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The right of publicity in the USA, the EU, and Ukraine

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ABSTRACT

The purpose of the research is to compare the regulation of the right of publicity in the USA, the EU and Ukraine and to analyze its legal nature.

Conducted examination allowed to conclude on the following. The right of publicity is one of the emerging rights belonging to celebrities who have gained publicity in certain spheres of show business (singers, actors, artists, writers, etc.), the sports industry, or politics; individuals who have become the victims of crime; and others. American legal doctrine has already developed case law and a legal framework allowing famous persons to freely license and transfer their right of publicity. The countries of the EU have not developed a unique approach regarding the right of publicity, while the Bailiwick of Guernsey has introduced a unique system of protection of the so-called image rights, creating a special register of such rights and allowing protection of moral and patrimonial rights to one's image, which is broadly defined.

The right of publicity is distinguished from trademarks and copyright; an analysis of their legal nature shows that these objects are not identical.

Current Ukrainian legislation provides for protection of one`s name and image, however the emerging market of show business in Ukraine makes it obvious that the right of publicity shall be introduced into Ukrainian Civil Code. A new right in Ukraine can be based on the example of the American model (i.e. on relevant provisions of the California Civil Code).

1. Introduction

The right of publicity is one of the emerging rights belonging to celebrities who have gained publicity in certain spheres of show business (singers, actors, artists, writers etc.), the sports industry, or politics; individuals who have become the victims of crime; and others. It is natural that the identity of such people is widely used to attract the attention of customers to goods or services, for example in advertisement campaigns. Participation in such campaigns sometimes creates a bigger income opportunity for the celebrity than from his/her main activity. Moreover, recent studies show that celebrity-based campaigns can be very effective. Of course, advertisers and the stars themselves are interested in the creation of a legal tool capable of protecting the interests of both sides and preventing unfair usage of a celebrity`s persona.

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American legal doctrine has already responded to such need, having developed case law and a legal framework allowing famous persons to freely license and transfer their right of publicity. Moreover, some jurisdictions in the USA allow the descendibility of such right. However, there is no unanimous approach in the USA regarding its nature and the scope of protection. In the national legislative framework of European countries the situation regarding protection of the right of publicity is even more vague because this legal institute is only at the beginning stage of its development. The right of publicity is not directly mentioned in Ukrainian legislation, notwithstanding the fact that Ukrainian show business is developing very fast. Therefore, an analysis of the right of publicity in various jurisdictions, outlining the possibility of its introduction into Ukrainian legal doctrine, is very timely.

2. The origin of the right of publicity in the USA

The right of publicity originally developed from the right to privacy. The privacy right doctrine in the USA is traditionally connected with the names of Samuel Warren and Louis Brandeis, who published the article titled 'The Right to Privacy' in *Harvard Law Review* in 1890 (Krasilovsky, et al., 2007, p. 306). Since then the right to privacy has transformed into the right to be left alone. A famous American scientist, William Prosser, further enunciated the following categories, included within the personal right to privacy: protection against intrusion into one's private affairs; avoidance of disclosure of one`s embarrassing private facts; protection against publicity placing one in a false light in the public eye; and remedies for appropriation, usually for commercial advantage, of one`s name and likeness (Biederman, et al., 2011, p. 186). It is the appropriation of one's name and likeness that has given rise to the development of the right of publicity. Today the right of publicity is understood as the right of a celebrity to use, control and forbid the illegal usage of their identity, including the celebrity`s name, likeness, and voice, as well as other aspects of their personality. Normally, the right of publicity is owned by famous athletes, singers, actors, politicians, and other famous persons who are followed and admired by the public.

The first state to recognize the protection of one's name and likeness was New York, in 1903 enacting what are now Sections 50 and 51 of the New York Civil Rights Act (Weiler & Myers, 2011, p. 220). The term 'right of publicity' was first introduced in the famous *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* case in 1953. The court explained that the right of publicity was independent from the right to privacy. The court noted that 'this right might be called a "right of publicity". For it is common knowledge that many prominent persons… far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures' (Simensky, et al., 2011, p. 443).

