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Permission for Dissemination of a Minor's Image

Zezwolenie na rozpowszechnianie wizerunku małoletniego

SUMMARY

In the article the author analyses the legal character of permission for dissemination of images of minors with limited legal capacity and those that are characterized by complete legal incapacity based on the following acts: The Act on Copyright and Related Rights, Civil Code and the Family and Guardianship Code. Based on the Civil Code regulations, the author classifies the permission to one-sided and authorizing legal acts and indicates differences related to the permission for dissemination of an image resulting from the different age of minors. Minors under 13 years of age may not grant permission to disseminate their image by themselves and the permission granted should be classified as significant, which should be decided on by both parents. Minors with limited legal capacity may allow the dissemination of image by themselves, although they should get their parents' unbinding opinion.

Keywords: image; permission for dissemination of image; minors; limited legal capacity; lack of legal capacity

INTRODUCTION

The issue of authorization to distribute the image of a minor is related to a number of legal problems. The Civil Code shapes the scope of legal capacity in a different manner, including the submission of valid statements by minors under thirteen years of age and those who are over thirteen but have not turned eighteen yet. For the first group, legal acts made independently are invalid as a rule. For minors with limited legal capacity, the Civil Code introduces the following solutions: specifies certain types of acts which may not be validly performed by minors; establishes a special control system over certain legal acts they perform or gives minors full competence for other legal acts.

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In the article, the author analyses the problems of permission for dissemination of the image as regards two categories of minors specified above. Considerations regarding the legal nature of permission were preceded by a synthetic presentation of opinions of the doctrine and case law which define the image and discussion of principles governing the dissemination of image. In the context of minors with limited legal capacity, the author's aim is to answer the question to what extent they are allowed to decide freely about image dissemination. In the context of minors with no legal capacity, it is the author's aim to answer the question: can the granting of permission be regarded as the child's so-called significant matters which should be decided on by parents jointly? To answer the question above, the author shall perform a dogmatic and legal analysis of regulations based on the Act on Copyright and Derivative Rights, the Civil Code and the Family and Guardianship Code.

The problems of the minor's image were so far discussed in the relevant literature. Attention should be drawn to the publications concerning exceptions and the necessity to obtain permission for dissemination, i.a. *Dziecko w świetle fleszy – problematyka prawna ochrony dóbr osobistych*[1] and *Rozpowszechnianie wizerunku małoletniego na podstawie art. 81. ust. 2 ustawy o prawie autorskim i prawach pokrewnych*[2]. In the former, the author analyses the problems of the dissemination of a minor's image if he/she is a model. In the second article, she analyses the problems of image dissemination of celebrities' minor children in magazines. The problems of a child's image was also partly undertaken in the article entitled: *Udostępnianie i publikowanie wizerunku nasciturusa, noworodka i małego dziecka w świetle zasady dobra dziecka*[3], by J. Haberko and by E. Ferenc-Szydełko in the study entitled: *Wizerunek dziecka jako dobro prawnie chronione. Wybrane zagadnienia*[4]. In the cited articles, the problems of a minor's image was not thoroughly analysed, which allows the author of the present article to try to explore the subject further and to answer the previously posed questions.

There is a relatively large number of publications on the legal nature of permission. In civil law, the notion of permission is highly controversial. Some representatives of the doctrine are of the opinion that permission is a one-sided legal act with

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[1] A. Sydor, *Dziecko w świetle fleszy – problematyka prawna ochrony dóbr osobistych*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej" 2013, nr 121, pp. 85–104.

[2] A. Sydor-Zielińska, *Rozpowszechnianie wizerunku małoletniego na podstawie art. 81 ust. 2 ustawy o prawie autorskim i prawach pokrewnych*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej 2017, nr 4, pp. 79–92.

[3] J. Haberko, *Udostępnianie i publikowanie wizerunku nasciturusa, noworodka i małego dziecka w świetle zasady dobra dziecka*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2013, nr 3, pp. 59–70.

[4] E. Ferenc-Szydełko, *Wizerunek dziecka jako dobro prawnie chronione. Wybrane zagadnienia*, [in:] *Księga jubileuszowa prof. dr. hab. Tadeusza Smyczyńskiego*, red. M. Andrzejewski, Poznań–Szczecin 2008, pp. 18–26.

