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THE FRENCH RIGHT OF IMAGE:
AN AMBIGUOUS CONCEPT PROTECTING THE
HUMAN PERSONA

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I. INTRODUCTION

Our modern civilization thrives on images that may be interpreted and
perceived on many different levels. In Western society, where individualism
plays a central role, the protection of one's image from unauthorized use
has long been recognized as an essential attribute of the human persona,
reflecting one's soul and uniqueness. With the onset of a global market
economy, the image of a person has acquired the potential for significant
economic value. French law, however, still remains ambiguous when it
comes to protecting one's image from unauthorized commercial
exploitation—what many countries call the “Right of Publicity.”

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1. Throughout this Article, the term “image” has been used in place of the French term
l'image,” meaning likeness, voice, photograph, portrait, or video reproduction. Although the
American term “image” also includes these characterizations, the use of this term should not be
confused with the concept of an image of a person that is held by the general public, often
deliberately created or modified by publicity or advertising. See Webster’s New Twentieth
Century Dictionary of the English Language 907 (2d ed. 1982); see, e.g., White v.
Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (holding that California’s common law
right of publicity extended to television game show hostess Vanna White’s celebrity image); see
also Silvio Martuccelli, The Right of Publicity Under Italian Civil Law, 18 Loy. L.A. Ent. L.J.
543, 549 (1998) (discussing the Italian case of singer Lucio Dalla whose image was
misappropriated in advertisements for an audio equipment company).

2. For a discussion of the right of publicity in other countries, see Jay Dougherty, Foreword,
Symposium: International Rights of Publicity, 18 Loy. L.A. Ent. L.J. 421 (1998); Guillermo
This resistance to the adoption of a legal right to one's image has been a direct result of France's struggle to balance the conflicting interests that it finds inherent in the recognition of this right. Most of the effort to reconcile this issue has come from the French courts. Thus far, the courts have succeeded into turning what was essentially a negative right, enabling an individual to prohibit unauthorized uses, into a positive right, enabling the individual to receive damages.

This Article discusses the French droit a l'image—the right of image—and the scope of protection that it affords against unauthorized uses of one's image. This is a right that can be analogized to the right of publicity. Part I discusses the historical background of the French right of image, its genesis in the French courts, and the modern adoption of image protection in French statutory law. This Part focuses primarily on the ambiguous nature of the right of image as embodying both privacy-based, extrapatrimonial principles, as well as economic-based, patrimonial principles. This Article argues that the scope of legal protection available to persons in France depends largely upon the court's characterization of the right according to these competing interests.

Part II analyzes the different sources of legal protection for one's image under French law and the scope of the right provided thereunder, that includes the French Civil Code, Penal Code, and copyright laws. This Part also identifies the elements required to prove a cause of action for infringement of one's right of image. Part III focuses on the availability of legal defenses to a right of image claim. Part IV discusses the transferability and descendibility of the right of image, paying particular attention to the extrapatrimonial and patrimonial characterization of the right. Part V discusses the possible conflicts of laws, as well as discussing the applicable laws a French court might apply to foreign and domestic plaintiffs. Finally, this Article concludes that as advancements in modern communication make it easier to misappropriate one's image, property-based—rather than privacy-based—claims will become more frequent, making it increasingly difficult to assess the true nature of the French right of image.

II. THE DIFFICULT ADVENT OF THE DUAL NATURE OF THE FRENCH DROIT À L’IMAGE

A. The Ongoing and Difficult Characterization of the Right of Image

Historically, the French right of image has been recognized as part of a bundle of rights that have been labeled by most commentators as “personality rights.”3 Personality rights are generally thought to consist of the moral rights of authors: the right to privacy, the right to protect one’s honor and reputation, and the right to control the use of one’s image.4 The French view these attributes as an extension of one’s personality.5 The right of one’s image was initially perceived as only a minor personality right, and was often absorbed into, or treated as a spin-off of, the right of privacy.6

However, since their creation in the mid-twentieth century, France has adopted the international rules and standards focusing on the necessity of protecting an individual from attacks against his or her privacy or dignity. For example, Article 12 of the 1948 Universal Declaration of the Rights of the Human Being and the Citizen states that “[N]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”7 Similarly, Article 8 of the European Convention on Human Rights asserts that “Everyone has the right to have their private and family life, home and mail respected.”8

Initially, the right of image was established by case law as a personality right, enabling an individual to prevent the unauthorized fixation

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4. Id.
5. Id. at 1228–29.
6. The emergence of the French right of image compares to the emergence of the right of publicity in the United States, both having their roots in notions of a privacy right to protect individuals from having their name or likeness misappropriated. See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). In the United States, the privacy-based right eventually became the economic-based right of publicity. See Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2nd Cir. 1953).
and reproduction of his or her image. French courts recognized this right only in circumstances involving the invasion of one's privacy or the damage to one's honor and/or reputation. In such cases, courts normally applied general tort liability principles found in Article 1382 of the French Civil Code.

The first case to recognize a right to prohibit the unauthorized use of one's image dates back to the end of the 19th century. An artist who drew the famous actress Rachel on her deathbed sold the drawing despite the family's objections. Photographs of the drawing had been taken, and the Tribunal de Premiere de la Seine ordered confiscation of both the drawing and the negatives. The court stated that "No one may, without the explicit consent of the family, reproduce and bring to the public eye the image of an individual on her deathbed whatever the celebrity of the person involved." Although the decision was based on the desire to protect the privacy of the family, the court's holding included as much consideration for the property aspect of the image as it did for the tort aspect: "The right to oppose this reproduction is absolute. It finds its foundation in the respect which the suffering of families demands, and it cannot be ignored without stirring the most intimate and respectable sentiments."

In a subsequent case also recognizing the right of image, a photographer hung a photograph of a child in the window of his studio. Although the father of the child had consented to the exhibition of the photograph, the mother had not. In this instance, the court held that "[o]nly the photographed person may allow or deny the public exhibition of his or her image ... for it may prejudice the freedom granted to each individual

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9. See Hauch, supra note 3, at 1231–32, 1237 (describing the origin of the right of privacy as a "remarkably 'uncivil'" process in the French civil law system).
10. Id.
11. CODE CIVIL [C. CIV.] art. 1382 (Fr.) ("Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.") [Any person who performs an act that harms another person must compensate the other for the harm caused by that act.]; see Hauch, supra note 3, at 1231–32.
12. T.P.I. Seine, June 16, 1858, D.P. III 1858, 52 [hereinafter the Rachel Affair]. In fact, the issue was not the right to the image of the dead actress, but the family's right of privacy that had been invaded.
13. Id.
14. Id.
15. Id., translated in Hauch, supra note 3, at 1233.
16. Id.
17. See T.P.I. Poitiers, Oct. 21, 1935, D.H. 1936, 45. As the child was a minor, the right to authorize or to deny the display of the child's photograph was held to be exercised by the father, who was vested with parental authority. Id.
with respect to his or her persona.\textsuperscript{18} Due to the fact that the father was vested with parental authority, the right to authorize or deny the display of the child's photograph was properly exercised.\textsuperscript{19}

While these two examples illustrate the jurisprudential roots of the right of image, as well as its close relationship to the right of privacy, the right of image today has emerged from the shadow of the right of privacy. Recent case law has imposed sanctions on the unauthorized use of one's image, thereby establishing a right that is independent from all other attacks on one's private life.

The \textit{Papillon}\textsuperscript{20} decision provides a particularly articulate example. This case, decided in 1970, concerned the publication of a book recording the life of former convict, Henri Charrière, a.k.a. Papillon.\textsuperscript{21} The book was based on documents from the files of the court that sentenced him to life imprisonment forty years earlier. The court held that the publication of the book did not amount to an invasion of Papillon's privacy.\textsuperscript{22} Nevertheless, the court still held that the reproduction of Papillon's photograph on the cover of the book, without his consent, infringed upon Papillon's right of image, entitling him to recover damages.\textsuperscript{23}

\textbf{B. Legislative Response to the Judicial Creation of the Rights of Privacy and Image}

Although the right of privacy has long since been recognized by French courts,\textsuperscript{24} only recently has the French Legislature given it specific protection in French statutory law. The Law of July 17, 1970, introduced Article 9 into the French Civil Code and provided for specific offenses in the Penal Code.\textsuperscript{25} Article 9 provides that "Everyone is entitled to respect of private life" and this article empowers the courts to issue drastic preliminary injunctions to prevent or stop intrusions into the intimacy of one's private life.\textsuperscript{26} Article 226-1 of the French Criminal Code subjects anyone who

\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} See Hauch, \textit{supra} note 3, at 1233--36 (noting that legal protection for some aspects of an individual's privacy has been recognized by French courts since at least the \textit{Rachel Affair} in 1858).
\textsuperscript{25} Law No. 70-643 of July 17, 1970, J.O., July 19, 1970, p. 6751 (codified in C. CIV. art. 9 (Fr.)).
\textsuperscript{26} C. CIV. art. 9 (1)--(2) (Fr.). Article 9(2) provides that "Judges can, without prejudice to the later reparation of any damages suffered, prescribe all measures such as sequester, seizure and
purportedly violates the intimacy of one’s privacy, “by fixing, recording or transmitting, through any device, the image of a person in a private place, without their consent, to penalties of imprisonment of one year and a fine of 300,000.”

