MARIA ŁOSZEWSKA-OŁOWSKA

The Right to the Image in the Doctrine and Jurisprudence of Polish Courts: Analysis of Selected Problems

KEY WORDS
image, representation, dissemination, consent, well-known person, detail of a larger whole

ABSTRACT

The image is one of the personal rights particularly vulnerable to violations in the course of both the press activity and advertising actions. The manner in which this concept is defined stems from the attainments of the doctrine and jurisprudence. On the basis of the aforementioned sources, the legislator has determined the conditions that must be met by the institution of consent repealing unlawful dissemination of image and other circumstances justifying the publication of image, despite the lack of consent of the person portrayed. The article, presenting various legal measures and relying on decisions of the courts, indicates the boundaries of the right to the image and determines the acceptable scope of its use.

Object of protection

An image is one of the personal rights specifically vulnerable to unlawful interference caused by the press activity. The protection of this value is not limited to the Civil Code only[1]. The Act on Copyright and Related Rights (Ustawa o prawie autorskim i prawach pokrewnych)[2] also considers these issues, establishing an explicit prohibition on the dissemination of the image of the portrayed person without their consent in Article 81 Paragraph 1. Thus, while copyright law applies only to the issue of sharing the image publicly – particularly through its publication, the Civil Code protects it against other violations, which include, *inter alia*, preparing the portrait despite the clear objection of the person presented in it. It is frequently emphasised that placing an appropriate regulation in copyright law is the result of the tradition existing in this area since all the hitherto acts (of 1926 and 1952) contained similar provisions as far as this matter was concerned. However, it is only one of the reasons.

[1] The Act of 23 April 1964, "Dziennik Ustaw" (Dz.U.) ["Journal of Laws"] 1964, No. 16, pos. 93 as amended.
[2] The Act of 4 February 1994, Dz.U. 1994, No. 24, pos. 83 as amended.

The existing competition between goods belonging to the group of personal rights and other values – also protected by binding legal regulations – is considered to be a typical phenomenon in the field of personal interests. This is what happens as well in relation to the image, the regulation of which should be perceived through the prism of two types of conflicts. The first one is between the right of an author to the created work and the personal right of the person depicted and, as it seems, it is the real reason for introducing provisions concerning the dissemination of the image to copyright law[3]. Another, equally important conflict appears when, in the course of the press activity, the discussed value is juxtaposed with the constitutionally guaranteed right to information. Article 81 of the Act on Copyright and Related Rights undoubtedly resolves this dispute, specifying situations in which the subjective right to the image becomes limited exactly due to the aforementioned value.

The first issue that needs an in-depth analysis is an attempt to determine the scope of the concept. A particular difficulty to define individual rights is still discernible in the area of personal rights. However, the image seems to evade this rule and does not create significant terminological problems. According to Stefan M. Grzybowski, an image and a portrait are in fact only representations of this personal right which he differently calls the physical image. Not only facial features, but also all the physical characteristics which individualise people enabling to recognise them should be understood here[4]. Nevertheless, as Elżbieta Wojnicka notes, certain arising terminological difficulties concerning the correctness of the concept 'image' descend into the background in the light of the fact that the object of protection is incontestable[5]. The analysis of various definitions emerging in the doctrine indicates a far-reaching convergence in its formulation. Therefore, under the term of the image, Wojnicka understands visible, physical human features, creating the appearance and allowing for the identification of the person among other people while under the notion of the portrait – a material carrier by means of which the image is captured[6]. Teresa Grzeszak recognises the discussed good as a concretised determination of the physical image of a man suitable for multiplication and dissemination[7]. According to Janusz Barta and Ryszard Markiewicz, this term means an intangible product that, by means of artistic measures, presents a recognisable

[3] On the issue of moving the provisions about the image from the Act on Copyright and Related Rights to the Civil Code, see J. Sieńczyło-Chlabicz, *Prawo do wizerunku a komercjalizacja dóbr osobistych*, „Państwo i Prawo" 2007, No. 6, p. 19 ff.

[4] S.M. Grzybowski, *Ochrona dóbr osobistych wg przepisów ogólnych prawa cywilnego*, Warsaw 1957, p. 96.

[5] See: E. Wojnicka, *Prawo do wizerunku w ustawodawstwie polskim*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego". Prace Instytutu Prawa Własności Intelektualnej, Iss. 56 (1990), pp. 106–107.

[6] Ibidem, p. 107.

[7] See in: T. Grzeszak, *Reklama a ochrona dóbr osobistych (naruszenie praw osobistych wykorzystanych w reklamie żyjących osób fizycznych)*, „Przegląd Prawa Handlowego" 2000, No. 2, p. 10.

representation of a particular person or persons[8]. There is also a consensus among the representatives of science as to the fact that a caricature is a kind of an image[9].

Definitional issues are of high importance also in the jurisprudence. It can be read in the Supreme Court judgment of 20 May 2004 (II CK 330/03) that:

> the image, except for the perceptible to the environment, physical characteristics creating the appearance of a particular individual and allowing – as it is stated – for their identification among other people, may include additional fixed elements related to the practised profession such as make-up, dress, manner of movement and way of contacting the environment[10].

Consequently, in the opinion expressed by the same court in another settlement, such understood legal good

> brings it closer to the terms 'persona' and 'persona rights' which are highlighted in contemporary scientific literature and should be understood as granting protection to the concretised interest of the person opposing to the dissemination of associations relating to them, including not only their representations, but also the surname, characteristic sayings, voice, etc.[11]

In this decision, the Supreme Court additionally stresses that

> the image implies the physical image of a person as a representation of their character, especially the face; when understood metaphorically, it might also relate to such human qualities, the disclosure of which enables the identification of the person.

This aspect of defining the examined concept is perceived as particularly crucial since it widens the circle of situations in which protection may be granted. It is rightly noted that this manner of formulating the image is of unusual importance in the context of advertising materials, at times using the similarity of actors to famous people – primarily celebrities, popular actors or other people from public life[12].

