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Commercial value and manifestation of personality rights in Hungary

In the past four years, I have been examining the commercial value and the alienation of personality rights from a historical-comparative aspect. Some of the main outcomes are presented in this paper in English language. I have examined the development of the protection of material interests in German and Hungarian law, to show that the commercial exploitation of personality rights is not a new phenomenon. The paper continues with the dogmatical questions of personality rights with commercial value: the obstacles of a dignity-based protection, and the logical step of manifestation, so the description of the transition of non-pecuniary personality rights into property-like assets. The third part of the work focuses on the cause of action and the remedies of the exploitation of these proprietary-like assets. On the side of cause of action the alienability of these rights is examined, thus the scope of contractual disposition (transferability), the inheritance of commercial interests and the connection of these assets to the traditional, moral interests. Regarding the remedies the compensation claim, the liability for damages and the claim to surrender excess profits are examined, both *inter vivos* and *post mortem*. This paper aims to point out the missing aspects of the regulation and the misinterpretation of the application of the remedies – and in general the subjective right – by examining the body of case law.

I. Historical development

I.1. In general

In the development of the German and Hungarian personality right, it could have been seen that during the emergence of the protection of personality rights in the private law was associated with material interests, too. In the German law the legislator intentionally refused to protect the personality in general; two separate cause of actions for the right to the name[2] and likeness[3] were codified. Both of these personality rights protect obvious commercial interests beside ideal ones because their appropriation is usually related to the industrial property rights, to competition law and to the interests of the press and advertisement. These personality rights were also, which have been applied in the framework of the unjust enrichment law of the § 812 BGB and thus established the fundaments of the protection of the commercial value of personality rights.[4] The BGH[5] have recognized in 1999 that the general personality right does not solely protect ideal, moral interests but commercial interests, too. Such aspects of commercial interests are inheritable; the heirs are entitled to exercise these rights.[6]

The development of the personality right was much more difficult in Hungary since there have not been published any studies about the governing law,[7] despite the recognition of

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[2] § 12 BGB.
[3] §§ 22-24 KUG.
[4] NJW 1956, 1554 – Paul Dahlke; NJW 1958, 827 – Herrenreiter; NJW 1981, 2402 – Carrera.
[5] Bundesgerichtshof, Federal Supreme Court of Germany.
[6] NJW 2000, 2195 – Marlene Dietrich; NJW 2000, 2201 – Der Blaue Engel.
[7] The first Civil Code of Hungary has became effective in 1.5.1960. Despite from some aspects, like trade law and marital law, customary law was in force.

the compensation claim.[8] Hence, the first task was to identify in what extent the personality rights were protected, and in what extent was the recognition of these rights in connection with material, commercial interests. Since the protection of personality rights is a phenomenon of the XX. Century, an earlier normative base of such rights cannot be found. New ways and directions of infringement have occurred in this century due to the social, economic and technical changes. The Hungarian General Civil Code of 1900[9] have recognized these changes, therefor established separate cause of actions for some of the personality rights. In the later period of the codification, this protection was abstracted, and a general protection would have been granted by the drafts of 1914 and 1928. The enactment of a new civil code was unsuccessful until the end of the Second World War. Since customary law was the second important source of law after statutory law, the jurisdiction and the precedents (prejudices) of the royal courts must have been examined.

I.2. Recognition of various aspects of the right to a name in customary law

The right to the name was the first personality right to find a way to recognition. This have not happened, unlike in the civil codes of Germany and Austria,[10] through the establishment of a general right to a name in the case law, firstly, but through the extensive and analogical application of already applicable cause of actions, which have two subsets. The first subset contains cases of the infringement of merely ideal and moral interests. One aspect of the right to the name emerged from the cause of action of section 94 Marital Act.[11] According to this section, the husband had the right to prohibit the woman the bearing of the married name after the dissolution, if she was the guilty party.[12] In the jurisdiction of the royal Curia[13] such a claim for the infringement of the married name was also possible after the dissolution, although this could not have been directly concluded from the section 94 Marital Act.[14]

A similar tendency can be deemed on the protection of artistic names (*pseudonyms*), since in the cases of copyright law related name infringements not the copyright law but the general private law (here: the right on personality) was applied. This is how another aspect of the right to the name have been recognized, where the connection between author and work was missing and thus the copyright act cannot have been applied.[15]

In the second big subset belong infringements, which could be related to commercial value and economic interests. The enrollment of the name of a person as part of the company name[16] and the infringement of such company names outgrowed the tort on company names. Although the cause of action in the cases of the infringement of the company name containing

