

## Legal Aspects of Legitimate Use of Images of a Person

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### INTRODUCTION

The right to one's own image in the Republic of Kazakhstan has appeared in the Civil Code after independence, which was preceded by a long and systematic process [1]. Since independence there is a reevaluation of outdated social values, a person performs as a separate, independent person possessing distinct, individual rights, featuring all the effective ways and means to protect them. Russian scholars jurist just felt the new requirements of the times and started the development of the Civil Code of the newly independent state, including in its design number of provisions, which are still not in the GC of the Kazakh SSR. These provisions include paragraph 3 of Chapter 3, "Moral Rights" and it includes a number of non-property rights, which have been allocated to individual articles, including the right to one's own image.

In the civil legislation of the Republic of Kazakhstan the right to one's own image is seen as a moral right, along with honor, dignity and business reputation, the right to privacy, the right to inviolability of the dwelling. The human right to one's own image is enshrined in Article 145 of the Civil Code of the Republic of Kazakhstan: "Article 145. The right to one's own image

- No one has the right to use the image of any person without his consent and in the event of his death - without the consent of the heirs.
- The publication, reproduction and distribution of fine work (painting, photography, film, etc.), which depicts another person is permitted only with the consent of the image and after his death, with the consent of his children and the surviving spouse. Such consent is not required if it is established by legislative acts, or person represented posed for a fee."

Currently, there is a need to improve certain provisions relating to the right on their own image. Let's analyze some aspects of the legal regulation of the consent to the use of images that seem to be most interesting from the point of view of law enforcement.

**The Form of the Consent to Use of the Image:** It was mentioned above that for the legitimate use of images of the person legislator has provided only by his consent (paragraph 1 of Article 145 of the Civil Code of RK) and for legitimate image of the person in the visual works - said that there is no need for consent, if it is established by legislative acts or the person posed picture for a fee (paragraph 2 of Article 145 of the Civil Code of RK).

However, the Civil Code does not specify the form in which it is necessary to obtain consent for the use of the image. The absence of reference to the consent form shown in practice can lead to difficulties in enforcement. So, if there is no specific statutory consent form shown, then for the individuals using his image, there is no assurance that their rights and interests are protected in the event that such a trial. Since there is no precise and exact position of the form in which the agreement of a person shown should be obtained there are different court practice to occur. Abandoned gaps in the law could serve as a so-called "double-edged sword." So, on the one hand, the lack of clear regulation of an issue in the legislation allows a broad interpretation of legal rules in their favor, without limitations on the rights and legal interests of citizens. On the other hand, the preference to a particular interpretation of the law can lead to "preponderance" in favor of one of the disputing parties. Let us consider what general consent forms on the uses images may be obtained?