The recognition of the entity, which decides about its identification and not associated solely with facial features, remains the key issue emerging against the background of all the definitions created[13]. In this light, the decision passed by the Warsaw Court of Appeal on 26 November 2003 (VI Ca 348/03) appears particularly interesting. The case concerned the publication on the TV programme of a journalistic material carried out in the prison, which captured a figure, presented at a distance, of a convict currently serving a prison sentence. A clear discrepancy in the assessment of whether the offender's face was recognisable or not

[8] Definition of J. Barta and R. Markiewicz, see in: *Komentarz do ustawy o prawie autorskim i prawach pokrewnych*, J. Barta *et al.*, ed. by J. Barta, R. Markiewicz, Warsaw 1995, p. 386.
[9] See: ibidem, pp. 386 and 388; J. Sobczak, *Prawo autorskie i prawa pokrewne*, Warszawa–Poznań 2000, p. 207; K. Stefaniuk, *Naruszenie prawa do wizerunku przez rozpowszechnienie podobizny*, „Państwo i Prawo" 1970, No. 1; E. Wojnicka, *Prawo do wizerunku*..., p. 117.
[10] Judgment placed in the legal information system Legalis, C.H. Beck.
[11] The Supreme Court judgment of 15 October 2009, I CSK 72/09, Legal Information System LEX Omega, Wolters Kluwer Polska, No. 533565 [hereinafter referred to as: LEX].
[12] See, *inter alia*, J. Sieńczyło-Chlabicz, *Prawo do wizerunku*…, pp. 19–34. Also J. Barta, R. Markiewicz, *Media a dobra osobiste*, Warsaw 2009, p. 114 ff.
[13] On the issue of recognition, see among others the decision of the Warsaw Court of Appeal of 10 June 2008, VI ACa 1648/07.

appeared between the courts of the first and second instance. The district court held that it was not as *immediately after it was shown, it remained at a distance*. Simultaneously, the court did not exclude the possibility that the closest people could figure out who the person was after having watched this snapshot. However, it was accepted that it is only a detail of a larger whole since the material presented a series of consecutive pictures showing the building of the prison, its surroundings and the interior for the purpose of illustrating the reportage. The court of second instance was of a different opinion and supported the view that the prisoner was recognisable and, for the resolution of the matter, it was irrelevant whether he was identified only by the closest people as well as that his face remained in a close-up for merely about 10 seconds. Furthermore, it was these 10 seconds of a close-up which determined that it was undesirable to accept the assumption that there was a circumstance – involving the fact that the portrayed person was only a component of a larger whole – repealing the illegality of the image publication. This thesis is also reinforced by the fact that the plaintiff's face was not

part of the background illustrating the functioning of the prison such as, for instance, the depiction of remote prison windows or a general view of the courtyard with prisoners wandering around. It was the film's base relating to the content of the reportage and exposed especially for this purpose.

The judgment of the Supreme Court of 27 February 2003 (IV CKN 1819/00)[14] is not less interesting in the analysed context. The case concerned the publication of the plaintiff's photo, who could be identified by the jacket, bag and silhouette. That photo was an illustration for the publication entitled *W centrum Gdańska biją i okradają* (*They beat and rob in the centre of Gdańsk*) devoted to attacks on foreign tourists, vehicle thefts, drinking bouts and the accompanying fear experienced by citizens. In the opinion of the Court of Appeal (hearing the case in the second instance), the character shown in the photograph from the back was not recognisable, which allows for the concluding statement that the image of the plaintiff was not published. It can be further read that

the publication of the photograph, in which there are no features that can be used to identify a natural person, and relatives and friends receive knowledge as to whom the particular photo depicts from other sources (in particular on the basis of information obtained from other participants of the photographed event), is therefore not the spread of the image.

While agreeing with this statement, the Supreme Court also added that

the characteristics allowing the readers of the press to identify the photographed person would have the secondary importance in this respect. Thus, the manner of depicting the individual (e.g. presenting the figure from the front, back or in profile; photograph of the whole silhouette or only some of its fragments; showing characteristic features of the clothing or behaviour of an individual, etc.) would not have been of any importance here. Recognisability (the ability to identify a natural person) in the photo published in the press would have to be of a more universal (general) nature in a two-fold sense at least. Firstly, it could not be confined to a narrow circle of family and friends of the recognised person. Secondly, the very way of portraying allowing for the identification (determining the identity) of the photographed person should be the source of such recognition.

[14] OSP 2004/6/75.

In the definitional context, it is also worth noting that, while the word 'image' in the legal language – understood in the manner presented above – is associated with the representation and, at times, other elements that identify a person, in the ordinary sense of the term, it is frequently related to renown, good reputation, i.e. respect in its external aspect. This question has its reminiscences in case law. The Supreme Court judgment of 7 October 2009 (III CSK 39/09)[15] states that

> it is obvious that the image, which was mentioned in Article 23 [of the Civil Code] as one of the personal rights of a man, means the representation of a man preserved as a portrait, photograph or in another form. Such understood image cannot belong to a legal entity that is an abstract being and it would be nonsense to assign this meaning to the concept 'image' in relation to the legal person.

Even though Article 43 of the Civil Code requires a proper application of regulations on the protection of personal rights of individuals to legal persons, it is beyond doubt that image protection in the literal sense, i.e. as it is described in Article 23 of the Civil Code, in the case of the second category of entities is outdated. The above-quoted judgment confirms this thesis. The image is thus a typical example of the value which belongs exclusively to human beings.

Violation of the right to the image. Consent as a circumstance repealing the illegality of its distribution

It has already been mentioned earlier that the image is protected by both the provisions of the Civil Code and the Act on Copyright and Related Rights. The first of the normative acts provides protection against any violations; the second one however limits it to the dissemination of representations without the permission of the portrayed. Thus, if it comes to the illicit popularisation of the image, the basis for the claim may be any of the regulations, though the victim should make a choice.

The most common violations of the discussed law involve the following: unlawful preparation of a portrait and its distribution, primarily in the form of a photograph. In view of the press activity, especially the latter should undergo a more thorough analysis.

As far as preserving someone's likeness is concerned, it is assumed that it is not permitted if it occurred despite the explicit objection of a given individual. Similarly, the situation is analogical when portraying is done in situations confined to the private sphere. However, the question has appeared whether it is also unlawful to produce the image without

[15] LEX No. 532155.

the knowledge of the portrayed, except for the cases indicated above? The doctrine here was in favour of allowing for such a possibility[16].

In the press activity, infringement of the right to the image usually occurs as a result of its dissemination. According to the commonly accepted views, the very fact of making the portrait accessible to a broader range of people without the previous consent of the individual constitutes an interference into the sphere of subjective rights to which he/she is entitled. Simultaneously, both the doctrine as well as jurisprudence emphasise that the protection is granted in such a situation regardless of whether or not there has been a breach of other personal goods, such as reputation, dignity or privacy[17]. This means that, exactly as it is in the case of the right to isolation, only undertaking the action without the consent of the entitled person shall decide about infringement. Further consequences which appeared due to this fact may indicate that other personal interests have also been affected. It only confirms the thesis that the mutually intersecting ranges of personal rights are another common phenomenon which we are faced with in the field of personal rights that also consists of the image.