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[8] Görög Márta: A kegyeleti jog és nem vagyoni kártérítés. Pólay Elemér Alapítvány, Szeged, 2008.
[9] Draft on the Hungarian General Civil Code of 1900.
[10] To the implementation of § 12 BGB in § 43 ABGB in the year of 1916 see Károly Szladits: Az osztrák polgári törvénykönyv novella-javaslatáról. In Magyar Jogászegyleti Értekezések 1908, p. 284.
[11] Act Nr. XXXI. of 1894. Section 94. *The guilty divorced woman cannot bear her married name. The unguilty divorced woman can bear the married name after the divorce, if this has been declared by her during the judicial separation.*
[12] 729. EH.
[13] Hungarian Royal Curia (*M. Kir. Kúria*) is the name of the supreme court until 1946. During the socialist era it was called „Supremest Court" (*Legfelsőbb Bíróság*). Since 2012 it is called Curia (*Kúria*).
[14] K. III. 301/1934; K. III. 1938/1940; K. III. 2680/1940. K. III. 5694/1941.
[15] K. I. 2193/1934 – Huszár Imre.
[16] According to the Act Nr. XXXVII. of 1875 it was the name of the merchant (*cég, Firma*). The regulation was also applicable for company names. In the English text I use the form of 'company name', since it is more understandable.

names of persons remained the sec. 24 of the Commercial Code[17] for a long time, the legal doctrine of the time was also talking about the infringement of a different subjective right, the right to a name.[18] Similar to this, were claims against the unlawful appropriation of names for advertising, as a trade name or other significant indication of companies.[19] The commercial interests entered the shaped the protection of moral interests on many ways, which have been connected to the industrial property rights, unfair competition and commercial law.

I.3. The right to a likeness

The other realm of commercial interests is the right to likeness, which was recognized by the courts quite late, in the 30's, even though a huge body of case law have developed around it. The protection of likeness has, similar to the right to a name, emerged from existing cause of actions, since it was firstly recognized by the extensive application of copyright sections.[20] These civil wrongs were connected to the advertisement on one hand, and on the press and media companies of the other, which makes it clear that commercial interests and commercial value also overshadow the appropriation of the picture of a person.

The right to likeness has also protected ideal, moral interests, since the publication of likenesses, especially on posters in the streets or in newspapers the reputation and the social status of the depicted person have set back essentially. In some cases, the civil wrong aimed inevitably an intent to realize profit, in these cases the gain of the estate of the wrongdoer was in the center; the immaterial distress was quite vague.[21] The royal courts have ruled the payment of a compensation (liability for non-pecuniary damages) applying the rules of copyright law, in cases of a mental distress.[22] If a likeness was commercially exploited, the courts deemed that the wrongdoer shall be liable for the damage caused.[23] In this case the damage – so the Royal Court of Appeal of Budapest – was the sum, what the wrongdoer should have had payed, if the parties have had contracted each other, and a consent from the entitled would have been given. The amount of such a fictive license fee have been granted regarding the previous case law. [24]

I.4. State-economical determination of proprietary-like allocation of personality assets

Although the personality right was generally protected during the 30's and 40's and all the published rulings name the sections 107-109 Mtj.[25] as the cause of action, this protection

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[17] Act Nr. XXXVII. of 1875. Section 24. *Who is infringed in their legal interests due the unlawful appropriation of a company name, can claim, that the wrongdoer the use of such a company name – beside the application of the regulations on the fine in § 21 – omits, and compensates the damage caused.* […]

[18] Fehérváry Jenő: Magyar kereskedelmi jog rendszere. Grill, Budapest, 1941. p. 40.

[19] K. IV. 824/1941 – Milkó; K. II. 1758/1938 – Csángó; K. IV. 1753/1939 – Ritz; K. II. 5006/1936 – King Edward; K. II. 2571/1936 – herceg Esterházy Miklós; K. IV. 3354/1936 – Atelier.

[20] Act Nr. LIV of 1921. Section 64. *In cases of ordered pictures and sculptures, the practicing of rights of section 60, the consent of the purchaser (orderer) is required, too; the purchaser has the right, without the consent of the author, to reproduce the work for commercial purposes.*

[21] K. P. I. 623/1939 – viaszképmás; K. P. I. 3618/1930 – hirdetőoszlop.

[22] K. P. I. 5820/1939.; Grill Dtár XXXIII. 539 – spiccelés; K. P. I. 4102/1938. – meztelenül Dunaparton; K. P I. 3463/1938 – lemetszett lábak.

[23] K. P. I. 3647/1928 – olajügynök.

[24] K. P. I. 5332/1932 – igazolványkép; Budapesti Kir. Ítélőtábla 1932. IX. 19. P. XIV. 2755; Budapesti Kir. Törvényszék 1938. V. 5. - 9. P. 33.875/1938.

[25] Civil Code of Hungary of 1928. (draft)
Sec. 107. Every person has the right determine the unfolding of their personality in the framework of the law and

was non-commercial. Even though the moral aspect of these rights has been highlighted, the presence of the commercial and pecuniary aspects was inevitable, and could not be excluded, at least partially, from the legal evaluation. The development and crystallization of these commercial aspects was hindered for a long time by the socialist private law.

