Image rights: the Italian position

Image rights have long formed a valid alternative source of income for individuals in the arts, cinematic, show-business and sporting industries, generated through the grant of a right to exploit an individual's image or personality for the purposes of endorsing or advertising a brand or product.

The attention of European legal professionals has in recent times been drawn to the large number of Italian court decisions concerning image rights dealings and the extent of protection afforded to them under Italian laws. Perhaps the most interesting issue raised by these decisions is the apparent divergence between common practice and what black letter law provides.

While industry figures are increasingly seen to place contractual controls on the exploitation of image rights, the Italian judiciary has generally adopted an archaic approach to the interpretation and application of the law, narrowing the means by which image rights can be exploited and underlining that the right are, without exception, under the absolute control of the person to which they relate.

Legal framework

The legal framework for image rights in Italy can be found in the Italian Civil Code and the Italian Copyright Law (*Legge sul Diritto d'Autore*).[1]

This framework generally provides that no person is permitted to display or publish another's image unless such display or publication has been consented to by the person to which the image relates, or is "justified" under one of the exceptions listed in (b) below.

Any other dealings with a person's image, such as its licensing, are similarly not permitted without the relevant individual's consent; image rights are considered an inherent and inalienable part of an individual's personal identity.

In the event that a person's image is displayed or published in contravention of the law, that person is entitled to apply for an injunction preventing such further use and/or payment of damages in compensation for the infringement of that person's legal rights.

(a) Image rights as a concept

The Italian legal system takes what many consider to be an outdated, overly-protective view of image rights.

For example, although an individual's image may be displayed or commercialised without consent in certain circumstances, it may not do so if such use would prejudice the honour, reputation or dignity of the person in question. This caveat was enacted in the 1940s and reflects the view of the era that commercial exploitation of a person's image could easily be associated with dishonour, not due to a lack of consent, but because image rights were simply not to be considered as an economic asset at the time. This is most obvious when one notes that the word "portrait", rather than "image", is used throughout the relevant law; all related rights are to be considered stationary, inherently tied to a person and sacred, rather than proprietary commercial assets.

(b) Exceptions to obtaining consent

There are certain circumstances or purposes under Article 97 of the Italian Copyright Law that "justify" the publication of an image without the consent of an individual, including:

(i) the notoriety or public position of the individual;
(ii) a requirement of justice;
(iii) scientific, educational or cultural reasons; and
(iv) where the image is association with public events or public ceremonies.

These exceptions effectively act as a waiver of the right to privacy and are, predictably, narrowly applied by the Italian courts.

For example, in *Sandro Mazzola v Bambole Franca S.a.s.*,[2] a toy manufacturer began producing toys bearing the discernible features of Inter Milan and national team striker Sandro Mazzola, defending its use of the player's image on the basis that he was a famous figure and therefore its actions fell under the exception at (i) above. The Court of Milan, however, emphasised that the exceptions contained in Article 97 were drafted to protect the public interest, not to further purely commercial aims. The judge ruled that it was not sufficient to merely fulfil one of the exceptions; there must be a clear public interest in the publication of the image and it must, on balance, have greater weight than the purely commercial interests of the person seeking to exploit the image.

(c) Consent

Under Italian law, consent does not necessarily have to be in writing and it does not necessarily have to be expressly granted; it may also be implied in the circumstances or by virtue of an individual's behaviour. However, the Italian courts have again in this regard sought to narrow the means by "image rights" can be divorced from the persons to which they relate, requiring consent to have a clearly defined scope and specify the duration, scope and form under which exploitation of the individual's image is permitted (see, for example, *F.D. v Henkel*[3]).

Further, and perhaps more importantly, several decisions of the Italian Supreme Court (see e.g. *Corsini, Pireddu v Casa Editrice Universo S.p.a., Universo publicit S.r.l.*[4]) have suggested that consent to the exploitation of image rights may be withdrawn at any time by the consenting party, regardless of what has been previously agreed between the parties by way of contract or otherwise. The obvious consequence of an approach that grants individuals an absolute right to control and veto any use their image, irrespective of commercial terms, is that image rights contracts in Italy are highly unstable.

Divergence between law and practice

Despite the obstacles posed by Italy's existing legislation and the court's archaic approach, the commercial reality in Italy is that image rights are commonly exploited under contractual arrangements and consent to such exploitation is not commonly withdrawn by individuals in reliance upon their fundamental right to personality. Recent case law in Italy relating to breaches of sponsorship contracts has also begun to demonstrate an emerging recognition of the proprietary nature of image rights.[5]

This commercially-focused practise reflects the more liberal view of common law jurisdictions that image rights can be freely exploited and that such exploitation can be governed exclusively by a contractual arrangement, to the exclusion of implied personal rights.

Comment

The general approach of the Italian judiciary to and its application of image rights law is static and outdated, and contrasts greatly with the more flexible and fluid governance of other aspects of IP commercialisation in the country.

Further, despite recent court decisions suggesting that the withdrawal of consent to the exploitation of image rights may in certain circumstances be controlled by contract (see for example, *S.C. v Pioneer Italia S.p.a.*[6]), no statement of intent to modernise the

existing legislative regime appears to be emerging from Parliament. The divergence between industry practice and the strict letter of the law therefore leaves the status of image rights essentially unresolved.

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1. Article 10 of the Civil Code and Articles 96 and 97 of L. 633 22 April 1941 (Legge sul Diritto d'Autore).
2. Trib. Milan 25 November 1974, in riv. Dir. Sport., 1974, 235.
3. Cass. civ. Sez. I, 16 May 2006, n. 11491, in Mass. Giur. It., 2006; Cass.
4. Cass. civ. Sez. I, 17 February 2004, n. 3014.
5. Cass. civ. Sez. I, 11 October 1997, n. 9880, in Mass. Giur. It.,1997. – Cass. civ. Sez. I, 11 August 2009, n. 18218, in Danno e Resp., 2010, 5, 471.
6. Cass. civ. Sez. I, Sent, 19 November 2008, n. 27506.

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