

**PHOTOGRAPHER'S AND  
IMAGE // PRIVACY / PUBLICITY RIGHTS**

**LA PARISIENNE DE PHOTOGRAPHIE**



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photography

**PHOTOGRAPHER'S AND  
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# **PHOTOGRAPHER'S AND IMAGE // PRIVACY / PUBLICITY RIGHTS**

## **I) PHOTOGRAPHER'S RIGHTS**

### **1) INTRODUCTION**

In spite of the differences that may exist amongst national copyright legislations due to country's legal system and historical development, today's copyright laws are quite similar in structure. They generally contain a definition of the conditions for protection (originality), protected subject matter, rules on first ownership and subsequent transfers of title; moral rights and exclusive economic rights.

There are two distinct yet similar approaches to the protection of authors and their works.

One, the so-called "droit d'auteur" or "author's right" approach prevails in most continental European countries, and in particular in France and in Germany. The second one is the so-called "copyright" approach which prevails in most countries having a common law tradition (the U.S for example), and in Europe in particular in the United Kingdom and Ireland.

Copyright has a significant impact on the field of photography. It is the legal framework that ensures the basic economic return for photographers and photo stock agencies. Copyright law is increasingly seen as a legal instrument to regulate competition and fight copyright infringement.

Copyright protects **original** works in the field of literature and the arts, including writings, musical compositions, works of visual arts and other creations of the mind (immaterial goods). Copyright further protects related or neighboring rights (performing artists, film producers, broadcasting organizations, etc.) **It does not protect ideas or information themselves, only the manner in which they are expressed.**

Copyright comes into existence without formalities. Though, it is to be noted that in the United States, in order to enforce copyright, a US author must register its work and while foreign authors may enforce without registration, as noted below statutory damages and attorney's fees are only available as a remedy if the work was registered before the infringement. Copyright registration serves to (i) demonstrate copyright ownership and (ii) enable the copyright holder to seek statutory damages and attorney's fees. (For example, statutory damages are often calculated as a multiple of the license fee which would have been requested and paid for permission to use the image.)

In most countries that are signatories to the Berne Convention, the copyright term is fixed at 70 years after the death of the author. This term is to be calculated from the beginning of the year following the death of author.

In the United States, it is quite complex determining whether a work has entered the public domain or is still under copyright. The following chart, adapted from the Cornell Law school

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chart [<http://copyright.cornell.edu/resources/publicdomain.cfmis>], is useful to describe the term of protection for works under the different schemes. (See “Copyright Term and Public Domain in the United States” table.)

| Date of Work                                             | Protected From                                                                                                                   | Term                                                                                                                                                               |
|----------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Created on or after January 1, 1978                      | Original work fixed in a tangible medium of expression                                                                           | Life of the author, plus 70 years. For works made for hire, anonymous & pseudonymous works, 95 years from publication, or 120 from creation, whichever is shorter. |
| Registered between January 1, 1964 and December 31, 1977 | Publication with Notice                                                                                                          | 28 year original term, plus 67-year renewal term, which vests automatically without registering the renewal                                                        |
| Registered between January 1, 1950 and December 31, 1963 | Publication with Notice, and works still in the first term had to be <b>renewed</b> in order to be protected for the second term | 28-year original term, plus 67 years if properly renewed. Otherwise, no protection after the 28 <sup>th</sup> year (latest date December 31, 1991)                 |
| In the second (renewal) term between 1950 and 1978       | Properly renewed for second term                                                                                                 | Automatic extension for a total of 95 years (28 + 67)                                                                                                              |

Works created for the United States government by its employees acting within the scope of their employment are not subject to copyright. This places government created work in the public domain, which is why anyone can obtain a government map or copy the circulars from the Copyright Office.

In France, copyright term is also fixed at 70 years after the death of the author. It is to be noted that posthumous works are protected an additional 25 years beginning on January 1 following the disclosure. Copyright protection is increased by 30 years if the author died in the line of duty for France.

Once the works are in the public domain they can be freely used.

It is to be noted that in spite of the differences that may exist amongst national copyright legislations due to country's legal system and historical development, today's copyright laws are quite similar in structure. They generally contain a definition of the protected subject

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matter, rules on first ownership and subsequent transfers of title; moral rights and exclusive economic rights and the conditions for protection (originality).

As any author, the photographer is the creator of the original expression in a work.

In the US, the Copyright Act (Title 17 of the United States Code) protects “**original works of authorship**” that are “**fixed in a tangible medium**”. The United States Code Section 102, reads as follows: “*Copyright protection subsists... in original works of authorship fixed in a tangible medium of expression, now known or later developed, from which, they can be perceived, reproduced or otherwise, communicated, either directly or with the aid of a machine or device.*” Further, Section 102, subsection 5, defines works of authorship, amongst others, as: “*pictorial, graphic and sculptural works.*”

In France, Article 3 of Law n° 57-298 of March 11, 1957, on Literary and Artistic Property (Title 1 of the Intellectual Property Code) was amended by Law of July 3, 1985 as follows: “photographic works of an artistic or documentary character, and other works of the same character produced by processes analogous to photography” shall be replaced by the words “**photographic works and other works produced by techniques analogous to photography**”.

This means that up to the July 3, 1985 law, photographic works had to depict newsworthy events or to bear the photographer’s personality.

### **2) ORIGINALITY REQUIREMENT:**

In order for a creator – especially a photographer - to benefit from the protection of copyright, his creation must be qualified as “original”. In other words, the work has to bear the imprint of its creator.

Even though a photographic image is a mechanical reproduction of some subject, the originality of a photographic image lies in the angle of the shot, the lighting of the subject, the framing of the image, the staging of the subject, or the moment of capture.

The courts appreciate very broadly the “original” character of the photographic image. The result is that some photographs, that may appear as banal, are considered original works marked by the personality of the author.

In 1884, the US Supreme Court decision in the Burrow-Giles Lithographic Company vs. Sarony case held that photographs fit within the scope of copyright when exhibiting the requisite originality. The Burrow-Giles vs. Sarony case involved Sarony’s photo Oscar Wilde No. 18. The US Supreme Court found this photograph capable of protection as a “useful, new, harmonious, characteristic, and graceful picture” as exhibited by “posing, selecting, arranging, lighting and shading.”

