

The right to the image of the patient

Prawo do wizerunku pacjenta

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Abstract

Photos of patients are an important element of medical documentation. They are used in didactics, for scientific purposes, in scientific publications, in specialist databases, as well as for marketing and educational purposes. Very often such photos can be found on the websites of specialized medical offices and social media, on such websites as Facebook or Instagram. The development of the communication channels of the modern world, combined with the increasing availability of the Internet, leads to postulates to safeguard the patient image, which is not always adequately legally protected, among others, due to the absence of separate regulations. An overview of selected rulings and doctrines shows the differences that exist in the definitions of a human image. The lack of a legal definition of image results in the lack of clear guidelines on how to understand the patient image. By introducing appropriate regulations or recommendations that would determine what exactly the patient image is, as well as when and under what conditions the patient image can be published, it would be possible to avoid uncertain situations and limit possible future claims and legal issues.

Key words: image, image rights, image protection, patient image, personal rights

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Streszczenie

Zdjęcia pacjentów są ważnym elementem dokumentacji medycznej. Są wykorzystywane w dydaktyce, w celach naukowych, publikacjach naukowych, specjalistycznych bazach danych, a także w działalności marketingowo-edukacyjnej. Bardzo często takie zdjęcia możemy spotkać na stronach internetowych specjalistycznych gabinetów medycznych i w mediach społecznościowych, w takich serwisach jak Facebook czy Instagram. Rozwój kanałów komunikacyjnych współczesnego świata w połączeniu z coraz większą dostępnością Internetu powoduje, iż pojawiają się postulaty ochrony wizerunku pacjenta, który nie zawsze jest właściwie chroniony, m.in. z powodu braku odrębnych przepisów. Przegląd wybranych orzeczeń i poglądów doktryny przedstawia różnice, jakie istnieją w definicjach wizerunku człowieka. Brak definicji legalnej wizerunku jest nie bez znaczenia dla braku jednoznacznych wytycznych pojmowania wizerunku pacjenta. Wprowadzenie odpowiednich przepisów lub rekomendacji, które określa, kiedy i na jakich warunkach można publikować wizerunek pacjenta, pozwoliłyby jednoznacznie rozstrzygnąć, czy dana forma przedstawienia pacjenta jest jego wizerunkiem czy nie, oraz pomogłyby uniknąć sytuacji wątpliwych i ograniczyć ewentualne przyszłe roszczenia i pytania prawne.

Słowa kluczowe: wizerunek, prawo do wizerunku, ochrona wizerunku, wizerunek pacjenta, dobra osobiste

Background

The aim of this paper is to introduce the issue of using patient image, mainly in education and clinical care. In order to fulfill this aim, some legal issues concerning the scope of the right to the protection of patient image were analyzed. In the following article, the author does not consider the unauthorized use of patient image with regard to the General Data Protection Regulation (GDPR).¹

Photos of patients are an important element of medical documentation. In the current legal system, there is no comprehensive definition of “medical documentation”. A photo of a patient has not been mentioned in any legal act as an element of medical documentation.

Article 25 of the *Act of 6 November 2008 on Patient Rights and the Patient Rights Ombudsman*² determines what should be included in medical documentation at the very least. The aforementioned regulation is a certain minimum set by the legislator. The expression “at least” does not exclude including patients’ photos in medical documentation.

Kubiak proposed his own definition of “medical documentation”, stating that it is “a collection of data describing patient’s health and the scope of services provided to them”.³ In my opinion, based on this definition, a patient’s photo may be considered a part of medical documentation.

One more article of the *Act on Patient Rights and the Patient Rights Ombudsman*, i.e., Art. 26(4), should be noted. It states that medical documentation shall be shared with university or research institute for scientific purposes, without revealing the name and other personal data that could lead to identification of the person whom the documentation concerns.

Photos of patients are used to document changes occurring during the disease development or treatment. They are often sent via Internet to establish the diagnosis during interdisciplinary consultations between specialist doctors – they are used in telemedicine. The photos are eagerly used in didactics as they enable to show the specific symptoms of the disease, whereas the verbal description could

be insufficient. They are also presented for scientific purposes, e.g., during conferences, speeches, lectures, and also in scientific publications, e.g., as a presentation of clinical cases. At long, they are included in specialized databases. Finally, their marketing-educational use shall be noted, where they are used as illustrations of “before” and “after” treatment patient’s condition. Very often, such photos can be found on the websites of specialist doctor’s surgery and in social media, such as Facebook or Instagram.

Here, the question to be asked is in how many of those cases the patients gave their informed consent to using their image. Will the patient’s consent always be required for publicizing the patient image and will introduction of such a requirement not result in limiting right to information and disseminating scientific knowledge? To answer these questions, the term “image” must be first defined.

