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Image Right and Copyright Law in Europe: Divergences and Convergences

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Abstract: This paper analyses the multiplicity of image rights in Europe and the classical conflictual relationship between the right to one's own image and copyright law. First, the paper analyses the main mechanisms of legal protection of a person's image in selected jurisdictions, in both the civil law and the common law tradition. It is deduced that the civil law approach based on the right of privacy or the right of personality is expressed mainly either via a duality, reflecting the extra-patrimonial and the patrimonial attributes to one's own image, or via the recognition of a single right with a dual nature. On the other hand, the protection granted to the right to one's own image in the United Kingdom is piecemeal in nature, since it is based on a broad interpretation of the classic torts of breach of confidence and passing off, which fails to provide a coherent and effective legal framework for protecting the intangible asset of a person's image, both in terms of its dignitary and its economic identity. After pinpointing the major differences in terms of protecting the right to one's own image in Europe, the emphasis is placed on the relationship between image rights and copyright law. A classic approach considers image rights as an external limitation of copyright law, and therefore typifies the relationship between image rights and copyright law as being primarily conflictual in nature. Nonetheless, it is also possible to focus on the convergences between the right to one's own image and copyright law, since both refer to intangible assets that combine both extra-patrimonial and patrimonial interests. In this respect, copyright law could serve as a model for the eventual creation of a European patrimonial right to one's own image. While the idea of promoting the recognition or establishment of a new intellectual property right for protecting the economic attributes of a person's image in EU Member States' domestic jurisdictions, inspired by the US publicity right, is not new, and has been advanced by doctrinal circles both in the civil law and in the common law tradition, the new borderless realities of the dissemination and commodification of image, and the affirmation of strong protection for

the dignitary attributes of a person's image by the case law of the European Court of Human Rights emphasise the need for, and the feasibility of, the construction of a European patrimonial right to one's own image. The unique prototype of copyright law consisting of a synthesis of extra-patrimonial and patrimonial interests could be used as a model for building such a right.

Keywords: copyright law; image rights; right of publicity; personality; commodification of image; EU harmonisation

1. Introduction

Image plays a vital role in modern society. A person's image can convey various messages and symbolisms. It tends to become independent of its subject, and represents and acquires an autonomous value, which may be informative, commercial, social, moralising or propagandist. The increasing autonomy of their image from the person represented has been greatly facilitated and strengthened by the tremendous and previously unknown possibilities offered by technology, in terms of easy and rapid production and dissemination of the image. In this context, new cultures and trends have emerged in respect to use of the intangible asset of a person's image in new communication spaces. In social media, a person's image, in addition to being an element of personhood in the context of a defensive rhetoric of protecting a human being's dignity, becomes a striking feature of the person's social presence, and a content that enhances people's connection to social media communities. At the same time, the classic extremities in terms of social attitudes towards the control of a person's image exacerbate the controversies surrounding the role played by a person's image. While some people regard the capturing of their image as stealing their soul, others inconsiderately hold up to public scrutiny images incorporating every aspect of their personhood, even the most intimate ones.

The paradoxes and the various identities of a person's image are naturally exported into the field of law. Protection of a person's image often takes a dual form based on the privacy/property dichotomy that fails to express in legal terms the autonomy and the particular features of a person's image. Based on the foregoing, a person's image appears to be a legal asset with a multiple identity and an indiscernible nature, rather like the ancient Greek God Hermes, who has been credited with many different faces: messenger, creator (the creator of the first lyre, the God of literature) and scientist (the founder of alchemy and astrology), but also merchant ("*agoraios*", the God of luck and commerce) and the protector of traders and the patron of thieves and liars. Moreover, while the dissemination of a person's image knows no national boundaries, there is no uniform legal response to the complex legal issues generated by the unauthorised production and circulation of a person's image.

This article focuses on the interaction between the legal protection of a person's image and copyright law. In terms of the interface between the protection of a person's image and copyright law, this relationship is seen as primarily conflictual and antagonistic, since image rights are traditionally exercised as external limits to copyright law. On the other hand, copyright law, which is also marked by an innate duality, could serve as a prototype for the effective and comprehensive protection of a person's image in European law.

2. The Multiple and Conflicting Sources of Image Rights in Europe

The protection of a person's image is far from being uniform or even harmonised in Europe. In the civil law tradition, the legal protection of one's own image is based on the right of privacy or on the right of personality, depending on whether the latter is recognised or not. On the other hand, protection of a person's image in the United Kingdom is not constructed in terms of the recognition of a right, but via the application of the classic torts of breach of confidence and of passing off. In the following paragraphs, a brief overview will be provided of the various legal approaches on image rights all over Europe. It will be demonstrated that the richness of sources of image rights that is deeply rooted in the particular identity of each national legal system creates a colourful mosaic in which divergent forms and levels of protection co-exist.

2.1. Civil Law: An Approach Based on the Right of Privacy and the Right of Personality

The protection of a person's image in the civil law tradition presents some common trends, but is far from being uniformly structured [1] While exclusivity and a broad perception of the concept of a person's image appear to be major features commonly shared in jurisdictions following the civil law tradition, diversified approaches to the legal matrix and the philosophical justification of image rights create either a dichotomy or a unity in respect of the legal regime governing protection of a person's image.

2.1.1. The Duality of Image Rights

The particular significance of the person's image is expressed in the civil law tradition through the legislative or jurisprudential recognition of the autonomy of the protection of a person's image in relation to protecting other aspects of their personhood. This autonomy is more specifically established via the recognition by case law of a person's exclusive rights to his own image. Since the image consists of the person's representation, identification of the person appears to be an obvious and sufficient condition for awarding protection. In this context, there is no violation of the image right when the small dimensions and very poor quality of an image make it impossible to recognise the individual [2] or when it is impossible to identify the person due to the rapid alternation of images [3]. In respect to the features of a person that allow identification, civil law tradition courts have generally favoured a broad approach on the issue, which has resulted in a flexible and dynamic interpretation of the conditions of identification. In this context, the use of look-alikes [4] or of the special distinguishing characteristics of a celebrity in advertisements was deemed as a violation of the image right [5].

Nevertheless, the resemblances in terms of legal remedies in the field of image protection are certainly limited, since the protection of image in the form of a subjective right appears unanimous and unquestionable only in respect to the non-patrimonial, *i.e.*, the "dignity" aspect of a person's image. Indeed, in France, where image rights have been recognised since 1858 in the famous case of the image of actress Rachel lying on her death-bed [6], the classic dichotomy between privacy and property interests appears to be the major philosophical obstacle standing in the way of the official recognition of an autonomous image right [7] comprising both the dignity and the commodity aspects of a person's image.

While certain case law appears to have recognised the dual, *i.e.*, extra-patrimonial and patrimonial [8], nature of a person's image, the formal attachment of the legal protection of a person's image to Article 9 of the French Civil Code, which establishes the protection of privacy, impedes the unanimous recognition of a comprehensive protection of a person's image. Indeed, while some courts, by overstretching the legal matrix of Article 9 of the Civil Code do not hesitate to build a holistic approach towards the protection of a person's image, which also protects image as a commodity [9], others, in respect of the commodification of a person's image, exclude Article 9 as not applicable to the legal interests at stake, and award protection on the legal grounds of tort law or contract law [10].

Legal doctrine also appears to be divided. While there is a common consensus regarding the need for legal protection of the patrimonial aspect of a person's image, the recognition of a new property right to prevent the unauthorised exploitation of a person's image, or of personality rights in general, is not universally accepted. Instead of acknowledging a new exclusive property right ([11], p. 168; [12,13]) based on the model of the US right of publicity, it has also been suggested that it would be preferable to acknowledge a new tort of appropriation of personality within the framework of a specialised application of the doctrine of parasitism in respect to personality attributes [14]. Nonetheless, whatever the legal grounds might be (a new exclusive right or a new tort), it seems that French law is strongly characterised by a dualistic approach, similar to that prevailing in copyright law ([14], p. 11), which is expressed via the separation of extra-patrimonial and patrimonial aspects of a person's image, instead of an exclusive autonomous image right comprising both dignity and property interests.