Some American states have already developed the legal framework regulating the right of publicity, while in some states it is still protected as a common right. Currently, at least 18 states have enacted statutes, protecting the right of publicity, including California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin (Biederman, et al., 2011, p. 231). A profound analysis shows that there is no uniform approach between the states regarding the understanding of the right of publicity, its post-mortem availability, and transferability.

The scope of protection under the right of publicity may vary from state to state. As section 391.170 of the Kentucky Revised Statutes (1999) lays down, the general assembly recognizes that a person has property rights in his/her *name and likeness* which are entitled to protection from commercial exploitation. Due to § 47-25-1103 of Tennessee Code (2010), every individual has a property right in the use of that *person's name, photograph, or likeness in any medium in any manner*. In accordance with the section 3344 of the California Civil Code (1951), it is the *name, voice, signature, photograph, or likeness, in any manner,* that is protected under the right of publicity. The common law of different states of America provides even greater protection to the right of publicity.

In the case Motschenbacher v. R.J. Reynolds Tobacco Company (1974) the court ruled that the usage of the identifiable race car of a well-known race-car driver in a television commercial violates the right of publicity of this driver. In another case, Hirsch v. S.C. Johnson & Son, Inc. (1979) the court recognized that the usage of the nickname of a famous football player ('Crazy Legs') on the packaging of a shaving gel for women violated his right of publicity. In Johny Carson v. Here`s Johnny Portable Toilets, Inc. (1983) the court ruled that the usage of the phrase 'Here`s Johny', by which the actor was introduced for NBC`s long-running *The Tonight Show*, violated the right of publicity. However, the scope of what is protected under the right of publicity is also limited. In the landmark case Vanna White v. Samsung Electronics America, Inc. (1992), the court ruled that usage of a robot dressed like the hostess of the famous show *Wheel of Fortune*, is not a violation of her right of publicity, because the plaintiff in the case did not show proof that consumers confused the robot with her identity, hence the robot was not a likeness of Vanna White.

Sometimes, celebrities earn more after their death than during their life. The Forbes study shows that the estates of Michael Jackson, John Lennon, and Bob Marley still generate millions of dollars of income (Michael Jackson tops Forbes list of highest-earning dead celebrities, 2014). This raises additional questions – are the rights of publicity descendible and if yes, who shall exercise this right and for how long? The post-mortem availability of the right is not uniquely recognized in all the jurisdictions.

Post-mortem availability for the right of publicity is raised in *Shaw Family Archives Ltd. v. CMG Worldwide, Inc*. The Shaw Family Archives were selling T-shirts with the image of Marilyn Monroe and were running a web-site allowing the customers to purchase licenses for the use of Monroe`s picture, image, and likeness on commercial products. Marilyn Monroe, LLC and CMG Worldwide, Inc. alleged that these actions had violated the right of publicity for Monroe under the Indiana Statute. The parties raised the question that the statute of the state, where Monroe was domiciled at the time of her death, should be applied. The parties discussed whether Monroe was a New Yorker or California domiciliary at the time of her death. At the time of the case`s consideration, New York limited the rights of publicity to living persons, while the right was recognized in Indiana and California. The court ruled that at the time of Monroe`s death, the right of publicity was not recognized by any of the abovementioned states, making it impossible for her to transfer through a will a right she did not have at the moment (Burr, 2011, p. 354–360). Another case worth citing in this context is *The Martin Luther King, Jr. Center for Social Change, Inc., et al. v. American Heritage Products, Inc., et al.*, where the Supreme Court of Georgia was addressed several questions on the right of publicity, including whether the right of publicity survives its owner and whether the right is inheritable and devisable. When answering this question, the Supreme Court of Georgia held that 'the right of publicity survives the death of its owner and is inheritable and devisable… If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity`s untimely death would seriously impair, if not destroy, the value of the right of continued commercial use'(Biederman, et al., 2011, p. 216–226).