The doctrine is dominated by the view that the breach of the right to the image can be considered only when its dissemination occurs without the prior permission of the portrayed. Therefore, a consent is treated as a circumstance excluding not only illegality but, most of all, the very fact of infringement[18]; and, when setting conditions to be met, it is stressed that it has to be indubitable, explicit and detailed. All the above attributes, though not identical, remain in a close relation. Let us consider what they mean in practice. First of all, the fact that the consent has been granted must remain beyond dispute. Hence, doing this in a written form or even an authenticated deed – although even a verbal permission is believed to be sufficient – will be the preferred solution for the reasons of proof[19]. In case of the trial for protecting the image, violated by an illegal publication, it is the defendants (usually the publisher and editor-in-chief) that are obliged to prove that they acted with the approval of the portrayed. In one of

[16] *Komentarz do ustawy...*, p. 358; M. Czajkowska-Dąbrowska, *Glosa do wyroku sądu apelacyjnego w Warszawie z 13 stycznia 1999 r*., „Orzecznictwo Sądów Polskich" 2000, No. 9, p. 470; A. Kopff, *Koncepcja praw do intymności i do prywatności życia osobistego (zagadnienia konstrukcyjne)*, „Studia Cywilistyczne", Vol. 20 (1972), p. 37; E. Wojnicka, *Prawo do wizerunku...*, pp. 108–109. This situation seems to be interesting particularly with respect to the fact that it is fairly widely accepted that the violation of or threat to the right to the image can only take place when the action is taken without the consent of the entitled. However, in this particular case, making the image without the knowledge (and thus without the permission) of a given person is not considered to be unlawful as if the acquiescence was alleged or the lack of knowledge in this area was not identified with the objection.

[17] See, *inter alia*, the Supreme Court judgment of 13 January 1999, I ACa 1089/98, LEX No. 39415.

[18] S. Grzybowski, *Ochrona dóbr...*, p. 96; K. Stefaniuk, *Naruszenie prawa…*, p. 66; A. Szpunar, *Ochrona dóbr osobistych*, Warsaw 1979, p. 106; E. Wojnicka, *Prawo do wizerunku...*, p. 109.

[19] See: R. Golat, *Ochrona wizerunku w prawie cywilnym*, „Gazeta Prawna" 1996, No. 10; J. Sobczak, *Prawo autorskie*…, p. 204.

the press cases, the plaintiff even drew the public attention to the fact that journalists as professionals are expected to seek and obtain the written consent (the court did not however address this issue more closely). Nevertheless, the lack of doubt that the consent has been granted means something more. It is generally accepted that the entitled person should be familiar with and approve of the terms of distribution since the consent refers to the publication of the image in certain circumstances including the time and place of publication as well as the comment accompanying it, etc.[20] In this context, the decision of the Court of Appeal in Katowice of 14 March 2001 appears to be especially interesting[21]. In one of the monthlies dealing with investment, finance and real estate issues, in a special promotional section in which texts explaining consumers various matters related to services and goods, a photograph of plaintiffs – an old marriage resting on a bench in the Łazienki Park old – was published. Before the photo was taken, the reporter had asked for permission, informing them that the image would be an illustration of an article about retirees. Nonetheless, the situation turned out to be completely different – the photo accompanied the material advertising life insurance. In such circumstances, the marriage pleaded for the protection of the right to the image. In the case discussed, it was indisputable that the permission for taking the photo and publishing it was granted; however, the question concerned the extent of the permit. The court of the first instance dismissed the claim, thereby recognising that the plaintiffs' claims were unfounded. The Court of Appeal responded differently to this issue though. Most of all, it highlighted the fact that the existence of the consent and its scope could not be presumed. The defendant was obliged to demonstrate that they had obtained the consent of the entitled to distribute the image under strictly specified conditions. In conclusion, the court held that the image was used in a manner entirely different from what the initial arrangements indicated and, moreover, it was insufficient to only obtain the consent for the publication. To be released from liability, it was necessary to prove that there was an approval to use the photographs for advertising purposes. The defendants however did not do it. One more aspect of this case still needs to be emphasised. As the findings suggest, the reporter knew from the beginning what the purpose of the pictures would be and she did not inform the plaintiffs about it in an orderly and understandable manner. Her behaviour departed considerably from the requirement of attaching utmost care and accuracy while collecting and using the press material. On the basis of the quoted settlement, the following conclusion can be drawn: the

[20] *Komentarz do ustawy...*, p. 387; K. Grzybczyk, *Naruszenie dobra osobistego w reklamie*, „Rejent" 1999, No. 9, p. 128; T. Grzeszak, *Reklama…*, p. 11; K. Kurosz, *Glosa do wyroku sądu apelacyjnego w Warszawie z 14 marca 2001*, „Rejent" 2000, No. 1, p. 104; E. Wojnicka, *Prawo do wizerunku*..., p. 110 ff.
[21] „Orzecznictwo Sądów Apelacyjnych" 2001, No. 5, pos. 27.

court approves of the thesis, increasingly more frequently promoted, that Article 81 of the Act on Copyright and Related Rights gives the portrayed person the power to decide on each – thus, not only the first – dissemination of the image[22]. As it is suggested by Teresa Grzeszak, the presented position may be associated with the fact that further distribution typically occurs in a different context[23].

It is worthwhile to analyse the problem a little closer. In the cases of breach of dignity in the press activity, it is a widespread practice to place a particular statement – which actually took place – in a completely different and new context which consequently may prejudge about the illegality of interference with the good name of the authorised entity. The analysis of the image-related issues can therefore prove that this matter is relevant also with regard to the discussed good and concerns the minuteness of the consent. However, let us start by explaining whether or not the expressed approval entitles to the next publication. Two different cases should be distinguished at this point. The first concerns the next distribution although made under the same conditions. The Supreme Court judgment of 2 February 1967 states that

> upon the moment when the consent for publication has been granted and the photo published, any subsequent publication by the same or by other magazines is allowable. [...]. However, further publications are allowed provided that the source is indicated and without introducing any changes to the reprinted photograph. It therefore implies that one's picture once published may be published again only if referred to the circumstances in which it was made and published for the first time[24].

