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ON THE NEED FOR COMPREHENSIVE REGULATION OF THE RIGHT OF PERSONAL PORTRAYAL (COMMENTS ON THE INADEQUACY OF THE EXISTING LEGISLATION TO THE REALITIES OF THE INFORMATION SOCIETY ERA)

Abstract

The authors pointed to basic causes of the discrepancy and of the existing interpretative problems with personal portrayal – legislative duality, expressed in severance of the provisions on personal portrayal into two legislative acts, with doubts as to their mutual relationship, laconic and fragmented nature of the legal regime of personal portrayal and its inadequacy to the realities of the information society era. In their opinion, the legislator should comprehensively regulate the problems of personal portrayal and the commercial use of the right of personal portrayal in a separate legislative act, based on the conception of the right of personal portrayal as mixed, personal and economic interest, with a dominant economic aspect, and also regulate a number of specific questions which raise serious interpretative problems in the current legislative framework.

KEYWORDS

personal portrayal, information society, commercialization

SŁOWA KLUCZOWE

wizerunek, społeczeństwo informacyjne, komercjalizacja

1. INTRODUCTION

For a long time, the problems of human portrayal and its protection have been subject to doctrinal considerations¹ and abundant case-law.² However, over the recent years, in connection with the exceptionally dynamic development of the Internet and social media, they have assumed, in the Authors' opinion, a special meaning and must be considered in a new context, corresponding to the realities of the contemporary era of information society. This era is characterized by previously unprecedented technological development and globalization of the exchange of information, including the related globalization of interpersonal contacts. Its consequences are the economic, social, and cultural transitions unfolding before our eyes at a previously unknown scale, which entails the need to introduce new legal solutions, adequate to the evolving situation.³ In this context, attention should be drawn especially to two phenomena. First, one of the effects of technological development is unparalleled ease of fixing and disseminating a portrayal of any given person – in a positive, neutral, or negative context. Second, although the Polish legislator considers personal portrayal as personal interest, nowadays it

¹ For example, cf. E. Wojnicka, *Prawo do wizerunku w ustawodawstwie polskim*, ZNUJ. PWiOWI1990, No.56, p.107 *et seq.*; J. Barta, R. Markiewicz, *Wokół prawa do wizerunku*, ZNUJ. PWiOWI 2002, No. 2, p.11; A. Pązik, *Prawo do wizerunku w obliczu zmian*, ZNUJ PPWI 2010, issue no. 107, p. 127 *et seq.*; T. Grzeszak (in:) J. Barta (ed.), *System Prawa Prywatnego*, Vol. 13, Warszawa 2017, p. 773 *et seq.*

² For example, cf. judgment of the Supreme Court (S.C.) of 27 February 2003, IV KKN 1819/00, OSP 2004, No. 6, item. 75; judgment of the S.C. of 20 May 2004, II CK 330/03; judgment of the Court of Appeal in Warsaw of 24 February 2005, VI ACa 721/04. See M. Łoszevska-Ołowska, *Prawo do wizerunku w nauce i orzecznictwie sądów polskich - analiza wybranych problemów*, "Studia Medioznawcze" 2012, No. 1, p. 110 *et seq.*

³ This conviction regarding the legislative framework on human portrayal was already expressed by the authors in their previous publications: P. Horosz, A. Grzesiok-Horosz, *Ochrona wizerunku w mediach w dobie pandemii*, "Zarządzanie Mediami" 2021, No. 2; id, *Prawo do wizerunku w społeczeństwie informacyjnym*, "Santander Art and Culture Law Review" 2021, No. 1.

is often approached as a commercial interest subject to the terms of commercial transactions, which is a manifestation of a wider tendency, referred to as the commercialization of personal interests.⁴

It is hard to resist the impression that the existing legislative framework, as regards provisions on the protection of personal portrayal, is not only fragmentary and, therefore, unclear but, in the first place, inadequate to the realities of the contemporary information society era, which gives rise to discrepancies between legal practice, on the one hand, and the content and spirit of the relevant provisions, on the other, as well as to serious interpretative problems.

In this article, the Authors wish to present problems caused by the current statutory regime with an intention to initiate a discussion leading to the formulation of a new conception of a legislative framework of the right of personal portrayal, adequate to the realities of the information society era.

At the beginning, the Authors are going to briefly discuss the current statutory framework, and then indicate the opinions of academic authors and judicial practice based on such a framework, with special emphasis on the existing interpretative problems in the context of discrepancies between the content of the applicable provisions and the trading practice sanctioned by case-law. Further on in this article, proposals *de lege ferenda* will be presented, based on the conception of a comprehensive regulation of the right of personal portrayal in a separate legislative act.

