

1. IMAGE RIGHTS OF INDIVIDUALS

PHOTO IP

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IN SUMMARY

- **Everyone has the right to object to the capture and use of their image.**
- **Images can have heritage value (models, actresses, etc.)**
- **There are several exceptions to this principle: freedom of expression, the image of deceased persons, caricatures, creative freedom and the consent of the person concerned.**
- **Moreover, it is forbidden to capture and, a fortiori, to use the image of certain people.**
- **Written authorization is always preferable to tacit, valid but limited authorization.**

THE PRINCIPLE

Anyone, regardless of their reputation, may object to the capture and use of their image. However, the public or notorious nature of a person may have an impact on the assessment of the infringement of image rights.

Minors and protected adults are naturally entitled to image rights.

A person's image is **any physical characteristic that enables him or her to be identified**. So it's primarily the face. But it can also be anything that enables a person to be identified. This identification can be the result of a particular physical characteristic, presumably sufficiently distinctive for the person to be identified. Such would be the case, for example, of a specific attitude, unique to an individual, which would undoubtedly enable him or her to be recognized.

The right to an image relates not so much to physiognomy as to all the visible characteristics of an individual that enable him or her to be identified. **The person must be identified or identifiable.**

All forms of representation of a person's image fall within the scope of image rights. This includes not only photographic reproduction, but also drawings, sculptures and any other form of image representation. The photograph of a drawing or sculpture of an individual must therefore be authorized before any use, it being specified here that the drawing or sculpture is likely to constitute a protectable work (find out more), so authorization from the author of this work will also be required (find out more).

Only the persons depicted in the photograph can claim compensation for the infringement of their image (Cass., 27.09.2005, 03-13622).

EXCEPTIONS TO THE PRINCIPLE

The right to public information

Since the capture and use of an individual's image is part of the public's right to information, the authorization of the person represented is not in principle required. For example, a person taking part in a public event cannot object to the reproduction and use of his or her image as part of a news item, unless publication of the image would disproportionately infringe his or her rights or respect for human dignity.

As with any exception, the right to public information must be interpreted strictly. Certain conditions must be met.

An infringement of a public figure's privacy or right to his or her image can only be legitimized by the public's right to information if the subject of the publication in question falls within the scope of current affairs or a debate of general interest, and if the information contained in the publication, assessed as a whole and with regard to its context, is such as to fuel public debate on the subject (CC-11.03.2020-19-13716).

In balancing the rights involved, namely the right to privacy and image, on the one hand, and the right to freedom of expression, on the other, consideration must be given to the contribution of the offending publication to a debate of general interest, the notoriety of the person concerned, the subject of the report, the previous conduct of the person concerned, the content, form and repercussions of the said publication, as well as, where applicable, the circumstances in which the photographs were taken (CC-21.03.2018-16/28741).

To find out more about this methodology, see study 8.1. "Freedom of expression and image rights".

Since the image is used for the purposes of commercial promotion, it is not "information" to which the public would necessarily be entitled under freedom of expression, regardless of the absence of invasion of privacy.

Thus, although it falls within the scope of freedom of expression, information of a commercial or advertising nature does not fall within the scope of the public's right to information.

The image of the deceased

The case of the image of a deceased French citizen

The image of a deceased person may be reproduced without authorization. This is the solution adopted by French case law (Cass., 14.12.1999, 97-15756 - Cass., 20.11.2003, 02-12297) and by the ECHR (13.07.2006, 58757/00).

The Court of Cassation regularly rules that the right to sue for respect of privacy or image is extinguished on the death of the person concerned, who is the sole holder of this right (Cass., 11.05.2022, 20-23390). A purely patrimonial prejudice cannot result, for the rightful claimants, from an infringement of the image of a deceased person.

The Conseil d'Etat adopted the same solution in a ruling dated April 27, 2011.

However, this question is still being debated due to the controversy surrounding the legal nature of image rights. If it is accepted that this right is essentially patrimonial in nature, it should be able to pass to the heirs of the deceased, who would then be the only ones entitled to use the image.

The decisions which, exceptionally, have recognized a prejudice to the privacy of the relatives of a deceased person, have retained either an attack on his or her dignity, or a desire to harm his or her heirs. In any event, the relatives of the deceased may claim an invasion of their own privacy as a result of the broadcasting of an image of the deceased, the mere broadcasting of this image being insufficient in this case, unless the memory or respect due to the deceased has been infringed.

The use of a deceased person's image remains all the more delicate as foreign legislation may have adopted a different position to that of French case law.

Property rights to the image of foreigners

The French Supreme Court has ruled that the consequences of violating a person's right to his or her image are governed by the law of the place where the acts were committed. The use in France of the image of a deceased foreigner should therefore be governed by French law.

This being the case, French law is concerned here only with the consequences of an infringement of a right, as the High Court does not rule on the nature and regime of this right. If the deceased person's national law recognizes his or her heirs as having a proprietary right to the deceased's image, can the French judge, who is competent to assess infringements of this right on French territory, find that this right exists under foreign law in order to give it effect in France?

There would be something shocking in allowing the image of a deceased foreigner to be used in France by his or her heirs, whereas this property right would be denied to the heirs of a deceased French citizen.

Without dwelling on the theoretical subtleties of the debate, it should be noted that the recognition of a property right in the image of the deceased does not prevent French judges from depriving it of effect on the sole grounds that "the right to act for the respect of the image is extinguished on the death of the person concerned". The right exists, but its action is paralyzed.

Image of a dead man

Court of Cassation decision of October 20, 1998

The French Supreme Court has ruled that "the fixation of the image of a person, living or dead, without the prior authorization of the persons empowered to grant it, is prohibited, and the dissemination or publication of said image without authorization necessarily falls within the scope of articles 226-1, 226-2 and 226-6 of the penal code" (Crim. Oct. 20, 1998, no. 97-84.621).