Consequently, the duality of image rights in the French paradigm is a remarkable illustration of the multiplicity of sources of image rights that derives mainly from the formalistic attachment of image protection to the legal matrix of privacy rights. This analytical approach is understandable. From a national point of view, overstretching the protection of privacy in order to encompass the patrimonial aspects of a person's image might endanger the coherence and purity of their right of privacy. Nonetheless, a strict separation of the dignitary aspects of a person's image from the patrimonial aspects disregards the organic link between a person's image and their personhood, and could possibly lead to the legal treatment of a person's image as a mere commodity. This link is taken into consideration more effectively by German law, where image rights are assigned a hybrid nature, as will be demonstrated in the following paragraph.

2.1.2. The Dual Nature of the Image Right

In contrast to the French approach, characterised by a dualism in respect of image rights, other civil law jurisdictions seem to have adopted a multifarious and more flexible approach to the right to a person's own image, where individual's image is of a dual, hybrid nature. The hybrid nature of the right of personality, and by extension of the image right, is also consistent with the monist approach to copyright law, which is seen as a unitary right, with two organically interlinked facets: the moral one and the economic one. The link established between the right to one's own image and copyright law is not limited to common doctrinal justifications, but has also been officially formalised to some extent in certain civil law jurisdictions, such as Germany, Italy and the Netherlands [15], where legislative provisions governing the protection and use of an individual's image are part of copyright law.

The concept of protecting a person's image has a long tradition in Germany, where the right of an individual to his own image was officially recognised in 1907, in Section 22 of the Copyright in Works of Art and Photography Act (Kunsturhebergesetz, KUG). The origins of the enshrinement of this right in law can be traced back to 1889, in the Bismarck case, where two photographers entered the bedroom of the former German Chancellor Otto von Bismarck without permission and photographed his corpse [16]. In contrast to the French dualist approach to image rights, German law, and more specifically German jurisprudence, adopted a unitary approach comprising the protection of both patrimonial and non-patrimonial interests, based on the legal grounds of a general right of personality, at whose core lies the autonomy of self-determination [17]. It has favoured a functional evolution of the category of personality rights, rather than a radical paradigm shift, like that implied in the recognition of a distinct intellectual property right in one's own identity ([18], p. 50). In the famous Marlene Dietrich case, it was made clear that the general source right of personality primarily serves the protection of non-material interests, but furthermore, the general right of personality and its special forms also protect those interests of the person which are of financial value [19]. The most recent trend, as exemplified by the Marlene Dietrich decision, is toward a gradual convergence with the system of compensation adopted in infringement of intellectual property cases ([18], p. 51). In light of the above, image rights in German law appear to be a mixture of tort, copyright, human rights and restitution, depending on the characteristics of the claim ([20], p. 456).

A unified approach to image rights is also followed by other civil law jurisdictions, such as Spain, Italy and Greece. In Spain, the Organic Law of 5 May 1982 provides civil-law protection for the "fundamental right to honour, personal and family privacy, and one's own image" ("*el derecho fundamental al honor, a la intimidad personal y familiar y a la propia imagen*"), as guaranteed by Article 18 of the Spanish Constitution of 1978. The protection of a person's image comprises a list of acts that are considered illegitimate infringements of this right, such as "the taking, reproduction, or publication, by photography, film, or any other process, of a person's image captured in places or moments of his private life or outside of those settings...." (Article 7.5) and "the use of the name, voice, or picture of a person for purposes of advertising, business, or of a similar nature." (Article 7.6 ([21], p. 565). Here too, as in France in respect of the non-patrimonial aspect of the right of a person's image ([14], p. 167; [22]) the right to one's own image is recognised as a subjective right, given that when an illegitimate infringement of the fundamental right has been established, Article 9.3 of the Organic Law provides, that harm will be presumed, and that compensation will include moral damages.

In Italian law, protection of a person's image is derived from broad provisions in the civil code, together with specific statutory provisions related to copyright law (covering the use of portraits without permission). Article 10 of the Civil Code [23] and Articles 96 [24] and 97 of the Italian Copyright Act of 22 April 1941 (no. 633/1941) ([25], p. 191) serve as a legal basis for comprehensive protection in terms of the use of an individual's image, with or without his or her consent. It is noteworthy that image rights have served as a legal basis for the judicial recognition of a broader publicity right covering all aspects of the commercialisation of an individual's identity. Indeed, in the Lucia Dalla case [26], the Italian courts, reasoning for the first time by analogy with the Civil Code's protection of image rights, applied the rules established for a "typical right"—the right of image—to protect an "un-enumerated right"—the right of publicity,—considering the latter as similar in nature to the former ([27], p. 109). In this respect, even though the Italian right of publicity is a judicial creation,

its legitimacy and viability are still supported by the Civil Code ([27], p. 109), which appears as a common legal source for the protection both of the dignitary and commercial attributes of a person's image.

A unifying approach is also favoured in Greek law, where the protection of personality in Article 57 of the Greek Civil Code comprises both extra-patrimonial and patrimonial aspects, while an autonomous right to one's own image, with a dual nature, has been recognised by Greek case law and doctrine [28,29].

Opting for a unifying approach towards image rights certainly offers the advantage of a more pragmatic equilibrium between the extra-patrimonial and patrimonial attributes of a person's image. Although the dignitary and patrimonial aspects of a person's image are considered as two sides of the same coin, it is impossible to completely dissociate one from the other. The monism of image rights permits a flexible approach towards the valuable intangible of image as a commodity, by safeguarding at the same time the paramount status of human dignity.

2.2. The Piecemeal Protection of a Person's Image Provided by Tort Law in the UK

Unlike the continental European tradition, English law offers no particular protection to an individual's image. In the absence of a general right of personality or of privacy or of a specific privacy tort, the legal protection of the personal dignitary and commercial aspects of a person's image is naturally sought in the framework of tort law. Especially in respect to the unwillingness to grant robust protection of image rights in the UK, a significant reason is that image rights are considered as a threat to freedom of expression. Images normally tell the truth, and there is a strong argument for promoting the publication of what is true rather than imposing restrictions through the application of image rights ([30], p. 1).

Recent trends in case law in the United Kingdom show a clear tendency towards a realignment or even somehow a mutation of the classic torts of breach of confidence and of passing off, in order to fill the gaps in terms of providing specific protection for a person's image. In some cases, the classic torts appear to be extended to their upper limits in order to protect privacy and prevent the commodification of personal information.

2.2.1. The Tort of Breach of Confidence as a Form of Privacy Protection

While UK courts have constantly rejected the recognition of a right of privacy, the enactment of the Human Rights Act in 1998 marked a significant shift in terms of the judicial protection of privacy and more generally personal dignity concerns. The step forward towards the establishment of stronger protection for personal or "private" information was made through an elastic interpretation and application of the tort of breach of confidence. Instead of introducing a new right or a new tort, the English courts decided that action for breach of confidence was a suitable mechanism within which to "absorb" privacy, owing to its flexible and evolving nature ([31], p. 257; [32]). One of the key ways in which action for breach of confidence has been transformed in order to protect informational privacy lies in replacing the requirement to keep information confidential with a requirement for information to be kept private, on the basis of Article 8 of the European Convention on Human Rights [33]. In this

way, the centre of gravity of the action was moved from protecting relationships to the protection of information itself ([33], para. 1.03).

The Campbell case [34] could be seen as a cornerstone of this judicial evolution. The case concerned the disclosure by a newspaper of the drug addiction of a celebrity, the model Naomi Campbell, which was accompanied by the unauthorised publication of photographs of the model leaving a meeting of Narcotics Anonymous. According to a modern application of the tort of breach of confidence, what the case was really about was “private” information, whereby for information to be classified as “private”, it must pass the “reasonable expectation of privacy” test [35]. As Lord Nicholls highlighted: “Now the law imposes a ‘duty of confidence’ whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase ‘duty of confidence’ and the description of the information as ‘confidential’ is not altogether comfortable. Information about an individual’s private life would not, in ordinary usage, be called ‘confidential’. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.... The time has come to recognise that the values enshrined in Articles 8 and 10 are now part of the cause of action for breach of confidence.” Consequently, the private nature of the information, combined with the reality that images, far from merely adorning a news article, usually provide the main message, were crucial arguments for protecting the claimant’s privacy.

