides, there is always a risk that the content of such terms may be changed by site administration without notifying the users (Külcü & Henkoğlu, 2014). It may result in a discrepancy between the intent of the person publishing the image and possible results of their actions (Liu, 2014).

It seems that the clarification provided by the Plenum of the Supreme Court of the RF is reasonable only for the situation when the interface of the web site allows reading and understanding the conditions of image publishing and provides recording the personal consent for further use directory in the moment of publishing.

The Article 152.1 of the CCRF gives no limitation to personal will in defining conditions for use of the personal image, thus a depicted person is free to define time frame, method, amount and purpose for possible use their image. Presence of such possibility is noted by legal experts (Grishaev, 2012; Mikriukov, 2013) and the Plenum of the Supreme Court of the RF. At the same time, the authors believe that recording the requirements to the content of personal content to use of personal image in Article 152.1 of the CCRF will facilitate protection of rights and prevention of litigation.

According to Article 152.1 of the CCRF, in case of death of the depicted person, the scope of persons authorized to give consent for use of the personal image are children of the deceased, surviving spouse, or, if the two categories above are absent, the parents of the depicted person. Lack of consent from at least one child or the surviving spouse leads to inadmissibility of using the personal image (Erdelevskii, 2007). According to clarifications from the Plenum of the Supreme Court of the RF, in case of death or absence of all the persons listed in item 1 Article 152.1 of the CCRF, publication and use of the personal image of such person requires no consent. Thus, persons willing to use such image have complete freedom to do so. It appears, that the scope of persons whose consent is necessary for use of image of a deceased person is formulated too narrowly and shall be expanded by inclusion of other categories of close relatives, on analogy to Article 14 of the Family Code of the Russian Federation, namely, grandparents and grandchildren.

Article 152.1 of the CCRF lists the cases when consent of a person to use of their personal image is not necessary:

- 1) The image is used for state, social or other public purposes.
- 2) The personal image had been obtained while shooting in open access places or during public events, except for the case when such image is the main object of use.
- 3) The person posed for a fee.

Posing for a fee presumes that the depicted was instructed to take some pose or poses for a monetary remuneration, while another person is capturing the appearance in some method. It is evident that the

described actions shall be preceded with some agreement between the persons involved, including expression of consent for capture of appearance on behalf of the depicted person. In this regard, it is necessary to agree with the opinion of Gavrilov (2015) that the provisions of item 1 Article 152.1 of the CCRF are in internal contradiction. It appears, that sub-item 3 shall be deleted from the content of the item 1 Article 152.1, as creation and subsequent use of personal image in cases of posing for a fee is performed exclusively with prior consent of the depicted person.

Items 2 and 3 of Article 152.1 of the CCRF define consequences of unlawful use of personal image and methods of protection of the infringed right. At the same time, it is obvious that this list is not exhaustive. As it has been noted previously, the right to personal image may be seen in two aspects: First, as a personal nonproperty right accruing with respect to an intangible benefit – a personal appearance; second, as copyright, that is, a set of personal nonproperty and property rights arising due to creation of an intellectual property by capturing an appearance of a person. Such duality makes it possible to use tools available for protection of nontangible benefits (Article 12, 150-152.2 of the CCRF), and those for protection of copyrighted works (Article 1250-1252, 1301 of the CCRF), depending on which aspect of the right to personal image was infringed. In this context, the clarification contained in the joint Resolution of the Plenum of Supreme Court of the RF and the Plenum of the Supreme Arbitration Court of the RF dated 26.03.2009 that when the right to personal image are infringed, the legal defenses provided by Part 4 of the CCRF are inapplicable is not in full compliance with the legal nature and content of the subjective right in question.

7. Conclusion

The conducted research allowed formulating a number of conclusions and propositions: 1. Personal image is a personal appearance captured in an objective form. 2. Consent to use personal appearance may be given in oral or written form, the latter being preferable from the evidentiary point of view. 3. In our opinion, circumstances under which a person publishes their image on the Internet may witness to consent to subsequent use of the image only if the interface of a web site allows reading and understanding the conditions under which the image is published and provides recording the consent. 4. Legislative recognition of requirements to the content of personal consent to use a personal image in Article 152.1 of the CCRF (term, method, scope, purpose) will facilitate protection of rights and prevent litigations. 5. The scope of persons whose consent is necessary for use of image of a deceased person shall be expanded by inclusion of other categories of close relatives, namely, grandparents and grandchildren. 6. Creation and subsequent use of personal images in case of posing for a fee supposes prior consent, thus, it is proposed to remove the sub-item 3 from the item 1 Article 152.1 of the CCRF, which is formulated as an exception from a general rule on necessity of obtaining consent for use of the personal image by third parties. 7. The right to personal image is of a dual nature, as it is on the one hand a personal nonproperty right accruing with respect to an intangible benefit – a personal appearance, on the other hand, it may represent a set of personal nonproperty and property rights arising due to creation of an intellectual property by capturing an appearance of a person. Selection of a method to protect the right to personal image on the Internet depends on aspects of infringement of the right.

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