2. CURRENT LEGISLATIVE FRAMEWORK

In support of the need to introduce a separate comprehensive legal regime concerning the problems of the right of personal portrayal, as suggested by the Authors, attention should be drawn, first of all, to the specific regulatory duality – following from historical grounds⁵ – that is the severance of the provisions on personal portrayal and its protection into two legislative acts. Personal portrayal

⁴ J. Sieńczyło-Chlabicz, *Prawo do wizerunku a komercjalizacja dóbr osobistych*, “Państwo i Prawo” 2007, No. 6, 19-34; J. Balcarczyk, *Prawo do wizerunku i jego komercjalizacja. Studium cywilnoprawne*, Warszawa 2009; A. Glanc-Walkiewicz, B. Gadek, *Image merchandising jako element komercjalizacji dóbr osobistych*, “Prawo Mediów Elektronicznych” 2020, No. 1, pp. 4-9; A. Lasota, *Komercjalizacja wizerunku a media społecznościowe*, “Przegląd Prawno-Ekonomiczny” 2018, No. 45, p. 186 *et seq.*; B. Giesen, K. Kurosz, *Wizerunek modelu w stosunkach kontraktowych*, ZNUJ PPWI 2021, No. 4, p. 7 *et seq.*; P. Ślęzak, *Komercyjne wykorzystanie wizerunku*, ZNUJ PPWI 2019, No. 1, p. 40 *et seq.*

⁵ K. Bojańczyk, (in:) *Prawo autorskie i prawa pokrewne. Komentarz*, M. Machała and R. M. Sarbiński (eds.), Warszawa 2019, p. 1326 and literature cited therein.

was listed in Article 23 of the Civil Code⁶ among other human personal interests subject to legal protection. In consequence, also the general provisions on the protection of personal interests under Article 24 apply to personal portrayal.⁷ There are no other provisions on human portrayal in the Civil Code. On the other hand, they can be found in the Act of 4 February 1994 on copyright and related rights (UoPA),⁸ which however also does not regulate that matter in a particularly extensive way, devoting to it only Articles 81 and 83.

Article 81(1) UoPA attaches key importance to the question of protecting personal portrayal and its dissemination. By a laconic statement that dissemination of a personal portrayal requires consent of the portrayed person, this provision introduces a rule of thumb making the possibility to disseminate personal portrayal dependent on the respective person's consent. Since the discussed provision was contained in UoPA, the term dissemination of a personal portrayal should be understood as the activities referred to in Article 6(3) UoPA, that is making the portrayal publicly available so that the image is accessible to an unspecified number of addressees.⁹

It is generally accepted in academic literature and judicial practice that consent of a given person to the dissemination of their portrayal can be given in any form, although it may not be implied. At this point, it should be highlighted that consent to the dissemination of an image by other persons may not be implied from the mere fact of the image's dissemination by the portrayed person. The burden of proving the fact of consent is with the person disseminating the personal portrayal. It is also assumed that the obtained consent may not be transferred to a third party unless the portrayed person had agreed to such a transfer.¹⁰

Under Article 81(1) UoPA, consent to the dissemination of personal portrayal is not required, provided that no express stipulation to the contrary has been made if the portrayed person has received an agreed remuneration for modeling. Accordingly, this provision introduces a presumption shifting, in case of

⁶ Act of 23 April 1964 – Civil Code (Journal of Laws of 2022, item 1360), hereinafter referred to as KC.

⁷ For example, see: J. Buchalska (in:) *Dobra osobiste i ich ochrona*, ed. M. Romańska, Warszawa 2020, p. 140 *et seq.*; N. Skiba (in:) *Dobra osobiste*, I. Lewandowska-Malec (ed.), Warszawa 2017, p. 74 *et seq.*

⁸ Consolidated text: Journal of Laws 2022, item 2509 as amended, hereinafter: UoPA. According to Piotr Ślęzak, regulation of the right of personal portrayal in copyright legislation is justified by an assumption that the rights of a person portrayed in a work limit the rights of the work's creator, see *Ochrona prawa do wizerunku*, Katowice 2009, p. 27 *et seq.*; id. (in:) *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*. Ed. P. Ślęzak, Warszawa 2017, p. 552 *et seq.* See also A. Nowak-Gruca, *Użytkownik forever off: problemy cyfrowego „życia po życiu” związane z ochroną wizerunku i korespondencji*, ZNUJ PPWI 2020, No. 1, p. 30 *et seq.*

⁹ Cf. K. Bojańczyk, (in:) *Prawo autorskie*, p. 1336 *et seq.*; G. Pacek, (in:) *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, A. Michałak (ed.), Warszawa 2019, p. 650; J. Barta, R. Markiewicz, *Wokół prawa do wizerunku*, p. 18 *et seq.*

¹⁰ P. Ślęzak, *Ochrona prawa do wizerunku*, p. 38.

a dispute, the burden of proof of the missing consent to the dissemination of personal portrayal to the person modelling for consideration, and such a person must demonstrate to have made such an express stipulation. It should be emphasized that Article 81(1) UoPA clearly provides that in situations of modelling free of charge, the model's express consent is required for the dissemination of personal portrayal, and the burden of proof in that respect is with the disseminating party.