Similarly in France, on June 5, 1996, the Court of Appeal of Paris in the case of Les Editions du May vs. Ingigliardi found the black and white photograph fitting within the scope of



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copyright protection as it depicted “a writer sitting on his couch near his library, blowing into an instrument of his own invention”, displaying qualities in “contrast, lighting and shading” and further had a “documentary character conferred by the representation of the writer blowing into the instrument of his invention.”

Photographs reproducing underlying fine art - in this case paintings - can also be considered as original works.

On September 26, 2001, the Court of Appeal of Paris ruled: “The only condition for the protection of photographic works in accordance with the provisions of the July 3, 1985 law lies in their originality. Meet this condition photographs depicting the works of a painter, far from stepping aside in favor of the painter, the photographer has sought their essence by choosing deliberately the lighting, the lens, filters and framing or angle of view, thus expressing his own personality... [the photographer] shot detailed views of a fragment of the work particularly revealing to him, this global approach is not the one of a simple technician but reveals a true creator.”

In a similar case in the U.S., the Bridgeman Art Library, a British company, brought a copyright infringement action against Corel Corporation based on the unauthorized inclusion of Bridgeman images of fine art in a series of Corel CD-ROM titles of well-known paintings of European Masters. It is to be noted that Bridgeman has exclusive rights in many well-known works of public domain art from museums located around the world and maintains a large archive of images available for reproduction and licensing. The district court held that because the transparencies - taken by professional photographers - accurately reproduced the underlying works of art without any modification could not be considered as “original.” The court determined that a photograph that was merely a copy of someone else’s work could not be original despite the change of medium or talent used in taking the image. Bridgeman requested that the district court reconsider its decision. The court reaffirmed its prior decision and noted that in order for a photograph of other printed work to be protected by copyright, the case law requires a “distinguishable variation, something beyond technical skill to render the reproduction as original.”

In both instances while opposite decisions were rendered, the French and U.S. courts sought the imprint of the photographer.

### **3) THE IDEA / EXPRESSION DICHOTOMY + IMAGE**

As mentioned above, copyright protects the expression of an idea, yet not the idea itself. Many photographers can independently take a photograph of the same subject, for example, a child at play, yet each has an original work, and none infringe upon the exclusive rights of the other. If ideas can only be expressed in certain limited ways, the idea and the expression have merged and neither the idea nor the expression will enjoy copyright protection. It is known as “the merger doctrine”. For example, a photographer who was known for photographing babies against a white background could not prevent other photographers from similarly creating photographs of babies against a white background. Many photographers can take photographs of waves crashing on a beach, or two business people shaking hands.

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In general, the more creative a photograph, the more protection it is given. The less choices a photographer makes, the less protection.

In *Kaplan vs. The Stock Market Photo Agency*, a New York Federal District Judge dismissed photographer's claim for copyright infringement. The complaint alleged that the Stock Market licensed an "imitation" photograph created by Bruno Benvenuto to Fox for advertising purposes. Both images depicted an exasperated businessman contemplating a leap from a tall building. The court found that the similarities between both images were non-copyrightable and that the situation could only be expressed in the same manner.

In *Aubard vs. Société de Diffusion Photo Presse International*, the Court of Appeal of Versailles dismissed photographer's copyright claim and found that are not considered works of the mind, "photographs taken by several photographers located on the same spot during a banal phase of a car race." The court further found that such photographs taken using the continuous shooting mode did not permit photographers "to express creativity and personal competency."

Both courts ruled in an identical manner: the similarities between the images were non-copyrightable as they failed the originality criteria and, in both instances, the situations could only be expressed in the same manner.

Photographers who reproduce preexisting works (copycat), i.e.; is by using an almost identical framing, staging of the subject matter, similar lighting and shading, etc. cannot claim copyright and can be sued for copyright infringement.

#### **4) AUTHORSHIP AND OWNERSHIP OF COPYRIGHT**

Copyright is completely separate from ownership of the physical creative work.

The French Intellectual Property Code provides under Article L111-1:

*"The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons.*

*The right shall include attributes of all intellectual and moral nature as well as attributes of an economic nature...*

*The existence or conclusion of a contract for hire or of a service by the author of a work of the mind shall in no way derogate from the enjoyment of the right afforded by the first paragraph above."*

Article L111-3 provides as follows:

*"The incorporeal right set out in Article L 111-1 shall be independent of any property right in the physical object..."*

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Common law copyright allows an author to transfer or sell his authorship rights to the benefit of an employer or a commissioning party through a written agreement called “Work-Made-For-Hire.” Thus, the author becomes the employer or the commissioning party as if they, in fact, created the work. If the photographer was to copy all or part of a work he created as work-made-for-hire, he would be infringing his own work. In the U.S. the work-made-for-hire agreement is defined by the 1976 Copyright Act – Section 101 – Title 17. A work-made-for-hire comes essentially into being two clauses: (i) an employee creating copyrightable work in the course of his employment; or (ii) certain specially commissioned or ordered work, if both parties sign a contract agreeing it is a work-made-for-hire.

The crucial point here is that the photographer must expressly agree in writing that the works he creates as part of his employment become the employer’s property or that commissioned work is a work-made-for-hire.

### **5) MORAL RIGHTS IN FRANCE**

Under French Intellectual Property Code the creation is considered as being the extension of its creator. This creation/creator relationship constitutes an inherent right.

The French Intellectual Property Code provides under Article L121-1:

*“The author shall enjoy the right to the respect of his name, of his status as author and of his work. [Right of attribution]*

*This right is attached to his person. [Inherent right]*

*It shall be perpetual, inalienable and imprescriptible. It is transmittable, in case of death, to the author’s heirs.*

*This right may be exercised by a third party in accordance with the will provisions.”*

Moral rights encompass right of paternity, right of divulgation, right to the respect of the work’s integrity and the right of reconsideration and withdrawal.

#### **A) Right of paternity:**

The author’s work must bear his name. In other words, the author must be credited for each of his creations/works.

