

**Right to image versus right to report: the Gianni Rivera case.**

**Introduction**

The Italian Copyright law, Law no. 633 of 22 April 1941, provides for protection of the right in one's own image. An exemption to this is found in Article 97, pursuant to which the reproduction of the image of a person is permitted without prior consent when (a) it is justified by the person's fame or public office held, (b) the needs of justice or law enforcement, (c) scientific, didactic or cultural purposes, or (d) reproduction that is related to facts, events, ceremonies of public interest or that are held in public.

A recent decision issued by the First Section of the Italian Court of Cassation (no. 19515 of 16 June 2022), offers clarification on the scope of the exemption provided in article 97.

In the case at hand, photos of an individual, Gianni Rivera, had been published publicly which depicted him in scenes of every day life. Mr. Rivera filed suit, and the publisher, RCS MediaGroup, defended its actions by asserting the exemption under (a), considering the notoriety of the person portrayed.

In examining this case, the Italian Supreme Court distinguishes between lawful and unlawful publications, focusing on the criterion of the inherent nature of the activity for which the person is known. In fact, without prejudice to the prohibition on (even indirect) commercial exploitation of another person's image for the purpose of advertising or propaganda, or the purchase of goods and services, publication of a person's image without consent is lawful if the photographs are taken in the context of not only the activities for which the person has become famous, but also in the context of those scenes that are incidental to or connected to those activities. On the other hand, it is unlawful to publish images that portray the person in scenes of his or her private life, which are not connected in any way to the public sphere.

The Gianni Rivera represents an opportunity to refresh our analysis of the relationship between the right to image and the right to report newsworthy content, which requires a delicate balancing act, confirming that no right reigns supreme, even where it is protected on a constitutional or super primary level.

**The right to image and the right to report - national and conventional regulatory framework**

In the taxonomy of Italian fundamental rights and freedoms, the right to image falls within the category of personality rights and constitutes an expression of the broader right to privacy. In terms of content, it prevents the publication or exhibition of an individual's image without the consent of the person concerned.<sup>1</sup>

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<sup>1</sup> Campagnoli M.C., *Il diritto all'immagine*, in Responsabilità civile, Cendon Paolo, Utet, 2017, Milan, p. 631; Mezzasoma L., *Il diritto all'immagine fra codice civile e Costituzione*, Revista Internacional de Doctrina y Jurisprudencia, 2013.

At the constitutional level, the right to image is not expressly recognized, but rather resides within the ambit of personality rights set forth under Article 2 of the Constitution. This framework is supported by Article 3 of the Constitution, which, through a programmatic objective of social inclusion, ensures respect for the dignity of individuals.

At the conventional level, the jurisprudence of the European Court of Human Rights in Strasbourg has identified the right to one's image in Article 8 ECHR, which protects the private life and privacy of the individual.<sup>2</sup>

The overarching constitutional and conventional coverage is supplemented by a network of primary Italian legislation, which clarify the characteristics of the right to the image, establishing its limits, faculties, rights and remedies.

Article 10 of the Italian Civil Code enshrines the first two limits on the image right insofar as it provides cases in which the publication or exhibition of a person's image is legally permitted, though always with respect for the decorum or reputation of the person or their heirs. On the remedial level, Art. 10 of the Civil Code also provides inhibitory protection, whereby the person depicted may request a prohibition on publication or exhibition, as well as the right to claim compensation under Articles 2043 and 2059 of the Civil Code.

The Italian Copyright law (Law no. 633 of 22 April 1941) clarifies in Art. 96 that it is forbidden to exhibit, reproduce or market the image of a person without that person's consent. However, Art. 97 specifies that consent is not required *'when the reproduction of the image is justified by the notoriety or public office covered, by the necessity of justice or the police, by scientific, didactic or cultural purposes, or when the reproduction is connected with facts, events, ceremonies of public interest or held in public'*. Paragraph 2 of the article also provides that publication must occur with respect for the decorum and reputation of the person, and goes one step further, to protect the honour of the individual concerned.

An analysis of the provisions cited above shows that, as often occurs in the field of copyright, although this right concerns a physical person, the right to image has not only a moral and intangible component (hence the limits of respect for the decorum, honour and reputation of the person portrayed), but an economic component, which lends itself to commercial exploitation and sale.

