

The protection of the image of a building under French law: where judges create law

Sabine Lipovetsky and Emmanuèle de Dampierre*

This topic may surprise many law practitioners working in common law countries, where taking and publishing pictures of property that is visible from the public domain is not subject to any specific rules. The protection of the image of property granted by French law therefore appears to be something specifically French.

What is even more surprising is that the scope of such protection has been widened by case law despite France's civil law tradition. The role of a French judge is traditionally confined to the interpretation of law as outlined in the codes.¹ However, Article 4 of the French Civil Code reads that

a judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice.

The general rules on copyright and property law being insufficient to balance the rights of architects, property owners, photographers, and publishers against other rights, Article 4 justifies the judicial creation of specific rules on the protection of a property's image.

The legislature had the opportunity to rule on this issue in 2003.² The bill was never passed, thus leaving the unsettled issue of the scope of protection of the image of property in the judges' hands. Not only did the creative role played by the courts not seem to bother the law-makers, but even the legal doctrine did not criticize such extension of protection. Comments mostly focused on the content of the rules created by case law and on the practical impact of the various positions held by the courts in the past two decades.

As mentioned, judges have to balance diverging interests. First, a building may be protected by copyright, which is held by the architect who designs the building, by the artist who adds new elements to it, or by their assignees as far as patrimonial rights are concerned. Provided that the building qualifies as a work of art and therefore benefits from copyright protection,

The authors

- Sabine Lipovetsky is an Avocat and Partner at Kahn & Associés in Paris. Sabine is also a Lecturer in Law at Paris X, Nanterre University (France). Emmanuèle de Dampierre is also an Avocat and Associate at Kahn & Associés in Paris.

This article

- This article highlights a specifically French aspect of law, namely rights in the image of property, offering an overview of the French law relating to the image of a building, in particular where it benefits from copyright protection and is accessible from the public domain.
- Judges must balance the interests and rights of architects/artists and building owners and use two bodies of law: IP for architects who design an original building and for artists who add new original features to a pre-existing building, and property law for owners. Anyone may reproduce the image of a building, eg via a photograph or a video, subject to three conditions. First, where the building is a work of art, such reproduction is subject to the architect/artist's consent—or that of the holder of the patrimonial rights, who may be the building owner. Secondly, the use of the image must not infringe the architect/artist's moral rights. Finally, irrespective of whether the building is a work of art or not, the use must not cause an abnormal disturbance to the building owner's property rights.
- Judges have created rights to the benefit of property owners that do not exist in the French Civil Code, interestingly enough in a civil law country. However, traditional legal grounds such as civil liability and privacy rights may be more useful to property owners.

* Email: slipovetsky@kahnlaw.com and ededampierre@kahnlaw.com. The authors would like to thank Hélène Carrier for her kind assistance.

¹ By Art 12(1) of the French Code of Civil Procedure, 'the judge settles the dispute in accordance with the rules of law applicable thereto.' Art 5

of the Civil Code adds: 'judges are forbidden to decide cases submitted to them by way of general and regulatory provisions'.

² A bill 'aiming at providing a legal framework to image rights and at reconciling them with freedom of expression' was submitted to the Assemblée Nationale on 16 July 2003 (AN no 1029).

judges must reconcile the interests of architects and artists with those of third parties who reproduce the image of a building—and who may also benefit from copyright protection on such reproduction, or those of a building owner who undertakes to bring changes to a building.

Then, irrespective of whether the building is a work of art, judges have to balance the interests of the property owner against those of a third party who reproduces the image of the building on photographs, videos, drawings, etc. Regarding this issue, judges have been the most creative, using property law to extend the scope of protection of the image of a building to the benefit of its owner, although they later tempered the extensive rights that they had granted.

Today, anyone may reproduce the image of a building, for instance via a photograph or a video, under three conditions. First, where the building is a work of art, such reproduction must be subject to the consent of the architect/artist—or that of the holder of the patrimonial rights, who may be the building owner. Secondly, the use of the image must not infringe the architect/artist's moral rights. Finally, irrespective of whether the building is a work of art, the use must not cause an abnormal disturbance to the building owner's property rights.

The image of a building subject to IP rights

IP rules are involved where a building is a work of art, which implies that the building bears some originality. If an architect or an artist is entitled to copyright protection, he will have rights on the building and its image, which include both patrimonial rights and moral rights. These issues are discussed below.

Original buildings may be protected by copyright

Under French law, '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'.³ Architectural works are further listed as works of the mind.⁴ However, not all architectural works can benefit from *droits d'auteur* (copyright protection). Although the sole criterion for copyright protection that is set out by law is the embodiment of the work in a tangible form,⁵ meaning that a mere idea does not give entitlement to copyright protection, case law also requires that the work of the mind be original in character.⁶ Judges have inferred this second criterion from Article L 112-4 of the French Intellectual Property Code: 'the title of a work of the mind shall be protected in the same way as the work itself where it is original in character'. This therefore extends the originality requirement from the title of a work of the mind to the work of the mind itself.