Other exceptions to the requirement to obtain consent from the portrayed person to the dissemination of their portrayal are laid down in Article 81 UoPA(2) under which no consent is required to the dissemination of an image of a well-known person if their portrayal has been made in relation to their public function, especially a political, social or professional one, or from a person portrayed only as a detail of a larger whole, such as a meeting, landscape or public event.¹¹

It should be emphasized that the legislator did not include within the framework of UoPA any specific provisions on possible economic aspects of disseminating personal portrayal, confining itself to settling the mere question of consent to the portrayal's dissemination and exemptions from the requirement to obtain such consent. The provision of Article 81 UoPA is primarily intended to protect the rights of a given person to their personal portrayal and, as such, it supplements in this regard the above-mentioned Civil Code regime on personal interests.

Protective nature also applies to the provision of Article 83 UoPA, under which Article 78(1) UoPA applies appropriately to claims of a portrayed person in case of dissemination of their portrayal. This provision sets out the claims available to a creator for the violation of his author moral rights. This way, the legislator uses a reference without introducing any separate catalogue of claims available to a party injured by unlawful dissemination of their personal portrayal, and, most importantly, without taking into account the economic aspect of such a situation – clearly recognized both by the doctrine and judicature. At the time being, under Article 83 in conjunction with Article 78(1) UoPA, an injured party may demand that the perpetrator ceases to disseminate the injured party's personal portrayal, takes steps necessary to remove the consequences of violation or, finally – if the violation was culpable – the injured party may seek an award by the court of an appropriate amount of money as compensation for the harm suffered or imposition on the perpetrator of an obligation to pay an appropriate amount of money to a designated social purpose.¹²

Under Article 83 UoPA, the claims mentioned above cannot be asserted after twenty years of the death of the portrayed person.

¹¹ For more, see. P. Ślęzak (in:) *Ustawa o prawie autorskim...*, p. 570.

¹² See A. Niewęglowski, *Prawo autorskie. Komentarz*, Warszawa 2021, p. 850; E. Ferenc-Szydełko (in:) *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, E. Ferenc Szydełko (ed.), Warszawa 2021, p. 561 *et seq.*

3. DOUBTS ARISING UNDER THE CURRENT LEGISLATIVE FRAMEWORK

Neither provisions of KC nor UoPA offer a legal definition of the concept of personal portrayal and the concept is subject to different interpretations, however, definitions formulated by academic authors and in case-law have many contact points. Both literature of the subject and case-law generally recognise as personal portrayal a concrete and fixed ‘physical image’ or ‘representation’ of a given person – that is human appearance fixed in a certain way, including the person’s features visible at the first glance, identifying him or her as a particular natural person.¹³ It is irrelevant what technique has been used to make the portrayal of a given person,¹⁴ however, the image should be fixed in a widely understood plastic art form.¹⁵ There is a general agreement that an indispensable characteristic of a personal portrayal is the possibility of objective recognition – identification of the portrayed natural person,¹⁶ wherein – even if the image is not entirely clear – it suffices that the portrayed person is recognisable to third parties.¹⁷ On the other hand, one cannot understand a mere description of a given party’s appearance as a personal portrayal, even if such a description enables that party’s unambiguous identification. The question of recognisability was clarified by the Supreme Court, which concluded in the judgment of 27 February 2003¹⁸ that the possibility to recognise a given natural person must be universal and cannot be limited only to a narrow circle of people closest to the portrayed person. That conclusion was approved by academic authors.¹⁹

¹³ Cf. A. Pązik (in:) *Ustawy autorskie: komentarze. T.2, Prawo autorskie i prawa pokrewne, Ochrona baz danych, Zbiorowe zarządzanie prawami autorskimi i prawami pokrewnymi*, R. Markiewicz (ed.), Warszawa 2021, p. 1912 *et seq.*

¹⁴ For example, cf. the decision of the Court of Appeal in Katowice, file reference I ACa 158/18 in which the Court concluded that the term ‘personal portrayal’ should be understood as any representation regardless of its technique.

¹⁵ Por. G. Pacek, (in:) *Ustawa o prawie autorskim...*, p. 648.

¹⁶ J. Sieńczyło-Chlabicz, *Prawo do wizerunku...*, p. 19 *et seq.*; G. Pacek, (in:) *Ustawa o prawie autorskim...*, p. 649. The Court of Appeal in Warsaw, in the judgment of 9 March 2018 (VI ACa 1694/16, Legalis), pointed out that a necessary condition for the recognition of a given representation of human appearance as personal portrayal is the possibility to assign such a portrayal to a given person, that is the identification of that person by means of the portrayal.

¹⁷ T. Grzeszak, *Głos do wyroku SA w Łodzi z dnia 28 sierpnia 1996 r.*, “Monitor Prawniczy” 1997, No. 8, p. 318 *et seq.*; J. Balcarczyk, *Prawo do wizerunku...*, p. 33.

¹⁸ IV CKN 1819/00, OSP 2004, issue no. 6, item 75.

¹⁹ J. Błęszyński, *Głos do wyroku SN z dnia 27 lutego 2003 r.*, IV CKN 1819/00, OSP 2004, issue no. 6, item 75, p. 321. See also G. Pacek, (in:) *Ustawa o prawie autorskim...*, p. 648 and literature cited therein.

