



LEGAL ASPECTS OF MEDIA ACTIVITY

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Legal aspects of media activity

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We now provide you a report devoted to legal issues related to the functioning of the media—both traditional and tech-based. We discuss below some of the most important practical issues in the media business today.

The media industry is continually evolving along with the development of new technologies. The appearance of social media redefined how people communicate and impacted how journalists practise their profession. The growth of media means not only new possibilities, but also additional obligations, including for publishers. We discuss the challenges they must struggle with in the article “Rules for liability of the administrator of a website for unlawful content posted by users.”

Any critical publication on the activity of individuals or legal entities carries a risk of infringing their rights. Editors, publishers and journalists must know where the boundaries of permissible criticism lie and how to document compliance with journalistic standards. We write about this vital issue in the everyday practice of news media in the articles “When does a journalist infringe a company’s reputation?” and “Negative PR against a management board member or finance director: Does it concern the company?”

In the world of entertainment media as well, new trends are arising, particularly relating to promotion and advertising. A slice of the marketing cake previously reserved for radio and television, in the form of product placement and sponsorship, has now been quickly colonised by individual online content creators, who have won the hearts of advertisers. We suggest what to pay attention to when entering into contracts with these personalities in the article “Risks and rules when cooperating with influencers.”

Undoubtedly one of the key aspects of media activity is merchandising, including the use of trademarks, characters, presentations, images and symbols that audiences associate with a product. Revenue from this type of activity can even top the income from the original production, clearly demonstrating how important this aspect of the work of creative talent and producers can be. In the article “Protection of catchphrases from films and TV shows,” we discuss how clever, viral quotes from screen productions can be employed in other areas.

The main theme in this issue is personality rights. In the article “Use of an individual’s image in the media: A question of consent,” we explain how to safely use a person’s depiction. In turn, “Using the image of a public figure

in memes: Where is the boundary?” addresses the possibility of using images of celebrities or other well-known people for satirical purposes or in ordinary online publications. Finally we write about how to safely use pictures of people in large groups or collective shots (“Dissemination of a person’s image as a detail in a larger whole: Theory and practice”).

We hope you find the report interesting reading.

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Rules for liability of the administrator of a website for unlawful content posted by users

EWA GÓRNIŚIEWICZ-KACZOR

Liability for content published on the internet infringing for example personal interests, industrial property rights or copyright may be imposed not only on the author of the content, but also on the administrator of the site where it was published.

The possibility of demanding that the administrator of a website take down infringing content is crucial from a practical point of view. Often it is the only real chance to seek protection of one’s rights. Typically, given the large number of persons posting unlawful content and the inability to identify the authors (as many posts are published under pseudonyms), attempting to enforce one’s rights against the persons posting the content would be impossible or irrational. Meanwhile, making a demand to the administrator of the site allows the person whose rights have been infringed to block the content. If the administrator does not block access to the infringing content, it may be held liable under the Electronic Services Act of 18 July 2002.

The administrator of a website may be released from such liability by promptly preventing access to infringing content after being notified of the content. These rules may seem clear, but the devil is in the details.

Who may be held liable

First it must be determined who is the administrator, in order to learn who is affected by this rule. An administrator (also known as a “web host”) is the entity providing a web hosting service, i.e. providing space for data posted by

third-party users to be stored in the memory of servers and providing access to the posted data.

The concept of an administrator is broadly defined. Significantly, to be an administrator it is not necessary to be the owner of the IT system that technically enables publication of the content. Administrators include, for example:

- Owners of social media sites
- Owners of sites allowing users to publish content, including owners of sites that are newspapers or journals
- Organisers of online forums
- Commercial platforms where users post announcements or auctions.

Such entities are administrators of content published by third parties.

Source and form of information about infringing content

The Electronic Services Act provides that the source of information about infringing content may be an official notice or a reliable report. While the first notion does not present special difficulty in interpretation, it is not so easy to determine what is a “reliable report.”

A report is a notice submitted to the administrator. The determination of whether the report is reliable must be objective. Essentially this means determining whether a reasonable person would regard the report as trustworthy. For this reason as well, for the report to be reliable, it must be substantiated that the circumstances actually occurred. Suppose that we demand that a website take down a post describing an event that did not occur (such as a theft), in which we are presented as persons taking part in commission of a crime. Then we must cite objectively persuasive circumstances showing that the event did not occur. The mere assertion that it was not the case is insufficient, as the administrator has no duty to investigate. The point is that the report must present information making the unlawfulness of the content obvious.

Significantly, the act does not limit the entities who may be the source of such a report. Thus it need not be the person whose rights have been infringed. Essentially it may be anyone, including an employee of the website administrator.

Nor is the form in which a reliable report must be made limited. It could be a letter, an email, or a contact form used by the site administrator. In one case the administrator of a site alleged that the requirement for the form in which it had to receive notice of the infringement was not met. The adminis-

trator deemed that the clock started ticking on the period it had to take down the infringing content only when the person reporting the infringement had complied with a certain form for the report. The defendant in that case was the Polish social media site *nasza-klasa.pl*. According to the terms and conditions for the site, abuses had to be reported via the site's contact form. But the plaintiff was not a user of the site, and didn't even use a computer. The plaintiff demanded that *nasza-klasa.pl* take down a fake account opened by a third party using the plaintiff's details. The account was used to publish and distribute messages to the plaintiff's friends offensive to the plaintiff, his wife, and his friends. *Nasza-klasa.pl* was notified of the situation by the plaintiff's wife and a friend of the plaintiff by email, by traditional post, and finally using the site's contact form. The issue in the case was to determine when the site administrator learned of the infringement. The fake account was taken down, but only 39 days after the initial report by post, and 20 days after notification via the contact form. The defendant claimed that it obtained a reliable report of the infringement only upon receipt of the complaint via the contact form, and only knew of the infringement from that moment. But the courts of both instances held that even if the terms and conditions of the site administrator limited the form in which a violation should be reported, that was irrelevant, because an earlier report which the administrator should have been aware of also counted, and the administrator's awareness was not limited to reports submitted via the contact form (Wrocław Court of Appeal judgment of 15 January 2010, case no. I ACa 1202/09).

Monitoring and filtering of content

The Electronic Services Act provides that administrators of data stored on servers are not required to verify the data.

Instructive in this context is the judgment of the Supreme Court of Poland in the case of an article about politician Roman Giertych posted on the tabloid website *fakt.pl* which attracted numerous defamatory comments (judgment of 30 September 2016, case no. I CSK 598/15). The website sued in the case claimed that it learned of the content of the posts only when it received a copy of the statement of claim in the lawsuit. It was found in the proceeding that the defendant filtered comments published on the site, using an automated system flagging vulgarities (although this system could be faulty due to misspelling of the offensive words), and also manually by its own employees. In this case, the Supreme Court found that the site administrator's knowledge of the comments defaming Giertych arose from earlier reports to the administrator connected with operation of the site and its awareness that offensive comments could appear under content such as the article in question, which was a magnet for offensive comments. By accept-

ing this and not taking appropriate actions, even though it employed staff for this purpose and knew that its filtering system was not entirely effective, the administrator bore liability for infringement of the plaintiff's personal interests. The court recognised the administrator of fakt.pl as the moderator of the site, i.e. it had a real influence over the content published there. In such a situation, according to this judgment, the administrator must prove that it did not know of the infringing content. But in practice, evidence to show this may not exist.

The responsibility of sites that do not moderate content works differently, as they are not subject to a duty to filter and track content in real time (as held for example in the judgment cited above by the Wrocław Court of Appeal).

Another equally notorious and interesting case was the litigation against the site chomikuj.pl (Kraków Regional Court judgment of 27 May 2015, case no. IX GC 791/12, and Kraków Court of Appeal judgment of 18 September 2017, case no. I ACa 1494/15). This site provides its users IT infrastructure enabling them to share files and charges users a fee for downloading files. Users whose files enjoy a lot of interest receive a fee from the site. The Polish Filmmakers Association (SFP) and the distributors of three Polish films submitted to the site a demand to block access by third parties to files containing these films, which had been uploaded to the site. But the defendant, chomikuj.pl, did not take down all the files. It alleged that some of the notices it received indicated only the titles of the films to be taken down, and did not identify the specific files (i.e. the addresses allowing them to be located on the site). The platform explained that if it complied with the demand from SFP and the distributors, it would have to verify the data across the entire site. And that is what the court made it do in the final judgment, ordering it to seek out and block access to all files with these films located on the site. According to the court, chomikuj.pl could not claim the exemption from liability under the Electronic Services Act, because that exemption was available only to an administrator that is neutral in its treatment of stored or accessed data. But the business model of the chomikuj.pl platform showed that it took an active part in administering files uploaded by third parties, for example by encouraging sharing of a greater number of files.