Furthermore, in the 1990s, other specific legal provisions have been enacted to take into account the rights of performing artists and professional models; that is, people who make a living from the professional use of their image. However, none of these legal provisions explicitly establish the right of image as a general and comprehensive legal right.

However, the right of image, first founded on the general provisions of Article 1382 of the Civil Code, has nevertheless benefited from case law that specifically recognizes this right as an autonomous personality right. Thus, despite the lack of specific statutory protection, the unauthorized use of another person’s image constitutes a wrongdoing, and the victim of that unauthorized use is no longer required to establish fault in order to vindicate their right of image.

C. From the Acknowledgment of a Right to One’s Image to a Right on One’s Image

As discussed above, there is an abundance of French case law affirming the notion that everybody has an exclusive right in their own image. This right allows one to prohibit any unauthorized use or dissemination. There is also general consensus among most courts that the

27. Code pénal [C. PÉN.] art. 226-1 (Fr.)
28. Concerning performing artists, article L 212-2 of the French Code propriété intellectuelle [Intellectual Property Code] [C.P.I.] provides that “[t]he performing artist enjoys the right to respect of his name, quality and performance. This inalienable and perpetual right is attached to the individual. It is descendible to heirs to enable protection of the performance and memory of the deceased performing artist.” See C.P.I. art. L 212-2. Article L 212-3 of the C.P.I. goes on to say, “The fixation, reproduction and public display of the artist’s performance as well as the separate use of the sound and image of a performance recorded both with sound and image, are subject to written consent of the performing artist.” Such consent, as well as the corresponding compensation, are governed by articles L 762-1 and L 762-2 of the Code du travail [Labor Code] [C. TRAV.], subject to respect of the provisions of article L 212-6 C.P.I. Id. art. L 212-6. Concerning models, articles L 763-1 and following of the Code du travail provides that
Any contract pursuant to which an individual or a legal entity retains, for a fee, the services of a model, is deemed an employment contract. Any individual who is assigned either to display to the public, directly or indirectly through reproduction of his image on any visual or audiovisual medium, a product, service or commercial, or to pose as a model, whether or not his image is subsequently used, is deemed a professional model, even though such activity is carried on an occasional basis.

right of image is characterized as a personality right rather than as a property right, despite some courts' contrary statements. Additionally, various legal scholars and commentators have emphasized the ambiguous nature of the right of image by describing it as embodying two concepts.

On the one hand, the right to protect one's image from unwanted exposure embodies a privacy interest. This aspect flows from the general difficulty in placing a specific value on one's personal rights, while also recognizing the general consensus that one cannot alienate a personal attribute—the extrapatrimonial nature of the right. This concept has been called the right to the image, meaning that an individual has an exclusive right to his or her own image such that he or she can oppose its unauthorized use and dissemination. On the other hand, the right also embodies the desire to protect a marketable asset—the image of a popular person for which others are willing to offer compensation to use it. The relatively recent recognition of this patrimonial nature has been characterized as the right on the image (or the right to profit on the image)—the patrimonial nature.

It seems that French case law has followed suit, struggling with the replacement of the former concept with the latter. For example, a 1996 decision of the Paris Court of Appeal held that the right of image is a personality right that entitles the holder to oppose a dissemination and use of his or her image without prior consent; the violation of this right may cause moral and economic damage when the holder conferred commercial value to his or her image as a result of his or her notoriety.

In fact, most of the decisions recognizing a right on the image involve celebrities, whether or not well-known, for whom their image is an essential feature of their professional career, including performing artists, athletes, and models. In these cases, courts have acknowledged a right to authorize and control such use. Inexplicably, however, they have failed to award adequate (or substantial) damages. Still, the modern perception of the


31. See articles cited supra note 30.


33. See, e.g., Cass. 1e civ., Nov. 17, 1987, 1987 Bull. Civ. I, No. 301 [Delon v. Ici Paris]. In this case, the French High Court upheld the ruling of the Court of Appeal reasoning that, "the importance of the prejudice suffered by Mr. Delon (this prejudice being the result of an article
right of image recognizes its dual nature, encompassing both a negative, subjective right to prohibit the fixation and reproduction of one’s image, as well as a positive, economic right to commercially exploit one’s image.

III. THE SOURCE AND SCOPE OF LEGAL PROTECTION

Statutory protection from the unauthorized use of one’s image is found predominantly in the French Civil and Penal Codes. Only in rare circumstances, however, may a victim claiming that his image has been misappropriated bring an action before the criminal courts. More typically, a plaintiff would seek relief in the civil courts.

A. Protection Afforded by the French Criminal Code

As mentioned previously, Article 226-1 of the French Criminal Code imposes the possibility of punishment on anyone who intrudes on the intimacy of another’s private life by either (1) capturing, recording, or transmitting words pronounced in private or in confidence without the author’s consent; or (2) fixing, recording or transmitting, through any device, the image of a person in a private place, without his or her consent. Under French law, individuals, as well as corporate entities, may be found guilty of violating the above Article, resulting in a prison term of one year and a fine of \( \text{FF}300,000 \). Article L 226-8 of the Criminal Code further criminalizes the printing of knowingly false stories or the printing of manipulated images of a person without the person’s consent, whenever the false nature is not obvious or clearly indicated in the publication.

In addition to a three-year statute of limitations, a criminal action requires a plaintiff to establish the following elements: (1) an intent to take or to disseminate the image, although a showing of willful indiscretion is not required; and (2) that the image was taken on private property. However,

entitled Alain Delon Operated in Cuba and illustrated by a photograph of the actor) was not in accordance with the profit generated by the Ici Paris company” and that consequently, the actor could not allege that he would have suffered, “a loss of profit constituting by itself a commercial prejudice.”

34. C. PÉN art. L 226-1 (Fr.).
35. See id.
36. Id. arts. L 226-8; see T.G.I. Paris, 17e ch., Correct., Mar. 6, 1997, available in LÉGI-PRESSE, Oct. 1997, at 133 [Prince Rainier III v. Voici]. The court discharged the managers of Voici magazine, a popular French weekly tabloid, sued by the Prince of Monaco, on the ground that “the contentious photograph displayed in an obvious manner the features of a fabricated editing and that the layman reader of Voici magazine would not be mistaken with the use of such a device.”
37. Id.
the definitions of consent and private property are highly subjective, vague, and subject to change.\textsuperscript{38}

\textit{B. Protection Afforded by the French Civil Code}

As discussed below, French case law, interpreting the Civil Code, has established the general principle that any person, regardless of birthplace, fame, or activity, is entitled to prevent the unauthorized publication and use of his or her image. Additionally, case law has established that consent must be clearly expressed for both the taking and the using of a person’s image. The specific code provision upon which courts have relied is article 1382 of the Civil Code, from which four principles have been extracted by the courts.

First, it is irrelevant which medium is used to reproduce or disseminate a person’s image. The courts have condemned everything from the unauthorized reproduction of photographs to the unlawful reproduction in the form of a figurine, doll,\textsuperscript{39} or cartoon character in a video game.\textsuperscript{40} Second, courts have also condemned the unauthorized use of a performing artist’s fictitious name that reflects his or her personality.\textsuperscript{41} The fictitious

\textsuperscript{38} Case law gives many examples of hesitation, for example, a beach with private and paying access, was nevertheless held a public place. See CA Paris, Mar. 11, 1971, D. 1971, 71-447, note Foulon-Piganiol. Also, a synagogue has been held to be a public place. See CA Paris, Jan. 11, 1987, Gaz. Pal. 1987, 1-138, note Bertin. On the other hand, a prison was held to be a private place. See CA Paris, Oct. 23, 1986, Gaz. Pal. 1987, 1-22, note Bertin); see also Cass. crim., Apr. 25, 1989, 1989 Bull. Crim., No.165 (holding that the taking a photo of a person from outside the closed window of his or her apartment and its further unauthorized publication characterize criminal offenses under article 2261 (unauthorized taking) and article 226-2 (unauthorized dissemination) of the Code pénal.