3. Legal regulation of the right of publicity in the EU

The analysis of the case law of the European Court of Human Rights does not show any cases where the right of publicity was directly mentioned. The right to one`s own image for a famous person is protected as the right to privacy in accordance with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). In the Von Hannover v. Germany (2012) case the photos of the applicants, who were the elder daughter of the late Prince Rainier III of Monaco and her husband, were published in German magazines without their consent. They considered that the refusal by the German courts to grant an injunction against any further publication of the photos violated their rights to the respect for private life. In this case the European Court of Human Rights developed the criteria relevant for balancing the right to the respect for private life and the right to freedom of expression (contribution to a debate of general interest; notoriety of the person concerned and the subject of the report; prior conduct of the person concerned; content, form, and consequences of the publication; and the circumstances in which the photos were taken). Because the photos in question did contribute to a debate of general interest (showing the illness of Prince Rainier and the attitude of his family members towards his health) the court found no violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The United Kingdom has traditionally offered wide protection to free speech, resulting in the refusal to develop a specific legal framework or tort for protection of the right of publicity. Currently the right of publicity may be protected by using already existing torts, like malicious falsehood, false endorsement, infringement of IP rights, defamation, libel, etc. (Helling, 2005, p. 32). The latest British court practice shows that the infringement of the right of publicity is now protected by framing the case in the torts of breach of confidence and passing off.

The tort of breach of confidence was claimed in the *Douglas v. Hello* case. The famous couple Michael Douglas and Catherine Zeta Jones gave exclusive right to publish their wedding photos to *OK! Magazine*. Despite anti-paparazzi measures used at the ceremony, the rival magazine *Hello* managed to get the photos from the wedding and published them. Both the Douglases and *OK! Magazine* sued *Hello* for breach of confidence. The court ruled in favor of the claimants, stating that the Douglases arranged the ceremony so as to impose an obligation of confidence and to control the information (Cantero, et al., 2010, p. 5–6). This tort shows the influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the UK. It should be noted that this case protected personal and dignitary aspects of the rights of public people.

Another concept, protecting commercial rights to control the usage of one`s personality is the one of passing off. In order to succeed in a passing off claim, a claimant shall prove: misrepresentation, the goodwill of the claimant, and damages caused to the claimant. The classic approach does not universally apply to all the cases of infringement of the right of publicity. For example in the *Lyngstad v. Anabas* case, the famous Abba musical group was not successful in claiming that their rights were infringed when their name and images were used on memorabilia. The court ruled that Abba was not itself arranged into a likewise business activity in the UK and was not eligible for protection. Almost 30 years later, this practice was challenged by Irvine v. Talksport, Ltd. (2003). In this case an image of a famous Formula1 driver was used in advertisement materials for a radio station. The court held that the parties should not be engaged in a common field of activity in order to apply the false endorsement doctrine and ruled in favor of the claimant.

A different approach originated in Germany. After the Second World War, the German Federal Supreme Court developed the notion of general right of personality, based on Art. 1 and 2 of the German Constitution and section 823 of the German Civil Code. The scope of this right is very broad and is identified by the courts on a case-by-case basis (Cantero, et al., 2010, p. 10). However, two aspects of the general right of personality are protected by separate statutory provisions—these are the right to one`s name and image. The right of publicity is not recognized as a right per se in Germany. However, in court practice, the broad scope of a person`s identity is protected, including protection of person`s likeness, voice, signature, and other personal characteristics (Welser, 2014, p. 50). Because the right of publicity is a personal right, it is not transferrable,

voidable, and descendible in Germany. However, a person may consent to the usage of some aspects of his/her identity for a fee, allowing this right to be marketable. In the opinion of Bergmann, German Law has moved towards the American approach by recognizing the ability to consent through licenses (Bergmann, 1999, p. 44). In 1999 the daughter of Marlene Dietrich sued for damages because of the illegal use of her mother`s image in the advertisement of a musical about Marlene Dietrich`s life. The court ruled in favor of the claimant in the case, allowing post-mortem protection of the right of publicity (Helling, 2005, p. 53). However, the term of protection is limited to 10 years, during which an individual`s picture or other characteristics of that person cannot be used for commercial purposes without prior permission of the heirs (Welser, 2014, p. 50).