However, as regards more specific questions, attempts to precisely define the concept of personal portrayal face difficulties. Both in case-law²⁰ and in the literature of the subject, one can encounter a wide grasp of the scope of the concept of personal portrayal as personal interest, according to which it can refer not only to the face of a given person but also to that person's entire silhouette, any distinctive features individualising the person as a specific natural person, such as a characteristic tattoo, way of speaking, deportment or even certain props strictly associated with the individual, elements of their clothing or hairstyle.²¹ Some of academic authors, however, reject such an opinion as too far-reaching.²² One can also come across a view that the concept of personal portrayal, apart from the representation of face and the entire silhouette, includes also human voice, referred to as 'audio image', enabling recognition of a given person through the sense of hearing.²³

Doubts as to the specific scope of the term 'personal portrayal' are, in a large measure, cast by the above-mentioned legislative duality. Even if we accept that the term 'personal portrayal' itself should be understood in the same way under Article 23 KC and Article 81 UoPA,²⁴ in academic literature there is no agreement as to whether the UoPA provisions on the protection of personal portrayal are a concretization of Article 24 KC or an independent legal regime, which gives rise to problems with determining if the right of personal portrayal subject to protection under Article 23 KC as personal interest and the right of personal portrayal under Article 81 UoPA are the same right or in fact, different rights with different scopes and characteristics.²⁵ In this context, differences in the opinions of different doctrinal authors are not trivial but relate to the very essence and nature of the right of personal portrayal – which relates to the problem of divergence between the existing legal provisions and legal practice. If, under Article 23 KC, personal portrayal constitutes a personal interest, the right of personal portrayal should be considered as inalienable and non-heritable. On the other hand, however, it would be impossible to disregard trading practice in which, as noted above, the right of personal portrayal is subject to increasing commercialization and often treated as an interest with a measurable value capable of economic assessment,

²⁰ See e.g., judgment of the Supreme Court of 20 May 2004, II CK 330/03, "Monitor Polski" 2005, No. 2, p. 111.

²¹ See J. Sieńczyło-Chlabicz, *Rozpowszechnianie wizerunku osób powszechnie znanych*, "Przegląd Prawa Handlowego" 2003 No. 9; J. Barta, R. Markiewicz, *Wokół prawa do wizerunku...*, p. 12.

²² See Pązik (in:) *Ustawy autorskie...*, p. G. Pacek, (in:) *Ustawa o prawie autorskim...*, p. 648.

²³ See A. Pązik, (in:) *Ustawy autorskie...*, p. 1917.

²⁴ A. Matlak, *Cywilnoprawna ochrona wizerunku*, "Kwartalnik Prawa Prywatnego" 2004, No. 2, p. 321.

²⁵ G. Pacek, (in:) *Ustawa o prawie autorskim...*, p. 647; J. Balcarczyk, *Prawo do wizerunku*, p. 84 *et seq.*; T. Grzeszak, (in:) *System prawa prywatnego*, p. 781 *et seq.*; A. Matlak, *Cywilnoprawna ochrona...*, p. 321.

not to say expressly – an economic right. This practice, based on the UoPA regime and, in the same way, generally accepting the assumption about the independent nature of that regime in relation to the provision of Article 23 KC, is increasingly adhered to by both academic authors and the judiciary in which, starting from the judgment of the Supreme Court of 27 April 1977,²⁶ interpretations were given which recognized an economic value of the right of personal portrayal. Currently, in academic literature, an opinion is often encountered that the right of personal portrayal – at least in the form established under UoPA provisions – is a mixed interest, both personal and economic.²⁷ However, this is not the only opinion that can be found in literature – there are also voices qualifying the right of personal portrayal, as established under Article 81 UoPA, as an economic right.²⁸ On the other hand, an opinion also persists according to which this is a case of a personal interest.²⁹

It must be noted that although the opinion about a mixed personal and economic nature of the right of personal portrayal corresponds best in its essence to the observable trading practice and the phenomenon of commercialising personal portrayal in the realities of the information society era, it is only quite loosely supported by the applicable legislation. In fact, also in the provisions of the UoPA, the legislator seems not to consider the economic aspect of the right of personal portrayal, which is manifest, for example, in the provision of Article 83 UoPA, prescribing to apply, as noted above, the rule of Article 78(1) UoPA to claims of a person whose personal portrayal has been unlawfully disseminated, as the latter provision sets out remedies available for the violation of author's moral rights. It should also be noted that the legislator, in the provisions of UoPA, in fact, concentrates only on the question of protecting personal portrayal, without addressing in any way the problem of possible commercial use of the right of personal portrayal or reaping benefits from dissemination of a personal portrayal by the portrayed person. One can only agree with the opinion that basing the question of exploitation of a personal image only on the act of consent of the portrayed person, as an element removing unlawfulness of the dissemination, is a flawed solution, often insufficient in contemporary trading practice. Both academic literature and judiciary generally identify stark discrepancies between the content of the provisions focusing on the protection of personal portrayal as personal interest and trading practice, which commercializes such personal portrayal, and, in principle,

²⁶ I CR 127/77, LEX 63627.