Certain works are credited with DR (Reserved Rights). Only orphan works can bear such a credit line. An orphan work is a work that is still protected by copyright but whose author or rightholder is unknown or cannot be located.

On October 27, 2005, in a case involving a photograph depicting General de Gaulle taken by a photographer of France, i.e.; a soldier, the district court of Nanterre found that the claimant as *“the beneficiary of a public servant who created a photograph within his duties...”*

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*beneficiaries from the moral prerogatives attached to the person of the photographer. His [the beneficiary's] claim for moral rights infringement is therefore admissible."*

The court found that the reproduction on a **book cover** of the image showing General de Gaulle head-and-shoulder without crediting the photographer and "*bearing a fanciful copyright*" constituted an infringement of his right of attribution. The court further found that "*the cropping of this photograph withdrew all the original strength emanating from the way the soldier's solitude, determination and power were shot*" constituted an infringement upon the photographer's right to the respect of the work's integrity. Together, these infringements constituted an infringement of the photographer's moral rights.

### **B) Right of divulgation:**

Pursuant to article L121-2, paragraphs 1 and 3 of the Intellectual Property Code "*the author alone shall have the right to divulge his work... This right may be exercised even after expiry of the exclusive right of exploitation set out in Article L123-1.*" Thus, the photographer has the right whether or not to divulge his work to the public, i.e.; to a plurality of persons who are not connected by personal relationship. The photographer also determines how his work is divulged. As this right is imprescriptible, the cessionaries or beneficiaries of a deceased photographer can validly claim damages for infringement upon the photographer's right of divulgation in case his work is divulged once in the public domain.

Stock photo agencies must be extremely cautious when acquiring old photographic collections as they may contain materials that were not divulged to the public during the photographer's lifetime.

However, divulgation of orphan works is permitted under specific circumstances and as provided for by the Intellectual Property Code: A party can seek from the district court authorization to divulge orphan works after having conducted diligent searches to find the author or his cessionaries or beneficiaries and such searches produced no results.

### **C) Right to the Respect of the Work's Integrity:**

Pursuant to the provisions of Article L121-1 of the Intellectual Property Code, a user of a photograph must respect the work's integrity when reproducing it or representing it.

Mainly, the work cannot be cropped, modified, adapted or altered in any way or manner without photographer's prior approval.

Certain photographers, and Cartier-Bresson in particular, consider that minor retouching or correction of a photograph constitute a moral rights infringement.

This is what he thought of photography techniques: "*Constant new discoveries in chemistry and optics are widening considerably our field of action. It is up to us to apply them to our technique, to improve ourselves, but there is a whole group of fetishes which have developed on the subject of technique. Technique is important only insofar as you must master it in order to communicate what you see... The camera for us is a tool, not a pretty mechanical toy.*"

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*In the precise functioning of the mechanical object perhaps there is an unconscious compensation for the anxieties and uncertainties of daily endeavor. In any case, people think far too much about techniques and not enough about seeing."*

May also constitute moral rights infringements: low quality reproductions and colorizations.

### **D) Right of Reconsideration and Withdrawal:**

Article L121-4 of the Intellectual Property Code provides as follows:

*"Notwithstanding assignment of his work, the author shall enjoy a right to reconsider or of withdrawal even after publication of his work, with respect to the assignee. However, he may only exercise that right on the condition that he indemnifies the assignee for any prejudice the reconsideration or withdrawal may cause him."*

In other words if an author believes that his work reflects adversely to his person or his professional standing, he can withdraw it during his lifetime from the communication to the public. This right can only be exercised on the grounds of moral rights, i.e.; an author cannot withdraw his work for pecuniary purposes.

In addition, under the assumption that the author decides to resume the communication of his work to the public, he must first offer it to the former assignee under the same terms and conditions that were in effect during the previous communication.

Cessionaries or beneficiaries cannot exercise this right if the author did not, during his lifetime, reconsider or withdraw his work.

### **6) MORAL RIGHTS IN THE U.S.:**

In 1988, the United States became a signatory to the Berne Convention. Consequently, Congress had to enact a version of moral rights protection in order to comply with Berne standards. Thus, the Visual Arts Right Act of 1990 (VARA) was included in the U.S. copyright laws.

A "work of visual art" is defined under VARA as:

- (1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or in the case of a sculpture, in multiple cast, carved or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or*
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.*

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This narrow definition limits the effectiveness of VARA. Stock photographs, illustrations and work-for-hires are therefore excluded from the protection under VARA.

The type of protection offered by VARA is different from copyright protection. VARA makes author's rights inalienable (non-transferable) and confers upon them rights of attribution (or paternity) and integrity. VARA gives the author the right to claim authorship of his work, to prevent the use of his name on the works of others, and to prevent use of his name on mutilated or distorted versions of his own work, if the changes would be prejudicial to his honor or reputation. In addition, the author has the right to prevent the mutilation or distortion itself if it will damage the author's reputation.

The moral rights of the author cannot be transferred. However, VARA does allow the author to waive his rights in a written instrument signed by him. The written instrument of waiver must specifically identify the work and the uses to which the waiver applies. The waiver of moral rights does not transfer any ownership in the physical work or copies of that work.

VARA exempts from its coverage modifications made to work of visual art due to the passage of time, the inherent nature of the work's materials, conservation or public display. Such modifications are not considered to be a violation of moral rights.

The term of protection for works created after the effective date of VARA; i.e.; after June 1, 1991, is the artist's life. For works created before June 1, 1991, the author will have moral rights in works to which he holds title and such moral rights shall last as long as the copyright in the work.

To this day, the European Community has not succeeded in standardizing moral rights across its states and countries.

### INSERTION DE ORPHAN WORKS

#### **7) ECONOMIC RIGHTS**

##### **ALL RIGHTS MUST SPECIFICALLY BE GRANTED FOR USE OF AN IMAGE**

In 1991, in a case involving a photograph taken by Robert Doisneau of a group of people posed around a car painted by the famous painter Yves Corbassière. Corbassière authorized the use of the image at a specific exhibition only. The photograph was subsequently used in both a catalogue and in posters promoting the Doisneau exhibition, as well as in postcards and posters unrelated to the promotion. The court upheld the use of the photograph for promotional purposes because it furthered the cultural purpose of the exhibition. On the other hand, postcards and posters constituted an unauthorized commercial exploitation of the photograph and beyond the scope of Corbassière's consent.