The infringement of personality rights was not matching in the capitalist market economy and in the socialist controlled economy. Some sorts of infringement can be found in both legal systems, just like the right to piety,[26] the infringement of the marital name by the guilty wife[27] and the protection of reputation.[28] In these cases, the tortious actions have nothing to do with the economic and political mindset. Some other cases, appropriations and exploitations are determined and dependent from free enterprise economy such as the infringement of company name, the unlawful appropriation of the name and likeness, as well as the sensation mongering of the boulevard press. As clear as it is, the commercial appropriation of personality rights solely and utterly fit in the second category, hence the development of the evaluation of the commercial value of personality rights have been hindered to develop until the regime change of 1989, due to the lack of legal regulation. This have had also another consequence: the overexaggerating of moral interests. The protection of "non-pecuniary" personality rights was not effective, since the Supreme Court had overruled the precedents about the compensation for non-pecuniary damages in 1953.[29] After this, the whole socialist legal doctrine tried to legitimize this legal institute, and thus the efficient protection of moral interests. This immaterial direction was only fortified by the equation of the human dignity as a human right with the cause of action of the infringement of personality rights in private law.

II. Dogmatical basis of commercial value

II.1. Commercial value and human dignity

Since the dogmatical and theoretical fundaments of the commercial value of personality rights could not have been developed, it must have been examined, how can be personality rights with proprietary-like nature classified in the system of civil law and of the subjective rights. There was an additional problem to solve before such an examination could have been taken. This problem emerged with the new Civil Code of 2013,[30] since the general personality right as a human right which is equal to the human dignity as human right was codified as the general cause of action in civil law in cases of the infringement of the personality rights in general.

The recognition of the general personality right in German law happened without any act of the legislator, but through the judges, regarding the rules of the new Basic Law of

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the rights of others. None shall bother the entitled person in this development (the right of personality).
Sec. 108. Who is infringed in their personality right, can claim for the injunction of the wrong; if a repetition of such a wrong is likely, he can claim for omission.
It is also deemed as an infringement of personality right, if someone a name – may it be a pseudonym – denies, or a legal interest of an other person in a way infringes that he uses a similar name to his unlawfully; also when somebody the legal interests of another infringes in a way that his likeness, letter written by him or addressed to him or another confidential deed misuses.
Sec. 109. The right of personality is after the death of the rightholder as long protected, as it is necessary for their piety.

[26] K. P. I. 4614/1940; BH 1981. 356.
[27] K. IV. 5101/1938; K. III. 5226/1938; BH 1967. 327.
[28] K. IV. 8069/1927; BH 1979. 411.
[29] Legfelsőbb Bíróság III. sz. Polgári Elvi Döntése.
[30] Act Nr. V. of 2013 on the Civil Code.

Germany of 1949 and its body of case law. The BGH ruled, similar to the BVerfG[31] that the application of the human dignity in connection with the right of self-determination indicates and legitimizes the recognition of a so-called general personality right.[32]

The newly recognized law was applied since then by the BGH in cases of the infringement of personality rights in the framework of private law. This dual concept have made it possible that the protection of legal persons could rely solely on the self-determination right, without the application of the human dignity regulation[33] and that the dignity did also not hinder the recognition of the commercial and thus transferable and inheritable aspects of the general personality right.[34]

Part of the Hungarian literature and case law deemed the new rule of 2013 about the human dignity as the only cause of action.[35] According to section 2:42 para. (2) Civil Code *human dignity and the related personality rights must be respected by all. Personality rights are protected under this Act.*

The recognition of the general personality right in the Hungarian legal system finds its fundamental base in the Basic Law only in human dignity. This can cause several problems, although the core problem is that such a concept of a general personality right in private law may hinder the recognition of the material aspects. There is a tension between the commercial value and marketability of personality rights and between the human dignity, since a solely dignity-based protection shall exclude all possibilities to separate, even partially, any personality rights from the person, and they cannot become transferable, alienable, inheritable goods. This collision of interests shall be solved through the ways of the interpretation of the law. The section 2:42. para. (2) Civil Code shall be interpreted so that it explains the connection of the true general clause of section 2:42. para. (1) Civil Code[36] to the human dignity as human right. In a way that it does not become a cause of action for the infringements of personality rights in general. The duplication of the general clause can be avoided this way, and the section 2:42. para. (1) has a function, as well as the human dignity right in the framework of private law is also classified. In this, on the self-development of the personality-based personality protection, the human dignity right shall not only be a subsidiary link to the Basic Law, but also a so-called "human minimum". According to Art. II. para. (1) Basic Law[37] the human dignity is inviolable, which traditionally means illimitability. The human dignity in private law shall be a core field in the protection of personality rights, and the genus the self-development right encompassing all named and unnamed personality rights, and thus the right to private life, too. The most important is, though, that with such interpretation of the human dignity, the transferable, inheritable personality goods may be recognized, without modifying the Code.

