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THE RIGHT OF PUBLICITY UNDER ITALIAN CIVIL LAW

*Silvio Martuccelli**

I. INTRODUCTION

The use of a name, likeness, voice, photograph, or other distinguishing characteristics to conjure up the image of a well-known personality is likely to increase the marketability of consumer products or services. Celebrity endorsements generate consumer interest in advertised goods and services by associating familiar images with them, increasing public curiosity about and improving the attitude of the public towards such products. The unauthorized use of a celebrity's persona for commercial purposes, however, can result in both personal and economic injury to the individual whose persona has been used.

Over the last forty years in the United States, and more recently in Italy, the "right of publicity" has developed to protect against unauthorized commercial exploitation of one's persona.¹ While the right of publicity

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1. See Serafino Gatti, *Il "diritto" alla utilizzazione economica della propria popolarità* [The "Right" to the Commercial Exploitation of One's Own Popularity], in *RIVISTA DEL DIRITTO COMMERCIALE* [COMMERCIAL LAW REVIEW] 355-64 (1988); Richard B. Hoffman, *The Right of*

exists by statute and common law in the United States, Italian law does not expressly provide for such protection.² As is common in civil law countries, however, a person may be able to protect his or her persona from unauthorized commercial exploitation by relying on a number of statutory enactments protecting individual privacy,³ one's "image," one's name, and to some degree, copyrights.⁴ In addition, Italian judges are statutorily authorized to "reason by analogy" when deciding cases—a process called *analogia iuris* and *analogia legis*—allowing them to apply existing statutory rules on similar subjects and to rely on the general principles of the

Publicity—Heir's Right, Advertiser's Windfall, or Court's Nightmare?, 31 DEPAUL L. REV. 1, 1 (1981).

2. For a survey of American states providing the right of publicity either by statute or common law, see J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6.1[B], at 6-6, § 9.5[A], at 9-31 (1996).

3. In general, the right of privacy includes the right to avoid unauthorized and unjustified intrusions into one's private life that can interfere with personal feelings and cause distress, embarrassment, and humiliation. See William L. Prosser, *Privacy [A Legal Analysis]*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY* 107 (F. D. Shoeman ed., Cambridge Univ. Press 1984) ("Th[e] close link between autonomy and privacy explains why breaches of privacy are about much more than just intrusion, embarrassment, unwanted publicity, or loss of earnings, which in law are damages associated with violations of privacy."); see also William L. Prosser, *The Right to Privacy*, 48 CAL. L. REV. 383, 389 (1960) (arguing that the tort of invasion of privacy generally consists of four categories, including: (1) intrusion upon one's seclusion or solitude or into one's private affairs; (2) public disclosure of embarrassing private facts; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness). Dean Prosser's four privacy torts, as well as the seminal article on the subject by Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), have each influenced the development of the privacy tort world-wide. 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 Warren and Brandeis article as a catalyst in the development of privacy rights in Europe and South America); Elisabeth Logeais & Jean-Baptiste Schroeder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona*, 18 LOY. L.A. ENT. L.J. 511 (1998) (describing the Warren and Brandeis described notion of privacy as adding to the development of privacy torts, including the privacy-based aspects of the French right of image).

4. See, e.g., Guillermo Cabanellas, *The Right of Publicity Under Argentine Law*, 18 LOY. L.A. ENT. L.J. 449 (1998) (describing the Argentine right of publicity as a product of the Argentine Federal Constitution, various international agreements on human rights, and Argentine copyright, trademark, and name laws); Logeais & Schroeder, *supra* note 3, at 512 (describing the French right of image, analogous to the right of publicity, as a product of the French Civil Code, Penal Code, and copyright laws); Nigri & Gandelman, *supra* note 3, at 470 (describing the Brazilian right of publicity as a product of the Brazilian Constitution, copyright laws, and the concept of "neighboring rights"). The similarity between Italy and other civil law countries regarding the manner in which rights are derived from broad and distinct bodies of statutory law is no coincidence, considering the influence of the Roman civil law tradition on other European nations and their colonies and former colonies. See THOMAS GLYN WATKIN, *THE ITALIAN LEGAL TRADITION* 1 (1997).

legal order of the State.⁵ Indeed, the Italian right of publicity owes much of its creation and continuing viability to this process.

This Article discusses how the combination of Italian statutes and judicial interpretations has created a right to protect one's persona from commercial exploitation, analogous to the American right of publicity. Part II introduces the history of Italy's version of the right of publicity, focusing on the Italian Civil Code and judicial interpretations applying Civil Code provisions to new situations. Additionally, this Part explains the rationales which form the basis for recognizing the right of publicity in Italy. Part III describes the cause of action and defenses for this right, as well as the remedies available to the plaintiff whose right is infringed. Part IV discusses how a foreigner may bring a right of publicity claim in Italy. Part V discusses the transferability and descendibility of the right of publicity. Finally, this Article concludes that although the right of publicity is at present an unclear and evolving legal doctrine in Italy, it is following the path of the American right of publicity and is destined to play a prominent role in the immediate future.

II. EXISTENCE OF THE RIGHT OF PUBLICITY: ITS HISTORY AND RELATIONSHIP WITH OTHER BODIES OF LAW

As introduced above, Italian law is the product of one of the world's oldest civil law traditions, Roman civil law.⁶ Also, like many other civil law countries, the Italian codes are modeled after one of the most copied systems, the French *Code Civil*.⁷ Today, however, the Italian Constitution⁸ occupies the highest place in the hierarchy of Italian legal sources.⁹ After the Constitution, the Italian codes and a number of free-standing legislative decrees make up the main body of Italian law.¹⁰ Italy currently has five distinct codes: the Civil Code,¹¹ the Code of Civil Procedure,¹² the Code of Criminal Procedure,¹³ the Navigation Code,¹⁴ and the Penal Code.¹⁵

5. See *infra* Part II.

6. See WATKIN, *supra* note 4, at 1.

7. See *id.* at 25. Indeed, Spain and Portugal, as well as all the nations that were once colonies of these countries, modeled their civil law systems after the French codes. *Id.* Thus, Central and South America are composed of countries with legal systems modeled after the French codes. *Id.*; see, e.g., Cabanellas, *supra* note 4 (discussing Argentine law); Nigri & Gandelman, *supra* note 3 (discussing Brazilian law).