- *The consent of a person by default.* Such situations are typical, for example in cases where a person, being in its natural state, being fully aware that he is an object of the image, does not prevent this action does not express a clear protest against the actions of its image, no outward anger over the ongoing process of the image. In this case, under the natural state of the usual means normal behavior and the human condition, not under the influence of alcohol or drugs, psychological problems, violence, etc. Such cases include, for example, friends or family photo shoot, shooting in public places during official or business events, posing for the artist, sculptor (without fee), sketches. For these case is characteristic of main shortcoming: in spite of the fact that the circumstances in which depicted a man possessed and to the absence of objections on his part, but not in his power remains the question of how the resulting images will be used later. Accordingly, if such a consent form will be enshrined in law, it can become a kind of "trump card" in the hands of criminals who will appeal specifically to the fact that the consent was obtained by default and the behavior of a depicted, it was clear that he was not against further use images. In this case, he is depicted naked, as if his hand is not strong evidence, the right to own image behind him is not recognized.
- *An oral agreement.* This consent form is expressed is that depicted man verbally agrees to the use of his image, thus making it so that it can be clearly concluded his full consent. The advantage of this form of agreement is in the speed of its production and there are no additional costs. In this case significant "advantage" in the interests of the parties is not present, however, comes into force struggle of evidence, that there is a significant importance circumstance, whether party to prove that a verbal agreement has been received (or not received). It seems that here in assistance can be brought as evidence and technical recording devices (audio, video).
- *The written consent.* In this case we obtain the consent of the person in writing. Such consent may be made from a template, or in any form. In the absence of a template to facilitate the subsequent enforcement in agreement should clearly prescribe the conditions of use of the image, the person (natural or legal) that is allowed to use the image, the term of image usage. Depending on the will of the parties, you can specify on what basis (no charge or fee) and allow the use of the image. This form of the consent virtually eliminates the possibility of illegal use of images, but even here there is a caveat. To ensure the necessary level of protection of their interests, the agreement is necessary to make two copies of each of the parties to set out clear, for which cases, objectives, an image is used, a clear set of images allowed to be used, both copies must be signed by both parties. It is also necessary that consent be written, by illustrated person personally, in order to facilitate his proof that the handwriting of a depicted. The same conditions of written permission apply with the death of a depicted in the case for requesting the consent of his heirs. Along with the written consent of the indisputable advantages, its main drawback is the lack of specific conditions for use of a described image. So if the agreement is made in a rather general way, there is no guarantee that they will not use to justify the use of other, non-implied consent, facial images, or a third party (in the case if, for example, did not indicate a person is allowed to use images). That is why, in our opinion, it is necessary to develop and legislate typical consent to use of the image, which will provide the most significant terms of its provision.
- *A written notarized consent.* This consent form envisages need for notarized consent. Certification of agreement as such is not included in the list of notarial acts specified in Article 34 of the Law of the Republic of Kazakhstan dated 14 July 1997 "On Notary", although it can be expressed by a statement of individuals to other individuals and legal entities (paragraph 13) of Article 34 of the Law). The current legislation on notaries permits and other notarial acts, when they are provided by laws. This consent form provides the greatest degree of protection of the right on their own image, as well as the rights of a person who has been given permission to use the image. In addition, we believe that this consent form is most appropriate for cases of consent heirs after death of a depicted. Despite the apparent lack of the consent form, expressed the need for additional cost of paying notarial acts, notary consent form is completely worth the cost in the event of litigation. Here, except for the form notarized consent as evidence at the meeting may be further invited the notary who signed the agreement.

Thus, as the consent form, in our opinion, the most fully ensure the interest of the parties regarding the use of the image is a written consent form. In this case, it would be useful to develop a standard form of the agreement, which in turn, allows the existing legislation to legalize this form.

**No Need for Consent:** As noted above, paragraph 2 of Article 145 of the Civil Code stipulated occasions when use of the image does not require the consent of the image and such cases are provided only for the image in the visual works. Thus, the law specified that there is no need to obtain consent, if it is established by legislative acts, or person represented posed for a fee.

In our view it is reasonable to supplement and specify that provision of the Civil Code. There is always a fee to pose an expression of consent to use of the image or not. Since the Code does not specify who should make payment, then we can assume that the charge carries as depicted and depicting, as well as third party.

For example, payments made by the customer, for instance, the photographer for taking photographs at a wedding or anniversary event within the meaning of legal norms will constitute your agreement for continued use of the photographs. But if a person is invited to the ceremony and poses (assuming poses for a payment, the customer has paid for the services of the photographer photographing all invited), then he gives thereby consent to the continued use of the images obtained for purposes unknown to him? It appears not. In addition, this position will provide the priority code of copyright for works produced over the right visual image, but this is subject to a more detailed study.

