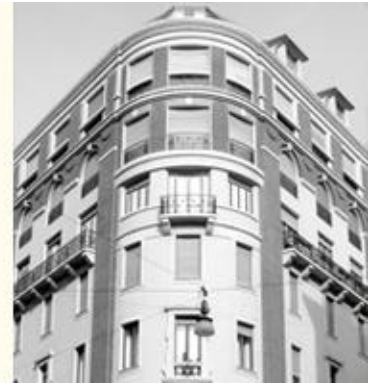




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OCTOBER 1999

IMAGE RIGHTS IN THE ENTERTAINMENT INDUSTRY

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1) Legal Background

Art.10 of the Italian civil Code states that “whenever the image of a person, or the parents, the spouse or the children is shown or published in circumstances outside the case where the showing or publication is consented by the law, or that is in harming of the honour or reputation of the same person or above mentioned relatives, the judicial authority, upon request by the interested party, can order the abuse to be stopped, save the reimbursement of damages”. The above places a general prohibition to show or publish the image of a person outside the cases expressly consented by law or when from such action harm is caused to the honour or reputation of the person or his relatives.

The aforementioned Art. 10, through the general reference to the Law, also refers to the dispositions of the law No. 633 of 22 April, 1941, known as the Copyright Law (hereafter C.L.) and in particular to articles 96 and 97 of the same concerning the image rights.

In particular the disposition of Art. 96, first paragraph, of the C.L. stating that “Subject to the provisions of the following Article, the portrait of a person may not be displayed, reproduced or commercially distributed without the consent of such person”, repeats the principle that the legality of the displaying, reproduction or commercial distribution of the portrait of a person is always conditioned to the consent of the same, except only the cases of free use of the image as in Art. 97 C.L., which states in the first paragraph that “the consent of the person shall not be necessary if the

reproduction of the portrait is justified by his notoriety or his holding of public office, or by the needs of justice or the police, or for scientific, didactic or cultural reasons, or when reproduction is associated with facts, events and ceremonies which are of public interest or which have taken place in public” and then in the second paragraph that “the portrait may not be displayed or commercially distributed if its display or commercial distribution would prejudice the honour, reputation or dignity of the person portrayed”.

With regards to this, we note that while the copyright law prohibits the display, reproduction or commercial distribution of the “portrait”, Art.10 of the civil code refers to the display of the “image”. Such terms are, however, to be considered synonyms because in Art. 97 C.L., where the exceptions to Art. 96 are foreseen; the term ‘image’ is used. As far as the display, reproduction or commercial distribution of the portrait after the death of the portrayed person, Art.96 paragraph 2 C.L. refers to the disposition of Art.93, paragraphs 2 and 4, C.L. on the subject of correspondence according to which for the display, reproduction or commercial distribution of the portrait of a person after his death “the consent of the spouse or children or, if none exist, the consent of the parents, shall be required; if there is no spouse, child or parent the consent of the brothers or sisters or, if none exist, the consent of the direct ascendants and descendants to the fourth degree, shall be required”.

Such article also states, in paragraph 3, that when such persons “are two or more in number and disputes arise between them the judicial authority shall decide the matter, after having heard the public prosecutor” and it concludes in the fourth paragraph that “the wishes of the deceased person, when expressed in writing, shall in all cases be respected”.

From reading Art. 10 of the civil code and Art.96 C.L., a general principle appears, that every person has the power to control through his consent the display, reproduction and commercial distribution of his own portrait and that he can object to the display and reproduction of the image of his close relatives.

Regarding this we should clarify that the fact that Article 10 c.c. does not subordinate the execution of image rights of the relatives to their death, does not mean that when they are still alive one finds a

situation of conflict where the same right can be exercised both by the person portrayed and by his close relatives.

The systematic reading of such law leads us to believe the opposite. During his life time, only the portrayed will have the right to exercise the control on the others' uses of his own image, while after his death such right will pass on to his close relatives.

