

PROTECTION OF CHILDREN'S RIGHT TO PERSONAL PORTRAYAL

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Abstract

The right to personal portrayal is a component of personality, along with the right to privacy and private life. These are rights that require special and enhanced protection, especially in case of children, given the need to protect their healthy development. The child has the right to personal identity and is the owner of these rights.

Parents have an important role in defending the right of personal portrayal of the child, acting through various means to respect the child's right to privacy and private life against interference of third parties and stopping the public display of the child's image. However, in many cases the use of the child's images require the consent of the parents or guardians of the child. An important aspect regarding the role of parents in protecting the rights of personal portrayal of the child is the fact that there are some restrictions regarding their behaviour in order to protect their children's rights, because often parents are violating these rights or unconsciously expose their children and their image, in order to gain personal advantage or influence the decisions of public authorities.

An important aspect in the treatment of this topic is the delimitation of the right of personal portrayal from the right to freedom of expression, which is often difficult.

The right of personal portrayal of children must also be analysed in the context of sharing images on social networks, a phenomenon related to everyday life. In most cases, parents are the ones, who distribute images of their children and, although, this behaviour most often seems to be innocent, on the other hand, may be responsible for attracting users with deviant behaviour.

Exploitation of children's images for advertisement, advertising, entertainment, modelling or cultural, artistic or sports represent a number of peculiarities.

The protection of children's right to personal portrayal must be analysed taking into account the safeguards and remedies offered by both the national and the European legislation.

Key Words: *rights of personality, right to own image, personal portrayal, child rights, defense of non-patrimonial rights*

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1. Children`s right to own image

The right of personal portrayal of children is an attribute of the person, an element of identity. Image rights are a component of human personality, alongside the right to intimacy and private life.

It is a right of personality and require special and enhanced protection, especially in case of children, given the need to protect their healthy development.

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Children should be treated with care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity. The child's best interests should be a primary consideration in all cases involving children.

The right to one's own image, including the protection of image and voice of the person, is a component of privacy and seeks to protect the identity, intimate sphere, personal relationships, or sexual liberation of it.

A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication.

The child is a person under the age of 18. The child benefits from all human rights and at the same time, children are subject to special legal regulations, given their specific characteristics. Children are right holders, and not only objects of protection.

Thus, the child benefits of the right over his own image, has the right to personal identity and it holds these rights, even if the exercise or protection thereof cannot act alone.

The moment of obtaining and exertion of these rights by the child himself or by a guardian is a controversial issue. This is a controversial issue in judicial literature, because it is considering that most of the rights are acquired at birth and in case of several rights they are recognized even in favour of conceived child¹ with the condition that is born alive. Then, in terms of exercising the right to personal portrayal, the child, up to a certain age, does not perceive these rights because of developmental circumstances, nor can exercise them personally, only through the mediation of parents or representatives.²

The individual is protected no matter the age, since personality rights begin on the birth of living child. Under these circumstances, the right to protection of one's own image are recognized even in favour of a newborn baby.

¹ The problem of unauthorized use of photographs showing unborn fetus viewed using ultrasound, must be dealt with through the right to privacy of the pregnant woman, and not in terms of any right to their own image of the fetus, because that appearing only with childbirth, since then being able to talk about a person as defined in Article 73 of the new civil Code and it is not a case of application of Article 36 of the civil Code. Cristea B. (2013), Dreptul la propria imagine, drept al personalității, Revista Română de drept privat, no.1/2013, p. 105.

² Stephen Balkam, who is the founder of an institute for family online safety, said that 46% of the generation "millenials" posted a photo of their child before he fulfilled a year. Moreover, some parents have even posted an ultrasound of their baby before he was born. <http://www.go4it.ro/internet/copiii-crescuti-pe-facebook.-parintii-romani-insista-sa-publice-online-imagini-si-clipuri-video-cu-urmasii-lor-minori-desi-in-fiecare-minut-sunt-vandute-500-de-poze-cu-copii-in-ipostaze-cu-caracter-sexual-15514302/> [15.02.2017].

According to some authors, damage caused by unauthorized reproduction of a newborn's image may have less consequence than in case of an adult, since the physiognomy of a growing child is still changing (Cristea, 2013:105). I appreciate that violation of image right of newborn baby or child may have consequences as serious as in the case of an adult, because the purpose of use unauthorized reproductions may be much more dangerous, such as child abduction or on the other hand given the sensitivity of the child, this could affect his mental situation and may have consequences even more dramatic than in case of an adult.

The right to one's image in favour of a newborn has been recognized in the jurisprudence of the ECHR under Article 8 of the Convention, the Court found that newborn image was caught by the photographer in identifiable form and can be subject to further exploitation, against the will person concerned and/or his parents.³

The personal portrayal of own image, or, synonymously, appearance, representation or mirror, is a constituent of public and private life of the individual (Perju, 2015:56).