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an authorizing character[5], others claim that it is an act similar to a declaration of will – consent[6]. In the author's opinion, permission belongs to the former category of acts, which brings about legal consequences, as specified in the article.

In the title, the author uses the term "minor" to describe the subject of civil law – a natural person who is a human being from the moment of birth until the age of majority. The author deliberately does not use the word "child". This term is defined by the Convention on the Rights of the Child, but not very precisely[7], which is why some representatives of the doctrine take the position that it also covers the fetus[8]. Within the meaning of the Convention, a child means every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier (Article 1).

There is no doubt, however, that the Convention is a guarantee that Poland and its citizens will respect the rights granted to minors[9]. The convention guarantees the child, among others, the right to protection of private life – prohibiting unlawful or arbitrary interference in the sphere of private, family and home life, as well as correspondence, honor and reputation of the child (Article 16).

In the Polish legal order, violation of the above-mentioned rights would be subject to the provisions on the protection of personal rights under the Civil Code. A separate issue is the protection of the privacy sphere of the child in his/her relations with parents. Any possible abuses in this respect should be subject to control and assessment of the guardianship court. In extreme cases, it is also impossible to exclude the possibility of an action by the prosecutor against one or both parents in order to protect the child's personal good[10]. However, the discussion of these issues is not included in the subject matter of the article.

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[5] For example, S. Grzybowski, *Ochrona dóbr osobistych według przepisów ogólnych prawa cywilnego*, Warszawa 1957, p. 122; K. Stefaniuk, *Naruszenie prawa do wizerunku przez rozpowszechnianie podobizny*, „Państwo i Prawo" 1970, z. 1, p. 67; Z. Banaszczyk, *Zgoda poszkodowanego jako okoliczność wyłączająca bezprawność (w świetle odpowiedzialności deliktowej za czyn własny na zasadzie winy)*, Warszawa 1984, p. 83; P. Sobolewski, *Art. 24, nr 20*, [in:] *Kodeks cywilny. Komentarz*, t. 1: *Część ogólna. Przepisy wprowadzające Kodeks cywilny. Prawo o notariacie (art. 79–95 i 96–99)*, red. K. Osajda, Warszawa 2018.

[6] One of proponents of the latter view is i.a. P. Ślęzak, *Umowy w zakresie współczesnych sztuk wizualnych*, Warszawa 2015, p. 434; A. Szpunar, *Zgoda uprawnionego w zakresie ochrony dóbr osobistych*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1990, nr 1, p. 41; A. Matlak, *Cywilnoprawna ochrona wizerunku*, „Kwartalnik Prawa Prywatnego" 2004, nr 2, p. 338.

[7] Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on November 20, 1989 (Journal of Laws 2011, No. 120, item 526).

[8] T. Smyczyński, *Pojęcie i status osobowy dziecka w świetle Konwencji o prawach dziecka i prawa polskiego*, „Państwo i Prawo" 1991, z. 4, p. 48; P. Jaros, *Definicja dziecka*, [in:] *Konwencja o prawach dziecka. Wybór zagadnień (artykuły, komentarze)*, Warszawa 2015, p. 53.

[9] For example, T. Smyczyński, *op. cit.*, p. 50; P. Jaros, *op. cit.*, p. 55.

[10] T. Smyczyński, *op. cit.*, p. 55.

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NOTION OF IMAGE

The Act on Copyright and Derivative Rights does not provide a normative definition of image as it only uses the statement contained in Article 81 of the Act on Copyright and Derivative Rights: "Dissemination of an image requires the permission of a person presented in it"[11]. This fragment suggests that the notion of image should be identical with a portrait – an image, i.e. a work from the point of view of copyright in which an image of a specific person was recorded. In practice, however, not every image is contained in a work (e.g. passport photographs taken in a photo booth) and not every portrait – a work – presents an actual person.

It is commonly accepted that an image does not have to be recorded but it may have a transient form, e.g. in the form of live broadcast of a TV show, and that visual media are the exclusive means of image communication. Such an approach excludes copyright protection, the so-called written image understood as a more or less faithful description of a person presented in a literary form: the first name and surname and the so-called audio image (a person's voice). These assets can be protected, amongst other things by the construction of personal assets[12].