The hypothesis of Article 10 c.c., as would seem reasonable to intend, rules the residual case where the portrayed person, despite being alive, is not able to exercise his right (because he is under age, incapable or other). This allows the legislator to ensure a suitable protection of the rights even in such a residual case and to avoid a conflict of interests, which could hinder its execution.

The only limitations of power of the person's control over his own image are foreseen, as already mentioned, in the exceptional cases (notoriety or holding of public office, needs of justice or police, or for scientific, didactic or cultural reasons, facts, events and ceremonies which are of public interest or which have taken place in public) noted in Art. 97 C.L. and that, in the absence of legislative limitation, must also be applied to the cases of 'post mortem' image use.

As we have already mentioned, such hypothesis, being a derogation of the image rights, are definite and exceptional and, as such, of strict interpretation (cfr. Supreme Court 28 March 1990, n. 2527 published in 'Giustizia Civile' 1990, I, 2369).

Art. 97, paragraph 2, C.L. puts, in turn, an internal limit to the operability of the exceptions established in paragraph 1 stating that the portrait "may not be displayed or commercially distributed if its display or commercial distribution would prejudice the honour, reputation or dignity of the person portrayed". Finally we should also consider the disposition of Art. 21 of the royal decree June 21, 1942, n. 929, known as the Trade Mark Law, which states in the first paragraph that "the portraits of persons cannot be registered as trade marks, without the consent of the same and after their death, without the consent of their spouses or children and; if none exist, or after their death, of the parents and other ascendants, and if none exist or after their death, of relatives to the fourth degree". And furthermore in paragraph 2 that "the names of persons different from those who require the registration can be registered as trade

marks provided that their use does not harm the fame, credit or honour of he who has the right to carry such names...” specifying moreover in paragraph 3 that “if they are well-known, the names of persons, and trade marks used in the artistic, literary, scientific, political or sportive fields can be registered as trade marks only by those who have the right or with their consent or by the persons mentioned in paragraph 1”.

2) Consent. Form of consent. Implicit consent, proof, objective and subjective limits of the same.

As far as the form of the consent is concerned, it should also be stated that the prevalent opinion of jurisprudence and literature withholds that the consent to place the image of a person in circulation, as well as being naturally explicit, can also be implicit.

In such case, the proof of consent and the modalities which have accompanied it should be acquired in such a way as to leave no room for doubt, evaluating the behaviour of the interested party in relation to the purpose that was given at the moment when such portrait was made (Rome Court, November 12, 1975, IDA 1976, 148).

Moreover, it has been underlined that the tacit consent of the party involved for the reproduction of his own image cannot be held subsisting for the mere delay in exercising his right, not subject to time limitation. (Supreme Court, March 15, 1986, n.1763, in ‘Il Diritto d’Autore’, 1987, 120, according to which the image right of a spectator was withheld violated, being filmed while watching a football match and inserted in the opening of a well known sports programme transmitted by RAI, the Italian broadcasting organisation, even though the right was exercised at a distance of six years).

In a sentence by the Court of Rome the problem relating to the objective and subjective limits of consent was dealt with, underlining that the efficacy of consent must be kept within the strict frame of the exchanged good, in the limits in which the same consent was given (objective limit of the diffusion) and with exclusive relation to the subject or subjects towards whom the consent was given (subjective limit). That is on the basis of the consideration that the subjective situation pertaining to the person can rapidly change and even though the diffusion of the image, which took place in the past, may seem

proper, later on the same may no longer correspond to the changed needs and connotations of the portrayed person (Court of Rome, October 7, 1988, published in “Giustizia Civile” 1989, I, 1243. In the specific case the new usage of the nude photograph of a well-known actress published for the first time in 1976, when the same actress was not yet known to the general public, with her consent, in the magazine Playboy, was withheld illegal by way of republication on another magazine in January 1985, when the same actress had achieved the role as a successful conductor of television programmes aimed essentially at family viewers, without the same actress having renewed her consent to the publication).

2.2) Following. Revocability of consent. Contract.

On the theme of revocability of consent the doctrine is divided.