Image definition

According to the definition of *Uniwersalny słownik języka polskiego* (“Universal Dictionary of Polish”) of the Polish Scientific Publishers PWN, the term “image” [„wizerunek”] originates from German “Visierung” and means someone’s likeness, image, portrait, or picture. Metaphorically, it is “the way a person is seen, pictured”.⁴

Since there is no legal definition of an image, legal scholars and commentators made numerous attempts to formulate it. Those attempts have not yet resulted in one universally approved definition of the term. It is still a matter of dispute among legal scholars and commentators.

One of the first definitions was created by Ritterman, who indicated that “the image of a person includes the head as well as entire figure that individualizes the person as a physical entity”.⁵

In the post-war period, Grzybowski suggested to replace the term “image” [„wizerunek”] with the term “physical image”. The author notes that in the legal literature and legislation, the following terms appear: physical image, image [wizerunek], portrait, facial features, etc.⁶ He stated that “it is not only about the facial features but about all the

physical features that individualize the person and allow for recognizing the person, e.g., a specific body build”.⁶

Bleszyński agrees with Grzybowski and states that the term “image” may be applied both to the entire figure and its particular elements as well, although it must maintain the premise of individualizing the image.⁷

Stefaniuk criticizes Grzybowski and defines an image himself as an intangible value, thus with no possible precise definition. Stefaniuk tries to single out certain features that are specific to an image: “There are such facial and figure features that allow for identification the person as the specified physical entity. With specific, own appearance and physical image the person connects feelings that are the components of the person’s mental life, which is to be protected by a legislator by the protection of image”.⁸

Wojnicka defines the term “image” [“wizerunek”] as a “noticeable, physical features of the person that create their appearance and allow for identification them among other people”.⁹

Barta and Markiewicz widely comment on the subject of an image. The authors give to the term “image” [“wizerunek”] the following meaning: “[A]n intangible work that by artistic means presents a likeness of a person”.¹⁰ In another publication, the abovementioned authors note that the subject matter of the right to an image is the entire figure and not only the face – the most specific element of a person’s appearance. Within the term “image” shall thus be included both natural features of a person and these that have been added, e.g., hairstyle, make-up, clothes, glasses, and accessories, if only they are, along with other features, specific to the person. The authors stress that a certain person may be distinguished by specific to them eye color, hairstyle, make-up, and specific accessories, e.g., a walking stick.¹¹ Barta and Markiewicz in their considerations go even further and refer to Charlie Chaplin. They use this example to state that the image may compose of specific way of moving, behaving and gesturing.¹¹

This opinion is shared by Sieńczyło-Chlabicz, who advocates the wide use of the term “image”. The author states that an image is most often associated with external features of a certain person, especially their face. It should not be limited, though, to the compilation of anatomical features of a person.¹² The author states that the term “image” may also include a specific phrase that the person is uses to say. As an example, the author gives the case of *Carson v. Here’s Johnny Portable Toilets* from USA,¹³ in which the court ruled the phrase used by Johnny Carson in his talk-show to be an element of his protected “identity”.¹² The case concerned the “here’s Johnny” phrase used by Johnny Portable Toilets as an element of their marketing in selling and renting portable toilets.

Święcka and Święcki define the term “image” as “a personal interest that contains of features that allow for distinguishing or characterizing the certain person. The image is established, in turn, on tangible medium, such as a photo, sculpture, movie, or picture”.¹⁴

Bleszyński in the annotation on the judgment of the Supreme Court of February 27, 2003 states that “an image is thus a compilation of specific features of a person that allow for imagining their appearance. The synonym of the term «image» is likeness of a natural person, regardless of the form of their depiction (e.g., in the form of a photo or fine art work). Something entirely different is indicating features that make associations with a certain person possible (e.g., a caricature)”.¹⁵

Grzeszak, in turn, believes that an image [wizerunek] is: “a specified establishment of a physical image of a person that may be reproduced and disseminated”.¹⁶ Similarly, Matlak claims that an image [wizerunek] is an establishment of a physical image that may be reproduced and disseminated. The author also notes that disseminated is always the specified image that we can “attribute” to a certain person in the specified moment of their life. This leads to a statement that a person has many images – different, depending on the moment of their life, and so it is not enough to give one general consent to using one’s image. The consent shall also include the specification of the moment of life when the image was established. This reservation will help to avoid using images of past years, basing on the consent that had been given by the entitled.¹⁷ These comments are of practical significance to the subject of this thesis. Consent given by the patient for disseminating the specified image (e.g., a photo after a cosmetic surgery) means that the consent applies to that specific image and no others, established later or earlier likenesses of the person (e.g., of the same patient before a cosmetic surgery and years after it).

In conclusion, it should be stated that the term “image” was and is understood very widely. It may include not only facial features but also those of an entire figure and specific body build or the way of moving (e.g., walking), voice, phrase, and also specific accessories, hairstyle and make-up, basing on which the person may be identified.

It should be noted that according to the above, a patient’s image should be seen similarly widely. All above elements may be included in a patient’s image as well.

Summarizing this part of the thesis, it should be concluded that the analysis of the views of legal scholars and commentators and of court rulings allows to formulate the following statement: along with the development of new ways of communication and new technologies, a tendency to widen the definition of an image can be noted in practice. This tendency reflects in including into the term new elements to ensure their legal protection, e.g., specific phrases, voice or “theater masks”.