The notion of 'personality rights' has developed in the French legal system, comprising the right to image, right to privacy, freedom of speech, religious freedom, family relations, and intimacy (Cantero, et al., 2010, p. 7). The right to one`s image is now somewhat autonomous, having its roots in the right of privacy. The French legal doctrine differentiates the *right to one`s image*, meaning that an individual has an exclusive right to use his/her image and prevent third parties from such usage (a positive right) and *the right on one`s image*, allowing the person to commercially exploit his/her image (Logeais & Schroeder, 1998, p. 517). This dualistic approach creates the separation of the personal and commercial aspects of one`s image, making it hard to introduce a fully united right of publicity in France. Today the image right in France protects not only the sound image of the person, but also other aspects of the personality, e.g. voice, etc. (Helling, 2005, p. 42).

At the end of nineteenth century an artist drew the famous actress Rachel on her deathbed and sold these images despite the allegations of the family, who sought protection from such usage in court. The court ruled that nobody could reproduce and sell the images of a deceased person without the explicit consent of the family (Logeais & Schroeder, 1998, p. 514). Another remarkable court decision in France is the *Papillon* case, where the publication of the life story of a former criminal having the nickname 'Papillon' was at question. The court ruled that the publication of the criminal`s image on the book cover was a violation of his image right (Helling, 2005, p. 43).

While the right to commercially exploit one`s image is expressly recognized in French legal practice, the situation with descendibility of the right is not so clear. In the early cases French courts ruled that the right of image was a personality right terminating upon the person`s death (Logeais & Schroeder, 1998, p. 535). The first court decision to recognize the post-mortem availability of the image right was the decision in the *Raimu* case, where the widow of the famous French actor tried to prevent an advertising company from using the image of her husband. The court ruled in favor of the claimant, stating that the patrimonial aspects of the right of image are descendible (Logeais & Schroeder, 1998, p. 537).

In Spain the right to one`s image is seen as an autonomous personal right, independent from the right of honor and the right to privacy (Cantero, et al., 2010, p. 13). The right is laid out by the Constitution of Spain and the Organic Law of May 5, 1982. In accordance with Article 7 of the latter, the use of the name, voice, or picture of a person for the purpose of advertising, business, or a similar nature is illegal in Spain (Barnett, 1999, p. 565). One remarkable case involving the name of a famous actor is the *Gades* case. In this case promotional material about the Spanish actress Laura del Sol mentioned Antonio Gades as the actor with whom she completed her most recent movie. The Supreme Court of Spain ruled that this material contained an illegal usage of Mr. Gades` name and hence he should be compensated (Barnett, 1999, p. 575).

Descendibility of the rights to one`s image is also allowed in Spain. Pursuant to Organic Law, a right may be enforced by family members who were alive at the time of his/her death. In the case of the absence of legal heirs, the Ministry of Justice is entitled to enforce a person`s image right for 80 years after the death of celebrity (Savare, 2013, p. 54).

In Italy legal doctrine distinguishes between typical rights (directly provided by the statute) and 'un-enumerated rights' (those not specifically mentioned in the legislation, but deriving from the court decisions) (Helling, 2005, p. 57–58). One of the typical rights is the right to one`s image protected by both the Civil Code (Art. 10) and the Copyright Law (Art. 96, 97) (Verducci-Galetti & Grazioli, 2008, p. 76). The right of publicity was first recognized in the *Dalla v. Autovax* case in 1984, where a famous Italian singer sued a company for misappropriation of his persona in an advertisement campaign. The court used its freedom to reason by analogy and applied the rules on protection of the image right to this case, hence protecting the commercial value of Dalla. It is difficult not to notice that the right of publicity is therefore an 'un-enumerated right'.

In further cases the courts seem to follow the recognition of the right of publicity, using it as an extension of the right to one`s image or name. For example, the court has extended protection against unauthorized usage of a singer`s image and signature (*Baglioni v. Eretel Srl and Disco Spring*) and against the usage of a look-alike of a famous person (*Vitti v. Doimo SpA*) (Martuccelli, 1998, p. 552). A possibility to transfer the right of publicity or pass it to legal heirs is still undecided by Italian legal practice and jurisprudence (Savare, 2013, p. 54).

