Issue | July 2015
No.2 | Special Issue: Privacy

Montesquieu Law Review

The fatal metamorphoses of image rights

Professor Isabelle Tricot-Chamard, Kedge Business School, Bordeaux

Program supported by the ANR
n°ANR-10-IDEX-03-02

Forum Montesquieu
Faculté de droit et science politique

université de BORDEAUX

The fatal metamorphoses of image rights (1)

Professor Isabelle Tricot-Chamard, Kedge Business School, Bordeaux

Suggested citation: Isabelle Tricot-Chamard, The fatal metamorphoses of image rights, 1 Montesquieu Law Review (2015), issue 2, available at
http://www.montesquieulawreview.eu/review.htm

Like the right to respect for private life, image rights originate in the individualist values brought about by the liberal revolutions of the 19th century. Judges immediately introduced them into positive law as a bulwark to protect the person, contributing to guaranteeing a sphere safeguarded against external intrusions in order to foster individual fulfilment. While image rights have rapidly prospered in French case law, so too have new techniques. Since the end of the 19th century, the development of photography, combined with the liberalisation of publishing – and particularly the press – has fuelled an abundance of litigation. Moreover, it is significant that the decision (2) marking the emergence of image rights in France concerns a photograph (of the actress Rachel on her deathbed) that was reproduced and retouched despite the formal refusal of the surviving family, a copy of which was acquired in particular by *L'illustration*.

The boom in the means of audio-visual communication in the 20th century allowed the "massification" of information and, as a corollary, awarded a central role to images. These developments emphasised the variety of issues raised since the 19th century by the rights held by individuals over their own representation, without making any tangible changes to the substance thereof. Nevertheless, this product of case law was only very gradually shaped by judges. Case by case, they drew a number of outlines, rejecting its absolute nature. However, in the absence of any legal enshrinement (3) and in the face of a divided doctrine, French case law remained heterogeneous. It was only in 1998 that the Court of Cassation (4) genuinely affirmed Article 9 of the Civil Code (5) as the basis of image rights. Having thus become an attribute of personality, images officially gained independence two years later, as the subject of a fully-fledged subjective right (6). Lastly, owing to its unavailability, the relevant time limit was only definitively set with the demise of the *de cujus* principle in 2005 (7).

While image rights entered the new millennium under the best auspices, they find themselves in critical condition a good ten years on. Their deterioration in related to their atrophy (section I) but also to their own development, expressing shifts as to their very essence (section II).

I – Atrophy

The dwindling scope of image rights is the result of an expansion of other rights that either circumvent (section A) or compete (section B) with it.

A – The delegitimization of the monopoly over one's image

A person's right to control their own representation is now heavily circumscribed by transparency and truth requirements that structure freedom of expression on the one hand, and the law of evidence on the other.

While the former has long covered the public's right to be informed, its interpretation in that sense has been palpably extended over the last decade to the detriment of image rights, nonetheless recognised as an aspect of Article 8 of the European Convention on Human Rights (ECHR) (8).
Firstly, on the basis of that right, current events and public interest debates have, as with privacy, become justifications for infringements of image rights. Through a comprehensive interpretation thereof, the Court of Cassation took a benevolent view of the use of images as illustrations (9). Its informational value was no longer assessed as such but rather in light of the connection with the illustrated statements (10), which also serves to justify images captured without the knowledge of the interested party, unless however that the representation of said party violates human dignity or is offensive. Lastly, the same rules apply to the distribution of the image, authorised for specific purposes or subject to particular conditions; these restrictions do not infringe the right to information (11).

Next, the egalitarian conception of image rights – long set down in principle by the Court of Cassation (12) despite some hesitation due to hostility on the part of trial judges – is no longer relevant as regards the right to information. The decisive influence on this change of direction in linked to ECHR developments, once classing a princess as a "*'private' individual" despite her fame (13), and now as a "public figure", "who [is] undeniably very well known*" (14). Celebrities can no longer "*claim protection in the same way [...] as private individuals unknown to the public*" (15), the balance between their rights and freedom of expression being based on specific criteria (16). In that vein, the Court of Cassation accepted, for instance, a person's fame "owing to their respective family relations" and dismissed the unlawful invasion of their privacy as a violation of their image rights (17). Ten years earlier, the Court considered that such infringements were characterised by the "*sole purpose of relating*", with supporting photos, a celebrity's attendance at a highly-publicised demonstration as it was "*in a private capacity*" and "*unrelated to her professional activity*", the media company not having, moreover, proved that the star "*had lent her support to the cause*" (18). Henceforth, it is for the interested party to establish "relevant indications" or "particular circumstances" in order to prove that their image had been captured, not without their knowledge, but secretly or in unfavourable conditions (19).