Harsher liability under Copyright Directive

Soon we can anticipate changes in the rules governing the liability of administrators who store on their sites and provide access to copyrighted works uploaded by third parties. Pursuant to Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (also known as "ACTA 2"), administrators who play an active role in connection with such content

will not be able to rely on the exemption from liability under the Electronic Services Act. They will have to obtain licences from the copyright holders. We discussed this more extensively in an article on the EU's upcoming reform of copyright law.

The member states have until 7 June 2021 to transpose the directive into their national legal systems.

Conclusions

The time when the administrator of a website learns of infringing content and blocks access to the content is crucial for determining the administrator's liability. The administrator is not liable for infringing content as long as it has no knowledge that the content has been published on its site. It has no general obligation to monitor and filter content posted by third parties. However, this state of knowledge will be evaluated differently in the case of an administrator who moderates content than in the case of an administrator who does not do so.

In the latter case, the mere possibility of learning of the infringement does not give rise to liability.

But in the former case, i.e. for an administrator who moderates posts, the court may conclude that the administrator had knowledge of infringing content based on an earlier takedown notice. An administrator who moderates content should carefully consider the procedure and method for documenting content where it has intervened. Otherwise, in court the administrator may find itself unable to prove that it had no knowledge of the infringing posts.

If the administrator already knows of such content, it is required to promptly block access to the content. The administrator's liability is determined by the state of its knowledge of the unlawfulness of the content. The source of knowledge may be anyone, and the report can take any form. In this respect, a quick reaction by the administrator is hugely important, and thus it is vital from the administrator's perspective to implement failsafe mechanisms allowing it to take the necessary steps in a reasonable time.

It should also be borne in mind that not every administrator can take advantage of the exemption from liability under the Electronic Services Act. According to the courts, the ability to claim this exemption may be determined by the administrator's business model, that is, the role played by the administrator in storing and accessing content.

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When does a journalist infringe a company's reputation?

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The press enjoy the constitutional freedom of expression and fulfil citizens' right to objective societal information, oversight and criticism. Where is the boundary the media must not cross before colliding with the personal rights of others? Can journalists report news derived from third parties, and are they required to report only true information?

A TV programme in Poland broadcast a report stating that a company had brought hazardous waste into its manufacturing plant with the intention of using it for production of construction materials. The basis for the report was an investigation by a detective bureau commissioned by another company.

The broadcast was illustrated with passages from video recordings made by a detective using a hidden camera. The detective traced suspicious cargo on its way from a waste incineration plant, where the material supposedly originated, to the manufacturing plant, where it was unloaded. Voices of company officials (distorted to disguise their identity) were accompanied by ominous music, along with speculations and insinuations painting a picture of a company involved in illegally processing hazardous waste and using it in the production of its goods.

In the subsequent months, the company in question and other entities connected with the matter underwent a range of inspections. In administrative and criminal proceedings, attempts were made to reconstruct the events described in the news report. It was unequivocally determined that no waste was brought into the plant, and the reliability of the detective's investigation left much to be desired. What relevance do these findings have for the responsibility of the journalist reporting the story?

Journalist's obligations

In Poland, the Press Law imposes obligations on journalists directly affecting their liability to third parties. The press are required to present events accurately, and among other obligations the journalist must:

- Maintain particular care and diligence in collecting and using press materials, especially to verify the accuracy of the information or indicate the sources, and

- Act in accordance with professional ethics and principles of social coexistence, within the bounds defined by provisions of law.

The requirement for “particular” care by journalists is further-reaching than the ordinary care required in civil dealings. Care and diligence in this instance are interpreted to mean integrity, reliability, conscientiousness, specificity, and responsibility for the choice of words. Significantly, the degree of this exceptional care must be adjusted to suit the nature of the source of the information, particularly when it concerns sensational news. If the source is not very reliable, is not an authority in the field, is pursuing his own interest (e.g. commercial interest), or is emotionally involved in the matter, journalistic vigilance and diligence should be heightened.

Apart from verification of the source of the information, the following aspects are also relevant:

- Seeking out all available sources to verify the truthfulness of the information obtained
- Ascertaining the consistency of the information with other known facts
- Enabling the interested person to address the information.

At the stage of making use of the materials gathered by the journalist, it is important to present the information and circumstances of the matter thoroughly (and not selectively), and also to weigh the seriousness of the allegation, the significance of the information from the perspective of a legitimate social interest, and the need (urgency) of publication. The journalist should not prejudge the nature of the matter described and create slanted material, even if initially it seems accurate and reliable.

The form of the publication may also be relevant when assessing the fairness of how the information is used.

Does a journalist have to tell the truth?

Sometimes a journalist acts with diligence and care but nonetheless the information published turns out to be untrue. Does this mean that the journalist has unlawfully infringed the interests of the persons reported on in the publication? These doubts were resolved by the Supreme Court of Poland in a resolution from 2005 (Case III CZP 53/04), where it held: “A showing by the journalist that in collecting and using press materials he acted in furtherance of a socially justified interest and fulfilled the obligation to act with particular care and diligence eliminates the unlawfulness of the journalist’s action.” The journalist’s compliance with these obligations thus excludes unlawfulness even when the statement asserted by the journalist proves to be

untrue. This is an entirely correct position, as journalists do not have the instruments and competencies at their disposal that are available to prosecutors, courts and administrative authorities. Journalists cannot be expected to determine beyond any doubt that the assertions in their reports are true.

But this does not release the journalist from the obligation to strive to present truthful information, in compliance with the greatest diligence and integrity. This is particularly relevant in the case of activist journalism, raising the alarm about undesirable activity of societal relevance. This is tied to the second aspect which should exist for the journalist's action to be found not to unlawfully infringe the personal interests of the subject: acting in furtherance of a social interest.

In furtherance of a social interest

In the case described here, the furtherance of a social interest would be for the journalist to strive to realise the principles of transparency of public life, the society's right to information, and to reveal and publicise an undesirable phenomenon threatening human life or health. But it would be woefully inadequate for the journalist to make a bare assertion that he is acting in the social interest simply because the topic discussed may be important for society.

Criticism pursued in the social interest is a beneficial activity when it presents facts that have actually occurred. But when the critic departs from the truth or presents facts ignoring relevant circumstances or failing to verify them thoroughly, such criticism cannot be regarded as fair, objective, and helpful. The judicial rulings concerning activist journalism take the view that it is better to withhold publication of unverified material than to publish falsehoods. Acting in the public interest means first and foremost reporting the truth; spreading falsehoods is more harmful than deciding not to report on the topic.

When mistakes are made

So where did the journalist go wrong in this case? First and foremost, he placed too much trust in the source of the sensational claim. As it turned out, the detective hired by another business (perhaps a competitor of the one of the companies presented in the report) was himself acting without due care, erroneously making fundamental findings for the case. Thus the detective was a source of information who required a sceptical approach, which the journalist lacked. The reporter accepted the detective's findings as true, making only haphazard efforts to verify them. Nor did the journalist verify the reports about the alleged waste by following up all available sources.

The seriousness of the phenomenon described and the negative consequences that could arise if the allegations were true—for the society and for the entities involved—warranted a thorough analysis of the circumstances of the case, even at the cost of requiring more time to present the material. Haste in preparing and broadcasting the report certainly did not demonstrate diligent and careful action by the journalist. The form of the report, highlighting the sensationalism of the topic, combined with the shortcomings identified above, only add to the picture of how a reporter should not perform his duties.

Reputation of legal person

It is thus justified to state that in this case the journalist unlawfully injured the reputation of the company which was the subject of the report. And reputation (also referred to as renown or good will) is one of the interests most frequently injured by journalists in practice.

A company's reputation is injured by information which, viewed objectively, ascribes to the company improper behaviour, potentially causing a loss of the trust it needs to properly function and perform its tasks. It can be assumed with a high degree of likelihood that information that a company was acquiring and using hazardous waste could negatively impact the company's reputation, i.e. its perception by third parties. It is not necessary in this respect to prove that the company suffered an actual loss to its reputation. It is sufficient to show the potential for such injury.

Conclusion

When the topic is weighty, journalism—especially activist journalism—requires rapid action aimed at stirring an intense societal reaction. But it is also essential to respect the rights, interests and reputation of the subjects. The journalist must know how to strike a balance between these two aspects. The news reported should be true, but when it is not, the journalist will not be blamed if he can show that he acted with the greatest care and diligence, and performed his duties in furtherance of a social interest. This means thorough verification of all aspects of the matter, with all available sources. It is not sufficient to rely on someone else's findings, particularly when they come from an unverified source. Acting in the public interest does not mean simply tackling a socially important topic, but first and foremost reporting carefully checked facts. Failure to comply with these obligations may mean unlawful infringement of the subject's reputation, resulting in civil liability.

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Negative PR against a management board member or finance director: Does it concern the company?

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Can a statement concerning an individual employed by or affiliated with a company infringe not only the reputation of the individual, but also the reputation of the company? What sort of connection with the company, and what sort of comment, can have such results? What can be the practical consequences for example in litigation? The analysis below is devoted to companies, but the remarks are universal and may generally apply to any legal person (such as a cooperative, foundation, local government entity, and so on).

