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Natural Person's Posthumous Image Protection and the Scope of Heir Discretion



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Abstract

While a person's legal capacity ends up with death, his or her honor, dignity and privacy could continue to be protected. The emerging computer technologies expand the scope of human image manipulation by offering technical capabilities for a full-fledged reproduction of human face with its characteristic expression and movements. The difficulty is thus to delineate the virtual person and the real one for protecting both private and public interests. The article concludes that children, spouse and other heirs should not have the right to allow commercial use of the person's image unless consented by him in his lifetime. It is argued the public interest to identify a natural person and separate him from a virtual double is to be protected. It is further demonstrated the likelihood of confusion grows with the progress of digital technologies, only to make a case for better protection of private interest that involves legitimate claims by family members to clear the decedent of any association with what he or she did not do. The interest of the third parties including consumers is likewise to be kept in mind, with a disclaimer to be given of someone's image reproduced through the use of digital technologies in a movie or other complex product: since the offered digital product will not carry anything new, consumers have the right to know creative outcome from an average digital clone.



Keywords

rights; image; posthumous right protection; inheritance; heirs; autonomy of will.

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Background

Digital technologies largely expand the scope of human image manipulation by offering technical capabilities for full-fledged reproduction of human face with its characteristic expression and movements as demonstrated by yet sporadic uses of movie star images.

One memorable example is a recent dispute around Peter Cushing's image in the Star Wars saga. It has emerged against the backdrop of the following circumstances.

Peter Cushing, a famed British actor behind a number of major roles in the British sci-fi movies, was also known for his role in the Star Wars. Peter Cushing has died in 1994 at 81. In 2016, the Walt Disney Company has produced a sequel to the Star Wars, with Cushing's computer-generated image superposed over that of a replacement actor. The company referred to a contract once signed with Cushing where he consented to the use of his image in the Star Wars franchise. In addition, Walt Disney claimed to have obtained the heirs' consent for this purpose.

In 2024 Peter Cushing's friend has sued the Walt Disney Company for damages contending that in 1993 he have signed a contract with the actor whereby he undertook to protect Cushing's images and character as a whole and arguing on this basis that the use of Cushing's computer-generated image required his (plaintiff's) approval¹.

While the dispute is still to be examined by court on its merits, the very fact of its existence shows the movie industry has long and steadily used computer-generated images or voices of movie stars who, by far not always up against such practice, may be interested in a trustee for control of fair use when consenting to it on one or another terms.

¹ See: Peter Cushing vs Star Wars: Disney's legal battle over dead actor's image explained. Available at: URL.: https://inews.co.uk/news/peter-cushing-star-wars-disney-legal-battle-3273068?srltid=AfmBOoodV_Gs0VDTcE9e0cq0mjDjLnslPl_FjjW7rDpPTT7ilxPmZCDB (accessed: 04.04.2025)

Thus, while this article was in the making, the web was abuzz with the news that “neural networks will reproduce actor Viacheslav Tikhonov in his famous role as Stirlitz”². A film where the image of one more dead notable actor, Vladislav Galkin, was reproduced in an eight-minute footage already went into general release³.

The process of digitization of our history (including that of cinema) seems only to gain momentum.

Thus, the problem is to separate the virtual person from the real one for the purpose of protecting both the private and the public interest.

1. Persons Authorized to Apply for Protection

While a person's legal capacity ends up with death, his or her honor, dignity and privacy can continue to be protected.

Thus, pursuant to para 1 (2), Article 152 of the Civil Code of Russia (hereinafter CCR), the parties interested may apply for protection of a person's honor, dignity or business reputation even after his or her death.

There is a remarkable difference in the range of those authorized to apply for protection: Article 152 of CCR mentions “interested parties” with regard to honor, dignity and business reputation; Article 152.1 of it refers to children and surviving spouse (or, where none, parents) for consent to use the image; para 5, Article 152.2 allows children, parents, surviving spouse to apply for protection of the decedent's privacy; and para 9, Article 1483 mentions that heirs of a famous person may consent to the use of his or her name, pseudonym or picture in a trademark.

E.A. Khodyreva believes that “differences in the range of those authorized to apply are justified and underpinned by the essence of a particular personal right” [Khodyreva E.A., 2024: 34]. One can accept this view only partially: since the persons in question will protect the decedent's non-property valuables rather than their own right (as is explicit from para 2, Article 150 of CCR), it is not clear why, for example, the

² Available at: URL.: <https://rg.ru/2024/11/04/nejroseti-vernut-v-zhizni-viacheslava-tihonova-dlia-rol-i-shtirlica.html>; <https://rg.ru/2024/11/05/doch-viacheslava-tihonova-prokommuntirovala-novost-o-dipfejke-shtirlica.html> (accessed: 06.11.2024)

³ Available at: URL.: <https://daily.afisha.ru/news/62890-vladislava-galkina-ozhivili-s-pomoschyu-dipfeyka-radi-rol-i-v-novom-diversante/> (accessed: 06.11.2024)

decedent's brother or sister, while able to claim refutation of anything that will discredit his honor or dignity, cannot prevent the dissemination of privacy-related information. Apparently, a better solution would be to entitle all interested parties to apply for protection, as was done in Article 152 of CCR, with the nature of interest to be determined by court in examining the specific dispute.

As follows from para 2, Article 150, the protection applies to the decedent's personal non-property valuables. Moreover, para 2, Article 150 assumes that "the decedent's non-property valuables can be protected by other individuals only where protection is explicitly envisioned by law". Therefore, the law provides for *numerus clausus* of situations when personal non-property valuables "outlive" their holder.

2. Rights to be Protected

What right will those designated by law protect?