Originality is the 'cornerstone' of copyright law,⁷ such that architects may benefit from copyright protection where their work has some truly original features and, traditionally, originality is defined as the 'imprint of the author's personality'.⁸ With regard to buildings, there is no such imprint of the author's personality where the architect brings no 'original contribution' to a lodge which is of 'banal conception and did not bear the mark of a creative effort and aesthetic research'.⁹ In contrast, a building bears the imprint of the architect's personality where it has an 'appearance of its own, bearing the mark of his personality, and resulting from a personal effort of creation and aesthetic research, leaving considerable room for the arbitrary'.¹⁰ It is irrelevant that some elements taken separately are commonplace, as long as the building taken as a whole reveals an 'obvious aesthetical pursuit'.¹¹ It is also irrelevant whether the architect followed the building owner's instructions¹² or whether he was inspired by pre-existing buildings so as to be representative of a regional style.¹³ For example, a castle's gardens were considered by judges as 'an original creation, although created in compliance with the contract, that is to say with the respect and faithfulness that were required by historical constraints of styles' as they were nevertheless 'undoubtedly expressing the author's personality'.¹⁴

³ Art L 111-1(1) of the French Intellectual Property Code (IPC).

⁴ By Art L 112-2, 7° of the IPC: 'the following, in particular, shall be considered works of the mind within the meaning of this Code:...'.⁷ Works of drawing, painting, architecture, sculpture, engraving and lithography.

⁵ Cf the expression 'by the mere fact of its creation' set out in Art L 111-1(1) of the IPC.

⁶ Cass ass plén, 7 March 1986, *Babolat v Pachot*, No 83-10.477; more recently, Cass soc, 31 March 2009, No 07-45.680.

⁷ A Lucas and P Siringelli, 'L'originalité en droit d'auteur', JCP G 1993, I 3681, no 1.

⁸ Paris, 4^e ch, 20 November 1996; more recently, Cass crim, 4 November 2008, No 08-81.955.

⁹ Civ 1^{ère}, 5 July 2006, No 05-12.193.

¹⁰ Colmar, 1^e ch A, 18 January 2011, No 07/00727.

¹¹ Colmar, 1^e ch A, 18 January 2011, No 07/00727.

¹² Civ 1^{ère}, 18 October 1972, No 71-13.291.

¹³ Versailles, 12^e Ch, 15 February 2011.

¹⁴ Paris, 4^e ch A, 11 February 2004, No 2002/10230.

These rulings show that the key to originality is the architect's aesthetic choices. The difficulty here is that buildings must often meet functional and/or technical requirements. Only a building that is purely functional should not benefit from copyright protection. A building is purely functional, ie lacks originality, where the architect's work was entirely motivated by technical requirements leaving no room for creativity, that is, where the 'choice made by [the architect] was the only possible choice'.¹⁵ This means that there is originality where the architect had a choice between several alternatives, that is, where the shape of the building was not essential to meet technical requirements. For instance, La Géode is not

a purely functional monument devoid of any artistic character, as the choice of its spherical shape and the use on its entire surface of a material acting like a mirror respond only to a concern for aesthetic bearing the imprint of the personality of its author, and add a large degree of originality to "La Géode" which allows it to distinguish itself from any other monument.¹⁶

Meeting technical requirements is not incompatible with making specific aesthetical choices, as the technical and aesthetical elements are merged into a building that should be apprehended in its entirety in order to evaluate its originality.¹⁷ Judges find originality where there is 'a strong architectural image' or 'an original whole bearing the imprint of the [architect]'s personality'.¹⁸ This originality requirement applies even where the architect does not create the building 'from scratch'.

Courts have considered that 'restoration is by its very essence exclusive of any notion of original creation ... as its purpose is to restore the original work to its former condition or its original state, to bring back to life the work of art as it was originally, such that it should not benefit, in the absence of the imprint of the personality of its author, from [copyright protection].'¹⁹ There is originality only where the restoration of a building reflects the architect's 'specific aesthetic choice'.²⁰

Architects who add new original features to a pre-existing building also own copyright in their addition, whether or not the pre-existing building is part of the

public domain. Therefore, the fact that a monument has fallen into the public domain does not mean that no copyright will exist with regard to that monument in the future. For instance, the architect Jean Nouvel owns copyright protection in the glass roof that was added in the 1990s to the Opéra de Lyon.²¹ This reasoning can even be extended to the rights held by an artist who adds original elements to a building. For example, the illuminations of the Eiffel Tower are protected by copyright. The Cour de cassation held that 'the composition of light effects intended to reveal and emphasize the lines and shapes of the monument constituted an original "visual creation"; it was thus, a work of the mind; it necessarily followed from that an incorporeal right to the benefit of the author'.²² Reproduction of the Eiffel Tower by night is therefore subject to the copyright holder's consent.

Likewise, courts have held that Christo, the artist who wrapped the Pont-Neuf²³ with polyester fabric and ropes in 1985 owned the copyright in this particular representation,²⁴ but not in the idea of packing things.²⁵

Finally, if several architects have taken part in a building's conception, they hold competitive rights on the building, and notably on the building's image. Such rights include 'attributes of an intellectual and moral nature as well as attributes of an economic nature'.²⁶

The architect may oppose the reproduction of the building's image

Patrimonial rights, or economic rights, include the right of reproduction and the right of performance.²⁷ The Intellectual Property Code clearly defines the right of reproduction with regard to architectural works:

reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way. It may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording. In the case of architectural works, reproduction shall also consist in the repeated execution of a plan or of a standard project.²⁸

¹⁵ Pau, 1^e ch, 3 January 2005, No 02/02282.