II.2. The logical-dogmatical step to commercial value: the manifestation of personality rights

Due to the traditional classification of subjective rights the personality right is a so called personal absolute right. It is an absolute right because the entitled can exercise his personality rights in a way that no one shall bother him while doing so. Everybody shall omit

[31] Bundesverfassungsgericht, Federal Constitutional Court of Germany.
[32] BGHZ 13, 334 – Leserbrief.
[33] BverfG NJW 2010, 3501, 3502 – Gen-Milch.
[34] NJW 2006, 3409 – Der blaue Engel II; ZUM 2009, 479.
[35] BH 2018. 248 – rendőri szakszervezetek tüntetése.
[36] Sec. 2:42. para. (1) Civil Code "*Everyone is entitled to freely practice his personality rights* […] *within the framework of the law and within the rights of others, and to not be impeded in exercising such rights by others*."
[37] Art. II para. (2) GG *„Human dignity shall be inviolable. Everyone shall have the right to life and human dignity; the life of the fetus shall be protected from the moment of conception."*

to hinder him in his right. On the other hand, the personality right is a personal right, since it is not a proprietary right. It protects the personal relations of the person from bothering. In its content it is a non-proprietary right, similar to family law. This form of the classification does not allow the recognition any commercial interest on personality rights, hence the examination aimed to describe this fundamental basis on another way, how legal relations are regulated and how the law describes the world and its facts.

The Roman law and the pandectism described the physical world around us, with its tangible assets (things).[38] This so-called physical world, physical reality encompasses things, the sovereignty on the things, and thus proprietary rights. The personal idea, the protection of immaterial rights, which do not exist in material form, have been filtered in the private law in the 19th century, and became more and more important.[39] The copyright law and the industrial property rights have been regulated firstly;[40] this was followed by the recognition of the personality rights. *Artur Meszlény* and *Gyula Dezső* classified these immaterial rights according to their alienability and their degree of bunding to the person of the right holder.[41] The personality rights can mainly be qualified as a personal immaterial good, since they are non-alienable and highly bound to the person. It is also possible to classify various personal goods possessing commercial value and transferability, as a non-independent proprietary immaterial good. A commercial personality right shall be a right also, which is partially transferable, but also stays in a close relation with the personality, and thus with the original entitled person, similarly to a previous right. This can be seen on the example of the right to a name, which was also classified, different than other personality rights, as a non-independent proprietary immaterial right by *Meszlény* in 1909.

The conversion and transformation of personality rights can be described by the definition of manifestation. The phenomena of manifestation can be also found in intellectual property right, since the protected thoughts, based on a creative activity, appear in the physical reality by the creation of the author. The manifestation of various personality rights can be found in the previous legal doctrine, too. This was related to a commercial value in the framework of unfair competition law and trademark law, and not within the personality regulation itself. Some aspects of personality rights may be removed from the inner core of personality, and also from the so-called ideal world, and become part of the physical reality because of their manifestation, which may give these rights a new function, too (manifestation). Other legal interests and legal objects become part of the personality right, thus they will be impersonated.

The manifestation is a privilege of some personality right, and not all of them. There are personality rights, which cannot be detached from the person either because they merely protect ideal and moral interests (e.g. the right to reputation and the protection against slander), or because they exist to protect a physical existence of a person (e.g. physical integrity, freedom). These rights cannot leave the ideal world either because it is not possible in a matter of sense, or because due to their nature they protect those aspects of the personality, which already exists in the physical reality.

There are also rights, which may be manifested, these are the so-called personality

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[38] Elster, Alexander: Urheber- und Erfinder-, Warenzeichen- und Wettbewerbsrecht (Gewerblicher Rechtsschutz). Walter de Gruyter & co., Berlin und Leipzig, 1928. p. 11.; Kohler, Joseph: Das Eigenbild im Recht. Berlin, J. Guttentag, 1903.; Balás P. Elemér: Szerzői jog és dologi dinamizmus. In Emlékkönyv Dr. Szladits Károly tanári működésének 30. évfordulójára. Grill, Budapest, 1938. p. 7.

[39] Fazekas Oszkár: A szellemi tulajdon jogbölcseletéhez. In Emlékkönyv Nagy Ferenc huszonöt éves egyetemi tanárságának megünneplésére. Atheneum, Budapest, 1906. p. 143.

[40] Act Nr. XVI of 1884 on the author's rights; Act Nr. II. of 1890 on the protection of trade-marks; Act Nr. XXXVII. of 1895 on patent law.

[41] Meszlény Artur: A svájci polgári törvénykönyvről. Atheneum, Budapest, 1909. p. 173.; Dezső Gyula: Az objectiv kártérítés tana. Grill, Budapest, 1917. p. 300.

assets. These have two subsets, which can be relevant classifying civil wrongs, appropriations. In the first group belong appearance assets of the personality (e.g. name,[42] likeness,[43] slogans[44]), in the other disclosure assets (e.g. life-picture, private life, private secret). These personality assets can obtain a commercial value through their manifestation and thus become into a non-independent proprietary immaterial right. Since the right to the name shows the most various forms of manifestation, this was examined.