Pursuant to Article 81 of the ACDR, the notion of image – as an intangible asset – only pertains to a natural person. In this way, it has a more narrow meaning than in everyday language. It should be also noticed that the civil law structure of personal assets also includes the image of legal persons and/or organizational units with no legal personality, understood as reputation or a good name.

The doctrine and case law make attempts to define the notion by assigning multiple meanings to it. The common element of these definitions is, however, the statement that the image is the presentation allowing the recognition of a natural person, but a difference in views regarding the scope of recognizability can be seen. Some claim that the possibility of identification (and thus its protection pursuant Artticle 81 of the ACDR) should have a universal character[13], others – that it should be limited to a certain group[14].

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[11] Act of 4 February 1994 on Copyright and Derivative Rights (consolidated text, Journal of Laws 2018, item 1191 as amended), hereinafter referred to as ACDR.

[12] More detailed information can be found in J. Balcarczyk, *Prawo do głosu – zarys problematyki*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej" 2010, nr 2, pp. 115–126.

[13] T. Grzeszczak, *Prawo do wizerunku i prawo adresata do korespondencji*, [in:] *System Prawa Prywatnego*, t. 13: *Prawo autorskie*, red. J. Barta, Warszawa 2017, pp. 673–675; *Prawo autorskie i prawa pokrewne. Komentarz*, red. D. Flisak, Warszawa 2015, pp. 1141–1143. See also judgement of the Supreme Court of 27 February 2003, IV CKN 1819/00, „Biuletyn Izby Cywilnej Sądu Najwyższego" 2003, nr 10.

[14] P. Ślęzak, *Ustawa o prawie autorskim i prawach pokrewnych*, Warszawa 2017, p. 555; J. Sieńczyło-Chlabicz, *Przedmiot, podmiot i charakter prawa do wizerunku*, „Przegląd Ustawodawstwa

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These differences also apply to the notion of image. Some representatives of the doctrine are in favour of the broad notion which refers to the essence of personal assets from the Civil Code, which includes visual presentation or even suggesting a specific person in the form of props or associations related to a specific person. Representatives of this trend identify the notion of image with a person's appearance understood as a set of features which make up the exterior figure. Others understand as image only such likeness which would allow identification of a person's identity, i.e. essentially their image, likeness. This differentiation can be important for minors' image, which I refer to in a further part of this article.

It is not justified to quote in this study all definitions which appeared in the doctrine on the image[15]. It can be provided as an example that J. Błeszyński claims that image is "a visual presentation of a person, i.e. a set of characteristic physical features which make it possible to get a picture of their appearance"[16]. J. Balcarczyk also refers to physical features of a person, and understands the notion of image as: "facial features or characteristics of a figure or other physical features of a person or their identification, creating a sense of identity and uniqueness which define a person's personality"[17].

J. Barta and R. Markiewicz define the image as an "intangible product which presents a recognizable likeness of a person (or persons) by plastic means. An image can be recorded by a painted portrait, drawing, photograph"[18]. According to these authors, also "an artistic mask (used to present another person, an artificially create artistic image) can be regarded as an image if it allows recipients to identify this person at the same time – which is a rule"[19].

The image is defined differently by P. Ślęzak indicating that: "an image, e.g. a photograph, allows an unambiguous identification of a person, if it presents »elements of the body«, i.e. a fragment of the body, a figure shown from the back"[20]. It seems that J. Sieńczyło-Chlabicz has similar views on this matter as she claims that: "Recognizability of a person is the basis condition for granting protection in a given scope of protection as well as the basic criterion of the study – whether a breach of the image occurred. The most significant is the impression a photograph

Gospodarczego" 2003, nr 8, p. 20. See also judgement of the Court of Appeal in Warsaw of 7 July 2012, I ACa 612/12, LEX No. 1281102.

[15] It is fully provided by, among others, J. Sieńczyło-Chlabicz, J. Banasiuk, *Cywilnoprawna ochrona wizerunku osób powszechnie znanych w dobie komercjalizacji dóbr osobistych*, Warszawa 2014, pp. 75–81.