8. Costituzione [Constitution] [COST.] 1948 (Italy).

9. See WATKIN, *supra* note 4, at 43.

10. See *id.*

11. Codice civile [C.C.] (now merged with the Commercial Code).

12. Codice di procedura civile [C.P.C.].

13. Codice di procedura penale [C.P.P.].

One of the main obstacles to securing effective protection for one's publicity rights in Italy is the fact that the right of publicity is not expressly enumerated by statute. Rather, a right of publicity exists as a result of the Italian Civil Code's empowerment of the courts to use the processes of *analogia iuris* and *analogia legis*.¹⁶ Using this process, courts can look to existing civil statutory enactments and "reason by analogy" to apply principles gleaned from those bodies of law to the present situation. Accordingly, a discussion of which laws and cases to which a court might refer is necessary to determine the scope of the Italian right of publicity.

A. Statutory Protection for Name, Pseudonym, Image, and Copyright

A number of distinct Italian laws provide protection for analogous aspects of one's publicity rights. Just as the right of publicity is concerned with prohibiting the unauthorized commercial exploitation of one's personal attributes, the Italian Civil Code prohibits the unauthorized use of a person's name, pseudonym, and image (or photograph), and protection for similar attributes exists under Italian copyright laws.

For example, article 6 of the Italian Civil Code provides a right to protect the integrity of one's name from improper or unauthorized use:

Right to Name. Every person has a right to the name given [him or her] according to law. The name includes the given name and the surname. No changes, additions, or corrections of names are permitted, except in the cases and subject to the formalities [as] indicated by law.¹⁷

Additionally, article 7 of the Civil Code provides a judicial remedy for violation of the right to name:

Protection of [the] right to name. A person whose right to the use of his [or her] name is contested or who may be prejudiced by the

14. Codice della navigazione [C. NAV.].

15. Codice penale [C.P.].

16. See C.C. (*Disposizioni sulla legge in generale*) [General Provisions of the Law] art. 12, translated in 1 ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION bk. 2, ch. II, art. 12 (Mario Beltramo et al., trans. 1991). Article 12 provides:

Interpretation of Statutes. In applying statutes no other meaning can be attributed to them than that made clear by the actual significance of the words, according to the connection between them, and by the legislative intent. If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to the general principles of the legal order of the State.

Id.

17. C.C. (*Delle persone e della famiglia*) [Persons and the Family] art. 6, translated in 1 ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION bk. 3, tit. I, art. 6.

use made of it by others, can judicially request that the injurious practice be terminated, without prejudice to the right to [recover] damage[s]. The court can order that the decision be published in one or more newspapers.¹⁸

The protection afforded a person's given name under articles 6 and 7 of the Civil Code also cover a pseudonym when it is "used by a person in such manner as to have acquired the importance of a name."¹⁹

Italian law also protects the "right of image," providing the ability to prohibit the use of one's photograph or likeness without authorization. article 10 of the Italian Civil Code provides:

Abuse of another person's likeness. Whenever the likeness of a person, or of his parent, spouse, or child, has been exhibited or published in cases other than those in which such exhibition or publication is permitted by law, or in a manner prejudicial to the dignity or reputation of such person or relative, the court, upon request of the interested party, can order the termination of the abuse without prejudice to the right to damages.²⁰

Similarly, Italian copyright laws protect authors' rights and other rights related to copyrights.²¹ Specifically, article 96 of the 1941 Copyright Law provides that the "portrait of a person may not be displayed, reproduced or commercially distributed without the consent of such person."²² Consent of the subject is not required, however, when

[T]he reproduction of the portrait is justified by his [or her] notoriety or his [or her] holding of public office, or by the needs of justice or the police, or for scientific, didactic, or cultural reasons, or when reproduction is associated with facts, events and ceremonies which are of public interest or have taken place in public. The portrait may not, however, be displayed or commercially distributed when its display or commercial

18. *Id.* art. 7.

19. *Id.* art. 9.

20. *Id.* art. 10.

21. See Law No. 633 of April 22, 1941 (*Gazz. Uff.*, July 16, 1941, n.166) (certain portions codified as amended at C.C. arts. 2575-2583, *translated in* 2 ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION bk. 7, tit. IX, ch. II, arts. 2575-2583) [hereinafter the "Copyright Law"]. The Copyright Law also recognizes rights "connected with the exercise of copyright." PAUL E. GELLER & MELVILLE B. NIMMER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE [Italy] § 9[1], at ITA-70. Such rights are referred to internationally as "neighboring rights" and are often looked to for protection of publicity rights. *Id.*; see also Nigri & Gandelman, *supra* note 3, at 475.

22. Law No. 633 of April 22, 1941, art. 96 (*Gazz. Uff.*, July 16, 1941, n.166), *translated in* 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD ch. VI, § II, art. 96 (1956).

distribution would prejudice the honor, reputation or dignity of the person portrayed.²³

Accordingly, one can look to a broad spectrum of laws meant to protect various attributes of one's persona that, when used for commercial purposes without authorization, would constitute a right of publicity violation.

B. Judicial Creation of the Italian Right of Publicity

In 1984, an Italian court first recognized the right of publicity, expanding the traditional right of image available under the Italian Civil Code, a law which already granted celebrities a right to the commercial use of their photograph. In the case of *Dalla v. Autovox SpA*,²⁴ an Italian District Court found that the misappropriation of a celebrity's persona wrongfully engendered an association between a celebrity and a product.²⁵

Although the right of publicity is a judicial creation, its legitimacy and viability are nonetheless supported by the Italian Civil Code. Italian judges have the power to "reason by analogy" to other provisions of the code, a proceeding known as *analogia legis*, and apply those provisions as a foundation for resolving a controversy to which no law currently applies.²⁶ If doubt persists, however, the judge may refer to the general principles of the legal order of the State, a proceeding known as *analogia iuris*.²⁷ Looking to the Civil Code provisions protecting one's photograph, the judge in the *Dalla* case reasoned that such protection should also apply to unauthorized uses of attributes of one's persona, hence creating a right similar to the American right of publicity.

23. *Id.* art. 97, translated in 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD ch. VI, § II, art. 97 (1956).

24. Pret. di Roma, 18 apr. 1984, Foro It. 1984, I, 2030 (with comment of Pardolesi); Giur. It. 1985, I, 2, 453 (with comment of Dogliotti, *Alcune questioni in tema di notorietà, diritto all'immagine e tutela della personalità* [Some Issues About Notoriety, Right of Image, and Protection of Personality]); see also *id.* at 551 (with comment of Garutti, *Utilizzazione in una campagna pubblicitaria di accessori abitualmente usati da una persona* [Utilization in an Advertisement Campaign of Accessories Regularly Used by a Person]) [hereinafter "*Dalla*"].