One part, based on the consideration that the image right is pertaining to the moral sphere of the person, believes that the consent given for the publication of the portrait is revocable “ad nutum” (that is at any moment, without need of motivation) while the other part, considering that we are dealing with rights of an economical nature and in any case with contracts, withholds that such consent, once given, is irrevocable unless through the normal procedures of contractual termination (breach).

In particular, with regards to the latter aspect, the consent given in a contractual form, against payment of compensation or promise of compensation, is not revocable.

Of the two opinions, we find the second more appropriate. That is 1) because the present law, contrary to the previous copyright law of 1925, which expressly foresaw the revocability of the consent given, does not mention such revocability; and 2) because if the principle of the revocability “ad nutum” were to be admitted, all those entrepreneurial activities which are legally based on the reproduction or on the diffusion of the image would face a very high entrepreneurial risk; and finally 3) because if the first opinion were right, no limit to revocability would be justified.

Naturally, the above is valid for the consent given for the diffusion of the portrait which does not harm the honour or reputation of the portrayed person.

The consent for the diffusion of one's own image can be summarised in a real contract with the object of a "suffering" against a economical compensation ('Supreme Court, April 16, 1991, n. 4031 in 'Giurisprudenza Italiana' 1991, I, 1976).

In such case a party through a contract – with purely obligatory effects – will bind himself essentially to a "suffering", that is to tolerate that his image is used commercially by third parties according to the agreed modalities, forms and limits.

It is evident that the peculiarity of the good referred to in these contracts affects the treatment reserved to them and in particular the criteria used in the evaluation of the private contractual activity, public order and common decency, must be particularly careful and severe.

Finally, it must be noted that the consent for the use of one's own image for advertising usage is generally given under contracts with a wider content, in which for example artistic activities are foreseen for the creation of advertising material, or under sponsoring contracts (on this see Supreme Court, October 11, 1997, n. 9880, in 'Diritto dell'Informazione e dell'Informatica, 1998, 277, 949).

2.3) Following. Violation of consent

Whenever the image of another is diffused without authorisation, the author of the diffusion shall be obliged to reimburse the damages for illegal deed, according to the principles of extra-contractual responsibility, while in the case of violation of the contractual rights he will be obliged under the laws ruling the proper performance of contracts.

With regards to this, the compensation granted by the Courts may be related to the notoriety level of the person, his condition to gain economical advantage by consenting the use of his image to third parties, the economical loss caused by the illegal diffusion (i.e. the missed possibility to offer the use of his own image for such utilisation or relating to similar products or services), or even the simple difficulty of obtaining the best commercialisation of his image with reference to products or services of a different kind (Supreme Court, May 2, 1991, n. 4785 in 'Foro Italiano' 1992, I, 831; Rome Court, July 20, 1991, Naples Court April 18, 1997, in 'Il Diritto d'Autore, 1998).

3) Protection of a person's right to his image after his death

As mentioned above, Art. 96 C.L. refers, for the ruling on the matter of image rights after the death of the portrayed person, to paragraphs 2, 3 and 4 of Article 93 C.L. regarding the rights relating to correspondence.

According to such laws and to Art. 93, paragraph 2, C.L., the portrait of a person after his death cannot be displayed, reproduced or commercially distributed without the consent of the spouse or children or, if none exist, the parents; if there is no spouse, child or parent the consent of the brothers or sisters or, if none exist, the consent of the direct ascendants and descendants to the fourth degree shall be required.

This listing, being exceptional, is necessarily definite.

The identification of several entitled subjects who can give consent to the use of the portrait, can evidently create situations of conflict among them with a possible paralysis of the determination on the portrait diffusion.

For such hypothesis of conflict in particular Art. 93, paragraph 3 C.L., attributes the power of decision to the Judicial Authority, having heard the Public Prosecutor.

Art. 93, paragraph 4, ruling that “the wishes of the deceased person” shall be respected, responds to the need to protect the wishes of “de cuius”, who is against his portrait being diffused after his death or that his image undergoes “post mortem” an economical exploitation, establishing the priority that his will “shall in all cases be respected when expressed in writing”.