Recognition as an image determinant

A recognition premise is a necessary condition of protecting an image and a criterion of deciding whether

there was an infringement or not. Recognition means the possibility of identifying the person presented in the image by third parties.

Copyright does not specify elements that allow for identification nor does it specify the group that can make the identification. It seems that a recognition may be divided into 2 aspects. The 1st concerns the requirement to define the group of persons that can make the identification of the person whose image has been established. The 2nd concerns the method of the person's portrayal, i.e., which physical features allow for identification an individual.

Court rulings and views of legal scholars and commentators do not present a uniform approach to the aforementioned issues. In one ruling, the Supreme Court of Poland judged that the number of persons that can identify an established image of a person shall be large enough to allow for calling the image "universally recognizable".¹⁸

Barta et al. present a different view and state that the identification by a group of persons composed of acquaintances and co-workers is enough.¹⁹ Siańczyło-Chlabicz is of similar opinion. She refers to German judicature (under the Art. 22 of the *Kunsturheberrechtsgesetz*, it is considered that the recognition by a limited group of people of the same social circle as the identified person is entirely enough²⁰) and advocates hypothetical recognition as enough to grant the protection of the image to the entitled person.¹²

The ruling of the Court of Appeal in Warsaw presents a similar approach. In the decision of November 26, 2003, it is stated that: "[...] under Art. 81 of the *Act on Copyright and Related Rights* [Act of February 4, 1994 on Copyright and Related Rights], it cannot be judged that the infringement of personal interests in the form of disseminating an image can be committed only if the image is recognizable to receivers. If it was so, then under the regulations of Art. 23 in conjunction with Art. 24 of the Civil Code and Art. 81 of the *Act on Copyright and Related Rights*, the protection would be provided solely to public persons and those whose face is commonly known". Art. 81 of the *Act on Copyright and Related Rights* does not contain such limitations. On the contrary, the dissemination of the images of the commonly known persons does not require the consent of the concerned if the image was taken during their public activity (Art. 81 sec. 2 point 1 of the *Copyright Act*).²¹

The cited ruling indicates that a recognition of an image does not occur only if and when the image is universally recognizable. Thus it can be assumed that the group of receivers can be limited and that it is enough for the person to be recognized by the group of their acquaintances and co-workers; it need not be third parties necessarily. There is no doubt that the group of people that need to make identification cannot be limited only to the person depicted in the image.

Another doubt concerns the elements of the entitled person's identity and which of these elements allow for

considering identification made. According to Barta et al., "recognition" does not need to be equated with personal data that allows for identification a person. It is enough if an association between the image and the person established in it is made.²² A recognition of the image may occur by connecting it with relevant content allowing for identification.

The issue mentioned above was analyzed by the Court of Appeal in Warsaw. The court judged that the publication of photos that are not an image (likeness) of a person but in relation with the content of the article allow for the recognition (identification) is an infringement of personal interests. In accordance to the ruling above, it should be assumed that the infringement of patient's personal interests occurs when their image is published together with the detailed description of the case. On the other hand, it can lead to limiting possibilities of presenting particular medical cases and thus to limiting the right to information and disseminating scientific knowledge.²³

Obviously, it concerns the situation in which the patient permitted to publish their image. The opinion of the author of this thesis is that in a situation where there is no one right solution, not always the priority can be given to the protection of an individual and each case should be considered individually.

Patient's image

It seems that all the presented above definitions concerning an image may also be applied to a patient's image.

Before trying to portray patient's image in detail, the methods of the portrayal should be presented first.

The development of new technologies and of medical equipment allows today to see and present the human on the outside in close detail, but also to examine and depict their inside as if it was transparent.

A patient is portrayed using photos or medical images. Although the photos probably do not require an additional explanation, the medical images are not so commonly known.

Medical imaging is took with specialized medical equipment through various physical influences. They are for example: conventional X-ray diagnosis, digital X-ray imaging (RTG), computed tomography (CT), ultrasonography (USG), nuclear medicine, functional imaging, microscopy, photoacoustic imaging, and other techniques.

By using medical imaging, an image with very detailed features of the examined human can be obtained. Basing on these images, it will be possible to identify a patient or a deceased person. Pantomography images are used in postmortem identification (obviously it shall be remembered that the right to the protection of one's image and other personal interests exists as long as the person lives and expires as they die; it is universally accepted that the right to veneration of and the memory about the deceased

persons are also legally protected – it is worth to notice that the image of the deceased may be protected then, yet not as a personal interest of the deceased but of their family member). A panoramic X-ray image of teeth, jawbone, mandible, and temporomandibular joints and maxillary sinuses is only one of many medical images, basing on which identification can be made. Obviously, it should be noted that on the basis of medical images the identification is hypothetically possible but rather by a specialist and not by a layman.