\textsuperscript{39} CA Versailles, June 30, 1994, D. 1995, 645, note Ravanas. An advertising agency had placed an order with a craftsman to make small figurines of the Princess Caroline of Monaco shopping at the local market in St. Rémy de Provence where she was staying. The court for provisional remedies prohibited any further dissemination of the figurines. The Court upheld the decision, but reduced the amount of damages awarded because it found that the Princess essentially suffered a moral prejudice (violation of her right to seclusion, to be left alone, misleading impression that she commercialized her image) and that she would have bargained for a small compensation the right to reproduce her image in those figurines.


\textsuperscript{41} See Cass. 1e civ., Feb. 19, 1975, Ann. 1977, 153 [WS v. Jourdain]. In this case, a cabaret artist well-known in show business as “Lova Moor” was entitled to prevent the use of her fictitious name as the name commercial sign of a women’s clothing store. \textit{Id}. The High Court indicated that protection afforded to a fictitious name does not require it to have become famous beyond the circle where the person conducts his or her activities. \textit{Id}. It is enough that it enjoys notoriety in said circle. \textit{Id}. 

name is usually unique and chosen by the person, as opposed to a nickname which is given by others.\textsuperscript{42}

Third, the person must be recognizable in the reproduction of his or her image. The issue is whether it is possible to identify, \textit{sensu largo}, the person whose image has been reproduced. When the person is unknown, his or her image must be clearly reproduced so as to enable undeniable identification. In 1993, the famous French photographer Robert Doisneau was sued by two separate women, both claiming to be the young girl in his famous photograph entitled \textit{Kiss of the Hôtel de Ville}.\textsuperscript{43} Both women were seeking a share of the profits derived from the photograph.\textsuperscript{44} A French court dismissed both right of image claims because neither woman's facial features were recognizable in the photograph.\textsuperscript{45}

By contrast, if a person is well-known, it may be enough that his or her image is imitated or conjured up. An example is the case of French singers Johnny Halliday and Sylvie Vartan, whose distinctive features were used in advertising posters.\textsuperscript{46} Further examples include the use of French actors Claude Pieplu's voice and Gérard Depardieu's facial features in commercials.\textsuperscript{47} In 1983, the French advertising industry issued

\begin{footnotes}
\item[42] See id.
\item[43] T.G.I. Paris, 1e ch., June 2, 1993, Gaz. Pal. 1994, 16 [Epoux Lavergne v. R. Doisneau; and Françoise Bornet v. R. Doisneau]. For commentary on these cases, see E. Logeais, \textit{The French Right to One's Image: A Legal Lure?}, 5 ENT. L. REV. 163 (1994). The judgment was upheld by the Paris Court of Appeal on December 10, 1996; see also, T.G.I. Paris 3e ch., Sep. 19, 1980 [Fossey v. Bière 33 Export] (unpublished) (dismissing plaintiff's claim that his image had been used in a beer commercial). In the Fossey case, the advertising agency denied using plaintiff's image, although it could not reach the model allegedly used by the advertising agency. See id. The court found an overall likeness but also acknowledged differences in the facial features and lack of evidence that the agency had intended to defraud plaintiff's right of image. See id.; see also CA Paris, 14e ch., June 6, 1984, D. 1985, IR, 18 [F. v. Timacra Films] (finding that an attorney erroneously identified himself as a character depicted in a fictional movie based on the true news account of the murder of a judge in Marseille).
\item[44] Id.
\item[45] See discussion supra note 43.
\item[46] See T.G.I. Paris, 3e ch., Feb. 24, 1976 [Belmondo, Halliday and Vartan v. Eminence], available in FRANÇOIS GREFFE, \textit{LA PUBLICITÉ ET LA LOI} 214 (1994). Advertising posters for Eminence underwear captioned "Beware of imitations" portrayed impersonators of the French singing duo, Johnny Halliday and Sylvie Vartan. The court awarded damages because their fans were mistakenly led to believe that the couple had endorsed the brand commercial. However, the court denied economic damage because the couple had no history of marketing their image, and thus they had no valid claim for a loss of profits.
\item[47] See T.G.I. Paris, Dec. 3, 1975, D. 1977-211, note Lindon [Piéplu v. Régie Francaise de Publicité] (condemning a commercial for sock puppets that reproduced "the diction, the flow, the tone and the modulation of Piéplu's voice, conjuring up the verbal features of the actor"). In the Piéplu case, the court found that "[t]he imitation of the actor's voice infringed his personality rights and such wrongdoing entailed moral and professional damage." Id.; see also T.G.I. Paris, Oct. 17, 1984, D. 1985, Somm. 324 [Depardieu v. Suchard] (holding that the use of a British
\end{footnotes}
recommendations to make people aware that impersonations of an individual in an advertisement should be authorized and that the risk of any likely customer confusion should be avoided by clearly indicating the impersonation in the advertisement.\textsuperscript{48}

The final element extracted from the Civil Code involves the concept of consent. Consent must be clearly expressed for both the taking and the further usage of a person’s image.\textsuperscript{49} It is then within the court’s discretion to decide whether or not consent was given and to evaluate the scope of that consent.\textsuperscript{50} The following two sections discuss the requirement and scope of consent to use in the right to one’s image in France.

1. The Prerequisite of Prior Consent

Both the reproduction and the use of a person’s image require prior, express, and specific consent.\textsuperscript{51} Such consent must be given before the taking of a person’s image acting in a private context and prior to the disclosure of the image to the public, even if the image was taken in a public setting.\textsuperscript{52}

With respect to prior consent for the reproduction of a person’s image, courts strictly apply the traditional elements of the right of image that are closely linked to the protection of privacy. A fairly recent illustration of this point lies in a 1996 Nanterre trial court decision where the court prohibited Prisma Press, a publisher owning various tabloids, such as Voici Magazine, from printing photographs of Daniel Ducruet, the husband of Princess look-alike model of the French movie actor Gérard Depardieu in a commercial by the manufacturer of a chocolate brand was unlawful, because the model’s “image merged into the actor’s image and took advantage of his fame”). Yet another case concerned Newlook magazine’s reproduction of erotic photographs of a swimmer, who resembled a popular French female swimmer known for her aquatic dancing shows, in the midst of her synchronized swimming exercises. See T.G.I. Paris, Oct. 27, 1988, D. 1989, Somm. 358 [Mlle H. v. Sarl Editions des Savanes]. The court condemned the review and awarded €110,000 in damages to the swimmer. Id. The court found that publication of the photographs could lead one to believe that Miss H. had agreed to pose nude and then authorized the publication of the photographs in exchange for payment. Id. The amount of damages awarded appeared to be dictated by the level of indecency and deception that the photographs exhibited. Id.

\textsuperscript{48} See GREFFE, \textit{supra} note 46, at 213.

\textsuperscript{49} T.G.I. Paris, Mar. 6, 1996 \textit{[Beatrice Dalle v. RCS France], cited in YVES MARCELLIN, PHOTOGRAPHIE ET LOI \textit{[PHOTOGRAPHY AND LAW]} 126 (1997).}


\textsuperscript{51} See cases cited \textit{supra} note 50.

\textsuperscript{52} See cases cited \textit{supra} note 50.
Stéphanie of Monaco, with his mistress around a swimming pool. With respect to prior consent for the subsequent use of an image already reproduced, courts do not only rely on the murky distinction between private and public places where the image was taken, but they also tend to rely on other circumstances showing a kindred personal right to protect.

The same rules apply to so-called public figures who, like any ordinary person, have a right to the protection of their privacy and image. As a result, prior consent of a public figure is also required whenever enforcement of their personality rights rises above the public’s right of information about this person due to his or her public status. At this level of invasion, consent must be clearly expressed for both the taking and the further using of a person’s image. It is then within the court’s discretion to decide whether consent was given and to evaluate the scope of said consent.

The problematic aspect of this consent issue with respect to public figures is deciding whether the individual has the burden of expressly consenting or opposing the use. If express consent or opposition is not required, then the issue is whether tacit consent can be inferred from the public status of the person. When the public figure consents to the taking of his or her image, he or she may still object to its further dissemination, on the ground that such dissemination violates a right of privacy and image. Such objection is valid even though the individual may have consented in the

53. See T.G.I. Nanterre, ord. réf., Aug. 24, 1996 [Daniel Ducruet v. Prisma Presse], cited in MARCELLIN, supra note 49, at 126. The court for provisional remedies found that Daniel Ducruet, who could precisely indicate the specific time, setting, and social circumstances where the photographs were shot (on August 5, 1996, using a long lens), established his lack of consent to the taking of the photographs and imminent damage because of their contemplated publication on August 26, 1996. Id. The photographs were, however, published extensively abroad. Id.

