Loyola of Los Angeles
Entertainment Law Review

Volume 18
Number 3 *Symposium: International Rights of Publicity*

Article 2

3-1-1998

The Right of Publicity under Argentine Law

Guillermo Cabanellas

THE RIGHT OF PUBLICITY UNDER ARGENTINE LAW

By Guillermo Cabanellas[*]

I. INTRODUCTION

The right of publicity under Argentine law implicates the exclusive right to exploit aspects of a person's identity, such as name, likeness, voice, or photograph. Argentine law is part of the civil law tradition, and it is common to find protection for certain rights based on broad rules found in different statutes.[1] Such rules and statutes are then interpreted by courts to create a coherent set of rules and principles applicable to a specific legal issue.

For example, the protection of the business concept of "know-how"[2] under Argentine law is derived from multiple statutes, including the Criminal Code, the Civil Code rules on torts, various labor law statutes, and the so-called "Confidentiality Law." A thorough analysis of know-how rights requires a consideration of these sets of rules. Somewhat similarly, although the legal protection against torts is theoretically established by a relatively small set of sections of the Civil Code,[3] the actual limits of protection are drawn from an extensive body of judicial opinion giving substance to the vague definitions in the Civil Code.

---

* Visiting Professor, Loyola Law School of Los Angeles. Adjunct Professor, University of Illinois. Professor, National University of Buenos Aires. Lic. Econ., 1972, National University of Buenos Aires; L.L.B., 1973, National University of Buenos Aires; M.C.L., 1975, University of Illinois; J.S.D., 1978, University of Illinois.

1. The practice of looking to broad and distinct bodies of domestic and even international law is, in fact, common among civil law countries, especially in South America. *See, e.g.*, Deborah Fisch Nigri & Silvia Regina Dain Gandelman, *Right of Publicity: The Brazilian Legal System*, 18 LOY. L.A. ENT. L.J. 469 (1998) (describing the Brazilian right of publicity as a product of the Brazilian Constitution, copyright laws, and the concept of "neighboring rights").

2. "Know-how" includes a broad category of rights roughly analogous to patents, designs, models, trade secrets, or technology. *See* Donald I. Baker & Richard H. Sayler, *U.S. Justice Department Patent-Antitrust Policy: The Hazards of Changing Policies and Distant Horizons*, 365 PLI/PAT. 105 (1993).

3. CÓD. CIV. arts. 1066–1137.

Likewise, the Argentine right of publicity is derived from a broad set of rules found in different bodies of Argentine law. Although the Argentine Civil Code, enacted in 1869 and frequently amended, includes very limited and vague rules concerning publicity rights, the right is not expressly recognized as an independent positive right. Thus, the limits, enforcement mechanisms, and other legal aspects of publicity rights are largely the result of developments based on very different statutes, many of which are only indirectly connected with the concept of *derechos personalísimos* ("highly personal rights")[4] which may also include the right of publicity.

The fact that Argentine statutory and case law have not recognized the right of publicity as an independent legal concept, not unlike many other legal systems, presents great difficulty when trying to define it concisely. As this Article elucidates, this difficulty does not mean that the right does not exist under Argentine law. Rather, its substance must be found under other areas of the law and terminology, including the Argentine Federal Constitution, a number of international agreements on human rights given constitutional status, copyright and trademark law, a body of law known as the Law on the Name of Individuals (hereinafter the "Law of Names"), laws regarding the protection of privacy and intimacy, and various criminal laws. This diversity is not merely a consequence of the relatively recent recognition of publicity rights in Argentina, but is part of a legal technique associated with the so-called highly personal rights.

This Article discusses the scope of the Argentine right of publicity as it exists under a broad range of Argentine statutory and case law. Part II discusses the historical background of the right of publicity in Argentina, as well as its relationship to the above-described bodies of law. Part III discusses the contours of the Argentine right of publicity, including the formalities required to establish and protect it, the duration for which it is protected, the ability to pass publicity rights to one's heirs or transfer them to third parties, and the possibilities of conflicts with other laws. Part IV provides the legal elements required to prove a violation of the right of publicity, as well as the defenses thereto, and the possible remedies available to a plaintiff who successfully proves a violation.

This Article concludes that, although the right of publicity exists in a scattered and uncertain form under Argentine law, the spread of information

4. For discussion of these rights, see S. CIFUENTES, DERECHOS PERSONALÍSIMOS (1995); Leiva Fernández, *El Derecho Personalísimo sobre la Propia Voz*, [1990-A] L.L. 845; López Olaciregui, *Eleccion del Nombre: Los Derechos Personalísimos y los Derechos Patrimoniales Frente a las Garantías de la Constitución*, [1945-II] J.A. 465; Cáceres, *Derecho a la Intimidad*, [1978-B] L.L. 908.

and technology in Argentina will likely provide the Argentine courts greater opportunity to establish more concrete rules for the protection of this right.