The potential of the tort of breach of confidence to encompass personality protection claims was further illustrated by the famous *Douglas v. Hello* case, where the House of Lords applied the classic principles of the tort in order to award protection of personal information of a hybrid nature, both private and commercial. In this case, Michael Douglas and Catherine Zeta-Jones objected to the unauthorised publication of photographs of their wedding in a celebrity magazine, having already sold the “exclusive” right to their wedding photographs to another magazine. While it is not obvious whether the case is an orthodox application of the classic principles of the tort of breach of confidence or, despite the affirmation of the contrary [36], a dangerous recognition of an unorthodox IP-style right of control over the commercial exploitation of personality ([31], p. 258; [37], p. 246), the *Douglas v. Hello* decision indisputably strengthens the protection of personality assets in UK law. It could be argued that in a way, affirming the legal protection of the exclusive control of private information has indirectly favoured a more comprehensive, albeit nuanced, approach to protecting a person’s image.

While the Campbell case could be placed mainly in the context of pure privacy or personal dignity concerns, the Douglas case concerned an amalgam of privacy and commercial interests. However, the two cases do not lead to the emergence of a legal framework which, leaving aside privacy or confidentiality, offers protection against the misappropriation of a person’s image. The lack of legal protection against the unauthorised commercial exploitation of a person’s image in the form of a publicity right could be partially counterbalanced by a modern and revised application of the tort of passing off. Nevertheless, the prerequisite of dilution or confusion that is dominant in the doctrine of passing off is an inherent and insurmountable limitation that prevents a broader application of the tort in cases of misappropriation of a person’s image.

2.2.2. A Modern Approach to the Tort of Passing Off: A Substitute for a Publicity Right?

Traditionally in English law, a celebrity cannot claim some right to their image or name but as Carty emphasises “is left to find an appropriate tort, in the absence of an overarching right and against a background of judicial antipathy to fame” ([38], p. 235). UK law has traditionally protected character merchandising, involving both fictional and real characters, against unfair competition by means of the law of passing off [39]. As a result, there is a lot of room for discussion as to whether a “modern” judicial approach to the tort of passing off could serve as a possible remedy against the absence of a right of publicity, similar to that recognised in the US or judicially in other EU Member States. Since publicity rights have been recognised in the US as an aspect of intellectual property and they share the same justifications as other intellectual property rights, the protection of character and more specifically of image merchandising by the law of passing off might at first sight seem to be an orthodox and appropriate legal vehicle for awarding protection against the unauthorised commercialisation of a person’s image.

Still, the debate is contentious, since the issue forms part of the broader discussion regarding adjustment of the tort of passing off, in such a way that its centre of gravity is based on misappropriation rather than misrepresentation. While the extension of the tort of passing off in order to combat the misappropriation of valuable intangibles could be seen as a positive change in the tort [40], there is also a strong doctrinal tendency towards safeguarding the tort in its classic form. The latter could be seen in a way as being analogous to plagiarism, which, unlike sole copyright infringement, is a wrong involving misrepresentation rather than misappropriation ([41], p. 497). In this context, despite the growing demand for a reconsideration of the doctrine of passing off so that is better suited to deal with celebrity cases, the classic trinity of the tort of passing off—misrepresentation (and material misrepresentation at that), goodwill and damage—in contrast to trends in other common law jurisdictions such as Australia [42], has generally been sparingly applied in the UK.

Nevertheless, certain trends have definitely appeared. A significant shift in respect to the orthodox application of the classic ingredients of the tort of passing off was apparent in the *Irvine v. Talksport Ltd* case [43], where for the first time there was judicial acknowledgment that the tort of passing off renders “false endorsement” involving a celebrity unlawful, without the parties somehow having to be in competition (the doctrine requires that the parties should be engaged in a “common field of activity”) [44] with one another. Since the tort of passing off is closely linked to the protection of intellectual property, and more specifically to the protection of registered trademarks, it was also natural that the judicial recognition by the European Court of Justice of a wider protection for well-known registered trademarks, in a way that encompasses the additional modern function of trademarks as advertising assets in their own right, should be reflected in the judicial process of this modern reading of the tort of passing off, in respect of image rights ([38], p. 243).

The second big step towards the application of the tort of passing off in respect to protecting a celebrity’s image was taken in the recent “Rihanna” case [45] where, in the same way that the *Irvine v. Talksport Ltd* case marked the first application of passing off to “false endorsement”, the tort was applied for the first time to “false merchandise” featuring a famous person [46]. The case concerned the unauthorised merchandising by the fashion retailer Topshop of T-shirts bearing the singer’s image. The particular circumstances of the case were instrumental in determining the successful outcome of

Rihanna's claim [47], and the case certainly does not mark a revolution, but it does involve a positive development, since it clarifies the legal landscape around the application of the tort of passing off in respect to misappropriation of a celebrity's image. At the same time, as solemnly stated by Judge Birss, the case certainly does not create an "image right" in the UK [48]. As has been argued, the Rihanna decision does not represent a widening of the law of passing off as much as a useful illustration of the evidential hurdles that will need to be overcome for a case of passing off to succeed in this area ([49], p. 61).

So, while as regards the protection of purely dignitary interests in respect to a person's image, the influence of the European Convention on Human Rights has pushed UK law to transform the tort of breach of confidence into a tort of protection of personal information, no similar change has occurred in respect to protection against unauthorised appropriation of a person's image. Consequently, the UK approach towards protecting a person's image appears to be fundamentally dualist in nature, since the trends in terms of protecting the extra-patrimonial and patrimonial aspects of a person's image are completely divergent. The gaps in terms of protecting a person's image as a commodity are not unintentional, since they express the declared traditional unwillingness of English law to protect celebrities' fame. Nonetheless, the UK model remains isolated within the European legal landscape, where strong protection is generally granted to the patrimonial attributes of a person's image, regardless of the form that this protection takes.

3. Creating a Bridge between the Image Rights and Copyright Law

3.1. Image Rights vs. Copyright Protection and vice-versa, a Classic Discussion

The relationship between image rights or in general between the legal protection of a person's image and copyright law could be seen as essentially antagonistic in nature, because image rights have traditionally been recognised as external limitations on copyright law, and thus as an informal exception that is not provided for in the list of exceptions established in the Information Society Directive [50]. The creation of copyright-protected works of mind based on another person's image can take various forms, such as capturing the image without the person's consent, unauthorised use of another person's image in an artistic project, either with or without modifications, use of a legitimately taken photograph in the private sphere in an artistic context, or using a performer's image in an advertisement or a video game [51], *etc.*

The conflictual interaction between the protection of a person's image and copyright law, and more broadly with creative freedom, has often been considered by the courts. At the same time, since a person's image is also protected by personal data protection, the national independent authorities responsible for overseeing data protection also have competence in respect to that issue. In this context, the courts have pronounced that image rights take precedence over copyright law, in cases of unauthorised use of photographs taken by professional photographers during the coverage of private events, such as wedding ceremonies, to promote the photographer's work [52].

A recent ruling by the Paris High Court clearly demonstrates the tension that may exist between the right to one's own image and the issue of artistic freedom. In this case, a well-known Spanish artist used some photographs of his former girlfriend to create works of modern art. Because some of the

photographs were of an intimate nature, the woman objected to their use, while the artist responded that using the photographs was justified on the legal grounds of Article 10 of the European Convention on Human Rights, protecting freedom of expression. While the Court found on the one hand that the claimant's behaviour could be interpreted as consent with regard to one such photograph, mainly because she had attended the ceremony at which the artist had received a prize for the work created on the basis of such pictures, on the other hand, with regard to the other photographs, it was decided that there was no evidence that she had consented to their reproduction and further dissemination, and consequently, in respect to these pictures, the Court then weighed up the two competing interests and found in favour of the plaintiff, despite the unequivocally artistic nature of the work incorporating the photographs [53,54].