Article L122-1 of the French Intellectual Property code provides rights under "Chapter II - Patrimonial Rights" as follows: "*Author's exploitation rights encompass public display and reproduction rights.*" Public display and reproductions rights constitute together patrimonial rights.

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The US Code, under title 17, section 106, provides the copyright holder with the exclusive control over the works. The rights applicable to visual arts include the following: exclusive reproduction... distribution and display rights.

Directive 2006/115/EC of the European Parliament and of Council of December 12, 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and Council Directive 93/83/EEC of September, 12, 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission shall apply to some extent under this chapter.

### **A) Reproduction rights are defined as follows:**

In France - Article L122-3: *“Reproduction shall consist in the physical representation of a work, by any process, enabling its communication to the public in an indirect way. It can be carried out, in particular, by printing; drawing; hand cutting; woodcutting; carving; engraving; copper plating; etching; photography; casting; moulding and by all processes of graphic and visual arts; mechanical, cinematographic and magnetic recordings.”* Under this provision, reproduction can be made by all processes. It can be made using the same means as the original: the most frequent case is the reproduction of a photograph by another photographic medium. Reproduction can also be achieved by other processes. For example, a photograph can be reproduced by using drawing or painting techniques. In such a case, the painter must obtain permission from the photographer for the execution of a painting depicting the photograph. The same example in the U.S. would be qualified as a derivative work and would also require the author's approval (unless fair use applies).

In the US, the reproduction right is perhaps the most important right granted by the Copyright Act. Under this right, no one other than the copyright owner may make any reproductions or copies of the work, in whole or in part. Title 17, section 106 (1) reads as follows: *“[the right] to reproduce the copyrighted work in copies or phonorecords.”*

### **B) Public Display:**

Article L122-2 of the French Intellectual Property Code provides as follows:

*“Public display shall mean the communication of the work to the public by any process whatsoever, mainly:*

*(1) public reciting, lyrical performance, dramatic representation, public presentation, public projection and transmission in a public place of the broadcasted work; (2) broadcasting.*

*Broadcasting shall mean the distribution of sounds, images, documents, data and messages of any kind.*

*Shall also mean public display the transmission of a work via satellite.”*

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Pursuant to this article, a photo exhibit shall necessarily be approved by the photographer as he must grant the right to publicly display his work. It is to be noted that in case of an exhibit, the photographer must also grant reproduction rights as duplicates must be made of the originals.

The right of public display will also be exercised by the author when his photographic works are broadcasted via internet or through a TV channel or when projected on a wall.

In the US, under the public display right, a copyright holder is allowed to control when the work is displayed "publicly." A display is considered "public" when the work is displayed in a "place open to the public or at a place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered." A display is also considered to be public if it is transmitted to multiple locations, such as through television and radio. This right is limited to literary works, musical works, dramatic works, choreographic works, pantomimes, pictorial works, graphical works, sculptural works and stills (individual images) from motion pictures and other audio visual works.

Directive 93/83/EEC – Satellite and Cable Directive  
Chapter II – Broadcasting of Programs – Article 2, reads as follows:

*“Broadcasting right Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works”*

### **C) Distribution and rental rights:**

In France, distribution and rental rights are implicit under the previously mentioned articles L122-2 and L122.3. The rental aspect is further addressed under Article L122-7 along with the pecuniary aspect: *“...The right of public display and the right of reproduction may be transferred, for or without payment. Transfer of the right of public display shall not imply transfer of the right of reproduction. Transfer of the right of reproduction shall not imply transfer of the right of public display. Where a contract contains the complete transfer of either of the rights referred to in this Article, its effect shall be limited to the exploitation modes specified in the contract.”*

It is worth noting that in France, the provisions of the Intellectual Property Code constitute strict enforceable laws. Both Code and jurisprudence aim at protecting authors, deemed as weak party, against third parties who commercialize author's works in France or against third parties who make the author's works available on the French territory.

Any author, regardless of his nationality can enforce his rights under French law from the moment his works are accessible to the French public or when he is in a contractual relationship with a French company.

Under title 17, section 106 (3) of the US Code defines both rights as: *“[the right] to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”*

Directive 2006/115/EC – Rental and Lending Right Directive, reads as follows:



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## Chapter I – Rental and Lending Right

### Article 2 – Definitions

- (a) *“rental” means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage;*
- (b) *“lending” means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public;*

### Article 3. - Right holders and subject matter of rental and lending right

- 1. *“The exclusive right to authorize or prohibit rental and lending shall belong to the following:*
  - (a) *the author in respect of the original and copies of his work...”*

### Article 9 – Distribution right

- 1. *Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter “the distribution right”:*
  - (a) *for performers, in respect of fixations of their performances*

## **8) FAIR USE**

Since January 1, 2009, fair use, under Article L122-5-e) of the French Intellectual Property permits the reproduction and public display of excerpts of copyrighted material without the author’s approval to essentially promote teaching, scholarship, and research, to the exclusion of musical scores, digitized works of publishers and educational works. Author does not get compensation for such uses.

Fair use, under Section 107 of the Copyright Act, permits the use of copyrighted material without authorization to promote criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research. This list is just an example and the doctrine is very flexible without hard and fast rules.

## **9) LICENSING**

Copyright is separate and distinct from the object itself. A person can buy a photographic print, but will not own any of the exclusive rights under copyright unless those rights are acquired specifically.

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Generally speaking, any license must specify the rights granted by the copyright holder:

- 1) reproduction rights; and
- 2) public display or how the work will be communicated to the public; and
- 3) distribution and rental rights; and
- 4) term (duration); and
- 5) territory; and
- 6) fees due to photographer based on the license scope.