Interpreted in light of the right to a fair trial (Article 6, ECHR), "*the right to evidence [...] for the purposes of supporting one's claims*" (20) also contributes to "delegitimising" a person's monopoly over their own image. Usually, it only prevails over the guarantees offered by Article 8 ECHR on the twofold condition that the item produced is necessary (21) to the needs of the defence and constitutes an infringement that is proportionate to the interests at stake. The first criterion has, however, very recently been overshadowed.

In French case law, two recent decisions involving cases of surveillance by a private detective mark this new direction. One accepts the lawfulness of such evidence against a policyholder, followed and filmed "*on the public highway or in places open to the public*" for the purposes of challenging an expert report. Without regard for those grounds denouncing disloyalty and the needlessness of such evidence, the Court of Cassation rejected the disproportionate nature of infringements "*relative solely to the mobility and independence of*" the insured person "*in light of the necessary and legitimate protection of the rights of the insurers and the interests of policyholders as a whole*" (22). The second decision draws a similar conclusion concerning a dispute as to eye damage, observations made "*from the public highway*" covering only "*the absence of spectacles*

when driving a vehicle or when cleaning and tidying a balcony" (23). The infringement of image rights was also rejected on the basis of the sovereign statement made by the trial judges that the poor quality of the photographs made it impossible to identify the person. Does such a failure not constitute grounds for ruling that such evidence is inadmissible?

These solutions are all the more surprising when we consider that the fact of *"voluntarily invading another person's privacy [...] by viewing, recording or transmitting, without (their) consent*" "*the image of a person in a private place*" is a criminal offence (24). However, the position detailed above is not an isolated incident. In similar cases, the Swiss and Spanish courts in particular have taken an identical approach, approved by the ECHR. The latter accepts, for example, that insofar as a claim for compensation made by a policyholder is based on his disability, "*the public interest of guaranteeing a fair trial for all litigants*" requires "*that any evidence to the contrary be put before the court*" (25).

Gone is the requirement that, in order to be admissible, evidential methods that violate personality are the only relevant ones. As to proportionality (now the sole evaluation criterion), this implies a genuine right to private surveillance which includes images, with the right to a fair trial justifying the production of the results thereof where these are intended to support a litigant's claims. Image evidence being admissible even where there are no allegations of fraud on the part of the person featuring in said image(s), the main question remains as to the possibility of capturing their image in a private place. France has already shown herself in favour where such an operation is carried out from a public place or a location that is open to the public.

B – Marginalising the control over one's image

The boom in digital technology, and especially Web 2.0, has multiplied the ways in which a person may be exhibited, even carrying with it an unspoken injunction to display oneself on the Web. Social media, and search engines in particular, also encourage the mass dissemination of information, and particularly images. The protection thereof, where the individual represented can be recognised, finds itself increasingly within the scope of those rules relating to personal data (26). While the latter appear to be more favourable to an improved control over information making a person recognisable, the scheme that those rules institute contribute in reality to weakened protection for images.

Subject as it is to a fundamental right to protection (27), personal data enjoys significant guarantees in Europe. Under Directive 95/46, data collection supposes "*specified, explicit and legitimate purposes*" in light of which the requirement as to the relevance and non-excessive nature of the data concerned is to be assessed (Article 6). The Directive also sets down strict conditions for data processing, an especially vast concept which extends to "*any operation or set of operations which is performed on personal data, whether or not by automatic means*" including their collection (Article 2). Among the six bases justifying such operations, the consent of the person concerned features as a principle, the others relating to situations in which data processing is "necessary", under the terms of the Directive (Article 7). It must then correspond to imperatives (28), overriding interests (29) or even be required "*for the purposes of the legitimate interests pursued by the controller or by the third party or third parties to whom the data are disclosed*". This slightly enigmatic basis is nevertheless subject to the exception where "*such interests are overridden by the interests for fundamental rights and freedoms of the data subject*". Nonetheless,

it seems destined to a flexible interpretation, as the ECJ has considered, in a cautious yet cryptic statement, that a search engine's activities were "*likely to fall within its scope*" (30).