[16] J. Błeszyński, *Glosa do wyroku Sądu Najwyższego z 27 lutego 2003 roku, IVCKN 1819/00*, „Orzecznictwo Sądów Powszechnych" 2004, nr 6, poz. 75, p. 320.

[17] J. Balcarczyk, *Prawo do wizerunku i jego komercjalizacja*, Warszawa 2009, p. 86.

[18] *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, red. J. Barta, R. Markiewicz, Warszawa 2011, p. 519.

[19] *Ibidem*.

[20] P. Ślęzak, *Ustawa o prawie autorskim…*, p. 555.

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makes on the recipient, namely an indication that the recipient sees an image of a specific person"[21].

The Supreme Court made a similar statement in its judgement of 25 May 2004: "The image, apart from physical features that are perceivable for others which make up the appearance of a given person and allow – as specified – their identification by people, can include other recorded elements related to their occupation, such as make-up, clothing, way of moving and contacting the surrounding world"[22].

In the context of minors' image, including in particular ones which do not have limited legal capacity yet, it is difficult to talk about the possibility of using the evaluation criteria of recognizability in a way that is analogous to adults. We will usually establish the identity of minors, who do not have limited legal capacity, by means of individual facial features (and even features which are not related to image such as finger prints), more rarely on the basis of other data, the so-called acquired (developed) data, e.g. the dressing style, make-up, etc. Thus, the image to which the entitled person (a small child) has a defined individual right should be associated as their image/likeness which allows the child's identification as regards their identity even in a specific narrow environment. On the other hand, as regards minors with limited legal capacity, the way of defining the image can be similar to that of adults and include also additional elements such as their clothing or hairdo style.

PRINCIPLES CONCERNING DISSEMINATION OF AN IMAGE

Permission is the condition for legal dissemination of an image. This is determined by Article 81 (1) sentence 1 of the ACDR. The Court of Appeal in Kraków, in its judgement of 20 July 2004, indicates: "Dissemination of an image requires the permission of a person presented in it". In practice, this means that it is necessary to obtain permission (consent) from a person whose image is to be disseminated to make it available to the public (see Article 6 (1) (3) of the ACDR), e.g. in an online advertisement, in a YouTube video. Public sharing also includes publication of the so-called deep link on a website which allows the opening of the website where images of persons can be found[23].

The doctrine and case law also emphasize the fact that the consent to image dissemination may not raise any doubts, i.e. the consent to image dissemination

[21] J. Sieńczyło-Chlabicz, *Rozpowszechnianie wizerunku osób powszechnie znanych*, „Przegląd Prawa Handlowego" 2003, nr 9, p. 34.

[22] II CK 330/03, „Biuletyn Sądu Najwyższego" 2004, nr 11, p. 10.

[23] I ACa 564/04, LEX No. 142138.

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must be clear[24], in particular if an image is used in advertising[25]. However, it is acceptable to reconstruct the party's will on the basis of circumstances accompanying the presumed permission or analysis of individual elements of the factual state[26]. The approach presented in case law is consistent with the definition of declarations of will contained in Article 60 of the Civil Code, which reads as follows: "Subject to exceptions provided for in the act, the will of a person performing a legal act may be expressed by each behaviour of this person which reveals their will in a sufficient manner, also by revelation of this will in electronic form (declaration of will)"[27]. Thus, each perceivable system of things or a phenomenon created by a person, if it manifests a decision to induce specific consequences in the light of adopted rules, may be regarded as the granting of a consent. Therefore, significant elements of permission: actual intention of inducing legal consequences on the part of the consenting party, the possibility of establishing the sense of the submitted declaration by the recipient, as well as freedom at the moment it is submitted[28].

In the practice of professional image trading, it is postulated that, due to the evidence value, written consent to image dissemination should be obtained with the specification of its scope.

It is indicated in the literature that the decision on image dissemination should be related with full awareness of the portrayed person as for the future form of the presentation of its image, publication place and date, juxtaposition with other images, accompanying comments or the use of image in advertising[29]. In the latter situation, permission to image dissemination is granted, as a rule, to a specific entity and the subsequent use by another entity requires further permission[30]. We need to share the view of P. Ślęzak on: "contractual clauses in which a model agrees to the creation and dissemination of the image »in general« must be regarded as against the act, and, as a consequence are subject to the invalidity sanction" (Article 58 of the CC)[31].