One would think that more logical is to assume that the image has consented to the use visual work, unless he received payment. However, in this case, in our view, with the image to be agreed upon the question, which pictures, photos, videos with his image can be used. In the case depicted agree on the use of the resulting image, it must also be specified. With regard to the provisions of the cases stipulated by legislative acts, the provision of the Civil Code does not require any further explanation and quite rightly included in the Code. For example, the draft Law of the Republic of Kazakhstan "On Personal Data" image of a person can be logically included in the term "biometrics", which in turn is included in the draft law the concept of "personal data". The draft law provides for the regulation of the processing of personal data, which means the individual or set of actions for the

implementation of access, collection, collation, storage, storing, updating, modification, use, distribution, depersonalization, blocking and destruction of personal data. The processing of personal data is carried out by personal data holders - government bodies, legal entities or individuals. In the case of adoption of the draft law goes into effect may come special provisions to the processing of personal data (including the use of the image of a citizen) without the consent of the subject. This provision is in our opinion quite justified, since the list of cases referred to in the draft law, with the principles of the public interest. However, it would be desirable to clarify the requirements of the draft law to the image of the man as a biometric, thus marginalize the concrete image of the person as biometric data from other images of the person. It will thus be a balance of public interest and personal rights of the citizen. In other words, should be legally delineating clear boundaries of the right to his own image and the right to use images as personal data.

In the Russian Federation are two grounds on which a person is allowed to use the image without his consent:

if its use is carried out in the state, public or other public interests;

if the image is obtained by a citizen survey, which is conducted in a place open to public access, or at public events (meetings, congresses, conferences, concerts, performances, sporting events and similar events), except when such image is the main object of use [2].

In the scientific literature often expresses the view that the right is rather difficult to determine which cases should be accepted by the state, public or otherwise in the public interest [3]. With these arguments, of course, could not agree more, but even the existence of such a general formulation of the Civil Code as appropriate. Thus, the reservation of the state, the public and the public interest, although it did not specify, but in general, to protect the rights of persons who distribute or otherwise use images of persons which are of particular interest to the public, of course, is really appropriate. For example, in the United States and European countries there are concepts of «right of publicity» and «right of privacy», which do not have an exact translation into Russian or Kazakh language, but it is based on the principles of compliance with public, government or other public interests of the entire society. If we talk about the «right of privacy», it includes a very impressive and often not clearly indicated the amount of intangible goods protected by case law. According to the Webster English Dictionary, «privacy» denotes a certain quality of life,

defined by the real possibility of a person to exercise autonomy and freedom in one area of life that can be described as "private." [4]. The Supreme Court of Canada has defined it (right to privacy) as "narrow scope of personal autonomy, which is a free choice." [5]. Literally «privacy» means seclusion, privacy, secrecy. This word is a term used for the expression of the human right to autonomy and freedom in private life, the right to protection from intrusion into it of other people, authorities or any non-governmental organizations and public institutions. So that in the U.S., as well as European countries «right of privacy» may be limited precisely for those persons who are of special interest to the public (such as public figures, stars and other famous people, so-called «celebrities»). In its turn «right of publicity» in European countries is the right of a person for publicity, some measure of publicity, which defines the personality itself. In the above-mentioned countries there is a great practice and theoretically developed arguments that would more clearly delineate the boundaries of the possible violation [6]. An interesting rich practice is present in the European Court of Human Rights [7].

Thus, the addition of cases in which there is no need to obtain the consent of the image, by including them into the Civil Code of the Republic of Kazakhstan reservations about the public or the public interest, would be justified in terms of the existing international experience. A separate issue is the same in what form should include this provision in the Code to take into account the long-term practice of this principle, as well as eliminate the possibility of overly broad interpretation of the provision.

Regarding the second base as defined in the Civil Code of the Russian Federation, which permits the use of a facial image without his consent, in the author's opinion is also appropriate. I think that it is included in the code on the grounds that it would be difficult and inappropriate to seek the consent of each individual citizen when his image was obtained when shooting, which is held in places that are open to public access, or at public events (meetings, congresses, conferences, concerts, performances, sporting events and similar events (except for cases when such image is the main object of use).

Thus, the use of the base of the face image in the laws of other countries, it is appropriate to include in the article 145 of the Civil Code of the Republic of Kazakhstan. It is possible that these provisions may be subject to some revision and refinements, taking into account the suggestions and recommendations of the domestic and foreign scholars and practitioners, as well as international experience.

## REFERENCES

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