The well-known *Google Spain* decision which set down this solution offers an eloquent illustration of the way in which the law on personal data has marginalised the protection afforded to image rights. Firstly, by accepting that data collection on websites may be necessary to the legitimate interests of the search engine operator, the ECJ recognised a correlation between that basis for data processing and a company's purpose. As a result, it undermined the principle condition, which is the consent of the interested party, potentially eliminating control over their image on the internet. Next, it considered that the possibility of obtaining the deletion of personal data displayed by a search engine did not imply the same option with regard to the publisher of a web page. In this case, the storage of data in a newspaper's internet archive, although over ten years old, appears to fall within the scope of the "*solely for journalistic purposes*" exception provided under Article 9 of the Directive. If this analysis were to be confirmed, the fate of images when faced with the right to information would again be altered online. Lastly, while the Court drew a right to be forgotten out of rights previously enshrined for individuals, it attached conditions that strengthened the essentially private framework in which those rights are to be exercised. The person concerned must assert his or her rights directly against the data controller. It therefore falls to the latter to decide on the merits of any such claims, in light of criteria that do not favour image protection.

The Court quite logically required that the compliance of data processing and its purpose(s) with the Directive be checked, but also that this be done in light of the time that has passed. While these checks leave room for a degree of subjectivity – especially with regard to photographs or videos – that is not the main problem.

The data controller must also examine whether their operations can "*palpably affect the fundamental rights to respect for private life and the protection of personal data*" without, for all that, any violation being necessary. It is nevertheless the "potential seriousness" of the interference that the data controller must establish, in order to weigh that up against the public interest in accessing the personal information at issue and their own economic interests. The margin of appreciation is all the greater as, while the *Google Spain* decision accepts the prevalence of the rights of the person concerned, on the one hand this is subject to "*specific reasons, such as the part played by said person in public life*" and, on the other hand, for a request on a search engine using a person's name in this case. It is based in particular on the scope that such a tool confers to personal data, multiplying their visibility and accessibility in an aggregated, structured form, and furthermore concerning sensitive information here.

These reasons suffice to give an indirect insight into the difficulties encountered in controlling the reproduction and circulation of one's image when faced with the power of data controllers. The seriousness of the intrusion into the fundamental rights of individuals, bearing in mind the growing banality of images on the internet, is only marginally accepted. Appeals to supervisory authorities, such as the CNIL in France, only stand to succeed in the circumstances established under European Union law.

II – Degeneration

Under the influence of the market for images and the development of communication technology, the purposes of image rights are undergoing change (section A). Nonetheless, the usefulness of their primary purpose does not appear to be entirely destined for annihilation (section B).

A – Changes to the purposes of image rights

The fact that images are viewed as economic assets changes the nature of the law to which images are subject, even bringing about possible distinctions as to the ownership of the same. This then raises the issue of purpose.

While images have long been the subject of contracts covering their exploitation, the *summa divisio* between things and persons has been grounds for hesitation on the part of French judges on the marketing thereof up until quite recently. Josserand, who had already decried the "patrimonialisation" of persons in 1932, concluded that "*we could be tempted to write that they are becoming Americanised*" (31) The importation of a form of right of publicity, distinct from the right of privacy across the Atlantic owing to its commercial dimension, does not belie this nowadays. The Court of Cassation thus enshrined the commercialisation of image rights, bizarrely basing its decision on the "*provisions of Article 9 of the Civil Code, solely applicable in matters of transfer (of that right)*" and which, even more bizarrely, "*fall within the scope of contractual freedom*" (32). Pursuing that line of reasoning, the Court ruled on the sole basis of Article 1134 of the Civil Code that "*the consent given by a person as to the distribution of their image cannot be construed as consent to the disclosure of their name and rank*" (33). The rigorous interpretation of intent here must not occlude the "contractualist" approach to image rights, without reference however to any transfer of rights whatsoever by the police officers who were the subject of the news report at issue in this particular case. The recognition of a right *over* an image, for which French doctrine had long hoped, is granted at the expense of a right *to* an image.