However, the presented position, as well as the argumentation justifying it, faced the objection of some representatives of the discipline[25]. *Inter alia*, Elżbieta Wojnicka stresses that relying on the fair use, entitling to the successive dissemination, is not clear in this situation. Even if we had in mind the press reprint, it would be necessary to determine whether it is appropriate to re-distribute the image without the renewed permission. If the circumstances identified in Article 24 § 2 of the Act on Copyright and Related Rights (currently Article 81 Paragraph 2 of the Act on Copyright and Related Rights)[26] do not appear, obtaining a permit must be regarded as indispensable. This manner of reasoning seems to be convincing. Any further publication means in fact an interference not only in the powers of the representation's author, but also of the person portrayed. Insofar as, in the

[22] See, among others: *Komentarz do ustawy*..., pp. 386–387; T. Grzeszak, *Reklama*..., p. 11; E. Wojnicka, *Ochrona autorskich dóbr osobistych*, Łódź 1997, p. 112.
[23] T. Grzeszak, *Reklama*...
[24] I CR 496/66, OSNC, No. 9 of 1967, pos. 161.
[25] *Komentarz do ustawy*..., pp. 386–387; T. Grzeszak, *Reklama*..., p. 11; E. Wojnicka, *Ochrona autorskich…,* p. 112.
[26] This ruling was issued under the previous Copyright Law Act, in which Article 24§ was equivalent of the current Article 81 Paragraph 2.

former case, it is possible to invoke the provisions of fair use, which are in fact a legal limitation of copyright, when the portrayed person is concerned, it is flawed and vague. The consent of the portrayed person proves necessary unless the circumstances excluding the need to obtain it appear, i.e. the photograph depicts a well-known person performing public functions or when it is the image of the person constituting only a detail of a larger whole such as a landscape, public event or assembly (Article 81 Paragraph 2 of the Act on Copyright and Related Rights)[27]. Simultaneously, we cannot disregard the regulation of Article 25 Paragraph 1 Point 1 of the Act on Copyright and Related Rights, which implies that it is permissible without the consent of the author to further disseminate a current journalistic photograph, which frequently is the image of a person, in the printed press, radio and television for informational purposes. In my view, we should take the position that it is the case in which further publishing is allowed without the necessity of obtaining the consent of the person portrayed if the photograph is of a journalistic character[28], meets the requirement of currentness and its further distribution is for informational purposes solely (in particular, it does not include advertising purposes). The portrayed person could thus make his/her possible claims only against the author (if the latter has not been authorised), and not against other entities distributing the picture. In the light of the fact that fair use is a restriction on the rights of creators (a category which excludes the photographed person), it should be regretted that the legislator did not address the issue raised in Article 81 of the Act on Copyright and Related Rights, especially since it is one and the same legal act, and the resulting collision concerns not only the relationship between the author and the portrayed person; as a matter of fact, the conflict encompasses also the right to information.

The question of further dissemination of the image, in circumstances that are different from the initial conditions of publishing, is another important issue discussed in the jurisprudence. It was, *inter alia*, the subject of the cited above judgment of the Supreme Court of 2 February 1967 (I CR 496/66) issued in the context of the following situation. The plaintiff was photographed during the New Year's party. The picture represented her and her husband. A few years later, the same photograph appeared on the cover of the magazine, accompanied by the quotation from the poem by Majakowski: *will there be love or not, big or small* (*będzie miłość czy nie, wielka czy maleńka*). The woman, whose marriage had just fallen apart, filed a lawsuit over the protection of the image, arguing that she had given consent in

[27] K. Stefaniuk took a different position on this issue, *Naruszenie prawa*..., p. 69.
[28] R. Sarbiński, *Fotografia reporterska w prawie autorskim – pojęcie, przesłanki ochrony i ewolucja uregulowania*, „Przegląd Ustawodawstwa Gospodarczego" 2002, No. 1, p. 14 ff.

the belief that it would be a one-time publication, concerning all the people enjoying their time. The decision of the court of the first instance was not favourable for her as the judges held that the consent was not subject to any restricting conditions and dismissed the lawsuit. An entirely different position was taken by the Supreme Court which emphasised that the purpose of the publication was substantially revised. The image was used as a graphic design for the magazine and thus as a kind of an 'ornament'.

In this context, judicial decisions which concern the use of the image for advertising purposes seem interesting as well. One of these judgments was issued by the Court of Appeal in Katowice on 14 March 2001 (I ACa 51/01) and has already been cited (the publication of the photo of an elderly couple in the journal accompanied by the material advertising life insurance). When agreeing to distribute the photograph, the couple were convinced that – as they were assured – it would constitute an illustration for the article about retirees. As I have previously highlighted, the fact that the consent was granted was unquestionable in the opinion of the courts of both instances. However, its scope became the essence of the dispute. The district court, essentially acceding to the claim that participation in the advertising event requires an express approval (the person concerned is aware that the portrait will be used for this purpose and accepts it), did not consider that, in this particular case, the image served as an advertisement of insurance companies. The exitus states:

photos, as well as company logos, served as a graphic transmitter of the article's content; it was a symbolic message of the verbal content included in it. Since the defendants spread the image of the plaintiffs on the basis of their consent (Article 81 Paragraph 1 of the Act on Copyright and Related Rights) – the lawsuit has been subject to dismissal.

An appeal was lodged against the judgment. The court of the second instance hearing the case explicitly stated that – sharing the view of Barta and Markiewicz – that the agreement did not apply to 'abstract' distribution, but refers to specific, known to the portrayed person, distribution terms, including the time, place, accompanying comment, etc. In this particular case, the plaintiffs expressed their approval, being convinced that the photograph would appear in the magazine together with the material about the life of pensioners. Despite the journalist's assertions, this did not happen. Thus, the distribution occurred beyond the scope of the permission and, furthermore, regardless of the recognition that the publication was of an advertising nature. However, this issue was as well dealt with by the Court of Appeal which found that advertising involves disseminating information about services and goods in order to influence the evolution of demand. In this sense, the picture of an elderly marriage, raising positive connotations and neighbouring the names of insurance companies (offering, among others, life insurance), was a promotional material. While concluding, it should be ascertained

that the following inference is appropriate: firstly – in principle, it is necessary to obtain the permission both with the first and any subsequent publication; secondly – distribution should take place within the limits of the authorisation, i.e. *inter alia*, for the purpose known to the portrayed person; thirdly – any change of purpose or context of the publication requires a separate consent; fourthly – if there are any doubts, the burden of proof lies with the distributor (with both obtaining the consent and determining its scope). These circumstances are not presumed. Journalists must therefore bear in mind that the risk of dissemination of the image falls on them and, in case of the dispute, they will prove that they had a clearly delineated consent for the action undertaken. A simple conclusion can be drawn here – the real purpose of taking the photo should not be concealed from the photographed person and it is worthwhile to seek and obtain the consent, which shall clearly and unambiguously specify the conditions of making it accessible to the public.