Permission for dissemination should be granted before dissemination starts. It can be withdrawn, however, usually only before the image is made public. In special

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[24] See judgement of the Court of Appeal in Warsaw of 12 February 1998, I ACa 1044/97, LEX No. 81433.

[25] See also judgement of the Court of Appeal in Gdańsk of 25 October 2012, I ACa 814/12, LEX No. 1305947.

[26] See in particular: judgement of the Court of Appeal in Warsaw of 3 September 1997, I ACa 148/97, LEX No. 32440; judgement of the Court of Appeal in Warsaw of 17 July 2009, VI ACa 5/09, „Monitor Prawniczy" 2011, nr 5, p. 278.

[27] Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2018, item 1025 as amended), hereinafter referred to as CC.

[28] More broadly, Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 1994, pp. 192–193.

[29] J. Barta, R. Markiewicz, [in:] *Media a dobra osobiste*, red. J. Barta, R. Markiewicz, Warszawa 2009, p. 108.

[30] See decision of the Supreme Court of 27 September 2013, ICSK 739/12, LEX No. 1415494.

[31] P. Ślęzak, *Prawo autorskie. Wzory umów z komentarzem*, Warszawa 2015, p. 556.

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cases of image dissemination, e.g. in audiovisual works, the consent withdrawal must, however, include precise specification of the reason, e.g. infringement of personal rights in the form of good name.

Dissemination of the minor's image, which is related to the declaration of will on this matter, will be subject only to the Civil Code and the Family and Guardianship Code as minors are in parental custody until they turn eighteen. These problems are discussed in the next point of the article.

There are three exceptions to the rule concerning the necessity to obtain permission for legal image dissemination. Their full discussion is beyond the scope of this study, therefore, I will only briefly present these problems without analysing complexities related to minors.

The first of the exceptions concerns the payment of remuneration for posing with no opposition to dissemination (see Article 81 (1) sentence 2 of the ACDR). The term "posing" used in the article indicates that the regulation refers to professional image recording. This means that if a model receives full remuneration for their image recording, it is presumed that the consent to its use (dissemination) has been granted. The opposition in the situation of accepting the remuneration should be expressed clearly without raising any doubts, no later than at the time when the remuneration is accepted. Attention should be paid to the fact that, in the case of discussion, this provision transfers the weight of proving that no consent to image dissemination was granted, despite the reception of payment.

Another exception to the principle of necessity to obtain consent to dissemination concerns the recording of images of commonly known persons in connection with their public function, in particular political, social and professional ones (see Article 81 (2) (1)). *Ratio legis* of this regulation is about allowing, in particular the press, to disseminate information about political, economic, cultural, sports events, which in practice excludes the possibility of using the image of such a person without their consent, e.g. in postcards, in calendars or in advertising[32].

The most controversial in the interpretation of this exception is the term "well-known person". The case law and the copyright doctrine have established certain rules in this area. Being "commonly" known means a situation when the knowledge of the existence of a given person objectively exists in public space. This situation mostly applies to actors, singers, politicians, persons conducting business or social activity[33]. The Court of Appeal in Poznań in the judgement of 2 September 2010 decided that under certain circumstances, also an ordinary person, if they are the

[32] See M. Łoszewska-Orłowska, *Zakaz publikacji w prasie danych osobowych i wizerunków osób publicznych podejrzewanych lub oskarżonych o przestępstwo*, Warszawa 2018, p. 38.

[33] *Prawo autorskie…*, art. 81, nr 12. In the context of minors as a commonly known person, see A. Sydor, *op. cit.*; A. Sydor-Zielińska, *op. cit*.

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persons responsible for a given event, and their actions are appropriately promoted, may be regarded as a commonly known person[34].

The case law also indicates that the premises of "commonness" should refer to the circle of recipients whom the disseminated image is "addressed" to. Thus, we can distinguish persons relatively well-known (in the specific area for a specific group of people, e.g. mayor of Pobiedziska, a well-known sports activist) and absolutely commonly known persons (President of the Republic of Poland)[35].

Dissemination of images of the aforementioned persons must be related to the function fulfilled by a given person, which eliminates image recording in private situations (e.g. on holiday, during a stay at the hospital, having fun at a private party).