25. See *id.*

26. C.C. (*Disposizioni sulla legge in generale*) [General Provisions of the Law] art. 12, "Law interpretation."

27. *Id.*

1. *Dalla v. Autovox SpA*²⁸

In 1984, a popular Italian singer Lucio Dalla ("Dalla") brought suit against an Italian company, Autovox SpA ("Autovox"), a producer of audio equipment such as radios, compact disc players, and stereos.²⁹ Dalla alleged that Autovox misappropriated his persona in an advertising poster by using two of the most distinctive elements of his appearance—a woolen cap and a pair of small, round glasses.³⁰ Dalla argued that the use of the cap and glasses constituted a misappropriation of his persona because they created an immediate association between himself and Autovox.³¹ He further alleged that the advertisement damaged his reputation because consumers were likely to believe that he endorsed Autovox's products, despite the fact that Dalla consistently refused to appear in commercials.³² Before the *Dalla* case, the majority of commentators believed that the misappropriation of one's persona for commercial purposes occurs only with the unauthorized use of the celebrity's actual name or image.

This case was unique because the plaintiff did not claim an infringement of his right to name under article 6 or 7 of the Civil code, nor of his right of image or portrait under article 10 of the Civil Code or article 96 of the Copyright Law.³³ Dalla did not claim an infringement of the right to name because his name had not been mentioned in the advertisement. He also did not claim an infringement of his right to image or portrait because neither his image, face, features, nor picture had been utilized by Autovox.

The District Court judge, reasoning by analogy, held that the applicable rules for the right of image shared the same nature and economic and social function.³⁴ The court further held that the misappropriation of Dalla's persona had been accomplished not through the use of his name or

28. Pret. di Roma, 18 apr. 1984, Foro It. 1984, I, 2030 (with comment of Pardolesi); Giur. It. 1985, I, 2, 453 (with comment of Dogliotti, *Alcune questioni in tema di notorietà, diritto all'immagine e tutela della personalità* [Some Issues About Notoriety, Right of Image and Protection of Personality]); see also *id.* at 551 (with comment of Garutti, *Utilizzazione in una campagna pubblicitaria di accessori abitualmente usati da una persona* [Use in an Advertisement Campaign of Accessories Frequently Used by a Person]) [hereinafter "*Dalla*"].

29. See *id.*

30. *Dalla*, Foro It. 1984, I, at 2032. This case is strikingly similar to the famous American case of *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992). In *White*, television game show hostess Vanna White alleged that Samsung had misappropriated her identity in its advertisement featuring a robot dressed in a blonde wig and evening gown and posed in front of a letter-board, an image consciously selected to resemble White. *Id.* at 1396.

31. *Dalla*, Foro It. 1984, I, at 2032.

32. *Id.*

33. *Id.*; see *supra* notes 17–22 and accompanying text.

34. *Dalla*, Foro It. 1984, I, at 2033.

likeness, but through the use of other indicia of his identity—the cap and glasses. Therefore, the infringement was not of the right of image itself, but of the as yet unrecognized right of publicity.

The judge granted Dalla's claim by relying on three main factors: (1) his constant use of the wool cap; (2) his degree of fame and notoriety as a musician; and (3) the graphic character of the advertisement.³⁵

In addressing the first issue, the court maintained that Dalla's right of image had been infringed not by the publication of his picture or portrait, but by the reproduction of some distinctive elements of his personality immediately associated with Dalla.³⁶ Although Dalla did not invent the woolen cap and the small, round glasses, he wore those accessories constantly in order to distinguish himself and create an easily recognizable persona.³⁷ The court held that the objects shown in Autovox's advertisement were a "faithful reproduction" of the cap and glasses used by Dalla, clearly referring to his physical, professional, and moral attributes.³⁸

Autovox argued that the singer had occasionally been photographed without the cap and glasses, offering photographs of Dalla without them as proof.³⁹ The judge considered this fact irrelevant, however, holding that simply because a public figure, like an artist, government minister, or soccer player has been photographed thousands of times does not mean that if they are depicted in atypical clothing it will ruin the image they have carefully built.⁴⁰

Emphasizing the second factor, the court found that there was a clear exploitation of Dalla's popularity in the advertising poster.⁴¹ The court recognized that the infringement of the right of publicity was derived from the appropriation of the singer's personal identity and had been used for purposes of trade, not for purposes of public interest in information.⁴²

The third issue analyzed by the court involved the size of the cap and glasses in relation to the size of the entire advertisement.⁴³ In Autovox's advertising poster, the woolen cap and the small, round glasses occupied

35. *Id.* at 2032–33.

36. *Id.* at 2033. *Compare Dalla*, Foro It. 1984, I, at 2032–33 (discussing the instant recognizability of Dalla's wool cap and glass) *with* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) ("The robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous.").

37. *Id.* at 2032.

38. *Id.* at 2033.

39. *Dalla*, Foro It. 1984, I, at 2032.

40. *Id.*

41. *Id.*

42. *Id.* at 2033.

43. *Id.*

almost two-thirds of the whole space.⁴⁴ Thus, Autovox could not argue that the objects were secondary or marginal elements of the advertisement, as the objects were clearly the centerpiece of Autovox's advertisement.⁴⁵ The advertisement portrayed to the public that Dalla endorsed Autovox's product. Certainly, the resemblance to the singer's features was so clear that there was no need to show his face in the advertising poster.⁴⁶

Finally, when assessing the amount of damages available to Dalla, the court considered a number of factors. First, the court considered the amount Dalla could have received if he negotiated with Autovox to endorse their product.⁴⁷ Second, the court considered the fact that Dalla never endorsed any products and refused to appear in commercials, as well as the fact that even if he did endorse some products, he may not have had any interest in endorsing and binding himself to Autovox's products.⁴⁸ Finally, the court considered that Dalla may have wished to avoid any negative reaction from Autovox's competitors by keeping a neutral position towards any kind of audio equipment.⁴⁹

Accordingly, this case represents Italy's first recognition of the right of publicity. Interestingly, despite the striking dissimilarity between the two legal systems, the recognition of the right of publicity in Italy occurred in much the same way as it did in the United States—judicial creation based on interpretation of statutes protecting personal interests in one's privacy and persona.⁵⁰

2. Cases After *Dalla*

Dalla was followed by a number of other cases in which the right of publicity was recognized by judicial interpretation of Italian statutory rights, most often the rights of image and name. In most of these cases, however,

44. *Id.*

45. *Dalla*, Foro It. 1984, I, at 2033.

46. Similarly, the Samsung advertisement attacked by Vanna White did not feature her face. *White*, 971 F.2d at 1396. Rather, the advertisement contained only a robot dressed-up to resemble her. *Id.*

47. *Dalla*, Foro It. 1984, I, at 2033–34. In fact, appearing in commercials was not always favorable for a well-known person. Very often the opposite result could occur from such participation, and the celebrity's identity could be damaged by excessive appearances on the screen or by the annoying bleakness of the dialogue.