Right to the own image is not absorbed by the right to privacy (Ungureanu & Munteanu, 2010:70), though many authors consider this, the right of own image concerns not only the private sphere of the individual but also the public one.

At first image right was the work of jurisprudence, being a personality right, which currently enjoys legal regulatory and protection.

2. The legal regulation of the right to own image of child in Romanian Civil Code

Romanian legislation regarding child protection is governed by the following principles: the superior interests of the child, right to life and development, the right to freely express his opinion, image rights, non-discrimination.

³Case *Reklos et Davourlis v. Grecia* 2009, This case focuses on photographs taken of a newborn in a private clinic without prior parental consent, and keeping the negatives. Immediately after birth, the child was placed in a sterile unit to which only the clinic medical staff had access. The next day, the mother were shown two photographs of the child, facing the camera, photos taken inside the sterile unit by a professional photographer headquartered in the clinic. The applicants complained about the intrusion of the photographer in a sterile environment where only medical personnel had access, and possible irritation caused by the child being photographed from the front. The Court found that there had been a violation of Article 8 (right to respect for private life) of the Convention. Although the photos showed baby just in front and not in a state that could be considered demeaning or damages the personality, the Court considered in this case that the photos were harmless, but that the photographer kept photos without the agreement of applicants. Child's image was thus retained in the hands of the photographer in an identifiable form, with the possibility of further use against the will of the child and / or his parents. National courts are not considered lack parental consent for pictures that would be taken or negatives to be retained by the photographer and thus failed to ensure the child's right to protection of his private life. <http://www.srdo.ro/2016/01/18/dreptul-la-protectia-imaginii-persoanei-nou-nascut-fotografiat-fara-consimtamantul-prealabil-al-parintilor/> [12.03.2017].

Personality rights are inherent in every human being and there are inseparable from it, and they belong to all people in the same manner, with an identical content, no matter the legal condition of the individual.

The image right is governed by legislative requirements of various legal branches, benefiting even from a constitutional recognition.

Constitution guarantees the rights of personality, according to art. 1, para. 3, and image rights provided for by art. 30 para. 6, showing that freedom of expression may not harm the dignity, honor, privacy of person and the right to own image.

The image right is a right guaranteed and regulated by the Civil Code⁴ by art. 58 para. 1, art. 73 et seq., defining in principle the right to own image.

Art. 73 para.1 of the Civil Code enshrines the right to own image - Everyone has the right to his own image. In the exercise of the right to their own image, it may prohibit or prevent reproduction, in any manner, physical appearance or his voice or, the use of such reproductions.

Para. 2 of the same article states that, within the limits of Article 75⁵, of the Civil Code copyright holder may prohibit or hinder reproduction in any way to his physical appearance or his voice or, where appropriate, the use of such reproductions.

Art. 74 Civil Code provides certain situations within, without prior consent of the holder of the right to his own image and under provisions of Article 75 of the Civil Code, can be considered as violations of their own image, such as capturing images or voice of the person located in a private space; dissemination of materials containing the image of a person under treatment in healthcare units; use in bad faith image or voice of a person.

Also the New Civil Code, in art.76 entitled The Presumption of Consent, establishes a presumption of consent itself, when the holder of the image right gives a referred information or material to a natural or legal person who knows about that operates in the field of public information, consent for their use is deemed not rely on a written agreement.

3. The protection of child`s image right in special legal regulations

Special regulation regarding protection of right to own image in particular protection of children`s right to personal portrayal are found in various legal norms.

Criminal law also provides protection on right to own image of the person, by it`s specific means. Thus, it constitute the crime of violation of privacy act and

⁴Romanian Civil Code, the Law no. 287/2009, republished on 15 July 2011 and entered into force on 1 October 2011.

⁵ Art. 75 C.civ, Limits.

(1) There is no violation of the rights provided in this section touches that are permitted by law or international conventions and covenants on human rights to which Romania is a party.

(2) The exercise of constitutional rights and freedoms in good faith and in compliance with the covenants and conventions to which Romania is part does not constitute a violation of the rights provided for in this section.

punishable under art. 226 of the Criminal Code, which consists of violations of privacy by photographing, capturing or recording images, by listening using technical means or by recording audio of an individual, in a house or room or outbuilding related to them or to a private conversation shall be punishable by no less than 1 month and no more than 6 months of imprisonment or by a fine.

Also in paragraph 2 of the same article, criminal law penalizes the act of unlawful disclosure, dissemination or transmission of sounds, conversations or images to another person or to the general public. The same article stipulates certain situations where the act is not an offense, for example when a) the act committed by the individual who attended the meeting with the victim during which the sounds and conversations were recorded and photos were taken, if there is a legitimate interest; b) if the victim has acted with the explicit intention to be seen or heard by the perpetrator; c) if the perpetrator has records of the commission of an offense or helps prove that an offense was committed; d) if public-interest acts are recorded, which are meaningful to the life of the community and whose disclosure has public advantages that outweigh the damage to the victim.