¹⁶ Paris, 1^e ch A, 23 October 1990, *La Géode*.

¹⁷ Pau, 1^e ch, 3 January 2005, No 02/02282.

¹⁸ id.

¹⁹ Paris, 4^e ch A, 11 February 2004, No 2002/10230.

²⁰ Paris, 4^e ch, 20 November 1996, JurisData no 1996-024119.

²¹ Completed in 1831.

²² Civ 1^{ère}, 3 March 1992, No 90-18081.

²³ The Pont-Neuf, the oldest bridge in Paris, has been classified as a 'Historic Monument' since 1889 and as a UNESCO World Heritage Site since 1991.

²⁴ Paris, 13 March 1986, *Pont-Neuf*.

²⁵ TGI Paris, 26 May 1987.

²⁶ Art L 111-1(2) of the IPC.

²⁷ Art L 122-1 of the IPC.

²⁸ Art L 122-3 of the IPC.

Thus a photographer, a filmmaker, a graphic artist, or any other third party may not reproduce the image of a copyright-protected building without the architect's authorization²⁹ or that of any other person who subsequently holds patrimonial rights in the building, as patrimonial rights may be assigned.³⁰ Such patrimonial rights may be assigned to the building owner, or to an entity with which the building owner has entrusted the management of the building. For instance, the architect who designed La Géode assigned his patrimonial rights to the Établissement public du Parc de la Villette, a public institution which manages the building.³¹

Because patrimonial rights last up to 70 years after the author's death,³² the architects (or their assignees) of famous monuments such as La Géode,³³ the Pyramide du Louvre, the Grande Arche de la Défense, l'Opéra Bastille,³⁴ and the Bibliothèque Nationale de France³⁵ are protected against the unauthorized use of the image of their architectural work.

But should these patrimonial rights prevent third parties from reproducing a landscape that incidentally includes such a building? As patrimonial rights should not extend to a building's surroundings beyond measure, judges have limited the scope of the right of reproduction with respect to architectural works.

Judges first limited the architect's patrimonial rights to the reproduction of the building as the main subject. A 1987 decision carried with it the seeds of this limitation. One could see a small part of a fountain, located in a public place, in the background of advertising posters. In response to the infringement action brought by the artist, the court held that, since the elements represented on the posters 'did not communicate to the public the characteristic and original features of the fountain', the posters 'did not constitute a reproduction, even partial, of the work of art'.³⁶

Three years later, judges clearly held that the unauthorized marketing of postcards representing the Grande Arche de la Défense as the main subject constituted copyright infringement.³⁷ The court then clarified this new requirement: a monument may be the main subject of a picture where it is represented alone or where it appears in a panorama as the main element or

at least as an essential element but not if it is merely an element of a landscape.³⁸ Likewise, judges held that the unauthorized marketing of postcards representing La Géode as the main subject constituted copyright infringement.³⁹ The court further added that 'copyright laws do not restrain copyright protection of works of art which are located in publicly accessible locations'.⁴⁰

In 1995, the Cour de cassation softened its harshness towards architects and held that copyright is infringed where a work of art is deliberately represented as an accessory to the main subject. In this case, statues by French sculptor Maillol had been filmed for a documentary devoted to parks and gardens. Said the Court, 'the reproduction of a work of art which is located in a public place is lawful where it is accessory to the main topic that is represented or dealt with'. However, the close-ups on the sculptures had been 'deliberately represented for themselves'.⁴¹

The Cour de cassation encountered a highly fact-specific situation in a 2005 case.⁴² Two artists had modified the well-known Place des Terreaux (a public square in Lyon): they changed the location of the Bartholdi fountain,⁴³ added 72 fountains, and created a huge draughts board with black and white granite slabs and fourteen 6-metre-high black and white granite pillars. Historical buildings that had fallen into the public domain, and which were freely reproducible, were surrounding what the court acknowledged to be a work of art. As one could not reproduce the buildings or the public square without reproducing the work of art, the court had to deal with the intertwining of historical buildings and modern original constructions. Said the court:

if copyright protection undoubtedly extends to the reproduction of a work of art located in a public place, the issue is a delicate one where, as in this case, the work of art is mainly built in the ground of a public place.

Judges further stated that the reproduction of the work of art is not infringing where it does

not reproduce the plaintiffs' work of art in isolation, which is photographed as an accessory to the main subject, such subject being the overall look of the square with always at

29 See Art L 122-5 of the IPC for exceptions to the exclusive right of reproduction and performance.

30 Art L 122-7 of the IPC.

31 Paris, 1^e ch A, 23 October 1990, *La Géode*.

32 Art L 123-1 of the IPC.

33 Completed in 1985.

34 All three were completed in 1989.

35 Completed in 1996.

36 Civ 1^{ère}, 16 July 1987, No 85-15.128.

37 TGI Paris, 1^e ch, 12 July 1990, *Grande Arche de la Défense*.

38 id.