Directive 2006/115/EC – Rental and Lending Right Directive, reads as follows:

- (12) *It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them.*
- (14) *It is also necessary to protect the rights at least of authors as regards public lending by providing for specific arrangements...*

Under French laws and the European Directive, fees due to the copyright holder must be fair and adequate.

### **10) COPYRIGHT INFRINGEMENTS AND INTERNET**

Any use out of the license scope constitutes infringement(s) of the copyright holder.

As mentioned earlier, copyright owners generally have the right to authorize or prohibit any of the following actions in relation to their works: copying the work in any way, issuing copies of the work to the public, renting or lending copies of the work to the public, public display, broadcasting the work or other communication to the public by electronic transmission, making an adaptation of the work.

Copyright is infringed when any of the above acts are done without permission including any use out of the license scope, whether directly or indirectly and whether the whole or a substantial part of a work is used, unless what is done falls within the scope of exceptions to copyright permitting certain minor uses.

Regarding Internet copyright infringements, it is worth noting a French particularity.

In order to demonstrate an internet copyright infringement in France, while in most countries if not all a simple screen shot is sufficient, one must hire a “Huissier de Justice” (usher or bailiff) as he is the only professional qualified to collect, in the form of a report called the "record of findings" or "report of findings", all the evidence of the infringement according to the methods of constituting evidence defined by French jurisprudence.

This findings report has the status of an **irrefutable and indisputable certified document** that is acknowledged as the only element of proof before Courts and Tribunals.

# **PHOTOGRAPHER'S AND IMAGE // PRIVACY / PUBLICITY RIGHTS**

In writing the report, he describes the environment of what he has found on a website, certifies the security elements attached to his mission, establishes the indisputable nature of the infringement and, using tools that are validated before the courts, establishes the identity of the perpetrator of the infringement, its extent and its permanence over time. Such report enables a precise calculation of the actual fees/penalties the infringed party is entitled to recover.

## **II) IMAGE // PRIVACY / PUBLICITY RIGHTS**

### **A) IMAGE RIGHTS**

#### **1) UNDERSTANDING IMAGE RIGHTS AND THEIR SCOPE**

Privacy / publicity rights limit photographer's exclusive rights.

In France, privacy and publicity rights are referred to as "image rights".

The right of image is the right of an individual to control the use of one's image or personal property.

Before using an image, it is important to examine the subject of the image as an image may have multiple beneficiaries. So, the chain of contracts becomes quite complex as it entails:

- Third parties copyright or trademark in and to the depicted work or object ("underlying works");
- Rights of the owner of the work of the mind;
- Rights of the depicted person;
- Rights of the depicted property (movable or immovable things);
- Photographer's copyright;
- Licensing rights of the photo agency.

It is to be noted that fireworks, sounds (voices included) and lights are also protected by image rights.

The reproduction of a photograph depicting a house designed by Le Corbusier requires obtaining permission from (i) the house owner, especially if such house is surrounded by trees and invisible to the public eye and (ii) also requires clearing rights with Le Corbusier Estate and /or ADAGP, the French visual arts rights management society, and paying royalties.

In the case SA La Rochere vs. Di Nisi, the Court of Appeal of Besançon found that the publication of a photograph depicting a building made of glass bricks infringed upon several of the architect's rights:

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*“From the moment of its creation, an architectural work invests its author with moral rights and is therefore entitled to the right to the name, respect of the work’s integrity and right of divulgation. These attributes are perpetual and inalienable. As a result, constitutes an infringement of an architect’s moral rights the publication of a brochure with a photograph depicting the glass bricks building he designed without crediting his name. Constitutes an infringement of the reproduction rights an unauthorized reproduction in brochures and advertising displays of the glass bricks building he designed.”*

Any use of images depicting the Arch of Defense or the Louvre Pyramid will require the authors’ or their beneficiaries’ permission.

It is to be noted that exploiting a picture of the Louvre, showing the Pyramid will not require the architect’s approval as the Louvre is in the public domain. But if the picture essentially shows the pyramid then the photographer’s pre-approval is required.

Similarly, images depicting the Eiffel Tower by night cannot be exploited without the pre-approval of the lights creators.

There are additional legal exceptions to the exclusive rights of the author. Article L122-5 of the Intellectual Property Code reads as follows:

*“Once a work has been divulged, the author may not prohibit:*

...

*9°. the reproduction or public display, in full or in part, of a graphic, visual or architectural work, via press either written, audiovisual or online, for the sole purpose of immediate information and in direct relation with the latter, provided the author’s name is clearly indicated.”*

These exceptions do not apply to photojournalists and news illustrators. They only apply if they do not *“conflict with the normal commercial exploitation of the work”* and *“do not cause an unjustified damage to the legitimate interests of the author.”*

The law of July 17, 1970, introduced Article 9 into the French Civil Code which provides that *“Everyone has the right to respect for his private life.”*

There is extensive case law relating to the protection of image rights and affirming that everyone has an exclusive right to his image and may in his sole discretion prohibit any unauthorized use or dissemination. This exclusive right constitutes an aspect of the personality right and aims at protecting each individual from violating one’s physical, intellectual or moral integrity.

The medium used for reproduction and/or dissemination of a person’ image is irrelevant. It may include photographs, sketches, paintings or figurines.

Article 226 of the French Criminal Code prohibits *“fixing, recording or transmitting, through any device, the image of a person in a private place, without his consent.”* Under this article, violation of a person’s image rights may result in a penalty of one year imprisonment and a fine of €45,000.

# PHOTOGRAPHER'S AND IMAGE // PRIVACY / PUBLICITY RIGHTS

As a general rule, both the reproduction and the use of a person's image require **prior, express, and specific consent**.

These personal and extra-patrimonial rights extinguish upon death unless the image gravely infringes upon the private life of the deceased or his descendants. For example a person killed during an attack.

## 2) LIMITATIONS

Use of a person's image does not require prior, express, and specific consent when the photograph was taken: in a public place; the person is not the subject matter of the photograph and there is no violation of privacy.

Court of Cassation defined a public place as "a place which anybody can have access to without special authorization, regardless of whether access is subject to some specific conditions, timetables or reasons."