4. The legal framework of the right of publicity in Bailiwick of Guernsey

Bailiwick of Guernsey is a British Crown dependency; however it is not part of the United Kingdom and the European Union. In 2012 the Ordinance of Bailiwick of Guernsey (The Image Rights (Bailiwick of Guernsey) Ordinance, 2012 – hereinafter 'the Ordinance') has come into force, introducing a new level of protection for the right of publicity.

The Ordinance provides for definition of a *'registered personality'*, that is 'personnage', i.e., a natural person; a legal person; two or more natural persons or legal persons who are or who are publicly perceived to be intrinsically linked and who together have a joint personality ('joint personality'); two or more natural persons or legal persons who are or who are

publicly perceived to be linked in a common purpose and who together form a collective group or team ('group') or a fictional character of a human or non-human ('fictional character'), whose personality is registered under the Ordinance.

The personality is not protected per se; the Ordinance protects the images associated with the personality (Guernsey Image Rights, London, 2013). The *'image'* is defined broadly by the Ordinance and shall mean the name of a personnage or any other name by which a personnage is known; the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristic or personal attribute of a personage; or any photograph, illustration, image, picture, moving image, or electronic or other representation ('picture') of a personnage and of no other person, except to the extent that the other person is not identified or singled out in or in connection with the use of the picture.

The Ordinance provides for proprietary and moral rights to the owners of the registered personality. Pursuant to Art. 52 of the Ordinance, a registered personality is personal or movable property, legal ownership (*nue propriété*) of which is vested in the person registered as the proprietor of the registered personality. A registered personality's image rights are personal or movable property, legal ownership (*nue propriété*) of which is vested in the proprietor of the image rights. These rights are transmissible by assignment, testamentary disposition, or operation of law in the same way as other personal or movable property. The registered personality`s image rights can also be licensed. A personality shall be registered for a period of 10 years from the date of registration and may be renewed for further periods of 10 years. An image shall be registered for a period of three years from the date of registration and may be renewed for further periods of three years.

The moral rights are applied only to natural persons. Pursuant to Art. Art. 65, 68 of the Ordinance a personnage whose personality is registered has the right to be identified whenever a person uses a protected image associated with or registered against that registered personality and makes such an image available to the public and the right not to have the protected images associated with or registered against that registered personality subjected to derogatory treatment. Unlike the proprietary rights, the moral rights are not assignable. They continue to subsist so long as the personality remains registered, and may be exercised by the personal representative of the personnage. However, these rights may be transmitted after the death of a person entitled to such a right.

Mourant Ozonnes define the following advantages for obtaining the image rights in the Bailiwick of Guernsey:

- Clear statutory clarification of the extent or rights and exception for protection of such rights.
- Option to inform the world about the image rights of the personality, which can be further referenced to in licensing/assignment contracts.
- Definition of proprietary rights, intellectual property rights that can further be assigned.
- The infringement of the image rights is not restricted to specific classes of goods and services (as in trademark case).
- Opportunity to manage the image rights offshore (Innovative new image rights legislation in Guernsey, 2011).

For the moment the Image Rights Register is available online and comprises 53 registrations (Access Image Rights Archive). As an examination of the case law of Bailiwick of Guernsey shows, there is no current case law involving image rights protection. These rights will generally be enforced by addressing the Royal Court of Guernsey, sitting as an Ordinary Court (Duerden, 2014, p. 64).

The Ordinance also provides for the registration procedure, infringement of image rights and limitations to them, and administrative and supplementary provisions etc.

This is the very first innovative system for protection of the rights of publicity, clearly recognizing such right as one of intellectual property. The experience of Bailiwick certainly will be widely examined by scholars from different countries and will be taken into account when modeling national systems for protection of the right of publicity.

5. Legal nature of right of publicity: interaction with trademarks and copyright

The right of publicity has enjoyed a critical approach against its existence. For example, Professor Michael Madow has outlined four main arguments against the right of publicity. In his opinion, the right of publicity redistributes wealth upwards; it increases the price of celebrity merchandise; it makes possible the censorship of popular culture; and it stimulates enormous investments in the person of a celebrity (Gervais & Holmes, 2014, p. 196–197).