Undeniably, a key concept in balancing the protection of a person's image with copyright law is that of consent. Indeed, the question of whether the person portrayed has given his or her express or implicit consent is crucial for the purpose of affirming that image rights shall take precedence over artistic freedom and copyright law. So, when there is no doubt that the person's consent has been granted for such use, copyright law prevails over image rights. In this context, in another case decided by the French Supreme Court (*Cour de Cassation*) it was judged that an actress, who was also a model and television presenter, did not have the right to prevent the use in an art book of a nude photograph taken by a famous photographer, because in giving her permission for her image to be captured, she had also consented to the further publication and exhibition of the photograph for every purpose [55].

The task of calibrating the two conflicting rights—image right and copyright—has traditionally been left to case law. At the same time, it is also possible in some jurisdictions for the basis for the judicial calibration of these rights to be established in legal texts, such as in the case of Italian law, where Article 97 ICA18 provides that the portrayed person's consent is not needed whenever the reproduction is made for scientific, educational or cultural purposes, whereas such reproduction is not allowed under any circumstances when publication or exposure would be harmful to the honour, reputation or dignity of the portrayed person. Consequently, artistic or cultural use can form a legitimate defense when a person's image has been used in an artistic or cultural context. Here, artistic freedom, or more generally, cultural creativity for cultural purposes can be expressed in innumerable ways, and can be interpreted either strictly or broadly by the courts. For example, the Italian courts decided that the criteria of the exception of reproduction for “cultural” purposes were met by the reproduction of the portrait of model and actress Claudia Schiffer by a painter belonging to the mainstream of American pop art, within the context of a magazine article purporting to provide an insight into the artist's work and life [56].

While it is difficult, and sometimes even impossible, to dissociate the artistic value of a work from its commercial value, since every artist has to make a living, artistic or cultural privilege should normally be accepted only when the prevailing nature of the use of the image, and consequently the identity of the work concerned, is artistic, creative or transformative, such as in cases of the use of a person's image for parody, for purely artistic purposes or maybe even for use in utilitarian objects, such as a postcard [57]. On the other hand, when the artistic nature of such use is less important than the utilitarian and commercial aspects, artistic freedom cannot serve as a limitation on image rights, such as when a famous goalkeeper's image is used in a copyrighted-protected sport video game [58] or a singer's image is used on an album cover without his consent [59].

The collision between creative freedom and the right to one's own image as an element of the right of privacy was naturally also considered by the European Court of Human Rights in the *Vereinigung Bildender Künstler v. Austria* case [60]. This concerned an arts exhibition, where the works to be shown included a painting entitled "Apocalypse", which had been produced for the occasion by the Austrian painter Otto Mühl. The painting showed a collage of various public figures in sexual positions. While the naked bodies of these figures were being painted, the heads and faces were depicted using blown-up photos taken from newspapers. One of the politicians represented brought proceedings under Section 78 of the Austrian Copyright Act (*Urheberrechtsgesetz*) [61], seeking an injunction prohibiting the exhibition and publication of the painting. The domestic courts prohibited exhibition of the painting, on the basis of the above provision, which protects the right to one's image. The European Court of Human Rights then had to consider whether prohibition was a violation of Article 10 of the Convention, which also covers artistic expression. The eminently artistic nature of the painting, which amounted to a caricature, and thus a form of artistic expression and social commentary which, by virtue of its inherent features of exaggeration and distortion of reality, is naturally intended to provoke and agitate, was a crucial factor that led the Court to affirm the violation of Article 10 ([60], § 33).

As a result, image rights and copyright law often collide and have to be weighed against one another in order to decide the prevailing interest in each specific case. While the unauthorised use of a person's image in a work protected by copyright will often be considered as a violation of image rights, it is noteworthy that artistic freedom, the driving force of copyright law, can equally serve as a significant limitation on image rights, especially in the case of works involving parody and satire. The clash between image rights and copyright law may give rise to interesting case law, but it is even more intriguing to turn the classic logic of an antithesis between two conflicting interests round, and to look at image rights and copyright law in a different context. In the following paragraphs, it will be demonstrated that rather than being seen as a threat to image rights, copyright law could serve as a model for establishing a pan-European publicity right.

3.2. Copyright Law as a Model for the Patrimonial Right of Exploitation of Image

While the emphasis of judicial practice has logically been focused on the sometimes fierce antagonism between copyright law and the right to one's image, or more broadly the legal protection of a person's image, this relationship could also be explored from a different angle. Copyright law, as a "special" kind of property, seen either as a right characterised by a dual nature or as an essential legal synthesis of moral and pecuniary interests, could serve as a model for the patrimonial right to one's own image, since these two branches of law share some similar justifications and common features.

In the light of the foregoing, instead of focusing on principles aimed at balancing conflicting rights, it will be preferable to use as a starting point for further reflection, the points of convergence between copyright law and the right to one's own image, in order to build a pan-European patrimonial right to one's own image, based on the model of copyright law. The emergence of such a right is inevitably linked to the broader issue of protecting the economic aspects of personality which, as has been shown, is a subject being dealt with in widely diverging ways in the European legal landscape. Indeed, while the case law of the European Court of Human Rights has moved towards a set of common principles

applicable not only to the dignitary aspects of personality but also more specifically to the recognition of an autonomous image right as a subset of the right of privacy, no similar trend has been apparent in terms of the protection of one's own image as a commodity.

The conjunction of copyright law with the legal arrangements governing protection of the commercial value of a person's image will now be considered from the viewpoint of their common justifications (3.2.1). At the same time, the US right of publicity, which is mainly analysed as a *sui generis* form of proprietary protection, demonstrates not only the affiliation between copyright law and the patrimonial right to one's own image, but also the potential of using the prototype of copyright law as a model for the conceptual construction of a uniform legal framework for the protection of one's own image in the EU (3.2.2).

3.2.1. The Right of Image as an Intellectual Property Right

The foundations for building a bridge between copyright law and the legal protection of one's own image are not only to be found in the common practices involved in dissemination of or trade in these intangible assets. They are also apparent in the doctrinal justifications of copyright law and of personality rights, which have both been analysed from the viewpoint of natural law and utilitarian arguments.

Starting from natural law arguments, both Locke's labour theory and Hegel's personhood justification have been advanced as justifications for intellectual property law and for a patrimonial right over personality aspects. In the case of copyright law, it has often been argued by analogy to physical property that ownership of intellectual labour naturally leads to the recognition of a property right over intellectual creation that is the "fruit of that labour". In the same vein, Locke's labour-based justification of property could be used as a doctrinal basis for awarding a property right to celebrities for the protection of their persona, where they have expended time, effort and investment in constructing their celebrity status [62], since here, this too is the fruit of their labour [63]. So, because celebrities have developed "the fruit of publicity values", they should be able to benefit from this and prevent others from reaping what they have not sown ([64], p. 216). It is also natural that the main objections to Locke's theory of justification of property are to be found in respect of both intellectual creations and of personality attributes. Indeed, in both cases it is unclear whether the value of the intangible asset is entirely attributable to labour or to other factors, such as the commons in the case of copyright law ([39], p. 6), or to chance and circumstances or to the collective labour of a number of individuals, in the case of the creation of a celebrity's persona ([38], p. 250; [62]; [65], p. 184; [66], p. 369). In parallel, the personality justification for copyright law could also be used to justify a patrimonial right of personality. Like the copies of a work of mind that are distributed to consumers of intellectual creations, personality attributes, such as a person's image, when materialised in something external, consist of fungible property ([67], p. 427), can be transferred and therefore become commodities. So, if a celebrity's persona is regarded as a "shell", and thus as an external embodiment of personal traits that are different from their inalienable internal sense of self, it then becomes a commodity that is transferable ([68], p. 329; [69], p. 208).