Also Criminal Law, by art. 374 states and sanctioned child pornography, which is the production, possession for display or distribution, the purchase, storage, display, promotion, distribution and making available in any way, of child pornography. This acts are punished severely, if are committed using a computer system or other means of data storage.

Child pornography means any material that shows a juvenile displaying a sexually explicit behavior or that, even if not representing a real person, simulate a juvenile with such behavior in a credible manner.

The *Law no. 504/2002* about broadcasting, contains specific provisions on the right to image, also The National Audiovisual Council (CNA) *Decision no. 220/2011 on Audiovisual Content Regulatory Code*, as amended by Decision 469/2011 CNA, provides in article 3 children's right to own image.

Among these provisions must mention the fact that legislation prohibits alcohol advertising spots featuring children, also broadcasters cannot broadcast images of violence between minors. It is prohibited in news programs, debates or reports broadcast images or photos of the body of the deceased child, also it is prohibited the broadcasting of programs aimed mainly at exploiting the physical appearance of minor or its age-inappropriate exposed poses.

After 10 pm are forbidden live broadcast audiovisual programs involving minors under the age of 14 years, except for cultural events and sporting competitions.

Participation of a child up to 14 years in public debates during audiovisual programs can be made only with his written consent and his parents or legal representative.

Sequences of violence in schools will only be presented with point of view of school management and parents' consent, except to the situation where the broadcaster is acting in the best interests of the child when it only required the

consent of their parents or legal representative, so that the public image and the right to private life of the child cannot be harmed. Images of minors involved in events with negative connotation will run only if the broadcaster is acting in their best interests and ensure it is not running any clue that could lead to the identification of children involved.

There are special provisions in the *Law no.8/1996* on copyright, and related rights in art. 80, 87, 88 texts referring to using a work containing a portrait. Using a work containing a portrait requires the consent of the person represented in that portrait, as provided by art. 73, 74 and 79 of the Civil Code. In the absence of clauses that go against, consent is not required if the person represented in the portrait is a professional model or has received remuneration for that portrait picture. The existence of consent is presumed under Art. 76 of the Civil Code.

The *Law no. 148/2000* on advertising also contains certain provisions regarding the restriction of advertising images with children. The law by art. 6f) prohibits advertising that damage the image, honor, dignity and privacy of individuals; art. 13 b) states that advertising for alcoholic beverages and tobacco products is not permitted in any circumstances representing minors consuming these products. Also the law on advertising, by art. 16 states that publicity for products and services for minors is prohibited when presents children in dangerous situations.

Law no. 272/2004 on the protection and promotion of children's rights, as amended and supplemented, governing children's right to protect its public image, privacy, private life and family. Art. 27 of the Law states that the child has the right to protect its public image and privacy, family life. Also, this text states that participating child under the age of 14 in public debates in audiovisual programs can be done only with its written consent and parents or, where applicable, the legal representative`s.

The publication of a person`s photo also represents a processing of personal data of the person concerned. In accordance with special legislation in matters of personal data processing, *Law no. 677/2001*, data subjects are entitled to object to the processing of their data, in this case the image, which can compel the deletion of the images in question at publishing.

And not least in the matter of the special laws on the protection of child rights to own image has to be mention the *GD no. 75/2015* on regulating the provision of paid work by children in cultural, artistic, sporting, advertising and modelling.

4. Violation of children's right to own image

Image rights infringement can take many forms. It could be realized through the action capture, reproduction without consent, exposing the appearance by photographing, filming, drawing, painting, engraving and other such means or through a sound recording device of a person's voice.

The action of reproduction gets a wise sense involving any representation outside of the image, no matter the way (photo, drawing, lithography, graffiti,

sculpture, relief, chopping wood, making a mask or puppet / marionette, design snapshots or films, broadcast television or broadcasting radio, using a loudspeaker sound, posting on Internet, etc.), in any form or substance / material used, and the duration of exposure (sufficient, however, as to be perceived by human senses). Falls under the umbrella of legal provision not only a faithful reproduction, but also one that without photographic allows the identification (Cristea, 2013:102).

The right to own image is not an absolute right, so photographing and using the image of a person shall be permitted even without a prior consent, when they are made in good faith in the exercise of other fundamental rights such as, for example, the right to freedom of expression. Often, to determine whether there was an infringement of image right a delimitation is needed between image rights and freedom of expression, which often is a difficult exercise.