The analysis of the Supreme Court judgment of 16 April 2004 (I CK 495/03)[29] leads to similar conclusions. This decision was taken in the context of the following case. In one of the editions of the magazine *Marie Claire*, an interview with a famous actress was published. It was accompanied by posed photographs which were also included on the cover. As the part of the advertising campaign, launched to encourage the purchase of that issue, the cover with the photograph on it (in the form of a poster) was displayed at bus stops. According to the court, the woman did not sign any agreement permitting to use her image; the photo session was based on verbal arrangements which did not relate to the use of the pictures on the cover. Moreover, the consent granted for adding them to the interview, after the initial acceptance, was withdrawn what, in the court's opinion, was binding upon the publisher. In that decision, the Supreme Court also draws attention to the fact that placing pictures on the cover is *a separate form of distribution due to their availability to the recipients before purchasing a copy of the magazine*. The issue of giving consent for a specific type of dissemination also appears in the judgment of the Supreme Court of 8 January 2004 (I CK 40/03)[30]. The case concerned the use of pictures of the plaintiff in a particular context – unknown to her at the time of modelling and receiving salary for her work. Even though the plaintiff had given the permission to publish her photos without restrictions, the agreement did not include adding inscriptions to them. It should also be mentioned at this point that the image was used for advertising the so-called phone sex by placing subtitles encouraging to use audio text services next to the photo.

[29] Glosa 2005/1/54.
[30] LEX No. 560838.

In the light of these decisions, the judgment of the Court of Appeal in Łódź of 28 August 1996[31] appears to be rather surprising. The case concerned the following situation. The plaintiff, being a medical doctor and working on-call at the emergency department, partook in various training and simulation sessions in the field of emergency care. One of them was held with the participation of photographers and cameras. One of the companies made available its equipment for this action, free of charge and for promotional purposes. It was a communications system installed under the helmets. Then, the editorial board of the magazine *Ratownictwo Polskie* enabled the above-mentioned company to publish a sponsored article, which was illustrated by the photo of the plaintiff taken during the described action. Setting aside, for the time being, the fact whether this image was a detail of a larger whole (which, according to the court of the first instance, did not raise any doubts and provided a reasonable basis for the use of the photograph for advertising purposes), the appellate court claimed that the plaintiff's claims are unfounded since he decided to participate in the action. Nevertheless, what seems particularly troubling is the fact that the court upheld the assertion that, since the image was a detail of a larger whole, *the defendants were not obliged to obtain the plaintiff's permission to publish the photo for advertising purposes*[32].

The presumption of consent for the dissemination of the image cannot be inferred on the basis of either the Civil Code or the Copyright Act (unless the portrayed person received payment for posing). Even more, the fact that the portrayed did not previously object to the publication of his image in various magazines does not create this presumption either[33]. Therefore, the decision of the Court of Appeal in Warsaw of 3 April 1997[34], relating, *inter alia*, to the method of granting consent, should be regarded as interesting. In this particular case, the lawsuit was brought in connection with the publication of a newspaper article prepared on the occasion of the Homeless People Day. While collecting materials, two journalists went to one of the centres where people suffering from this problem live. There, they were presented with a woman whose personal life details appeared then in the article bearing the plaintiff's photographs as well. According to the court of the first instance findings, the journalists did not obtain the consent for the aforementioned publication. The existence of the permission should not be questioned. Simultaneously, the interested person does not need to express loudly their opposition and its absence should not be equated with

[31] I ACr 341/96; „Orzecznictwo Sądów Polskich" 1997, No. 2, pos. 42.
[32] On this issue, see: T. Grzeszak, *Glosa do wyroku sądu apelacyjnego w Łodzi z 28 sierpnia 1996 r.*, „Monitor Prawniczy" 1997, No. 8, p. 318 ff.
[33] The Supreme Court judgment of 27 April 1977, I CR 127/77, unpublished.
[34] I ACa 148/97, „Wokanda" 1998, No. 4.

receiving the consent. Leaving aside for the moment the circumstances which led to taking photographs, the thesis itself seems to be extremely accurate. An appeal was filed against the already mentioned court judgment, acceding to the claim in full. The appellate court noted that the existence of consent and the manner of obtaining it were a moot point in this case. The evidence gathered proved that the plaintiff knew that she was talking to journalists; moreover, she was aware of the purpose for which the photos were taken. Thus, she tried to look her best. It was done by, among other things, improving her hairdo and posing for the photos. Consequently, the court concluded that, through the active participation in the shooting, awareness of the purpose of these activities and their future use, the claimant expressed her consent. Although it did not happen directly, the permission was indirect – through the so-called implied actions. The existence of the consent is however indubitable what can prove extremely important in relations with the press.

Recapitulating, it must be assumed that the consent – not treated as a legal action – can take diverse forms[35]. Certainly, if it is written, it simplifies the process of proving that it has really been granted. However, it seems that there is no need for any specific statement made on the sheet of paper; for instance, a permission explicitly inferred from the email correspondence can have such a character. Remaining in compliance with the jurisprudence, it should also be acknowledged that the situational context in which the consent is expressed (e.g. meeting in the street a journalist who introduces themselves and informs for which television or radio station they are carrying out the street poll) also fulfils the conditions of obtaining it if, after such information, the interlocutor proceeds to answer the asked question and the distribution of the image is for informational purposes. Finally, in some cases, the consent will be part of the agreement, which shall then determine, among other things, also the terms of the image dissemination and remuneration payment[36].

It should be noted as well that the consent can be withdrawn. The Supreme Court devoted special attention to this issue in the already frequently cited judgment of 16 April 2004 (I CK 495/03). *Inter alia*, it states that the consent as a type of a permit shall be treated in a manner similar to the declarations of intent, except that it can be withdrawn: *The motives for this objection are not decisive for its effectiveness since deciding on the use of a personal good belongs to the entitled*. Interestingly, in this case, there was no contract signed which would allow for the use of the image and which is typical of giving interviews to women's

[35] On this issue, also see the Supreme Court judgment of 16 December 2009, I CSK 160/09, LEX No. 566088.
[36] Such a remark can be made on the basis of the already quoted Supreme Court judgment of 16 April 2004, I CK 495/03, concerning the publication of the photo on the cover of the magazine *Marie Claire*.

magazines; and the consent for posing to the photos and their subsequent authorisation related only to their use as an illustration for the article, but all the arrangements made did not concern the cover. Moreover, in the light of the courts' findings and opinions, this acquiescence was effectively withdrawn[37].

Article 24 of the Civil Code protects not only against unlawful infringement on the image, but also against the threat to the image. Considerations included in the Supreme Court judgment of 3 September 1998[38] concerned this particular issue. According to the court, the circumstances, against which the lawsuit was filed, were non-contentious. The plaintiff's (a sculptor) house was visited by a journalist and a photographer. He took 14 pictures representing the plaintiff surrounded by his sculptures. The photographs were to illustrate the press material about the plaintiff, under preparation at that time. However, the reporter did not ensure the claimant that the article with pictures, in which he was also present, will assuredly be printed. The publication did not occur and the man asked for the protection of his right to the image, perceiving the threat to this good in the fact that the pictures were to remain in the editorial office's archives. According to the Supreme Court, there was no basis for such an assertion. Article 81 of the Copyright Act requires the approval of the distribution of the image. The evidence indicated that it was provided – the plaintiff agreed to publish depicting him photos only together with the article. Thus, publishing them in another context would violate the plaintiff's right to the image. However, since the publication did not occur, there is no infringement on the right to the image and,

on the basis of the fact that the pictures remained in the archive of the editorial office, the threat of violating the plaintiff's right to the image by publishing photos depicting him in circumstances not covered by the consent he granted cannot be presumed. [...] The threat of infringing a personal good requires specified conditions. Merely a vague indication of the hypothetical possibility of infringement on a given personal good is insufficient.

