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**INDEMNITY FOR VIOLATION OF THE RIGHT TO ONE'S OWN IMAGE  
(INDEMNIZACIÓN POR VIOLACIÓN AL DERECHO A LA PROPIA IMAGEN)**

**CASE:** *Amparo Directo 24/2016*

**REPORTING JUDGE:** Arturo Zaldívar Lelo de Larrea

**DECISION ISSUED BY:** First Chamber of Mexico's Supreme Court of Justice

**DATE OF THE DECISION:** December 6, 2017

**KEY WORDS:** right to freedom of expression, right to freedom of information, right to one's own image, moral damage, material damage, compensation, copyright.

**CITATION OF THE DECISION:** Mexico's Supreme Court of Justice, *Amparo Directo 24/2016*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of December 6, 2017, Mexico.

The full text of the decision can be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emplematicas/sentencia/2021-10/AD%2024-2016.pdf>

**CITATION SUGGESTED FOR THIS DOCUMENT:** Human Rights Office of Mexico's Supreme Court of Justice, *Extract of Amparo Directo 24/2016*, Mexico.

## SUMMARY OF THE *AMPARO DIRECTO* 24/2016

**BACKGROUND:** A host of various television programs sued a business corporation (publishing company) for having published, in two of its magazines, photographs of her with her torso naked without her consent. A district judge in Mexico City issued a final decision in which it ruled that the TV host had partially proven the action and that the publishing company had failed to prove its motions and defenses. Dissatisfied, they filed appeals that were heard by a unitary court in civil and administrative matters of the same place, which issued a decision on February 25, 2015 and determined the liability of the publishing company for having caused moral damages [*daño moral*] to the TV host. The publishing company filed an *amparo directo* against that determination, which was admitted by a collegiate court in civil matters in Mexico City, and with respect to which the First Chamber of Mexico's Supreme Court of Justice (this Court) determined to exercise its power to assert jurisdiction.

**ISSUE PRESENTED TO THE COURT:** Whether the publication of the images of the TV host is supported by the legitimate exercise of freedom of expression and if, where appropriate, the violation of the right to one's image constitutes a right that can be redressed through the copyright legislation.

**HOLDING:** The *amparo* was granted, essentially for the following reasons. In principle, it was determined that the publication of the photographs without the TV host's consent is not protected by the freedom of information of the publishing company. This is so given that the published images, in which the TV host appears on a beach with her torso naked, reveal an aspect of her private life. In this sense, there is no connection between the images and a topic or information of public interest, since they are not related to the professional facet of the TV host that justifies the publication without her consent, they do not connect with issues of general interest to society, nor were they taken for informational or journalistic purposes. On the contrary, the only appreciable purpose is to obtain a profit, appealing to the curiosity of the public to know a situation in the scope of her private life. On the other hand, the Federal Copyright Law does not

allow redressing violations of the right to one's own image through compensation for moral damages; however, being an intangible right that can be exploited commercially, it contemplates the possibility of claiming material damages for its infringement. The decision was therefore reversed in order to take those considerations into account.

**VOTE:** The First Chamber decided this case unanimously by four votes of judges Norma Lucía Piña Hernández (reserved the right to issue a concurrent opinion), Arturo Zaldívar Lelo de Larrea, Jorge Mario Pardo Rebolledo (reserved the right to issue a concurrent opinion), and Alfredo Gutiérrez Ortiz Mena (reserved the right to issue a concurrent opinion). Judge José Ramón Cossío Díaz was absent.

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=200372>

## **EXTRACT OF AMPARO DIRECTO 24/2016**

- p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of December 6, 2017, issues the following decision.

### **BACKGROUND**

- p. 1.6 A person dedicated to conducting various television programs (the host), sued a business corporation (the publishing company) for the violation of her right to one's own image. The host argued that the publishing company had published photographs without her consent in two magazines when it published photographs of her without her consent, with naked breasts.
- p. 2 A district judge in civil matters in Mexico City issued a decision on October 17, 2012, in which he determined that the host had partially proven the action and that the publishing company had failed to prove its motions and defenses.
- p. 2-3 Dissatisfied, both filed appeals. By decision of February 25, 2015, a unitary court in civil and administrative matters in Mexico City determined to absolve the publishing company from redress for material damages and determined its liability for having caused moral damages to the host.
- p. 3-4 On March 20, 2015, the publishing company filed an *amparo* lawsuit against the unitary tribunal's decision. By decision of February 3, 2016, this Court determined to exercise its power to assert jurisdiction to hear the *amparo* and on June 24, 2016, it was sent to judge Arturo Zaldívar Lelo de Larrea to prepare the draft.