The third exception to the rule concerning the necessity of obtaining consent to disseminate refers to the recording of image of a person which is only a fragment, a detail of a whole, i.e. a congregation, landscape, a public event. *Ratio legis* of this regulation lies in making it possible (mostly to the press) to perform the reporting, informative and documenting function.

To establish, whether an image is only a fragment of a greater whole, the elimination test developed by the German doctrine can be used. According to this test, the image plays a minor role if its elimination or replacement does not influence the value of the presentation of a whole[36].

For example, the legislator shows the circumstances of image recording, i.e. landscape, congregation, public event, which does not exclude the use of the regulation also for other places, circumstances related with a person's functioning in society, as long as they are public, understood as available for the general public. The classification should, however, include the establishment of the role that the image plays in the recorded situation, e.g. in a photograph.

Outside the scope of exception is dissemination of cropped images and images composed into a greater whole but created under conditions of infringing the person's right to privacy, e.g. at a closed event.

LEGAL NATURE OF PERMISSION TO DISSEMINATE AN IMAGE

In civil law, the notion of permission is highly controversial. Some representatives of the doctrine are of the opinion that permission is a one-sided legal act with an authorizing character, others claim that it is an act similar to a declaration of will – consent[37].

[34] I ACa 620/10, LEX No. 756690.

[35] See *Prawo autorskie*..., art. 81, nr 12; judgement of the Court of Appeal in Katowice of 6 September 2013, I ACa 519/13, LEX No. 1381379.

[36] *Prawo autorskie*..., art. 1, nr 12.

[37] See footnotes 5 and 6.

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This differentiation in the case in question seems not to be very important due to the provision of Article 65[1] of the CC, which states that: "Regulations on declarations of will shall apply to other declarations". It results from this regulation that there exists a group of declarations submitted on the basis of private law "which are not legal acts and which have the nature of actions and tasks which, under specific circumstances, are acts which are connected with specific legal consequences by the legislator"[38]. At the same time, it is emphasized in the doctrine that:

> Appropriate use of regulations on declarations of will is possible when regulations referring to individual declarations do not regulate a specific issue independently and only in a scope which is allowed by similarities occurring between such declarations and declarations of will. […] Each instance requires an individual analysis both of the declaration itself and the regulation which is to be applied, and due to the diversity of this category, no general conclusions referring to all declarations may not be formulated[39].

The adoption of the assumption that permission to image dissemination belongs to the category of "other declarations" would mean the necessity to analyse the possibility of "appropriate" application of a relevant regulation of the Civil Code each time a dispute arises. Such a situation does not promote security or confidence of civil law entities, which should be regarded as a major drawback of the presented position.

According to the author, consent to image dissemination should be regarded as a one-sided legal act which becomes effective by submission of a declaration of will by one party, which creates a legal relationship at the same time. A legal act is commonly defined as a factual state consisting of at least one declaration of will which is externalized by a decision of a civil law entity and aimed at causing specific legal consequences. From the point of view of rules regarding the communication of one-sided declarations of will, the permission requires communicating it to the other party. It causes legal consequences related to it and also ones resulting from the act and the principles of social co-existence and established customs (see Article 56 and subsequent of the CC). It should be also established that permission as a legal act is aimed at a creation, change or expiration of a legal relationship. From the point of view of Article 81 of the ACDR, the permission granted (in a specific form or contents) is tantamount to concluding that no personal assets of the portrayed person were infringed. The classification of permission in the category of legal acts is also significant from the practical point of view. It allows the application of the Civil Code regulations concerning declarations of will (Articles 60–61), defects

[38] A. Janas, *Art. 65[1], nr 4*, [in:] *Kodeks cywilny. Komentarz*, t. 1: *Część ogólna*, red. M. Fras, M. Habdas, Warszawa 2018.

[39] *Eadem*, *Art. 65[1], nr 3*, [in:] *Kodeks cywilny. Komentarz*, t. 1: *Część ogólna*, red. M. Fras, M. Habdas, Warszawa 2018.

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of declarations of will (Articles 82–88), forms of legal acts (Articles 73–81), legal invalidity (Article 58). The adoption of this position also involves the necessity of establishing the scope of legal capacity.