39 Paris, 1^e ch A, 23 October 1990, *La Géode*.

40 Paris, 1^e ch A, 23 October 1990, *La Géode*.

41 Civ 1^{ère}, 4 July 1995, No 93-10.555.

42 Civ 1^{ère}, 15 March 2005, *Place des Terreaux*, No 03-14.820.

43 Completed in 1888, classified as a Historic Monument in 1995.

least one of the historical monuments, or the photograph of one of these buildings only.

The main explanation to this outcome is that granting protection to the artists under such circumstances would subject the reproduction of public historical monuments to copyright protection, ‘which is impossible’.⁴⁴

The Cour d’appel upheld the decision⁴⁵ on the grounds that the contentious postcards reproduced the work of art ‘in an ancillary manner, as an inseparable component of a whole belonging to a common heritage’. Also, the particular protection that is afforded to authors ‘must not affect common use and enjoyment of public spaces. The Cour de cassation agreed with the lower courts,⁴⁶ stating that the work of art ‘blended in with the architectural whole of the Place des Terreaux’ in such a way that ‘the work of art was of secondary importance to the subject, which dealt with the representation of the square’.

These decisions have been much discussed. Authors have pointed out that, since a work of the mind is granted copyright protection by law whatever its purpose,⁴⁷ it should be irrelevant whether the work of art was intended to be located in public or private places.⁴⁸ Other authors have pointed out⁴⁹ that France has never transposed into its legislation the optional European directive’s provision,⁵⁰ which states that

Member States may provide for exceptions or limitations to [copyright protection in the case of] use of works, such as works of architecture or sculpture, made to be located permanently in public places.

In a 2009 decision, the Cour de cassation held that the provisions of Directive 2001/29 concerning exceptions and limitations to copyright ‘were only optional and could not serve as a rule of interpretation allowing the national judge to expand the scope of a national law to a case not provided for by said national law’.⁵¹ Indeed, if France has not transposed these provisions into the Intellectual Property Code, why should case law create this exception to copyright protection? Nevertheless, several authors have stated that, despite this 2009 decision, the Cour de cassation should maintain its

⁴⁴ TGI Lyon, 1^e ch, 4 April 2001, *Place des Terreaux*, No 1997/02478.

⁴⁵ Lyon, 1^e ch, 20 March 2003, *Place des Terreaux*, No 2001/03048.

⁴⁶ Civ 1^{ère}, 15 March 2005, *Place des Terreaux*, No 03-14.820.

⁴⁷ Art L 112-1 of the IPC.

⁴⁸ TGI Lyon, 1^e ch, 4 April 2001, *Place des Terreaux*: JCP G 2001, comm. F Pollaoud-Dulian.

⁴⁹ Civ 1^{ère}, 15 March 2005, *Place des Terreaux*: JCP G 2005, II 10072, comm. T Lancrenon; JCI Civil Annexes, Fasc 1246, A Lebois.

⁵⁰ Art 5(3)(h) of Directive 2001/29 on the harmonization of certain aspects of copyright and related rights in the information society.

case law regarding architectural works made to be permanently located in public places. Indeed, rather than seeing in this outcome the creation of an exception to copyright protection, they see in it the acknowledgement of copyright’s natural boundaries ‘which result from the nature of things, from material circumstances’.⁵²

The architect may oppose the distortion of the building’s image

The author’s moral rights are divided into four perpetual, inalienable, and imprescriptible attributes:⁵³ the author shall enjoy the right to respect for his name and authorship, the right to respect for his work,⁵⁴ the right of disclosure,⁵⁵ and the right to reconsider or of withdrawal.⁵⁶

Case law relating to the architect’s moral rights mostly deals with the right to respect for his work, which may be involved where the building owner modifies the architectural work, or where a photographer reproduces the building in a disrespectful manner. Thus the right to respect for the architectural work may be invoked whenever the image of the building is distorted, in any way. This article does not deal with the three other attributes of moral rights, as they do not raise any specific issue with regard to a building’s image.

Grande Arche de la Défense illustrates the reproduction of a building in a disrespectful manner: the court held there that the representation of the building and of a female figure with a very low-cut neckline constituted an association ‘of very dubious taste’, likely to affect the architect’s design ‘of purity and of abstraction’.⁵⁷ The same quantum of damages was allocated to the owner of the patrimonial rights (seven infringing postcards) and to the owner of the moral rights (one infringing postcard), which shows the importance of moral rights in France.

If the architect’s moral rights are powerful with regard to the reproduction of his architectural work, they have been weakened by the courts when balancing the architect’s interests with those of the building owner. Judges have tried to set a *modus vivendi* in

⁵¹ Civ 1^{ère}, 22 January 2009, No 07-21.063.

⁵² TGI Lyon, 1^e ch, 4 April 2001, *Place des Terreaux*: JCP G 2001, comm. F Pollaoud-Dulian, M Vivant, and J-M Bruguière, *Droit d'auteur: Précis Dalloz*, 2009, p 376, n 564.

⁵³ Art L 121-1 of the IPC. After the author’s death, his moral rights are transmitted to his heirs.

⁵⁴ Art L 121-1(1) of the IPC.

⁵⁵ Art L 121-2(1) of the IPC.

⁵⁶ Art L 121-4 of the IPC.