However, a question may be posed whether if on the basis of such images the identification will be possible, then can the patient request protection and may such image be considered an image in legal sense at all?

Although it seems that the affirmative answer may be possible in the light of the aforementioned principle that the premise of recognizing the person in the image is the necessary condition of protecting the image, the author is rather inclined not to qualify such medical images as patient's image. Though the identification in such cases is possible perhaps only by specialists, considering such portrayals as images would limit right to information and disseminating scientific knowledge.

It is also recommended to consider a situation when patient's medical image is presented together with the detailed description of the case because in such a situation the identification can be made and not only by a specialist. Is the possibility of making an identification enough to discuss the protection of one's image? Such a situation was encountered by the authors of the article published in „British Journal of Psychiatry”.²⁴ In more detail, this issue was addressed in *GMC finds doctors not guilty in consent case*.²⁵

In the mentioned article, people with bulimia were described in detail. The complainant, who has been described in the preceding article, during the hearing referred to as Miss C., claimed that the article presented many details about her particular case and thus she might be identified. She said that she had given oral consent to use data regarding her, yet she had thought that her identity would be sufficiently protected. Miss C. had been recognized by her friend after a part of the article had been used in „Aberdeen Press and Journal”, a local newspaper.

All the authors of the article expressed their regret and admitted that on the basis of the article description, her identification was possible by close friends and health workers assigned to her care. Yet they also stressed that the described in detail personality traits are extremely relevant in psychiatric cases studies. Professor Gerald Russell, summoned as an expert in eating disorders, gave an opinion that all details about Miss C. presented in the article were essential and necessary. He also stated that at that time (1991–1993), it was not customary to seek the patient's consent before publication. He knew that these rules have changed greatly over the last 5 years and that

nowadays patient's consent should be obtained before the article is published.²⁵

Ultimately, the General Medical Council (GMC) did not find the authors of the discussed article guilty of a grave professional misconduct. This case, however, started a debate in the medical community about the method and form of obtaining patient's informed consent.

The GMC is a public body that maintains the official register of medical practitioners in the UK. Its main activity is protection, promotion and maintenance of public health and safety by controlling the entries in the register, and suspending or removing members if necessary. It also establishes standards for medical schools in the UK.

Therefore, it seems that the claims of the injured parties can result not only from the unauthorized publication of their photo image but also of incorrect use of other medical data, for example, the mentioned description of the case that makes the identification of the patient possible. It should be noted that even if the detailed description is not considered an image, the patient's right to privacy may still be infringed. Fundamental international conventions provide the protection of this interest.^{26–28}

Undoubtedly, the simplest identification is made on the basis of a photography; therefore, the following considerations will focus on patient's image in this context.

As mentioned in the introduction, the patients' photos are used in various ways, i.e., in scientific studies, hospital medical documentation, specialized databases, or telemedicine.

Taking medical images is a common practice in some specializations, e.g., dermatology, ophthalmology, dentistry, orthopedics, oncology, or cosmetic surgery, and they can be an important part of the medical documentation. The method of depicting patients by the means of photos depends especially on the specifics of the scientific discipline.

In dermatology, for example, a photo is an objective method to compare progress in skin disease treatment. These photos are integral part of patient's medical documentation and are available for doctors during the visit (Fig. 1,2).

In ophthalmology, some photos present the sight organ or entire face, while in cosmetic surgery (esthetic medicine) the corrected body parts often occur, such as face, breast, abdomen, thighs, or eyes. Dentistry patients' photos present entire face or they are extra- and intra-oral photos.

In medical literature, detailed guidelines for taking medical images can be found. Persichetti et al. present methods of taking photos of patient's face in esthetic surgery. They indicate that the patient prepared for taking the according photo should have their hair behind their ears.³⁰ It is recommended to remove jewelry, glasses and hearing aids. Make-up is not permitted, especially during skin revitalization treatments. All clothes that make the image unclear should be removed. *Principles and practice of external digital photography in ophthalmology* discuss

other guidelines concerning the correct taking of a photo of a patient with ophthalmologic problem.³¹

Patients' photos can be divided into those that can serve for identification and those that make identification almost impossible, and into those that present patient's image or do not present it.

Use of patient's image

Nowadays people can contact the world at any time. Thanks to the Internet, we have unlimited possibilities to access important information or documents. Within few seconds we can find information that interest us.

Along with the development of new technologies and possibilities of long-distance information transmission, the protection of patient's image began to take on a new, different from traditional, meaning. It should be noted

that obtaining patient's consent to publication of their image for medical purposes, e.g., in medical journals, has not been a common practice so far.

Even if the consent was given, it often concerned only the specified situation and field of exploitation, e.g., printed journal or book. The dissemination of a journal on paper assumes the access of a specified, limited group of people. It is different, however, when it is disseminated electronically via Internet in an open access (OA). Thus, it can be assumed that the patient who originally permitted to use their image in the specified situation, e.g., to create the medical documentation or to include it in the scientific publication with limited access, may not permit for dissemination in another form. Unfortunately, the patient rarely knows their image is used in such a way.