Company and individual: Separate entities and their personality rights

Under Polish law, the personality rights of a legal person must be distinguished from those of individuals serving on the authorities of the legal person or affiliated with the legal person. Each of these entities have their own personality rights. (The personality rights of an individual are governed by Civil Code Art. 23, while the regulations governing personality rights apply as relevant to legal persons pursuant to Civil Code Art. 43.) One of the fundamental personality rights of both natural persons and legal persons is their reputation. In the case of an individual, this is known as the “external aspect” (as opposed to the internal aspect, i.e. personal dignity), and in the case of a company, it may be referred to as reputation or goodwill.

The treatment of offensive or false statements as infringing the reputation of a company is clear if they concern the company itself. Such a statement about a company may take a direct form (such as “company X is breaking the law”) or an indirect form (where the company is not named, but it is obvious from the circumstances, market situation or context which company is meant).

But we are interested here in a somewhat more complicated situation, where the negative statements are aimed not at the company itself, but at:

- The authorities of legal persons or their members, i.e. the natural persons belonging to the authorities (version 1), or

- Other natural persons who are not members of the corporate authorities but are factually or legally affiliated with the legal person (such as employees, shareholders, contractors, proxies or attorneys) (version 2).

Undoubtedly a statement targeting such individuals may infringe their personality rights as natural persons (e.g. their dignity or reputation). But can they at the same time infringe the personality rights of the legal person they are affiliated with?

Version 1: Statements targeting corporate bodies or their members

To start, we should draw an important distinction. If a statement concerns a corporate body as such (e.g. “the management board committed fraud”), there is no doubt that the infringement also directly infringes the personality rights of the company. This is because the corporate body cannot be regarded as holding its own personality rights.

The issue is harder when the statement targets a specific member of a corporate body. Most courts recognise that a statement concerning members of the corporate authorities may infringe the reputation of the legal person.

In one case the court considered whether a publication in which an individual who was a shareholder and the CEO of a company was called “an exceptionally unreliable and irresponsible partner” constituted a statement about the company. The publication revealed the name of the company and the role performed in the company by the individual described. The court held that such criticism of the behaviour of an individual in commercial dealings infringes not only his reputation as a natural person, but also the company’s reputation. This was because the accusation referred to the activity with which the company was identified, as understood by readers (Kraków Court of Appeal judgment of 28 September 1994, case no. I ACa 464/99).

In another case the court examined whether dissemination of information that the CEO was guilty of mobbing of employees infringes the reputation of the company or only of the CEO as an individual. The court held that the statement did not concern the sphere of the CEO’s private life, but his activity as the person managing the company and referred to relations between the CEO as a manager and the company’s staff. Thus it harmed the company’s reputation (Warsaw Court of Appeal judgment of 2 February 2011, case no. I ACa 909/10).

In yet another dispute, the defendant had disseminated information that during a reception at a restaurant, members of a company’s management board had subjected the defendant to hooliganism by throwing glasses at the defendant. The context of the defendant’s statement overlapped with the busi-

ness of the company whose management board members were involved, because the defendant pursued activity competitive with the plaintiff company. The court held that allegations of this type directed against members of the company's management board, with an indication that they concern managers of a legal person's enterprise, and raised in the context of a publication concerning the competitive activity of the company and the instigator of the allegations, infringes the reputation of the legal person (Kraków Court of Appeal judgment of 22 January 2016, case no. I ACa 1599/15).

Thus, as a rule, the courts recognise that because a legal person acts through its corporate bodies, allegations against members of such bodies are allegations directed against the legal person as such. It appears that this position in the case law follows from the role and importance of the corporate bodies of a legal person. But the connection is not automatic, and a defamatory statement concerning a member of a corporate body does not necessarily infringe the reputation of the company. The judgments so far show that the courts will make a careful case-by-case analysis of the wording and context of the statement, and primarily whether or not it concerns the sphere of the individual's activity as a representative of the legal person.

Although this line of decisions appears to predominate, there are also judgments where the courts stress the separateness of the legal person as a legal entity and indicate the impossibility of merging the company's personality rights with the individuals serving on the company's authorities. They hold that the personality rights of a legal person cannot be infringed by infringing the personality rights of the members of its authorities, because they do not form part of the "substratum" of the company as an entity. "The essence of a legal person is that it is a separate legal entity, and thus infringement of the reputation of the legal person concerns the entirety of its substratum as an entity, rather than certain individuals who are only members of it" (Supreme Court of Poland judgment of 11 January 2007, case no. II CSK 392/06).

Version 2: Statements targeting other persons affiliated with the company but not members of the corporate authorities

The case law to date does not provide a clear answer to whether statements targeting other natural persons who are related to the company but are not members of the corporate authorities can infringe the personality rights of the company. There are some rulings where the courts have held that the reputation of a legal person has been infringed by statements about its employees, but these rulings have referred to the "collective" and not specific, identifiable individuals. For example, in one case the court held that a company's reputation was injured by dissemination of the allegation that "unbal-

anced people work for the company” (Świdnica Regional Court judgment of 7 April 2017, case no. IC 2237/16). In another case the court held that a suggestion of dishonest activity by unnamed commune officials infringed the personality rights of the commune, which after all functions through its employees (Supreme Court judgment of 9 May 2002, case no. II CKN 740/00). But these rulings concerned statements about staff as a collective. In individual instances, i.e. where the statements in question concern named employees, other criteria would have to be applied and the result could be different.

It appears that the possibility of infringement of the personality rights of a legal person through a statement about an individual affiliated with the company but not a member of the corporate authorities cannot be excluded *a priori*. Much will depend on the nature of the individual’s affiliation with the legal person, the perception of this affiliation in external dealings, and the wording and context of the statement.

What to consider when assessing whether a comment about an individual infringes a company’s reputation?

Under either version 1 or version 2 above, the determination of whether the reputation of the legal person has been infringed should be preceded by a thorough examination of the specific situation.

First, the nature of the individual’s connection to the legal person should be examined. The stronger the connection, the more the individual influences the legal person and the greater the probability that statements about the individual will impact the company’s reputation. In the case of members of the management board, the connection to the company is generally strong in the eyes of the average person exposed to the statement. This applies particularly to single-member bodies. The situation may look different for example in the case of members of the supervisory board, whose link with the company need not be so noticeable. While, as a rule, in the case of members of corporate bodies the connection and impact on the company appears fairly natural and dictated by the role such bodies perform, it is more difficult to find such a connection in the case of individuals who are not members of the corporate authorities. But it cannot be ruled out. The impact on an innovative biotech company of an employee who, while not a member of the board, is regarded due to his function as the “face” or “mouthpiece” of the company, may be much stronger than in the case of a member of the office support staff of the same company. The impact on the company may also differ between different shareholders of the company.

Second, the wording and context of the allegedly defamatory statement must also be considered. Only a statement targeting an individual that concerns the individual's sphere of activity as someone performing a certain function within the company could infringe the company's personality rights. A comment about the CEO of a media company will not infringe the company's reputation if the comment concerns the CEO's personal life and does not reveal his ties to the company.

Practical consequences

The issue raised here is not of merely theoretical importance. First, the answer to the question of whether a statement about individuals can infringe the reputation of a legal person has a fundamental impact on standing to bring a suit alleging defamation. Before filing a defamation action on behalf of a company alleging that its reputation was infringed as a result of a statement about a board member or shareholder, it must be carefully examined whether the company should really be a plaintiff in the case. Otherwise, the case may be dismissed.

Second, if it is determined that the company's reputation was injured as a result of statements about individuals, the argumentation should be carefully chosen, stressing the encroachment on the sphere of the company's own interests. This is particularly relevant if the company files suit after a separate case has been filed by the individual directly named in the allegedly defamatory statement. After all, the result in the two proceedings may not be the same, and each of the entities is seeking protection of entirely different interests.

Third, when alleging infringement of a company's reputation as a result of statements about individuals, we must pay attention to the wording of the claims. Although the libellous statements concerned an individual, the claim should reflect the injury to the company's reputation. Sometimes the relief sought is erroneously worded, particularly when seeking an order to publish a retraction or apology in the press. In the worst case, the way the claims are phrased could lead to denial of the claim.

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Risks and rules when cooperating with influencers

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Whisper marketing is nothing new. Customers, especially younger ones, will lean toward a purchase if the good or service is recommended by a friend or someone they trust. They treat traditional advertising with increasing distance and scepticism.

A distinctive feature of online word-of-mouth marketing appears to be the blurring of lines between, on one side, private posts and personal opinions based on the user's own beliefs or experiences with a product or service, and on the other, professional commercial communications. Consumers seeking information about goods and services are more inclined to take purchasing decisions in line with a recommendation by a favourite YouTuber, vlogger, blogger, or well-known actor or TV personality. Often they just want to buy what they see in a blogger's post or an Instagram photo. As advocate general Michal Bobek aptly pointed out in his opinion of 14 November 2017 in *Schrems v Facebook Ireland Ltd* (C-498/16), “[N]owadays there are entire professions that blur the line between private and professional connections in internet communication, in particular on social networks. Some uses might appear to be private, but are entirely commercial in nature. Social media marketing influencers, ‘prosumers’ (professional consumers), or community managers may use their personal accounts on social networks as an essential working tool.”