²⁷ See e.g., J. Sieńczyło - Chłabicz, *Prawo do wizerunku*, p. 28; T. Grzeszak, (in:) *System prawa prywatnego*..., p. 548; J. Sieńczyło-Chłabicz, J. Banasiuk, *Cywilnoprawna ochrona wizerunku osób powszechnie znanych w dobie komercjalizacji dóbr osobistych*, Warszawa 2014, p. 338 *et seq.* Cf. also B. Giesen, K. Kurosz, *Wizerunek modela*... p. 5.

²⁸ J. Barta, R. Markiewicz, *Prawo autorskie*, Warszawa 2016, p. 631 *et seq.* Opinion of Barta and Markiewicz seems to evolve since they had initially pointed to a mixed nature of the rights, see *Wokół prawa do wizerunku*, p. 24 *et seq.*

²⁹ A. Matlak, *Cywilnoprawna*..., p. 325.

offers interpretations aimed at recognizing the economic aspect of the right of personal portrayal.³⁰

Admissibility of consent given by the entitled party to the dissemination of a concretized personal portrayal is, in fact, supported by the provisions of Article 81(1) UoPA, which approach the problem only by excluding the unlawfulness of disseminating such personal portrayal without addressing, in any way, the economic aspects, including the problem of possible remuneration for the consent to the dissemination of personal portrayal. In the Authors' opinion, such an inclusive approach is not expressed in the presumption, under Article 81(1) UoPA, that the portrayed person who modelled for remuneration consented to the dissemination of their personal portrayal since the text of that provision clearly indicates that the portrayed person receives such remuneration for modelling, that is for a merely factual act. Although it is argued in the academic literature – not without justness – that remuneration received by a model generally depends on the expected method and scope of disseminating the model's personal portrayal and, therefore, the remuneration is in fact paid for dissemination. Such opinions indeed correspond to the trading practice, however, they do not have strong support in the text of the above-mentioned provision and, in fact, they are its rather far-reaching interpretation, dictated by a willingness to fill the gap between the practice and literal wording of the applicable legislation.

Adoption of the opinion approved by the Authors about a mixed personal and economic nature of the right of personal portrayal and admissibility of commercializing a concretized right of personal portrayal does not, however, solve all problems arising in this context.³¹

Finally, one should point to a number of interpretative doubts following from the laconic nature of the provisions governing the problems of personal portrayal. For example, one should mention the problem of expressing consent to the dissemination of personal portrayal of a minor or incapacitated person, which question has not been decided in Article 81 UoPA. In academic literature,

³⁰ Opinion recognising the right to a concretized personal portrayal as second-tier subjective right deriving from the personal right of personal portrayal, which, as such, can be subject to commercial transactions, see B. Giesen, K. Kurosz, *Wizerunek modela...*, p. 5. For more on that subject, see B. Giesen, *O naturze prawa do wizerunku - uwagi na tle rozważań historycznych oraz prawnoporównawczych*, (in:) *Qui bene dubitat, bene sciet: księga jubileuszowa dedykowana profesor Ewie Nowińskiej*, J. Barta, J. Chwalba, R. Markiewicz, P. Wasilewski (eds.), Warszawa 2018, p. 146 *et seq.*

³¹ The question remains unresolved of a possible general consent granted by a given person to the dissemination of their personal portrayal, for example, its free use for the purposes of a particular advertising campaign, conducted using various techniques and methods of fixing the personal portrayal or consent granted to the exploitation of a personal portrayal in different situations by a given individual as the so-called brand ambassador. The provision of Article 81 UoPA does not resolve that matter unambiguously, however, its wording seems to suggest that consent of a given person to dissemination of their personal portrayal should always be concretized. For opinions of academic authors, see K. Bojańczyk, (in:) *Prawo autorskie...*, p. 1336.

it is generally accepted that in such cases consent to dissemination of personal portrayal is given by the statutory representatives of a given individual, which in the case of children generally refers to their parents.³² In fact, however, such an opinion is a reflection of the existing trading practice and raises, among others, theoretical doubts relating to the very nature of personal interests.³³ Besides, it remains unclear, in a situation when remuneration for modelling is to be received by a person with only limited capacity to legal acts, whether dissemination of such a person's portrayal still requires consent from their statutory representative.

The provision of Article 83 UoPA, relating to the remedies available to a person injured by unlawful dissemination of their personal portrayal, gives rise to two kinds of problems. As noted above, the legislator did not decide to formulate a separate catalogue of such remedies although, bearing in mind the specificity of violations of personal portrayal, this would be, in the Authors' opinion, definitely legitimate. Instead, the legislator used the technique of reference to the provisions of Article 78(1) UoPA. This leads to a situation in which, as noted above, a person whose personal portrayal has been unlawfully disseminated cannot seek compensation although, in the case of famous persons – the so-called celebrities, who charge specific fees in the trading practice for a consent to dissemination of their personal portrayal, its dissemination without such a consent – and, in the same way, without paying the expected fee – constitutes sheer loss from the point of view of such celebrities. This gives rise to a situation in which courts examining particular cases must often resort to legal acrobatics, wishing to award compensation for harm to a given person in an amount corresponding to the loss suffered, that is *de facto* compensation for the economic loss sustained by exploiting the person's portrayal without paying remuneration,³⁴ although they cannot expressly call the amount awarded compensation for economic loss.