Public roads and streets are naturally public places but it was held that:

- A private beach even when accessible for a fee can be considered as a public place (the entrance fee constitutes only a condition for access which is granted to all);
- Place of worship are public places;
- But jails, strip search rooms in a police station, a sick bay in a department store are private places.

Whether a place is private or public remains quite ambiguous and is still debated in courts. Case law has yet to establish clear guidelines.

Courts have held that consent is required if a person is photographed in a public place and when singled out or easily identifiable unless the photograph was taken at a newsworthy event.

A person photographed at his workplace - which is considered as private place - must give consent to the use of his image. It should be noted that this consent is not required when the use of the image is required for internal identification purposes or for display purposes on the company's intranet.

Respect for privacy is guaranteed by the general tort liability principles found in article 1382 of the French Civil Code.

As mentioned earlier, Article 9 of the Civil Code provides that "*everyone has the right to respect for his private life.*" Protection for "*the intimacy of private life*" is strengthened by the article's second paragraph which provides in addition that a court can issue an interlocutory order to prevent or to end the violation of such right.

## **PHOTOGRAPHER'S AND IMAGE // PRIVACY / PUBLICITY RIGHTS**

In a case involving the unauthorized publication of a photograph showing a person participating at a gay demonstration, the Court held that the publication of the photograph did constitute an infringement of privacy as it revealed the person's homosexuality which he kept secret from his family and co-workers.

In the Perrot vs. Filipacchi Editions case, a photograph was taken following an attack. on the output of the infirmary Galeries Lafayette. The person was leaving the sick bay of Galeries Lafayette and was recognizable.

On the basis of Article 9 of the Civil Code, the Court held:

*“A person injured in an attack has the right to object or to refuse consent to the reproduction of the identifiable body features.”*

### **3) EDITORIAL USES**

Certain photographs taken during a newsworthy or public event may be published without pre-approval of the person photographed.

Though this rule is not without exceptions:

(A) The photograph must illustrate immediate news;

(B) And it must not violate the intimacy of private life.

It is to be noted that in case of immediate newsworthy events, the portrayed person can be the subject matter of the photograph.

#### **(A) Immediate News:**

The photograph must be taken in circumstances directly linked to the events and published shortly thereafter.

Two court rulings are perfectly illustrate this concept as they relate to the same person and were rendered by the same judges.

The person disputing the publications of images portraying her was the teacher who was held hostage with her class of 20 children by a man who called himself the Human Bomb.

In the first case, Moulard Dreyfus vs. VSD (District Court of Paris, November 17, 1993, 1<sup>st</sup> Chamber, 1<sup>st</sup> Section): The court found that the published image by VSD portraying her within the framework of her professional activity did not violate her intimacy of private life because she was shown while working at a school party and because this photograph illustrated an immediate newsworthy event.

In the second case, Moulard Dreyfus vs. Publiprint France Soir (District Court of Paris, January 5, 1994, 1<sup>st</sup> Chamber, 1<sup>st</sup> Section): The court found that because the photographs

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were not taken in circumstances directly linked to any event at stake or their factual consequences, their publication - without the teacher's consent - of images portraying her in front of another school, constituted a violation of image rights.

### **(B) Absence of violation of the intimacy of private life:**

The right of information may be undermined by the right to human dignity.

In a judgment of September 18, 2000 the Court of Cassation ruled that the photograph of the murdered prefect Erignac is "*detrimental to human dignity*".

The right of dignity also arose in a case involving a controversial advertising campaign run by the clothing company Benetton. The campaign consisted of three advertising posters reproduced in the media, each showing a naked torso, buttock, and groin area tattooed with the words "HIV-positive." The court condemned Benetton on the ground that it violated the dignity rights of AIDS patients. The court found that the advertising posters, without captions providing an explanation of the message or the nature of the purported debate, degraded the dignity of AIDS patients and would likely spur detrimental social rejection of these individuals. (Court of Appeal of Paris, 1<sup>st</sup> Chamber A, May 28, 1996, Sté Benetton Group SA et autres vs. Association Aides Fédération Nationale).

### **4) PUBLIC FIGURE PORTRAYED WITHIN THE FRAMEWORK OF HIS ACTIVITY**

A public figure has a right to respect for his private life. Thus the same rules apply to public figures who, like any ordinary person, have a right to the protection of their privacy and image. As a result, prior consent of a public figure is also required whenever enforcement of their personality rights rises above the public's right of information about this person due to his public status.

In 1996, the Supreme Court of Nanterre prohibited Prisma Press from publishing photographs of Daniel Ducruet, husband of the Princess Stéphanie de Monaco, with his mistress in a swimming pool.

The Court of Cassation, 1<sup>st</sup> civil, April 13, 1998, in the case of Sté Presse "Jours de France" vs. the empress Farah Diba: This case involved the publication in the press of photographs of the former empress of Iran in her bathing suit on the beach and in a garden, the Court of Cassation clearly set the principle that "a monarch like any layperson, is entitled to respect of his private life and to oppose any circulation of his image where he is not depicted in the exercise of a public activity." The court upheld that the photographs portrayed moments of private life.

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### **5) THE RIGHT TO OBLIVION OR TO BE FORGOTTEN**

The right to oblivion or to be forgotten is the right of a convicted criminal who has served time and been rehabilitated to object to the publication of his image or the right of celebrities who have posed for photographs at a young age but who do not wish to have these photographs reproduced after becoming famous or the right of parents who do not wish to be reminded of their child's murder.

### **6) HISTORICAL EVENTS**

Certain newsworthy events images may become some years later historical images.

Photo reporter, Jean-Pierre Rey took a picture of a young woman perched on a friend's shoulders and carrying a Vietnamese flag. The image was published worldwide and became emblematic of the events of May 1968. Thirty years later the woman sued the photo stock agency Gamma for on the grounds that the image showed her as a revolutionary which she is not and thus caused her grave prejudice.

The Court of Appeal of Versailles found that *“the exclusive and absolute image rights of a person are limited when images are taken during newsworthy or public events... The woman of 28 years old at the time could not ignore the impact of the demonstration and the consequences resulting from her participation... The image shows her brandishing a Vietnamese flag, highly symbolic gesture... The repeated divulgation is lawful and does not require her consent since reproduction always occurs in the context of May 1968 events... for the sole purpose of illustrating events belonging to history...”*

### **7) COMMERCIAL USES**

The right to privacy enables everyone, regardless of reputation and profession, to commercialize his image.