The reach of online marketing is vast, and the trust that customers place in (mainly) internet advisers is hugely important, as it allows producers to present a new product to various audiences in a way that doesn't come across as forced or pushy. This aspect is exploited by businesses promoting their goods or services via brand ambassadors or influencers, which can lead to abuses. This problem has been diagnosed in several European countries and in the US, where cases against influencers have been pursued by the authorities and some have reached the courts. Guidelines and recommendations have been developed to help ensure transparency in the behaviour of bloggers and protect consumers. In Poland there are no separate regulations governing the activity of influencers, or rules for cooperation between influencers and businesses. But this does not mean that such activity remains beyond the reach of the law. Authorities are beginning to keep a more vigilant eye on posts by influencers.

Is every post an ad?

A photo of cosmetics, a post lauding a bank account, or a video on preparing a meal: is every statement of this sort an advertisement? As the Supreme Court of Poland has pointed out, “Every ad is a message, but not every message is an ad” (judgment of 26 January 2006, case no. V CSK 83/05). What does this mean for the activity of influencers? Messages on various topics, such as posts, photos or videos, are after all the essence of what influencers do. Is it an advertisement, or still ordinary information?

It can be accepted in simple terms that an objective report, a concise and purely informational, non-evaluative message, may constitute “information.” But a post or vlog that praises, rates, or encourages the purchase of a given product is an ad. As the Polish courts have held, an ad is any statement directed to potential consumers, referring to goods, services, or an undertaking offering goods or services, with the aim of encouraging or inclining the addressees to purchase goods or services. Encouragement may be expressed directly, e.g. by using terms referring to the concrete actions resulting in sale of goods or services, or indirectly, by creating a suggestive image of the goods or services, or of the business entity, to a degree imparting to the addressees an urge to acquire the goods or services. The concept of advertising includes any actions by a business entity intended to create demand by increasing prospective buyers’ knowledge of products, in order to encourage them to purchase products from that business entity (*ibid.*) Essentially, advertising of goods and services is permissible so long as it is not restricted or excluded by applicable regulations (such as the ban on advertising prescription drugs).

It would be difficult to draw a clear line between information and advertising in the activity of influencers. To be on the safe side, it seems they should treat their posts as ads for products or services and ensure that they do not violate the applicable regulations and are always properly labelled.

Business entities exploiting the popularity of influencers and promoting their products via influencers should also remember that in the case of advertising cooperation, a post by an influencer should not leave any doubt as to its advertising nature.

Advertising contrary to the law exposes both the business entity and the influencer to a risk of civil liability. This may include liability under the Unfair Competition Act and the Unfair Market Practices Act.

Surreptitious advertising

Both of these acts aim to combat surreptitious advertising. The Unfair Market Practices Act employs the term “crypto advertising,” defined as the use

of editorial content in the mass media for the purpose of promoting a product, where the producer has paid for the promotion but this is not clear from content, images or sounds readily apparent to the consumer. As the Court of Competition and Consumer Protection has aptly pointed out, “The term ‘surreptitious advertising’ is more meaningful to audiences than ‘crypto advertising’” (Warsaw Regional Court judgment of 21 April 2016, case no. XVII AmA 25/15).

Surreptitious advertising occurs when a message is intended to encourage the audience to purchase a good or service, but creates a false impression in the audience that the message is impartial, neutral information about a product (*ibid.*) The following are examples of practices that could constitute surreptitious advertising:

- Broadcast or publication of an interview by a journalist with an expert who instead of presenting an objective opinion or their own position, recommends a product from a specific undertaking because of business or personal ties with the producer
- A programme in which a product is commented on by “random” passers-by or an audience instructed what to say
- Mention by characters in films or TV shows of a specific, existing product unrelated to the plot (e.g. where the star praises a specific dealership selling the type of car driven by the character) (Supreme Court judgment of 6 December 2007, case no. III SK 20/07)
- Mimicking a news programme through the use of:
 - A presenter playing the role in an ad clip of a journalist anchoring a news programme of a station known to the audience from such programmes
 - Decorating the studio to resemble the set of a news programme
 - Separating ad clips from blocks of televised ad content
 - Presenting a survey of seemingly random consumers (Warsaw Court of Appeal judgment, case no. VI ACa 543/06).

If the advertising nature of the message is hidden, and the influencer does not inform the audience of their ties to the producer of the recommended goods, it may constitute impermissible surreptitious advertising (Supreme Court judgment of 6 December 2007, case no. III SK 20/07). The intention of concealing the promotional nature of the message is of decisive importance for finding that a message constitutes surreptitious advertising. The source of the message is irrelevant (Warsaw Court of Appeal judgment, case

no. VI ACa 543/06). We will address in the second part of this article how to label a sponsored post to minimise the risk of a finding that the post is unlawful.

Misleading advertising

Misleading advertising, i.e. advertising giving the consumer a false impression of the goods or services, where the misleading information could impact the consumer's purchasing decision, is also prohibited (President of the Office of Competition and Consumer Protection, decision no. DDK 4/2009 of 6 August 2009, *Veroni Minerali Fit*; Supreme Court judgment of 25 May 2012, case no. I CSK 498/11). An assessment of possibly misleading advertising should reflect all of its elements, particularly concerning the quantity, quality, ingredients, method of manufacture, fitness for use, possible applications, repair and maintenance of the advertised goods or services, as well as the customer's behaviour. A blog post containing false information, or true information that is incomplete, unclear or ambiguous, could be found to be misleading advertising, as could a post omitting certain essential information about goods or services.

Slogans like “the best,” “the only,” “the most popular,” or the like, should also be used with caution. The courts have held that use of such claims may constitute misleading advertising, for example when the evidence does not back up the statement that a particular product is actually chosen more often than others (Poznań Court of Appeal judgment of 10 October 2005, case no. I ACa 221/05). Great care should also be exercised when using disclaimers or asterisks next to ad slogans. Such references should merely clarify the slogan or statement, without altering its meaning (for example when an ad post states that the product is the “best,” but it is explained in the fine print at the end that it is the best only in the history of this specific manufacturer, not in the history of skincare cosmetics in general (Polish Advertising Council, Advertising Ethics Committee resolution of 13 November 2012, no. ZO 127/12, in case no. B/04/12, *Nivea*)).

For a finding of unlawfulness, it is irrelevant whether the recipient actually followed up and purchased the recommended item. In short, it is up to the seller and the influencer to ensure that a sponsored message is understandable and accurate.

Selected principles for cooperating with influencers

In light of the risks associated with promoting goods or services with the help of influencers, a few principles should be borne in mind.

- **An ad is an ad—clear and express labelling of influencer's post**

An advertising post should be clearly labelled as an “ad,” a “promotional text,” or a “sponsored article” (President of the Office of Competition and Consumer Protection, decision no. RBG-61-23/14/JM of 19 December 2014, *Express Media sp. z o.o.*) The audience should know unequivocally whether they are dealing with a private post or a sponsored post.

Such labelling should appear immediately adjacent to the text (directly over or under it). It is not sufficient to place the notice “sponsored article” at the end of a post or among other labels. Similarly, it may not be recognised as adequate to identify the item as an “advertising text” in a tiny, illegible font.

- **Hashtag leaving no doubt as to the nature of the post**

Influencers use hashtags (such as #Ad, #Spon, #Advert, or #reklama) to indicate that a post or message is an ad rather a personal post.

Unlike in Germany or the UK, it has not been examined yet in Poland whether a hashtag should be in Polish to meet the condition of clearly and expressly identifying an advertising post, or it is sufficient for example to use a word or abbreviation in English.

In Germany it is insufficient to identify an advertising post with a hashtag in a foreign language (such as #advert). According to German guidelines, use of readymade labels, including hashtags offered by social media sites, may be found not to meet the requirements for clear and understandable identification of an advertising item. It is recommended to label posts with hashtags first in German, and then, optionally, with an additional hashtag in English.

In the UK, the guidelines from the Advertising Standards Authority and the Competition and Markets Authority suggest avoiding unclear hashtags such as #spon or #collab, and recommend labelling advertising posts clearly and directly in the accompanying text (over or under the item, in the lead, or the like).

English undoubtedly enjoys great popularity in Poland, but that does not mean that a hashtag such as #Ad would be readily understood by users. The audience would not necessarily recognise that this identifies an advertisement. So it’s important to ensure that the hashtag used does not generate any doubts. For the sake of clarity, it is worthwhile identifying posts in Polish and additionally in English.