Shooting a person in a private sphere, whether that space belongs to her or another person without consent is in principle prohibited, whether or not followed by the use of the images or recordings. Shooting a person in private places without their consent could be criminal offenses under the Code. At the opposite pole is shooting situation, using the image of a person caught in a public place, carry on a public activity, in which case, in principle, use of the person's image without his consent is not illegal if you do not harm the reputation or dignity.⁶

The most common situations and legal conflicts are those when, without having persons consent, their image is used even though this image, captured in a public place but during a private activity. Capturing and distributing the image of a person without consent must be done responsibly so as to ensure a fair balance between freedom of expression, the public need to be informed and privacy.

In order for the use of the image of a person do not represent an unlawful act, it requires consent or in case of children parental consent, or legal representatives consent.

Consent is the will of the person to be captured its own image or voice and used by others. Consent given does not mean that the person renounces on its right to image when allowing the use of his photography.

Consent must be validly expressed, through the provisions of art.1024 Civil Code, must come from a person with discernment, should be free and uncorrupted. The person whose consent is required must receive all information likely to influence the will and therefore to enable him to take an informed decision.

Consent must be externalized, express or implied, but it cannot be presumed only if prescribed by art. 76 Civil Code, when himself make the material available to a natural or legal person who has knowledge about that operates in the field of public information, consent to their use is presumed not required written agreement. By the time of publication this consent may be revoked, being an unilateral act.

⁶ <https://www.juridice.ro/358510/dreptul-la-imagine-in-contextul-distribuirii-fotografiilor-pe-retelele-de-socializare.html> [11.03.2017].

In all cases consent is presumed to be given for the capture and dissemination of an accurate image of the person and not a distorted representation (Ungureanu & Munteanu, 2010:72).

Regarding caricature, it can be the expression of the freedom of opinion and its exercise in good faith shall place it within the limitations laid down by art. 75 para. Civil Code, provided that representation does not undermine dignity, and harms not offending, and it's not a deliberate offense or denigration.

In the French judicial literature it has been noted that the caricature is a traditionally accepted tolerance regarding those whose profession or activity permits the presumption of their implicit consent: politicians, movie stars, generally people who acquired notoriety through their public activities; the alteration of reality must have a comical effect, to be susceptible to generate laughter, not to harm (Cristea, 2013:116).

The satire is legal if it respects the personality rights, the satire mustn't intend to harm and must keep measure. In the domain of humour tolerance has limits since it cannot harm the respect of private life, image and dignity (Ungureanu & Munteanu, 2010:76).

If a consent has been given in order to execute an image/portrayal, this cannot be extended to the distribution of the representation or if it has been conferred to one person, it doesn't profit others (Ungureanu & Munteanu, 2010:18). The simple expression of an unspecified consent, in lack of any other particulars, can't be considered as bestowing on the third party the right to proceed freely regarding the image.

In principle, the consent should be given before the third party's action in order to capture the image, multiply or use the image, but in the absence of this, the holder of rights is free not to institute proceedings against the guilty party that actioned in absence of the interested party's consent.

As to the consent of the parents in order to capture, use and distribute the image of an underage, the law does not distinguish whether it's necessary the consent of both parents or the consent of one of them is sufficient. Taking in consideration that the parents hold equal rights regarding the child, and parental authority is exercised in common by both parents, I consider that in order to use the image of the underage by a third party it is necessary the consent of both parents.

In the case of obtaining the consent of one of the parents and the other parent doesn't oppose to the use of the image of the child, I consider that the right of the child to personal portrayal has not been breached.

Where the parents don't reach an agreement regarding this matter, the court may substitute the consent of one of the parents if the refusal is unjustified and this would serve the best interest of the child in order to benefit of a proper development.

Also, taking in consideration that the law doesn't distinguish, the consent of the parents is necessary regardless the age of the child, even if for example a child older than 14 years may conclude alone administration deeds.

There are many discussions and it is an interesting question whether it is necessary the consent of an underage child, especially with the faculty of discernment, in order that the parents may publish photos of them.

Children should have a right of control regarding their own image, and to be able to prohibit including their own parents to use their image, to distribute photos with them, especially if these may be defamatory or if represent them in an embarrassing pose or images that later may discredit their image. As the images of children are not a property or right of the parents, these shouldn't act against the will of the children and especially in the detriment of their interest.⁷

The law provides a few situations in which in order to take photos and reproduce images of a person, their consent is not necessary. As a general rule any use of the image of a person represents an intrusion in the private life of that person. An intrusion may be justified a) if it is provided by the law; b) if it has a legitimate aim; c) if it is necessary in a democratic society. In order to justify the intrusion, the subject that used the image must pursue one of these legitimate purposes: the security of the society, the security of the state, public order, the exercise of the right to inform the public regarding common interest information and other legitimate interests.