To answer this question, one needs to identify what is to be analyzed in the first place: protective relationships alone or also regulatory ones? Pursuant to para 9, Article 1483 of CCR, a trademark carrying the name, pseudonym or picture of a person of national or international renown as of the day of its registration could be registered upon consent of his or her heirs. Article 152.1 assumes possible use of a decedent's image upon consent of his children or surviving spouse, or, where none, that of parents. This will obviously give rise to the regulatory relationship whereby persons designated by law may allow to use someone's image or name. However, he who may allow to use a thing may claim to terminate what extends beyond the afforded right. Thus, despite the emergence of regulatory relationships as specified by the legislator in para 9, Article 1483 and Article 152.1, there is also room for protective obligation.

Articles 152 and 152.2 of CCR deal with protective obligation alone; but one can recall numerous cases of seeking consent from children or grandchildren of a decedent to publish his diary, something that would otherwise qualify as violation of privacy.

Thus, both regulatory and protective relationships can be adopted as subjects of analysis. Artificially separating them would distort the course of this study from the onset.

As for what those designated by law (heirs, children, other interested parties) exactly protect, three answers are possible. Firstly, they

may protect a right of their own they have by virtue of law. This opinion is shared by E.P. Gavrilov who notes that “a decedent’s personal non-property rights and valuables, albeit not heritable, could be protected by certain individuals. They thus *become specifically entitled to protect the said rights and valuables* (emphasis added. — E.G.)” [Gavrilov E.P., 2015: 24].

According to the second view, protection applies to the right passed from the decedent to those designated by law. In sharing this view, E.A. Khodyreva notes those listed in Article 152.1 of CCR enjoy the right passed from the decedent [Khodyreva E.A., 2024: 36].

Lastly, protection may apply to a legitimate interest. While such view was not advanced in literature before in respect of Articles 152, 152.1 and 152.2, it was not denied either that there might be a legitimate interest not yet transformed into any subjective right.

Thus, D.M. Chechot wrote: “One has either to prove that no law-protected interest exists apart from subjective rights and that the concept of a “law-protected interest” employed in numerous regulations is wrong; or, accepting this concept as legitimate, to explore it both as a general theory and across sectoral disciplines” [Chechot D.M., 1968: 43]. S.N. Bratus believed that an interest “is not itself a subjective right but its prerequisite and purpose” [Bratus S.N., 1950: 20]. V.P. Gribanov wrote that “an interest is also a need embodied in conscious motivation manifested in real life as a desire, intention and strife, only to finally take the form of relations between individuals as they act” [Gribanov V.P., 2000: 240].

The question is whose interest we are dealing with: obviously, not that of the decedent who is no more. Thus, it may be a private interest of a heir (relative or other interested party) or a public interest. In fact, one does not exclude the other: a plaintiff applying for protection of personal non-property valuables of the decedent may pursue his own private interest which is to protect the reputation of his close relative. A public interest of obtaining true, undistorted information about recent events is protected indirectly. This interest is to remember a person by what he did rather than what has emerged as a result of commercial or other posthumous use of his personality.

3. Comparative Legal Brief: What is Protected and Why

Since reputation (including posthumous) needs to be protected irrespective of time and geography, the following comparative legal brief appears pertinent.

In the German civil jurisprudence interesting arguments were advanced in the Mephisto case (BGH, 20.03.1968 — I ZR 44/66)⁴ in the following situation: an author published a novel about a theater director gradually ceding to the pressures of the Nazi government, only to back down on his moral principles. Believing that the main protagonist was an allusion to his deceased father, the plaintiff went to court to prohibit the sales of the book as discrediting the decedent's honor and dignity on the argument that some of the described events were absolute fiction. Curiously, the defendant did not deny the association between the main protagonist and the plaintiff's father: despite the changed name, readers could follow through a chain of events to arrive at the same conclusion. In satisfying the claim, the court argued that death terminated all processes affected a person's reputation in his lifetime, with a decedent's personal rights to be protected differently from those of the living. The difference assumes that, in balancing someone's personal right with contrary interests of others, we neither should nor could take into account the right holder's sentiments. Meanwhile, it is generally accepted a person will leave behind not only physical things, but also good or bad memories — an image made up of how the person lived and what he or she did. While still alive, a person can oppose falsification of what he or she does. There is no reason why this protection (to make sure that one's acts are not falsified) should cease after someone affected by misinformation is dead⁵.

Thus, under the logic of this ruling, protection purports to make sure that the person is perceived by what he or she really did and that personal information is correct.

4. Details of Relationships to be Regulated

It can be assumed personal non-property rights such as those associated with a picture or image are no longer important after the identified person's death⁶. However, this assumption is not as good as it might seem. A historical personality is remembered by his deeds and merits: it is after death a person can become vulnerable to the maximum extent, especially since modern technologies allow to reproduce the voice,

⁴ Available at: URL.: https://www.prinz.law/urteile/bgh/I_ZR__44-66 (accessed: 06.04.2025)

⁵ Available at: URL.: https://www.prinz.law/urteile/bgh/I_ZR__44-66 (accessed: 13.11.2024)

⁶ This option was proposed, for example, by the party registered the Kalashnikov trademark in the eponymous lawsuit.

facial expression, appearance and characteristic language of a famous person. In this case, identifiers can link all associations with the decedent in the public mind to an event, entity or product —something that he has nothing to do with. One can recall a number of disputes⁷ around a famous person's memories where it was discussed whether a posthumous product or event could or could not be associated with someone's name, image, pseudonym etc.

Article 150 of CCR allows to protect personal non-property rights following the holder's death thus enabling interested parties to bring action to prohibit what violates such rights. Meanwhile, this raises doctrinal questions on the subject and extent of protection.

5. A Proprietary Part of a Non-Property Right?

In tracing the evolution of legal practice, commentators of the German civil law find that personal rights will exhibit a physical and a non-physical component, of which the former is heritable and the latter ceases to exist after death [Rixecker R., 2021: 270].

This approach is based on actress and singer Marlene Dietrich's case where a famous episode involving Marlene Dietrich was reproduced in an advertisement. Heirs demanded a compensation from the defendant who argued that the episode involved a different actress. The court has satisfied the claim in noting that a person's recognizability was of major importance and, once the double was perceived as a famous actor, it could be argued the latter's image was used in the advertisement⁸.