- **Content of influencer’s post**

An advertising post by an influencer is designed to encourage the purchase of a given product or service. But importantly, the content of the post must not mislead users for example as to the properties of the product, ingredients or the like. It should be ascertained that in the sponsored post, the in-

fluencer provides accurate information about the product and its properties. Caution is recommended in posts comparing different products. Comparative advertising is allowed, but it must not conflict with fair practice, meaning for example that it cannot disparage competing goods or services.

- **Contract with influencer**

The principles set forth above may be embodied in specific undertakings in the contract between the seller of goods or services and the influencer. If the producer works through a marketing agency or influencers' agency, we suggest examining the agency's terms and conditions and incorporating them in the contract with the agency.

Moreover, the contract with an influencer may address such issues as dissemination of the influencer's image, the frequency of sponsored posts, the rules for use of the producer's materials (photos, product descriptions, trademarks), and dealings after the parties' cooperation ends (e.g. non-competition).

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Protection of catchphrases from films and TV shows

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Catchphrases are intriguing not only as a phenomenon of social communication. They can also develop an economic dimension if they have marketing appeal. Consumers eagerly purchase T-shirts and gadgets decorated with amusing sayings, as a medium for expressing their own personality and preferences. What counts in this situation is to be the first to register the phrase.

Quotes from films and TV shows have become popular and entered the vernacular as clever sayings. They have been incorporated into mass culture, and not just in speech. They are commonly known as catchphrases or *bons mots*.¹

Another source of catchphrases is comments by celebrities, and by hosts and guests on TV programmes. Many funny, clever or original sayings be-

1) Examples from Polish films are such quotes as: *Co ja sobie za to kupię? Waciki?*, *Mój mąż z zawodu jest dyrektorem*, *Tu Ryba, wzywam cie*, *Akwarium...* or *Bo to zła kobieta była*.

come permanently fixed in viewers' memory. Often they are used in internet memes, in ads, or as legends on T-shirts or other items. Catchphrases are typically composed of just a few words, often with a surprising twist or using wordplay. They may have originated spontaneously, unscripted, as situational humour, capturing the personality of the author. Other times they are deliberately crafted. But do catchphrases enjoy legal protection? If so, what sort of protection?

Can a catchphrase be a creative work?

Some sayings, even if comprising just a few words, may be treated as a creative work. But not every saying by a well-known figure, even if it gains huge popularity, will be protected by copyright. As funny, clever or refined as a saying may be, it must possess the features of originality and individuality. Rarely will a catchphrase display sufficient creativity by a specific person when examined in legal terms.

For example, an ad in Poland used a slight variation on the opening of the cult 1984 Polish film *Sexmission* ("Darkness, I see darkness"). The court examining a challenge to this use of the phrase admitted that it was identified with the film, but regarded it as only an idea or theme. The creative effect of the words from the script were reduced to a rhetorical figure so general that it was no more than an abstract notion, lacking the originality required for copyright protection, notwithstanding its artistic value (Kraków Court of Appeal judgment of 5 March 2004, case no. I ACa 35/04).

In denying protection, the court held that from the perspective of copyright law, a set of words must create a logical whole, a conceptual cohesion commonly linked with a single identified creator. The court also said that it is not so much the length of a set of words that qualifies it as a work, but a certain qualitative whole (brief creative work such as limericks are for example protected). The court reasoned that it is essential to exclude brief fragments of another's creative work from the operation of copyright law. Limiting the scope of copyright regulations is required not so much by conscious paraphrase as by the high likelihood that such a phrase will be used in other works of art unconsciously.

Similarly, the court allowed a short phrase from the lyrics to a pop song to be used in a beer ad, where the phrase was banal and only provided an inspiration for the creators of the ad. Overly protective treatment of creative turns of phrase would tend to create isolation of thoughts and prevent the exchange of views, leading to disappearance of creative works referring to earlier works making up part of the common cultural heritage (Warsaw Court of Appeal judgment of 14 May 2007, case no. I ACa 668/06).

Catchphrases as personality rights

It is worth considering whether catchphrases can be treated as a form of personality rights. Generally, personality rights are intangibles concerning the intellectual and physical integrity of a person and commonly regarded as significant in the society. Examples indicated by lawmakers include scientific and artistic creativity. It must be borne in mind that personality rights are an attribute of every individual, strictly tied to the person and inalienable. In this sense, this could offer an attractive form of protection for the authors of catchphrases.

The court cases cited above include reasoning suggesting a rather optimistic view of this possibility. The designated personality rights in the case of catchphrases could be the individual's renown, popularity, or creativity, in the sense of the creative process and its result, but ultimately qualification as a "creative work" within the meaning of copyright law is not necessarily required.

While admitting the possibility of turning to the legal regime for protection of personality rights in the case of catchphrases, it must be acknowledged that this is just the beginning. An analysis of the specific case will not necessarily lead to the conclusion that use of a catchphrase authored by someone else in an ad or on a gadget will infringe the personality rights of the author.

Or perhaps a trademark?

An aphorism or apt saying can be registered as a trademark (verbal, verbal-graphic or sound). Unlike the model for protection of copyright or personality rights, the right to a trademark arises upon fulfilment of procedural requirements and timely payment of applicable fees. Nonetheless, it may prove the most advantageous form for protection of rights to catchphrases.

By registering a trademark in Poland, the owner obtains an exclusive right to use the mark for commercial or professional purposes throughout the country for a period of 10 years (with the possibility of extension for further 10-year periods). This exclusivity also entitles the owner to prohibit third parties from using an expression similar to the registered mark, to the extent that it would cause a risk of confusion.

Just as not every catchphrase can be protected as a creative work or personality rights, so not every saying can be registered as a trademark. While it is not necessary for a series of words to have artistic value in order to qualify as a trademark, it should in some respect be fanciful, inventive or surprising, for example through wordplay or an unusual juxtaposition. This is required for a trademark to fulfil its basic function of distinguishing goods or services on

the market. In this respect, protection of a catchphrase as a trademark will not always be possible. Much also depends on the nature of the goods or services for which the given trademark is to be protected.

From the start, the possibility of registering sayings comprised solely of elements that have entered everyday language, or are customarily used in fair and established commercial practice, must be questioned. Such phrases, like idioms or adages, belong to the public domain. This furthers the principle that no single entity can monopolise expressions that everyone should have a right to use. Thus a simple saying from ordinary language, only used in a different context or meaning, or spoken in an original manner by an actor or public figure, may not obtain such protection.

For example, registration of the phrase *Gorąco Polecam* (which simply means “I warmly recommend”) as a trademark for foods was denied because it had poor distinctiveness when it came to identifying the origin of the goods. In other words, customers would not tie these words to a specific manufacturer but would regard it as an ordinary phrase functioning in the public domain.

However, in the case of well-known TV shows, undoubtedly there are many amusing, clever or original sayings by actors that could be registered as trademarks. Typically such sayings are associated with a specific programme or channel, enabling the trademark to serve its basic function of indicating the origin of goods or services.

It would be a separate issue to determine who owned the catchphrase—the TV channel or the author of the saying—and consequently who could seek protection of such a mark. In such instances, the production contract should provide for passage of intellectual property rights to works created during the cooperation in production and broadcast of TV shows.

Whether a trademark is registered by the TV channel or an individual, the mark must be used in commerce. But this does not mean that the owner of the mark must pursue such trade personally. Granting a licence, for example by a TV channel for production and sale of products bearing the trademark, would suffice to demonstrate commercial use of the trademark.

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Use of an individual's image in the media: A question of consent

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A person's image, in the sense of a physical picture of an individual, is subject to protection as a personality right and as personal data. The rule under Art. 81 of the Polish Copyright Act is that a person whose image is fixed must consent to dissemination of the image. Fixation of an image includes capturing of the whole or part of a person's profile, through any means—photo, film, drawing, painting, or portrait—enabling identification of the person. Dissemination of an image means any form of publication, i.e. making it accessible to an unlimited set of recipients, as in the case of media access. It is irrelevant whether use of the image is aimed at generating financial gain.

The regulations provide for a fixed catalogue of exceptions where it is not necessary to obtain consent to dissemination of a person's image. The first is a situation where a fee was paid for posing. The second is dissemination of the image of a well-known person, where the image is made in connection with the subject's performance of a public function. The third exception is dissemination of a person's image constituting only a detail in a greater whole such as an assembly, landscape, or public event.

Determining whether there is a legal basis for processing the image under personal data protection regulations is a separate issue.

Consent to dissemination of image under Copyright Law

To disseminate someone else's image in the media, it is usually necessary to obtain consent. Such consent will be required for example when an employer wants to post photos or videos of staff on Facebook or other social media, in order to promote the employer's business. Consent will also be required for example when individuals place photos on their social media profiles from conferences they participated in, where other individuals (not a crowd) are visible in the images.