### **STUDY OF THE MERITS**

- p. 14 In this case, it will first be examined whether the conduct of the publishing company was covered by freedom of expression; subsequently, the possibility of redressing the violations of one's own image through moral damages in terms of the Federal Copyright Law (LFDA) will be analyzed.

## I. Freedom of expression and personality rights

- p. 15 This Court has recognized that the possibility of establishing subsequent liabilities for the exercise of the freedom of expression constitutes one of the most important external limits on this right.
- p. 16,19 In constructing the doctrine on conflicts between freedom of expression and the rights of personality, this Court has assumed as a methodological premise the consideration that freedom of expression is a right of special importance as it constitutes a precondition of democratic life; this does not mean that it should prevail in all cases over the rights of personality, which also have constitutional status in Mexican law.
- p. 19-20 Thus, when there are conflicts between freedom of expression and the rights of personality, it is necessary to clarify a series of constitutionally relevant issues that must be taken into account when resolving a specific case, which include: the content of the expressions that give rise to the lawsuit, the subject matter involved, the qualities of the person who made the expression and those of the person claiming to have suffered damage.
- p. 20-21 The publishing company basically argues two issues. Firstly, that from the constitutional point of view the publication of the images of the interested third party without her consent was carried out in exercise of the right to freedom of expression and the host is not entitled to the protection of her own image, since it is not expressly provided for in either the Constitution or any international treaty. And, secondly, that from the legal point of view in the specific case an exception provided for in Article 87 of the LFDA is applicable, according to which it is not necessary to obtain the consent of the person when "the photograph is taken in a public place and for informational or journalistic purposes".
- p. 21 These arguments are unfounded. The publication of the images made by the publishing company violates the right to the host's own image, which means that the dissemination of the photographs is not protected by the right to freedom of expression.

### a) Fundamental rights at odds

### **i. The freedom of information of the publishing company**

- p. 23 In resolving the *Amparo Directo* 3/2011, the First Chamber of this Court explained that although freedom of expression is a fundamental right that protects both the assertions of facts and the expression of opinions, this right acquires different characteristics depending on the content of the communication: the freedom of opinion that the communication of value judgments supposes and the freedom of information that is the transmission of facts. The central idea is that while information about facts may be true or false, those properties cannot be predicated on opinions because they are imbued with value judgments.
- p. 24 In this case, the host pointed out that the publishing company published, without her consent, in two magazines it owns, several photographs in which she was shown partially naked. Thus, what must first be determined is what kind of expressive discourse the publication constitutes.
- p. 24-25 This Court understands that the expressive content that the publication constitutes refers to information about facts that are reflected in the images that gave rise to the controversy, so we are dealing with an exercise of freedom of information.
- p. 25 Thus, the conflicting rights are the right to freedom of information of the publishing company and the right to the host's own image.

### **ii. The right to the host's own image**

- p. 25 In *Amparo Directo* 6/2008, the Plenary of this Court stressed that the right to one's own image, which derives from human dignity, implies the image that one preserves to show oneself to others and, as such, it is located within the right to intimacy, constituting very personal rights, outside the interference of strangers, so that the individual has the right to decide, freely, on his own image.
- p. 27 Thus, despite not being expressly provided for in the Constitution, the right to one's own image has constitutional status and has the normative resistance of all fundamental rights.
- p. 27-28 This Court understands that the fundamental right to one's own image not only protects the autonomy of people to freely decide the image by which they want to show themselves

to society -one of the manifestations of which is the "physical appearance"-but also grants decision-making power over the representations or graphic manifestations of that image and the uses or purposes they will be given. Thus, in this facet the fundamental right to one's own image grants people protection against non-consensual uses of their image originating from third parties.

p. 28 For some people, the image itself is also a good that can have an economic value in the market. From this perspective, it must be conceived as an intangible right susceptible to commercial exploitation, the violation of which can cause material damage to people, as happens in cases in which, in order to obtain a profit, the photograph of someone who usually obtains economic income through the commercialization of his or her image is used without consent. Thus, as a fundamental right, this right also offers specific protection against the non-consensual use of one's own image for purely commercial or lucrative purposes.

p. 28-29 In addition, the host must be considered a public figure, so it must be understood that her right to her own image presents less normative resistance to possible interferences derived from freedom of expression, according to the dual system of protection, which entails different parameters to analyze interferences with the rights of public figures and individuals.

p. 29 This Court has held that public officials and individuals with public renown are public figures. This second case refers to those who, because of a certain situation, acquire a certain notoriety that justifies the interest of society in knowing information related to these people.