On the other hand, utilitarianism recognises the awarding of property rights as a means serving another purpose and thus, only insofar as it furthers society's goals of utility [70] or wealth

maximisation via optimum functioning of the market ([39], p. 14). Providing incentives that are necessary for the creation of intangible assets is the centre of gravity of instrumental theories of justification of both copyright law and a patrimonial right of the personality. In the same way as for copyright law, it has been argued that the rationale behind conferring property rights on a celebrity's persona is to "provide an incentive for performers to make the economic investment required to produce performances appealing to the public ([62]; [71], pp. 673, 681; [72])". Logically, in both cases (intellectual creations and patrimonial attributes of personality), it could be counter-argued that there is no empirical evidence that creators will not create ([39], pp. 11–13; [73]) or performers will not perform, or that anyone will decide not to become famous ([74], p. 604) in the absence of copyright law or of a patrimonial right of personality.

3.2.2. The Illustrious Precedent of the US Right of Publicity

The US right of publicity is the most illustrative example of the affinity of copyright law with the patrimonial right of the personality. This tort protects "the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others"[75]. The application of this right to the protection of one's own image is unequivocal, since *a priori* the unauthorised commercial use of a person's image is normally covered by the tort. It is noteworthy that the seminal decision in *Haelan Laboratories v. Topps Chewing Gum* [76], where the right of publicity was acknowledged for the first time in 1953, was about the publication of pictures of baseball players. Nonetheless, the right is certainly broader than the protection of one's own image and it has been gradually extended by case law to encompass the protection of every aspect of identity.

The right of publicity initially began as a type of privacy tort but it has subsequently become a separate intellectual property right. The autonomy of the right of publicity in relation to its legal matrix was mainly "due to the difficulties in reconciling the notion of a right to privacy with the need to protect the essentially economic interests that a person might have in his own image" [77]. As a result, the right of publicity was mainly conceived and analysed by analogy to other forms of intellectual property, rather than to privacy. The conceptual link between the right of publicity and copyright law and trademark law has been generally acknowledged by legal doctrine, even though there has been debate as to whether the analogy between the right of publicity and copyright law is stronger than it is with trademark law or *vice-versa* [78]. In this context, McCarthy notes that the right of publicity bears a certain resemblance to its cousins concerning trademarks and copyright ([79], p. 134), while Bedingfield upholds their kinship in a more affirmative way when asserting that "the true ancestor of the publicity right "is not the right to be left alone, but rather the law of copyright and trademarks" ([80], p. 114).

The kinship of the right of publicity with copyright law is further affirmed by the application of common principles in respect of limitation of the right. The copyright law concept of "transformative use" has emerged as the most influential test in balancing the right of publicity with free speech [81], while another intellectual property law mechanism imposing limitation—the copyright first sale doctrine—has also been applied in respect of re-sales of a celebrity image [82].

Despite the fact that it is generally accepted in the US that the right of publicity is a proprietary right ([83]; [84], p. 1971), its transformation from a subset of privacy to an independent property right is not anodyne. The conceptual tension between privacy and property can be found in the continuing struggle over the question of whether the right is descendible and thus enforceable by the family of the deceased [83]. The patchwork of legal answers in respect to this question is indicative of the special hybrid nature of the right of publicity as a form of intellectual property. While the classification of the right of publicity as a property right could militate in favour of recognition of its descendibility, its origins in privacy could, on the other hand, argue for termination of the right at the time of the person's death [85].

The situation is somehow comparable to the conundrum that surrounds the duration of the author's moral rights in copyright law in Europe. While the monist German copyright law has adopted a somewhat homogeneous treatment of moral and economic rights, by providing an equal term for both which, as a result, also contains a *post mortem auctoris* term of protection, the French dualist *droit d'auteur* tradition provides for perpetual protection of the moral right [86], while it is also possible for the right to end with the author's death [87] or for some of the prerogatives of the moral right to last a shorter time than others [88]. Similar discrepancies can also be found in the question of the duration of the right of personality. In Germany, it is clear that the right is extended beyond the person's death, both for ideal and economic interests protected by this right ([14], pp. 126–27). On the other hand, in France, personality rights are mainly regarded as indescendible in nature, even though case law has from time to time recognised that the economic right to one's own image passes to the heirs of the deceased ([14], pp. 204–05).

Consequently, even in jurisdictions such as the US, where the economic interests of personality have been detached, and have evolved as an autonomous intellectual property right, the organic original link of the patrimonial right to one's own image with personhood appears as an essential, albeit latent or dormant, characteristic that is commonly shared by image rights and copyright law, since the latter, among all forms of intellectual property, is the only one that, by its nature, entails a more or less affirmed synergy of dignitary (moral) and economic interests, depending on the copyright tradition. Nevertheless, both the protection of works of mind and image-right protection may be explained by an economic approach to property law, by highlighting the notion of value. Since a person's image, like a work of mind, possesses a value, consideration must be given as to whether this value is to be protected by a legal mechanism of a monopolistic nature.

3.2.3. Towards a Unified Solution for Image Rights, Based on the Example of Copyright Law?

The resemblances between the right to one's own image and copyright law could logically create the doctrinal temptation to use the well-established, internationally recognised and EU-harmonised model of copyright law as a conceptual mould for shaping an image right or more broadly a right of publicity. The idea is certainly not new, and has seduced doctrine from time to time, both in the civil law ([12], p. 133; [89–90]) and the common law traditions ([31], p. 260; [91–95]). In some instances, the idea became a legal reality, as in the case of the State of Guernsey, which in December 2012 enacted a registered image right ([96], p. 52).

The idea has also been strongly supported by the celebrity industry. Nevertheless, in most cases, the doctrinal discussion concerning the need to recognise or establish an image right or a right of publicity has mainly been set in a strictly national framework. Nonetheless, the question of protecting image rights now deserves to be analysed in a different context. Leaving aside the often unspoken reality that a person's image has been intensively marketed, and thus forms an intangible asset derived from personhood that is subject to the rules of supply and demand [97], the trend towards an unofficial Europeanisation of the legal protection of the dignitary attributes of a person's image under the influence of the case law of the European Court of Human Rights again highlights the problematic of the coherent and effective protection of image rights.

The dissemination and dynamic licensing of a person's images take no account of national borders. The wide divergences between national legal regimes, in respect of protection of the image in EU Member States, may pose forum shopping [98] and jurisdiction issues, since the Internet does not consider the differing levels of protection afforded by Member States to personality rights ([62], p. 17). A remarkable example of this new dimension of image rights are the recent CJEU decisions reached in the cases of *eDate Advertising GmbH v. X* and *Oliver Martinez v. MGN Ltd* [99]. Both cases raised the question of jurisdiction when the alleged infringement of personality rights was committed on the Internet by an operator established in another Member State. While the Court extended the applicability of the findings reached in the *Fiona Shevill* case [100], and held that they not only covered cases involving defamation but also "a wide range of infringements of personality rights recognised in various legal systems"[99], at the same time it held that for claims related to Internet infringements, an additional connecting factor had to be established between the claim itself and the forum upon which the jurisdiction of a court under Art.5(3) of the Brussels I Regulation may be based. In this regard, it was decided that in such cases, an individual may bring proceedings before the court of a Member State where he has his "centre of interests" [101]. As has previously been noted, this decision creates a real risk of forum shopping, because it is inevitable that displeased parties in jurisdictions with weak protection of personality rights, such as the UK, will prefer to bring an action in a court that enforces stronger protection of personality rights, such as in France or Germany ([31], p. 260; [102]).

Moreover, the recognition of a European image right will affirm the reality of the dynamic and borderless exploitation of the image in modern society. The law cannot overlook this reality, but it has an obligation to serve and provide an unbiased framework for social and economic developments ([103], p. 522). Business practices and contracts covering the exploitation of image are an integral part of a serious economy and of a dynamic commercial reality that it is not reflected in a harmonised way in the European legal landscape. This argument is eminently functionalist and at this point, it calls to mind Judge's Frank reasoning in the fundamental decision involving *Haelan Laboratories, Inc. v. Topps Chewing Gum*, which gave birth to the US right of publicity. Indeed, what Judge Frank was doing by creating a new right was to respond to a pre-existing commercial practice: baseball card companies had been signing exclusive contracts with players for a long time prior to the decision ([104], p. 76).