The author of this thesis thinks that an important role in this subject is played by the process of digitalization and the emergence of Internet and promoting the OA policy. It is a relevant issue within the subject of this thesis. Many publications and various types of documents that until now has been accessible only in printed copies of limited range, after digitalizing them widened their method of dissemination and the range of their exploitation into being universally accessible via Internet.

There is no doubt that the emergence of the Internet created entirely new possibilities to communicate universally. A global platform of instant transmission of information, not only textual but also pictorial, emerged.³²

Matlak notes that the digital method of storing is specified by the very small "eternal volume" of such storage, which allows for an easy transmission. Using Internet for transmitting the "digital versions" of works makes them accessible for hundreds of millions of people in the whole worldwide practically at the same time.³³

The process of digitalization is used more and more often because it significantly decreases copying costs while at the same time maintaining the quality of the original in the copy.³⁴ It allows for dissemination of any scientific reports or digital pictures on a scale unknown before.



Fig. 1. Sample photos used in dermatology documenting skin lesions (used with the permission of the author of the publication²⁹)

Ryc. 1. Przykładowe zdjęcia wykorzystywane w dermatologii dokumentujące zmiany skórne (wykorzystano za zgodą autora publikacji²⁹)

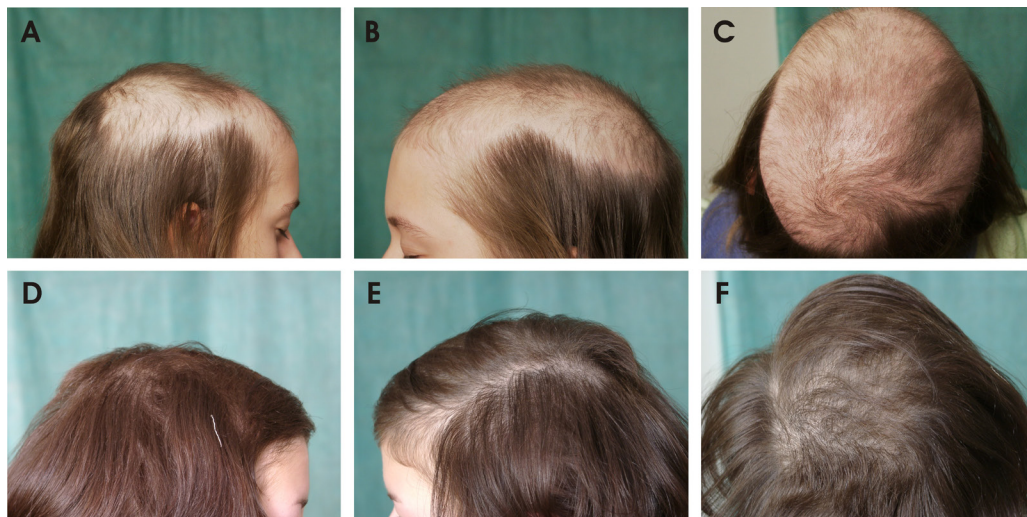


Fig. 2. Depiction of the process of the treatment (used with the permission of the author of the publication²⁹)

Ryc. 2. Zobrazowanie procesu leczenia (wykorzystano za zgodą autora publikacji²⁹)

It should be stated that the access to the uploaded materials is varying. Some of them are accessible to anyone that is interested and there is no technical barrier, e.g., scientific journals published in OA system, while some are shared only with limited group of people or even an individual person.³⁴

Open access to scientific publications and open science should be emphasized here because they both gain increasing significance in the context of science policy worldwide. Currently, open science is supported by many institutions, i.a., United Nations, European Commission and European Research Council. It is an increasingly common practice that research funding institutions oblige their employees or grantees to make their research results available accordingly to OA rules. It should be noted that the National Science Centre of Poland (NCN) was among the signatories of the so called cOAlition S. It establishes that since January 1, 2020 scientists who have received grants from national agencies, e.g., NCN, are obliged to share their research results by publishing them in scientific articles with open, free and instant access.³⁵

On October 23, 2015 Ministry of Science and Higher Education adopted OA policy included in the document titled *Kierunki rozwoju otwartego dostępu do publikacji i wyników badań naukowych w Polsce*. (Development directions of open access to publications and scientific research results in Poland).³⁶

In *Budapest Open Access Initiative* declaration of February 2002, open access has been defined as free availability on the public Internet, permitting anyone to use publications and other content. Open access publications are online digital publications, available without any fee or technical safeguards (open access gratis) and free of dispensable copyright and license rights (open access libre).³⁷

According to the ministerial guidelines and to facilitate the access to scientific publications, and reach wider group of receivers, the publishers transform their traditional (printed) journals to electronic ones, which allow for unlimited access to the presented content. Often such activity is financially supported by various government subsidies. An example may be „Działalność upowszechniająca naukę” (“Activity diffusing science”; Polish acronym: DUN) program which funds the fulfillment of public tasks to support Polish science development by disseminating, promoting and popularizing results of research and development, innovation and invention activities, also on international scale, as well as the fulfillment of tasks concerning the maintenance.