48. *Id.*

49. *Id.*

50. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (coining the term "right of publicity" to describe a right distinct from the previously existing right of privacy that can be asserted to enjoin the unauthorized use of a person's name or likeness for commercial purposes).

the object of the protection has been more than a name or photograph. Rather, the courts have awarded protection for the mere fame or popularity of the celebrity.

For example, in *Baglioni v. Eretel Srl and Disco Spring*,⁵¹ a court upheld the use of the right of publicity to enjoin commercial appropriation of one's persona. In *Baglioni*, the court held that the unauthorized reproduction of a popular singer's image and signature in the pages of a calendar constituted an infringement of his right of publicity.⁵² The court found that the misappropriation of the popular Italian singer Claudio Baglioni's persona could damage him in three ways: (1) by impairing his popularity and reputation; (2) by failing to adequately compensate him; and (3) by leading to the loss of control over the singer's own persona.⁵³

In another case involving the singer, *Baglioni v. Colgate Palmolive*,⁵⁴ a district court judge granted publicity protection to him to enjoin the unauthorized sale of tubs containing audio cassettes of his greatest hits, calling the act a commercial misappropriation of his persona.⁵⁵

In *Vitti v. Doimo SpA*,⁵⁶ the court held that the unauthorized use of a look-alike of the Italian actress Monica Vitti in an advertisement for a furnishings magazine misappropriated her persona for commercial purposes.⁵⁷ The magazine also included Vitti's photograph on the cover and an article containing a portion of her biography.⁵⁸ The court found this use of a look-alike to violate Vitti's right of publicity.⁵⁹ As in *Dalla*, the court considered Vitti's reluctance to appearing in commercials,⁶⁰ and also ruled

51. Pret. di Roma, 18 feb. 1986, *Il diritto di autore* 1986, 215 (with comment of Assumma, *Lo sfruttamento a fini pubblicitari della notorietà di artisti e sportivi* [*The Exploitation for Advertising Purposes of the Notoriety of Artists and Sportsmen*]) [hereinafter *Baglioni I*].

52. *See id.*

53. *See id.*

54. Pret. di Roma, 15 nov. 1986, *Temi Romana* 1986, 744 (with comment of Lombardi, *Pubblicità commerciale lesiva di diritti della personalità di noto artista* [*Commercial Advertisement Infringing the Personality Rights of a Well-Known Artist*]) [hereinafter *Baglioni II*].

55. *See id.*

56. Pret. di Roma, 6 July 1987, *Il diritto di autore* 1987, 570 (with comment of Assumma, *Profili originari ed evolutivi del concetto di immagine-ritratto ed uso pubblicitario della fotografia di un sosia* [*Original and Evolving Profiles of the Concept of Image-Portrait and Advertising use of a Look-Alike Photograph*]) [hereinafter *Vitti*].

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

that a disclaimer situated vertically in small characters on the right-hand side of the advertisement was not enough to avoid liability.⁶¹

Finally, in *Valentino Garavani SpA v. Postalmarket SpA*,⁶² the court held that the unauthorized sale of goods through a catalogue marked with Valentino Garavani's world famous trademark infringed the plaintiff's right of publicity.⁶³ The infringement amounted to an offense because it may have damaged the reputation of Valentino Garavani's product.

In the cases reviewed above, the Italian judges have unequivocally held that the right of image could be extended through *analogia legis* to include protection against the misappropriation of someone's personal identity. Thus, protection is available for misappropriations that are accomplished not through the use of the person's name or likeness but rather through the use of elements and accessories which are immediately identified by the public to that particular person. In other words, the courts have upheld the principle that every person has the right to derive the advantages that result from his or her persona. This point of view recognizes that a public figure's persona often results from the cultivation of his or her public identity through artistic and professional work.

Although each of these cases have applied only the right of image or name, the statutory protection for the use of a pseudonym raises interesting right of publicity issues as well. The right of publicity can be considered as protecting something that can be called a "stage image." A person's stage image is often substantially different from the person's "real image." The 1970s rock group *Kiss* is an example of individuals having different images on and off the stage. The classical use of a pseudonym by an author—a pen name—is simply a "stage name." Accordingly, just as an author can create a "stage name" using the pseudonym and protect that name from unauthorized use, one's "stage image" might be protected from unauthorized use. In other words, Italian law protecting one's pseudonym may be extended by judicial interpretation to cover a *visual pseudonym*. Because

61. *See id.*

62. Pret. di Roma, 7 apr. 1987, Foro It. 1987, I, 2878 (with comment of G. Olivieri) [hereinafter *Valentino*].

63. *Id.*; see also App. Milano, 16 may 1989, Foro It. 1991, I, 2861; Cass. 16 apr. 1991, n.4031, Riv. Dir. Inf. 1991, 835; Cass. 2 may 1991, n.4785, Foro It. 1992, I, 831; Cass. 6 feb. 1993, n.1503, Giust. Civ. 1994, 298; Cass. 12 feb. 1994, n.1652, Giur. It. 1995, I, 1, 298; Trib. Milano, 6 jul. 1994, Riv. Dir. Inf. 1995, 358; Trib. Milano, 17 nov. 1994, Riv. Dir. Inf. 1995, 373; Trib. Roma, 22 dec. 1994, Riv. Dir. Inf. 1995, 641; App. Milano, 11 apr. 1995, Giust. Civ. 1995, 3755; Cass. 12 mar. 1997, n.2223, in Dir. Ind. 1997; T.A.R. Lazio, 8 jan. 1998, n.96, Foro It. 1998, III, 74 (with comment of R. Pardolesi & G. Resta, *Non sono soltanto figurine: Antitrust e nuove forme di proprietà intellettuale?* [They Are Not Only Stickers: Antitrust and New Forms of Intellectual Property?]).

the image is addressed to the audience's eye, we have to use clothes or objects able to convert our "real image" into our "stage image." These clothes and objects, constantly used "on stage," contribute to the creation of a "stage image," definitely deserving the same protection as the "real image."