II.3. Types of protected name rights and their forms of manifestation

The manifestation of the name can happen in different, separate ways. The right to a name can manifest in form of another legal institutes. The change of the function of a name can happen through registration as a trademark, and suddenly becoming an intellectual property right. A similar tendency can be observed within the framework of the protection of personality rights, since the name of a person can transform into a registered company name,[45] an unregistered trade name[46] or even as a domain name.[47] These verbal indications are protected within the personality right in Hungary. A manifestation is, of course, only possible is these rights contain the name of a person, so that they are not solely phantasy names, so that the right to a name works as a previous, so-called priority right. In these cases the name of the person does not only indicates the right holder, but also goods, services, websites etc.

The right to a name, similarly to the right to likeness can manifest sui generis, too. This means that the commercial appropriation of these assets does not transform them into another legal institute, they remain as they were, as personality rights, even though they function is altered. This form of manifestation indicates the establishment of a so-called proprietary right to a name (*Vermögensrecht am Namen, néven való vagyoni jog*), and encompasses the appropriation of the name for advertisement and endorsement. If the name of a person serves the indication of goods and services, it is actually a trade name and is protected as so. The reason why the cases in which the right to a name acquires commercial value remaining a personality right is fewer, is that the right to likeness cannot transform into so many other legal institutes, since it is lacking the nature of a verbal indication, and thus it cannot become a part of a company or a trade name, or cannot be registered as a domain name.

Through the manifestation of a person's name as part of a company name transforms its protection into a personality right on company name (*Persönlichkeitsrecht an Firmennamen, cégnévhez fűződő személyiségi jog*). If the company name is a mere phantasy name, the personality right of no person can be an obstacle for the appropriation and use of such company name. An obstacle can be, if the company's name consists a name of a person and the company wants to establish a new company containing its own name, and thus using the name of the person with it. The jurisdiction requires in these cases the consent of the entitled person of the name.[48]

The name can also manifest in the form of a domain name. In this case a new subjective right comes into being, which gives his owner an absolute right on the registered

[42] BDT 2018. 87 – kutatóintézet.
[43] PJD 2019. 19 – horgászcikkek.
[44] BH 2002. 261 – Jó estét! Jó szurkolást!
[45] ÍH 2004. 56 – REHAB.
[46] BH 1990. 255 – RORÁRIUS; BH 1994. 21 – Rácz.
[47] ÍH 2009. 111 – vedjegy.hu; ÍH 2011. 154 – biztositás.hu; ÍH 2017.11 – muszakieredetvizsgaszeged.hu.
[48] Legf. Bír. Pf. IV. 21007/1992 – Láng.

domain name. The domain name is not the name of the person, not a company name, not a trademark. The verbal designation used as a domain name is also not automatically an unregistered trade name, such a quality may be acquired by the consistent commercial appropriation of it. A domain name can also be registered as trademark or as the name of a company, and thus function as a trademark or company name. This indicates that a new subjective right comes into existence. The protection of domain names, since it is not necessarily connected to the market and enterprise, is not automatically based on the protection of trade names, since it does also protect ideal, moral interests.

II.4. The two tracks of commercial interests within the personality right

This system of the form of manifestations of the name indicates that the protected interests within the personality right are diverse, and does not only include ideal, moral interests, since the Hungarian private law does not only protect the legal objects which are in a very close relation with the personality. This seems to support my opinion that the human dignity as a human right only covers an aspect, a part of the protection of personality and that the free development of personality of section 2:42. para. (1) Civil Code shall be the general cause of action for any infringement. The protection of the various legal interests and objects make it clear that the Hungarian way of protection of personality resembles to the solution of Switzerland and Liechtenstein, protecting one's personal relations. In this category belong all immaterial interests and legal object, on what an exclusive right shall be granted by the common opinion. The mixing of moral and commercial interests can be observed on the manifestation of the right to a name. Here is the tension between the transferability and the classification of these legal objects the most intense.

In the division of immaterial goods, the personality rights are unalienable assets, while their social and commercial exploitability pushes them into the territory of transferable goods of intellectual property rights. The mixture of moral and commercial interests indicates various problems regarding the classification of these assets.