The ideal of an international harmonisation of the patrimonial right of personality is certainly not new either ([105], p. 244). As Olaf Weber notes, "the trans-national consensus concerning the appropriation of personal name and likeness is nowadays broader than expected", while "the growing

international trade in commercial items which use such indicia may ultimately lead to a harmonisation pressure in publicity rights” [57]. Nonetheless, in a more concrete European context, a possible harmonisation of the right to one’s own image could also be expressed in more concrete terms.

Indeed, the first steps of such a change have already been taken. The influence of the case law of the European Courts of Human Rights in respect of protecting a person’s image—a subset of the right of privacy—has opened the way for a more robust protection of the dignitary attributes of a person’s image in Europe. The significance of the legal protection of a person’s image was first emphasised in the *Reklos and Davourlis v. Greece* judgment [106], where the right of image was declared by the Convention to hold a special position within other privacy interests. More precisely, the Court stated that: “A person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his peers. The right to the protection of one’s image is thus one of the essential components of personal development and presupposes the right to control the use of that image. Whilst in most cases the right to control such uses involves the possibility for an individual to refuse publication of his or her image, it also covers the individual’s right to object to the recording, conservation and reproduction of the image by another person. As a person’s image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case, obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image ([107], § 40).” The Court continued the same line of thinking in subsequent cases [107].

Nonetheless, thus far this evolution has been limited to the extra-patrimonial aspects of a person’s image, since there is no ECHR case law interpreting Article 8 under a property-based right of publicity claim ([107], p. 308). Furthermore, even though we cannot rule out that Article 8 has the potential to be interpreted in a way that also covers the patrimonial interests of a person’s image in the future ([108], p. 692), we should also bear in mind that it is also well established in ECHR case law that copyright law, despite its moral dimension, is protected by Article 1 of the First Additional Protocol to the ECHR [109], just like any other form of intellectual property.

Given that intellectual property rights, including copyright, which from the viewpoint of the co-existence of moral and economic rights is somehow unique, have constantly been protected as “possessions”, it is apparent that in terms of the legal protection of image rights under the umbrella of the ECHR, there is a clear imbalance between the somehow harmonised protection of the dignitary attributes of a person’s image under Article 8, and the gap in terms of protecting the patrimonial attributes of a person’s image. This legal situation does not take account of the fact that the right to one’s own image, even when viewed primarily as an intangible asset with proprietary attributes, conserves an inner, albeit sometimes hidden, relationship with its legal matrix, personhood. So, despite the potential for basing the protection of economic interests linked to a person’s image on Article 8 of the ECHR or even on Article 1 of its First Protocol, it may be preferable to consider harmonising the law in this area throughout the Member States at EU level, based on the model of copyright law.

Copyright law could serve only as a useful precedent for the construction of a European patrimonial image right expressed as a distinct new intellectual property right combining both ideal dignitary and patrimonial attributes. This point needs to be emphasised, because simply treating the right to one’s

image in the same way as copyright not only serves no purpose but is also non-pragmatic ([110], pp. 160–61), due to the undeniable reality that in contrast to copyright law, and despite Locke's labour-based justification of property, a person's image, viewed either as a chief element of the self or as a valuable intangible, is not a creation ([14], p. 159) in the sense of copyright law.

The establishment of a European intellectual property right in respect of the patrimonial attributes to one's own image, based on the model of copyright law, will provide a more coherent and effective approach to protecting the valuable intangible asset of image. At the same time, this new form of intellectual property will have to be balanced with freedom of expression and creative freedom, via a set of limitations and exceptions. It should also be emphasised that a special intellectual property right of this kind is by nature much more closely related to the essence of the human being than copyright law is. This fundamental finding could be crucial when considering controversial issues such as the transferability of the right or the internal balancing of economic and non-economic interests within the new right. If the deeper essence of protection of the patrimonial aspects of a person's image is based on personal autonomy instead, this may constitute both grounds for a sound justification of the licensing of image rights and an essential safeguard for the organic link between the intangible value of image and the core of personality, *i.e.*, human dignity. In this context, the superior principle of safeguarding human dignity might restrict personal choices that ultimately negate or abolish the essence of the human being. It is therefore understandable that in the internal hierarchy of values represented by a new intellectual property right to one's own image, a certain degree of priority must be given to the dignitary attributes of the image, in the same way as for copyright law, where moral rights, and more specifically the right of integrity, may function as a restriction on the exploitation of a work of mind. Nonetheless, it should also be borne in mind that such a right will be an intellectual property right that is intended to harmonise and facilitate the commercialisation of a person's image at EU level.

Moreover, from a practical point of view, the long experience in relation to copyright law could provide useful guidance in respect of certain key issues associated with image rights, such as the contractual framework for exploiting licensing of image rights or calculating damages in cases of infringement. Indeed, a person's image, in addition to being a valuable intangible, is a chief element of personality that is inextricably linked to the self. In other words, the patrimonial right to one's own image cannot be detached from the moral aspects of personality, including the dignity of the human being. Accordingly, since contract law has proved fairly ineffective in protecting people against oppressive licences, image rights licences and broader personality licences should be governed by a set of specific rules supplementing the general rules of contract law ([111], p. 19). In this respect, the principles governing the contractual framework of copyright law, which combines both patrimonial and moral interests, could inspire the formation of a harmonised set of rules governing image rights contracts.

Even though there is no harmonised EU framework for copyright contracts, a number of fundamental common elements can be traced between various EU Member States, such as the principle of restrictive interpretation of copyright contracts and the principle of specialty ([112], p. 32) or rules restricting the assignment and/or waiving of moral rights ([112], p. 36; [113]).

It is noteworthy that similar principles can also be found in various EU Member States in respect to personality contracts. Gisclard notes that the principle of restrictive interpretation of personality contracts is recognised in France, Belgium, Italy, Spain, Switzerland, Germany, Luxemburg, Croatia, Romania, Poland and even to some extent in the US, in respect to the right of publicity [111]. The

principle of restrictive interpretation of personality contracts signifies that the interpretation is to be made in favour of the person whose image or other attributes of personality is concerned by the contract. So, if the consent of the represented person has been given for one specific purpose, it cannot by analogy be interpreted as covering other acts. As a result, the consent given for capturing the image shall not be interpreted broadly in order to also cover publication of the image, while the principle also implies the restrictive interpretation of the scope of a publication licence.

By confining the scope of exploitation of the image, the principle of restrictive interpretation of contracts safeguards the close inner link between the person represented and his or her image, and as a result, functions as a way of protecting the represented person. This principle is therefore interlinked with another fundamental axiom of the humanistic author-centred tradition of copyright law, the principle of *in dubio pro autore*. Other copyright contract principles that could be considered as a source of inspiration for the future regulation of image contracts are the non-transferability *inter vivos* of the moral right [114], the *intuitu personae* nature of the contract and the principle of proportional remuneration [115].

The convergence of certain principles governing copyright contracts and personality contracts could be perceived as an indication revealing the filiation of these fields, but it can also serve as a starting point for building a harmonised regulatory framework governing image contracts, based on the model of copyright law contracts. Even though, as previously noted, there is no European harmonisation for copyright contracts [116,117] concrete and much more detailed rules apply to them in national legislations, since the basic principles of their interpretation are specifically addressed and governed by special rules in EU Member States' national legislation. On the other hand, the regulation of personality contracts has hitherto been a purely judicial task.

4. Conclusions

If we set aside the classical opposition between copyright law and the right to one's own image in cases where an individual's image is used to create a copyright-protected work of mind, it could be argued that copyright law offers a mirror for the development of the right to image. Similar analogous questions and dilemmas arise, such as the personality/property divide, and it is worth saying that the same solutions could be adopted, even if copyright law is traditionally a "creature of legislation", while the right of image has generally been left to the competence and discretion of the courts. Instead of being expressed in terms of conflict, the discussions of whether a right to publicity covering the patrimonial attributes of one's own image should be adopted or not at EU level, could take advantage of and be inspired by the experience, the conceptual background and the rich expertise accumulated in the field of copyright law across the three centuries of its existence.

Conflicts of Interest

The author declares no conflict of interest.

