

[FR] Exception for Artistic Purposes - Another Exception to the Right of Personal Portrayal?

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On 2 June 2004 the press chamber of the Regional Court of Paris delivered a judgment that has attracted particular attention, concerning the right of personal portrayal, by supporting the freedom to communicate ideas that are specially expressed in an artist's work.

A photographer had published a book, co-produced in conjunction with a philosopher/sociologist, of unidentified faces photographed in the Paris metro. One of the people photographed complained that he had discovered quite by chance that he was included in the book and had also been used in a film. He claimed that the publication, without his consent, of a photograph taken surreptitiously and reproduced for purely commercial purposes in two different media (book and film) violated his right of personal portrayal. In its judgment, the Court began by recalling a principle referred to on many occasions according to which "while every individual has an exclusive right in respect of his/her personal portrayal enabling him/her to object to an image being made or reproduced without his/her consent, this right is not absolute and yields more particularly to the right to information, a fundamental right protected by Article 10 of the European Convention on Human Rights, which authorises the publication of images of people involved in an event, subject to respect for personal human dignity". However, the Court for the first time to our knowledge went further by saying that "the same should apply where an individual's exercise of his/her right of personal portrayal would have the effect of arbitrarily hampering the freedom to receive or communicate ideas that are specially expressed in an artist's work".

Following the exception for information purposes, the Court seems to be using Article 10 of the European Convention on Human Rights to sanction an exception for artistic purposes to every person's right of personal portrayal on the basis of "the originality of the process used by the author". It should be noted in passing that this concept is very close to the concepts of literary and artistic ownership and could, in terms of the right of personal portrayal, be difficult to handle because of the risk of arbitrariness; it could even result in exclusion of application of the right of personal portrayal for any publication of photographs of people as it is easy for them to be protected under copyright. In the present case, the Court felt that the aim sought by the photographer (ie to place his art at the service of sociological observation) could not have been achieved if he had worked openly. If he did "steal" these images, the Court felt it was not particularly for a commercial

or mercenary purpose but with a view to providing special sociological and artistic evidence on human behaviour, backed by the analysis of a sociologist/philosopher. The Court noted more particularly that the photograph representing the applicant did not show him in a degrading situation and that the impression given by the photograph did not make him look ridiculous. It concluded that by taking and using the disputed image in such circumstances, neither the photographer nor the producer of the film had made wrongful use of their freedom of expression.

TGI Paris (17e ch. civ.), 2 juin 2004, M. Bensalah c/ L. Delahaye Magnum, Editions Phaidon Presse Limited et SA MK2

Regional Court of Paris (17th civil chamber), 2 June 2004, M. Bensalah v. L. Delahaye Magnum, Editions Phaidon Presse Limited and MK2 S.A.