II. THE ARGENTINE RIGHT OF PUBLICITY: ITS HISTORY AND RELATIONSHIP TO OTHER BODIES OF LAW

A. History

Argentine law does not expressly recognize a right of publicity. Although a person generally has an exclusive right to exploit the different aspects of his or her own identity in Argentina, this right does not have a separate legal category. Instead, exclusive rights to exploit the different aspects of a person's identity are generally considered to be part of the highly personal rights.[5]

Highly personal rights are not statutory concepts, but instead developed from judge-made law and legal discourse based on different aspects of the Argentine legal system. Highly personal rights have been defined as "private subjective rights" originating at birth and lasting throughout a person's life. They usually refer to matters such as a person's physical integrity and a person's right to his or her own body. This right includes "exotic" rights, such as a person's right to die, which are only vaguely related to the right of publicity.[6] Due to their inherent, non-pecuniary, and necessary nature, these rights may not be transferred or disposed of in an absolute and radical way.[7]

The right of publicity, by contrast, is more closely related to copyright, trademark, and other laws protecting proprietary interests, laws which are not properly identified with the highly personal rights. Thus, the exercise of the right of publicity in connection with trademarks has been governed largely by trademark law, which differs substantially from the rules applicable to highly personal rights. Indeed, the right of publicity, similar to the highly personal rights, has not been the subject matter of careful statutory definition. The Argentine Civil Code includes only indirect references to highly personal rights.[8] The original version of Article 1078 included a provision requiring the indemnification of damages caused to a

5. *See supra* note 4 and accompanying text.

6. *See* Jose A. Mainetti, *Academic and Mundane Bioethics in Argentina*, *in* TRANSCULTURAL DIMENSIONS IN MEDICAL ETHICS 43 (Edmund Pellegrino et al. eds., 1992) (discussing ethical implications of the right to die under Argentine law).

7. *See* CIFUENTES, *supra* note 4, at 200.

8. *See* CÓD. CIV. arts. 1075, 1078.

person's "legitimate affections" by criminal conduct.[9] Article 1075 recognized rights that were identical with "the existence of a person," without further elaborating on the meaning of this identity.[10] The official commentary to the Civil Code mentions a general obligation to indemnify "any harm caused to a person, its rights or faculties."[11] After the passage of Article 1075 in 1869, neither the Civil Code nor case law developed a clear concept of highly personal rights or of the remedies necessary for their protection.

Several statutory changes have taken place in this century with regard to highly personal rights in general, and publicity rights in particular, reflecting a broadening legal interest in these rights. First, in 1968, the Civil Code was amended to broaden significantly the right to obtain damages caused to a person's feelings ("moral damages").[12] Second, in 1975, Article 1071-*bis* was included in the Civil Code, expressly recognizing a "right to intimacy."[13] Finally, in 1994, the Federal Constitution was amended to strengthen the protection of highly personal rights, both directly by means of the *habeas data*, and indirectly, by giving constitutional status to international treaties creating minimum standards of highly personal rights protection.[14]

B. Relationship with Other Laws

Like many other legal concepts, the right of publicity is not expressly recognized by Argentine law, but is instead a product of many bodies of law with various purposes and limitations. The following areas of law contain applicable principles which, taken together, form the basis for protecting the right of publicity in Argentina.

1. The Argentine Federal Constitution and International Agreements Given Constitutional Status

Several provisions of the Argentine Federal Constitution have been used as a basis for rights similar to the right of publicity, primarily Article

9. *Id.* art. 1078.

10. *Id.* art. 1075.

11. *See* Official Commentary to CÓD. CIV. art. 1075.

12. *See* CÓD. CIV. art. 1078. The publication of photographs was previously regulated by Law 11723 in 1933. *See* Law No. 11723, arts. 31, 32, Sept. 28, 1933 [1920–1940] A.D.L.A. 443.

13. CÓD. CIV. art. 1071-*bis*.

14. *See* CONST. ARG. arts. 19, 43.

19 covering privacy rights and Article 43 covering *habeas data* and *habeas corpus* rights.[15] Additionally, several international agreements on human rights ratified by Argentina include broad provisions on the rights to a person's identity, lending support to the publicity rights concept. The *American Declaration on Human Rights and Duties of Man*,[16] for example, provides a right to legal protection from attacks on a person's reputation and private life.[17] The *Universal Human Rights Declaration*[18] provides that every human being is entitled to the recognition of one's legal personality,[19] freedom from arbitrary intrusions in one's private life, and freedom from attack on one's honor or reputation.[20] Similar protection is granted by the *International Covenant on Civil and Political Rights*.[21] Because constitutional status is awarded to these agreements, their importance in Argentine law is magnified.[22]

2. Copyright, Trademark, and the Law of Names

Argentine copyright law is also implicated in any discussion of publicity rights. In Argentina, the province and function of copyright laws are distinguished from laws protecting an individual's personality in that copyright protection generally requires an intellectual creation, while the protection of an individual's personality does not require the existence of intellectual creativity.[23] However, the copyright statutes do include specific provisions on publicity rights. Specifically, Article 31 of Law 11723 (hereinafter the "Copyright Law") provides that the photograph of a person may not be the subject matter of commerce without the express consent of that person.[24] In the event that the person is deceased, the law requires consent from the deceased's spouse and son(s), or direct descendants of the

---

15. *See id.*

16. American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, *reprinted in* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, 18 OEA/Ser. L.V./ II. 82 doc. 6 rev. 1 (1992).