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 35. In order to pass the test all the circumstances of the case will be examined such as : “the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purpose for which the information came into the hands of the publisher”: *Murray v. Express Newspapers Plc* (2008) ECDR, para. 36 per Sir Anthony Clarke MR.
 36. As Lord Hofmman observed: “There is in my opinion no question of creating an ‘image right’ or any other unorthodox from of intellectual property. The information in this case was capable of being protected, not because it concerned the Douglasses' image any more than because it concerned their private life, but simply because it was information of commercial value over which the Douglasses had sufficient control to enable them to impose an obligation of confidence.” See: Lord Hofmman (124) [2007] UKHL 21.
 37. See also: Christina Michalos. “Douglas v Hello: The final frontier.” *Entertainment Law Review* 18, no. 7 (2007): 241–46. It is submitted by the author that the difficulty that the question of the jurisprudential basis of the celebrity magazine OK! poses is precisely because the nature of both the Douglasses’ claim and that of OK! was not one of breach of confidence but rather concerned a right of publicity (which as yet the English common law has yet to embrace).
 38. Hazel Carty. “Advertising, publicity rights and English law.” *Intellectual Property Quarterly* 3 (2004): 209–58.
 39. Tanya Aplin, and Jennifer Davis. *Intellectual Property Law, Text, Cases and Materials*, 2nd ed. Oxford: Oxford University Press, 2013, p. 507.
 40. Samuel Ricketson. “Reaping without Sowing: Unfair Competition and Intellectual Property Rights in Anglo-Australian Law.” *University of New South Wales Law Journal* 7, no. 1 (1984): 1–54.

41. Michael Spence. "Passing off and the Misappropriation of Valuable Intangibles." *The Law Quarterly Review* 112 (1996): 472–98.
42. Henderson v. Radio Corporation [1969] R.P.C. 218.
43. High Court, Chancery Division, Edmund Irvine & Tidswell Ltd v. Talksport Ltd [2002] EWHC 367 (Ch) (13 March 2002).
44. See: McCulloch v. May [1947] 5 RPC 58. The judge dismissed the passing off claim on the ground that there was no connection between the plaintiff's business (presenting radio programs) and the defendant's business (selling cereal).
45. Fenty v. Arcadia Group Brands Ltd (t/a Topshop) [2013] EWHC 2310 (Ch); [2014] F.S.R. 5 (Ch D).
46. Jeremy Roberts. "Face off: Rihanna wins 'image rights' case." *Entertainment Law Review* 24, no. 8 (2013): 283–85.
47. The preexisting collaboration of the retailer with the famous singer and its position of as a major high street retailer that trades on its association with celebrities were deemed sufficient to create a real likelihood that a substantial number of customers would be deceived into thinking the t-shirt was an authorized item. See: Jeremy Roberts, Face off: Rihanna wins "image rights" case, [46]. Moreover, the claimant's involvement in a range of trading activities ended up to built up goodwill in her image through a significant range of trading interests, such as a style leader.
48. As Birss J. notes, whatever the position in other jurisdictions and however much celebrities might wish for one, there is no freestanding general right for an individual to control the reproduction of their image.
49. Huw Beverley-Smith, and Liddy Barrow. "Talk that tort... of passing off: Rihanna, and the scope of actionable misrepresentation: Fenty v. Arcadia Group Brands Ltd (t/a Topshop)." *European Intellectual Property Review* 36, no. 1 (2014): 57–61.
50. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22 June 2001, P. 0010–0019.
51. See from the US the famous Vanna White case where the claimant, the hostess of "Wheel of Fortune" TV show, was represented in an advertisement via a female-shaped robot: White v. Samsung Electronics America, Inc 989 F.2d 1512, 1993 US App.
52. See for example Greek Data Protection Authority, decision nr. 30/2002, 1 *AIMEE* (2004), p. 126.
53. Tribunal de grande instance de Paris, Ordonnance de référé, Virginie G/Juan F., 10 janvier 2013. Available online: http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3590 (accessed on 18 April 2014).
54. "Right of Publicity Trumps Artistic Freedom of Expression." The 1709 blog. Available online: http://www.the1709blog.blogspot.co.uk/2013_01_01_archive.html (accessed on 18 April 2014).
55. CourCass, 1ère chambre civile, 20 mars 2007, Bull. 2007, I, no. 125, pourvoi no. 06–10.305.
56. Trib. Milano, 23 December 1999, *AIDA*, 2001, 372.
57. Olaf Weber. "Human Dignity and the Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus in Publicity Rights?" *SCRIPTed* 1, no. 1 (2004): 200.
58. Kahn v. Electronic Arts GmbH, 25 April 2003.

59. “Cour de cassation, 9 juillet 2009, N° de pourvoi: 07-19758.” Available online: <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020837294&fastReqId=999344737&fastPos=1> (accessed on 18 April 2014)
60. Vereinigung Bildender Künstler v. Austria, no. 68354/01, 25 January 2007.
61. Section 78 of the Copyright Act, in so far as relevant, reads as follows: “(1) Images of persons shall neither be exhibited publicly, nor in any way made accessible to the public, where injury would be caused to the legitimate interests of the portrayed persons or, in the event that they have died without having authorised or ordered publication, those of a close relative.”
62. Catherine Walsh. “The justifications underlying personality rights.” *Entertainment Law Review* 24, no. 1 (2013): 17–21.
63. See for example Uhlaender v. Henricksen, 316 F Supp 1277, 1282 (Minn D Ct, 1970). Neville J: “A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labors and is a type of property”. See also McFarland v. E & K Corp 18 USP.Q.2d (BNA) 1246 (D.Mim. 1991): “[a] celebrity’s identity, embodied in his name, likeness, and other personal characteristics, is the ‘fruit of his labor’ and becomes a type of property entitled to legal protection”.
64. Melville Nimmer. “The Right of Publicity.” *Law and Contemporary Problems* 19 (1954): 203–23.
65. Michael Madow. “Private ownership of public image: Popular culture and publicity rights.” *California Law Review* 81 (1993): 125–240
66. Rosemary J. Coombe. “Authorizing the celebrity.” *Cardozo Arts & Entertainment Law Journal* 10 (1992): 365–95.
67. As Radin states “Since fungible property is not connected with the self in a constitutive way, but is only held instrumentally, nothing is problematic in trading it off for some other item that the person would rather have.” See: Margaret J. Radin. “The Colin Ruagh Thomas O’Fallon Memorial Lecture on Reconsidering Personhood.” *Oregon Law Review* 74 (1995): 423–48.
68. Justin Hughes. “The Philosophy of Intellectual Property.” *Georgetown Law Journal* 77 (1988): 287–366.
69. Savan Bains. “Personality rights—Should the United Kingdom grant celebrities a proprietary right in their personality?” *Entertainment Law Review* 18 (2007): 205–11.
70. This is mainly the US approach that can be found in art. 1, s. 8 of the US Constitution stating that the Congress shall have power “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”.
71. David E. Shipley. “Publicity never dies: It just fades away: The right of publicity and federal preemption.” *Cornell Law Review* 66 (1981): 673–737.
72. See for example the US case Zacchini v. Scripps-Howard Broadcasting Co, 433 US 562, 575–76 (1977): “the act is the product of petitioner’s own talents and energy, the end result of much time, effort, and expense. ... [T]he protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court”.