Finally, we should note that Art.93, paragraph 4, C.L., naming the ascendants and descendants to the fourth degree, indirectly indicates a time limit (which naturally varies in relation to the life duration of such relatives) after which the consent of the heirs of the portrayed person is no longer needed for the diffusion of the portrait of the same.

4) Jurisprudencial analysis of the image rights

For portrait or image, we traditionally intend a work of figurative art or a photograph, where the determined person appears as recognisable, even if the image is only part of a greater and more complex picture.

On this subject we should specify that the above mentioned traditional concept of image has been gradually made wider by the Courts, so to include, especially in relation to the usage of the image of well known persons, such as artists, the reproduction of resemblance through the use of a double and the amalgamation of all these elements, such as the constant and repeated use of determining characteristics, such as the tone of voice, reminding the determined person. Moreover, the jurisprudential analysis has concerned the case of well-known persons, where the formulation of the concept of image and the limits of the use of the same are strictly connected to the concepts of notoriety and public interest as in Art. 97 C.L..

We will therefore examine, here below, some decisions in order to emphasise the advanced state of jurisprudence in the most reoccurring cases of usage of the notoriety of the artist for advertising or promotional purposes by third parties and in particular the cases of appropriation of resemblance through a double, cases where evocative elements of the personality or activity of the artist have been used as well as the frequent case of reproduction of nude images taken from movies.

4.1) Use of the notoriety of the artist for publicity and promotional purposes

As we have said, the well-known person's portrait can be diffused without the authorisation by the same only if this responds to the needs of public information. That is the aim to give the public the resemblance of the person in question and to visually document the news diffused about such person, while, where such diffusion has other aims, the lack of authorisation renders this behaviour illegal.

The use of other people's fame, not justified by informative needs, reveals the intention to exclusively follow speculative intents and prejudices the possibility for the damaged part to exploit the economic advantages of such character himself.

Baglioni vs. Palmolive

The case refers to the insertion in washing powder bins of new production by the Company Colgate-Palmolive of tapes reproducing famous songs by the Italian pop music singer Claudio Baglioni, without

his consent. Written on the outside of the packet was ‘Concerto nel fustino – All’interno le canzone più belle di Claudio Baglioni’ (Concert in the bin – The best songs by Claudio Baglioni inside).

The Judge withheld that such promotional initiative could induce the belief among the public of the existence of previous consent and joint interest of the artist in the commercial operation, with harmful consequences to his popularity.

In such a situation it was believed that there was an evident prejudice to the notoriety of the artist, with consequent violation of the rights of his name and image intended, not in the physical sense of ‘resemblance’ but as a complex of connotations and qualifications which externalise and identify a given person (Rome Court, November 15, 1986 in “Foro Italiano” I, 973, *Il Diritto d’Autore*, 1987, p.155 ss).

Baglioni vs. Ertel

The case refers to the reproduction of the image and the signature of the same artist, Claudio Baglioni, on the pages of a calendar without his consent. The Judge inhibited the publication withholding a wrongful use of the notoriety of the artist, with consequent exclusion or limitation of the use that the same artist could have made of it as right-owner, and that such illegal use could have induced a drop in his notoriety. (Rome Court, February 18, 1986, in ‘*Il Diritto d’Autore*’ 1986 p.215; *Temi Romana*, 1986, 137).

De Curtis vs. Centro Acustico S.r.l., Maico, T.V.R. Voxon

The case refers to the use of a scene from a movie for a TV commercial. The scene is interpreted by a famous Italian actor, Totò, where the actor speaks to a person who uses a product made by the defendant.

Liliana De Curtis, daughter and only heir of Antonio De Curtis (Totò) asked the Court of Rome to condemn the company to reimburse the damages occurred because of the illegal diffusion of the image of her father in the advertising message by Maico, transmitted by the Broadcasting organisation T.V.R. Voxon.

The Court withheld that, despite the non-existence of harm to the honour and reputation of the artist, the advertising use of such images without the consent of the interested party had generated economical damages. This case is also interesting for the issue of the right to promote the action. The Court, in fact, withheld the existence of the heir's right to promote the action for the reimbursement of damages deriving from the violation of image rights, under both moral and economical aspects (Rome Court, December 22, 1994, in 'Diritto dell'Informazione e dell'Informatica', 1995, 641; 'Foro Italiano', 1995, 2286).