54. See CA Paris, May 3, 1989, C.D.A., 273 [Serge July, Sté NVelle de Presse et Communication v. Amar Tamarat] (sentencing to joint payment of f50,000 in damages the editor of a newspaper and the publishing company for reproducing, in connection with an article on the stock exchange crisis, a photograph shot in large format at the Paris Stock Exchange with Mr. Tamarat in the center and forefront of a group of fellow stock brokers, all identifiable). In this case, the court found that since the central position and gesticulating attitude of Mr. Tamarat "made him a distinctive character embodying the main interest of the photograph," publication of his image was subject to his prior express consent. Id.

55. Civ. 1ère, Apr. 13, 1988, J.C P. 1989, 21219, note E. Putman [Sté de Presse Jours de France v. L’impératrice Farah Diba]. In this case involving the publication in the press of photographs of the former empress of Iran in her bathing suit on the beach and in a garden, the French High Court clearly set the principle that "a monarch like any layperson, is entitled to respect of his private life and to oppose any circulation of his image where he is not depicted in the exercise of a public activity." Id. The court upheld the finding that the contentious photographs portrayed moments of private life. Id.

56. See cases cited supra note 50.
past to publication of similar reproductions in a similar context,\textsuperscript{57} \textit{a fortiori} in a different context.\textsuperscript{58}

\textsuperscript{57} See C.A. Paris, Oct. 25, 1982, D. 1983, 363 [\textit{Taranto v. Epoix Jarre}]. The Jarre couple authorized a photo journalist to photograph them with their children at home. \textit{Id.} Jean-Michel Jarre then forbade Denis Taranto, the owner of the photo agency, to publish photographs showing his children because the couple wanted to keep them away from any publicity. \textit{Id.} The couple was authorized by court order to send a bailiff to retrieve the corresponding negatives, and sued Taranto for damages. In the meantime, the disputed photographs had already appeared in foreign magazines. \textit{Id.} The court awarded Jarre damages, and held that the right of privacy, affirmed by article 9 of the French Civil Code,

\begin{quote}
\[\text{[E]nables anyone, be it a performing artist or other, to oppose the unauthorized dissemination of his image, an attribute of his personality. \ldots} \]
\end{quote}

Denis Taranto, who passed on the contentious photographs for publication despite his knowing of the Jarre's opposition, has violated their right to privacy, in its family context, and cannot claim as a defense prior authorized publication of photographs of Charlotte Rampling with her children. \textit{Id.}

\textsuperscript{58} See also T.G.I. Paris, Mar. 6, 1996 [\textit{Béatrice Dalle v. Sté RCS France}], cited in MARCELLIN, \textit{supra} note 49, 126. In this case, the monthly \textit{Max} magazine had published two photographs of the French movie actress Béatrice Dalle where she had posed respectively almost naked in a sadomasochistic setting and wearing a low-cut dress. \textit{Id.} The court held that

\begin{quote}
\[\text{[A]bsent a showing that Béatrice Dalle consented to the actual contentious reproduction of these photographs, her rights on her image enable her to oppose that said photographs, even though they were taken with her consent in a professional context, be circulated without her express consent because control of the use of her image stays with her.} \]
\end{quote}

\textit{Id.}

\textsuperscript{58} See T.G.I. Paris, Dec. 18, 1995 [\textit{Anne Parillaud v. Sté Prisma Presse}], cited in MARCELLIN, \textit{supra} note 49, at 127. In this case, the weekly magazine \textit{Voici} illustrated an article on "Stars' hidden pasts" with photographs from various fictional movies featuring undressed, young actresses with accompanying comments on the early stages of their careers. One of them, Anne Parillaud, sued the publishing company for violation of her neighboring rights, moral rights, and rights of image. \textit{Id.} The court awarded her damages in the amount of ff30,000 after holding that the defendant had violated the actress' neighboring rights provided for in article L 212-3 of the C.P.I. This law requires the written consent of the performing artist, prior to any separate use of the sound or image of his or her performance, when said performance was recorded with both sound and image. \textit{See} C.P.I. art. L 212-3. In addition, the court held that the actress did not give her express, specific consent for reproduction of her image in the magazine. \textit{Id.} There was no proof that the photographs were taken in a public place, in the course of a public event. \textit{Id.} In a second case involving the same actress, she complained of violations of her rights of privacy and image because of a press article on her movie career illustrated with five photographs. Three of these photographs had been taken while the actress was on stage and two were taken during official ceremonies. \textit{See} T.G.I. Nanterre, Feb. 21, 1996 [\textit{Anne Parillaud v. Sté d'Etude et de Développement de la Presse Périodique}], cited in MARCELLIN, \textit{supra} note 49, at 127. The court, relying on articles 9 and 1382 of the French Civil Code, affirmed anew the exclusive right of any person to oppose the unauthorized reproduction and dissemination of her image and awarded ff50,000 in damages for invasion of rights to privacy and image. \textit{Id.} Indeed, although the photographs alone did not harm such rights, their use to buttress information on the actress' private life, participated in an invasion of her privacy and an undermining of her image. \textit{Id.}
Moreover, when a public figure has not expressed consent or opposition to the taking of his or her image in a private context, courts will usually infer a lack of consent and find that there has been an invasion of privacy or a violation of the right of image. In such cases, courts often impose severe measures to prevent irreparable and imminent harm to the individual. For example, in a recent case, a group of paparazzi had taken photographs of Claire Chazal, a well-known television newscaster, while on vacation on a Greek island. The court issued two successive preliminary injunctions prohibiting the publication of these photographs, and ordered the prompt delivery of the photographs to Ms. Chazal's counsel. In each case, the court imposed a penalty for non-compliance. Although no publication had occurred when the action was brought, the Court found sufficient evidence that the Prisma group intended to publish the photographs. The court relied on a specific provision of the French Civil Procedure Code, Article 145 NCPC, to decide that Claire Chazal could legitimately seek possession of the contentious photographs.

2. The Scope of Consent

On many occasions, courts have asserted that a general waiver of the right of image for future use cannot be inferred from tolerating past uses of one's image. In other words, express or tacit acquiescence to prior publications of one's image cannot be deemed implicit consent to further uses. This rule applies to both public and private figures.
Under this broad standard, the general rule is that consent must be given for a specific use and duration, usually two years for models. Therefore, photographers would be well advised to contract for the specific uses of their photographs before distributing them. This requirement stems from similar requirements imposed by French copyright law, which provides that a valid assignment of copyrights implies that the modes of exploitation, as well as the term of the assignment, have been clearly stated.

Notwithstanding these general rules, the past behavior of the person challenging the use of his or her image may affect the decision of the court on two levels. First, a court may be more reluctant to order the seizure of the photographs and enjoin publication if the petitioner has historically displayed a nonchalant attitude toward the publication of his or her image. A plaintiff may, however, still seek and obtain damages for the unauthorized use. Second, courts tend to acknowledge a “pseudo-right to oblivion” (a right to have information about one’s past not released anew to the public) in favor of celebrities who have posed for photographs at a young age, but who do not wish to have these photographs reproduced after they have become famous.

IV. THE THREE MAIN DEFENSES RECOGNIZED BY CASE LAW

The enforcement of the French right of image often conflicts with other legal principles, such as the freedom of speech and expression. When confronted with such dilemmas, French courts attempt to balance the conflicting principles behind the right of image and the freedom of speech.
and expression. French case law has delineated three sets of circumstances where the right of image must adapt to suit the circumstances: (1) when photographs are taken in a public place; (2) when freedom of speech and news information are involved; and (3) when parody is at stake.