The image as a personal asset is a non-transferable right, which results from the non-material nature of personal assets. Article 57 of the CC states directly that only a right that is transferable according to the act can be disposed of. Thus, permission to image dissemination may not be considered in categories of an obligating or disposing act, and can be regarded only as an authorizing act. The authorizing nature of permission consists in assigning a competence to perform some conventional act to another entity with consequences for the assigning party. The essence of assigning acts is also the fact that "they do not by themselves execute an advantageous change in the authorized party's property"[40].

The aforementioned findings are of significant importance for persons with limited legal capacity. Pursuant to Article 17 of the CC, "Subject to exceptions that are provided for in the act, the validity of a legal act performed by a person with limited legal capacity through which such a person incurs an obligation or disposes of their right requires a legal representative". Thus, an entity with limited legal capacity may perform authorizing legal acts independently as the consent is required (an *a contrario* argument to this regulation) only as regards disposing and obligating acts. Thus, the commented regulation applies to minors who are over 13 and partially incapacitated persons.

Therefore, from the point of view of the Civil Code, persons over 13 years of age may independently decide on the dissemination of their image, also in social media. Similarly, they can, without the consent of the statutory representative, conclude agreements belonging to commonly conclude agreements in ongoing minor everyday life matters (Article 20 of the CC), dispose of their earnings on their own (Article 21 of the CC) and of objects handed over for free use (Article 22 of the CC).

A certain limitation to the full competence to perform authorizing acts by a minor under 13 can be the regulation of Article 95 § 2 of the Family and Guardianship Code[41] which refers to the scope of parental custody. Custody which parents have over children until they reach the age of majority pursuant to Article 92 of this Act. Article 95 § 2 of the FGC states that: "A child that remains in their parents' custody should obey their parents and in matters in which the child can make independent decisions and make declarations of will, should listen to the parents' opinions which are formulated for the child's sake". It results from the previous statement that the

[40] Z. Radwański, [in:] *System Prawa Cywilnego*, t. 2: *Prawo cywilne. Część ogólna*, red. Z. Radwański, Warszawa 2008, p. 209.

[41] Act of 25 February 1964 – Family and Guardianship Code (consolidated text, Journal of Laws 2017, item 682 as amended), hereinafter referred to as the FGC.

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fact of granting consent to image dissemination by a minor should be preceded by listening to the parents' opinions which are formulated for the child's sake. However, the legislator did not introduce the obligation to inform parents about actions planned by the child. The parents are not entitled to oppose to such actions, either. Thus, we need to share the view expressed in the doctrine that the infringement of the obligation to take the parents' decision into account does not influence the validity of a legal act which the child can perform independently, it can, however, be considered by the guardianship court in decisions concerning the child[42].

PERMISSION FOR DISSEMINATION OF IMAGES OF MINORS UNDER 13

Minors under 13 years of age do not have legal capacity so they may not submit valid declarations of will. Thus, a legal act made by a child is invalid (see Article 14 § 1 of the CC). All legal acts performed by this person apart from exceptions which are referred to in Article 14 § 2 of the CC, i.e. agreements which belong to commonly concluded agreements on ongoing minor everyday matters. Such agreements become effective the moment they are concluded, unless this involves blatant harm to a person without legal capacity. In the remaining cases, legal acts are performed by statutory representatives of a minor, i.e. the child's parents or legal guardians.

Thus, the consent to the image dissemination for a minor under 13 is expressed by the child's parents or legal guardians. This rule is largely formulated in Article 98 § 1 sentence 2 of the FGC which states that: "If a child is in both parents' custody, each of them may act independently as the child's legal guardian". In the context of the dissemination of a minor's image, this regulation must be, however, interpreted in connection with Article 97 § 1 of the FGC which states that "significant matters for a child are resolved by the parents jointly, if they do not reach an agreement, such matters shall be resolved by a guardianship court".

Joint representation by both parents is the resultant of the existence of the so-called significant matters for the child. The doctrine includes in this category legal and factual acts related to, amongst other things, a change of the child's first name, surname, place of stay, selection of preschool, school, treatment method, change of citizenship, going abroad, having a passport, an identity card[43]. In the category of "significant matters", the following distinction was also introduced: "matters that are always significant for a child" and "other significant matters".