Such consent may be provided in any form, i.e. orally, in writing, expressly or implicitly. According to the courts, granting of consent is not presumed. This means that the fact that consent was granted must not raise doubts. The scope of the consent, i.e. the context, manner, place or frequency of dissemination of the image, must also be easily determined. It is recognised that the scope of consent as to possible manners of use of an image is strictly

tied to the awareness of the person whose image is being used. For example, if a person consents to dissemination of their image in any manner or in any context, such consent may be regarded as invalid insofar as the person granting the consent did not realise what they were really agreeing to. The existence of consent to a given use may also be undermined if in light of the context in which the image is presented, e.g. in connection with added text, illustrations, or images of other people, the person's dignity or privacy is infringed.

To avoid the risk of litigation related to the specific use of a person's image, it is desirable to specify the circumstances in which the image will be presented (e.g. alongside text or images of others), the place and frequency of publication, as well as the purpose for dissemination of the image (e.g. advertising or promotion). This is indicated particularly when the image will appear regularly or be displayed permanently.

There is also a prevailing view that consent to dissemination of one's image may be withdrawn. The person granting consent may always withdraw consent before the image is disseminated. But withdrawal of consent does not apply to dissemination occurring prior to withdrawal of consent and not exceeding the scope of the consent. Withdrawal of consent applies to actions that were to occur in the future. This means that dissemination of the image prior to withdrawal of consent is lawful. However, dissemination of an image after withdrawal of consent will be unlawful, e.g. on a website or in social media in the days following withdrawal of consent.

There is no uniform view on whether the subject may waive the right to withdraw consent to dissemination of an image or promise not to withdraw consent for a certain time. The dominant view is that this right cannot be waived. In commercial practice, however, undertakings not to exercise the right to withdraw consent are often encountered. As a rule, merely making such an undertaking does not exclude the right to terminate it. However, if a person has obtained consent to dissemination of an image and then suffers a loss as a result of withdrawal of consent, that person may pursue damages. In particular, it cannot be excluded that refund of a portion of the fee paid for granting consent to dissemination of an image may be sought.

Payment for consent under Copyright Law and fee for posing

Consent for dissemination of an image may be given with or without payment. But paying for consent should not be confused with payment of a fee for posing.

If a person (typically a model) poses for a fee for the purpose of recording his or her image, it is not necessary to obtain the subject's separate consent

to dissemination of their image. Then the existence of consent to multiple dissemination of the image, at any time and in any territory, is presumed. If the model does not agree to a certain use of his or her image, this reservation should be made immediately. However, the absence of such a reservation does not deprive the model of the ability to seek protection against dissemination of their image in a context that infringes their dignity or honour. Regardless of receiving payment, a model may always oppose such dissemination of their image. In that case, payment of a fee for posing does not exclude the unlawfulness of such use of their image.

Payment of a fee for posing is thus an exception from the obligation to obtain consent to dissemination of an image. As a rule, it is also not necessary to specify the circumstances in which the image may be disseminated. Nonetheless, defining the boundary between a situation of paid posing and granting consent to dissemination of an image may present difficulties. For this reason, to avoid doubts, it is worthwhile specifying in a modelling contract, as in an agreement consenting to dissemination of an image, the context and manner of dissemination of the image.

Consent to processing of image under GDPR

Given the broad definition of personal data and processing of personal data, there is no doubt that dissemination of a person's image in the media should be regarded as processing of personal data within the meaning of the EU's General Data Protection Regulation (2016/679).

It should first be pointed out that not every image will fall within a specially protected category of personal data under Art. 9 GDPR. Specially protected data may be processed only in strictly defined instances. A facial image constitutes specially protected biometric data only if it is processed in a special technical manner.

The mere publication of an image in the media, e.g. on social media, will generally not fall within this special method of processing. Thus only the situation of processing of "ordinary" personal data arises, meaning that all the basic rules under the GDPR will apply to processing of the image. This firstly means the requirement for the lawfulness of the processing, i.e. having a legal basis for processing the personal data for a specific purpose. In most instances of processing of an image in the media, this will be the consent of the person whose image is used. But cases where an image is processed on some other basis under Art. 6(1) GDPR should not be ruled out, for example for the purpose of legitimate interests when the person whose image is processed has received a fee for this purpose. It is thus crucial to determine the legal basis for the processing, and then, if the processing is conducted

on the basis of the subject's consent, to ensure that the consent meets the conditions sets forth in Art. 7 GDPR.

This means that a request for consent for purposes of the GDPR must be clearly distinguished from other issues, such as requesting consent pursuant to the Copyright Law. Moreover, a request for consent for GDPR purposes must be presented in an understandable and easily accessible form, in clear and simple language. Consent must also be voluntary, and thus it is impermissible, for example, to use default ticking of checkboxes with request for consent, deeming consent to be given when the subject whose image is to be used did not actually tick the boxes.

Significantly, the request for consent for GDPR purposes should identify at least the controller of the personal data in the form of the image and the purposes for processing the image.

If the request does not meet these conditions, the statement by the subject whose image is to be used is not binding and does not constitute a basis for processing of personal data under the GDPR. In such case, processing of data in the form of the image may be held to be unlawful and result in imposition of sanctions on the entity using the image.

It is also important that consent may be withdrawn at any time by the person who has given it, and withdrawing consent must be just as easy as giving consent. Processing made before withdrawal of consent will remain lawful. However, it is vital to cease processing the image immediately after consent is withdrawn. To this end, it is necessary to implement technical and organisational measures in the data controller's organisation ensuring that processing of personal data is halted in such situations. Processing of data after withdrawal of consent, particularly in the media, creates a risk that the data subject will file a complaint with the president of the Personal Data Protection Office, which may in turn lead to an inspection of the data controller by the regulator.

Significantly, the Court of Justice of the European Union has held that recording and subsequently posting online falls within the concept of processing of personal data (C-345/17 *Buivids*, judgment of 14 February 2019). For purposes of the GDPR, it is irrelevant who was recorded, for example if it was a policeman recorded performing his official duties—such use of an image should also be treated as processing of personal data.

Summary

Today access to the media has a fundamentally different meaning that it had a couple of decades ago. We are no longer just passive viewers or readers,

but we jointly contribute to the media by uploading photos or videos. If we post material showing another identifiable person, who is not a public figure or just a face in the crowd, we must obtain consent to dissemination and processing of the person's image. Lack of consent may lead to liability for infringing personality rights or the GDPR. Significantly, the rights to one's image cannot be waived, and thus it is not possible to obtain consent to practically eternal exploitation of another person's image and in every conceivable context. It does appear permissible to temporarily agree not to exercise this right, i.e. not to withdraw consent granted for use of one's image. But in that situation as well, it is still essential to define as precisely as possible the manner and context of use of the image, to avoid overstepping the bounds of the consent.

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Using the image of a public figure in memes: Where is the boundary?

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Internet users don't need to be told what a meme is. But for the sake of order, according to Merriam-Webster, a meme in this sense is defined as "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." Memes have found a home in virtual reality, not only in sites especially devoted to memes but also in social media and news sites, where memes are often used to illustrate comments on current political events.

The refinement of memes can vary, as can their topics. Some use wordplay, a surprising juxtaposition, or other humorous effect, while others are crude or downright vulgar. Some touch on social problems or current political events, while others make light of human foibles or ridicule the subjects.

The authors of many memes use images of well-known people: politicians, actors, singers, athletes, or others whose activity is publicly known and commented on. Some of these persons, due to their social position, the profession they practise, the activity they perform, or simply their desire for a media presence, themselves condone public comment on their lives. In this

situation, it is easy to cross the boundary of what is permissible and encroach upon the sphere of legally protected interests. It can also be difficult to distinguish between an allowable joke and an insult. In the case of memes, these boundaries are set primarily by the regulations protecting personal interests, in particular image and reputation.

Image as a legally protected interest

As stated in the case law, “Image means the perceptible, physical characteristics of a person making up his or her appearance and enabling identification of the given person among other persons” (Kraków Court of Appeal judgment of 19 April 2016, case no. I ACa 1826/15). It is recognised that image means not only a person’s anatomy, but also other identifying elements such as characteristic glasses, hairstyle, clothing or accessories. It can even be a characteristic manner of behaving, a profile or specific shadow. It’s not hard to identify from the outlines of their profile alone such figures as Charlie Chaplin (or the character of the Little Tramp created by the actor), Elvis Presley, or, say, Donald Trump. But an image must always enable recognition of a person.

Infringement of an image occurs through its dissemination. Under Art. 81 of the Polish Copyright Act, use of the image of a public figure is legal if:

- The person is commonly known, and
- The image is made in connection with performance of public functions by the person, in particular political, social or professional functions.

The act does not include a definition of a “commonly known person,” but this gap is filled by extensive case law. According to the Supreme Court of Poland, this group includes “persons who expressly or implicitly consent to the public release of information about their lives” (judgment of 20 July 2017, case no. I CSK 134/07). As the court stressed, these are not just actors, performers or politicians, but also persons known from their pursuit of other activity, such as commercial or social. Thus this does not refer only to persons holding public office, as the key criterion for this determination is their acquired level of recognition. As indicated in the case law, “A certain group of persons may be assumed to fall within the set of commonly known persons for purpose of the copyright regulations either due to the office they hold or the profession they practise (athletes, actors, journalists), particularly when the person practising that profession gains popularity” (Poznań Court of Appeal judgment of 2 September 2010, case no. I ACa 620/10). These can be people who consciously decide to live their lives in the spotlight of public interest, or ordinary people who have become recognisable for example as participants in prominent events or perpetrators of serious offences.