While this delineation is not acceptable as applied to the Russian law, it is quite artificial, as was convincingly argued by C. Gomille [Gomille C., 2021: 297], even for German law. Instead of answering the existing questions, this delineation will create more ones; it is thus proposed to adhere to the concept of personal non-property valuables adopted in the national civil jurisprudence where they are characterized by (a) close association with the person in question and non-alienability, and (b) by non-property nature [Maleina M.N., 1997: 5–8].

⁷ At the time of writing, the most remarkable examples were disputes about the Doctor Liza pseudonym, Gagarin and Chkalov trademarks, V. Galkin's image reproduced by a neural network and used in a movie, V. Vysotsky's voice reproduced by a neural network etc.

⁸ See: German High Court ruling, 01.12.1999 — I ZR 49/97. Available at: URL.: https://www.prinz.law/urteile/bgh/I_ZR__49-97 (accessed: 29.06.2024)

6. Protecting a Public Interest of Safeguarding True Memories

Under the overall dispositive principle of civil law, it should be admitted that an individual in possession of a personal non-property right can establish his other rights by way of constitutive entitlement based on his personal non-property rights including of both institutional and proprietary nature.

A famous person has a right to allow to use his or her image in any business initiative including advertising, with the resulting contract to focus on the right to the name, picture, voice, image etc. Moreover, the counterparty enjoys such right will be bound by the contractually established limits which, if violated, will invoke the right to claim termination of abuse and damages for moral harm (since the holder's original personal non-property right was violated). Personal autonomy is thus manifested in the fact that only the holder will choose whether to allow or disallow such use.

It would be wrong if children, parents or surviving spouse (para 5, Article 152.2 of CCR) make such choice instead of the person. Meanwhile, it is obvious that all agreements that the person entered in his or her lifetime are not terminated by death (as rightly noted by the Civil Chamber of the Supreme Court of the Russian Federation in its ruling on the Kalashnikov trademark case).

Children, parents and the surviving spouse of the decedent have the right to protect his or her privacy (para 5, Article 152.2 of CCR). The question is what is to be protected. Firstly, it is probably the private interest of those designated in para 5, Article 152.2 (who will probably morally suffer if the decedent's image or voice is used in an obviously unacceptable context) but this aspect of protection is incidental since it does not deal with personal non-property rights of the relatives specified in para 5, Article 152.2, but with those of the decedent.

Protection can be underpinned by a public interest to know famous figures of history, culture etc. by their actual deeds rather than fictional stories.

Thus, protection under para 5, Article 152.2 could be extended to a *public interest to preserve or obtain true information on actual achievements of a natural person* (emphasis added.—E.O.). This public interest is part of a more general interest of true identification of natural persons which

overall is enshrined and implemented in Article 19 of CCR. With regard to the situation discussed, this interest consists in avoiding to confuse the real person with later events including what can be created by neural networks or other cloning technologies.

Protection can equally apply to the decedent's honor, dignity and business reputation — para 1 (2), Article 152.

Curiously, the provisions of para 1 (2), Article 152 and para 5, Article 152.2, while performing a similar function, establish a different list of those authorized to apply for protection: where Article 152 covers all interested parties, Article 152.2 mentions only children, parents and the surviving spouse. This does not seem to be the legislator's accidental mistake but a well-designed concept reflecting the terms of protection. Protection from the disclosure of what was once personal, medical or other secret extends over the lifetime of the next generation while protection from what discredits the honor, dignity, business reputation is not limited by any term.

7. Double Protection for a Movie Footage

Apart from the right to image, the one related to copyright is also protected. In the aforementioned Marlene Dietrich case (German High Court ruling BGH, 01.12.1999 — I ZR 49/97), a famous episode from a famous movie was reproduced for commercial purposes. It should be noted the context deals not only with the use of someone's image (picture, voice or gestures) but also with a copyright-related right (actor's right to performance) heritable within the period envisaged by Article 1318 before passing to the public domain. Thus, anything cloning a famous actor's gestures, voice, performing style or movements will require to determine if the right to image was violated as a personal non-property right, copyright-related right or exclusive right, or whether it is homage that does not qualify as violation. The following conclusion can be proposed for discussion: if characteristic traits of a person not associated with a particular performance but integral to his personality were used, it is a case for the right to image subject to Articles 150–152.2 of CCR. If the traits characteristic of a particular performance were used, it is a violation of the copyright-related right subject to provisions of Part 4 of the Code. In the event of minor cloning with an easily identifiable source and an obvious intention to quote and give homage, it should be a case for singular restriction of rights since homage without cloning a significant part of performance should not qualify as a violation.

8. Contractual Right to Use an Image

To design a contractual mechanism for consented commercial use of certain elements of one's image, one has to rely on the concept of constitutive entitlement.

“Constitutive entitlement is not exactly succession, B.B. Cherepakhin wrote, it shares with succession the derivative nature of entitlement but differs from genuine succession in a lack of title transfer from the assignor to the assignee. Constitutive entitlement does not change the subjective structure of a relationship and in this sense is not succession in terms of rights. But both in transferable and constitutive entitlement a right obtained by the assignee stems from that held by the assignor. As a general rule, one cannot assign more rights than one holds” [Cherepakhin B.B., 2001: 320].

T.I. Illarionova observed that succession can play a regulatory role by stating the amount of property rights [Illarionova T.I., 1987: 49].

The observation on sub-statutory regulation is apparently quite important.

In fact, legal branches better explored in terms of succession — in particular, property law and liability law — provide ample evidence that a person assigning a right (assignor) will discretionally determine what right is in his interest to assign. Of course, the assignor never has an unlimited choice: above all, he cannot assign to a legal successor more rights than are available. In addition, where an exhaustive list of possible subjective civil rights is provided by law, he is inevitably bound by it [Sinitsyn S.A., 2017: 25].