As Anna E. Helling notes, American jurisprudence provides for several theories justifying the right of publicity: theories arising from natural rights doctrine (the Labor Theory, the Unjust Enrichment Theory and the Personality Theory) and theories taking into account economic policies (the Utilitarian Theory, the Consumer Protection Theory, and the Allocative Economic Theory) (Helling, 2005, p. 18–22).

The justification of the theories arising from natural rights ensures that celebrities are human beings and their rights shall receive no less protection than the rights of other human beings. The rationale of the *Labor Theory* is that the value connected with the personality of the public persona is mainly the result of his/her creative incentive. By granting protection of the right of publicity the state is stimulating the creative incentive of the public. The *Unjust Enrichment Theory* seeks to forbid the theft of the others` property, stating that no one can unfairly use the results of other people's work. Under the *Personality Theory* one`s name, likeness, and other personal characteristics are understood as property, therefore owned by a celebrity (Helling, 2005, p. 19–21).

In accordance with the economic theories, the income from using one`s identity shall belong to its owner, the person who has worked hard to become a celebrity. Pursuant to the *Utilitarian Theory*, it brings advantages to the public if the state provides benefits from those who develop talents and skills that are socially useful for society. The *Consumer Protection Theory* deals with the idea that the usage of a celebrity`s identity by authorized person(s) may lead customers into misrepresentation and encourage the idea that the celebrity agreed to such usage. The *Allocative Economic Theory* lays out that publicity rights may either belong to the celebrity or be transferred to other people, allocating the value associated with the celebrity with whoever values it the highest (Helling, 2005, p. 19–20).

The right of publicity is sometimes falsely justified by the *rationales of trademark law*. Both rights serve the same functions – they provide the holders of the right with the protection of their interests and ensure that the customers receive proper information regarding the manufacturer or promoter of the goods (Montalvo, 2013, p. 908). However, they have substantial differences. First of all, the protection provided by trademark law provides for an incentive for the creation of new objects of intellectual property, while such incentive is not the main goal of the right of publicity (Gervais & Holmes, 2014, p. 182). Secondly, trademark law allows protection for certain goods and services listed in a trademark certificate, while the right of publicity is not limited to the classes of goods or services. The right of publicity is naturally derived from the right to privacy, while trademark law is derived from the tort of fraud (Montalvo, 2013, p. 907). Moreover, trademark indicates the origin of the products unlike the right of publicity, which refers to the personality of celebrity (Klink, 2003, p. 367–368).

The right of publicity has certain similarities with *copyright*. The author has patrimonial and extra-patrimonial rights as well as being the owner of the right of publicity. Some scholars even suggest the establishment of a pan-European patrimonial right to one`s image based on the model of copyright law (Synodinou, 2014, p. 191). In Tatiana Synodinou's opinion, the copyright model can be used when 'building a harmonized regulatory framework governing image contracts' (Synodinou, 2014, p. 198). Meanwhile, copyright cannot be used to fully protect the right of publicity. Two main concerns are raised by the authors when analyzing the possibility of copyright to protect the right of publicity. First of all, copyright does not protect name, fame, likeness, and other peculiarities of a persona (Sims, 1981, p. 460). Secondly, despite the fact that the celebrities are the subjects of copyrighted material, they usually do not own the copyright by themselves (Sims, 1981, p. 460).

6. Legal regulation of the right of publicity in Ukraine: new perspectives

The right of publicity is mentioned neither in the provisions of Ukrainian law nor in court practice. Currently, some elements of the right of publicity can be found in the legislation regulating personal immaterial rights and in trademark legal framework.

The Civil Code of Ukraine (2003) provides for a list of personal immaterial rights. The right to one`s name is regulated in Art. 294–296 of the Civil Code of Ukraine. Due to Art. 294 of the Civil Code of Ukraine a natural person shall have the right to his/her name. In accordance with Art. 296 a natural person shall be entitled to use his/her name in all spheres of activity. After analyzing the legal framework regulating the right to one`s name, one may conclude that these norms regulate the right to the name of all persons whether celebrities or not. Besides the right to one`s name is a non-proprietary right and thus its transfer is not prescribed by the Civil Code of Ukraine.