It is legitimate that in the case of forensic investigation the image of a person is reproduced without their consent, in order to conserve their morphological characteristics, and also it is legitimate to record images on the public roads in order to supervise traffic and the use of video surveillance tools by public authorities in order to ensure the protection of institutions and the security of people (Munteanu, 2011:132).

Regarding the use of the image, it is not relevant whether the image is presented to an undetermined public or to a limited number of persons, characterized by personal or professional relations. It is regardless if the image was used exclusively by the third party or is shown to other persons to, as long as the incriminated action is contained by the notion of use, it is subject to the discussed law (Cristea, 2013:103).

5. The role of parents and of legal representatives in the protection of the child's right to personal portrayal

The parents and the legal representatives have a special role in the protection of the child's right to personal portrayal, using various instruments to ensure the compliance of the child's right to private and intimate life, against the intrusion of third parties and to stop the public display of the child's image.

⁷"As children's-rights advocates, we believe that children should have a voice about what information is shared about them if possible," says Stacey Steinberg, a legal skills professor at the University of Florida Levin College of Law in Gainesville. <http://www.npr.org/sections/health-shots/2016/10/28/499595298/do-parents-invade-childrens-privacy-when-they-post-photos-online> [03.03.2017].

The parents are responsible to protect the child and to ensure it's harmonious and healthy development.

The parents and the legal representatives are obliged to act in the interest of the child.

The principle of the uppermost/superior interest of the child should prevail in all the procedures and decisions of public authorities and authorized private entities regarding children, and also in the judicial cases solved by the courts.

In order to determine the superior interest of the child there should be taken in consideration at least the following criteria: the needs of physical, psychological, educational and health development, of security and stability and a sense of kinship; the opinion of the child, with taking in consideration their age and maturity; the history of the child, especially situations of abuse, misconduct, exploitation and any kind of violence regarding the child, and potentially risky situations that may arise in the future.

Therewith, as a general rule the consent of the parents or legal representatives is necessary in order to use the image of a child.

This consent is very serious and should be given in a responsible manner as the child cannot act alone and does not have the discernment in order to meet a decision in such a situation.

The consent of the parents to the use of the images of the child by third parties should take in consideration firstly the superior interest and the good of the child. The parents should be well informed regarding the rights of their children, of the third party, the mode, conditions and scope of the processing of the images regarding the child.

A very important aspect regarding the role of the parents in the protection of children's rights to portrayal consists in the fact that they are restricted by a series of limitations regarding their behaviour, because many times the parents violate these rights or expose their children and their images unconsciously, or in order to obtain personal advantages or influence the decisions of public authorities.

Most of the time the parents share photos of their children on social networking websites or online and these activities are not always safe for children.

From desire to take pride in their children the parents, may expose them to various risks without wanting to. Also, parents frequently from pride and a wish to present their child to their friends exploit the child's image through various activities, like modelling, beauty contest, advertisements. Many times for the exploitation of the child in the media are guilty both the parents and other legal representatives that seek to impress the public by TV shows or broadcast or by TV debates in order to gain material or other kind of privileges, taking advantage from the child's situation, and the companies providing the audiovisual services that in order to increase the spectacular side of the productions use the images of children and other aspects related to their private life.

Children may not be used or exposed by their parents, legal representatives, other persons responsible for their raising and care, accredited private entities to

provide social services, public or private institutions, in order to obtain personal or institutional privileges or to influence the decisions of public authorities.

The parents and the legal representatives must forbear actions that may affect the public image of their child or the right of personal portrayal of the child.

The parents must be cautious with the use of the image of their child, and consenting to the capture, use and distribution of their image.

The children must be informed regarding their rights, but especially they should understand the importance of responsibilities generated by the recognition of certain rights in their favour.

They must be protected by their parents and relatives, but also by the community they are part of.

As often as the parents consider that the child's right to personal portrayal has been harmed, they have the obligation to protect these by the various judicial remedies offered by the national legislation.

If the parents don't act in the interest of their children it is possible that in the moment when the children may act alone they turn against the parents, taking in consideration that the civil action for the protection of non-pecuniary rights is indefeasible.⁸ In the future such cases in which children sue their parents, if they refuse to delete certain photos of the children may arise, especially since the children that appear on Facebook will mature in the future. Following the French legislative model the situation of the parent's posts regarding their children may be brought under regulation.

6. The child's right to personal portrayal and social networks

The child has the right to the protection of its public image and private, intimate and familial life. Any action that may affect the public image of the child or their right to private, intimate and familial life is prohibited.

The children's right to portrayal must be analyzed also in the context of distributing images on social networks, a phenomenon pertaining to everyday life. In most of the cases the parents distribute the photos of children and though such a behaviour appears to be innocent, it is not always responsible because certain photos present children in situations that may attract users with devious behaviour.

The parents must assume the role to protect their children and not to expose them, sometimes even unwillingly, to various risks by posting their images on social networks or by publishing on the internet.