In the *Amparo Directo* 6/2009, this Court pointed out that there are people who, due to certain circumstances of a personal or family, social, cultural, artistic, sports or other nature are publicly known or have public notoriety and, therefore, can be called 'public figures' and who, as a result of such notoriety, have involvement, influence or generate a legitimate interest in the community life to know information related to such persons. In

this specific case, the host has gained public notoriety because professionally she is dedicated to the conducting of television programs.

### **iii. Criterion for resolving the conflict of rights**

p. 30 As a general rule, whenever the image of a person is disseminated, the consent of the person is required, so in principle the publication of an image without the consent of its owner will not be protected by freedom of information.

However, there is a criterion that justifies the dissemination of the image of a person without their consent: the presence of public interest in that image.

p. 31 The LFDA is consistent with the above, as it establishes that express consent is not necessary to use or publish the portrait of a person when it is a minor part of a group or the photograph is taken in a public place and for informational or journalistic purposes. The place, as well as the journalistic and informational purposes, directly invoke the notion of public interest.

#### **b) The public interest as a justification**

p. 32 The existence of public interest in the publication of an image without the consent of the owner is considered a justification, because in that scenario the dissemination of the image constitutes a legitimate exercise of freedom of information.

p. 34 The Court considers that the criterion of public interest must be based on information that the public considers relevant to community life. Thus, information becomes of public interest when members of the community can reasonably justify a legitimate interest in its knowledge and dissemination. The public interest is not synonymous with the public's interest; therefore, curiosity or morbid interest is not sufficient.

p. 34-35 Although a public interest in the dissemination of a certain piece of news is recognized, this does not necessarily imply that there is also a public interest in knowing the private details of the persons involved, which of course includes the images of a person.

p. 35-36 The aforementioned does not mean that only political discourse is protected by freedom of information. This Court recognizes that in many cases people have a genuine interest



in knowing images that reflect the private lives of other people. The problem is to determine when such information can be disclosed on a public interest basis. This Court understands that information reflecting the image of a person may be classified as a public interest directly or indirectly.

p. 36 In the first case, the image directly provides information on issues of importance for the collective life of a community, or it is developed in public places without expectation of privacy. In this type of situation, the image has direct public interest because it provides relevant information for society and this relevance justifies that consent is not required for its publication.

p. 37 This Court is aware of the existence of entertainment publications and programs, in which the information that is disseminated in many cases refers to the life of private individuals with public renown. In this regard, it wants to be very emphatic that entertainment journalism is protected by freedom of expression.

In the field of show or entertainment journalism, it should be considered that there is a direct public interest in disseminating images of private persons with public renown when they are carrying out activities in public spaces, in private spaces with public access or in private events of general interest in which there is no justified expectation of privacy. In these scenarios, the direct public interest is indisputable when the person is also shown carrying out some facet of their professional activity. Hence, the direct public interest in principle is not applicable when the content of the image of the person presents a situation that belongs exclusively to his or her private life.

p. 37-38 On the other hand, if a public interest in the publication of an image related to a person's private life does exist, it must necessarily be indirect. In order to be able to determine whether this exists, it is necessary to corroborate a patent connection between the information the image reflects and the professional activity. This standard aims to rule out those cases in which the image reflects a situation of private life that has no link with the professional facet of the person.

p. 39 This Court considers that it is not acceptable for the media to interfere indiscriminately in people's private lives by disseminating images of them without their consent on the pretext of journalistic work. In accordance with the foregoing, the publication of such images will only be covered by freedom of expression when the journalist or the media has acted within that margin of appreciation that it has to apply the standard of the patent connection.

**c) Application to the specific case of constitutional doctrine**

p. 39 It must be ruled out that in this case the publication of the host's photographs is of direct public interest, since they show a situation which belongs to her private life. Despite appearing on a beach, which in principle could be considered a public place, by the content of the images -she has a bare torso, poses openly for the person who took the photographs and it is not seen that there is anyone else in the place- they can be considered as photographs that reveal an aspect of private life and it should be considered that there was an expectation of privacy.

p. 39-40 In this case, the public interest would have to be indirect. According to the content of the reports where the photographs are included, there is no connection between the images published and the professional activity of the host, because at no time is any topic of public interest or any aspect of her professional facet identified that could justify the publication of the images without her consent, a situation that also cannot be justified simply by appealing to the fact that the company is dedicated to the publication of print media.

p. 40 Thus, it is clear that the only appreciable purpose of the publication of the photographs in which the host appears partially naked is to obtain a profit by appealing to the curiosity of the public who read the magazine to know the images of a situation that belongs exclusively to the scope of her private life. Thus, it must be concluded that there is also no indirect public interest in the publication of the images.

p. 41 Consequently, the publication of images without consent is not protected by the freedom of information of the publishing company because there is no public interest in their dissemination, nor is the exception provided for in the LFDA applicable, according to which

the consent of the person is not necessary when the photograph is taken in a public place and for informational or journalistic purposes.