A person consenting to commercial use of some elements of his image may specify certain limits, with the consent undoubtedly playing a regulatory role to be implemented through constitutive entitlement. Above all, the person defines who is entitled. The consent so given is obviously closely related to the identity of those entitled. Meanwhile, it can follow from the text of contract or unilateral transaction (consent) that the assignor allows the assignee to dispose of the right to use his or her name, pseudonym or a likewise right.

Moreover, the assignor may specify the scope of such use. If the elements of the image are used in controversial business projects, it can be damaging to one's reputation. Thus, the person should have the right not only to allow or disallow the use of elements of his image — for instance, in advertising — but also to specify the scope of commercial use.

Consent can be given through a unilateral transaction or contract as follows, for example, from the Kalashnikov trademark dispute.

As a basis of constitutive entitlement, a contract does not contradict para 4, Article 19, Article 152. and para 9, Article 1483 of CCR (and by this token other provisions that require the holder of a personal non-property right to consent to the use of specific image elements) because a contract is the point of consents of all parties thereto [Krasavchikov O., 2001: 169].

What right is established by such constitutive entitlement? This question has been answered, in my view, by the Civil Chamber of the Supreme Court in ruling No. 43-KG21-7-K6 on the Kalashnikov trademark dispute of 22.03.2022 where an expression “the right to use a name” was proposed.

The dispute emerged from interpretation of a contract entered between M.T. Kalashnikov and the defendant in that the former allowed to use his family name in a trademark. Being payable, the contract assumed periodic fees for the consent being given. As the contract was entered for a long term, it is assumable, in view of Kalashnikov's age, that payment of the fees was to continue beyond his lifetime. However, the defendant has stopped all payments after Kalashnikov's death arguing the right holder's death terminated his personal non-property right thus ending the contractual liability. The Chamber has dismissed this argument by separating the right to a name closely related to the right holder from the right to use a name. As follows from the ruling, the right to use a name was contractually assigned to the defendant who, still using the Kalashnikov trademark, had no right to stop paying fees.

The separation made by the Chamber should be supported and continued. In exercising a personal non-property right available to him, a person may establish a property right — the one to use a name, pseudonym, picture or other elements of the image.

The conclusion allows to understand the value underlying a contract for the use of certain elements of someone's image. The right to use these elements can be defined as a property right framed by an absolute relationship between the one who holds this right from the assignor and the third parties. If the assignee who acquired this right by virtue of constitutive entitlement registers a trademark carrying the assignor's name, pseudonym or picture, the right to use an element of the image will dissolve, as it were, in the exclusive right to a trademark or brand; at the

same time, the elasticity of the former manifests in the fact that, if the exclusive right to a trademark is terminated — for example, where not used (Article 1486 of CCR) — the holder of the right to use someone's name or other element of the image will keep the right to create another trademark under the assignor's prior permission.

An incidental question is whether a person can create a property right from a personal non-property right he or she holds (to a name, pseudonym, image etc.).

V.A. Belov, in tracing the regularities of constitutive entitlement, writes that a “clean slate” cannot provide a basis for entitlement: moreover, under the general rule, an absolute relationship can give rise only to absolute relationships, just like a property relationship will give rise only to property relationships; the author did, however, caveat that he did not insist on the latter conclusion [Belov V.A., 2024: 576].

Despite that constitutive entitlement normally assumes that a property right gives rise to a property right and a liability right to another liability right — that is, both the original and the derivative right belong to the same group — this rule is not always universal.

Thus, in leasing a thing or giving it away for free, the owner, relying on his property right, creates a right of leasehold or gratuitous use as a binding title. Here liability is assigned as a result of constitutive entitlement based on property right: this situation is so ordinary that it will not normally catch the eye of researchers. A different situation is where a claim is made to a party that violated a property right. As for the latter, A.G. Karapetov observes that “an absolute right will give rise to a liability relationship to compensate for wrongdoing (damage). But can a liability emerge otherwise as part of property relationships? ... This problem at the juncture of liability and property law has not been properly studied in Russia” [Karapetov A.G., 2017: 38]. In this example, the original and the derivative right, while of different legal nature (property/liability, absolute/relative), both belong to the property rights category. Can we go further to examine how a property right is created from a non-property one?

The content of personal non-property right is so wide that it allows within constitutive entitlement to construct both new personal non-property rights (with someone holding the right to a name creating a derivative pseudonym to serve his professional activities) and property rights including those to use a name, picture and other image elements.

The specific nature of personal non-property rights — such as their weakly “articulated” content — was already noted in doctrine. According to S.A. Sinitsyn, “the legal value of personal rights lies in legal recognition of human autonomy to protect man from any unlawful interference with his freedom, so that a free choice of behavioral acts guaranteed by law will constrain the scope for abuse of power and provide a safeguard from government claims and commands”. The author concludes that “...making this group of personal rights part of subjective civil rights is unacceptable”. In support of this claim he argues that the exercise of personal non-property rights, like respiration, is not always volitional. “The right to live cannot be understood as a subjective civil right as it is exercised outside the civil law regulation of public relationships” [Sinitsyn S.A., 2017: 269, 270].

S.V. Tretyakov, in describing the category of subjective private rights via the dispositive effect, notes personal non-property rights are “the most controversial case” but they “...could be regarded as disposable though they assume only a relatively narrow range of dispositive powers available to the assignor” since in this case “the initiative to protect a (personal) right is part and parcel of its attribute” [Tretyakov S.V., 2022: 13, 166].

S.A. Sinitsyn's conclusion on peculiarities of personal non-property rights is only partially valid: their content is not as clearly articulated as, for instance, that of property rights, and it is true that these rights are partially exercised in the form of legal acts irrespective of the right holder's will.

However, this only shows that personal non-property rights are specific and reminds one of L.O. Krasavchikova's conclusion that “the prevalence of regulatory or protective function of civil law as applied to personal non-property relationships largely depends on the precise personal valuable that brings up the relevant legal association” [Krasavchikova O.A., 1994: 166]. Natural persons are allowed to determine (up to a certain point) the content of personal non-property rights available to them.