17. *Id.* art 5.

18. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810 (1948), *reprinted in* 5 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 237–42 (1965).

19. *Id.* art 6.

20. *Id.* art 12.

21. International Covenant on Civil and Political Rights, arts. 16, 17, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *reprinted in* 6 ILM 368 (1967).

22. CONST. ARG. art. 75(22).

23. *See* M. GOLDSTEIN, DERECHO DE AUTOR 187 (1995).

24. *See* Law No. 11723, art. 32, Sept. 28, 1933 [1920-1940] A.D.L.A. 450.

son(s), or in their absence, from the deceased's parents.[25] Consent may be revoked if any damages caused by such revocation are indemnified. Also, no consent is necessary when the use of protected attributes appears in a publication related to scientific, educational or cultural purposes, nor is consent necessary with facts or events of public interest or that have taken place in public.[26] Personal letters are also granted a similar protection because the right to their publication belongs to the author.[27]

As previously indicated, Argentine copyright law includes express provisions protecting a person against the unauthorized use of one's photograph. These provisions apply to the use of a person's image or voice in drawings, caricatures, paintings, dolls, sculptures, films, television, theatrical exhibitions, etc.[28] However, these provisions should be construed as only protecting a person's identity. The limits of the protection granted by the Copyright Law in this area are not clear. Some authorities indicate that the protection only extends to commercial use,[29] while others understand that any type of reproduction of a person's image will be covered by the provisions of the Copyright Law.[30]

A violation against a person's right to one's image will result even if no negative message or circumstances are associated with such image within its context and use.[31] Neither is it necessary to show that harm exists against a person's privacy, intimacy, or peace of mind.[32] The right to a person's image, under Article 31 of the Copyright Law, may not be assigned as a whole, but reproductions of the image may be authorized.[33] Such authorization, under appropriate circumstances, may be found by implication, particularly if consideration is paid for the use of the image.[34] However, if authorization is given for a specific use, it may not be extended to any other use. For example, authorization to publish a photograph in a sports magazine could not be extended for the photograph's publication in a medical journal.[35]

---

25. *Id.* art. 31.
26. *Id.*
27. *Id.* art. 32.
28. *See* CIFUENTES, *supra* note 4, at 522.
29. *See* Villalba & Lipszyc, *Protección de la Propia Imagen*, [1980-C] L.L. 815.
30. *See* CIFUENTES, *supra* note 4, at 523.
31. *Id.*
32. *Id.*
33. Law No. 11723, Sept. 28, 1933, [1920–1940] A.D.L.A. 449.
34. *See* "Saslavsky," CNCiv. [1976-B] L.L. 31.
35. *See* CIFUENTES, *supra* note 4, at 528.

An exception to a person's right to protect one's image under the Copyright Law arises with facts or events of public interest or events that have taken place in public. However, this exception applies only if the use of a person's image is in the context of a publication related to the facts or events on which the exception is based. For example, if a person is photographed during a basketball game, that photograph may be published in the sports pages of newspapers, but may not be used to advertise an unrelated product.[36]

Similar to the Copyright Law, Argentine trademark laws are implicated within the concept of publicity rights. Article 3(h) of Law 22362 (hereinafter the Trademark Law) provides that the name, pseudonym, or portrait of a person may not be used as a trademark without consent of that person or his or her heirs.[37] Consent is also necessary for the use of personal names as trade names.[38]

The right of publicity is protected by Argentine trademark law from two perspectives. First, if a certain aspect of a person's identity is used or registered as a trademark, an exclusive property right arises with regard to such trademark.[39] Trademark protection may apply to aspects such as a person's name, photograph, picture, or likeness.[40] This type of protection does not create a highly personal right. Trademark rights are not inherent to a person and thus may be freely transferred.[41] Rights resulting from registration have a ten-year limit, although they may be renewed.[42] However, registration rights lapse if the trademark is not used for a five-year period.[43] The protection granted to both registered and *de facto* trademarks is limited to the use by third parties of such trademark in connection with goods or services that may compete with those of the trademark owner, or with those indicated by the trademark owner upon registration.[44] Second, the elements of a person's identity may not be used or registered as a trademark without such person's authorization or the authorization of one's heirs.[45] This rule is expressly established in the case of names, pseudonyms,

36. *See* "Iribarren," CNCiv. [1943-II] J.A. 309.

37. Law No. 22362, art. 3(h), Dec. 26, 1980, [1981-A] A.L.J.A. 8.

38. *Id.* art. 29.

39. *See* Law No. 22362, art. 1, Dec. 26, 1980, [1981-A] A.L.J.A. 8.

40. *Id.*

41. *Id.* art. 6.

42. *Id.* arts. 5, 23(b).

43. *Id.* arts. 5, 26.