3. Rationale for Protection

In Italy, new issues and topics are traditionally raised by commentators and legal scholars. Indeed, many commentators have discussed the right of publicity in Italy in recent years.⁶⁴ However, as shown from the cases

64. See generally T. ASCARELLI, *TEORIA DELLA CONCORRENZA E DEI BENI IMMATERIALI* [THEORY OF COMPETITION AND IMMATERIAL GOODS] (1956); P. Caporali, *L'immagine è mia e l'amministro io* [The Image is Mine and I Run It], *Corriere Giur.* 1991, 749; F. Caringella, *Sosia ed identità personale* [Look-Alike and Personal Identity], *Foro It.* 1992, I, 3127; A. CATAUDELLA, *LA TUTELA CIVILE NELLA VITA PRIVATA* [THE CIVIL LAW PROTECTION IN PRIVATE LIFE] (1972); M. Chiarolla, *Alla scoperta dell' America, ovvero: dal diritto al nome e all'immagine al right of publicity* [To the Discovery of America, that is: From the Right of Name and Image to the Right of Publicity], *Foro It.* 1992, I, 831; A. Dassi, *Sulla lesione dell'immagine di persona nota* [About the Infringement of the Image of a Well-Known Person], *Resp. Civ.* 1991, 741; DE CUPIS, *I DIRITTI DELLA PERSONALITÀ* [THE RIGHTS OF PERSONALITY], *TRATTATO DI DIRITTO CIVILE E COMMERCIALE* [TREATY OF CIVIL AND COMMERCIAL LAW], DIRETTO DA CICU E MESSINEO E CONTINUATO DA MENGONI IV (1982); G.B. FERRI, *OGGETTO DEL DIRITTO DELLA PERSONALITÀ E DANNO NON PATRIMONIALE* [OBJECT OF RIGHT OF PERSONALITY AND NON-ECONOMIC DAMAGE] (1989); Garutti, *Abbinamento dell'immagine di personaggio noto a scopo di differenziazione* [Combination of the Image of a Well-Known Personality to the Aim of Differentiation], in *DIRITTO DELL'INFORMAZIONE E DELL'INFORMATICA* 560 (1990); Garutti & Macioce, *Il danno da lesione dei diritti della personalità-Profilo generali* [The Damage Deriving from the Infringement of Rights of Personality—General profiles], in *RASSEGNA DI DIRITTO CIVILE*; G. GIACOBBE, *IL DIRITTO ALLA RISERVATEZZA: VERSO NUOVI CONFINI DI TUTELA DELLA PERSONA?*, *IL DIRITTO ALLA RISERVATEZZA ITALIA E FRANCIA* [THE RIGHT OF PRIVACY: TOWARDS NEW BORDERS OF PERSONALITY PROTECTION? THE RIGHT OF PRIVACY IN ITALY AND FRANCE] (1988); G. Guglielmetti, *Utilizzo di sosia nella pubblicità* [Utilization of Look-Alikes in Advertisement], *Il diritto di autore* 1979, 563; A. Marini, *Da Sophia Loren a Stefania Sandrelli: evoluzione o involuzione della giurisprudenza?* [From Sophia Loren to Stefania Sandrelli: Evolution or Involution of the Jurisprudence?], *Giust. Civ.* 1990 2371; V. Metafora, *Il mito di narciso e la giurisprudenza: A proposito del diritto sul proprio ritratto* [The Myth of Narciso and the Jurisprudence: About the Right to One's Own Portrait], *Riv. crit. dir. priv.* 1990, 867; R. Moccia, *Diritto all'immagine verso il right of publicity* [The Right of Image Towards the Right of Publicity], *Foro It.* 1987, I, 919; Ponzanelli, *La povertà dei sosia e la ricchezza delle celebrità: il right of publicity nell'esperienza italiana* [The Poverty of Look-Alikes and the Richness of Celebrities: The Right of Publicity in the Italian Experience], in *DIRITTO DELL'INFORMAZIONE E DELL'INFORMATICA* 126 (1988); M. Ricolfi, *Questioni in tema di regime giuridico dello sfruttamento commerciale dell'immagine* [Issues About the Legal System of the Commercial Exploitation of the Image], *Nuova Giur. Civ. Comm.* 1992, I, 44; C. Scognamiglio, *Il diritto all'utilizzazione economica del nome e dell'immagine di persone celebri* [The Right to the Economic Utilization of the name and of the Image of Well-Known Persons], in *DIRITTO DELL'INFORMAZ. E DELL'INFORMATICA* I (1988); *Scopo informativo ed intento di lucro nella disciplina della pubblicazione del ritratto* [Informative Aim and Purpose of Trade in the

analyzed above, Italian courts contemplated the right of publicity before commentators and scholars did, even though it has never been expressly mentioned in a decision. The opposite is true for the development of the right of publicity in the United States. The notion of a right to protect against unauthorized public exposure was first discussed by American legal scholars before the turn of the century, but rejected by courts until just over 40 years ago.⁶⁵ The Italian and American versions of the right of publicity do, however, have in common similar rationales to support its existence.

First, the Italian right of publicity, as a result of judicial interpretation of the right to image, protects an individual's interest in personal dignity and autonomy.⁶⁶ Consideration for the protection of individual privacy and intimacy is reflected in the Italian Copyright Law protecting personal letters and memoranda,⁶⁷ as well as the legislative history of the Copyright Law,

Discipline of the Portrait Publication], in DIR. DELL'INFORMAZ. E DELL'INFORMAT. 133 (1991); *Appunti sul danno da illecita utilizzazione economica dell'immagine* [Notes on the Damage From Unauthorized Commercial Utilization of the Image], in DIR. DELL'INFORMAZ. E DELL'INFORMAT. 579 (1991); P. Testa, *Diritto all'immagine e utilizzazione pubblicitaria del sosia* [Right of Image and Advertizing Utilization of Look-Alikes], in DIR. DELL'INFORMAZ. E DELL'INFORMAT. 1051 (1987); O. Troiano, *Diritto all'immagine e sfruttamento della celebrità altrui* [Right of Image and Exploitation of Other's Celebrity], in FORO IT. 1991, I; see also Cass., 12 feb. 1994, n.1652, Giur. It. 1995, I, 1, 298; Cass., 2 may 1991, n.4785, FORO IT. 1992, I, 831; Cass., 16 apr. 1991, n.4031, DIR. DELL'INFORMAZ. E DELL'INFORMAT. 1991, 835; Cass., 22 june 1985, n.3769, DIR. DELL'INFORMAZ. E DELL'INFORMAT. 1985, 947; Trib. Milano, 6 july 1994, DIR. DELL'INFORMAZ. E DELL'INFORMAT. 1995, 358; Trib. Milano, 17 nov. 1994, DIR. DELL'INFORMAZ. E DELL'INFORMAT. 1995, 373; Trib. Roma, 22 dec. 1994, DIR. DELL'INFORMAZ. E DELL'INFORMAT. 1995, 641; Corte app. Milano, 11 apr. 1995, Giust. Civ. 1995, 3755.