⁵⁷ TGI Paris, 1^e ch, 12 July 1990.

order to ensure a reasonable and fair balance between conflicting rights. They first used to balance in favour of moral rights. For instance, they decided that the owner of a fountain, which was specifically intended by the artist to be displayed in a publicly accessible place, could not remove or destroy the work of art without any justifying circumstances which should be objectively measurable and amount to *force majeure*.⁵⁸ Later, courts have stated that a modification of a building—the construction of a fixed false ceiling under a dome in order to resolve acoustic problems—without the architect's approval had distorted the character of his work by destroying the building's overall original harmony.⁵⁹

It was in the 1990s that the courts began to be more protective of building owners' interests. Upholding a Cour d'appel's ground-breaking ruling, the Cour de cassation held in 1992⁶⁰ that

a building's utilitarian function prevents its architect from trying to impose the absolute intangibility of his work, which its owner can modify to adapt the building to new needs.

The owner's rights do not become absolute, as the court subjects the modifications to a double condition: first, they must be justified under the circumstances, meaning that they must not exceed what is necessary: what is new is that such circumstances do not have to amount to *force majeure*, but can pertain to commercial needs. Secondly, they must be indispensable and urgent. As a result, in the absence of any 'sufficiently serious harm' to the architectural work, the building owner's property rights win over the architect's moral rights. Authors have much criticized this outcome, as works of the mind should be protected whatever their merit or their purpose.⁶¹ They have pointed out that distinguishing architectural works with a utilitarian function from those that are purely artistic amounts to assessing their merit and their purpose.⁶² This outcome also goes against the principle of inalienability of moral rights, as the Cour d'appel has held that the architect who knows of the utilitarian function of the building from the start agrees to the limitation of his moral rights when he agrees to design the building.⁶³

⁵⁸ Paris, 25^e ch, 10 July 1975.

⁵⁹ Civ 1^{re}, 1 December 1987, No 86-12.983.

⁶⁰ Civ 1^{re}, 7 January 1992, No 90-17.534.

⁶¹ Art L 112-1 of the IPC.

⁶² Civ 1^{re}, 7 January 1992: D 1993, p 522, note B Edelman.

⁶³ Paris, 1^e ch A, 15 May 1990, No 89/8884.

⁶⁴ Paris, 1^e ch A, 11 July 1990 about the *Théâtre des Champs Elysées*; Orléans, 19 October 2006, No 05-2732; Civ 1^{re}, 11 June 2009, No 08-14.138.

Even if this amounts to a significant and contestable limitation to the architect's moral rights, courts have constantly held that these rights are not intangible, thus favouring the building owner's rights.⁶⁴ However, courts do sometimes rule in favour of the architect, provided that the modification seriously harms his work of art. For instance, courts have held that the architect's moral rights had been infringed where the building owner had painted the building and the two monoliths at the entrance, whereas they were purposely made of rough concrete.⁶⁵ The aesthetic justification—that the concrete had got dirty—was clearly disproportionate compared with the harm caused to the architect's work.

The administrative courts have imposed the same limitation on the architect's moral rights. However, they have subjected the modifications of the building to an additional condition: the modifications must be 'rendered strictly indispensable by aesthetic, technical or public security constraints, which are legitimated by the public service needs'.⁶⁶ There is, however, no justification for the proposition that architects of privately held buildings should be less protected than architects of publicly held buildings.

The image of a building is subject to the property owner's rights

Up to the 1990s, the unauthorized exploitation of a building's image was mainly challenged on the grounds of private life and/or unfair competition. Under Article 9 of the French Civil Code,⁶⁷ courts have sanctioned the exploitation of a property's image where it led to a violation of the property owner's privacy rights, eg where the owner was consequently disturbed by idle onlookers walking by his property⁶⁸ or where the image was accompanied by the owner's name and the property's exact location.⁶⁹ A second ground, Article 1382 of the Civil Code which provides for civil liability,⁷⁰ was useful to the owner where a third party's exploitation of the building's image constituted unfair competition regarding his own exploitation of such image.

Courts then decided to use property law in order to grant property owners extensive rights on the image of

⁶⁵ Cass crim, 3 September 2002, No 01-83.738.

⁶⁶ Conseil d'État, 11 September 2006, No 265174.

⁶⁷ Art 9(1) of the Civil Code states that 'everyone has the right to respect for his private life'.

⁶⁸ TGI Paris, 3^e ch, 13 September 1995.

⁶⁹ Civ 2^{eme}, 5 June 2003, No 02-12.853.

⁷⁰ Art 1382 of the Civil Code provides that 'any act of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it'.

their property. But, facing the criticism of many legal authors and law practitioners regarding the content of this judge-made law, the Cour de cassation gradually softened its position.

The following case law applies regardless of whether buildings are privately or publicly owned.

'Image rights' as attributes of property rights: the building owner may oppose the commercial use of his property's image

The *Gondrée* case law started long before the famous 1999 decision of the Cour de cassation.⁷¹ *Gondrée* was only the highest court's recognition of a building owner's absolute property rights including 'image rights' on his building. Technically speaking, 'image rights' are not separate rights, as there is no such thing as image rights for property (in contrast, there is a specific right to one's image). However, courts do use the words 'image rights'.

Lower courts had already started to grant property owners the right to control the use of the image of their buildings under Article 544 of the Civil Code, under which 'ownership is the right to enjoy and dispose of things in the most absolute manner, provided that they are not used in a way prohibited by statutes or regulations'.