Other interpretative problems are posed by the provision contained in Article 83 UoPA *in fine*, according to which the remedies set out in this Article may not be sought after twenty years from the death of the particular person. When determining the period in which it is admissible to seek remedies for unlawful dissemination of a personal portrayal, the legislator did not name the parties who could

³² For more, see A. Bagieńska-Masiota, *Permission for dissemination of a minors image*, "Studia Iuridica Lublinensia" 2019 No. 1, p. 9 *et seq.*; A. Sydor-Zielińska, *Rozpowszechnianie wizerunku małoletniego na podstawie Article 81 ust. 2 ustawy o prawie autorskim i prawach pokrewnych*, ZNUJ PPWI 2017 No. 4, p. 79 *et seq.*; Z. Ochońska, *Dysponowanie dobrami osobistymi małoletniego*, ZNUJ PPWI 2019, issue no. 3, p. 103 *et seq.*; J. Haberk, *Udostępnianie i publikowanie wizerunku nasciturusa, noworodka i malego dziecka w świetle zasady dobra dziecka*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2013, issue no. 3, pp. 59-70.

³³ As justly pointed out by Z. Ochońska, *Dysponowanie dobrami...*, p. 104, it should be considered if, bearing in mind the legal nature of the institution of personal interests, it should be admissible at all to dispose of them for a person other than the subject of those interests, bearing in mind respective opinions in the legal doctrine.

³⁴ See A. Pązik, *Prawo do wizerunku...*, p. 135.

seek such remedies,³⁵ whereby it must be remembered that one consequence of adopting the opinion about the personal nature of the right of personal portrayal is non-hereditary nature of such right and its extinguishment upon the entitled party's death. It is suggested in the academic literature that the personal portrayal of a deceased person is protected indirectly – by the right to protect the memory of the deceased, which would empower the deceased person's family and persons emotionally attached to the latter to seek such remedies.³⁶ However, this does not solve the problem of possible economic claims relating to the commercialization of the deceased person's portrayal or of the admissibility to designate by a particular individual in a testament the persons that would be entitled to assert such claims upon the individual's death.

The above overview of interpretative problems relating to the current legislative framework, although only brief and exemplary, bearing in mind the scope of this article, allows to formulate in the next part of the publication conclusions on the causes of such a situation, and to put forward proposals of specific legal solutions.

4. REASONS FOR THE DISCREPANCIES AND SUGGESTED SOLUTIONS

Seeking the sources of the interpretative problems signalled above and of the existing gap between the text of legal provisions on the personal portrayal and legal practice, one can point to three overlapping factors.

The first refers to the above-mentioned regulatory duality expressed in the severance of legal provisions on personal portrayal into two legislative acts – KC and UoPA, which raises doubts as to mutual relations between the rules contained in those acts, and the very concept of personal portrayal, as well as the scope of the right of personal portrayal within the framework of the former or the latter act.

The second – most serious in the Authors' opinion – is the inadequacy of the existing legislation to the realities of the information society era, especially to the progressing commercialization of personal interests, manifested in the legislator's focus on the protection of personal portrayal as strictly personal interest and failure, at the same time, to take into account its economic aspect.

³⁵ It may be somewhat surprising that the legislator, despite referring to the catalogue of remedies under Article 78(1) UoPA, did not decide, at the same time, to refer to Article 78(2) UoPA, the provision of which points to the parties who, upon the creator's death, may bring an action for the protection of the author's economic rights previously held by the deceased person.

³⁶ M. Markiewicz, (in:) *Ustawy autorskie: komentarze*, Vol. 2, p. 1943 *et seq.*

This relates to the third factor identified by the Authors causing the indicated interpretative problems – the laconic and fragmented nature of the existing provisions on personal portrayal, giving rise to legal gaps that must be filled by legal doctrine or judicial practice through interpretation which is sometimes only scarcely supported by the text of applicable rules. One example of such a gap is the above-mentioned provision of Article 83 UoPA, in which the legislator concentrates on the protective regime and, at the same time, neglects economic matters relating to the disposal of one's personal portrayal.

In the Authors' opinion, the solution to the identified problems would be a far-reaching reform and expansion of the existing legislation on personal portrayal, which, in principle, would mean its preparation from scratch. Such a legal regime should be comprehensive and account for the technological development enabling global and immediate dissemination of personal portrayal and the phenomenon of its progressing commercialization, manifested in the widespread practice of concluding agreements, the object of which is the exploitation of a given person's portrayal for remuneration paid to such a portrayed person.³⁷

In the first place, it seems legitimate to remove the existing legal duality and, in the same way, the signalled difference of opinion caused by such duality – by consolidating the provisions on the human personal portrayal in one piece of legislation.³⁸ In the Authors' opinion, such a legislative regime should not be limited to the expansion and modification of the rules on personal portrayal under UoPA. Instead, it is advisable to consolidate the provisions in an autonomous legislative act of statutory rank. Such an Act, which the Authors propose to entitle *Personal Portrayal Law*, should encompass provisions covering comprehensively all matters relating to human portrayal, both matters of its protection and exploitation of the right of personal portrayal and its commercialization, especially the question of disposal of the right of personal portrayal, both during the life of a given person and *mortis causa*. Such a solution is justified by the importance and specificity of the subject matter, especially that the underlying problems, in the Authors' opinion, are, in fact, quite loosely related to the matters regulated in UoPA.