⁸Delcroix Éric, Internet law expert, said it is very possible to see in future cases where children sue their parents because of their pictures published on Facebook in the past.<http://www.go4it.ro/internet/copiii-crescuti-pe-facebook.-parintii-romani-insista-sa-publice-online-imagini-si-clipuri-video-cu-urmasii-lor-minori-desi-in-fiecare-minut-sunt-vandute-500-de-poze-cu-copii-in-ipostaze-cu-caracter-sexual-15514302/>; <http://www.hotnews.ro/stiri-magazin-21288063-austria-fiica-depune-plangere-impotriva-parintilor-din-cauza-unor-poze-din-copilarie-care-acesia-postat-facebook.htm>; <http://www.mediafax.ro/life-inedit/o-adolescenta-si-a-dat-in-judecata-parintii-pentru-ca-au-publicat-pe-facebook-imagini-cu-ea-15713698> [05.03.2017].

Taking in consideration the fact that children cannot oppose the posting and distributing their image online, the parents must give the greatest consideration to the content of these materials.

Firstly the parents should be conscious of the various hazards they expose their children to, because there are mischievous persons, photos that present babies or children unclothed may fall in the hands of paedophiles. Also the posting of images that contain personal data may be dangerous since exposes children to online harassment.

Published photos of children may have consequences on their future, determining or influencing the children's online future. Through the pictures posted online the life of the child becomes public and these may be used in the future against the child, the latter could have difficulty in finding a job or may be scoffed by colleagues, acquaintances because of comical childhood pictures (for e.g. sitting on the potty, changing diapers, naked on the beach etc.)

If there are posted on social networks photos that depict other children also, for example group photos from birthdays, it is necessary to obtain the consent of the parents of the children that appear in the photos.

Frequently schools publish on their website or Facebook photos with children taking up various school activities, in order to promote themselves, without the parents' consent. This represents a breach of the right to personal portrayal, the legal regulations specify clearly that institutions may not use the children's image in absence of the parents' consent.

Regarding the protection of the image of the child during school activities, French doctrine stated that taking photos of children during school activities, as an auxiliary pedagogy method foreseen in the school regulation signed by the parents, does not constitute a breach of the child's right to portrayal. In another case the decision has been that taking photos of an underage participating to a folk dance was illegal as the parents' consent has not been asked for (Ungureanu & Munteanu, 2010:76).

Although the Law no.272/2014, with ulterior modifications and completions, presents a particularity opposed to the Romanian Constitution and European Convention of Human Rights, as it ensures for children beyond the protection of the private and intimate life also the guarantee of protection of their public image in audio-visual mass media, unfortunately the Romanian legislator didn't foresee the protection of children's images on the internet.

7. The exploitation of the child's image

The use of children's' images for advertisements, publicity, modelling or in the cultural, artistic or sporting sphere presents a series of particularities. The holder of the right to personal portrayal may permit a third party to use the images and even obtain pecuniary gains.

Personality rights are of non-pecuniary nature and cannot be appraised in money. However conventions pertaining pecuniary value regarding the

exploitation of image, voice, name and even one's private life are recognized as valid (Munteanu, 2011:127).

Resolution no. 75/2015 regulates the performance by children of remunerated activities in the cultural, artistic, sports, publicity and modelling areas, that also imply that use of the child's image in these areas.

The child may perform these remunerated activities in regard of the conventions concluded by the organizer and the parents/legal representatives, or in the case of children over the age of 14, directly by them, with the prior consent of the parents/legal representatives. These activities may be performed by the children as: actors, figurant, singer, musician, dancer, acrobat at cultural, educational or artistic events, such as: theatre, opera, ballet, circus, dance, music or performing contests, and any kind of contests or stage activities; actor, figurant, singer, musician, dancer, acrobat or model at artistic movies, filming, recording or live shows for radio and television, with or without advertising purpose; figurant or model at photo sessions, with or without advertising purpose; figurant or model at fashion shows; professional sportsman in the performance sports area.

The activities performed by the child in the cultural, artistic, sports, publicity and modelling areas must respect certain special conditions, foreseen in order to protect the children, depending of their age and development, regulating time, durations and the conditions in which these activities take place.

With the occasion of performing these activities the children must be accompanied by their parents.

The performance of cultural, artistic, sports, publicity and modelling activities by the children is conditioned by the prior briefing of the public services of social assistance, by depositing an information note before the effective start of the activity.

The breach of regulations that oblige to the compliance of the right to public image, private, intimate and familial life, and also the use of children in cultural, artistic, sports, publicity and modelling activities, that pertain a potential risk or that are susceptible to compromise their education or harm their health or physical, mental, spiritual, moral or social development constitute contraventions, if they have not been committed in conditions that qualify them as infractions, and are sanctioned by a fine between 500 and 10.000 lei.