A. Photographs Taken in a Public Place

The French High Court has defined a public place as "a place which anybody can have access to without special authorization, regardless of whether access is subject to some specific conditions, timetables or reasons."75 No prior express consent is required from the person or persons whose image is taken in a public place if the following conditions are met: (1) the photograph does not focus on, or single out, the individual or individuals claiming the right of image; and (2) the photographs must show the photographed person or persons engaged in public, rather than private, activities.76

The characterization of whether a place is public or private is frequently debated. Similar issues arise in characterizing the public or private nature of an event or ceremony. Case law has yet to establish clear guidelines.77

However, a defense based on the fact that the photographs were taken in a public place is not successful if commercial use is made of the photographs. For example, in a 1973 lower court decision, a photograph of a television reporter who had covered the opening of a chain store was published in a local newspaper and reproduced in an advertising leaflet released by the store.78 Both the newspaper and the store claimed that the photograph had been taken on public premises in the course of a newsworthy public event.79 The defendants further argued that the reporter did not try to avoid being photographed nor did the photograph portray her in an unpleasant manner.80 In dismissing the reporter's action, the court

75. Georges Levasseur, Protection de la personne, de l'image et de la vie privée (la voie pénale) [Protection of the Person, the Image, and the Private Life (the Criminal Law)], Gaz. Pal. 996 (1994).
77. For instance, the court held that the publication of a photograph of a female teacher "taken in the course of her professional activities (i.e., in a sphere accessible to third parties and thus alien to her private life) did not require prior consent." See T.G.I. Jan. 5, 1994, Juris-Data 040196. However, compare this holding with the holding in the Claire Chazal case. T.G.I. Nanterre, ord. réf., Aug. 2, 1996.
79. Id.
80. Id.
argued that if express consent was always required, it would be impossible to publish any news reports with photographs of groups of people or persons attending or participating in a public event. The court held, however, that

"[I]n such cases of publication, the photographed person is entitled to compensation only if his or her image is reproduced in an attempt to ridicule them or the caption of the photograph is unpleasant or their features are used for commercial purposes from which it can be inferred that the person endorsed, for free or for a fee, the advertising use of their image."\(^2\)

Therefore, the unauthorized commercial exploitation of a person's photograph is prohibited. For instance, a 1991 Paris Court of Appeal decision held that the unauthorized use in posters and postcards of a photograph of a group of people posed around a car painted by the famous painter Yves Corbassièrè's could be enjoined.\(^3\) The photograph was taken by Robert Doisneau with the consent of Corbassièrè, but such consent was limited to display at a specific exhibition only.\(^4\) The photograph was subsequently used in both a catalogue and in posters promoting the Doisneau exhibition, as well as in postcards and posters unrelated to the promotion.\(^5\) The court upheld the use of the photograph for promotional purposes because it furthered the cultural purpose of the exhibition, which was devoted to the artistic and intellectual history of 1950s Saint-Germain des Prés, located near Paris.\(^6\) Thus, the court found that the corresponding catalog and poster had a similar purpose. The postcards and non-promotional posters, on the other hand, were condemned by the court as unauthorized commercial exploitation of the photograph, beyond the scope of Corbassièrè's consent.\(^7\)

81. Id.
82. Id. For an illustration of a disparaging caption, see CA Paris, 1e ch. A, Sept. 27, 1988, Gaz. Pal. 1989, note Frémond [Rapho v. UFC]. In that case, the court held the editor of a newspaper liable for damages for reproducing a photograph of a priest in front of a church covered with funeral hangings. See id. The publication intended to illustrate a news article on the corrupt business practices of funeral parlors that had taken advantage of families' distress. See id.
84. Id.
85: Id.
86. Id.
87. Id.
B. Freedom of Speech and the Right to Provide News Information

Article 10 of the European Convention on Human Rights establishes and promotes the freedom of speech and information. The French Law on the Liberty of the Press, the backbone of the legal regulation of the press in France, also provides for such freedom. Therefore, reproduction and publication of one's image in a newsworthy context is the second exception to enforcement of the right of image.

1. "Information" is a Broadly Construed Term

A person who participates in an event likely to trigger the legitimate public interest falls into the realm of "public information" and thus he or she loses the full protection of his or her image, provided that the right of privacy is respected. This exception was clearly illustrated by the Paris Court in a matter concerning the publication of photographs taken of the 1995 bomb attacks in the St. Michel subway station.

With respect to photographs taken on court premises during public judicial proceedings, Article 38ter of the French Law on the Press provides that the use of any device to record, fix, or transmit sound or image during an administrative or civil court proceedings must have the prior authorization of the court, the parties, and their counsel. Moreover, sale or publication of any materials taken in violation of the above provisions is punishable by a fine of FF30,000.

The Law of July 11, 1985, amended on July 13, 1990, allows the recording of sounds and/or images during administrative or civil court proceedings whenever such recordings are relevant to the forming of judicial

90. Id.
91. See T.G.I. Paris, Sept. 10, 1996, D. 1997, obs. Hassler. In this case, the court declined to enforce a specific criminal provision of the French law against the Press. Id. It recognized that article 38 al.3 is rarely enforced on the grounds that "it would prevent any and all publication of photographs or images showing an event or news item with wounded victims." Id. art. 38 al.3. This provision prohibits the "publication, in any form, of photographs, engravings, drawings, portraits purporting to reproduce all or part of the circumstances of crimes and offenses . . . ." listed in other parts of the French Criminal Code. See Law on the Liberty of the Press, Law of July 29, 1881, art. 38, D.P. IV, 1881, p. 65.
94. Id.
archives. This option has been invoked only for historical litigation, such as the prosecution of Nazi Klaus Barbie, former French militiaman Paul Touvier, and accused war criminal, Maurice Papon, for crimes against humanity. These recordings are passed on to the administration in charge of the judicial archives and they may not be published for a term of twenty years. They are also available for review only under strict conditions. However, a court may authorize the reproduction and dissemination of images from trials for crimes against humanity, as soon as a court decision has become final.

2. The Use of a Person’s Image Must Be for Genuinely Informational Purposes

Consistent with the purpose of the information exception, the photograph must be taken “in circumstances directly linked to the events at stake or their factual consequences.” Based on this requirement, courts have prohibited the publication of old photographs in which the traumatizing impact for the victims was not outweighed by their informative value. Commercial use of an image also precludes claiming the exemption of newsworthiness. However, the concept of commercial speech was acknowledged by the Strasbourg Court. The court held that advertising

96. See Cass. crim., Mar. 16, 1994, JCP 1995, II, 22547, note Ravanas [the Touvier case]. In this case, the court held that the provisions of the Law of 1985 prevailed on the personality rights, including the right of image, which may be adversely affected by the reproduction or further dissemination of the recordings of the hearings. See id.
99. Id.
101. T.G.I. Paris, Feb. 20, 1985, D. 1985 Somm. 323; see also, T.G.I. Paris, ord. réf., Oct. 31, 1996, May 1997, III, 69 [Ilich Ramirez Sanchez v. Editions du Seuil and B. Violet, Légipresse]. In that case, the Seuil Company published a biography of the famous terrorist, M. Sanchez, better known as Carlos, and reproduced an old photograph of him on the cover of the book that had been extensively circulated at the time when he committed his terrorist attacks. Id. The court declined to enforce his right of image on the grounds that the protection granted by the right of image to which everybody is entitled is not applicable when a publication is newsworthy. Id. In contrast, in the Papillon case, T.G.I. Paris, ord. réf., Feb. 27, 1970, JCP 1970, II, 16293, note Lindon, the book publication occurred at the time of Carlos’ trial. Id.
102. T.G.I. Paris, Dec. 21, 1983, D. 1984, Somm. 331 [Noah v. Soc. Frse de Revues Team] (concerning the unauthorized reproduction of photographs of the French tennis player Yannick Noah in a brochure lacking any informative captions and intended for sale to his fans). In this case, the court dismissed the defense based on the right of information, as the circulation of the brochure was purely for commercial reasons and as it disregarded the fact that the photographs were taken in public places. See id.
103. Cour Européenne des Droits de l’Homme [European Court of Human Rights] [CEDH],
was protected under Article 10 of the European Convention for Human Rights, which did not distinguish between profit and non-profit advertising messages.

3. Freedom of Speech and the Right of Information May Be Undermined by the Right to Human Dignity

The French courts allowed the publication of photographs showing the dismembered corpse of a Dutch student killed by a fellow Japanese student. French legislation amending the Law of September 30, 1986, which allowed this publication and regulates audiovisual communication, now expressly provides for the respect of human dignity. Based on this provision, the Conseil Supérieur de l'Audiovisuel ("CSA"), the French administrative authority in charge of supervising proper enforcement of the law, admonished television channels that had broadcast the mortal agony of a French soldier shot in former Yugoslavia.

The right of dignity also arose in an interesting case involving a controversial advertising campaign run by the clothing company Benetton. The campaign consisted of three advertising posters reproduced in the media, each showing a naked torso, buttock, and groin area tattooed with the words "HIV-positive." The French Court of Appeal affirmed the right of dignity, holding that any business is ordinarily free to promote its activities by commenting on any social or contemporary issues, including very serious ones, even if the message does not relate to the company's products or services. In this specific case, however, the court condemned Benetton's exercise of commercial speech on the ground that it violated the dignity rights of AIDS patients. The court found that the advertising posters, absent captions providing an explanation of the message or the nature of the

Makt. Inter Verlag 1989.