44. *See generally* L.E. BERTONE & G. CABANELLAS, DERECHO DE MARCAS (1989) (discussing trademark protection in Argentina).

45. *See* Law No. 22362, art. 3(h), Dec. 26, 1980, [1981-A] A.L.J.A. 8.

and portraits in Article 3(h) of the Trademark Law.[46] These elements may not be registered as trademarks without previous authorization.[47] If they are used as trademarks without prior registration, such use may be legally attacked under other rules or principles, such as those derived from the Law of Names,[48] but will not constitute an infringement under the Trademark Law. Although these statutes explicitly restrict the use of a public figure and private person's identity, case law tends to limit protection granted to the identities of private persons.[49]

Under Argentine law, a "trade name" identifies a certain activity whereas a trademark identifies a good or service. In certain cases, particularly service trademarks, the functional characteristics of trade names and trademarks become practically identical. Rights to trade names are acquired by means of the use of the trade name,[50] which implies that aspects of a person's identity may receive legal protection. An exclusive right to their commercial use will be acquired by means of the use of such elements to identify an activity. This exclusive right will only extend to activities that compete with those that originated the exclusive right to the trade name.[51] Conversely, use of a trade name and the acquisition of rights to a trade name by means of such use are restricted if they imply using the name, pseudonym, or picture of a person without such person's authorization or their heirs' authorization.[52]

There are few statutory rules governing corporate names. These rules do not clearly state what protection they afford. The definition of rights to corporate names is primarily the product of case law.[53] The use of a corporate name, or the registration of a corporation in the Public Registry of Commerce, results in a right to the name.[54] The corporate name may include the name or pseudonym of individuals, and thus may become an indirect way to protect these individuals. However, the exclusive rights granted to

---

46. *Id.*

47. In the case of pseudonyms, a strong argument can be made that only pseudonyms achieving notoriety are entitled to protection from being used by third parties as trademarks. *See* Law No. 18248, art. 23, June 10, 1969, [1969-A] A.L.J.A. 413.

48. Law No. 18248, June 10, 1969, [1969-A] A.L.J.A. 413.

49. *See, e.g.*, "Fiorucci S.A.," CNEspecial Civ. y Com. (Buenos Aires), *available in* 7 REVISTA DEL DERECHO INDUSTRIAL 95 (1985); *see also infra* note 73 and accompanying text.

50. *See* Law No. 22362, art. 28, Dec. 26, 1980, [1981-A] A.L.J.A. 8.

51. *See id.*

52. *See id.* art. 29.

53. *See generally* E. CORNEJO COSTAS, TRATADO DEL NOMBRE SOCIAL (1989).

54. *See id.*; *see also* G. Cabanellas, *El Contrato de Sociedad, in* G. CABANELLAS, 2 DERECHO SOCIETARIO (1993).

corporate names are rather limited.[55] The standards used to define whether an unacceptable degree of confusion exists between different corporate names are much weaker than those of trademarks or trade names.[56] The registration mechanisms are such that if the same or similar corporate name is used in a different province or in connection with a different type of business association, the rights to a corporate name can only be asserted by bringing suit.[57] As with trademarks and trade names, it is possible for an individual to prevent the use of one's name or pseudonym as the corporate name of an unauthorized entity.[58]

Also, Article 21 of the Law of Names prohibits the use of a person's name without the person's consent, including the malicious use of a name for designating a fictitious character or thing.[59] According to Article 21 of the Law of Names, if a person's name is used by another person for the latter's designation, the person entitled to the name may obtain damages and an injunction against further illegal uses of the name involved.[60] Additionally, Article 23 of the Law of Names provides similar protection for pseudonyms.[61]

Complaints based on a violation of Article 21 of the Law of Names may only be brought by the person legally entitled to the name.[62] This standing requirement limits the commercial value of the protection granted by the Law of Names.[63] The right to a personal name is not assignable and may not be licensed in connection with personal uses, although as in the case of a trademark, it may be licensed for commercial use. Thus, the commercial development and exploitation of a person's name will generally require the acquisition of trademark or trade name rights.[64] Article 23 of the Law of Names grants pseudonyms that have acquired notoriety the same protection as individual names.[65]

---

55. *See generally* CORNEJO COSTAS, *supra* note 53.
56. *Id.*
57. *Id.*
58. *Id.*
59. *See* Law No. 18248, art. 21, June 10, 1969, [1969-A] A.L.J.A. 413.
60. *See id.* art. 21.
61. *Id.* art. 23.
62. *Id.*
63. *Id.*
64. *See supra* Part II.B.2.
65. Law No. 18248, art. 23, June 10, 1969, [1969-A] A.L.J.A. 413.