Thus, discretionary behavior as part of the content of personal non-property rights is less articulated than, for instance, that of property rights, reflecting the width of opportunities available to holders of personal non-property rights.

Wide content of personal non-property rights rich with opportunities means, in particular, that holders can create property rights not yet envisaged by law. One can accept E.G. Komissarova's view that “permissive nature of civil law regulation anticipating the initiative of parties assumes the emergence of such relationships as not yet envisaged by any provision” [Komissarova E.G., 2002: 139].

In some cases, “commercialization” of a personal non-property right would be contrary to the law. Prohibitions normally serve to protect individuals, including from their own poor decisions, and usually concern the rights that ensure physical existence [Krasavchikova O.A., 2017: 214–246]. However, personal non-property rights that ensure social existence allow for wider regulatory freedom; it is here that one finds references to consents (including to use a name (Article 19 of CCR) or picture (Article 152.1). It would be inconceivable that a holder of personal non-property right might extend his right to the third parties but it is quite acceptable that, where not contrary to the law, a holder of the right to a name or picture could create and dispose of a property right to use certain elements of his image.

The above could be also useful in situations where someone wants to allow a certain person to use elements of his image reproduced by artificial intelligence in a digital product (such as a computer game or movie).

9. The Right to Protection Extends to Relatives to Safeguard Reputation rather than Allow for Commercial Use

Articles 150 and 152.1 of CCR should be apparently interpreted teleologically as recognizing the right of the decedent’s spouse and children to protect his or her honor and dignity without allowing to exploit the image for profit unless consented by the person in question.

Thus, the aforementioned Mephisto case (BGH, 20.03.1968 — I ZR 44/66)⁹ offers an interesting argument. According to the court, personal rights, except for some proprietary components, were non-transferable and non-heritable, was not of decisive importance. Legal provisions could establish obligations and prohibitions irrespective of the presence or absence of the surviving person at law. Criminal law allows for review of rulings after the convict’s death to redeem his or her honor. This will not only protect family honor (reputation of the relatives) but also that of the decedent as the continuing right to social respect. Civil law should obviously protect human dignity after death of the person concerned. As the court explicitly observed, “value of a person survives his legal capacity”¹⁰.

⁹ Available at: URL.: https://www.prinz.law/urteile/bgh/I_ZR__44-66 (accessed: 06.04.2025)

¹⁰ Available at: URL.: https://www.prinz.law/urteile/bgh/I_ZR__44-66 (accessed: 06.04.2025)

Discussion of this study's findings shows that national and international civil jurisprudence are both uneasy in identifying what is to be protected in legal action concerning a decedent's non-property valuables. Formal logic suggests, on the one hand, that the rights associated with a person should end up upon his death; moral sentiments, on the other hand, require to punish for posthumous slander.

The final word is ultimately left to fiction. One has to agree with B.M. Gongalo that "legal fiction is much more widespread than is commonly believed" [Gongalo B.M., 2020: 141]. In this particular case, there is a useful fiction ultimately safeguarding both the private interest of plaintiffs (heir, spouse, close relative of someone whose personal information is discussed in legal proceedings) and the public interest.

Thus, while contracts for the use of certain elements of an image should be recognized as acceptable, they should undoubtedly reflect free will of the person whose image will be used. Coercion to enter into a contract is unacceptable in this case. Prohibitions to use a decedent's image, whether for profit or not, support a respectful attitude to the value of personality.

10. Historical Studies, Biographies

Another question is whether it is acceptable to use a decedent's image for exploring his or her life, for example, in creating a biographic movie.

The events a decedent was really involved in could be mentioned without seeking the descendants' consent. Thus, in *Vorsina vs Russia* case of 2004¹¹ the applicants claimed that a portrait of their ancestor — merchant Vorsin — reproduced in a trademark violated their property rights and that their grandfather's image on beer bottles caused them distress. The European Court of Human Rights, however, took into account that the ancestor pictured in the trademark really founded one of the region's first breweries. In the European Courts view, by using the portrait in this manner the brewery meant to revere his memory as a master brewer rather than insult the applicants' feelings toward him. Nothing suggests the distant ties between the applicants and the relative were thereby distorted.

¹¹ ECHR decision of 05.02.2004 as to the admissibility of application No. 66801/01 by Irina Aleksandrovna Vorsina and Natalya Aleksandrovna Vorgalik against Russia. Available at: URL.: <https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ARB&n=40498#42z0bhU2hlLDnl4m> (accessed: 06.04.2025)

Whether artistic fiction is acceptable in biographic movies or books is still a matter of discussion. It would be apparently desirable to separate documented facts from fiction, so that viewers or readers perceive a historical figure by what he or she really did rather than how these deeds were interpreted by the descendants.

While recognizing a scope for fiction in biographic movies, the European Court insists on avoiding “blatant distortion of the decedent’s life picture”¹². As it stands, this judgmental term appears quite appropriate; some of the cases where the ECHR used it, are however, controversial. Thus, the ECHR decision of 21.11.2013 on *Putistin v. Ukraine* wrongly concludes, in my view, that because the published information did not contain any names, the applicants’ rights were not damaged. Discrediting information affecting some non-identified parties within a group (a football team in this case) could be apparently recognized as discrediting each of them; therefore, personal non-property rights — as to the honor and dignity of both the decedent and his children and grandchildren (heirs) — were certainly violated.

The spouse, children and even more remote descendants (grandchildren and great grandchildren) apparently have the right to clear the decedent of anything he did not do in reality. This is a case for protecting both the honor and dignity of the decedent and personal non-property valuables of plaintiffs as family members.

11. Specific Interests to be Protected in Light of the Human Autonomy

A comparison of domestic literature with the discussed *Mephisto* case ruling demonstrates specific key points of convergence of the national and German civil jurisprudence.

Firstly, it is in the public interest to remember the decedent by what he did rather than what was imagined — a public interest to safeguard true information.