The law foresees the task of monitoring the audiovisual programmes by the National Audiovisual Council, so that the right of the child to the protection of their public image may be respected.

Also, NCA is part of the range of public institutions that have the scope to adopt specific regulations and apply appropriate measures in order to prevent the forced development of children's talent to the prejudice of their harmonious physical and mental development and to prevent the exploitation of the child by the mass-media.

As children may not be used or exposed by their parents, legal representatives, other responsible persons with their care, private entities accredited for performing social services, public or private institutions, in order to obtain personal or institutional privileges or to influence the decisions of public authorities, it

is even less permitted the use of video recordings with explicit violent or sexual content, that depict children as victims/ perpetrators of such aggressions.

Although it is prohibited, underage children in difficult situations, for example physically, mentally, sexually abused, in hospital, invalid etc., frequently figure in features or are identified directly or by address, related parties, or labelled as „the 14 year old rapist”, „knowledgeable thief” etc.

Regarding the use of children’s images in advertisements there are a series of prohibitions like the case of alcoholic beverages or tobacco. According to an order of the Health Ministry the appearance of children is prohibited in advertisements regarding unhealthy food, for example cold cuts, chips, chocolate or carbonated drinks, a whole list of products that cannot be associated with the image of children being established.

Media portrayal of children has a profound impact on attitudes to children and childhood, and is an important influence on adults’ behaviour towards children.

8. The child’s right to personal portrayal in the European legislation and the presentation of some cases

The child’s right to portrayal benefits of protection also at the level of European legislation. Article 8 from EHRC establishes the right to the abidance of private life, including the protection of personal portrayal that applies for the children too. Among the legislation adopted by the European institutions and with relevance in the field of protection of the right to personal portrayal can be mentioned Resolution no. 1003/1993 of the Parliamentary Assembly of the Council of Europe regarding ethics of journalism or Council Directive no. 94/33/CE of 22 June 1994, on the protection of young people at work etc.

Many countries recognize that individuals have a right of publicity. The right of publicity is the direct opposite of the right to privacy. It recognizes that a person’s image has economic value that is presumed to be the result of the person’s own effort and it gives to each person the right to exploit their own image. Although the right of publicity is frequently associated with celebrities, but every person, regardless of how famous, has a right to prevent unauthorized use of their name or image for commercial purposes.

In 1989, the United Nations agreed that children need a special convention of their own. This set of rights for children and young people is called the United Nations Convention on the Rights of the Child (UNCRC). A separate set of rights has been established for children and young people in recognition of the fact that childhood is a special time in life, when they need others to look after and help keep them safe.

It states that people under 18 have all the rights it contains, whatever their race, religion or abilities, whatever they think or say, and whatever type of family they come from. Children are individuals: they are neither the possessions of parents nor of the state, nor are they mere people-in-the-making; they have equal status as members of the human family. Children start life as totally dependent

beings, they must rely on adults for the nurture and guidance they need to grow towards independence.

Children are particularly vulnerable to abuse and exploitation. Children are physically more vulnerable than adults. They are also emotionally sensitive to negative experiences. Physical or mental abuse can scar children for life.⁹

The right to personal portrayal has initially been a creation of the jurisprudence and the judicial practice is constantly enriched in this dynamically developing area.

The European Court of Human Rights recognizes the right to personal portrayal in its jurisprudence. In its judgements the Court states that the image of a person constitutes one of the main characteristics of personality because it reveals the unique characteristics of a person and distinguishes a person from their peers. Such as, the right to the protection of personal portrayal is one of the essential components of personal development.¹⁰

In other cases the Court decides regarding the right of personal portrayal of children.

Kurier Zeitungsverlag und Duckerei GmbH no. 2.v. Austria and *Krone Verlag GmbH v. Austria*. The two cases concerned compensation proceedings under the Media Act brought by a mother and child against two publishing companies on account of their newspapers reporting on the dispute between the parents over custody of the child. The articles published by the two newspapers revealed the child's identity and gave details of his family life, and were accompanied by photographs showing him in a state of apparent pain and despair.

The Court held that there had been no violation of art. 10 of the Convention. It was true that the articles had dealt with a matter of public concern. However, given that neither the child nor his parents were public figures or had previously entered the public sphere, it had not been essential for understanding the case to disclose his identity, reveal most intimate details of his life or publish a picture from which he could be recognised. The Court was not convinced by the applicant's arguments that it had been necessary to publish a picture showing the child's suffering in order to draw public attention to the issue or to ensure the credibility of the sort. Lastly, the interference with the applicants' rights had been proportionate to the aims pursued. They had not been fined in criminal proceedings but had simply been ordered to pay compensation to the child for the injury caused due to interference with his right to respect for his strictly private life.¹¹

Another interesting case in the jurisprudence of European countries is the case of singer Paul Weller, acting on behalf of three of his children. He was successful in his privacy action against Associated Newspapers Limited (ANL) in relation to seven unpixellated photographs of the children and their father out shopping on a public street and relaxing in a café in Los Angeles. This decision highlights the risks of publishing otherwise innocuous photos of children engaged

⁹https://www.unicef.org/honduras/UNICEF_Master_FEB_2008_BON.pdf [10.03.2017].