[42] G. Jędrejek, *Art. 95, nr 10*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, red. G. Jędrejek, Warszawa 2014.

[43] E. Trybulska-Skoczelas, *Art. 97, nr 2*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, red. J. Wierciński, Warszawa 2014.

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The first category includes matters which will always have a significant character in connection with the child. A catalogue of these matters corresponds to the ones listed above. "Other significant matters", on the other hand, include "incidentally significant" connected with the manner which will be important only accidentally. They pertain, amongst other things, with ensuring holidays to the child, regulation of his/her lifestyle and also methods of supervising the child[44].

The qualification of image dissemination to the so-called incidentally important matters implies that there exist situations of the child's image dissemination which are deprived of special importance to which both parents' consent would not be required. This view must be rejected, however, due to the fact that in practice it is difficult to show the line separating the specified categories of dissemination. In the author's opinion, permission for dissemination of a small child's image, must be regarded as belonging, somewhat by nature, to the category of "the child's significant matters" which should be decided on by both parents. This is supported by arguments resulting from the nature of the image which is a legally-protected personal asset. Moreover, the significant permanent importance results from the present possibilities and the nature of means used for image dissemination (Internet). Thus, the child's common recognizability, e.g. in the social media, should be reflected on and a decision should be made by both parents.

As a result of the analysis, it should be concluded that minors with limited legal capacity can freely decide about the dissemination of their image. They have the competence to undertake one-sided authorizing acts. This rule is subject to limitations as minors are under their parents' custody in accordance with the FGC. Granting consent to image dissemination by a minor should be preceded by listening to the parents' opinions which are formulated for the child's sake. However, the parents' opinion is not binding for the child and if a dispute arises, it may be the family court's task to decide what can be considered good for the child. In the context of minors with no legal capacity, granting of permission can be regarded as the child's so-called significant matters which should be decided on by parents jointly[45].

Incidentally, it should be noted that the solution adopted in Polish law consisting in expanding the child's personal autonomy as he/she matures, and thus the modification of parental authority and the need to take into account these circumstances by state authorities, is consistent with interpretative directives of the principle of child autonomy, mentioned by the Convention on the Rights of the Child[46]. In ac-

[44] T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, red. H. Dolecki, T. Sokołowski, Warszawa 2013, No. 7.

[45] This is consistent with the ruling of the judgement of the Court of Appeal in Warsaw of 4 July 2018, V ACa 484/17.

[46] T. Smyczyński, *op. cit.*, p. 52, 54.

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cordance with the provisions of the Convention on the Rights of the Child, there are also provisions of the Family and Guardianship Code, which refer to the important role of both parents, equally normalizing the rights and obligations of the child, burdening them with equal responsibility for his or her fate[47].

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[47] *Ibidem*, p. 54.

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STRESZCZENIE

W artykule autorka analizuje charakter prawny zezwolenia na rozpowszechnianie wizerunku małoletnich o ograniczonej zdolności do czynności prawnych i tych, których cechuje całkowity brak zdolności do czynności prawnych, w oparciu o uregulowania: ustawy o prawie autorskim i prawach pokrewnych, Kodeksu cywilnego oraz Kodeksu rodzinnego i opiekuńczego. W oparciu o przepisy Kodeksu cywilnego autorka kwalifikuje zezwolenie do czynności prawnych jednostronnych i upoważniających oraz wskazuje na odrębności odnoszące się do zezwolenia na rozpowszechnianie wizerunku wynikające z różnego wieku małoletnich. Małoletni, którzy nie ukończyli 13. roku życia, nie mogą samodzielnie udzielać zezwolenia na rozpowszechnianie wizerunku, a udzielenie zezwolenia powinno być kwalifikowane do tzw. istotnych spraw dziecka, o których powinni decydować rodzice. Małoletni o ograniczonej zdolności do czynności prawnych mogą samodzielnie zezwalać na rozpowszechnianie wizerunku, lecz powinni w tej mierze zasięgnąć niewiążącej opinii rodziców.

Słowa kluczowe: wizerunek; zezwolenie na rozpowszechnianie wizerunku; małoletni; ograniczona zdolność do czynności prawnych; brak zdolności do czynności prawnych