

Garrigues

Protecting and enforcing advertising and image rights in Portugal

While national jurisprudence defends the nature of the image right as a personality right with important patrimonial value, economic exploitation can arise from the broad scope for negotiation in comparison to other personality rights

Every day, public figures and fashion models persuade us to buy different products through advertising. Advertisers seek to convince consumers to buy their products by linking these well-known figures to their products.

The economic exploitation of an individual's image is increasing worldwide as different media become accessible, and Portugal is no exception. Image rights have now acquired considerable value.

The image right of the individual is established in the Constitution and the Civil Code – specifically, in Article 79(1), which lays down the subject's rights against the unauthorised display, reproduction or commercialisation of his or her image, without consent.

This personality right protects various values, such as personal values, insofar as each person must decide whether, when and under what conditions his or her image may be displayed or used. In the present circumstances, it is undeniable that an image right also protects patrimonial values; thus, theories that qualify image rights as non-patrimonial are outdated.

Portuguese law recognises this content by assigning a subject the exclusive economic exploitation of his or her image. In addition, the Advertising Code supports this exclusive right, stating in Article 7(2)(e) that any advertisement that “uses, without the subject's consent, the image... of any person” shall be forbidden. Infringement of this rule can result in liability, a misdemeanour suit and accessory penalties, as set out by law.

Exploitation through advertising is one of the main ways to exploit an image economically. Thus, it is relevant to analyse Portuguese court decisions in cases that have dealt with consent in such context.

This article also analyses the extent to

which the freedom of negotiation (a consequence of the attribution of exclusive economic exploitation) is limited in the case of using images of minors in advertising.

Consent in jurisprudence

In a decision of September 28 2004 the Lisbon Court of Appeal considered a case in which the author had authorised the use of his image on the cover of a CD only, but the photographs were then enlarged for use on billboards in a shop and in a disco. The court emphasised that although the author had consented to the photo shoot, such photos were intended to illustrate the CD cover and not for display on billboards “with the intent to obtain patrimonial advantage, namely for the free advertising and promotion, that in commercial terms, these generate”.

The court found the actions to be illegal based on the infringement of image rights, and ordered the defendants to pay compensation. In addition, the court confirmed the extent of the consent in respect of the use of the image. Moreover, it established that the consent was linked to a certain purpose, and any economic use for a purpose other than that agreed on will be considered to be an infringement of image rights. Therefore, in each case it is necessary to determine the purpose of the agreement, since this determines the exact extent to which a subject disposes of his or her right.

Another practical issue concerning consent is the circumstances in which the judicial status resulting from consent can have full force against third parties. In a decision of December 18 2007 the Lisbon Court of Appeal held that: “although the right of image is indispensable and inalienable, limitations to the exercise of such right are not forbidden, namely the assignment to third parties... the right to the commercial exploitation of the image by football players.”

More Portuguese jurisprudence exists concerning the issue of enforcement against third parties, specifically in the *Panini* and *Velli* cases.

In the first case, publisher Panini Portugal obtained authorisation from the Portuguese Football Federation to negotiate directly with the Professional Footballers' Union regarding the publication of trading cards of the Portuguese national football team, featuring images of the players. For that purpose Panini entered into a rights assignment agreement with the union, which gave Panini the exclusive right to use and reproduce images of the football players on some trading cards. Panini then produced a collection of trading cards related to a sporting event, on which the professional football players' images were used and economically exploited.

Mabilgráfica – estudos gráficos, Lda, without Panini's consent, then brought to the market a collection of playing cards for the same sporting event showing the players' images.

In the court of first instance, the defendant's conduct was considered to be prejudicial to Panini, and the court stated that “if consent is possible, nothing prevents it from being rendered directly to the user of the image or by means of an intermediary”. However, the Supreme Court considered that the union was not authorised to act on behalf of the players in order to negotiate contracts concerning the commercial exploitation of their image rights. Thus, it held that a generic and definitive assignment of the image right is considered to be a forbidden deal, and that assignment on such terms infringes an image right as a personality right, which cannot be assigned or exercised by another person.

In the *Velli* case a company representing athletes negotiated with one such person on the “acquisition of rights inherent to his professional image”, as well as assignment

of the exploitation of such rights. On February 24 2005 the Evora Court of Appeal underlined the non-assignability of personality rights. In this respect, the court held that: "As such, the assignment of image rights, though partial and restricted to the field of sports, is null and void as it infringes public order (article 280 (1) and (2) and 81 (1) of the Civil Code), given that it does not refer to the availability of a specific image but rather to any image of the player at sports level."

It is clear that the consent for disclosure provided in Article 79 of the Civil Code is different from the assignment of one's own image, with the latter being illegal under such circumstances.

Children

The issue of using images of children and minors in advertising can be controversial. This issue assumes special relevance in the fields of sport and fashion, mainly due to the influence exercised by children in sales and their powers of persuasion over their parents.

To that extent, the problem of consent raises several issues, such as the incapacity of minors to consent to the commercial exploitation of their image. Under Portuguese law, a decision of a minor will be relevant to completion of the given consent. Where a minor has no capacity to understand legal business, his or her legal representatives can act on their own concerning the economic exploitation of the minor's image. This is a frequent and accepted practice, and is legal under Article 7(2) of the Advertising Code.

Notwithstanding this, specific precautions apply whenever minors aged under 16 participate in advertising. Their participation is subject to authorisation from the Commission for the Protection of Children and Young Persons, and the request must be accompanied by an authorisation from the legal representatives.

However, even if the minor can understand the impact of the exploitation, intervention by legal representatives may still be required insofar as patrimonial rights may, in certain cases, justify the protection of the minor.

Most doctrine also provides that if a minor and his or her representatives do not agree regarding the use of the minor's image, this use must not go ahead.

Conclusion

National jurisprudence clearly defends the nature of the image right as a personality



Gonçalo da Cunha Ferreira

Partner

goncalo.cunha.ferreira@garrigues.com

Gonçalo da Cunha Ferreira holds a law degree from the *Universidade Moderna* and has completed complementary training in strategic management, and mediation and arbitration. Mr Ferreira has been a consultant in industrial and intellectual property since 1985. He founded Cabral, Cunha Ferreira & Associados in 1988 and worked there up to 2006, when he joined Garrigues.



Paula Veiga

Associate

paula.veiga@garrigues.com

Paula Veiga is an attorney in the IP/IT law department of Garrigues in Portugal. Ms Veiga has been a consultant in that field since 2001. She has completed postgraduate diplomas in IP, communication, commercial and information society law, as well as courses in e-commerce, information policy and unfair competition law.

right with important patrimonial value. The potential for economic exploitation has resulted from the fact that this right allows broad scope for negotiation in comparison to other personality rights, such as the rights to privacy and honour.

The use of image rights in advertising is shaped by the consent of the subject. To that extent and according to the understanding of the courts, consent cannot be mistaken for assignment (assignment is forbidden whenever it is generic and definitive), based on the fact that this right is an inalienable right that cannot be waived.

The economic exploitation of the image of a minor, once consented to by his or her legal representatives, is strictly limited, and it is important to analyse the minor's understanding and capacity to consent, as well as the patrimonial implications of such consent. [WTR](#)