110. Id.
111. Id.
112. Id.
purported debate, degraded the dignity of AIDS patients and would likely spur detrimental social rejection of these individuals.\textsuperscript{113}

\textbf{C. The Parody Exception}

French Case law acknowledges that prior consent for the use of a person’s image is not required when the use is for parody purposes.\textsuperscript{114} Parody is a humorous form of social commentary and literary criticism that dates back to Greek antiquity. The French Courts have reasoned by analogy to the parody exception expressly provided by French copyright law (droit d'auteur) defining a parody of copyrighted work as a non-infringing use.\textsuperscript{115}

Parody is a method of exercising one's freedom of speech and is essential in a democratic society.\textsuperscript{116} By definition, parody is not an objective depiction of reality and truth.\textsuperscript{117} To qualify as an exception to the right of image, the parodistic use must have a humorous,\textsuperscript{118} non-offensive,\textsuperscript{119} and informative purpose.\textsuperscript{120}

Furthermore, while a parody of a person has been long recognized as acceptable, the parody exception does not apply to the mocking of a person associated with the trademark.\textsuperscript{121} In a recent case, the French High Court held that repeated mockery of the manager of the French car company

\textsuperscript{113} Id.
\textsuperscript{114} See cases cited infra notes 116, 118–21121.
\textsuperscript{115} See C. civ. art. L 122-5-4 (Fr.) (listing parody as one exception to the author's exclusive rights of reproduction).
\textsuperscript{116} See CA Paris, Mar. 11, 1991, Feb. 18, 1992, available in LÉGIPRESSE no. 95, 112 (noting that it is not for the courts to determine whether the parody is in good or poor taste).
\textsuperscript{117} C. civ. art. L 122-5-4 (Fr.).
\textsuperscript{118} See case cited supra note 116.
\textsuperscript{119} See CA Paris, 4e ch. B, Nov. 22, 1984, D. 1985, I.R. 165. In this case, the court held that the hodgepodge of the traditional depiction of both an enemy and elected official of the French people, through the use of a satirical broadcast, amounts to a willful offense, beyond the caricature of a person (i.e., the ludicrous and overdone yet lawful misrepresentation of some ridiculous or unpleasant features of his). Id.
\textsuperscript{120} See T.G.I. Nancy, Oct. 22, 1976, JCP 1977, II, 18526, note Lindon (involving the former French President M. Giscard d'Estaing, who obtained the withdrawal of gamecards entitled The Giscartes, where he was featured as the crowned King); see also T.G.I. Paris, Oct. 4, 1989, Berens v. Canal Plus, D. 1989, Somm. 240, note Amson. In the Berens case, also known as “The Sperm Bank” case, a satirical television program entitled Le Journal des Nuls transformed a commercial where an actor advertised the merits of a bank to make one think that the bank was not a financial establishment, but a sperm bank. See id. The court considered this a violation of the right of image as “the crude commentary of the parodied commercial was making the actor look ridiculous and moreover, the advertisers and announcers most likely to hire the actor might believe that he did this type of diversion of advertising on payment.” Id.
\textsuperscript{121} Civ. 2e, Apr. 2, 1997 D. 1997-411, note Edelman.
Peugeot was detrimental to the Peugeot trademark and the parody exception was not available as a defense.\textsuperscript{122}

\section*{V. A Transferable and Descendible Asset}

\subsection*{A. Transferability}

As already explained, the French right of image prohibits any unauthorized use of a person's image that fails to respect his privacy. Consent is the prerequisite for the use of a person's image. Thus, anybody may give their consent for free or bargain for compensation in exchange for it.\textsuperscript{123} This compensation may take the form of a flat fee or a royalty payment based on the scope of the authorized use.\textsuperscript{124} The Paris Court of Appeal stated that the general principle as: "Prior consent must be explicit with respect to its term and scope; therefore, consent given by a model to reproduce her photographs 'for commercial exploitation' can only be deemed given for a reasonable term (usually two years for a model) and predictable customary uses . . . ."\textsuperscript{125}

Various court decisions have acknowledged the exclusive right of any person to commercially exploit his or her image.\textsuperscript{126} Two professions, modeling and the performing arts, have contributed to the recognition by case law of the patrimonial aspect of the right of image. However, recently passed legislation concerning these two professions have failed to expressly acknowledge their right of image as an economic asset worthy of protection. Articles L 763-1 and L 763-2 of the French Labor Code (Law No. 90-603 of July 12, 1990) defining the payment terms and conditions for the sale or exploitation of the services provided by a model, do not make any reference to their right of image as an individual right.\textsuperscript{127} Similarly, Law No. 85-660

\textsuperscript{122} Id.

\textsuperscript{123} J. GHESTIN & G. GOUBEAUX, TRAITÉ DE DROIT CIVIL: LES PERSONNES [TREATISE ON CIVIL RIGHTS: INDIVIDUALS], L.G.D.J. 292, 315 (1989). Consent given to publish one's image is construed as a specific waiver of one's right to prohibit invasion in the private area of personality, such consent may be compensated for and the beneficiary shall benefit from this immunity. \textit{See id.} This explains the lawful transfer to the patrimonial side. \textit{See id.} However, the exclusivity is granted for good value only if the person jealously keeps prohibiting any use of his or her image by other third parties. \textit{See id.}

\textsuperscript{124} \textit{See id.}


\textsuperscript{126} CA Paris, 5e ch., Dec. 1, 1965, JCP 1966, II, 14711, obs. R.L [\textit{Sté Ed. Mondiales v. Ep. Wolff (Pétula Clark) et Soc. Atlantic Press}]. This decision is the first to recognize a person's right to exploit commercially his or her image.

of July 3, 1985, establishing the neighboring rights of performing artists by granting them protection for their name, quality, and performance, does not consider their right of image in itself, but rather through its embodiment in the protected performance. The silence in the law reflects the ambiguous nature of the right of image, which has yet to be expressly incorporated into statutory law as was the right of privacy under Article 9 of the French Civil Code.

The cautious legislative approach has not prevented French courts from protecting the goodwill attached to the image of these professionals. As stated by one decision,

[I]n the artistic field, fame stems from talent, work and lengthy, painstaking efforts along one's career, . . . a capital . . . the person enjoying it is the only one to decide how and when to exploit it . . . . Everybody is entitled to oppose any impairment of his or her persona, any prejudice to the representation which he or she may legitimately expect that people or the public will have of him or her.”

This view appears to reflect the new concept of “brand image” or reputation rights attached to a person.

Furthermore, the fact that consent may be contractually granted has allowed for the development of image licensing and marketing (for instance, character merchandising, sports licensing, endorsement, sponsorship, etc.). General rules of contract law apply to agreements consenting to the use of a person's image. In this respect, contracts that are against public policy and morality standards are null and void. Also, because the right of image is and remains a personality right, a general and perpetual waiver or transfer would probably be successfully challenged in courts, especially considering the existence of a right to oblivion.

Incidentally, persons involved in the marketing of their image may attempt to strengthen the protection of their image and buttress the contractual basis of their licensing agreement by registering their family name, fictitious name, portraits or distinctive visual elements conjuring up

128. See also cases cited supra note 47.
129. C. civ. art. 9 (Fr.)
131. See supra note 47 and accompanying text.
132. C. civ art. 6 (Fr.) (“On ne peut déroger par des conventions particulières aux lois qui intéressent l'ordre public et les bonnes moeurs.”) [One cannot enter into an agreement that is contrary to laws dealing with issues of public policy and good morality.]
133. Id.
their persona (including armorial bearings and mottoes) as a trademark.\footnote{CA Montpellier, Mar. 10, 1960, Ann. 1961, 301 [\textit{Sourou v. DM}]. In this case, the court upheld upholding the registration of a trademark for dolls of the “emblem of a building depicting Lady Carcas, the legendary heroin of the city of Carcassonne.” See \textit{id}. Other examples include the “Cognac Napoleon” and the champagne “Veuve Clicquot.” However, pursuant to article L 711-4(g) of the C.P.I., a trademark cannot be registered if it conflicts with the personality rights of another (including his family name, fictitious name and image).}