In addition to the studies shared by publishers themselves, database indexes should be noted too. These collect scientific articles and relevant metadata that allow an interested person for quickly finding the full content. The access to these databases may be paid or free. The most known medical database MEDLINE consists of more than 26 million library records out of 5,639 selected publications concerning biomedicine and health since 1950

until now.³⁸ The issue of how the databases serve doctors in hospitals, medical centers and doctor's surgeries is more widely addressed by Kus et al.³⁹

One more thing should be noted and that is one of the largest collections of images available to wide public – the content of Google Images. This database has been established in 2001 under the name of Google Image Search and already in its first year consisted of 250 million of photos.⁴⁰ It is estimated now to consist of 1 trillion of indexed images.⁴¹

Here shall be mentioned the article published in 2008 in „Journal of Medical Internet Research”,⁴² where the author's purpose was to, i.a., evaluate the accessibility of medical patient's images coming from articles published in scientific journals in Google Images search results. The authors indicated that the photos used in articles published in OA, e.g., by specialized platforms and institutional repositories, can be more often found in Google Images. The examples of such platforms are Researchgate.net and Academia.edu. Researchgate.net is an international social network addressed to scientists of all disciplines. Its users create private profiles where they can publish their own studies, lectures, papers, and articles. Academia.edu is an American website with about 7 million of users. It is one of the biggest scientific online services in the world. It is addressed to scientists of all science disciplines. Researchers upload there the bibliographic data of their texts or files prepared to download.

It should be noted that researched were, i.a., images of transsexuals and cissexuals. The authors identified 94 articles containing medical images (605 images in total). Thirty-five (37%) out of 94 publications contained at least 1 medical image found in Google Images. The fact that nearly all of these images portrayed intimate body parts (genitals, breast) is also important.

It seems reasonable to assume that it is unlikely that patients permitted for sharing these intimate photos by publically available Google. Often the process of taking photos of intimate areas, such as genitals, is in itself a cause for patient's distress. Both for transsexual and cissexual persons, it is important to respect their intimacy, as publicizing such photos may expose them to additional stigmatization and stress.

Thus it is extremely important to, after taking the photo that can be used to identify the patient, inform the patient about all possible forms of publication, fields of exploitation and, if there is no possible way to safeguard the photo, about the possible lack of control over its dissemination.

To conclude this part of this thesis, it should be noted that digitalization, lack of relevant regulations concerning image indexing, i.a., for Google Images base, and their following sharing online may prompt questions and legal doubts concerning the right to the protection of one's image. This situation is also a serious threat to proper respecting of patient's intimacy and dignity.

Consent – the base of use

Under the Art. 81 sec. 1 of the *Copyright Act*, the dissemination of an image requires the consent of the person presented in that image. The consent to using one's image is a declaration of intent, in which one party agrees to use in the specified purpose the image established on specified material. The permitter must know where and how their image will be used. It means that a patient who permitted taking their photo for medical documentation purposes does not need to widen it to another field of exploitation.

As the Court of Appeal in Warsaw stated in the ruling, the consent to disseminating an image must exist without a doubt, which means that the permitter must be fully aware about not only the form of the image, but also about the place and time of publication, the juxtaposition with other images and the accompanying commentary.⁴³

It seems then that to avoid possible infringements, it is necessary to obtain consent first for using images and photos of the patient in specified exploitation fields. Hood et al. are of the opinion that consent should always be obtained for any medical images and their following usage, irrelevant to the fact whether they can be used for identification.⁴⁴

Since authors of publications using patients' images in scientific publications did not always know which images required such consent, the International Committee of Medical Journal Editors (ICMJE) in 1991 issued recommendations concerning protection of patient's rights to privacy.⁴⁵ In these recommendations, a requirement to obtain an informed consent from a patient was established. The ICMJE proposed to include relevant provisions in journals guidelines for authors. According to these guidelines, the consent should also be included in the published article. In practice, it means that each journal determines individually how the consent should be included.

In 2001, Department of Health and Social Care (the UK) issued a guide on patient's consent to medical examination and treatment. It also includes guidelines on patient's informed consent to taking and using their images. Following this example, many other hospitals in the UK issued their own forms on taking and using clinical images and video records.

Royal Liverpool Hospital and Broadgreen University Hospital, for example, elaborated their own consent form, in which a patient can choose for what they particularly permit. The following fields of exploitation have been included: consent to taking clinical images/records only for medical documentation, for educational purposes in the context of medical science, for education of the patients' with similar treatment, or consent to publication of clinical images in the purpose that should be stated.⁴⁶

In 2001, the Institute of Medical Illustrators (IMI) elaborated guidelines on how to obtain patient's informed consent to taking their clinical image. These guidelines

can be used in other institutions in their current form or after alternating it in accordance with own needs, and are available at the IMI website.⁴⁷

In 2011 (novelization in 2013), GMC introduced their guidelines on taking and using visual and audio records of patients.⁴⁸ These guidelines consists of 8 key rules and explain when the patient's consent is needed. These indicate also when the consent is presumed and does not need to be separately expressed. Such situations can be for example: taking photos or records as a part of a patient care, treatment or for investigation purposes, taking images of internal organs or systems, pathology slides, laparoscopic and endoscopic images, records of organ functions, as well as ultrasound and X-ray images. On the basis of these information, it can be concluded that medical images are not considered patient's image by GMC.