In addition to the above, the images were taken by a relative, for personal use and were never authorized to be published.

- p. 42 Regardless of whether or not the images were actually in the public domain before they were published, this is not sufficient for publication without consent.

## **II. One's own image in the copyright legislation**

- p. 44-45 The publishing company basically argues that the appellate decision lacks proper grounding in law and fact because the LFDA does not establish the possibility of redressing the moral damages caused by the violation of the right to one's own image.

- p. 45 These arguments are partially well-founded. Indeed, the LFDA does not permit redressing the violations of the right to one's own image through compensation for moral damages. However, since it is an intangible right that can be exploited commercially, the copyright legislation in question does provide for the possibility of claiming material damages for violations of the right to one's own image. In this regard, this Court considers that the entire decision of the Unitary Court is constructed under the mistaken premises, which include the consideration that the LFDA permits the redress of violations of the right to one's own image through compensation for material and/or moral damages.

- p. 57 The unitary court pointed out that the right to one's own image is a right protected by the LFDA and that such law establishes a legal action for redressing damages for violations of this right. Secondly, it assumed at all times that a violation of the right to one's own image can be remedied in accordance with the copyright legislation through compensation for either "material damages" or "moral damages". And finally, thirdly it assumed that whenever a photograph or image of someone is published without consent, a "moral right" is violated over the images published in terms of the provisions of section I of article 21 of the LFDA, a violation that gives rise to compensation for moral damages in terms of article 216 Bis.

### **a) Moral Damages in the Federal Copyright Law**

p. 58 Article 216 Bis of the LFDA establishes that the violation of the rights conferred by that law may give rise to redress for material and/or moral damages. It also provides that, for the purposes of copyright legislation, "moral damages" can only be caused by reason of the violation of certain "moral rights in copyright" established in article 21 of the aforementioned law.

p. 59 Moreover, article 87 of the LFDA directly protects the right to one's own image, stating that a person's portrait may only be used or published with his or her express consent, except when it is a person who is a minor part of a group or the photograph is taken in a public place and for informational or journalistic purposes.

p. 60 It follows from the foregoing that it could be requested that the violation of the right to one's own image be remedied by means of redress for material and/or moral damages; however, the redress of moral damages is limited to violations of the moral rights in copyright provided for in Article 21.

In this regard, article 18 states that the author is the sole, primal and perpetual owner of the moral rights in the works of his creation, which explains why the right to one's own image is not provided for among the "moral rights in copyright".

p. 61 From a systematic interpretation of the LFDA it is seen that the violation of the right to one's own image cannot lead to the redress of moral damages in terms of the copyright legislation. However, it cannot be forgotten that article 216 bis provides that the violation of legally protected rights permits redress through compensation for material or moral damages. Consequently, if by provision of the law itself, the infringement of certain rights, such as the right to one's own image, cannot give rise to compensation for moral damages, it must be considered that in such cases there may be compensation for the material damages.

p. 61-62 In this sense, the right to one's own image is violated when a person's image is published without their consent, a violation that can lead to compensation when "material damage" is also caused -affecting pecuniary rights-, hence it is incorrect to consider that one's own

image constitutes a "moral right" whose violation necessarily translates into "moral damages". In addition to a fundamental right, for some people one's own image can also be a pecuniary right susceptible to economic exploitation.

### DECISION

p. 64-65 In accordance with the reasons stated, this Court considers it appropriate to grant the *amparo* requested to the publishing company for the effect that the unitary court reverses the challenged decision and instead issues another in which it re-analyzes the grievances, taking into account: (i) refraining from considering that when a photograph or image of a person is published without his or her consent a moral right over the published images is violated; (ii) refraining from maintaining that the violation of the host's right to self-image can be redressed through compensation for moral damages; (iii) consider that the LFDA does allow redressing the violation of the right to one's own image through compensation for material damages, as it is an intangible right susceptible to commercial exploitation; and, (iv) once the above has been done, decide under its jurisdiction according to the law.