However, it should be noted that, since this right pertains to the sphere of personality, commercialisation and the related commercial exploitation do not change the nature of the right, which, at its core, remains unchanged. In other words, even an express assignment of the rights of economic exploitation of an image cannot be definitive, since it can be revoked by the person holding the right at any time. In fact, the act by which the rights of economic exploitation are assigned is not a contract, which may only be terminated by mutual consent of the parties (Article 1372, Italian Civil Code), but a legal act in the strict sense, whereby while the holder of the image right provides express authorization to the use of their image, they may revoke consent at any time, subject to payment of compensation of damages for the violation of the related contract regulating the economic conditions of the assignment.

The Italian regulatory framework is completed by Legislative Decree No. 196/2003 (the so-called Privacy Code), as amended by Legislative Decree No. 101/2018 in application of EU Reg. No. 679/2016 (the GDPR), pursuant to which a person's image can be qualified as real personal data,

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<sup>2</sup> European Court of Human Rights, Guide to Article 8 of the European Convention on Human Rights, 31 August 2019, available on the EDU Court's website.

and Articles 615bis and 617bis of the Criminal Code, which define the offences of unlawful interference in private life and unlawful possession, dissemination and installation of equipment and other means of intercepting, preventing or interrupting telegraphic or telephone communications or conversations.

Moving to the other side of this equation, the right to report news is embodied in the right to inform, and therefore to publish or disseminate news that is of public relevance, insofar as it responds to a public interest in being aware of the facts that are the subject of reporting.

It is, first and foremost, an expression of the freedom of manifestation of thought provided in Article 21 of the Constitution, which lays down stringent limits for subjecting the press to seizure. It is also, however, an instrumental right to the same freedom of manifestation of thought, which can only be properly formed if one is in a position to have access to a free divulgence of newsworthy facts, that must be in compliance with the (albeit vague) general limits of morality. For a piece of news to be said to have been lawfully disseminated, jurisprudence requires that the information be truthful, relevant (in the sense that there exists a public interest in the information) and conscientious (presentation of the facts and their assessment in a form that respects the dignity of the person).

At the conventional level, there is an express recognition of the right to report news in the freedom of expression provided in Article 10 ECHR, which provides that *'this right includes freedom to hold opinions and freedom to receive or impart information or ideas without interference by public authority and without frontiers'*.

Finally, as noted above, Art. 97 of the Italian Copyright Act includes, among the exemptions allowing publication of personal images without consent, the public relevance of certain facts and the notoriety of the persons portrayed.

Taken together, these instruments provide a thorough groundwork for settling conflicts that inevitably arise between these two rights.

### **The Gianni Rivera case**

The confrontation between the right to image and the right to report plays out in a particularly interesting manner in an Italian court case involving the well-known former footballer and politician Gianni Rivera, and RCS MediaGroup, arising from RCS's use of Rivera's image in connection with the distribution of audiovisual works.

These works were included in DVDs that were commercially distributed by RCS for the purpose of celebrating and documenting sporting events in the history of football. However, the photographs used portrayed Rivera outside the game, or in any case when he was not wearing the AC Milan or Italian national team jersey. In particular, it is inferred from the Supreme Court's ruling that the images, originally taken with the consent of Rivera but unduly used by RCS, portrayed the man in the act of getting off a plane brandishing the Intercontinental Cup, in the company of other footballers - such as Mazzola, De Sisti, Iuliano - during an Italian national team retreat, during an interview, or again without his uniform and outside a football event.

RCS, which lost in first and second instance, appealed to the Court of Cassation, challenging the decision of the Court of Appeal of Milan insofar as it held that the exemption provided in Article 97 of the Copyright Law was excluded because of the commercial nature of the use, which was deemed to derive automatically from the fact that the images portrayed Rivera in civilian clothes.

RCS argued that, on the contrary, the didactic-cultural purpose of the audiovisual works and the legitimate exercise of the right to report was evident, thus justifying lack of consent.