65. See Warren & Brandeis, *supra* note 3 (including in their seminal article on the right of privacy in 1890 the notion that such a right includes the "right to be left alone"); *Roberson v. Rochester Folding Box*, 64 N.E. 442 (N.Y. 1902) (denying relief to a woman whose picture appeared in an advertisement for a flour company without her consent, despite the inclusion of the Warren/Brandeis inspired right to be left alone in the 1903 New York privacy statute); cf. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (holding for the first time among state supreme courts that the unauthorized use of one's name and likeness violated a person's right to be left alone); *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941) (holding that that the plaintiff, a college football player, could not recover against a beer company who used his picture in advertisements, reasoning that by virtue of the plaintiff's voluntary exposure through the university's publicity office, he could not credibly state a claim for privacy); *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (coining the term "right of publicity" to describe a right distinct from the previously existing right of privacy that can be asserted to enjoin the unauthorized use of a person's name or likeness for commercial purposes).

66. See C.C. art. 10 (prohibiting "exhibition or publication [of another] . . . in a manner prejudicial to the dignity or reputation of such person or relative . . ."); see also A.M. Gambino, *I limiti al right of publicity delle squadre di calcio* [The Limits to the Right of Publicity Soccer Teams], in NUOVA GIURISPRUDENZA CIVILE COMMENTATA 557-74 (1994); Garutti, *Utilizzazione in una campagna pubblicitaria di accessori abitualmente usati da una persona* [Utilization in an Advertisement Campaign of Accessories Regularly Used by a Person], in GIURISPRUDENZA ITALIANA 551 (1985).

67. Copyright Law, art. 93(1), *reprinted* in 2 NIMMER & GELLER, *supra* note 21, at ITA-23.

explicitly noting an intent "to protect privacy and family honor against indiscretion."⁶⁸ Likewise, the American right of publicity was founded on principles of privacy and the right to be left alone.⁶⁹

Second, the right of publicity secures the commercial value of a public figure's persona and prevents the unjust enrichment of those misappropriating it.⁷⁰ Under Italian law, an action for unjust enrichment—*l'arricchimento senza causa*—exists in the absence of any other remedy to rectify the situation.⁷¹ The essence of this principle is that one party has gained in a manner to which he or she is not entitled, and has done so at the expense of another.⁷² The American right of publicity also has as its core rationales the goals of protecting commercial value and preventing unjust enrichment.⁷³

Third, the right of publicity also allows an individual to prevent harmful or excessive uses that may dilute the commercial value of his or her identity. Although Lucio Dalla, as one who refuses to endorse products, may not be concerned with this rationale, other celebrities who exploit their personas to the fullest extent would argue that the ability to grant exclusive licenses is the key to securing value. The United States Supreme Court recognized this rationale in *Zacchini v. Scripps-Howard Broadcasting Co.*,⁷⁴ holding that the presentation of a circus performer's entire act on an evening news television program "pose[d] a substantial threat to the economic value" of the performer's publicity rights.⁷⁵

Finally, although proof of deception or confusion is not an element of the cause of action,⁷⁶ the right of publicity indirectly protects consumers from false suggestions of endorsement. Certain commercial uses of a celebrity's name, likeness, or other distinguishing attribute may create

68. 2 NIMMER & GELLER, *supra* note 21, at ITA-23.

69. See Warren & Brandeis, *supra* note 3.

70. See Copyright Law, art. 97, *translated in* 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD ch. VI, § II, art. 97 (1956) (prohibiting unauthorized reproduction of one's portrait).

71. See C.C. (*Delle obbligazioni*) [Obligations] arts. 2041–42, *translated in* 1 ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION bk. 6, tit. VIII, arts. 2041–42; see also WATKIN, *supra* note 4, at 260.

72. See WATKIN, *supra* note 4, at 260.

73. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (stating the reasoning for affording protection of the right of publicity: "[I]t is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.").

74. 433 U.S. 562 (1977).

75. *Id.* at 575.

76. See *infra* Part III.

probable or actual confusion among consumers. Autovox's use of Dalla's familiar wool cap and small, round glasses, for example, may have led consumers to believe Dalla consented to the appearance of these items or actually endorsed the product.⁷⁷ The public may incorrectly conclude that a celebrity endorses the defendant's product, service, or business that the defendant sought to promote by referencing the celebrity.⁷⁸ Also, consumers may erroneously assume that there is an agreed-upon joint promotional venture between the celebrity and the defendant.⁷⁹ Although most American state laws do not require that the celebrity prove actual or likely consumer confusion as an element of a right of publicity claim, prevention of such consumer confusion is certainly one of the most cited justifications for the right of publicity.⁸⁰

III. ELEMENTS OF THE CAUSE OF ACTION

The cases discussed above demonstrate the *prima facie* elements of a right of publicity violation.⁸¹ In order to claim an infringement of the right of publicity a plaintiff must prove: (1) that he or she is a public figure, not simply an ordinary person; (2) that the defendant has used distinguishing characteristics of the celebrity; (3) that the unauthorized use of his or her popularity is for a commercial purpose, to convince the public that he or she endorses or sponsors the product; and (4) that the unauthorized use of the celebrity persona caused immediate damage.

77. See *supra* Part II.B.1.

78. See Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 U. KAN. L. REV. 329, 352 (1997).

79. *Id.*

80. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (involving the use of sound-alike to impersonate the voice of singer Tom Waits); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (involving the use of robot to resemble the appearance of Vanna White); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (involving the use of sound-alike to impersonate the voice of singer Bette Midler); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (involving the use of television talk show host Johnny Carson's famous "Here's Johnny" slogan to advertise toilets); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (involving the use of race car resembling the car of famous driver Motschenbacher); *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (involving the use of a Woody Allen impersonator in advertisements for a video rental chain store).

81. It is important to note that in a civil law system such as Italy, the concept of judicially created law and *stare decisis* do not ordinarily exist. In Italy, each court has the authority to interpret the law independent of and, also in contrast to, prior rulings of higher courts in the same jurisdiction. Accordingly, while a principle established in the *Corte di Cassazione* (the court of last appeal in civil and criminal matters) is authoritative, it is not binding precedent on other courts.

A. The Public Figure Requirement

The right of publicity is characterized as the right to the exclusive commercial use of one's own persona.⁸² In contrast, the right of privacy is the right to avoid unauthorized and unjustified intrusions into one's private life that can cause distress, embarrassment, and humiliation.⁸³ In other words, the right of privacy protects the individual from psychological suffering and from the violation of the right to be left alone.⁸⁴ The right of publicity, however, prevents the misappropriation of the commercial value of one's persona. The right of publicity does not prevent the diffusion of news about one's private life, but rather the unauthorized use of the celebrity's persona for endorsements.⁸⁵ Accordingly, one must be a public figure, with some quantifiable value in his or her persona, in order to take advantage of the right of publicity in Italy.