This shift towards contractualisation places agreements regarding images within a wider context of freedom of choice. Exploitation thus rests on what must be classed as consent. The Court of Cassation also went so far as to infer the possibility of granting "an exclusive right to use one's image" (34) post mortem! If the person concerned must accept the commercial use of their image (35), they are then bound by their consent – at least according to the First Civil Chamber of the Court of Cassation. The Court rejected any inspiration that could be drawn from the rules framing the transfer of copyright in such cases, returning to the terms of the contract only. Thus, where a model has consented to the use of his or her image for specifically identified shots, the fact that consent does not circumscribe the duration, location or methods of use matters little (36). The same concept prevails as regards remuneration; there being no rules requiring that it be proportionate to revenue from its use, the lump sum set down in the contract is binding (37). The Second Civil Chamber of the Court of Cassation, however, has shown itself to be in favour of proportionate remuneration for models in addition to the lump-sum payment legally provided for their physical service. However, this interpretation of Article L.7123-6 of the Labour Code merely emphasises the availability of images and their implicit recognition by the French legislature (38).

Given the circumstances, are image rights intended to retain a moral dimension? If, aside from any connections the debates as to the public interest, it is only defensible through a contractual interpretation, it then loses any extra-pecuniary character and also becomes unequal. In that case,

unknown individuals would have difficulty in claiming damage, unlike those persons who habitually market their own image, with the exception of the public's right to information. In spite of the growing commoditisation, images are not destined to lose all but their commercial protection, but rather face a change in their nature. Will this be by their re-entering the orbit of the right to respect for private life, under the cover of human dignity, or even as a tool for controlling reputation, the financial dimension of which would appear to be expanding? Before image rights are completely transformed into a means solely intended to protect interests other than those attached to the control of one's own representation, a less resigned avenue may yet be explored.

B - Expectations as to the survival of image rights

The tide of defiance with regard to the Web, that both the French (39) and European (40) legislatures have sought to stem, raises questions as to the possible disappearance of (non-pecuniary) image rights. In this regard, consumer law techniques may contribute to their survival.

Firstly, it is class actions that open the way to such a scenario. While France finally inserted them into the Consumer Code (41), the relevant conditions nevertheless currently exclude any likelihood that a class action be deployed in defence of image rights. Such actions may in fact only be brought in respect of "*the remedying of pecuniary damage resulting from material damage*" (42). However, several national legislations are not as restrictive: an Austrian student who had become famous was thus able to bring a class action against Facebook's data controller, located in Ireland, for the purposes of ensuring that the right to respect for personal data be respected. It was also this "*power to initiative collective legal actions*" that the European data protection authorities called for in a joint statement (43).

Secondly, the proposals for the European Data Protection Regulation provide another avenue, inspired by consumer law, to foster the protection of images of individuals. The initial draft of the Regulation provided that "*a significant imbalance between the person concerned and the data controller*" removed any effect from the former's consent to the processing of their personal data. This audacious borrowing from regulations on unfair contractual terms was all the more remarkable given that the inequality here related not to rights and obligations but to individuals themselves. The taking into account of an imbalanced power relationship would have improved the protection afforded to individuals twice over. On the one hand, it would have strengthened the right to protection, which is currently more of a right to protect oneself by refusing beforehand to consent to the processing of one's data and the exercise of individual rights thereafter. On the other hand, it could have moderated the hegemony of some online players who turn the acceptance of their general terms and conditions into a real Pandora's box. By rejecting the value of consent in such cases, as well as allowing it to be withdrawn "at any time", the proposal also went back over the "contractualist" conception of consent to data procession which prevails in practice, favoured by the use of the notion of consent in the relevant legislation.

However, the significant imbalance provision was removed in the Resolution adopted by the European Parliament on 12 March 2014. According to the Committee on the Internal Market and Consumer Protection, the expression was the source of potential "legal uncertainty", which is readily acknowledged, but also useless, "*the legislation in contractual matters, including that concerning consumer protection, providing sufficient guarantees against fraud, threats, unlawful*

exploitation, etc.". This stance, based as it is on a contractual approach to data processing and thus assuming the marketability of such data, is thankfully not set in stone. The proposal is destined to undergo a great many more amendments; it can therefore be hope that the final version of the Regulation will not ignore the non-pecuniary dimension of data as personal as images.

Notes:

(1) Court of Cassation decisions published in the *Bulletin* are indicated by *

(2) Trib. civ. Seine (1st ch.), 16 June 1858, D. 1858. III. 62.

(3) Despite proposals presented before the National Assembly on 16 July 2003.

(4) Cass. 1st Civ., 13 January 1998, n° 95-13694*.

(5) Which lays down the principle that "*everyone has the right to respect for his private life*", since Law n° 70-643 of 17 July 1970.

(6) Cass. 1st Civ., 12 December 2000, n° 98-21161*: "*the infringement of the right respect for private life and the violation of each person's right to their image constitute separate sources of damage, conferring the right to separate remedies*".