Almost any type of “identifier” is now registrable in France, provided that it is distinctive for both products and services.\footnote{CA Paris, le ch., May 20, 1987, D. 1987, Somm. 384, note Lindon & Amson \textit{[SEDEP v. Drucker]}. In this case, concerning the use of a photograph representing the television announcer Michel Drucker, the Court of Appeal in Paris stated that because the announcer consented to being photographed, the television magazine was authorized to publish the photograph in relation with the announcer’s professional activity. \textit{id}. However, reproduction of the said photograph in the form of a poster was unlawful for lack of consent by the announcer. \textit{id}. It is interesting to note that the Court of Appeal reduced the amount originally awarded to M. Drucker by the Tribunal from \textit{ff}200,000 to \textit{ff}10,000 because the harm suffered was one of moral character, noting that “its fair compensation could not reach a sum which would represent a compensation for a loss of profit.” \textit{id}. In a 1986 case, Fauchon, a luxury catering and grocery store, published a brochure to celebrate its centennial birthday. See CA Paris, le ch. A, Dec. 5, 1988, D. 1990, Somm. 239, note Amson \textit{[Soc. Fauchon v. Mme. X]}. This brochure included a photograph of a famous actress, Mme. X, that was taken at a reception organized by the Fauchon company. \textit{id}. Mme. X was frequently paid for posing in photographs, but in this case, she had not consented to the reproduction of her picture in the brochure. \textit{id}. The Court found that Mme. X had consented to the taking of her photograph, yet Fauchon committed a wrongdoing by not obtaining her prior consent for its use of the photograph in the brochure. \textit{id}. The Court awarded \textit{ff}1 in damages because Mme. X did not introduce evidence of harm caused by the circulation of the brochure, or evidence of the amount of fees that she could have obtained from Fauchon for such advertising use of her image. \textit{id}.}

This difficulty comes in deciding for which classes the trademark should be applied. This same effect may be also attained through copyright licensing.

There is, however, an apparent paradox in the present case law with respect to assessment of damages for unauthorized commercial uses of a person’s image.\footnote{See CA Paris, le ch., May 20, 1987, D. 1987, Somm. 384, note Lindon & Amson \textit{[SEDEP v. Drucker]}.} If the person is well-known and has already commercially exploited his or her image at the time the unauthorized use occurs, then the courts tend to award less damages than if the celebrity has not previously marketed his or her image.\footnote{\textit{Id}.} The courts are usually more generous in assessing the amount of damages for both moral harm, because of the
induced endorsement, and for economic loss, because the commercial value
of the image is worth more since it has not been previously exploited.\textsuperscript{138}

\textbf{B. Descendibility}

The descendibility of the right of image depends directly on the
characterization of the right as based either on privacy or on its economic
value, that is, whether it is extra-patrimonial or patrimonial in nature.\textsuperscript{139}
This has been a long debated issue in the courts. After initially denying the
descendibility of the right of image, the courts appear to finally be moving
toward recognizing descendibility.

1. The Right of Image as a Personality Right
   Cannot Be Transmitted to Heirs

   In accordance with the majority of case law, the personality rights are
not descendible to heirs.\textsuperscript{140} The majority view is illustrated by a decision
involving the heirs of the popular French singer Claude François.\textsuperscript{141} Mr. P,
the tutor of François' two minor children, assigned by contract to the Bonnet
company the exclusive rights to reproduce, use, and sell, affixed to mirrors,
four photographs of the deceased singer.\textsuperscript{142} A second contract extended the
scope of the license to all forms of the singer's image in connection with
mirrors.\textsuperscript{143} Upset by the fact that other competitors were exploiting the
image of the singer as well, the Bonnet company sued its competitors for
copyright infringement and unfair competition.\textsuperscript{144} After having denied
copyright protection to the photographs, the Court dismissed the plaintiff's
claims, holding that the right of image is a personality right terminating upon
the death of the person.\textsuperscript{145} As such, the tutor of the heirs could not have
validly granted exclusive rights to the Bonnet Company.\textsuperscript{146}

\textsuperscript{138} See generally id.
\textsuperscript{139} See discussion supra Part I.B.
\textsuperscript{140} Cass. civ. 1e ch., Oct. 10, 1995, JCP 1997, II, 22765, note Ravanas. In this recent case,
the widow of the last Emperor of China sued the French publishing company Robert Laffont, the
High Court held that the widow could not claim unlawful invasion of the private life of her
deceased husband. See id.
\textsuperscript{141} CA Paris, 4e ch., June 7, 1983, Gaz. Pal. 1984, 2, 258, note Pochon & Lamoureux
[Société Bonnet v. Société Cashart United Diffusion Moderne].
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
On the other hand, the court stated that heirs have a right to object to the use of their father's image that would be offending to his memory, but they cannot assign this right to a third party. Therefore, the Bonnet company could not invoke such a right. The result of the court's holding here is that one cannot commercially exploit the image of a deceased singer without the prior consent of his or her heirs.

Even if the rationale for denying descendibility was initially because the right of image belongs only to living persons, it has nevertheless always been admitted that heirs may claim their own personality rights. Courts have acknowledged the right of families to prohibit the taking and the using of images of a relative in his or her death bed, in order to preserve the memory of one's deceased parent.

For example, on January 25, 1996, Paris Match published photographs of the former President of France, François Mitterrand, on his death bed. These photographs were taken in his home and without the knowledge of his family. The Paris Court of Appeal strongly reaffirmed that "[t]he right of privacy only belongs to living persons and can not be passed onto heirs." Although there is no post-mortem private life, it has been held that the unauthorized photographing of a person's remains amounts to an invasion of the family's private life, as well as to an impairment of the peaceful rest of the deceased ("paix des morts"). This action, the court indicated, violated the general principles of human dignity.

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148. Id.
149. Id.
151. See T.P.I. Seine, June 16, 1858, D.P. III 1858, 52 [hereinafter the Rachel Affair]. An artist who had been asked to draw the famous actress Rachel on her deathbed had sold the drawing despite the family's prohibition. Photographs of the drawing were taken and the Court ordered confiscation of both the drawing and negatives. The court held that the descendants may act to confiscate both the drawings and negatives. It acknowledged the right of descendants to act to protect "the memory and reputation of the deceased relative, as well as the seclusion of the family." See also, T.G.I. Paris, ord. réf., Jan. 11, 1977, D. 1977, 83, note Lindon (regarding the widow of Jean Gabin, a French actor, obtaining the right to prohibit the magazine Paris Match from publishing a photograph of the actor on his death bed).
152. CA Paris, 11e ch., July 2, 1997, D. 1997, 596. The editor of Paris Match was sued before the criminal courts on the basis of articles L 226-1 and 226-2 of the French Criminal Code and ordered to pay a fine of f1200,000, and the plaintiffs were awarded f1 in damages.
153. Id.
154. Id.
155. Id.
2. The Evolution of Case Law Toward Recognition of Descendibility

The first decision clearly recognizing the descendibility of the right of image was rendered in 1988 in a case involving the widow of the famous French actor Raimu and an advertising company that had used a caricature of her late husband to promote the advertiser's real estate.\(^{156}\) The court characterized the widow's claims as ones for invasion of privacy and damage to the image, fame, and memory of her deceased husband.\(^{157}\) It disallowed the damage to dignity claim but awarded her damages to compensate for her lost share of the profits made from the advertising use of her husband's image.\(^{158}\) The court stated:

The right to one's image has a moral and patrimonial character; the patrimonial right which allows the contracting of the commercial exploitation of the image for monetary compensation, is not purely personal and passes on to heirs. For a great actor to achieve celebrity, far from allowing the free use of his image for commercial purposes, makes it more necessary on the contrary to obtain his consent which he may deny for dignity reasons or grant subject to payment. In the present case, the use of an actor's image for advertising purpose is not offensive; yet it was subject to his heirs' authorization for she could have derived profit from such use according to the law of demand on the advertising market.\(^{159}\)

The decision is significant for three reasons. First, it affirms the dual nature of the right of image. Second, it establishes the general principle of descendibility of the patrimonial aspect of the right of image (without relying on corresponding statutory provisions concerning performing artists introduced by the Law of July 3, 1985). Finally, it concludes that heirs may object to impairment of the image of the deceased ascendant, whether such impairment is of a moral character (harm to the memory of the deceased) or of an economic character (loss of profits and eventual depreciation of the notoriety of the deceased’s image).

A 1996 decision confirmed the descendibility of the right of image in a case involving the widow of the Famous French comedic actor “Coluche,”


\(^{157}\) Id.

\(^{158}\) Id.