In 1988, a court of first instance stated that 'image rights are attributes of property rights', with the consequence that third parties cannot reproduce the image of a property without the owner's consent.⁷²

Courts of appeal followed this innovative ruling, but somewhat limited this absolute right of property: a building owner can only forbid the *commercial use* of the image,⁷³ and he may not *abuse* his right of property.⁷⁴ In a significant decision, judges held that 'a property owner has the most absolute right to forbid the reproduction of his property for commercial purposes and this right's only limit is the abuse of rights which could be made thereof... where the freedom to write and to print⁷⁵ does not infringe the inviolable and sacred right of property'.⁷⁶ For the first time, a court sanctioned the publication of a

building's image on the grounds of property law only, without any reference to privacy rights or to unfair competition.⁷⁷ The court also held that the owner does not abuse his property rights where his building is the 'essential subject' of the image. The Cour de cassation later added in that regard that where property is the main subject of the image, the commercial use of that image necessarily causes a 'manifestly unlawful disturbance' to the property owner.⁷⁸

As if the balance was not tipping enough in favour of building owners, the Cour de cassation then upheld the absolute property rights in its landmark decision in *Gondrée*.⁷⁹ A building owner⁸⁰ had brought a legal action against the publishers of postcards representing the Café *Gondrée*, the first house to be liberated by the Allied Forces on 6 June 1944. Under Article 544 of the Civil Code, the court ruled that 'only the owner may exploit his property, in any form', including in the form of photographs. Thus the exploitation of a building's image undermines 'the owner's right to enjoy his property'.

In spite of this well-established case law at the time, Parisian courts have rendered two opinions to contrary effect in 2000.⁸¹

The image of a castle had been reproduced in a booklet devoted to the history of castles and fortifications in France since the 10th century, which was offered for free in service stations. The cour d'appel surprisingly determined that there was no violation of the owner's property rights because there was no commercial use of the image, but rather an 'educational purpose'. Authors have correctly pointed out that the educational purpose of a publication does not alter its commercial nature where it is sold or offered in the context of a promotional campaign.⁸² The court also held that

the right [of property] claimed in this case (not expressly provided for by Article 544 of the Civil Code, written for corporeal things), which is both exclusive and perpetual in nature, can hardly be reconciled with the architect's copyright in the building, with the rule under which copyright (including the right of reproduction) does not vest in the

71 Civ 1^{ère}, 10 March 1999, Café *Gondrée*, No 96-18.699.

72 TGI Bordeaux, 19 April 1988.

73 Metz, 26 November 1992, No 3072/92.

74 Paris, 7^e ch, 12 April 1995.

75 Art 11 of the Declaration of the Rights of Man and of the Citizen of 1789 states that 'the free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law.'

76 Paris, 7^e ch, 12 April 1995.

77 Paris, 7^e ch, 12 April 1995; JCP G 1997, II 22806, *comm. v Crombez*.

78 Civ 1^{ère}, 25 January 2000, No 98-10.671.

79 Civ 1^{ère}, 10 March 1999, *Café Gondrée*, No 96-18.699.

80 It turned out later that the owner had no title to the property but was only its lessee-manager, he could not therefore oppose the use of the building's image: Civ 1^{ère}, 25 January 2005, *Café Gondrée*, No 01-15.126.

81 Paris, 4^e ch B, 31 March 2000, No 1999/02083; TGI Paris, 17^e ch, 31 May 2000, No 99/17383.

82 JCI Communication, Fasc 3760, no 40, by E Dreyer.

owner of the physical object,⁸³ and with the principle upon which all legislations are based, under which the patrimonial attributes of intellectual property rights are granted for a limited period of time, at the end of which the works of the mind become freely available and part of the public domain.

Similarly, a castle had been reproduced in a travel guide. In the same vein, the court held that the castle's reproduction in a travel guide did not infringe the owner's property rights, since the public had a legitimate right to be informed about the richness of national heritage, especially where a building is classified as a Historic Monument.⁸⁴ Also, the court held that although image rights are tied to property rights, the latter only confer to the property owner 'a specific quality'—not an absolute right, which allows him to oppose the abusive and prejudicial exploitation of the image of property that is visible from the public domain. This decision is probably excessive though, as the Cour de cassation has never subjected the property owner to a showing of a *prejudice*, even under its current case law, which only subjects him to a showing of an *abnormal disturbance*. The existence of a prejudice applies regardless of the defence of one's property rights.⁸⁵

By departing from the idea of absolute property rights, these two decisions might have shown the seeds of the important 2001 *Roch Arhon* decision,⁸⁶ where the Cour de cassation took a further step towards its current case law.

The building owner may oppose the use of the image that causes a 'certain disturbance' to his property rights

The image of a small island, Roch Arhon, had been reproduced and used in an advertising campaign designed to promote tourism in Brittany. The owner of the island, relying on *Gondrée*, opposed this use. Naturally, the Court of appeal held that the owner's property rights had been infringed, as the picture had been exploited with a commercial purpose and reproduced the island as the main subject.⁸⁷ However, the Cour de cassation stated that the Court of appeal should also have determined whether the exploitation of the image by its author had caused a 'certain disturbance' to the

owner's right of use and right to enjoy his property.⁸⁸ Instead of setting out the principle of the absolute property rights of building owners, the court tied 'image rights' to the right of use and right to enjoy one's property, which can be more easily limited than absolute rights.⁸⁹ The court then subjected the building owner's rights to a showing of a 'certain disturbance' caused to the *usus* or *fructus* of his property. There is no clear definition of that notion, the only certainties being that the owner had to show a real and existing disturbance, and that a disturbance does not amount to a prejudice.