The scope of the protection of legal objects and interests within the protection of personality rights in Hungarian law is broader than in Germany, we could say: different. In German law the recognition the recognition of alienable assets could have been recognized before the general personality right came into existence through the cause of actions of section 12 BGB and section 22 KUG, such a protection was also planned by the legislative intent of the BGB, although without the inheritance of such commercial aspects. The biggest change was the recognition of the general personality right by the BGH applying the articles of the *Grundgesetz* cumulatively about the human dignity and the self-determination. This have made the nature of the protection of personality in the German private law more immaterial, even moral. This was intensified by the modification of the sign rights in the *Markengesetz* of 1995, since the infringement of commercial verbal indications received a general passing off tort, and their protection was similarly formulated as the protection of trademark. This new cause of action has limited the application of the section 12 BGB, since its analogical application in case of the infringement of any commercial verbal indication, not containing a person's name was not possible anymore. This fortified the ideal and moral interests within this section, the material and commercial interests have been diminished by the commercial, unfair competition and sign law. This also indicated that during the recognition of the commercial aspects of the personality right in 1999 the BGH could not use the extensive application of the name rights in section 12 BGB as an argument for the scope of pecuniary interests.

The regulation in Hungarian law is different, since the right of personality

encompasses all sign and name rights, just like in Switzerland, where the commercial aspects of personality right did not found recognition, though. The variety of pecuniary interests indicate the multiplication of the forms of manifestation, too, and thus the multiplication of commercial, material exploitations with it. This causes a more intense tension between the non-pecuniary and pecuniary aspects, which makes the German model non-implementable. The system of commercial interests indicated by the intellectual property-like assets (company name, trade name, domain name) can be described by the manifestation as a general form of acquisition of such assets with commercial value.

III. A personality right of commercial value

III.1. Governing law and material interests

The recognition of the protection of commercial interests and material content of personality rights can be seen in the regulation of the remedies about the infringement of personality rights. According to section 2:51. para. (1) e) Civil Code *a person whose personality rights have been infringed can require for that the wrongdoer or his successor surrender the financial advantage (excess profits) acquired by the infringement applying to the rules of unjust enrichment*. According to section 2:53 Civil Code *any person who suffers any damage from the violation of his personality rights shall have the right to demand compensation from the infringer in accordance with the provisions on liability for damages resulting from unlawful actions*. The protection of commercial interests relies on the aim of the act and on the legislative intent, too.[49] Despite these remedies, there is a huge gap on the side of the cause of action, where any regulation of material interests is missing. There is no trace of the recognition of the possibility of any commercial appropriation, the loss of such right or even the contractability of such proprietary-like interests. In my opinion, the silence of the Code on these questions rely only on the fact, that the questions were not examined during the codification of the Code, which were discussed in Germany at the time of the Hungarian codification or which were highlighted by the German jurisdiction. This is queer, since the legislator had evaluated the tendency of commercialization regarding to the remedies in Germany. This is why the remedy of skimming off excess profits was implemented and codified in the Civil Code.[50]

The case law seems to be more forward, since in cases of unjust commercialization of personality rights, the courts grant a fictive license fee based on the liability of damages[51] and newly a reasonable enrichment based on the skimming off excess profits.[52] The jurisdiction suffers from the misinterpretation of the infringement of commercial interests as immaterial ones.[53] This fundamentally failed opinion relies on the unfortunate formulation of the regulation during the codification. It indicates the division between the non-commercial and pecuniary interests of the subjective law, regarding the cause of action. This could be otherwise solved either by the teleological reduction of the regulation, or by the codification of a special personality sphere protection commercial interests, similar to the personality rights of the author. It is clear that the Civil Code protects commercial interests, at least

[49] Vékás Lajos: Über die Expertenvorlage eines neuen Zivilgesetzbuches für Ungarn. In Zeitschrift für Europäisches Privatrecht 2009. p. 536, 551; Petrik Ferenc: Személyiségi jogok. In Wellmann György (szerk): Polgári jog. Bevezető és záró rendelkezések. Az ember mint jogalany. öröklési jog. HVG-ORAC, Budapest, 2014. p. 201-202.
[50] Uo.
[51] BDT 2007. 171 – aktfotó; BDT 2015. 70 – élesztőtabletta.
[52] Möglich: PJD 2019. 19 – horgászcikkek. Kecskeméti Törvényszék 8.P.20.334/2017/17.
[53] BDT 2007. 171 – aktfotó; BDT 2009. 24 – Budapest Őszi Fesztivál; PJD 2019. 19 – horgászcikkek

partially. The unregulated aspects and facts may be developed by the case law relying on the intent of the legislation, since the missing of the regulation was unintentional. This seems as an emergency solution, though, since Hungarian judges are not very proactive regarding such progresses and advancements. The intervention of the legislator is inevitable to make clarity and security in the application of law.

Such an action of the legislator could be a recognition of a personality right with commercial value, in my opinion. There are different solutions how the relation between the immaterial and pecuniary interests can be described.[54] The material interests cannot entirely separate from the moral ones, which does not mean that they cannot be threatened separately in the Code. Such a separation has more reasons. The most important is that the two interests indicate different content and nature (inheritability, transferability or the lack of these) regarding the cause of action and the remedies, too. This may ease the application and their mixture in the jurisdiction. This separation can be explained by the manifestation of the personality assets, and the alienability of the goods arising from it. This manifestation leads to the change of the legal nature of various personality assets, which can only be evaluated by a partially separate regulation.