\(^{159}\) Id.
and the publisher of a book discussing his life.\textsuperscript{160} The book contained several photographs of the deceased actor that had already been published, including some taken in a private context (e.g., family pictures with his parents, children, and his divorced wife) and at the funeral.\textsuperscript{161}

The Court of Appeal upheld the lower judgment and found that the publication of the book unlawfully invaded his privacy and prejudiced the image of the widow and children as well as the image of the deceased actor.\textsuperscript{162} Concerning the right of image, the Court made the following clear statement:

The right of image is a personality right which entitles anyone to oppose the dissemination and use of his or her image without prior consent . . . . [T]he violation of this right may cause to its holder moral damage and, as the case may be, economic damage whenever the holder conferred a commercial value to his or her image due to his or her activities or notoriety.

The court went on to say:

Whereas heirs may seek relief for the moral harm caused by such violation only if the selection and display of the image is likely to impair the perception that the public may have of the deceased artist, they are entitled to full compensation of the economic damage stemming from said violation.\textsuperscript{163}

In this case, the court found that the heirs of Coluche could not claim a moral harm resulting from the publication of the contentious book of the images of Coluche and his mother, both deceased.\textsuperscript{164} However, the court stated that the heirs were entitled to recover for the economic damage resulting from the unauthorized use of Coluche's image, but not for the unauthorized use of the image of his deceased mother.\textsuperscript{165} Apparently, the court found that Coluche's mother did not appear to have acquired any commercial value in her image during her lifetime.

A very recent case illustrates the express descendibility provisions concerning the neighboring rights of performing artists.\textsuperscript{166} Article L 212-2

\begin{footnotes}
\item[160. \textit{CA Paris, Sep. 10, 1996, R.D.P.I., no. 68, 63 [\textit{Les Editions Sand & M. Pascuito v. M. Kantor, Mme Colucci}]. Coluche: The Book of Souvenir was released in 1993, several years after the actor's accidental death.}]
\item[161. \textit{Id.}]
\item[162. \textit{See id.}]
\item[163. \textit{Id.}]
\item[164. \textit{See id.}]
\item[165. \textit{See id.}]
\end{footnotes}
of the French C.P.I. provides that the right of the performing artist to have his or her name, quality and performance respected passes on to his or her heirs to ensure protection of the performance and memory of the deceased artist. In this case, the copyright owner of the famous French film noir *Les Tontons Flingueurs* starring Bernard Blier, authorized the use of movie excerpts for an advertising campaign promoting the French bank Banc National de Paris. The advertising posters showed edited excerpts of the image and postures of Blier with new fabricated partners in the place of the original fellow actors and displayed them in an overall de-colorized ambiance.

The son and daughter of the deceased actor unsuccessfully petitioned the court to enjoin the campaign, complaining, inter alia, of a mutilation of the artist’s performance. The court made a strict yet correct interpretation of Article L 212-2 C.P.I., stating:

The descendibility of the right of respect of the performance and memory of the artist is based on the principle of a continuation of the defunct. Therefore, an heir may not exercise such right in his personal interest in an attempt to protect the image which he wants people to have of himself; he may only exercise this right in the sole interest of the deceased artist.

The court’s rationale parallels the traditional reasoning with respect to descendibility of the moral and patrimonial rights of a deceased author with respect to his or her work of authorship. The court found that advertisements using the movie excerpts did not harm the memory of the deceased artist, especially since he had performed in commercials while still alive. The court further held that the performance of the actor was not

169. See id.
170. See id.
171. Id.
172. See T.G.I. Seine, Apr. 1964, Gaz. Pal. 1964-2-223, note Gulphe. The court denied the *Caisse Nationale de Lettres* standing to enjoin the distribution of an edited version of the Victor Hugo masterpiece *Les Misérables*, which was claimed to be a scandalous distortion of the original work. See id. The court held that a third party such as the *Caisse Nationale de Lettres* cannot defend an author’s moral right so long as there remains living and known heirs who did not commit any abuse in the exercise or non-exercise of their rights. See id.
impaired by the editing of the scenes nor depreciated by the association of his name with the advertising of the bank.\textsuperscript{174}

It is interesting to note, however, that the court seemed to rely only on the provisions of Article L 212-2 of the C.P.I. and did not refer to the right of image every person enjoys, regardless of his social and professional status. The potential market value of images, as well as the uncertainty about the exact scope for post-mortem enforcement of their right of image, is highlighted by the current advertising campaign run by Apple Computer displaying images of deceased personalities such as Pablo Picasso, Albert Einstein, La Callas, and Indira Gandhi.

\section*{VI. CONFLICTS OF LAWS: THE SUPREMACY OF THE PLACE OF THE TORT}

Surprisingly, the intense debate on the nature of the right of image does not appear to have contaminated the issues of choice of law and jurisdiction arising in an international context for the violation of the right of image. In setting aside the law of the country from which the person complaining of a violation is a national, case law applies the rules for conflicts of laws and of jurisdictions applicable to tort law.\textsuperscript{175} With regard to jurisdiction, the French Courts apply Articles 42 and 46 of the French Procedural Code which provides for the general jurisdiction of the courts where defendant is domiciled or, as an additional option in tort matters, where the damage occurred or was suffered.\textsuperscript{176} These rules mirror Article 53 of the 1968 European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention").\textsuperscript{177} The Brussels Convention simply states that for matters relating to tort, delict or quasi-delict, a defendant may be sued "in the courts for the place where the harmful event occurred."\textsuperscript{178}

Thus, a plaintiff claiming an unlawful use of his or her image may bring an action either before the courts of the state where publication occurred first, or where circulation eventually took place.\textsuperscript{179} However, a plaintiff seeking full relief for the detrimental use of his or her image in

\begin{flushleft}
\textsuperscript{174} See id.
\textsuperscript{175} See cases and authority cited infra notes 176–81, 189.
\textsuperscript{176} N.C.P.C. art. 42, 46 (Fr.).
\textsuperscript{177} See European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1978 O.J. (L 304) 78, 8 I.L.M [hereinafter the "Brussels Convention"].
\end{flushleft}
several countries is well advised to bring a claim in the courts of the country where the image was initially taken or published unlawfully. There is a long standing rule supported by case law that when French courts have jurisdiction as the court where the damage is suffered—rather than where the damage originated—they may only award damages for actual harm that occurred in France.\(^{180}\)

It is interesting to mention the litigation surrounding the romance between Sarah Ferguson and J. Bryan during their vacation in southern France in August 1992.\(^{181}\) The couple had been photographed at their residence around a swimming pool during an intimate moment.\(^{182}\) The British paper, *The Daily Mirror*, published the photographs in August 1992.\(^{183}\) The French magazine *Paris Match* was about to publish them as well when the couple petitioned the French court for provisional remedies to enjoin the publication of the photographs in France.\(^{184}\) The court declined to issue the injunction because it would have been impossible to stop the imminent and serious damage already caused in Great Britain by the *Daily Mirror*’s publication.\(^{185}\) Consequently, *Paris Match* published the photograph, and the couple sued the photo agency.\(^{186}\) However, the publisher of *Paris Match* was ordered to pay damages in the amount of \(\text{FF} 250,000\).\(^{187}\)

With regard to the applicable law, French courts apply French law as *lex loci delicti* if they have acknowledged their jurisdiction.\(^{188}\) In a recent landmark decision, the French High Court reaffirmed the notion that the law applicable in tort matters is the law of the country where causation or materialization of the tort occurred.\(^{189}\) The case involved a claim for unfair


\(^{182}\) See id.

\(^{183}\) See id.

\(^{184}\) See id.

\(^{185}\) See id.

\(^{186}\) See id.


\(^{188}\) See, e.g., id.

competition brought in France by an American plaintiff against an American defendant. The plaintiff sought compensation for the distribution in France of a scientific review initially published and widely circulated in the United States. The High Court reversed the lower decision, that had applied U.S. law (as the law of the country where the contentious articles had been written and published), and decided to stay the proceedings until completion of similar litigation between the parties in the U.S. finished. The High Court found that France, the country where the reviews were distributed, was the country where both the causation and materialization of the tort occurred.

VII. CONCLUSION

Like the Roman divinity Janus, the right of image has two faces. One looks after the integrity of the human personality and the other looks after its position in the market place. No sooner has the French right of image gained a life of its own than have new evolutions threatened to undermine its features and to blur the perception of its boundaries. On the one hand, the advent of new technologies, like computer image morphing, the Internet, and other forms of mass communication, extend the possibilities of misappropriating an individual's image. On the other hand, the protection of the image of a person's belongings is more frequently claimed on the grounds of traditional property rights. However, as the right of image is no longer the privilege of the sole individual, it becomes more difficult to assess its core nature.

In accordance with article 3 of the Civil Code, "Since the applicable law in relation to contractual liability is the law of the State in which and not only where damage occurred, but also where the cause of the damage occurred." Id.

190. See id.
191. See id.
192. See id.
193. See id.