Second, the regime covering the problems of personal portrayal should be based on the conception of mixed, personal, and economic nature of the right of personal image, which would not only allow to solve many of the interpretative problems indicated above but, in the first place, would address the progressing commercialization of personal portrayal, as reflected in trading practice. Therefore, the new act should contain both the definition of personal portrayal as such

³⁷ A. Pażik, *Prawo do wizerunku...*, p. 139.

³⁸ The Authors avoid the formulation "provisions on the protection of human portrayal" since, in their opinion, focus on the questions of protecting personal portrayal is one of the drawbacks of the existing regime, whereas the problems of personal portrayal and its use – also for economic purposes should be regulated in a comprehensive manner – rules on the protection of personal portrayal would only be a fragment of the proposed regime.

and the definition of – a clearly singled out – right of personal portrayal, defined in the widest possible terms as the right to disseminate personal portrayal and its use in different fields of exploitation. Such a right – considering its economic aspect – should be expressly defined in the act as a right which the entitled party may dispose of by legal acts, and which is heritable, with corresponding restrictions specified in the act deriving from its personal aspect.

Third, the regime should have, as noted above, a comprehensive nature, covering not only protective provisions but also – or perhaps predominantly – provisions on the terms of disposal of the right of personal portrayal, including the question of disposal of the right of personal portrayal of a deceased person. In the Authors' view, it would be advisable to base the new legal regime, in a large measure, on the solutions applicable to the author's economic rights. At first glance, this might seem a certain inconsequence – bearing in mind the author's postulate to separate the provisions on personal portrayal from the UoPA statutory framework and to contain them in a separate legislative act. However, it is justified, on the one hand, by the trading practice, as agreements for the dissemination of a model's personal portrayal are generally structurally close to license agreements used in the context of author's economic rights,³⁹ and, on the other hand, by recognition of the right of personal portrayal as one of the rights to intangible assets. The inclusion of the provisions on personal portrayal in a separate legislative act is, on the one hand, supposed to enable a comprehensive, separate regulation of that subject matter, and, on the other hand, underline the specificity of the right of personal portrayal.

For the purposes of the new legal regime governing the right of personal portrayal, it could prove especially important to appropriately adapt and modify the constructions of permitted use – both personal and public, fields of a work's exploitation (in the analysed case – fields of a personal portrayal's exploitation) and license agreement.

The construction of permitted personal use could be used especially when modifying the terms of expressing consent to the dissemination of personal portrayal, which – as already indicated by the Authors in their previous publications – should, on the one hand, take into account the prevalence of practices relating to fixation of personal portrayal and its non-commercial dissemination, especially through social media and, on the other hand, commercialization and the economic aspect of the right of personal portrayal. In situations when a given person knows about and agrees to the fixation of their personal portrayal in circumstances justifying an assumption that the portrayal would then be disseminated, one should introduce, in the Authors' opinion, a presumption of the portrayed person's consent to the dissemination of their portrayal when the portrayed party has personal or social ties to the party fixing and disseminating the image, which would

³⁹ Cf. B. Giesen, K. Kurosz, *Wizerunek modela...*, p. 12.

sanction an already existing practice under which it is common to disseminate, via social media, pictures of entire groups of close persons or even acquaintances.⁴⁰ On the other hand, the presumption of consent would not apply when the portrayal of a given person is disseminated for commercial purposes or when the portrayal is fixed in circumstances that could be derogatory to the portrayed person or could expose that person to negative social reactions.⁴¹

In matters not covered by the indicated presumption, the rule expressly stated in the provisions of the new act should be an expression of a given person's consent to the exploitation of their personal portrayal in an agreement. Whereby, in the Authors' opinion, it would be most advisable to base the proposed solutions on the construction of license agreements used in the context of the author's economic rights. Under such an agreement, the entitled party would grant a license to the use of their personal portrayal in the fields of exploitation specified in the agreement,⁴² for a time and in the territory specified in the agreement. Following the solutions adopted for the author's economic rights, it should be presumed that such agreements are concluded for consideration.

Specific provisions should be devoted to the question of license agreements having as their object the use of personal portrayal of persons without a full capacity to legal acts, with a possible differentiation between the situation of persons without capacity to legal acts, where the license agreement would be concluded on behalf of such a person by their statutory representative, and situation of persons with limited capacity to legal acts, who could be empowered to conclude such agreements at the consent of their statutory representative. In both situations, the admissibility of disseminating a personal portrayal fixed in circumstances that could violate the dignity of such a person, expose them to negative social reactions or violate other interests of such a person, should be subject to review by family and guardianship court. Any proceeds from the use of the personal portrayal of a person without the capacity to legal acts, on general terms, should belong to the property of such a person, and not to that of their statutory representative.⁴³

Allowing for and expressing in the provisions of the new act the economic aspect of the right of personal portrayal would also allow expanding the catalogue of remedies available to a person whose right of personal portrayal is violated by a claim for compensation,⁴⁴ whereby the circumstance should also be taken

⁴⁰ See also A. Pązik, *Prawo do wizerunku* ..., p. 149, suggesting a possibility to consider a "sui generis permitted use with regard to that right."