Since the moral and commercial interests require a different legal regulation, this must have come clear on the side of the remedies, too. While the remedy of non-pecuniary compensation can only be awarded in cases of mental distress or other immaterial infringement, the liability for damages in form of applying license analogy and the surrender of excess profit can only be obtained, where the infringement is a mere pecuniary one. To make this clear for the judges, the protection of commercial interests must be separated, even in cases where both interests may be infringed.

III.2. A personality right with commercial value

There are two cumulative prerequisites, which make a personality right obtain commercial value. The first one is the manifestation of personality assets, and the second is the act of utilization, so the appropriation and exploitation of such assets for commercial and profit gaining purposes. The so-called publicity does not play a role in the acquisition of commercial value and in the infringement of commercial aspects, but in the application and the sum of the proprietary remedies. In the civil law system and thus in Hungarian law, there are more cases and expectant rights, for example the appropriation of personality assets in form of a trademark, trade name etc., as in the Anglo-Saxon concept of commercial interests in the framework of the right to publicity. The development of the commercial value of personality rights have other question in the United States, which is foreign for the civil law countries. In the case law suffers from the lawful evaluation of the marketability of personality assets of unknown persons on one hand, and the privacy protection of celebrities on the other.

The typical appropriation and commercial use of personality rights can be divided in three subsets:

1. The use of personality assets as trademarks, or in general as a not registered trade sign,
2. the appropriation of the name rights in the form of company name, trade name or domain name,
3. the appropriation of personality assets for commercial or advertisement purposes, may this manifestation aim to increase the sale of goods and services or to satisfy the hunger for

[54] Götting, Horst-Peter: Die Vererblichkeit der vermögenswerten Bestandteile des Persönlichkeitsrechts – ein Meilenstein in der Rechtsprechung des BGH. In NJW 2001, 585; Beuthien, Volker: Was ist vermögenswert, die Persönlichkeit oder ihr Image? In NJW 2003, 1220.

sensation by the public.

The protection of a personality rights with commercial value as a separate cause of action indicates several questions and problems. According to one opinion of the German doctrine the commercialization of personality assets and their transferability and alienability indicates their classification as intellectual property rights, which may also be a solution for Hungarian law. The merger of the ideal and material interests, the loss of power on the right by the pass of time (term of protection) and the omnipresence (so-called ubiquacy) of these goods indicate an intellectual property-like subjective right and regulation.

It is recognized by the jurisdiction that the entitled has the right to appropriate and sell the rights on these personality assets by a contract, and that he is entitled to a reasonable royalty in exchange of the commercialization. It has not been examined by the case law, yet, what is the extent of such a right acquired by contract, if the licensee is also protected towards the unjust exploitation of third parties. The Civil Code contains also no regulation on the question, whether the heirs could conclude such a contract with third parties.

The Civil Code does not contain the term of protection this commercial aspects of personality rights have, thus they become common domain with the death of the right holder on one hand,[55] and survive the deceased regarding remedy of the surrender of the excess profit in the framework of the right to piety in section 2:50. para. (2). According to this section *any heir shall have the right to lay claim to any financial advantage obtained by having violated the memory of a deceased person. Where there are several heirs, the deprived financial advantage shall be distributed among the heirs according to their respective shares of the estate*. The Civil Code says nothing about it, how long can the heirs file such a claim. In my opinion a term of protection of 20 years post mortem should be regulated. This could clear the contradiction between the obvious inheritability of the claim for the surrender of excess profits and for material damages, on one hand, and the questionable contractual disposal of the heirs.

The personality rights having a commercial value shall be lost by the forfeiting of the right. The Supreme Court have applied the forfeiting of personality rights instead of the statute of limitation in cases of name infringement of expropriated companies of the socialist era.[56] The forfeiting was not explicitly mentioned as so, though. In the Austrian jurisdiction is this legal institute analogically applied. It can be originally found in trademark law, but was also quoted in cases of the infringement of the commercial aspects of the general personality right of section 16 ABGB.[57] It can also happen that in some cases the protection of these commercial interests exhausts.[58]

The constitutional protection of pecuniary interests should be protected, similarly to the intellectual property rights, in the framework of the guaranty of property according to the Hungarian Basic Law. This solution is indicated by the German[59] and the Spanish law,[60] and also by the case law of the ECHR.[61] There is a tendency in the jurisprudence, on the other hand, which applies these material interests on personality rights similarly to trademark law in