Other circumstances excluding the illegality of the image dissemination

One of the judgments of the Supreme Court states: t*he publication of photos in the press may violate the right to the image. The publication of the photograph of a particular person is allowed only with permission*[39]. This thesis is a general principle from which exceptions are provided for especially in Article 81 Paragraph 2 of the Act on Copyright and Related Rights. In fact, they represent a compromise between the discussed value and the civil right to information, realised through the means of mass communication. The regulation contained in Article 13 of the Press Law Act is of a similar nature. Nevertheless, the right to information is

[37] Polemically on this subject, see: T. Grzeszak, *Gwiazda na okładce*, „Glosa" 2005, No. 1, pp. 63–64.
[38] I CKN 818/87, „Orzecznictwo Sądu Najwyższego". The Civil Chamber (Izba Cywilna) 1999, No. 1, pos. 21.
[39] The Supreme Court judgment of 26 January 1982, I CR 411/81, LEX No. 8392.

not the only reason favouring the view that the legislator should include also other situations allowing for the diffusion of the image without the consent of the photographed person. These involve the cases provided for by the Act on Qualified Sports and the Police Act.

Admittedly, when speaking of the circumstances excluding unlawfulness of the image violation, we should begin with the regulation placed in the Act on Copyright and Related Rights. The first circumstance – referred to in Article 81 – which does not involve the necessity of obtaining the consent of the portrayed person applies to well-known people if the image has been made in connection with the performance of public functions, in particular: political, social or professional. The doctrine often emphasises that the term 'a well-known person' is not sufficiently precise; an important role in this respect will be thereby played by the jurisprudence. On the basis of the existing settlements, one can put forward the thesis that the law have followed the path marked out by Barta and Markiewicz who, while formulating their view on this matter in 1995, did not rule out that the courts would relativise, taking into account the circle of recipients of the distributed image[40]. Consequently, the acceptance of this position was to imply that placing a photo of a person well-known in a given area in the local press remains within the permissible limits, but publishing it in a national newspaper may constitute an unlawful interference[41]. It should also be added that the term 'a well-known person' is not synonymous to the term 'a public official' or 'a person holding the public office'. Conceptual ranges of these terms may, though do not have to, overlap[42]. The category of well-known people involves primarily such officials as the Prime Minister or the Speaker of the *Sejm*, but many others are not known to the wider public. Similarly, some actors and athletes, although they are not public officials, are well-known. One of the judgments of the Supreme Court reads that

> as a result of the implementation of tasks by the sports associations, members of the national team may participate in the representation of the country and thereby they become widely known people and due to this fact their images are not only affected but, on the contrary, gain in popularity[43]. [Another judgment says] that the category of well-known people involves these persons who, directly or implicitly, agree to provide the public with the knowledge about their private lives, including those engaged in an economic or social activity. These are people who participate in the public life. Participating in the public life implies taking part, as an expert, in the meetings of the *Sejm* committees since reports of such gatherings are communicated to the public[44].

[40] See: *Komentarz do ustawy*..., pp. 387–388 and *idem*, *Media a dobra osobiste*, Warsaw 2009, p. 110. See also the Supreme Court judgment of 12 September 2001, V CKN 440/00; OSNC 2002, No. 5, pos. 68; the decision of the Appelate Court in Poznań of 30 April 2008, I ACa 245/08, LEX No. 466419.

[41] On this matter, see: *Komentarz do ustawy*..., pp. 387–388. *Cf.* J. Sobczak, *Prawo autorskie*…, p. 206. He allows for the dissemination of such image also in the national press, of course, after fulfilling all the other criteria set out in Article 81 Paragraph 2 of the Act on Copyright and Related Rights.

[42] On this issue, see: J. Sobczak, *Prawo autorskie*..., pp. 205–206.

[43] The Supreme Court judgment of 16 December 2009, I CSK 160/09, "Orzecznictwo Sądu Najwyższego". The Civil Chamber 2010, No. 7/8.

[44] The Supreme Court judgment of 5 June 2009, I CSK 465/08, LEX No. 510611.

This last sentence seems to suggest that the term ‘a well-known person’ can be interpreted in a broader context due to the performed public functions.

Moreover, the fulfilment of additional premises is necessary to be able to provide the image of a well-known person to a wider public. The first one requires that the representation should depict the person in connection with the public functions they perform, in particular political, social or professional. Hence, this solution precludes the publication of photos without the permission of the entitled, *inter alia*, in circumstances confined to the private sphere. However, there are some scientific postulates which, due to the openness of public life, promote the idea of allowing for the publication of images of well-known people even when they do not occur as officials (with the exception of intimate situations)[45]. Thus, solely the recognition that a person is commonly known is not a sufficient basis for publishing their representation. The legislator clearly states that the image is to be made in connection with the public function performed by this entity. In any case, it should be considered whether both conditions have been met, avoiding over-generalising this issue. In this context, the Supreme Court judgment of 12 September 2001 (V CKN 440/00)[46] appears to be particularly interesting. It was announced on the basis of the following case. In one of the newspapers, the photo of the president of a housing association was placed next to the article entitled *What does the president want to hide from cooperators* (*Co chce prezes ukryć przed spółdzielcami*). The image of the plaintiff (published without his consent) was a fragment of the photograph taken a few years earlier and depicting him with two other men during the meeting of the Civic Committee “Solidarity” (Komitet Obywatelski „Solidarność”) which was available to he press. The primary concern for the Supreme Court was to consider whether one of the circumstances excluding illegality – namely, whether the photo was taken with the participation of a well-known person performing their public functions (Article 81 Paragraph 2 Point 1 of the Act on Copyright and Related Rights) – was not relevant to this particular case. According to the Court

> the circle of well-known people depends on such circumstances as performing – at various levels – political, social and professional functions, popularity outside one's own environment due to the occupational, sporting or amateur activities. Associating the 'common recognition' of a person with a certain circle of recipients to whom the form of the image dissemination is addressed, e.g. the local newspaper, is not precluded as well. Therefore, there are different scopes of the term 'common recognition'; on the one hand, connected with the territory within which people who know a particular person live [...], on the other – the kind of public function performed by that person.