The absence of the possibility to transfer the right to use one`s name has caused celebrities to register their name as a trademark. If a celebrity has entered into a producer contract, the rights to such trademark are transferred to the producer of such celebrity. Research of Ukrainian case law shows that a conflict between the right to a name and to a trademark may arise. Such conflict arose between Svitlana Loboda, a famous Ukrainian singer, having participated in the Eurovision song contest, and her producers. The court ruled that 'Svitlana Loboda' is the name of an artist, a non-proprietary right to use her name is precluded by the Civil Code of Ukraine, and the producer as a trademark owner cannot forbid her to use it (Advokat Lobody: sud ne zapreschal pevitsee pet pod svoim imenem).

Some aspect of the right of publicity can be found in the Law of Ukraine on Protection of Rights to Signs for Goods and Services (1993), pursuant to Art. 6 of which a trademark cannot be registered if it reproduces surnames, names, pseudonyms and their derivatives, or portraits and facsimiles of famous persons in Ukraine without their consent.

The right to one`s own image is also protected by the Civil Code of Ukraine. Pursuant to Art. 308 a photo or other products of fine art on which a natural person is portrayed can be publicly demonstrated, reproduced, or distributed only by the consent of this person, and in the case of his/her death, by the consent of authorized persons. The consent granted by the natural person portrayed on the photograph or other product of fine art may be withdrawn after his/her death by authorized persons. Losses incurred by the person who conducted public demonstration, reproduction, or distribution of the photo or another product of fine art shall be reimbursed by these persons. If a natural person posed for the artist for a fee, the photograph or other product of fine art may be publicly demonstrated, reproduced, or distributed without his/her consent. A natural person who posed for the artist of a photograph or other product of fine art for a fee, and after his/her death his/her children and widow (widower), parents, or siblings can demand a termination of the public demonstration, reproduction, or distribution of the photo or other product of fine art provided the artist or another person is reimbursed for the losses incurred in connection therewith. A photo can be distributed without consent of a natural person portrayed on it, provided it is stipulated by the necessity to protect his/her interests or the interests of other persons.

The mentioned articles regulate only non-patrimonial interests of a natural person and do not provide for any special regime for a celebrity`s image and name, including the possibility to license or transfer the right to use his/her image. The descendibility of the rights is also not stipulated by Ukrainian Civil legislation.

In our opinion, current Ukrainian legislation does not provide the possibility to freely commercially exploit the right of publicity, preventing participants of show business from obtaining income from using their personality. Thus, Ukrainian legislation should be subject to amendments. The model of the American right of publicity can be taken as an example and introduced into Ukrainian Civil Code. A new provision can be based on Art. 3344 of the California Civil Code as one of the most detailed pieces of legislation regarding the right of publicity. Such changes will reflect the demands of the market and will allow its players to obtain additional income.

7. Conclusions

Conducted analysis presents the author grounds to conclude the following:

1. The right of publicity originally developed from the right to privacy in the American legal doctrine. The scope of protection and the possibility to license and transfer the right as well as its post-mortem protection vary from state to state.
2. There is no unanimous approach to the right of publicity in the countries of the EU. The latest British court practice shows that infringement of the right of publicity is now protected by framing the case into the torts of breach of confidence and passing off. In Germany the right of publicity is not recognized per se; however, recent case law shows that this right can be licensed and protected after death. In France legal protection is provided to the so-called right to one`s image. In Spain a right to one`s image is seen as an autonomous personal right, independent from the right of honor and the right to privacy. The right of publicity is recognized in Italian court practice.
3. The Bailiwick of Guernsey has introduced a unique system of protection for the so-called image rights, creating a special register of such rights and allowing protection of moral and patrimonial rights to one`s image, which is broadly defined.
4. The right of publicity has some similarities with trademarks and copyright; however, an analysis of their legal nature shows that these objects are not identical.
5. Current Ukrainian legislation provides for protection of one`s name and image, allowing these rights to be vested in any natural person independent of their fame. The emerging market of show business in Ukraine makes it obvious that the right of publicity shall be introduced into Ukrainian Civil Code, allowing the possibility to license and transfer this right. In our opinion, a new right in Ukraine can be based on the example of the American model, i.e. on the relevant provisions of the California Civil Code.

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