Secondly, what is protected is the value of human personality.

As E.A. Fleischitz wrote, “...the society is so much interested to protect an individual as an embodiment of specific traits, habits and ambitions, that it believes necessary, no matter how the relationships of property succession are regulated, to keep any known manifestation of

¹² ECHR decision of 21.11.2013 on *Putistin v. Ukraine* (application No. 16882/03). ECHR Newsletter, 2014, No. 3.

the corresponding personal interests at bay, once the source of these interests is no longer there” [Fleischitz E.A., 2015: 179].

The case for protection appears complex if the classic theory of relationship is applied. Who is the party to the relationship? Can it be society as a whole since the public interest to safeguard true information is claimed to be protected? If one applies posthumous fiction to oneself to measure its ethical aspect, there will be no doubt that the disclosed information should be true even after death of the person concerned.

Apparently, all interested parties should be entitled to apply for protection. The designation of possible plaintiffs in Article 152.1 and para 9, Article 1483 only means that the listed persons are assumed to have a legitimate interest, otherwise it has to be proved by the plaintiff as part of the case circumstances. Such construct is typical of situations where a common interest is protected by a member of the given community.

Do close relatives (spouse, heirs) have an interest here? Obviously, yes but it is equally obvious that it is not their interest that is protected in cases envisaged by the discussed provisions. As a result, they can protect their personal non-property rights in simultaneously protecting the decedent's personal non-property valuables.

Finally, could we acknowledge that the right to human dignity is maintained even after death? This would be apparently in line with the overall tradition of the national civil jurisprudence, in particular, given each person's right to identity that I.A. Pokrovsky wrote about [Pokrovsky I.A., 1998: 121].

Protection thus applies to the legitimate interests of those designated by law (spouse, close relatives, heirs etc.), as well as to a public interest. It is in the public interest to safeguard the historical memory, true information about famous persons and their achievements, and to remember famous persons by what they actually did not what was later imagined by biographers or manipulated by neural networks.

12. Specific Aspects of Commercialization

The German civil jurisprudence has developed an institution of “post-mortem personal protection” with a distinction made between claims on reputation (non-pecuniary) and claims for damages (pecuniary). Damages accrue on the same basis as for violation of copyright-related rights¹³.

¹³ For example, Marlene Dietrich's daughter has recovered damages for illegitimate use of her mother's image in an advertisement (BGH, 01.12.1999 — I ZR 226/97).

It is underlined in literature that the “property component” (kommerziellen Bestandteile) of a personal right is part of the estate to be exercised by heirs. The idea to claim damages for exploiting a decedent’s image emerged in the German civil jurisprudence as a kind of prevention: to make any posthumous usage of a famous person’s image no longer profitable, the legal practice will accept not only claims against violations of the right but also those of pecuniary nature [Gomille C., 2021: 300]. When evaluating this concept as applied to the national civil jurisprudence, one has to remember that sometimes it assumes execution associated with the object of exclusive, copyright-related right (Article 1314 of CCR) that the heirs are entitled to exercise within dates envisaged by Article 1318 of CCR. Where copyright-related rights are not at stake but the decedent’s name or picture is used for business, political or similar purpose, the available remedy is to demand a stop to whatever undermines the right (Article 12 of CCR).

Curiously, the progress of digital technologies is giving an unexpected turn to the sphere of public relations being discussed, with regulatory relations clearly superior to those of protection amidst a hint of commercial flavor.

If para 9, Article 1483 entitles heirs to enter into contracts for the right to register a trademark that carries a famous person’s name or picture while Article 152.1 deals with the spouse or close relatives’ consent to use a picture, could the consent be given away for payment? The answer is obviously yes. In particular, Supreme Court Plenum Resolution No. 25¹⁴ is explicit that such consent amounts to a transaction (para 46). The issue is that the available digital technologies allow to create an actor’s digital image for the roles he never played and words he never uttered. The effective law allows such use if consented by the spouse and children and, where none, by parents.

One example of the already emerging controversies is Peter Cushing’s story whose heirs consented that the Walt Disney Company reproduced his image with the help of computer graphics while the agent he appointed during his lifetime to protect his image from cloning was against¹⁵.

¹⁴ On specific provisions of Part I, Civil Code of Russia to be applied by courts see: the Supreme Court Plenum Resolution No. 25 of 23.06.2015 // Rossiyskaya Gazeta. 30.06.2015.

¹⁵ See: Peter Cushing vs Star Wars: Disney’s legal battle over dead actor’s image explained. Available at: URL.: https://inews.co.uk/news/peter-cushing-star-wars-disney-legal-battle-3273068?srsltid=AfmBOoodV_Gs0VDTCe9e0cq0mjDjLnsIPi_FjjW7rDpPTT7ilxPmZCDB (accessed: 04.04.2025)

An individual, while still alive, will not always consent to a “digital double” to play his role in a movie or lecture to his students. A famous person's death can bolster a public interest. Can only the decedent's children or heirs have a discretion to allow or disallow the commercial use of his or her image? While C. Gomille is positive [Gomille C., 2021: 302], one would be hard pressed to accept his view. The question to what extent an image of a famous person could be used to create digital “doubles” cannot be apparently left to the sole discretion of children, spouse and parents as this would seriously constrain personal autonomy and entail a high risk of disputes between relatives on “proper” commercial use of the decedent's image. It is up to the individual to decide whether to allow or disallow the use of his image elements.

But is it fair that the legislator should give someone a discretion in respect of somebody else's personal non-property rights? The public interest with regard to such “digital copies” owes itself to the decedent's achievements: thus, in protecting the public interest of safeguarding historical memory one should, firstly, provide a prior disclaimer for consumers each time they access a video, soundtrack or text created by artificial intelligence; secondly, limit the scope for heirs to give consent to use the decedent's name, picture or other image element while recognizing their right to honor the obligations emerging at his will during his lifetime (including to ensure the execution, require provision of information and extend the contract term as may be necessary) without allowing a new way of usage.