Anonymization and pseudonymization

It is a common practice in various types of scientific studies to anonymize or pseudonymize patient data before publishing patient's image. Anonymization means making identification of the person irreversibly impossible. In other words, after anonymization has been completed, it is no longer possible to recognize which natural person is presented in document, photo or information. Pseudonymization means processing data in such a way that it is no longer possible to connect it with the specified person that has been presented in it, without an additional information. Pseudonymization may involve replacing data (e.g., name and surname) with determined code, which can be decoded only with the use of information that are stored separately. Pseudonymization is a completely reversible process.⁴⁹

Anonymization or pseudonymization is done by deleting all personal data and retouching the images so that the identification would no longer be possible. Unfortunately, sometimes even after these actions the identification of the portrayed person is still possible. For example, psychiatry requires detailed presentation of the cases. Even sensitive data like gender or ethnic origin⁵⁰ can be essential in a particular case. Deleting these data to ensure effective anonymization may greatly decrease the value of the studied case as a didactic or research tool. Sometimes the authors indicate which data has been replaced, but this can help in identification. In addition, affiliation of the author in itself can be a clue in determining the geographical origins of the patient.

Basic graphic methods of image pseudonymization are presented in the already mentioned article of Hood et al.⁴⁴ As the authors indicate, the most frequently used are: covering the eyes with a black blindfold, and blurring or pixelating the image in part. Graphic methods of pseudonymization are shown in Fig. 3.

Unfortunately, in the cases presented above, the methods of pseudonymization can be considered insufficient because they may allow for identification. It may result from various factors, e.g., previously mentioned extended description of a case or specific congenital malformation, abnormalities in body parts build, untypical pigmented lesions, scars, or tattoos. In these cases, patient's consent should be always obtained.

Use of patient's image in publishing practice

According to the new guidelines,⁴⁵ many journals worldwide have determined new procedures for obtaining patient's consent to publishing medical images. Medical journals introduced forms of patient's consent to publishing their image. Publishers use these forms to various extent in practice and the introduced forms are not standardized. "The Lancet" journal does not require sending the form to the publisher but insist that the author to keep it. This publisher's form includes irrevocable consent to using all the sent material or its part in any editions of "The Lancet" journals, as well as in other works or products in any mean or medium.⁵²

The patient in the form confirms their understanding that their name will not be published together with the material and that they know that it is possible that someone, e.g., family members or health workers assigned to their care, may recognize them on the basis of the image and/or the accompanying text. In the above form, only an imprecise phrase has been used that "The Lancet" will try to ensure its anonymity. The publisher determines the exploitation fields in printed and electronic editions of journals, on websites, in sublicensed versions (including foreign languages versions), and in other works or products. The full form can be downloaded from the website of the journal.

"British Medical Journal" (BMJ) also introduced the detailed provisions on obtaining patient's consent to publishing medical images in guidelines for the authors.⁵³ The BMJ consent form, similarly to "The Lancet" practice, determines fields of exploitation. In addition, this form includes information about the possible use of all or part of the image in other publications and products published by BMJ and/or other publishers. The consent includes publications in English and translations in printed, electronic and any other formats, which may be used by BMJ or other publishers now and in the future. The BMJ warns that the article may appear in local editions of the journals or other publications in the UK and abroad. It also informs that the patient may withdraw their consent only before the publication of the article. After it has been publicized, the withdrawal is no longer an option. There is also information about the fact that the publication may be associated with social media and used in promotion, and about the fact that after its publication the article will be uploaded to the BMJ website and may be available also on other websites. Such provision secures the publisher against possible claims if the image has emerged, for example, in Google Images.

It should be yet noted here that the BMJ does not require consent to publishing such medical images as: X-ray and laparoscopic images, pathology slides, or images of body parts of no significance (which unfortunately were not defined), or multimedia files (e.g., video, audio), if they are anonymized by deleting all identifying marks and under the condition that they are not accompanied by a text that may reveal the identity of the patient.

To summarize, it may be stated that the recommendations issued by ICMJE have helped to raise awareness of authors and publishers and have underlined that patient's images require consent and confidentiality guarantee same as that concerning other parts of medical documentation. It should be noted that in the issued recommendations, the term "image" has not been defined nor otherwise addressed directly.