⁴¹ See P. Horosz, A. Grzesiok-Horosz, *Prawo do wizerunku*..., p. 30 *et seq.*

⁴² Similarly in A. Pązik, *Prawo do wizerunku*..., p. 149. For more, see also P. Horosz, A. Grzesiok-Horosz, *Prawo do wizerunku*..., p. 32 *et seq.*

⁴³ See Z. Ochońska, *Dysponowanie dobrami*..., p. 104.

⁴⁴ Such postulates have been put forward in academic literature – for example, see A. Pązik, *Prawo do wizerunku*..., p. 150.

into account if the violator acted for profit. Also in this context, in the Authors' opinion, it would be worth considering the use of solutions developed in relation to the author's economic rights, by allowing the injured party's discretion as to the method of determining the compensation amount as X-times the remuneration the injured party would be entitled to according to the rates adopted in trading practice for granting consent to the use of their personal portrayal in a given field of exploitation. However, considering the personal aspect of the right of personal portrayal, the injured party should also have the option to seek the award by the court of (non-economic) compensation for the harm suffered.

Finally, such a grasp of the right of personal portrayal would allow to unambiguously decide and specify in the provisions of the new act the fate of the right of personal portrayal after the death of the portrayed person, by accepting that the right does not extinguish upon the entitled party's death but only after a certain period specified in legal provisions – as is the case with author's economic rights.⁴⁵ Within this period, the right of personal portrayal would be heritable, and the parties entitled to conclude license agreements authorizing the use of personal portrayal of a given person in specific fields of exploitation would be that person's heirs, except for situations undermining the good name of the deceased person.

Provisions of the new act should also clearly specify situations in which it would be admissible to use, in a strictly defined manner, a personal portrayal of a given person without such person's consent (or in regard to a deceased person – without their heirs' consent), by expanding and clarifying the catalogue of such situations, currently contained in Article 81(2) UoPA. Also in this case, it would be useful to rely on the construction of permitted public use applied with regard to the author's economic rights – and to expressly permit, for example, dissemination of a given person's image for information purposes.

5. SUMMARY

As a part of the above considerations on the problems of legal protection and commercialization of human portrayal, the authors, having presented the current legislative framework, pointed to the existing discrepancies between the trading practice and the contents of the existing legal provisions. Both academic authors and judicature attempt to remove such discrepancies, whereby the interpretation offered takes into account the already well-established and constantly deepening

⁴⁵ Although the period of 70 years following the creator's death, as provided for in Article 36(1) UoPA for author's economic rights, calculated as per Article 39 UoPA in full years following the year of the creator's death, seems too long in the Authors' opinion. See also A. Pązik, *Prawo do wizerunku...*, p. 149.

practical tendency of commercializing human portrayal. Nevertheless, it is often only quite loosely supported by the text of the relevant provisions, invariably approaching personal portrayal as personal interest. The same refers also to the opinion of a part of academic authors approaching personal portrayal as a mixed, personal, and economic interest – regardless of the fact that this opinion is shared by the authors, who realize that it is poorly supported by the current legislative framework.

The current situation of significant discrepancy between the trading practice and the text of legal provisions is not conducive to legal certainty and trading security. In the authors' opinion, the attempts of legal doctrine and the judicature – although significant – cannot be sufficient, especially bearing in mind sometimes considerable differences in the interpretation of the provisions on personal portrayal. As a result, intervention of the legislator is necessary. To specify its desired scope and direction, the authors pointed to three basic, in their view, causes of the discrepancy and the existing interpretative problems – legislative duality, expressed in severance of the provisions on personal portrayal into two legislative acts, with doubts as to their mutual relationship, laconic and fragmented nature of the legal regime of personal portrayal and – first of all – its inadequacy to the realities of the information society era, characterized by globalization of the information flow and progressing commercialization of personal interests.

In the authors' opinion, expressed in the postulates *de lege ferenda*, presented both in this article and in their previous publications – the legislator should not limit himself to the modification and expansion of the existing provisions, but should comprehensively regulate the problems of personal portrayal and commercial use of the right of personal portrayal in a separate legislative act, based on the conception of the right of personal portrayal as mixed, personal and economic interest, with a dominant economic aspect, and also regulate a number of specific questions which raise serious interpretative problems in the current legislative framework.

In-depth reorganisation of the legislative framework of personal portrayal, as proposed by the authors, should contribute both to the removal of the causes of the existing discrepancies between the literal wording of legal provisions and trading practice and the signalled interpretative problems and to the regularisation of the subject matter in a manner corresponding to the realities of the information society era.

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