[45] See: J. Sobczak, *Prawo autorskie*…, p. 207. In such a situation, there is the premise of a direct relationship between the private sphere and the mentioned activity which, in accordance with Article 14 Paragraph 6 of the Press Law Act, excludes the illegality of infringement on the right to privacy.
[46] OSNC 2002/5/68.

In the *exitus*, the court came to the conclusion that the plaintiff as the President of the Housing Association, in the area of which a half of the town lives, is a person well-known to the recipients of the newspaper which published the picture. The adjudicating body could not however find the other, necessary premise of the countertype. The circumstances of the case clearly indicate that the photo was not taken in connection with the fact that the plaintiff served as the president of the Association (owing to which he became a well-known person to whom the article was ascribed). It was taken many years earlier, at the time when he was a member of the Presidium of the Civic Committee 'Solidarity'. In view of the failure of another statutory requirement, the publication, in the opinion of the Supreme Court, had to be regarded as unlawful. This judgment was invoked by the defendant publisher in the process of infringement on the right to the image of another president of the housing association, arguing that also this president – *per analogiam* as in the previous case – is a well-known person. The appellate Court in Poznań, in the judgment of 30 April 2008 (I ACa 245/08)[47], considered this view to be irrelevant. The decision says:

the plaintiff, as the president of the board of the Housing Association 'K' in Z. cannot be regarded as a well-known person within the meaning of the quoted provision [i.e. Articles 81 Paragraph 2 Point 1 of the Act on Copyright and Related Rights] in the situation when the housing association managed by him is only one of the many housing associations in the area of the city.

Furthermore, the court emphasises that the defendant publisher, referring to the judgment of the Supreme Court of 12 September 2001

ignores the fact that this view was referred to the person who performed his functions in the only housing association in the area of the town, where almost a half of its inhabitants belonged to it. Meanwhile, in this particular case, as it has already been proved above, the claimant is the president of one of the many housing associations located within the territory of a large city. The applicant moreover disregards the fact that the published image was not taken in connection with the function of the president performed by him.

Another, finally the last criterion of the dissemination of the image of a well-known person without their consent is the informational purpose of the publication. Even though this condition is not provided for by the Act, according to representatives of the doctrine, it arises on the basis of the teleological interpretation of the regulation in question[48]. Consequently, its lack (even with the occurrence of other premises) will result in the illegality of any actions that are associated with the dissemination of the representation of a well-known person, primarily if the image was used for purely commercial or advertising purposes[49]. Nowadays,

[47] LEX No. 466419.
[48] See: *Komentarz do ustawy*..., p. 388; T. Grzeszak, *Reklama*..., p. 12; E. Wojnicka, *Ochrona autorskich…,* p. 116.
[49] See: the Supreme Court judgment of 27 April 1977, I Cr 127/77, unpublished.

this approach, due to the progressing commercialisation of personal rights, is becoming even more important[50].

The situation is similar with respect to the other circumstance excluding the illegality of violation, indicated in Article 81 Paragraph 2 of the Act on Copyright and Related Rights. According to the cited regulation, the publication of the representation of a person, which constitutes only a detail of a larger whole – such as a gathering, landscape, public event, does not require a permission. Taking into account the activity of the media dealing with covering and reporting events of various kinds, this solution seems to be completely clear and justified. Nonetheless, two terms should be remembered. The first one involves the fact that the person present in the photograph should actually be a part of a broader spectrum, which excludes such techniques as cropping[51], exposing or increasing the representation in size. Certainly, the implementation of this provision does not require presenting the figure in the manner completely preventing the recognition. Returning to the case, already cited above, relating to the publication of the image of the offender sentenced to prison, the Warsaw Court of Appeal stressed that the face

> of the plaintiff, precisely due to the 10-second close-up, cannot be regarded as a part of the landscape or a detail of a larger whole. It was not a part of the background illustrating the functioning of the prison as, for instance, the picture of remote prison windows or a general view of the courtyard where the convicts would be staying at that time. It was a film base relating to the content of reportage and highlighted especially for this purpose. This representation of the plaintiff's face behind bars is not the effect of a documentary, informational or reporter's activity. The claimant was not filmed as if by the way of capturing, for example, a rescue operation, the work of the prison or hospital, or a landscape – as an element which is difficult to ignore, but as a person serving his sentence in this particular prison[52].

The second premise is the informational or artistic purpose of the image use[53]. This assumption was clearly confirmed by the Court of Appeal in Warsaw in its judgment of 13 January 1999[54], stressing that even if the person is a detail of a larger whole, the permit will be necessary if the image is not used for informational purposes, but as a forefront of the programme (though done by the external company to the programme broadcaster). In this context, the previously cited judgment of the Court of Appeal in Łódź of 28 August 1996, which recognises that the use of the image of a person which constitutes a detail of a larger

[50] On this matter, see: M. Czajkowska-Dąbrowska, *Glosa do wyroku*…; T. Grzeszak, *Glosa do wyroku*…; idem, *Reklama...*

[51] T. Grzeszak, *Reklama...*, p. 12; J. Sobczak, *Prawo autorskie*…, pp. 209–210. See also the Supreme Court judgment of 12 September 2002, V CKN 440/00.

[52] The Supreme Court judgment of 26 November 2003, VI ACa 348/03.

[53] See: T. Grzeszak, *Glosa do wyroku*…, p. 318 and *idem*, *Reklama...*, p. 12.

[54] I ACa 1089/98, „Wokanda" 2000, No. 3.

whole for advertising purposes remains within the permissible limits provided for by Article 81 Paragraph 2 of the Act on Copyright and Related Rights, seems to be obscure[55].

Article 81 of the Act on Copyright and Related Rights is widely accepted as a basic provision defining the permissible exceptions, enabling the authorised dissemination of the image of the portrayed person. However, this is not the only regulation which should be recalled in the context of the subject matter discussed here. Article 13 of the Press Law Act bears a similar meaning. In Paragraph 3, it provides the prosecutor conducting the pretrial proceedings or court hearing the trial with the opportunity to grant the consent for publishing the image of the suspect or the accused, thereby creating another circumstance excluding the illegality of the image violation[56]. This provision constitutes an addition to the list of situations when, in the absence of the consent of the person presented in the image, the publication is legal. The reasons for introducing this, already another, exception to the general rule, assuming the prohibition of the image publication without the photographed person's consent, are not limited merely to the informational purpose of the publication. They are also related to the general good of the judiciary since, at times, especially in the pre-trial phase, publishing the photograph of the suspect may be helpful in determining witnesses or other victims.