Thus, in the Kalashnikov trademark dispute¹⁶ the court concluded that the contract for the right to use the word *Kalashnikov* as a trademark element did not terminate with the possessor's death, and that M.T. Kalashnikov's heirs were thus entitled to the fees due thereunder.

This conclusion is valid, and the use of the name in a trademark is correct since it was consented by the possessor.

Should a famous person, on the contrary, repeatedly decline offers to use his name or picture for profit, it would be unfair to give his heirs wide opportunities to allow such usage. In this regard, the provisions of Article 152.1 needs further discussion and improvement.

¹⁶ See the Kalashnikov trademark dispute in Civil Chamber SC determination No. 43-KG21-7-K6 of 22.03. 2022. Available at: URL.: <https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ARB&n=711158#70SgahUM7WgK7dIQ1> (accessed: 06.04.2025)

For the purpose of contractual regulation it is important that Articles 150¹⁷, 152¹⁸, 150.2¹⁹ give to children, spouse and parents only protective powers. On the contrary, Article 150.1 gives regulatory powers — that of consent — to children, spouse and parents while para 9, Article 1483 also to heirs.

There are doubts whether the rule on the relatives' regulatory powers is fair.

Firstly, yes, the two permissive provisions serve to protect the same interest, that of safeguarding adequate memories of someone. Thus, the rules demonstrate a visible discrepancy: the surviving spouse not qualified for heirship for some reason (for instance, because of the testament made in favor of children or by deliberately renouncing inheritance) can allow to use a picture of the testator in a work created through the use of deepfakes (Article 152.1), but cannot do so in respect of a “portrait” in a trademark (para 9, Article 1483). The range of authorized persons should be obviously harmonized. Since the appointment of heirs translates a wish to provide support rather than put someone in charge of personal non-property rights, it would be reasonable to attach priority to the relations of marriage and kinship rather than those of heirship.

The Eurasian Economic Union's Agreement on Trademarks, Service Marks and Appellations of Origin of 03.02.2020 provides the fullest possible list of those authorized to give consent by requiring to seek consent of heirs or their successors, or other interested parties exercising posthumous protection of the person's honor and dignity²⁰.

Secondly and most importantly, the opportunity for sub-statutory regulation provided by the legislator for the benefit of the surviving spouse, children, parents (Article 152.1 of CCR²¹) or heirs (para 9, Article 1483) appears controversial one. A person can decide for himself or

¹⁷ In cases and under procedure envisaged by law non-property valuables owned by the deceased can be protected by other persons (Article 150 of CCR).

¹⁸ Honor, dignity and business reputation of an individual can be protected after his or her death upon demand of the interested parties (para 1 (2), Article 152 of CCR).

¹⁹ Children, parents and the surviving spouse of an individual shall be entitled to apply for protection of his or her privacy in the event of death using remedies envisaged by para 2, Article 150 and Article 152.2 (para 5, Article 152.2 of CCR).

²⁰ Eurasian Economic Union: Agreement on Trademarks, Service Marks and Appellations of Origin. Signed in Moscow on 03.02.2020, ratified by Federal Law No. 360-FZ of 09.11.2020 // Collected Laws of Russia, 02.08.2021, No. 31, Article 5888.

²¹ After a person's death his picture can be used only with consent of children and surviving spouse or, where none, that of parents (para 1, Article 152.1 of CCR).

herself whether to allow or disallow to use some elements of his image but is it fair that the legislator affords the right to dispose of the person's personal non-property rights to somebody else? Meanwhile, heirs and relatives, as was already mentioned, are just temporary fiction-based holders of the rights that survived the testator's death.

The provisions of para 9, Article 1483 on seeking heirs' consent to use the testator's name or portrait were probably influenced by other institutions referred to in Part IV of the Civil Code, namely, copyright-related rights.

A performer's exclusive right will in fact pass to heirs for the remaining time of protection (para 4, Article 1318 of CCR). Thus, an exclusive right can make part of the estate.

Does an estate include the exclusive right to elements of somebody's image? Apparently, no, unless the testator consents to commercial use of an element of his image in his lifetime as, for example, in the Kalashnikov trademark case: M.T. Kalashnikov has signed a contract for the use of his name in a trademark. In this case, the right to use the name survived the testator as a kind of property right put into existence by the holder's prior permission, and this right had monetary value.

Thus, allowing or disallowing to use a name, picture or certain elements of one's image for profit is a personal choice. It would be unfair to give heirs a free hand. Since personal non-property rights are posthumously protected for the sake of human dignity and historical memory, it is probably reasonable to assume that the surviving spouse, children and other heirs should at least respect the testator's will, whether explicit (for example, in a testament) or implied.

13. Protecting Rights of Consumers

If an individual wants to allow someone to use certain elements of his or her image including in a digital product (computer game or movie created through the use of artificial intelligence), such permission is within the scope of legal capacity. Just to recall, anybody can enter into a contract or unilateral transaction whether or not envisaged by law unless contrary to it (Article 8, 420 of CCR).

There is anecdotal evidence of such permissions²² which are not something altogether new either in the domestic culture or elsewhere:

²² For instance, Bruce Willis sold his rights to his digital image to the Deepcake Company. 29.09.2022. Available at: URL.: <https://habr.com/ru/news/690842/> (accessed: 13.11.2024)

one can recall multiple cases of someone allowing to use his or her image to create animation movies or fictional characters. In 1976, for example, the famous actor E. Leonov consented that the artist Mikhail Belomlinsky used his pictures to illustrate J.R.R. Tolkien's famous *Hobbit*²³.

The current changes regard only the scope of possible use. If previously we could never confuse someone with his image in an animation movie or illustration, the real person and the deriving virtual one can now merge together in the public eye.

Thus, if someone has allowed to use his image (including pictures, voice or facial expression), whether for profit or not, the validity of such contract is beyond doubt. The consequential questions regard (a) the limits and period of use; (b) the right of consumers to know that a complex product (movie, computer game etc.) contains an actor's digital copy, deepfake but not a "live person".