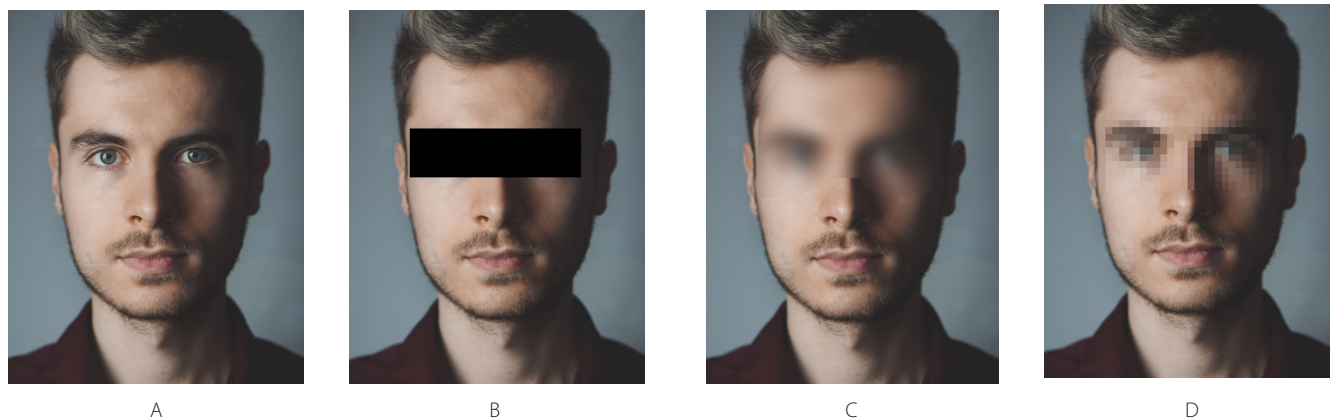


Fig. 3. Face photo: A – without anonymization; B – with traditional masking (black blindfold on eyes); with digital processing (C – blurred; D – pixelated)⁵¹

Ryc. 3. Zdjęcie twarzy: A – bez anonimizacji; B – z tradycyjnym maskowaniem (czarna opaska na oczach); z cyfrowym przetworzeniem (C – rozmycie; D – wypikselowanie)⁵¹

Polish practice

In Polish medical journals, uniform guidelines on patient's consent are not used. Most often, general information on the subject can be found in briefs for authors.

On the website of "Polish Archives of Internal Medicine" journal, authors are asked to confirm that they have obtained consent to using materials protected by copyright from other sources (including the Internet) and that all participants of the examination gave their written consent. The publisher ensures that all patients' data is confidential.⁵⁴

The "Archives of Medical Science" journal has provisions stating that the documents describing experiments on people must include a statement that they were performed with patients' informed consent and with the approval of the relevant ethics committee. In the case of images of the persons that can be identified, the consent must be given in writing.⁵⁵

"Acta Angiologica" journal requires patient's written consent delivered before publication takes place in the situations when the identification is possible on the basis of the case description, illustration or article, etc.⁵⁶ "Arterial Hypertension"⁵⁷ and "e-Dentico"⁵⁸ journals have similar provisions stating that to the images of the persons that can be identified, a written consent to publishing the images must be included. "Advances in Respiratory Medicine" guidelines state that the author's duties include securing patients' personal data, and data such as: name, surname, date of birth or other that allow for identification of the subject, must be removed from the text, patients' results or other shared files.⁵⁹

Many publishers have detailed provisions concerning this subject. Some of them introduce only general information concerning images that can be protected by copyright.

Practices of Polish scientific publishers may differ. There is no uniformity in this area. The author thinks that the reason behind this is lack of knowledge about the protection of person's image and lack of regulations in this matter.

Conclusions

The emergence of the Internet facilitated access to many scientific publications, also for persons who were not authorized before. Digitalizing and sharing content online became a source of legal doubts concerning the right to protect the patient's image, and often even a source of infringements. A patient, as any other natural person, has a right to protect their personal interest, i.e., the image. Lack of regulations which specify when the informed consent of a patient should be obtained for publishing their image may result in many violations.

The review of selected rulings and doctrine views presented in this paper shows the differences in definitions of "human image". The lack of legal definition of human im-

age is quite important in the context of the absence of uniform guidelines of how to understand a "patient image".

To avoid doubtful situations in which it is not possible to determine whether the presentation of a patient constitutes an image or not, patient's consent should be obtained. It becomes an absolute formal condition of accepting the article for publication. It also enables limiting possible future claims and legal questions.

In Anglo-Saxon countries, the introduction of GMC recommendations by ICMJE has had a great impact on increasing authors' and publishers' awareness about publishing patient image.

Polish legal system lacks such guidelines. The absence of relevant legal provisions or recommendations may result in an unauthorized use of patient image. The author suggests that appropriate provisions or recommendations should be included in the regulations on the protection of patients' rights (Charter of Patients' Rights – in Polish: Karta Praw Pacjenta) or on general principles of medical ethics, which would determine when and under what conditions the image of the patient can be published. It seems that introduction of relevant provisions (proposed, for example, by ICMJE) in Polish Medical Code of Ethics by Polish Chamber of Physicians and Dentists could solve that problem.

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