In evaluating an alleged infringement, it can be difficult to determine whether the image was made in connection with performance of a public function. There is no doubt that this is the case for example when the prime minister is photographed delivering a public address or during an official visit. But should a representation of the prime minister be treated the same when it is made in a private situation, for example on a bike ride with his family? In this case, the courts tend to expand the scope of permissible intervention in the private lives of public figures. As the Polish Constitutional Tribunal has held, “Protection of the sphere of private life is subject to certain limitations justified by a ‘legitimate interest’” (judgment of 21 October 1998, case no. K 24/98, *OTK* 1998 no. 6 item 97). Public figures must accept the interest of public opinion, also encroaching on private life. But as the courts have held, the boundary is the sphere of intimate life, which is violated when paparazzi take pictures from hiding.

The legal literature and case law also indicate a further condition, not expressly stated in the act, which is the purpose of the dissemination. An image may be disseminated only with the aim of relating public functions performed by the person, if this can be relevant for evaluating the person as a public figure. In this respect, it may be doubtful to what degree this defined aim of dissemination can justify the publication of an image made in a private situation unrelated to the person’s public function. As the Supreme Court has held, “There is no doubt that with respect to persons conducting public activity, intrusion on the sphere of privacy is more broadly justified than in relation to persons not belonging to this category. ... The scope of the right to freedom of expression must be weighed taking into consideration the traditions and sense of tolerance in the given society” (judgment of 11 October 2001, case no. II CKN 559/99). This does not change the fact that even with respect to persons conducting public activity, interference in the sphere of privacy may occur only exceptionally, for example if there is a connection between the person’s private behaviour and public activity.

Examples from the courts

Even before the era of internet memes, in a case involving a newspaper publication of a photomontage comparing the mayor of Siedlce and Charlie Chaplin, the Supreme Court indicated the permissibility of disseminating an image without the permission of the person presented only when the conditions discussed above are met (judgment of 27 January 2006, case no. III CSK 89/05). In that case the court held that the first of these conditions was met, because serving as the mayor of a city makes one a public figure. However, the court found that the second condition was not met, because the mayor’s image used in the newspaper was not made in connection with

the plaintiff's performance of a public function. The court did not explain its reasoning for that finding. But the court of appeal in the same case had found that the aim of the publication was to ridicule the mayor, based on the photomontage and the accompanying text. As the court of appeal explained, "Neither the picture nor the content of the article relates to decisions taken by the plaintiff as mayor of Siedlce, and thus it cannot be assumed that the point was exposure of erroneous decisions, or permissible criticism."

In another ruling, the Supreme Court resolved a dispute between a popular TV actress, Anna M., and the publisher of the newspaper F, which had published an article about her holiday visit to Egypt illustrated with photos of the actress topless. The court agreed that the plaintiff's pursuit of the acting profession and her status as a celebrity meant that she qualified as a public figure. But the court pointed out that in cases of this type, a link must be demonstrated between the person's public activity and the published information, or information of a private character. As the court held, "There must be a connection between the behaviour of the person in the public sphere and her behaviour in the private square; ... disclosure of such information or image must further the protection of a specific, legitimate social interest, which cannot be identified with the mere need to satisfy the curiosity of a certain group of people" (judgment of 24 January 2008, case no. I CSK 341/07).

The Supreme Court has also emphasised that the decision to publish a person's image must always be preceded by an analysis of the circumstances in which the image was captured and the context in which it is published. As the court stated, "Each case requires a thorough analysis of whether, in light of the overall circumstances of the matter, including the informational value conveyed by the photograph, its publication was permissible" (judgment of 10 January 2017, case no. V CSK 51/17).

Memes and protection of image

The application of these criteria to assessment of internet memes using the image of a public figure does not raise serious doubts. Take for example the image of the prime minister on a bicycle trip with his family, which he posted on his official account on social media. The whole scene soon became the subject of mordant memes, pointing out that despite the heat wave, the prime minister was peddling in long trousers, and neither he nor the rest of his family seemed to have broken a sweat. The memes thus suggested that the bike ride was staged for the purpose of the photograph. The memes also pointed out that none of the cyclists was wearing a helmet, and sarcastically claimed that the aim of the trip was to verify that the forest was suitable for

logging, to the delight of State Forests, overseen by the environment minister.

The first test of the legality of such memes is to determine whether the subject is a commonly known person. The prime minister undoubtedly qualified as such, as he is a politician holding public office. Then it should be weighed whether the boundary of the sphere of life which a public figure consents to share with others was crossed. The photo did appear to be taken outside of a situation where the prime minister was performing a public role, during his leisure time. Nonetheless, by posting the photo on his official social media account, the prime minister acknowledged that presenting himself along with his family was warranted from the point of view of the public office he holds. The attitude of the prime minister presenting his ties to his family would undoubtedly be relevant to at least some voters, as it could warm his image and build up public trust in him. The aim of dissemination of the image then needs to be evaluated. And here is where the greatest doubt arises. It could prove difficult for the court to determine whether such an image may be used to show that the scene was staged for the purpose of burnishing the prime minister's image, to draw attention to the need to wear bike helmets, or to manifest criticism against thoughtless logging of the forest.

Other means of protection

The right to one's image is obviously not the only thing at issue in the discussion of the legality of memes using illustrations of well-known persons. The content of the meme could also justify an allegation of infringement of other personal interests as well, such as the reputation of the person depicted. A crude or vulgar text under the person's image might be falsely attributed to the person pictured. This could create or enhance a false picture of the person as someone unrefined, insensitive, crude, unscrupulous or vulgar. Inclusion of the person's image in certain contexts could create an impression that he or she has socially unacceptable traits, such as alcoholism or susceptibility to corruption. But if by his own behaviour the subject provides grounds for such an unfavourable portrayal, the boundary between what is permissible and what is not can be hard to draw.

Liability for publication of a meme based on the Press Law must also be remembered. Essentially this includes the rule that liability for a violation of law caused by publication of press material is borne by the author, the editor, or other person who caused the material to be published. This does not exclude the liability of the publisher, however. We should also mention Art. 14(6) of the Press Law, which provides that information or data concerning the private sphere of life cannot be published without the consent

of the subject, unless it is directly connected with the person's public activity. There is also a separate provision in the Electronic Services Act governing the liability of portals allowing the publication of memes. In this respect, it should be found under Art. 14(1) of that act that the portal will not be liable if it does not know of the unlawful nature of the meme, and blocks access to the content when it receives official notice or obtains reliable information about its unlawful nature.

More drastic means are provided under the criminal law. Criminal liability can be imposed through means for protection of personal interests. In particular, this concerns prosecution at the request of the injured party for the offence of defamation (Criminal Code Art. 212) or insult (Art. 216). This lesson was learned by the author of a meme presenting a sportsman and candidate for parliament in a photo taken during a visit to the Presidential Palace, linked with the caption "New fashion in the 21st century: The hogs are still hungry but the trough is narrow." The court sentenced the author of the meme to a fine for criminal libel (Criminal Code Art. 212). In the court's view, the meme "served a stigmatising function and cast into doubt the integrity of D.K. and his intentions in acting on behalf of society, which could discredit him in the eyes of the persons for whom he acted" (Warsaw Court of Appeal judgment of 20 October 2015, case no. VI Ka 700/15). With respect to the use of a person's image, the application of other provisions of criminal law also cannot be excluded, such as Criminal Code Art. 191a, which provides for criminal responsibility for dissemination of an image of a naked person without his or her consent.

Summary

Creators of memes must remember that they do not function in a vacuum, and the internet is not a world where everyone is anonymous and traditional rules of decency do not apply. That someone by his own words or deeds gives cause for jokes or biting commentary does not mean that everything is permitted and authors of memes can act with impunity. Everything has its limits, and the law provides tools for enforcing social norms. It must also be remembered that under certain circumstances, liability may rest not only on the author, but also on other persons. Under the Press Law, this could be the editor or other person responsible for publication of such a meme, particularly the publisher. The operator of a website may also be held liable.

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Dissemination of a person's image as a detail in a larger whole: Theory and practice

PAWEŁ CZAJKOWSKI

Dissemination of people's images is an essential ingredient of the media, both traditional and new. In an audiovisual work, the absence of human images strips the scene of human characters, and without them the media impact is lost. Under the applicable regulations, as a rule there is a duty to obtain the permission of the person whose image is presented, but consent is not required when the image of an individual constitutes only a detail of a larger whole such as a gathering, landscape, or public event. This distinction seems understandable and even intuitive, but how should it be applied in practice? The answer is not so obvious, and requires more extensive analysis.

What is a person's image?