B. Use of Distinguishing Characteristics

The plaintiff must show that the defendant has used distinguishing characteristics of the celebrity, but not necessarily his or her physical attributes. In most cases, the misappropriation of another's persona is accomplished by actually using a statutorily protected element of one's identity, such as the person's real name, nickname, or professional name,⁸⁶ or by a likeness embodied in a photograph, drawing, or videotape.⁸⁷ However, the unauthorized use of other distinguishing characteristics of a person's identity can also infringe the right of publicity.⁸⁸ Thus, the misappropriation of another's identity through the use or imitation of the person's performing persona, such as Charlie Chaplin's "Little Tramp" or Julius Marx's "Groucho," can violate the right of publicity if used for commercial purposes.⁸⁹

82. See *Dalla*, *Foro It.* 1984, I, at 2032-34.

83. See *supra* note 3 and accompanying text.

84. This right is less protective of well-known persons (like movie actors, singers, sports figures, politicians, etc.) than ordinary people.

85. See *Dalla*, *Foro It.* 1984, I, at 2032-34.

86. See C.C. arts. 6, 7, 9.

87. See *id.* art. 10.

88. See *Dalla*, *Foro It.* 1984, I, at 2033 (discussing the use of two recognizable features of the plaintiff, his cap and glasses).

89. The American case involving the deceased actor Bela Lugosi illustrates this point well. In *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979), representatives of Lugosi's estate brought a right-of-publicity action against Universal Pictures for authorizing its use of Lugosi's likeness from the film *Dracula* on a number of commercial products. See *id.* Although the estate was unsuccessful on its right of publicity claim for other reasons, the court debated the merits of

The use of other identifying characteristics or attributes can also violate the right of publicity if they are so closely identified with the person that their use enables the defendant to misappropriate the commercial value of the person's identity.⁹⁰ Additionally, where the plaintiff's distinguishing characteristics are the only thing identifying the person in an advertisement, the plaintiff must show misappropriation of his or her persona.⁹¹ The Autovox advertisement, for example, used two distinguishing characteristics of Lucio Dalla—his ever-present cap and glasses—clearly invoking his persona to sell Autovox products.⁹²

In the seminal American case holding that the right of publicity is violated in a similar manner—through the invocation of one's "identity"—the court provided the following explanation:

Consider a hypothetical advertisement that depicts a mechanical robot with male features, an African-American complexion, and a bald head. The robot is wearing black hightop Air Jordan basketball sneakers, and a red basketball uniform with black trim, baggy shorts, and the number 23 (though not revealing "Bulls" or "Jordan" lettering). The ad depicts the robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out. Now envision that this ad is run on television during professional basketball games. Considered individually, the robot's physical attributes, its dress, and its stance tell us little. Taken together, they lead to the only conclusion that any sports viewer who has registered a discernible pulse in the past five years would reach: the ad is about Michael Jordan.⁹³

allowing an actor to prohibit the commercial exploitation of his or her film likeness. Justice Stanley Mosk argued that the right could not exist in such a case because Lugosi played a character created by a novelist in a film produced by a motion picture company under license from the novelist's successor. *Id.* at 432–34 (Mosk, J., concurring). Justice Mosk did not, however, say that an actor never possesses a proprietary interest in his or her image. *Id.* Rather, he argued that such situations should be limited to when "[a]n original creation of a fictional figure" is played "exclusively by its creator" citing, for example, Groucho Marx, Red Skelton, Abbott and Costello, and Laurel and Hardy. *Id.* at 432. Chief Justice Rose Bird, on the other hand, argued that the right of publicity should extend to portrayals of fictional characters. *Id.* at 445 (Bird, C.J., dissenting).

90. *See id.*

91. *See id.*

92. *See also* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396–97 (9th Cir. 1992) (discussing the use of familiar characteristics of Vanna White to promote Samsung electronic equipment).

93. *Id.* at 1399.

Accordingly, the means of appropriating the person's identity are irrelevant to the aims of protection. On the one hand, the right of publicity does not require that misappropriation of persona be accomplished through particular means to be actionable. On the other hand, the right of publicity is not infringed unless the defendant's use identifies the plaintiff.

C. Commercial Purpose Requirement

In each of the Italian cases discussed above, the defendant used the plaintiff's personal attributes for commercial purposes.⁹⁴ Accordingly, it can be said that to rely on these cases, a plaintiff must show that his or her attributes have been used in a similar manner. American law on the definition of "commercial purpose" may prove helpful in determining what uses are commercial and non-commercial.⁹⁵

D. Damages

In each of the Italian cases discussed above, the plaintiff was able to demonstrate that he had been damaged by the defendant's use of his personal attributes.⁹⁶ Accordingly, a plaintiff must prove that the unauthorized use of his or her persona caused immediate damage.⁹⁷

94. See, e.g., *Dalla*, Foro It. 1984, I, at 2030-34; *Baglioni I*, Il diritto di autore 1986, at 215; *Baglioni II*, Temi Romana 1986, at 744; *Vitti*, Il diritto di autore 1987, at 570; *Valentino*, Foro It. 1987, I, at 2878.

95. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995). The *Restatement* describes a commercial purpose as existing where a celebrity's name, likeness, or other distinguishing characteristics are used to advertise goods or services. See *id.* § 47, cmt. a. Also, the *Restatement* suggests that retailers and distributors of the defendant's products may also be liable, regardless of their intent. See *id.* § 47, cmt. e; see also *Baglioni II*, Temi Romana 1986, at 744 (holding the distributor of unauthorized recordings liable). On the other hand, a commercial purpose does not exist where a person's identity is depicted in news reports, fictional or nonfictional works, or other entertainment. See *id.* § 47, cmt. c. It should be noted, however, that at least one Italian court has held that the use of a celebrity's persona for the purpose of communicating information or expressing ideas does not violate the right of publicity. See Cass., 2 may 1991, Mass. Cass. Civ. 1995, n.4785; see also COST. art. 21 (Italy). The public and constitutional interest in freedom of speech protects this type of use. See *id.*

96. See, e.g., *Dalla*, Foro It. 1984, I, 2030-34; *Baglioni I*, Il diritto di autore 1986, 215; *Baglioni II*, Temi Romana 1986, 744; *Vitti*, Il diritto di autore 1987, 570; *Valentino*, Foro It. 1987, I, 2878.