The Court of Cassation, in Order No. 19515 of 16 June 2022, ruled on this issue, declaring, first and foremost, that the existence of the requirements of the right to report news does not in and of itself legitimize the publication of the image, since there must be a specific public interest for the news element to be accompanied by the publication of the photographic image.

As to the objections raised by RCS, the Supreme Court observed that the exemption provided in Article 97 of the Copyright Law is subject to strict interpretation, since it concerns exceptions to a constitutionally protected right, which pertains to the intimate sphere of the person. However, the Court added that the core of the analysis does not require an extensive or even analogical interpretation of the scope of application of the exemption but requires defining the concept of notoriety. If notoriety means that public awareness deriving solely from the principal activity for which the person is known - which in Rivera's case would be the act of playing football (leaving aside his subsequent political career) - then the publication of the pictures in which Rivera appears without a shirt and in scenes of everyday life, albeit not private, should be prohibited. If, on the other hand, as the Court of Cassation considers, the notoriety of the person involved also incorporates related activities, such as interviews or meetings with teammates, it is clear that the exemption will be applicable *de plano*.

In fact, the notoriety of a person is linked to the interest that the public has in knowing about the life of the famous person. In this case, the exercise of the right to report newsworthy material meets the needs of public information, in relation to facts and events considered interesting and relevant. It follows that the public image of the person extends to situations that may occur in full view of the public, such as at a bar or restaurant, but not, on the other hand, to environments where one wishes to preserve the sphere of intimacy and confidentiality, for example in a private home, even if in an area exposed to public view.

However, the Court makes it clear that the public image of a well-known person does not extend to contexts that are completely removed from those that made him or her known: such an extension would entail an unlawful compression of the right to privacy, which even a public figure must be allowed to enjoy.

Therefore, the Court held that the shots in which the player entertains himself with teammates, holds interviews, and celebrates with the cup for a victory that has just been achieved, concern activities that are connected and related to the activity for which the individual is known and contributes to creating the image of that individual. As a result, RCS's inclusion of those images in the audiovisual content is permissible.

The conclusion here is further confirmed by the fact that, according to the Court, the audiovisual works are intended for an obvious didactic-cultural purpose, namely to commemorate sporting events in the history of football. The Court specifically emphasizes that the commercial nature of RCS's activity does not invalidate the prevailing informative, didactic and cultural purpose, and thus does not require the acquisition of consent under Article 97 of the Copyright Law. Holding otherwise would lead to the result that the press, and in general the right of reporting exercised by professionals, would be compromised by the profit-making purpose pursued by such persons through their journalistic activity.

In otherwise, the Court made a distinction between a commercial purpose - supplemented by the using the image of the well-known person in or on products intended for sale - and a didactic-

cultural purpose, where the image is only used to inform the public about the facts being narrated, and in which the subject has been a protagonist or participant.

## **Conclusions**

The First Section of the Court of Cassation's decision in this matter is the result of an adequate balancing act between rights that draw on super-primary values and demonstrates, firstly, that absolute rights may be limited insofar as the essential and irreducible core of the right is not harmed, and secondly, that in the balancing between various constitutional rights, no one of them ranks supreme, so as to always impose itself on the others, but rather it is necessary to identify conditions that allow them to coexist and interpenetrate, through a scrupulous reconstruction of the limits of each.

As we have seen, on the subject of the right to image, consent assumes a fundamental role, but not in those cases where the balancing act with the right to report makes publication possible even in the absence of any consent. General limits, such as the prohibition on harming the honour, decorum and reputation of the person portrayed, and specific limits, which concern the individual causes that trigger the exemption under Art. 97 of the Copyright Act, intervene to counterbalance the lack of consent.

With reference to the concept of notoriety, it is crucial to identify the activities for which the image of the famous person may be published, even without of consent. According to the Italian Supreme Court, these activities include those that are connected and related to the activity for which the person became famous. This is indeed a logical and rational solution, because it gives adequate space to the public interest that drives the right to report, and which cannot be limited to the playing field, metaphorically speaking.

On the other hand, the public image does not extend to the point of also including scenes of private life, the dissemination of which, although it may incite the interest of some, is unlawful by virtue of that sphere of confidentiality that even a public figure is entitled to preserve and enjoy.