The nature of an image as a detail in a broader whole cannot be determined without understanding what an image is. Although this notion is crucial to the visual arts, the current regulations in Poland do not contain a statutory definition of an image. Thus if we are to discuss this issue, we need to examine judicial decisions and the legal literature.

According to a Polish dictionary, "image" (*wizjerunek*) means "someone's likeness in a drawing, painting, photograph or the like," as well as "the manner in which a given person or thing is perceived and presented." A more specific definition is provided by legal scholars, who state that an image is "an intangible work which through artistic means presents the recognisable likeness of a given person" (J. Barta & R. Markiewicz, *Commentary on the Copyright Act*, Warsaw 1995, p. 629). An image is generally referred to in the legal literature as a personal good comprising "features enabling a given person to be distinguished or characterised" (K. Święcka & J. Święcki, *Copyright and related rights: Commentary*, Warsaw 2004, p. 140). It is most often associated with the external features of a person, particularly his or her face, but according to some scholars it should not be restricted only to a person's anatomical features (J. Sieńczyło-Chłabicz, "Object, subject, and the nature of the right to image," *PUG* 2003 no. 8, p. 20).

Image comprises the totality of external features that in the eyes of the audience characterise the given person. This includes both natural features

such as the shape and colour of the eyes, as well as elements of dress or ornament (e.g. glasses, hairstyle, makeup, clothing and accessories) which, separate from or in combination with other features, are characteristic for a given person. Significantly, some commentators expand the notion of image to include “voice, and sometimes even the use of characteristic phrases, or a distinct manner of moving, behaviour or gesture” (J. Barta & R. Markiewicz (eds), *The media and personal interests*, Wolters Kluwer Polska, Warsaw 2009, p. 99).

The definitions of “image” indicated above are consistent with the rulings of the general courts in Poland, under which image means “the perceptible, physical characteristics of a person making up his or her appearance and enabling identification of the given person among other persons, but also the specific fixing of the physical picture of a person capable of duplication and dissemination” (Kraków Court of Appeal judgment of 19 April 2016, case no. I ACa 1826/15).

The Supreme Court of Poland has held that this framework may also include additional elements associated with the practice of a profession, such as clothing, ornament, way of moving, or other identifying elements such as glasses or hairstyle, or even the specific lines of a person’s profile or characteristic shadow (judgment of 20 May 2014, case no. II CK 330/03).

The line of judicial decisions is consistent with the views of legal scholars who have elaborated on the concept of “image,” and for the most part also consistent with the common understanding of this notion.

Requirement of recognisability

A basic criterion for regarding the presentation of a person as an image is that it is recognisable to third parties.

For the courts to find that the requirement of recognisability has been met, the following circumstances are decisive:

- The person should be recognisable based on features objectively regarded as characteristic, such as face, certain anatomical features, the overall physical picture or a characteristic fragment.
- The characteristic features presented enable recognition and identification of a specific person, and do not merely evoke an association with a specific person or an imagined picture of the person.
- The person portrayed should be recognisable not only for a small circle of family and friends, but also for third parties in an environment where the person is often present, such as neighbours.

Only when the requirement of recognisability is met can a person's image be infringed.

Image as a detail in a larger whole

Under the Copyright Act, dissemination of an image requires the permission of the person presented.

One exception where permission is not required is dissemination of an image of a person constituting only a detail in a larger whole, such as a gathering, landscape or public event (Copyright Act Art. 81(2)(2)).

Significantly, the act does not establish a fixed list of circumstances releasing users from the requirement to obtain consent to dissemination of an image, as indicated by the use in the act of the phrase "such as." The "whole" referred to in this provision may thus refer to protesters, a group of sports fans sitting in the bleachers, a peloton of cyclists, or the audience at a lecture. The image of a person taking part in such collective events will not be subject to protection and such persons will not be able to obtain an order barring dissemination of the image.

While it is undoubted that an image constituting a detail of a larger whole is not entitled to protection, and this can refer to any form of collective, it is not clear at what point an image forms a detail of a whole, that is, when it ceases to be one of many individual images.

When is an image a detail in a larger whole?

Given the variety of situations in which images are captured, and the various forms presenting them, the number of figures whose images are sufficient to make up a totality which can be disseminated without the consent of the individuals cannot be stated with any exactness.

The courts have developed a criterion in this respect in the relationship between the image of the individual seeking protection and the remaining elements of the scene in which the individual's image is captured. Under the commonly accepted position, dissemination of an image does not require permission if it is only an incidental or auxiliary element of the presented whole. In other words, as long as the image only makes up part of the "background" for the scene, dissemination of the image will not require permission.

To define as precisely as possible the significance of the image for the analysed presentation, a test is conducted under which use of an image does not require permission only if removal of the figure would not alter the subject or character of the presentation. But if the dominant frame is the

image of a specific person (for example if the photographer focuses on one person, highlighting that person), dissemination requires the permission of the person presented in the frame (Kraków Court of Appeal judgment of 19 December 2001, case no. ACa 957/01).

In particular judgments, the following have been held to be an image making up an element of a larger whole:

- A shot of a waiter in the “background” of film footage from a restaurant—but when the waiter is captured standing and “showcased” for about 10 seconds, becoming for that time an essential figure in the footage, the film no longer falls within this exception (Warsaw Court of Appeal judgment of 15 September 2016, case no. I ACa 1559/15)
- A photo of participants in a mass or pilgrimage (Katowice Court of Appeal judgment of 30 September 2013, case no. II AKa 201/13)
- A class photo (Wrocław Court of Appeal judgment of 30 January 2014, case no. I ACa 1452/13).

By contrast, an image that according to the court cannot be disseminated without permission is a shot in which the photographer selects a specific figure from the crowd for framing, enlargement, closeup or the like. That no longer falls within the exception (Białystok Court of Appeal judgment of 14 November 2012, case no. I ACa 543/12).

Collective image

An image auxiliary to the whole should be contrasted with a “collective image.” A collective image captures the images of a group of persons, perceived not as a new entity but only as the effect of capturing them in one medium at the same time and place. In other words, a collective presents more than one image, but the images function separately rather than making up a larger whole.

The notion of a collective image does not function in a statutory sense, but can be encountered in practice. Examples given in the legal literature of a collective image include the couple in a wedding portrait, or a photo of members of a music group or sports medallists on the podium. Such examples of the subjects of a collective image are uncontroversial, as each of the persons is an essential element of the scene or event, without whom it would be a different scene or event. In such cases it is necessary to obtain the consent of all the persons depicted to disseminate their image.

Practical evaluation of image as a detail in a larger whole

How should the positions discussed above from judicial decisions and the legal literature be interpreted in practice?

Under the developed practice, an image is considered auxiliary or incidental if removing or omitting the image would not affect the nature and substance of the material containing the image. Using the example of a photo of a group of pilgrims greeting the Pope as he passes through the streets of the city, or spectators seated in a section of the stadium during a football match, it should be recognised that removal of the image of a single person from either of these groups would not alter the meaning of the picture. In such case, a single image does not affect the nature or content of the material. Thus dissemination of such pictures with numerous images of persons gathered at a single place as a collective does not require consent.

The opposite result should follow in the case of a picture capturing a passer-by in the foreground, against a background of a group of other persons walking along, for example with the aim of depicting the dress or fashions of the inhabitants of the region. The image of such a passer-by, occupying most of the frame, should not be treated as an auxiliary element without which the picture would carry the same character and tone.

When considering in each instance whether a given image constitutes a detail in a larger whole, and thus whether dissemination of the images requires the consent of the subjects presented, it should be borne in mind that the exception addressed here was included in the Copyright Act to further the freedom of press reporting. Thus any doubts as to the activity of the media should be interpreted with a view to the purpose of the publication and how the picture in question would be received by the average viewer.

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Media law specialisation

In the media law specialisation, part of the Intellectual Property practice at Wardyński & Partners, we provide comprehensive legal advice to press and internet publishers and radio and television broadcasters.

We support clients operating on the media market in combatting infringements of intellectual property rights, acts of unfair competition, defamation, and infringement of personality rights.

We assist clients in managing copyright and provide ongoing legal advice to electronic media and radio and TV broadcasters. We represent our clients in proceedings before the National Broadcasting Council (KRRiTV) and the president of the Office of Electronic Communications (UKE), including in concession proceedings and matters connected with radio frequencies.

We review broadcasting operations for compliance with applicable regulations, including the Broadcasting Act, providing ongoing advice on “antenna compliance.”

We negotiate, draft and review contracts involving the operation of media entities, such as copyright transfer agreements, licence agreements, contracts for exploitation of works, and contracts for creation of content.

We advise and provide opinions at the stage of drafting of press articles, investigation and reporting. We verify the scope of information collected by journalists and analyse ready content for legal risks connected with publication. We also offer support on the potential consequences flowing from publication of press materials.

We evaluate and prepare responses to pre-litigation demands, claims, and requests for corrections in press reports. We also offer comprehensive advice on matters related to access to public information.

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