Taylor case

This case refers to the image of Liz Taylor in a still photograph from the movie "Cat on a Hot Tin Roof", upon which some items of clothing were superimposed using photomontage.

The Judge withheld that the reproduction of the still image of a movie in the advertisement of a good, made for the sole purpose of obtaining the image of a famous actress without her consent, constitutes a violation of the image rights of the portrayed person (Milan Court of Appeal, May 16, 1989, 'Foro Italiano', II, 1991, 2862).

4.2) Appropriation of someone else's resemblance, doubles

The non-authorized appropriation of other people's resemblance can be qualified as abusive, consisting in the appropriation of the patrimonial right of economical exploitation of notoriety.

An example of the above mentioned problem is the following case.

Monica Vitti vs. Doimo SpA Rusconi Editore

In this case, the actress Monica Vitti appealed by way of urgency against the publishing houses of the Rizzoli Group because her image, portrayed by her double, was being used to advertise products of a furniture business without her consent.

The Rome Court prohibited Doimo to use, and Periodici Rizzoli SpA and Rusconi Editore SpA. to publish, the advertising leaflet relating to the firm's products with the relative caption, withholding that the publication for advertising reasons of the image of the well known person's double, damages her

image rights when there is no consent or when there are no suitable elements to avoid the public readers being tricked into the identity of the portrayed person (in this case the effective identification of the double with Vitti, apart from the purely natural resemblance, had been reinforced using the same type of make-up, hairstyle and a certain type of glasses) (Rome Court, July 6, 1987, in 'Il Diritto d'Autore', 1988, p. 570).

4.3) Use of evocative elements of the personality or activity of the artist

Within the protection of a person's rights, the image is not only configured as an essential distinctive sign, representing a resemblance to the physical appearance of the person, but also as an expression, and the personality as a whole.

In the above point of view, i.e. the exploitation of a particular type of 'image', the following decision should be pointed out, relating to the case of a certain well-known Italian pop music singer, Lucio Dalla. An extension of the notion of the person's image was given in this case, including a series of clothing accessories used constantly by the same artist. A similar case refers to another well known Italian pop singer, Angelo Branduardi, where distinctive elements like the tone of voice, the image and the name were implied.

Dalla vs. Autovox S.p.A.

In the specific case the singer Dalla, well known on the Italian pop music scene, complained of a series of illegal uses of objects, in particular a thick knitted skull cap and a pair of button glasses of the same style as those usually worn by Dalla, were used on posters and advertising pages in a campaign by Autovox S.p.A., a company producing devices for musical reproduction.

In particular Dalla complained that the above mentioned objects constituted characteristic and distinctive elements of his activity and personality, giving an immediate identification with himself, so that their use in an advertising campaign were to be considered illegal.

The Judge withheld, conforming with Dalla's request, that in this case the image rights of the singer had been violated not by the publication of his portrait but rather by the reproduction of some elements

which, although were not an image or portrait in the strict sense, were inseparably connected, exclusively and unmistakably to Dalla, and that due to his notoriety were immediately associated by his fans to himself. (Rome Court, April 18, 1984, 'Giurisprudenza Italiana, 1985, I, 2, 544).

Branduardi vs. Buitoni

In this case the singer Angelo Branduardi complained that the industry Buitoni Perugina SpA had diffused through the biggest television and radio broadcasting organisations, throughout the national territory, an advertising campaign relating to toasted biscuits of their production using a musical message which was unmistakably a plagiarism of the song "Colori" (Colours).

In particular, the Court withheld that the diffusion of the musical composition and the exploitation of the same in an advertising campaign, without the consent of the artist, constituted a moral prejudice, leading to a reduction in the commercial value of the work and a reduction in the possibility of further uses thereof for advertising, creating damage in the right to exploit ones own notoriety, intended as the distinctive element of name, image and tone of voice. (Rome Court, May 12, 1993, in 'Diritto dell'Informazione e dell'Informatica', 1994, 305).