As for the first of these consequential questions, the civil law provisions on licensing agreements should probably apply by legal analogy. As a result, the ways of using an image which are not explicitly envisaged should be deemed prohibited; the term should be five years, unless otherwise provided for, and the fee should be a material term of such contract for transfer of right to use certain elements of the image.

The consented right should be presumed closely related to the personality of the person in question. Someone allowing to use of a certain element of his image will normally care who and how will use it. Thus, an actor making the soundtrack for a documentary will not consent to using his voice in promotional videos.

Therefore, any usage beyond what has been consented by those authorized should be deemed a violation of personal non-property rights, and will entitle the authorized person to claim damages for moral harm (Article 151 of CCR), require to terminate anything that violates the right (Article 12) and use other remedies to protect personal non-property rights.

As for the second question, it should be made clear that any digital copy of the image is just a copy that inevitably differs from the original to this or another extent.

A vast majority of known applications allowing to reproduce the appearance, facial expression, voice, movements or other elements of some-

²³ Cinema Encyclopedia: Soviet hobbit Evgeny Leonov. Available at: URL.: https://dzen.ru/a/Xx1I9AQWQV7u_52j (accessed: 05.04.2025)

one's image will do so by adding up what is available to produce something in between, or will use a random sample. What is important for regulatory purposes is that such processing yields no new outcome: options selected from what is available do not result from the right holder's decisions (informed or unconscious) but from a factor external to him or her. In other words, what observers of the digital cloning finally see is not the reproduced person's creation.

Thus, whether there is a favorite actor at play (meaning he consented to this role, participated in performance or took other professional decisions) or a digital copy generated by artificial intelligence, may make a difference for the consumer. Thus, consumers have the right to a disclaimer before entering into a paid services agreement — including before they have paid for access to a movie.

Visual identity, whether designated by civil law or not (unless contrary to it), performs multiple functions including to reduce the cost of searching for a needed counterparty (both in terms of time and money).

This function was perfectly well explored for trademarks: it was repeatedly stated that trademarks saved the cost of searching for goods and services²⁴. Thus, if the name of a person of national or international renown used in a trademark can create a false impression that he is associated with the production or sale of goods while no consent to use the name was given, the rule of para 9 (2), Article 1483 is undoubtedly violated.

The same extensive practice can now apply to protection of consumers' right where someone's image is used. Moreover, the general provisions to underpin the line of argument are those of Articles 1 and 10 (the bona fide principle supporting the exercise of subjective civil rights, and the rule on inadmissibility of abuse of a right).

Thus, using someone's image for profit or otherwise can be deemed unfair practice where such usage can/will create an impression that the person in question is associated with an event, product or service this image serves to designate.

There are also special provisions established for specific means of visual identity such as brand names.

²⁴ McKenna M. The Normative Foundations of Trademark Law. The Notre Dame University Law Review, 2007, no. 82, p. 1839. Available at: URL.: https://scholarship.law.nd.edu/law_faculty_scholarship/226 (accessed: 06.04.2025)

With regard to brands names, it is required not to misguide consumers as to who owns a business (Article 1539 of CCR). Thus, for a brand to carry the name of a famous person engaged in the same trade as the business designated by it, consent of the person or heirs is to be sought. But this requirements is probably limited in scope. The use is probably legitimate where it is clear to consumers that the person mentioned in the brand name has nothing to do with the company's establishment and operation. This issue, however, needs further discussion.

An important question is whether the name of a famous person can be used to designate a brand or business, once the person possessing the name has given his consent.

Once the consent is there, para 9 (2), Article 1483 of CCR can apparently apply by legal analogy. It is a common fact that who is permitted to do more is equally permitted to do less [Vaskovsky E.V., 2002: 276]. If a person of national/international renown allowed to use his name in a trademark as of the date of registration, the consent of the said person equally allows to use his name in a brand or business name.

Meanwhile, one has to take into account that a person's name can with time become part of culture and a basis for geographic or other appellations. In this case any derivative words can be freely used without permission.

Thus, the Chamber for Patent Disputes issued an opinion on 24 May 2010 dismissing an objection to register the Grushinsky Festival trademark arguing as of the date of its registration the event itself — Grushinsky Music Festival — was better known than Valery Grushin, in whose memory the festival was established by his friends a year after he went missing²⁵. The court agreed that, as the festival was held for many years, the word “Grushinsky” was perceived as designating an event rather than derivative of a natural person's name (Moscow District Federal Commercial Court resolution No. KA-A40/6791-10-1, 2 of 13.07.2010 on case No. A40-143190/09-67961). Claims against registration of the Gagarinsky trademark were dismissed on the same argument of different association (name of an avenue rather than that of a person)²⁶.

²⁵ Chamber of Patent Dispute opinion of 24.05.2010 (Annex to Rospatent ruling of 23.07.2010 on application No. 2006735310/50) to uphold legal protection of the trademark.

²⁶ Court for Intellectual Property Rights Presidium ruling of 31.10.2016 on case No. SIP-238/2016. See also para 3, Review of legal practice of the Court for Intellectual Property Rights on application of paras 2, 4, 5, 8 and 9, Article 1483, Civil Code of Russia. Approved by Presidium resolution No. SP-21/4 of 20.02.2020.

Therefore, it is not only personal non-property valuables but also third party interests including consumers that should be borne in mind in protecting a natural person's image.

Conclusion

The issue of possible scope of using a posthumous image is made urgent by the growing power of manipulative technologies. It is a vital public interest to distinguish a real person with his autonomy, actual feats and failures from a virtual copy since there is a risk that the latter overshadows the former in the public eye. We thus welcome the legislator's decision that the decedent's spouse, children and other close relatives should have the right to bring legal action to terminate abuse. However, these provisions should not be interpreted broadly as recognition of the heirs' right to allow the use of the image for profit — of course, unless consented by the right holder in his lifetime.



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