Commercial use of a person's image requires a prior, express, and specific consent, in other words a model release.

Image rights encompass moral and patrimonial values: the patrimonial right which allows charging fees for the commercial exploitation of the image is not purely personal and is transmittable to heirs.

In 1980, the Court of Cassation found that *“the photographs of a deceased person could not be used without the pre-approval of the beneficiaries of such right.”*

In 1996, the Court of Appeal of Paris confirmed the descendibility of the right of image in a case involving the widow of the famous French comedian and actor “Coluche,” and the publisher of a book discussing his life. The book contained several photographs of the deceased actor that were previously published, including some taken in a private context. The Court of Appeal upheld the lower judgment and found that the publication of the book



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unlawfully invaded his privacy and prejudiced the image of the widow and children as well as the image of the deceased actor. Concerning the right of image, the Court held that *“the right of image is a personal right which entitles anyone to oppose the dissemination and use of his without prior consent .... The violation of this right may cause to its holder moral prejudice and, as the case may be, patrimonial prejudice whenever the holder conferred a commercial value due to his activities or notoriety.”* The court further found that *“heirs may seek relief for the moral prejudice caused by such violation only if the selection and display of the images is likely to alter the perception that the public may have of the deceased artist; however they are entitled to full compensation for the patrimonial prejudice stemming from said violation.”*

On May 7, 1980, in a case involving large advertising posters showing soccer team players playing soccer, the District Court of Paris held that *“when photographed in a public place within the framework of their activities, football players which are public figures cannot oppose to the use of their images for newsworthy purposes. Nonetheless, they keep the right to commercialize their images and authorize uses for commercial purposes.”*

French judges have given specific protection to the name and/or image of personalities where certain commercial uses aimed at profiting from the reputation of the public figure in order to promote non related activities.

In a case involving the commercial use of a basket-ball player on an advertising billboard for a company selling cameras, the district court of Lyon held that such use *“...is an infringement of his patrimonial rights in and to his image.”*

It is to be noted that the same rules apply to non-public figure. Defense based on the fact that the photograph of a singled out person taken in a public place will be unsuccessful in case of commercial use.

Infringement of patrimonial rights entitles the photographed person to compensation if his image or features are reproduced for commercial purposes – without his prior, express, and specific consent approval.

The Belgian and Dutch laws have hallowed image rights of individuals. The Italian Civil Code expressly recognizes them. Image rights protection, in particular with respect to personalities, does have a quite strong tradition in Germany. Finally, this right is of constitutional value in Spain, Brazil and Peru.

### **8) PRIVATE PROPERTY**

Consent given by an owner to photograph his property does not entail consent to reproduction and dissemination of the photographed property.

Commercial use of a person's property image requires a prior, express, and specific consent, in other words a property release.

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Article L544 of the French Civil Code reads as follows:

*“Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.”*

But on May 7, 2004, the Court of Cassation limited the application of article L544 of the Civil Code by ruling that *“the owner of a thing does not have the exclusive right on its image”* and *“that he may oppose to the use of this image when it causes an abnormal trouble.”* (Decision n° 516)

Two main criteria for “abnormal trouble” have been withheld by the courts:

- The effects of the commercial use;
- Whether or not the photographed property is the subject matter of the image.

The owner can enforce his property rights if he can demonstrate that the use of the photographed property causes him an abnormal trouble. This right cannot be enforced if the use is a newsworthy or cultural event.

### **B) PRIVACY / PUBLICITY RIGHTS**

#### **1) THE LAW OF PRIVACY AND PUBLICITY FOR PHOTOGRAPHERS**

There is no federal statute in the United States concerning rights of privacy or rights of publicity. The laws vary from state to state, with some states having express statutes, other states relying on common-law (cases) and some both. The terms rights of privacy and right of publicity tend to be confused, as the right of publicity arises out of a right of privacy. The right of privacy developed through legislation and court interpretation into four areas: intrusion, disclosure, false light and appropriation. The violation of right of privacy by appropriation is the area of most vulnerability to photographers and involves the unauthorized use of a person's photograph, name, likeness or voice for commercial purposes. This right of publicity applies to individuals, whether they are celebrities or not. In some states (such as New York) the right expires upon death of a person and in others (such as California), the right can be transferred to heirs upon death and last for a period of years, which is not uniform state to state. Typically the law of the domicile of the person that is the subject of the commercial use applies but some states attempt to apply their law if the injury occurs in their state. Even though the laws vary from state to state, all privacy law must permit uses that are protected by the First Amendment of the U.S. Constitution—freedom of press and freedom of expression. These rights outweigh an individual right of privacy. Consequently, even if a photograph is licensed or sold for a fee, it will not be “commercial use” under privacy law if the end use is an editorial (newsworthy) or expressive use (such as a photograph displayed as a work of art).

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## **2) EDITORIAL USES**

Images intended for editorial uses do not require releases. Editorial use of an image is the use of an image to illustrate something that is newsworthy, cultural or of public interest. Courts in the U.S. do not question whether the public should be interested in the subject, just that there is interest. This includes news, entertainment, sports, music and other events. The First Amendment permits the recording of public events without consent from the subject. What is public is quite broad. If a celebrity is in a public space, even grocery shopping or in a park with a child, a photographer can take a photograph and license it to the media. Some states try to restrict the conduct of the paparazzi if it endangers the safety of others, but any laws must be very narrowly crafted to avoid violating the First Amendment.

Generally, if there is some relationship between a newsworthy article and the photograph, the use of the photograph will be considered editorial, even if the article is not directly about the subject of the photograph. If the use is editorial, incidental advertising or use of the product containing the editorial image is not considered infringing, such as the sale of a magazine or newspaper with a news image on the cover.