Similarly, a special character can be found in regulations included in the Police Act – relating to taking, and placing in the so-called police albums, booking photos, i.e. capturing representations of suspects[57] – and in provisions contained in the Act on Qualified Sports[58]. The latter normative act contains the following entry in Article 33 Paragraph 1:

members of the national team provide, on an exclusive basis, their image in the Polish national team outfit to the Polish Sports Association, which is entitled to use that image for its own economic objectives in the scope set by the regulations of the Association or an international sports organisation operating in the field of a given sporting discipline. The second paragraph implies in turn that the player, before enrolling in the national team, agrees on the dissemination of their image in the national team outfit within the meaning of Article 81 Paragraph 1 of the Act on Copyright and Related Rights.

The interpretation of the aforementioned provision was the subject of deliberations of the Supreme Court in its judgment of 16 December 2009 (I CSK 160/09)[59] issued in connection with the dispute between the player, being part of the representation of Poland, and Telewizja Polska, which used his image for the campaign of its own products on the basis of the

[55] See: T. Grzeszak, *Glosa do wyroku*…., p. 318.
[56] For further reference, please see: M. Łoszewska-Ołowska, *Relacje prasowe z przebiegu procesu karnego – wybrane aspekty prawne*, „Studia Medioznawcze" 2010, No. 2, p. 129 ff.
[57] On this subject, see the Supreme Court judgment of 4 June 2003, I CKN 480/01, LEX No. 137619.
[58] The Act of 29 July 2005, Dz.U. 2005, No. 155, pos. 1298 as amended.
[59] LEX No. 566088.

agreement signed between Telewizja Polska and the Polish Football Association (Polski Związek Piłki Nożnej). According to the court

> the legislator connected the rise of the right to use the image of the representative dressed in the national team outfit in favour of the Polish Sports Association with the fulfilment of the hypothesis of this provision, i.e. classifying a player for the national team. Therefore, this right contains the possibility of independent use of the players' image dressed in a costume of a representative for its own economic purposes by the Polish Sports Association. The representative's duty to accept the situation in which their image in the national outfit may be subject to the use by their sports federation on an exclusive basis is a correlate of this power.

It can be further read that

> disseminating the image implies more than granting the consent in the meaning of Article 81 of the Act on Copyright and Related Rights; therefore, the will of a player to belong to the representation of the country is tantamount to their consent for the use of their image within the limits set out in Article 33 Paragraph 1 of the Act [on Qualified Sports]. The literal interpretation of this provision implies that players make their image in the outfit of the national team accessible exclusively to the Polish sports association; however, the legislator allowed the sporting organisation to determine the range of this use in its internal legislative acts. It means that the player cannot authorise any third parties to use their image in the representative outfit without the prior approval of the Polish sports association.

This comprehensive quotation allows for deriving several conclusions. Firstly – along with the membership of the national team, the presumption of consent to use the image in a representative outfit arises. Even if these issues are not regulated by the act of appointing the national representation team, the Supreme Court derives such conclusion on the basis of Article 33 of the Act on Qualified Sports. Secondly – the consent for the publication, identified with the agreement to be a member of the national team, does not require any specific format or separateness in its expression. Thirdly – this provision relates only to the image of the player who is a member of the national team, dressed in a representative outfit. Fourthly – it eliminates the possibility of the player's objection to managing their image in the representative outfit. When analysing the content of the cited provision, one may wonder whether it is another circumstance excluding the unlawful infringement on the image. Regardless of the position held on this matter, it undoubtedly extends the circle of situations when, despite the absence of the clearly expressed consent of the portrayed person, our law allows to spread the image, even for typically economic purposes[60].

When summarising these at times selective remarks on what the image is and which circumstances waive the illegality of its distribution (primarily of publication), special attention should be paid to the very, rather complicated, manner of perceiving this particular personal good. Although it constitutes a value that creates relatively slight definitional problems (if juxtaposed with other personal goods), these are appearances only. This good can be perceived through some characteristic aspects. *Sensu stricto* – an image is a recognisable representation of the individual and it was understood this way in the publication herein

[60] *Cf.* J. Barta, R. Markiewicz, *Media a dobra*…, pp. 113–114.

presented. *Sensu lagro* – it happens to be identified with reputation, renown, i.e. another personal good – human dignity. This method of using the analysed term remains appropriate for the colloquial language and non-legal branches of science.

If we identify a recognisable representation of an individual with the concept of the image, the protection then may be limited only to the situation when it contains recognisable facial features (or silhouette features); however, it can also be perceived through a wider prism and considered that everything which is used to identify people – and associated not only with their appearance, but also with the manner of moving, facial expressions, gestures, etc. – remains under protection.

Finally, while speaking of the image, we need to realise that, on the one hand, it is an independently protected right, suffering damage from various publications, without any breaches of other values[61]; on the other hand, the fact of violating the right to the image (through the publication of the photo without the consent of the portrayed entity) sometimes descends into the background, particularly in situations when the image is what reveals personal details (it functions as if the name and surname were provided, though in a graphic form), but the essence of law violation is the rest of the publication – frequently extended – or even a brief comment of a slanderous nature or interfering with privacy[62]. In such situations, if it was not for the picture, in the absence of identification, the good name of an individual entity might not be infringed. Plaintiffs, appearing before the courts, draw attention to the issue of infringing their right to the image usually at a later stage, focusing primarily on the violation of honour. Secondly, it also sometimes happens that the photograph itself contains content that is disparaging or intruding into privacy. The image therefore serves, for instance, as an illustration of the circumstances confined to personal or family life, acting as a plane through other values suffer damage as well. When looking at the photograph, it is assessed whether what is presented in it constitutes the breach of other goods or not. It may thus be a series of images, left virtually without any comments.

The publication hereby presented does not encompass these uniquely opulent issues related to the protection of the image in Polish law and the jurisprudence of national courts. It is merely an attempt to refer to a few issues, fundamental from the point of view of the protection of the discussed good. Among other things, an important issue of the special status of politicians' images used in election campaigns remained outside the area of considerations.

[61] See, *inter alia*, the Supreme Court judgment of 16 April 2004, I CK 495/03.
[62] See, *inter alia*, the Supreme Court judgment of 24 January 2008, I CSK 319/07, the Supreme Court judgment of 8 January 2004, I CK 40/03, the decision of the Appelate Court in Poznań of 30 April 2008 (I ACa 245/08).

Above all, the purpose of the study has been to present how this good is perceived (defined), what constitutes its violation, what the consent is and which other circumstances may justify reaching for someone's image without the fear of committing an offence. These issues cannot be examined without the essential jurisprudence of Polish courts, though frequently remaining at variance with one another. Hence, the attention has been focused primarily on the current achievements of jurisprudence. It is also worth noting that, within the discussed field, the progressing commercialisation of the right to the image, related to the possibilities of its economic exploitation, will gain higher importance. It is possible that this problem has not been exposed strongly enough in this paper what does not mean that its rank was undermined against the background of the analysed subject. Similarly, the issue of the claims made by the entities whose right to the image has been violated remained outside the area of deliberations.