This decision facilitated the transition towards current case law. Indeed, even if the image was used with a commercial purpose, that exploitation did not infringe the property owner's rights because it did not provide for any direct benefits to the user of the image. This distinction between a commercial use that provides direct benefits and a commercial use that is not inspired by financial gains may not be obvious from the decision. However, the Court's reporter expressly stated that this distinction 'constitutes the fundamental difference between [Roch Arhon] and Gondrée'.⁹⁰ The reasoning of the Court was that, if the third party who uses a building's image derives direct benefits from such use, a certain disturbance is caused to the owner's right to enjoy his property, as the owner could have exploited and derived such benefits himself; for instance, the owner of *Café Gondrée* could have sold postcards. In contrast, where the use of the image is driven by educational, informational, or cultural considerations, no disturbance is caused to the owner's right to enjoy his property, as he has not lost a potential opportunity to make profits. Although the Cour de cassation thereby legitimated the two decisions of 2000 in which the publishers of the booklet and travel guide's main purposes were educational and cultural, this outcome was open to criticism. Some authors wrote that, where publishers do not derive direct profits from the use of a building's image, the photographer of that image nonetheless makes direct profits when he assigns his right of reproduction to the publishers.⁹¹

As a result, a certain disturbance was caused to the right to enjoy one's property (*fructus*) where the

⁸³ Art L 111-3 of the IPC states that copyright in a work of the mind 'shall be independent of any property right in the physical object. Acquisition of such object shall not vest in the acquirer of the object any of the rights afforded by this Code...'.

⁸⁴ TGI Paris, 17^e ch, 31 May 2000, No 99/17383.

⁸⁵ JCL Communication, Fasc 3760, no 35, by E Dreyer.

⁸⁶ Civ 1^{ère}, 2 May 2001, *Roch Arhon*, No 99-10.709.

⁸⁷ Rennes, 24 November 1998.

⁸⁸ Civ 1^{ère}, 2 May 2001, *Roch Arhon*, No 99-10.709.

⁸⁹ JCL Communication, Fasc 3760, no 42, by E Dreyer.

⁹⁰ D 2001, jurispr. p 1973, note J-P Gridel.

⁹¹ JCL Communication, Fasc 3760, no 41, by E Dreyer.

building owner could have derived financial gains from the use of the building's image.⁹² As the disturbance had to be *certain*, the owner had to prove that he had undertaken an initiative towards the commercialisation of the building's image.⁹³ However, one might ask why the building owner would bring a legal action based on property law when he could have brought an unfair competition claim under Article 1382 of the Civil Code. Admittedly he would have to prove a prejudice, but a disturbance often leads to a prejudice. Article 544 of the Civil Code should therefore be relevant only where the owner has not commercialized his property's image yet, but has just undertaken an initiative towards such commercialization.

In contrast, if the building owner had not lost an opportunity to market the image of his property, he could not prevent third parties from using the image of his building, unless he proved that such use—which is assumed to have been made with a cultural, informational, educational, or advertising purpose—caused a certain disturbance to the right to use property (*usus*). Such disturbance was characterized where the owner could not use his property 'under normal conditions',⁹⁴ that is, where the owner's security was jeopardized,⁹⁵ where the inrush of tourists accelerated the degradation of the site,⁹⁶ or disturbed the owner's quiet use of his property. However, courts have almost always ruled against property owners, taking into account the fact that numerous publications already contained the image of the well-known property⁹⁷ or that the owner had never opposed to road signs that led to the native house of a famous writer⁹⁸ (in both cases, who can tell if the inrush of tourists is due to the contentious publication?), and that the image was not accompanied by the owner's name or property location such that it was impossible to identify the property.⁹⁹

Courts were already so harsh on property owners that, according to an author, 'it is not certain that [the 2004 decision] will change, as a strictly practical matter, the situation that resulted from the 2001 decision'.¹⁰⁰

⁹² TGI Clermont-Ferrand, 23 January 2002, No 99/03771.

⁹³ Riom, 14 November 2002, No 01/01259.

⁹⁴ Riom, 14 November 2002, No 01/01259.

⁹⁵ Paris, 4^e ch B, 31 March 2000, No 1999/02083.

⁹⁶ Paris, 4^e ch B, 31 March 2000, No 1999/02083; TGI Clermont-Ferrand, 23 January 2003, No 99/03771.

⁹⁷ Paris, 4^e ch B, 31 March 2000, No 1999/02083; TGI Clermont-Ferrand, 23 January 2003, No 99/03771.

⁹⁸ Riom, 14 November 2002, No 01/01259.

⁹⁹ Paris, 4^e ch B, 31 March 2000, No 1999/02083.