3. Right to Intimacy and Privacy

Argentine law also provides protection for aspects of personal intimacy. The right to intimacy is generally protected by Article 1071-*bis* of the Civil Code.[66] The use of a person's name, likeness, voice, or photograph without the person's authorization may, under certain circumstances, constitute a violation of Article 1071-*bis* and give rise to tort liability. Article 1071-*bis* provides that any person who arbitrarily intrudes into another person's life, publishes portraits, publicizes correspondence, mortifies another person with regard to one's habits or feelings, or otherwise damages his or her intimacy shall be forced to cease such activities and to indemnify the damages caused.[67]

The leading case is *Ponzetti de Balbín v. Editorial Atlántida*.[68] In that case, a weekly newspaper published a photograph of a prominent politician while he was in an intensive care unit. The politician died shortly thereafter, and his widow and sons filed a lawsuit against the publishers based on the violation of privacy.[69] The publisher's conduct was found to exceed the limits allowed by the freedom of the press, and thus constituted an infringement on the privacy and intimacy rights protected by both Article 19 of the Federal Constitution and by Article 1071-*bis* of the Civil Code.[70] Other cases have recognized similar rights, including one case where a publication falsely and comically indicated that a person had died,[71] and another case where the defendant published a picture of a professional model in a ridiculous position.[72]

Both of these cases involved more than the mere publication of a person's photograph. A picture of a person on his or her death-bed, the creation of a false and harmful impression on a person's acquaintances, and placing a person's image in a ridiculous setting certainly go beyond merely using a person's photograph without consent. These cases also suggest that a stricter standard applies when the publication uses elements of a person's

---

66. CÓD. CIV. art. 1071-*bis*.

67. *Id.*

68. "Ponzetti de Balbin," CSJN, [1985-B] L.L. 114; *see also* Rivera, *Libertad de Prensa y Derecho a la Intimidad*, [1985-B] L.L. 114; Morello, *La Corte Suprema y el Nuevo Derecho a la Privacidad*, [1985-I] J.A. 510.

69. "Ponzetti de Balbin," at 114.

70. *Id.*; *see* CONST. ARG. art. 19; CÓD. CIV. art. 1071-*bis*.

71. *See* Mosset Iturraspe, *Broma, Chanza o Burla Mortificante*, [1981-D] L.L. 447.

72. *See* Bidart Campos, *Una Condena al Sensacionalismo Periodístico por Agraviar la Privacidad de Una Persona*, 136 E.D. 236 n.3 (1990).

identity when that person is not a publicly known figure.[73] Any damage to such person's reputation, prestige, or reasonable feelings must be redressed.[74]

4. Criminal Code

Finally, right of publicity violations may be criminally sanctionable under the Argentine Criminal Code. If the unauthorized use of another's personal attributes constitutes libel or slander, damages a person's honor or reputation, or falsely attributes to a person the commission of a crime, such use may be enjoined and punished under the Argentine Criminal Code.[75] Although libel, slander, or defamation may constitute a crime under Argentine law, the mere use of a person's identity will not result in libel, slander, or defamation if such use is not accompanied by elements relating to the commission of a crime or insulting expressions.[76] Thus, the Criminal Code is generally not effective to protect aspects of a person's identity from exploitation by third parties, unless the exploitation takes place in a particularly negative or derogatory context.[77]

Also, if the unauthorized use amounts to unfair competition, Article 159 of the Argentine Criminal Code may be implicated.[78] These provisions, however, are extremely vague, rarely used, and have yet to be applied to right of publicity claims.

III. CONTOURS OF THE ARGENTINE RIGHT OF PUBLICITY

A. Formalities and Duration

The right to protect a person's identity from unauthorized use begins with the person's existence.[79] No registration or public document is necessary for protection, although certain types of registration or documentation may strengthen the right of publicity. For example, the registration of a person's name as a trademark allows the imposition of

---

73. *See* Pereiro, *El Derecho a la Intimidad en el Código Civil y su Raíz en el Artículo 19 de la Constitución National*, [1990-A] L.L. 174.

74. *See id.*

75. CÓD. PEN. arts. 109, 110.

76. *See id.* arts. 109, 110.

77. *See id.*

78. CÓD. PEN. art. 159.

79. *See generally* CIFUENTES, *supra* note 4.

criminal penalties against an unauthorized use of such name as a trademark.[80] Identifying a business activity through the use of protected attributes of a person's identity triggers the legal protection granted to trade names, which also includes criminal penalties.[81]

The right of publicity, as described above, extends throughout a person's life. After a person's death, several aspects of the right of publicity will remain effective. This is analogous to trademark and trade name protection, both as a right to elements of a person's identity, which are either registered as a trademark or used as a trade name, and as a right to prevent the unauthorized use or registration of such elements as trademarks and trade names.[82] Under copyright protection, the right of publicity remains in effect so long as a direct descendant of the copyright owner is alive.[83]

B. Transferability

The right of publicity is not transferable as a whole. Rather, the ability to transfer publicity rights must be determined by identifying the right as a bundle of legal elements. Some of these elements, such as the elements protected by copyright and trademark laws, may be assigned or otherwise transferred.[84] Other elements, such as those related to an individual's name, may not be assigned entirely but may be transferred in a limited way.[85] Depending upon which legal basis one asserts for a right of publicity claim (e.g., the Argentine Constitution, highly personal right, the Copyright Law, the Trademark Law, or the Law of Names), the right may or may not be transferable.[86]