## **3) COMMERCIAL USES**

To make images available for commercial licensing in the U.S. including all forms of stock licensing, it is necessary to obtain releases authorizing broad commercial use from living people and authorizations from estates for deceased as most companies engaged in on-line stock or microstock licensing require broad release to accompany accepted images. Photographs, even taken of family and friends, cannot be used for commercial purposes without proper release. Sample release are available through trade associations, stock libraries and there are now electronic release forms for i-phone and smart phone applications ready to sign by the model. The electronic releases currently accepted by Getty Images are identified at [http://contributors.gettyimages.com/article\\_public.aspx?article\\_id=1834#13](http://contributors.gettyimages.com/article_public.aspx?article_id=1834#13). Getty Images also provides releases for models and property in multiple languages at [https://contribute.gettyimages.com/producer/documents/Model\\_Release\\_English\\_Dec\\_2008.pdf](https://contribute.gettyimages.com/producer/documents/Model_Release_English_Dec_2008.pdf). Corbis also provides releases in multiple languages at its resource page. <http://contributor.corbis.com/knowledgebase#Resources>. Most photo libraries will accept images from photographers that have used these forms of release.

## **4) PROPERTY RELEASES / RELEASES FOR ANIMALS**

Many photographers ask if a model release is legally required for photographs of buildings and animals. The answer is almost never. Model releases are required if using a photograph of a recognizable person's likeness for commercial purposes, such as advertising or trade. While the laws vary from state to state, the common element is that privacy and publicity law applies to a person, not any inanimate object, such as a building, corporation, bird, reptile or animal (no matter how cute). The exception would be if the animal (dog or race horse, etc.) was a recognized character, such as a movie or TV character or the building represented the company's trademark. Then there might be a trademark claim, based on the argument that the

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commercial use by an unlicensed entity might cause confusion as to sponsorship or interfere with an already licensed user. A person's common pet would not be a trademark. Some photographers will obtain property release regardless, as advertising agencies and others are comfortable if images have releases and may not realize that there is no legal basis to require one. It simply avoids receiving a letter from someone who thinks that you are exploiting a photograph depicting their home or dog.

### **5) DESIGN, TRADEMARK AND SIMILAR RIGHTS**

One of the purposes of photography is to depict ordinary objects and people at work and play engaging in typical activities involving people using products of others. Occasionally a manufacturer will object to the use of a photograph for stock purposes of an object it manufactures asserting violations of "trademark," "trade dress infringement" or vague reference to "intellectual property rights." In most cases, the use of a photograph of an object will not violate any state or federal law if the product is part of the "image story" and not a pure "product shot" without any other elements. Some stock agencies and trade associations contain lists of those entities that allege trademarks in objects, buildings and other products, merely to avoid customer aggregation. An item being on the list does not necessarily mean that the trademark rights are valid.

A photographic depiction of an object rarely infringes a trademark associated with the object, even if the design is registered. Trademarks are difficult to discuss with black and white rules as the nature of a trademark is not in the protection of the design or the art, but in the use of the object as the identifier of the source of goods. Even if goods depicted in a photograph are recognized by the manufacturer, recognition alone is not sufficient for trademark violation. The use of the photograph has to be in a way that causes confusion as to the source of the goods, or implies endorsement or association. Consequently, a stock photograph as it is displayed online among many thousands of images can never violate a trademark. It is only if a client uses the photograph in a trademark manner that the use of the photograph could potentially give rise to a trademark claim. Most end-user licenses restrict the use of an image as a trademark.

Trademark law encompasses both state and federal laws involving trademark registration, protection for unregistered marks under the federal Lanham Act, state and federal unfair competition claims and an anti-dilution trademark laws. In sum, it is difficult to summarize trademark law other than to identify and define the basic issues.

A trademark is defined as a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others. A service mark is the same as a trademark, except that it identifies and distinguishes the source of a service rather than a product. Trademarks deal with a mark, not the design of an object. For example, the SWOOSH design on a Nike baseball cap is the trademark, while the baseball cap is just the good. The SWOOSH mark indicates that the cap is licensed by Nike and is subject to Nike's manufacturing standards.

The very nature of a photograph, as a depiction of an object or activity, rather than as a design to indicate a source of goods tends to negate trademark use. It is a misuse of terms and a

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misunderstanding of trademark law for an owner of a mark to recognize its product as part of the composition of the photograph and assert a trademark violation.

Because it is impossible to anticipate the intended use of stock photographs for commercial use, logos and other unique features or buttons on an object should be removed from the photographs. In addition, with readily identifiable manufactured objects such as electronics, the photographs should not be shot head on but on an angle. This will avoid a claim where an actual competitor of the object depicted uses the photograph.

### **6) TRADE DRESS**

Trade dress originally referred to the packaging of a product but the definition of trade dress has expanded over the years to encompass the shape and design of a product itself. Like trademark law, the product design must be used to denote the source of the goods. If a product feature is decorative and aesthetic with no source identifying role, it cannot be given exclusive rights under trade dress. Like a trademark, it is a symbol or device that carries a meaning. Trade dress can be registered as a mark or protected as unregistered trade dress under the federal Lanham Act. Examples of registered trade dress that function as a trade mark is the red LEVI tab affixed to the vertical seam of the back pocket of jeans, the shape of LIFESAVERS candy and its hole, and the three stripes on ADIDAS athletic shoes, the FERRARI DAYTONA SPYDER classic sports car, Black & Decker Snake Light flashlight, and the Rubik's cube puzzle.

For a product design to be granted protection as unregistered trade dress, the design must be "distinctive." The cases describe distinctiveness is either "inherently distinctive" where the mark is so arbitrary, fanciful or suggestive that it considered distinctive (in trademark law, Camel cigarettes are considered a distinctive mark because there is no natural association between a camel and a cigarette).

Marks that are not inherently distinctive can acquire distinctiveness if they obtain "secondary meaning," another term of art used in trademark law. Simply put, secondary meaning is where, in the mind of the consumer, the primary significance of the mark is to identify the source of the product rather than the product itself.

Mere association with a particular product is not enough to acquire secondary meaning. Customers must care that a product comes from a particular company. Just recognizing the product and knowing who manufactured it is not sufficient to acquire secondary meaning and trade dress protection.

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