'Image rights' are not attributes of property rights: anyone may reproduce a building's image without the owner's consent, unless it causes an 'abnormal disturbance' to his property rights

In response to the first Civil Chamber case law, the second Civil Chamber of the Cour de cassation had expressly stated that 'image rights' are not attributes of property rights.¹⁰¹ Since the second Civil Chamber had ruled in favour of the property owner on the grounds of privacy rights, this *obiter* statement was clearly meant to express the second Civil Chamber's disagreement on the matter. This departure from the first Civil Chamber's *Gondrée* and *Roch Arhon* decisions led the Assemblée Plénière¹⁰² of the Cour de cassation to its landmark 2004 decision, which constitutes current case law.¹⁰³ With this decision, the balance has definitively shifted in favour of third parties, to the detriment of property owners.

The Assemblée Plénière held that 'the owner of a good does not hold an exclusive right to its image'. As the excessive pro-owner solution set in *Gondrée* should not lead to the opposite extreme,¹⁰⁴ the Assemblée Plénière tempered its new principle and added that the owner 'may nonetheless oppose the use of such image by a third party where such use causes him an abnormal disturbance'.

This decision has inverted the principle and the exception. Under *Gondrée*, the principle was that a property owner had exclusive property rights providing for the protection of his property's image. Under *Roch Arhon*, the principle was still that a property's image is tied to property rights, namely the right of use and the right to enjoy one's property, in such a way that third parties may not cause a 'certain disturbance' to such rights by using that property's image. With *Hôtel de Girancourt*, the principle is now that a property's image is out of the scope of property rights: there is a clear distinction between a property and the image of that property. That is, the ownership of a property no longer extend to the ownership of that property's image. Accordingly, anyone may freely reproduce a

¹⁰⁰ JCP G 2004, II 10085, comm. Ch Caron.

¹⁰¹ Civ 2^{ème}, 5 January 2003, No 02-12.853.

¹⁰² Plenary Assembly. Under Art L 431-6 of the French Judicial Organization Code, the Assemblée Plénière may rule on a matter of principle, in particular where there exist diverging opinions on that matter among the courts. The Assemblée Plénière is a formation of the Cour de cassation, which reunites 19 judges: the First President of the Cour de cassation and three judges from each of the six Chambers.

¹⁰³ Cass ass plén, 7 May 2004, *Hôtel de Girancourt*, No 02-10450.

¹⁰⁴ ibid; see also JCP G 2004, II 10085, comm. Ch Caron.

building's image, for whatever purpose—regardless of whether they derive direct profits from that reproduction. However, under the theory of abuse of rights, the use of a building's image must not cause an 'abnormal disturbance' to the owner's property rights—and that is where property rights are involved.

Like the notion of 'certain disturbance', 'abnormal disturbance' is not positively defined by case law, although the courts have defined what is *not* abnormal disturbance. For instance, they have held that abnormal disturbance is not characterized by the publication of a convent's image that is 'widely distributed to the public, in the form of postcards, tourist brochures and stamps'.¹⁰⁵

The Cour de cassation later held that the publication of an old house's image in a book that contained 4500 pictures did not disturb the owners' quiet use of their property, nor did it disturb their privacy.¹⁰⁶ It added that the plaintiffs had not raised any privacy rights issue, and thus implicitly stated that they could have won on that ground, if they had asserted that the geographical indications accompanying the image were invasive of privacy. It would have been indeed more useful to the owners to invoke their privacy rights, rather than showing an abnormal disturbance, which is almost never retained by the courts.

Judges have also stated that 'abnormal disturbance' does not result from the mere commercial exploitation

of a property's image.¹⁰⁷ This probably constitutes a major distinction from the notion of 'certain disturbance'. Likewise, there is no 'abnormal disturbance' where the property is only reproduced in ancillary manner.¹⁰⁸

One Cour d'appel decision did, however, retain abnormal disturbance in 2005, on facts which were very similar to parasitism. The Court found that the use of the *Belem*'s image¹⁰⁹ had caused abnormal disturbance to its owner on two grounds: first, the third party was taking advantage of the owner's investments that had been made in order to maintain the ship's image; then, the third party had reproduced the ship's image in a poor quality.¹¹⁰ However, this ruling was reversed in 2008.¹¹¹

Admittedly, 'image rights' are no longer attributes of property rights under French law. A French specificity remains in the sense that the use of the image of a building that is visible from the public domain must not disturb its owner's property rights. However, it is regrettable that such disturbance be so difficult to characterize in practice. If judges initially intended to increase the protection of building owners when they introduced the notion of property rights, it now seems to be easier for owners to use more traditional grounds—such as unfair competition or privacy rights—to prevent the use of their property's image.

¹⁰⁵ Bordeaux, 30 May 2005, No 02/06083.

¹⁰⁶ Civ 1^{ère}, 5 July 2005, No 02-21.452.

¹⁰⁷ Paris, 4^e ch A, 11 January 2006, *Tour Montparnasse*, No 04/19359 ; Orléans, 15 February 2007, No 06/00988.

¹⁰⁸ Paris, 11^e ch A, 27 September 2006.

¹⁰⁹ The *Belem* is the last three-masted ship in France. Built in 1896, it was classified as a 'Historic Monument' in 1984.

¹¹⁰ Orléans, 10 November 2005, No 04/02717.

¹¹¹ Paris, 4^e ch B, 31 October 2008, No 07/06204.