For example, highly personal rights are subject to limitations on assignment or transfer.[87] Because these rights are closely associated with the legal existence of a person, they therefore cannot exist apart from such person. Accordingly, publicity rights claimed based on their similarity to highly personal rights are a birth right only and are not assignable.[88]

---

80. *See generally* Law No. 22362, art. 31, Dec. 26, 1980, [1981-A] A.L.J.A. 8.
81. *Id.*
82. *See supra* Part II.B.2.
83. *See* Law No. 11723, art. 31, Sept. 28, 1933, [1920–1940] A.D.L.A. 449.
84. *See* CIFUENTES, *supra* note 4, at 186.
85. *See* Law No. 18248, art. 15.
86. *See supra* Part II.B.
87. *See supra* text accompanying note 7.
88. *See id.*

By contrast, publicity rights derived from the Trademark Law, trade name law and unfair competition rules are generally transferable. These rights are viewed as essentially economic in nature and often arise in business transactions. In the case of unfair competition violations, the damaged party may waive his or her rights and terminate the lawsuit after a criminal action has started.[89]

The Copyright Law protects different elements of a person's identity and allows one to authorize the use of these elements. The extent of such authorization depends on the authorizing person's intent. Such authorization differs from normal contractual consent because the authorizing person may revoke the authorization, although the person will then be liable for the damages caused by the termination.[90] In addition, the right to authorize the use of a person's identity passes to the person's heirs.[91] If a copyright violation does take place, the copyright owner may waive his or her rights.[92]

A general assignment, transfer, or waiver of the right to intimacy or privacy protected by Article 1071-*bis* of the Civil Code[93] is inadmissible to defend against an infringement claim.[94] However, when a tort has been committed under this provision of the Code, the copyright owner may also waive the indemnification rights that result.[95]

C. Descendability

Some elements of the right of publicity survive the person whose identity is involved, while other elements terminate at death. Under the Trademark Law, once an element of a person's identity is protected, it is possible to perpetuate the publicity rights by renewing the trademark registration. However, in the case of the protection of a person's name or identity against its use as a trademark, the right to such protection expires with the death of the person's heirs.[96] Similarly, under the Copyright Law, protection of a person's image and identity extends after a person's death to the person's heirs.[97]

---

89. *See* CÓD. PEN. art. 73.
90. Law No. 11723, art. 31, Sept. 28, 1933, [1920–1940] A.D.L.A. 449.
91. *Id.*
92. *Id.*
93. CÓD. CIV. art. 1071-*bis*.
94. *See* CIFUENTES, *supra* note 4, at 186.
95. *See* CÓD. CIV. art. 1100.
96. *See* Law No. 22362, art. 3(h).
97. Law No. 11723, art. 31, Sept. 28, 1933, [1920–1940] A.D.L.A. 449.

By contrast, protection asserted based on privacy or intimacy requires the heirs to file the action and show that they or other relatives suffered some type of redressible damage as a result of the infringement of the deceased's privacy.[98] Otherwise, the general rule is that torts causing only moral damages are not actionable after the death of the aggrieved person, unless such person filed the relevant action before death.[99]

D. Possible Conflicts of Law, Jurisdiction, and Standing Requirements

The applicable conflicts-of-law rules depend on whether a civil or criminal violation exists. In civil cases, the applicable law will likely be that of the place in which the tort took place. However, there is a trend toward using a center-of-gravity approach, whereby the applicable law will be that of the country with which the tortfeasor has closest contacts.[100] Hence, there may be cases in which an Argentine court will apply foreign substantive rules.

In criminal cases, such as crimes involving trademark violations or libel and slander, the general rule is that Argentine courts will apply Argentine law if the violation occurs or has effects in Argentina.[101] Otherwise, the Argentine courts will not exercise jurisdiction if Argentine law is not applicable according to that conflict-of-law rule.

Jurisdiction in civil cases is based on the plaintiff's election between the place in which the tort took place or the defendant's domicile.[102] This choice determines international jurisdiction as well as territorial jurisdiction within Argentina. Argentine courts will not refuse jurisdiction on the basis that the plaintiff or the defendant is not domiciled in Argentina. However, plaintiffs without assets in Argentina may be required to post a bond for court costs.

Standing is based on the existence of a legitimate interest of the plaintiff, particularly as the holder of a right that has been infringed. Under Argentine law, it is possible for the aggrieved parties to file criminal actions in connection with most violations of publicity rights which may constitute criminal conduct.

---

98. *Id.*

99. CÓD. CIV. art. 1099.

100. *See* A. BOGGIANO, 2 DERECHO INTERNACIONAL PRIVADO 1157 (1983).

101. *See* CÓD. PEN. art. 1(l).

102. *See* CÓD. PROC. CIV. Y COM. art. 5(4).

IV. LEGAL ELEMENTS OF THE RIGHT OF PUBLICITY

A. Proving the Cause of Action

Because the right of publicity is essentially a bundle of rights derived from various statutory rules and legal concepts, it is difficult to delineate the elements of the cause of action in a right of publicity suit.[103] Hence, the elements of the cause of action are determined on a case-by-case basis, depending upon the statute or legal concept used.