(7) Cass. 1st civ., 15 February 2005, n° 03-18302*; the right to respect for private life having already been ruled non-transferrable.

(8) ECHR, *Schüssel v Austria*, Application n° 42409/98, 21 February 2002.

(9) Cass. 2nd civ., 19 February 2004, n° 02-11122*: "*the principle of freedom of the press implies the free choice of examples of a general discussion on a social phenomenon*"

(10) Cass. 1st civ., 5 July 2005, n° 04-10607*, on the photograph of a police officer discovering damage to a vehicle; Cass. 1st civ., 7 March 2006, n° 05-16059*, on the photograph of the widow of a police officer killed whilst on duty, at the funeral.

(11) ECHR, *Hachette Filipacchi Associés (Ici Paris) v France*, Application n° 12268/03, 23 July 2009: an artist's publicity snapshots re-used in an article on the marketing of his image in order to fund his lifestyle; Cass. 1st civ., 9 April 2015, n° 14-13519*: ineffectiveness of making the distribution of his image subject to a preview, the filmed interview concerning a debate on ideas of general interest.

(12) Cass. 1st civ., 13 April 1988, n° 86-15524* and 27 February 2007, n° 06-10393*

(13) But without "official functions" - ECHR, Von Hannover v Germany, Application n° 59320/00, 24 June 2004, para. 72.

(14) ECHR, *Von Hannover v Germany* (n°2), Application n°s 40660/08 and 60641/08, 7 February 2012, para 120.

(15) ECHR, *Von Hannover v Germany* (n° 3), Application n° 8772/10, 19 September 2013, para. 53.

(16) Contributions to general interest debates (broadly understood), the person's fame and the subject of the report; their previous behaviour; the content, form and repercussions of the publication; the circumstances in which the photographs were taken; see also ECHR, *Axel Springer AG v Germany*, Application n° 39954/08, 7 February 2012.

(17) Cass. 1st civ., 13 May 2014, n° 13-15819*: snapshots relating to the "trivial" comments on their relationship "officialised" by poses where they were "embracing at various public events".

(18) Cass. 2nd civ., 18 March 2004, n° 02-12743*

(19) ECHR, *von Hannover v Germany*, n°s 2 and 3, above.

(20) Cf. in particular, ECHR, *L. L. v France*, Application n° 7508/02, 10 October 2006.

(21) Cass. 1st civ., 16 October 2008, n° 07-15778* and 5 April 2012, n° 11-14177*; Cass. com., 15 May 2007, n° 06-10606*

(22) Cass. 1st civ., 31 October 2012, n° 11-17476*
(23) Cass. 1st civ., 10 September 2014, n° 13-22612*
(24) Art. 226-1, Penal Code
(25) ECHR, *De La Flor Cabrera v Spain*, Application n° 10764/09, 27 May 2014.
(26) Definition: Law n° 78-17 of 6 January 1978, Art. 2, para. 2 and Directive 95/46, Art. 2 a).
(27) Cf. Charter of Fundamental Rights of the European Union and Council of Europe Convention of 28 January 1981, in particular.
(28) Legal obligation, exercise of public authority, enforcement of a contract to which the person concerned is party or pre-contractual measures they have requested.
(29) Vital interests of the person concerned or general interest
(30) CJEU, Grand Chamber, C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] (ECLI identifier: ECLI:EU:C:2014:317)
(31) *La personne humaine dans le commerce juridique*, Dalloz 1932, p. 1
(32) Cass. 1st civ., 11 December 2008, n° 07-19494*
(33) Cass. 1st civ., 4 November 2011, n° 10-24761*
(34) Cass. 1st civ., 14 February 2015, n° 14-11458
(35) Cass. 1st civ., 9 July 2009, n° 07-19758* and 24 September 2009, n° 08-11112*
(36) Cass. 1st civ., 28 January 2010, n° 08-70248*
(37) See Cass. 1st civ., 11 December 2008, n° 07-19494*, above.
(38) For images of sportsmen, see Law n° 2004-1366 of 15 December 2004
(39) See Law n° 2004-575 of 21 June 2004 *pour la confiance dans l'économie numérique* (on confidence in the digital economy)
(40) See proposed EU Regulation 2012/0011 (COD)
(41) By Law n° 2014-344 of 17 March 2014 on consumption
(42) Art. L. 423-1, para. 2 of said Code
(43) Of 8 December 2014, adopted by the Article 29 Working Party, 25 November 2014, point 5.