These articles punish with imprisonment and fines the deliberate violation of another person's privacy. In this case, the photographer had entered the room where the mortal remains of François Mitterrand lay.

This decision goes against the prevailing jurisprudence of the French Supreme Court (Cour de cassation). If the right to an image is extinguished on the death of the person concerned, it is difficult to understand why these photographs were deemed unlawful. No doubt it must be considered that, having been taken in a private place without the authorization of the persons concerned, the judges considered that the images thus captured infringed the privacy of the widow and children.

Right of opposition of relatives of a deceased person

A person's next of kin may object to the reproduction of his or her image after his or her death, if they suffer personal prejudice as a result, due to an infringement of the memory or respect owed to the deceased (Cass., 01.07.2010, 09-15479).

Such is the case of a shot showing the victim of a crime, his face wrapped in silver adhesive tape, revealing only his bloodied and swollen nose, the whole of his face giving the impression of being swollen under the tape bandage, his wrists restrained by the same tape, his keys slipped between his fingers, a newspaper stuck under his chest and a pistol pointed at his temple by a gloved hand, the left shoulder of his garment pulled upwards, suggests imposed submission and torture (Cass., 01.07.2010, 09-15479).

Cartoon

The reproduction of a person's image in the form of a caricature is lawful provided it complies with the laws of the genre. It must not be outrageous and must not alter the image of the person except within the limits of the genre. The caricature must be humorous.

As the law stands, cartoons cannot be used for commercial purposes: illustration of T-shirts, advertising campaigns, etc.

It is punishable by imprisonment and a fine to publish, by any means whatsoever, a montage made with the image of a person without his or her consent, if it is not obvious that it is a montage or if it is not expressly mentioned (226-8 CP). Any attempt to do so is punishable.

When the offence is committed via the written or audiovisual press, the specific provisions of the laws governing these subjects are applicable with regard to determining who is liable.

Creative freedom

Creative freedom, assimilated to freedom of expression, constitutes, in certain cases, an exception to the principle that the authorization of the person concerned is required (find out more).

Consent of the person concerned

The person concerned may consent to the use of his or her image. What's more, for certain professionals or celebrities, image rights are the subject of a full-fledged contract involving remuneration.

As we shall see, authorization may be written or tacit.

If authorization has been granted, the person concerned cannot complain of an infringement of his or her image rights, provided that the use of his or her image complies with the authorization he or she has given.

IN PRACTICE

Authorization required in the absence of an exception to the principle

Authorization is required

A person's image can be protected independently of any invasion of privacy. With few exceptions, therefore, authorization is required whenever a person's image appears on a photograph. As the image is one of the characteristics of a person's personality, its effective protection presupposes, in principle, the individual's consent from the moment it is captured, and not only at the time of its possible public distribution.

Authorization from the person concerned is still required, regardless of whether the image was taken from a public or private place.

Authorization must be carefully drafted, since any use that does not comply with the purpose for which it was granted is unlawful (CC-30.05.2000).

Authorization must be sought as soon as the image is captured, and not only at the time of its eventual distribution to the public (Cass., 02.06.2021, 20-13753).

Authorization may be written or tacit

The drafting of an authorization concerning image rights is a matter of contractual freedom. However, the Cour de cassation has specified that authorization is a matter of contractual freedom, but that the parties must stipulate sufficiently clearly the limits of the authorization given, in terms of its duration, geographical scope, nature of the media and exclusion of certain contexts (Cass., 20.10.2021, 20-16343).

Authorization must therefore comply with a certain formalism, as this case law is likely to affect the very validity of tacit authorizations.

The represented person's authorization may sometimes be required by circumstances.

Thus, the fact that a person has not authorized a film shoot in writing and has not been paid for it does not subsequently entitle him or her to claim remuneration, since his or her image was used for the sole purpose for which he or she had agreed to have it captured. This person took part in the filming as an employee, his image is positive and was used for educational purposes and for purposes of which he could not have been unaware (advertising for the company where he works, which is open to the public). At no time did the user make a negative, devaluing or malicious use of the person's image (CAAix-04.04.2013-RG11/13892).

However, written authorization is strongly recommended. Indeed, in the event of a dispute, the precise scope of the authorization given, particularly as regards the authorized uses, can be easily proven if the authorization is in writing. What's more, the French Supreme Court (Cour de cassation) now seems to be more demanding in terms of the formalities attached to such authorization (Cass., 20.10.2021, 20-16343).

Blurring and indirect reproduction of a person's image

A person is identifiable, despite the use of a cover, if his or her silhouette, combined with the image of the building in which he or she lives, enables him or her to be identified by neighbors or relatives.

Identification will most often result from the very duplication of a physiognomy. The monopoly will be infringed even when the image of the person has been altered, whether voluntarily or involuntarily, and insofar as this alteration does not affect the characteristic elements of the original image to such an extent as to render the person in question unidentifiable.

Penalties for failure to obtain authorization

According to the French Supreme Court, the mere fact that an image right has been infringed gives rise to a right to compensation (Cass., 19.01.2022, 20-12420).

When the person concerned trades in his or her image, a specific economic - commercial - loss can be claimed.

Their profession as models justifies retaining an economic loss resulting from the unauthorized use of their image, as the photographs have a market value and are likely to cause them to lose a chance of being recruited by competitors (TJ Paris, 23.06.2023, 20/09672).

RELATED STUDIES

- 2. Overview of specific prohibitions on capturing and using a person's image**
- 4. How to write an authorization to use a person's image**
- 5. Use a mannequin**

- 8. Public information and image rights**
 - 9. Freedom of artistic creation and image rights**
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