Under the Copyright Law, which is interpreted to closely resemble the right of publicity rules existing in other jurisdictions,[104] a cause of action consists of the unauthorized use of a person's image or other elements of a person's identity by means of reproducing the image or elements. Although the text of the Copyright Law requires commercial use of the image or elements, case law has eroded this requirement.[105] Also, the plaintiff is not required to show malice, the loss of business or clients, defamation, harassment, or the invasion of privacy.[106] Tortious conduct results from the mere reproduction of a person's identity, with the exceptions of public interest or public events cases.[107]

If a cause of action is based on the Trademark Law, it is necessary to show that an aspect of a person's identity constituting a trademark is used without authorization in a manner that infringes on the owner's rights.[108] In principle, only "trademark-like uses" are restricted by the exclusive rights of the trademark owner. Thus, use of a trademark, such as one formed by a person's name, will not constitute a trademark infringement if the use consists of merely mentioning such trademark in a newspaper article. However, there are several types of non-trademark uses of a trademark that may be illegal, particularly by virtue of unfair competition rules.[109] For example, a single component bearing a trademark placed in a larger production item[110] is a valid use of that trademark, but may be illegal if the

---

103. *See* discussion *supra* Part II.B.

104. The protection of publicity rights pursuant to Article 31 of the Copyright Law is methodologically misleading. The rights granted by Article 31 are not strictly intellectual property rights. Rather, the recognition of such rights was intended to protect individuals from the rights of copyright owners, in particular the authors of photographs.

105. *See supra* Part II.B.

106. *Id.*

107. *Id.*

108. *See* Law No. 22362, art. 31, Dec. 26, 1980, [1981-A] A.L.J.A. 8.

109. *See id.*

110. For example, a name-brand auto part used in the production of an automobile, or a

component is used in an unusual way meant to harm the reputation of the component's trademark.[111]

If the cause of action is based on the rules of privacy or intimacy,[112] it will be necessary to show that an intrusion has been made into a person's privacy circle. Thus, a public figure may not claim redress under the privacy rules simply because certain aspects of his or her life have been published and thereby becomes public knowledge. However, if an exceptionally private aspect of a public figure's life is exposed to the public, for example, a death bed scene,[113] a cause of action under the privacy rules will arise. For private figures, any intrusion into an individual's private life may be considered tortious. However, in both cases of publicly-known figures and private individuals, it is necessary to show certain types of damages for a valid claim. The conduct must "mortify a person's habits or feelings."[114] This vaguely phrased condition grants the courts wide discretion to redress any perceived emotional harm or intrusion into a person's privacy.[115] The latter is a vague standard and it gives some leeway to individual preferences. If a person chooses a life of seclusion, courts will be more likely to order redress than if a person publicly adopts a position of permissiveness toward intrusions into what normally constitutes a person's intimacy or privacy.[116]

When protection is sought under the Law of Names,[117] it is necessary to show that the plaintiff's name is used to identify a person not entitled to it. However, if the name is used to identify things or fictional characters, it is necessary to show that the use was malicious.[118] This additional element becomes particularly important when no relevant damages arise because, in other cases, wrongful use of a name by a person is illegal even if the harm is unintentional. However, that will not be the case if the name is applied to things or fictional characters. When protection is sought in connection with

---

name-brand computer chip placed in a computer.

111. *See* Law No. 22362, art. 31, Dec. 26, 1980, [1981-A] A.L.J.A. 8.

112. *See supra* Part II.B.

113. *See supra* note 68.

114. CÓD. CIV. art. 1071-*bis*.

115. *Id.*

116. *See* Bidart Campos, *Una Condena al Sensacionalismo Periodístico por Agraviar la Privacidad de Una Persona*, 136 E.D. 236 (1989).

117. *See supra* Part II.B.

118. *See* Law No. 18248, art. 21, June 10, 1969, [1969-A] A.L.J.A. 413.

a pseudonym, it is necessary to show that the pseudonym acquired a minimum level of notoriety.[119]

Finally, an action based on unfair competition law consists of two elements. First, the plaintiff and the defendant must have competing businesses. Second, the plaintiff must prove that the defendant illegally used an aspect of the plaintiff's identity without authorization to attract the plaintiff's clients.[120] Particularly, an unauthorized use of the plaintiff's identity that results in the attraction of clients away from the plaintiff's business to the defendant's business would be illegal.