[55] Menyhárd Attila: Forgalomképes személyiség? In Menyhárd Attila – Gárdos-Orosz Fruzsina (szerk.): Személy és személyiség a jogban. Wolters Kluwer, Budapest, 2016. p. 79; Szeghalmi Veronika: A személyiség „értéke“ és annak post-mortem továbbélése. In Forum: Publicationes Doctorandorum Juridicorum 2017. p. 233.
[56] BH 1990. 255 – RORÁRIUS; BH 1993. 350 – Herz; BH 1994. 21 – Rácz; BH 1997. 467 – Pick.
[57] OGH SZ 2010/70 – Maria Treben.
[58] Möglich: PJD 2019. 19 – horgászcikkek.
[59] NJW 2006, 3409 – Der blaue Engel II; ZUM 2009, 479.
[60] Trebes, Anja: § 68. Spanien. In: Götting, Horst-Peter – Schertz, Christian – Seitz, Walter (szerk.): Handbuch des Persönlichkeitsrechts. CH Beck, München, 2008. p. 1167. [44]; STC 81/2001 (26.03.2001) – Emilio Aragón.
[61] EGMR 25379/04; 21688/05; 21722/05; 21770/05 – Paeffgen GmbH v Germany.

the framework of international private law.[62]

III.3. Remedies for the infringement of proprietary-like allocations of personality assets

The claim for compensation for non-pecuniary damages should not be applied in cases of infringement of the pecuniary aspects, since it shall compensate the mental distress suffered. According to section 2:52. para. (1) Civil Code *any person whose rights relating to personality had been violated shall be entitled to restitution for any non-material violation suffered*. The case law has granted in the previous cases of the legal institute of compensation for immaterial damages (*nem vagyoni kártértés*), as well as the restitution (*sérelemdíj*) in the new Civil Code from 2014 such a compensation, even though the proprietary relation between the parties have been infringed without any mental distress. This may be deemed as an undue analogy. The problem of the non-application seems to be more complex in case of the restitution, since the Civil Code prescribes that such a claim can be filed in any cases of the infringement of personality rights. How wrong this opinion is, can be taken from the case law, hence a test shall be applied to examine, whether the commercial or the immaterial aspects of the personality rights have been infringed. In the first case restitution can be granted, in the second the liability for damages or the surrender of excess profits. The cumulative application of both remedies is also possible.

There are two possibilities to compensate unwanted shifts in the proprietary assets of a person: liability for damages and the surrender of excess profits gained by the infringement according to the rules of unjust enrichment. The Hungarian jurisdiction grants a fictive license fee as lost profit in the framework of liability for damages (license analogy).[63] The Civil Code bids the application of unjust enrichment law in cases of the surrender of excess profits, hence mixes two separate remedies.[64] The teleological and the systematic argumentation lead to the solution that it is a remedy for unjust enrichment. It differs from the liability for damages by the lack of subjective prerequisite, the tenability (culpability). In the framework of unjust enrichment, not only the lost profits, a fictive license fee is to be payed, but all profits, which the wrongdoer has aimed to obtain by the infringement. This opinion can be observed in the jurisdiction, too. All shifts in proprietary aspects are deemed by the case law as profits, and the amount and extent of these profits shall be proven by the plaintiff. In the previous precedents about liability for damages such a damage in terms of a fictive license fee must not have been proven by any party. If the infringement of a personality asset was obvious, the court granted such a fee.[65]

The succession of the rights has been clarified explicitly in connection with the surrender of the excess profits only, even though the application of this remedy post mortem is bound to the simultaneous infringement of the right to piety. This is clearly a bad solution in the Code, since the exploitation of commercial aspects is bound to the infringement of moral interests. On the other hand, it makes the application of this remedy nearly impossible, because the infringement of pecuniary interests post mortem almost never indicate the infringement of the right to piety, due to the legal doctrine.[66]

It would be reasonable to highlight in the framework of section 2:43 about liability for

[62] ÍH 2014. 58 – facebook.hu.
[63] BDT 2007. 171 – aktfotó; BDT 2015. 70 – élesztőtabletta.
[64] These are two different remedies in both trademark and copyright law. See: BDT 2008. 207 – Eredeti Pick Szalámi; Faludi Gábor – Kabai Eszter – Tarr Péter: XIII. fejezet. A szerzői jog megsértésének jogkövetkezményei. In Gyertyánfy Péter (szerk.): Nagykommentár a szerzői jogi törvényhez. Wolters Kluwer, Budapest, 2014. p. 581.
[65] BDT 2007. 171 – aktfotó; BDT 2015. 70 – élesztőtabletta.
[66] Menyhárd: i.m. p. 79; Szeghalmi: i.m. p. 233.

damages, that the *lucrum cessans* means an adequate license fee, on the other hand that such a claim is also actionable by the heirs, since it is a proprietary claim and thus, inheritable. This can only be made out by the teleological argumentation. The post mortem version of the claim to surrender excess profits should be separated from the right to piety, since this solution is false, merging the infringement of commercial interests with moral aspects. This also decreases the cases of the application of such a claim. Both proprietary claims should be abstracted and separated by a special cause of action, which could protect material and commercial aspects only. That could solve the tension of the application of the claim for damages and for the surrender of excess profits on one hand, and the application of restitution for mental distress and other immaterial injury.