4.4) Reproduction in magazines of nude images taken from a film

A problem frequently faced by Jurisprudence is that relating to the reproduction on magazines of nude images taken from movies, in particular if it is illegal and under what conditions, to reproduce still photographs taken by others.

As we will see, the jurisprudence has withheld in some cases that such use, responding to the need of public information, enters into the free uses foreseen by Art. 97 C.L. (the Cassini and Loren cases), in other cases it was withheld that such use was illegal without authorisation, as it did not respond to the needs of public information but rather to the mere economic exploitation of the image (see cases Sandrelli and Fenech).

In the first way:

Cassini vs. Casa Editrice Universo

The specific case related to the non-authorised exploitation by publication in a magazine of a nude image taken from a still picture of a movie interpreted by Nadia Cassini.

The Court held that such use could not be intended as harmful for the honour and the reputation of the actress, in consideration of the fact that the diffusion of such images had already been consented by the same, even though they were for different uses and in consideration of the fact that such publication did not result to be offensive for the present sensibility of the average man.

In particular it was withheld that the magazine on which the images had been published did not have a pornographic tone but was oriented, if only partially, to supplying information on the performing world to the public (Monza Court, March 26, 1990, 'Foro Italiano' 1991, I, 2862).

Loren vs. Editrice Tattilo

The example given on the use of still photographs in the Cassini sentence had already been seen in the Loren case, which refers to the publication by the well known monthly magazine, Playmen, of some pictures with an article entitled "Sophia Nuda: gli anni difficili" (Sophia nude: the difficult years) with a caption in which it specified that the unpublished photographs were the still photographs of a film interpreted by Sophia Loren in the early Fifties.

Sophia Loren accused the magazine of violating her image rights as well as damaging her honour and reputation.

The Rome Court withheld that the publication of a nude, but not obscene, portrait did not violate the honour nor the reputation of Loren and that such images, published about the time of her birthday, corresponded to the needs of public information (Rome Court, January 2, 1985, 'Il diritto di famiglia e delle persone', 1986, 211).

In the second way:

Sandrelli vs. Tattilo Editrice SpA

Stefania Sandrelli, star actress of the film “La chiave”, (The Key), summoned to the Rome Court the publishing company of the magazine Playmen, generally labelled ‘for men only’, complaining of the illegal publication of an eight page article on the film interpreted by her and accompanied by other still photographs which portrayed her in integrally nude poses, as it was done without her consent.

The Supreme Court specified that, as she had given her consent to use the still photographs but only to the use of promoting the movie, her consent could not be extended to the publication of such photographs by the magazine when such an operation was economically autonomous and without any connection with the exploitation of the movie.

The Court, in consideration of the fact that the derogation to the general prohibition of the diffusion of the portrait without consent of the person, as in Art. 97 C.L., could only be applied through the assertion that the publication had a specific interest of public information, withheld in the given case illegal the publication of the image of the well-known actress, withholding that the publication of her photographs in the magazine satisfied only the interest – evidently not covered by law – to know the most reserved “anatomic parts” of the actress and not that of public information (Supreme Court, March 28, 1990, n. 2527, in ‘Giurisprudenza Italiana’, 1991, I, 1, 126).

Fenech vs. Soc. Polieditor

Alongside the sentence above, we have the decision rendered by the Milan Court in the Fenech – Universo case, relating to the aspects of privacy, honour and reputation.

In this case the cinema actress Fenech complained for the publication in the magazine “Excelsior” of nude photographs taken from still photographs of the movie “Filius”, interpreted by the same actress in the past.

The Judge, after restating the disposition power of the person in her sphere of intimacy, even for economical exploitation purposes, excluded that the original consent given by the well-known actress while performing in the movie could be extended to the kind of publications in hand, in view of the principle that the diffusion of the images was to be withheld legal only in the specific and exclusive

frame for which the consent was given and should be foreseen, in every other case, as harmful to the honour and reputation of the portrayed person. (Milan Court, December 19, 1989, 'Foro Italiano' 1991 I, 2863).