97. See *id.*; see also C.C. art. 2043; A. Barenghi, *Il prezzo del consenso (mancato): Il Danno di sfruttamento dell'immagine e la sua liquidazione* [*The Price of (Missed) Consent: The Damage of Image Exploitation and Its Liquidation*], Riv. Dir. Inf. 1992, 565.

E. Remedies

The remedies available to a plaintiff whose right of publicity has been violated are comparable to intellectual property law remedies: injunction and damages.⁹⁸ Usually, damages are assessed by calculating the economic advantage gained by the defendant or by assessing the loss suffered by the plaintiff. Many criteria are used to reach this aim.⁹⁹

The court can determine the "fair market value" of the persona, taking into account the degree of popularity and reputation of the celebrity in the public.¹⁰⁰ The court can also derive the fair market value from the damages awarded in previous cases.¹⁰¹ Alternatively, the court may assess the fair market value by referring to the value of potential endorsement income rejected by other celebrities with the same degree of popularity.¹⁰²

Finally, the court must evaluate whether the celebrity has ever participated in commercial endorsements.¹⁰³ In fact, the persona of a celebrity who has never appeared in commercials is much more valuable than that of one who has already exploited his or her popularity many times.¹⁰⁴

IV. DOES ITALY RECOGNIZE A RIGHT OF PUBLICITY FOR FOREIGNERS?

As a general rule, under the Italian Civil Code, any foreigner can profit from the civil rights granted to Italian citizens on condition of mutuality, unless an opposite rule has been determined by a special law.¹⁰⁵ In other words, the Italian civil law recognizes that foreigners have the right to initiate any legal proceeding available to Italian citizens to protect the enjoyment and the exploitation of one's rights.

98. See Gatti, *supra* note 1, at 361.

99. See App. Milano, 9 apr. 1976, Giust. Civ. 1976, V, 1314; App. Milano, 16 may 1989, Riv. Dir. Inf. 1991, 579; Trib. Torino, 15 jan. 1994, Dir. Inol. 1994, 223 (discussing the so-called "price of consent").

100. Gatti, *supra* note 1, at 362.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Article 16 of the General Provisions to the Italian Civil Code provides: "Foreigner's treatment. The foreigner is allowed to profit from the civil rights ascribed to Italian citizens on condition of mutuality and barring the provisions determined by special laws. This provision applies to the foreign legal entities as well." C.C. (*Disposizioni sulla legge in generale*) [General Provisions of the Law] art. 16, *translated in* 1 ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION bk. 2, ch. II, art. 16.

In response to a claim set forth by a foreigner, an Italian court must define the nature of the claim in order to determine the applicable law. For example, the court must decide whether the right at issue is a right arising from a contract, or a right regarding the status of the plaintiff, such as the right of personality.

From the cases reviewed above, it is clear that the protection of the right of publicity has been considered to be included in the protection provided for the right of image, which is a right of personality.¹⁰⁶ Under Italian law, the right of personality claims are determined by the law of the state wherein the plaintiff is domiciled.¹⁰⁷ Therefore, in the case of a right of publicity claim set forth by a foreigner, the Italian judge, to grant relief, will have to check whether or not the state law of the foreigner recognizes and protects the right of publicity.¹⁰⁸

V. TRANSFERABILITY AND DESCENDIBILITY

Two of the most disputed aspects about the right of publicity are its transferability and its descendibility. The distinctive characteristics that are protected by the right of publicity can be separated from the celebrity for commercial purposes. Thus, the rights to one's persona are theoretically transferable to third parties.¹⁰⁹

Commentators have three views regarding descendibility.¹¹⁰ While some adamantly favor or oppose descendibility, others take a more qualified view that the right of publicity survives the death of the celebrity, but expires after fifty years.¹¹¹ Others argue that the right can be transferred to the heirs only if it has been exercised—or commercially exploited—within the celebrity's lifetime.¹¹²

106. See *supra* Part II.A.

107. See Law. No. 218, of May 31, 1995, art. 24 (Suppl. Ord. Gazz. Uff., June 3, 1995, n.128).

108. *Id.*

109. See Gatti, *supra* note 1, at 364.

110. *Id.*

111. Commentators have compared the right of publicity to copyright law and have extended the right after the celebrity's death to fifty years. See sources cited *supra* note 64. It must also be noted that, with regard to this matter, a 1993 E.C. Directive has extended the length of copyright to seventy years after the author's death. See *Direttiva del Consiglio della Comunità Europea sulla armonizzazione della durata del diritto di autore e di alcuni diritti connessi del* 29 oct. 1993 (93/98) CE, in G.U.C.E., 24 nov. 1993, n.L 290/9.

112. *Id.* A landmark American right of publicity decision held similarly on this issue. See *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979) (holding that, in the absence of statutory authorization, heirs of the deceased actor Bela Lugosi could not prohibit the use of his likeness in products in light of the fact that Lugosi had never exploited the commercial value in his likeness while living).

VI. CONCLUSION

Although it is a relatively new and undeveloped concept, the right of publicity certainly exists in Italy. In the process of interpreting statutes regarding the unauthorized use of an individual's name and image (or photograph), Italian courts have developed a right of publicity similar to the right available in the United States. Although it is uncommon in a civil law country such as Italy to find judicially created rights, Italian courts are authorized by statute to "reason by analogy" and apply provisions that regulate similar cases or analogous matters.

Despite the fact that other laws protecting copyrights and the use of pseudonyms may be looked to by courts in appropriate situations, to this point, only laws protecting one's image or name have been invoked as a source of publicity protection. In Italy, the right of publicity differs from the right of image for both technical and practical reasons. On the one hand, the right of publicity, since it is not expressly mentioned by the law, is protected by analogizing it to the right of image. On the other hand, the right of publicity could be viewed as a broader notion than the right of image. In fact, the right of publicity is regarded as an extension of the right of image from the name or likeness of a person to those elements or accessories so closely associated with the celebrity to become part of his persona. The right of publicity concerns the misappropriation of the commercial value of one's persona, no matter how it is accomplished. This includes the use of distinguishing characteristics of a person without any need to show his face or features.

Protecting the publicity rights of celebrities allows them to take advantage of the benefits of their efforts. Providing this protection also avoids the unjust enrichment derived from the unauthorized exploitation of a celebrity's popularity.¹¹³ Italian courts, by interpreting these statutes to protect publicity rights, recognize the social and economic value of providing such protection.

Although the right of publicity is, at present, not clearly defined by Italian law, the American right of publicity is destined to play a prominent role in the development of Italian law on this subject in the immediate future.

113. See generally RODOLFO SACCO, *L'ARRICCHIMENTO OTTENUTO MEDIANTE FATTO INGIUSTO* [THE ENRICHMENT GAINED BY MEANS OF A TORT] (1959).