¹⁰Case Toma v. Romania.

¹¹http://www.echr.coe.int/Documents/FS_Own_image_ENG.pdf[03.03.2017].

in day to day activities in public places and appears to create, for the first time, an image right in relation to the facial features of children. Further, it was held that publication of the photographs in this jurisdiction was unlawful because the children's Article 8 rights outweighed the Article 10 rights of the newspaper. Mr Justice Dingemans found that the balance came down in favour of the children because the photographs showed their facial expressions (and the "range of emotions" that were displayed). In addition he found that the claims for breach of the Data Protection Act were also established. The photographs were held to be particularly intrusive because they showed a range of emotions shown by the children on a family outing with their father.¹²

9. The remedies offered by the Romanian legislation for the breach of the child's right to personal portrayal

In the case of breach of the child's right to personal portrayal there are regulations that provide a series of possible remedies that the children, represented by their parents or legal representatives may use.

Firstly, every time when a breach of the child's right to personal portrayal is ascertained it is recommended that the device/platform that contains it, the internet files, should be saved as these constitute evidence in a future court case.

Such conflicts may be solved also amicably, in the case of identifying an appropriate solution for all parties involved. The removal of the photos and materials by which the breach of the child's right to personal portrayal is caused, can be asked of the author or the service provider, by written notification, negotiations and mediation.

The Civil Code offers the victim remedies and establishes certain means of defence:

Art. 253 of the Civil Code establishes that the natural person whose non-pecuniary rights have been breached or threatened may anytime ask the court:

- a) to prohibit the unlawful action, if this is impending/forthcoming;
- b) cessation of the breach and prohibition for the future, if this is ongoing;
- c) to establish the illicit nature of the action, if the disturbance caused subsists; in the case of breach by the exercise of the right to freedom of expression, the court may order only the measures foreseen by indention 1 letters b) and c).

The person who suffered a breach of such rights may ask the court to constrain the author of the action to perform any measures deemed necessary by the court to reach the restoration of the right, such as: a.) to oblige to author to publish the judgment, on its own expense; b) any other measures necessary to stop the illicit action or to repair the caused damage.

¹² <http://www.dailymail.co.uk/wires/ap/article-2605974/Paul-Wellers-children-win-lawsuit-pictures.html>[04.03.2017].

Art. 253 para. 4 of the Civil Code foresees that the harmed person may solicit compensation or a financial reparation for the caused prejudice, even if it's non-pecuniary, if the harm is ascribable to the author of the action; in these cases the prescription of the right to act the author in court in 3 years.

Non-pecuniary measures deemed to repair the prejudice have priority over the pecuniary ones, because they are much quicker and they can stop the disturbance for the future. Also, they are more effective in order to protect the dignity and privacy of persons than criminal punishment or damages (Ungureanu & Munteanu, 2012:254).

In the regulation of the new civil Code, in relation to the defense of the nonpatrimonial rights, including the personality rights, the concerned person has at her disposal both first instance and urgent proceeding judged according to the provisions on the presiding judge's order, interim measures.

Art. 255 of the Civil Code regulates provisional measures. If the persons who consider that they are harmed provide credible proofs that their nonpatrimonial rights have been objected to illicit actions that can be actual or imminent and that these actions may cause them a prejudice difficult to repair, may ask the court to take provisional measures. The court can especially prohibit the breach or to stop it provisionally or to take the necessary actions in order to secure evidence.

The provisional measure must be proportional. Provisional measures are meant to permit the threatened or harmed persons regarding in relation to their non-patrimonial rights to obtain quickly the same juridical measures that may be obtained by a court judgement regarding the main issue of the matter on trial. These don't solve and neither do anticipate the requests regarding pecuniary or non-pecuniary reparations.

Taking in consideration that the child's right to personal portrayal is regulated by a series of special legislative acts, besides the solutions provided by the Civil Code, these offer specific remedies for the victim. For example, if a third party uses unlawfully the personal data or/and the photos of a person, related to the protection of personal information the person may file a complaint to the National Authority for the Supervision of Personal Data Processing, that may control and apply sanctions to Romanian operators that process unlawfully personal data, as the image of a person. Another example is Law no. 8/1996 regarding the authors' rights and the affiliated rights, that stipulates that the use of a work, including photos, that contain a portrait of a person in the absence of their consent that is not implicit, constitutes a contravention is sanctioned by applying a fine.

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