B. Defenses: Media and Other "Speech Product"

No general set of defenses applicable to all types of right of publicity actions can be defined under Argentine law. Rather, the applicable defenses depend on the type of action involved. If the action is based on the rights to a person's image protected by the Copyright Law,[121] Article 31 of Law 11723 provides that publication is allowed if it relates to scientific, teaching, or cultural purposes or with public interest events or with events that have taken place in the public.[122] This defense should not be applied mechanically. For example, if a spectator is photographed at a public event, the photograph may not be used in connection with a different event or in another context.[123] Also, if athletes are photographed in the context of a public game, such photographs may not be used without their authorization, for example, on a chocolate bar's wrapper.[124] The right to publication of aspects of a public event is limited to the conveyance of information about that event and does not extend to commercial or other purposes.[125]

If publicity rights are derived from trademark registration or use, a defense may be that the aspect of a person's identity that constitutes a trademark has not been used as such. Mentioning a trademark or trade name in a newspaper article or other publication will not constitute trademark or trade name use or infringement.[126]

---

119. *Id.* art. 23.

120. CÓD. PEN. art. 159.

121. *See supra* Part II.B.

122. Law No. 11723, art. 31, Sept. 28, 1933, [1920–1940] A.D.L.A. 443.

123. *See* CIFUENTES, *supra* note 4, at 534.

124. *See* C.J. ZAVALA RODRÍGUEZ, PUBLICIDAD COMERCIAL: SU RÉGIMEN LEGAL 529 (1947).

125. *Id.*

126. *See* J. OTAMENDI, DERECHO DE MARCAS 247 (1989).

If an action is based on the violation of the rules of privacy or intimacy,[127] courts balance free speech with privacy rights. If a private person or situation is involved, courts tend to apply a relatively strict standard against the publication. If damage is caused to the person whose privacy is affected, the publisher must show a legitimate public interest in publishing the offending document to establish a valid defense. However, if a public personality or situation is involved, the standard is defined by the normal public interests and normal practices of the press.[128] Courts will not accept the existence of public interest as a defense if such interests are deemed immoral or morbid, as in cases involving illnesses, physical defects, or intimate activities of a public personality.[129] Furthermore, defenses are significantly weaker if elements of a person's identity are associated with a product's advertising. The exceptions and defenses provided by the copyright statutes are inapplicable, and the privacy provisions of the Civil Code will be strictly applied without the usual free speech balancing test.

Finally, statute of limitation defenses vary depending on the remedy involved. Violation of a person's privacy or intimacy rights under the Civil Code or the rights to the elements of a person's image protected by the Copyright Law constitute torts subject to a two-year statute of limitation.[130] Violation of trademark rights are subject to a three-year term of limitation.[131]

C. Remedies

The remedies available to a plaintiff upon proving an infringement of his or her right of publicity are generally broad. Civil damages will be applicable in all cases, including both pecuniary and "moral damages," akin to damages for pain and suffering.[132] Although Argentine courts are generally reluctant to grant moral damages, they are more likely to award such damages in privacy cases because the actual damages tend to be nominal.

Injunctions are also generally applicable in right of publicity cases. Injunctions are specifically ordered by Article 1071-*bis* of the Civil Code in the case of violations of privacy or intimacy rights. In cases based on other

127. CÓD. CIV. art. 1071-*bis*.

128. *See* "Ponzetti de Balbin," CSJN, [1985-B] L.L. 114.

129. *See* discussion *supra* Part II.B.3.

130. CÓD. CIV. art. 4037.

131. Law No. 22362, art. 36, Dec. 26, 1980, [1981-A] A.L.J.A. 10.

132. *See* CÓD. CIV. art. 1078.

provisions, the injunctions may result from the general equitable powers possessed by Argentine courts.

In some cases, particularly those that imply the violation of trademark rights, criminal sanctions in the form of fines and imprisonment are also applicable.[133] Criminal sanctions may be unavoidable if libel or slander exist together with the violation of a person's rights of publicity. If a trademark violation exists, the court can order the removal of the infringing elements from the goods bearing the mark.[134] Although a similar remedy is not expressly provided for other violations of publicity rights, it may be applied by the courts based on their general powers to order the termination of tortious conduct. In addition, in cases of violation of privacy or intimacy rights defined by Article 1071-*bis* of the Civil Code,[135] the court may order the publication of its decision condemning the acts of the defendant if it deems such publication necessary for the proper redress of the damage caused to the plaintiff's privacy. Finally, it should be noted that the general rule under Argentine law is that the loser pays the winner's litigation costs, providing the successful plaintiff with an additional remedy.

V. CONCLUSION

This Article has discussed the development of and legal foundations for publicity rights in Argentina. Such rights have developed by means of a gradual change in substantive laws directed at problems only incidental to the right to exploit the different aspects of a person's identity. Future developments will likely follow the same lines, particularly by means of case law interpreting the very broad provisions of Argentine statutory law with regard to copyright, trademark, and personal and privacy rights. It is likely that the spread of information technology, especially the ease with which images and information about public figures and private individuals alike are transmitted, in Argentina will have profound effects on the country's economy. In turn, such developments will likely make publicity rights litigation more common and provide more opportunities for Argentine courts to resolve important issues, particularly those involving torts with elements in different countries. Certainly, many of these issues will be clarified by the courts in the coming years.

---

133. *See* Law No. 22362, art. 31, Dec. 26, 1980, [1981-A] A.L.J.A. 10.

134. *Id.*

135. CÓD. CIV. art. 1071-*bis*.