73. Edwin C. Hettinger. “Justifying intellectual property.” *Philosophy & Public Affairs* 18, no. 1 (1989): 47–51.
74. Lee Goldman. “Elvis Is Alive, But He Shouldn’t Be: The Right of Publicity Revisited.” *Brigham Young University Law Review* (1982): 597–628.
75. Restatement (Second) of Torts §652C, cmt.a (1977).
76. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (1953).
77. Huw Beverly-Smith. *The Commercial Appropriation of Personality*. Cambridge, UK: Cambridge University Press, 2002, p.145.
78. According to Halpern the right of publicity “functions not in a vacuum but as a right appurtenant, much like a trademark, whose purpose is to protect the interest in the economic associative value of a well-known persona”. See: Sheldon W. Halpern. “Publicity rights, trademark right and property right.” In *Overlapping Intellectual Property Rights*. Edited by Neil Wilkof and Shamnad Basheer. Oxford: Oxford University Press, 2012, p. 334.
79. Thomas McCarthy. “The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity.” *Columbia Journal of Law & the Arts* 19 (1994–1995): 129–48.
80. David Bedingfield. “Privacy or Publicity? The Enduring Confusion Surrounding the American Tort of Invasion of Privacy.” *Modern Law Review* 55 (1992): 111–18.
81. See: *Cardtoons v. Major League Baseball Players Ass’n*, 95 F. 3d 959, 971 (10th Cir. 1996).
82. *Allison v. Vintage Sports Plaques*, 136 F.3d 1443 (11th Cir. 1998).
83. Rosina Zapparoni. “Propertising Identity: Understanding the United States Right of Publicity and Its Implications—Some Lessons for Australia.” *Melbourne University Law Review* 28, no. 3 (2004): 705. Available online: http://www.mulr.com.au/issues/28_3/28_3_5.pdf.
84. Paul Swartz. “Prosser’s Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept.” *California Law Review* 98 (2010): 1925–87. Available online: <http://scholarship.law.berkeley.edu/facpubs/1755> (accessed on 22 April 2014).
85. This is the case in the New York. See: ([14], p. 71).
86. See: Mira Sundara Rajan. “Moral or economic rights?” In *Overlapping Intellectual Property Rights*. Edited by Neil Wilkoff and Shamnad Basheer. Oxford, UK: Oxford University Press, 2012, pp. 217–20. For the perpetuity of the French “droit moral”, see: André Lucas, Henri-Jacques Lucas, and Agnès Lucas-Schloetter. *Traité de la Propriété Littéraire et Artistique*. Paris: Lexis Nexis, 2013, p. 562. (In French)
87. See for example the Cypriot Copyright law (article 7 (4) of Law 59/1976).
88. For example in the UK the right to prevent false attributions subsists until 20 years after the author’s death (CDPA 1998, s. 86).
89. Pierre Kayser. *La Protection de la Vie Privée par le Droit*, 3rd ed. Paris, France: Economica, 1995, p. 197.
90. Pascal Gourdon. “L’exclusivisme ambivalent du droit à l’image.” Available online: http://www.victoria.ac.nz/law/NZACL/PDFS/Vol_5_1999/Gourden.pdf.
91. Tim Frazer. “Appropriation of Personality—A New Tort.” *Law Quarterly Review* 99 (1983): 281–313.

92. The author emphasizes that “Treating “image rights” as intangible assets suggests that they are an intellectual property right of some kind, a factor which is likely to convince the judiciary or the legislature into finally giving celebrities the legal backing to commodify their celebrity”.
93. Gillian Black. “Exploiting image: Making a case for the legal regulation of publicity rights in the UK.” *European Intellectual Property Law* 33, no. 7 (2011): 413–18.
94. Jan Klink. “50 years of publicity rights in the United States and the never ending hassle with intellectual property and personality rights in Europe.” *Intellectual Property Quarterly* 4 (2003): 363–87.
95. The author proposes the introduction for a separate publicity right both in the UK and in Germany: “By contrast, 50 years of daily practice have proven the advantages of separate publicity rights in the United States. Regardless whether on a common law basis or by statutory provisions as in New York or California, the use of separate property based publicity rights leads to more security, clarity and market stability. Maybe it is time to change attitudes?”
96. Jason Romer. “Image is everything! Guernsey registered image rights.” *Entertainment Law Review* (2013): 51–56. As Romer notes “Guernsey image rights are property rights acquired by the registration of a “personality” in Guernsey’s Register of Personalities and Images, which gives the proprietor of the registered personality exclusive rights in the images associated with or registered against that registered personality”.
97. A remarkable example is the use of the image of athletes for endorsement and merchandising.
98. Thorsten Lauterbach. “US-style ‘personality’ right in the UK—En route from Strasbourg?” Presented at 20th BILETA Conference: Over-Commoditised; Over-Centralised; Over-Observed: the New Digital Legal World? Queen’s University of Belfast, United Kingdom, April 2005. Available online: <http://www.bileta.ac.uk/content/files/conference%20papers/2005/US-style%20Personality%20Right%20in%20the%20UK%20En%20Route%20From%20Strasbourg.pdf>.
99. CJEU, Judgment of the Court of 25 October 2011 in the joined cases C-509/09 and C-161/10, eDate Advertising GmbH v. X and Oliver Martinez v. MGN Ltd. Available online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0509:EN:HTML> (Accessed on April 18 2014).
100. Shevill v. Presse Alliance SA (C-68/93) [1995] E.C.R. I-415; [1995] 2 A.C. 18.
101. For an analysis of these cases see: Paul David Mora. “Jurisdiction and applicable law for infringements of personality rights committed on the internet.” *European Intellectual Property Review* 34, no. 5 (2012): 350–53.
102. Leigh Smith. “CJEU clarifies jurisdiction to award damages for infringement of ‘personality rights’ online.” *Entertainment Law Review* 23 (2012): 34–35.
103. Daniel Biene. “Celebrity culture, individuality and right of publicity as a European legal issue.” *International Review of Intellectual Property and Competition Law* 36, no. 5 (2005): 505–24.
104. David Westfall, and David Landau. “Publicity rights as property rights.” *Cardozo Arts and Entertainment Law Journal* 23 (2005): 71–123.
105. Alain J. Lapter. “How the other half lives (revisited): Twenty years after Midler v. Ford—A Global perspective on the right of publicity.” *Texas Intellectual Property Law Journal* 15 (2007): 239–325. (“akin to the justifications for global intellectual property protection, the right of

publicity, almost universally recognized as a neighboring right to either copyright or trademark, deserves protection within a uniform, global framework”).

106. Reklos and Davourlis v. Greece, no. 1234/05, 15 April 2009.
107. See: Khmel v. Russia, no. 20383/04, § 40, 12 December 2013; Küchl v. Austria, no. 51151/06, § 58, 4 December 2012; Von Hannover v. Germany (no. 2) nr. 40660/08 and 60641/08, §§ 95–96, ECHR 2012; Eerikäinen and Others v. Finland, no. 3514/02, § 61, 10 February 2009; Khuzhin and Others v. Russia, no. 13470/02, § 115, 23 October 2008; Gurgenidze v. Georgia, no. 71678/01, § 55, 17 October 2006; Sciacca v. Italy, no. 50774/99, § 29, ECHR 2005-I, and Von Hannover v. Germany, no. 59320/00, §§ 50–53, ECHR 2004-VI).
108. For the possibility of creating celebrity rights under article 8 of the ECHR, see: David S. Welkowitz. “Privatising Human Rights? Creating Intellectual Property Rights from Human Rights Principles.” *Akron Law Review* 46 (2013): 675–726. The author also refers to the opposite precedent in the case Vorsina v. Russia (no. 66801/01, 5 February 2004), where the ECHR refused the application of the heirs of a man whose portrait was used on bottles of beer on the grounds that by giving the portrait in question to a local museum, the family “had agreed, in principle, that the portrait may be seen by others” and also that the brewery’s use did not dishonor the family. Nevertheless, as the author states it is highly possible that this is a special case since the question was about the picture of a deceased person.
109. See, for example: Balan v. Moldova, no. 19247/03, pp. 34–35, 29 January 2008) (copyright); Anheuser-Busch, Inc. v. Portugal, no. 73049/01, p. 10, 11 October 2005) (Chamber opinion); Anheuser-Busch, Inc. v. Portugal, no. 73049/01, 11 January 2007) (Grand Chamber) (trademark registration application).
110. The direct inclusion of the right of publicity to copyright was sporadically defended by the doctrine (see: Roberta Rosenthal Kwall. “Intellectual Property Challenges in the Next Century: Preserving Personality and Reputational Interests of Constructed Personas through Moral Rights: A Blueprint for the Twenty-First Century.” *University of Illinois Law Review* 2001 (2001): 151–72, but firmly rejected by courts. See: *Brown v. Ames*, 201 F. 3d 654, 658 (5th Cir. 2000): “(a) persona does not fall within the subject matter of copyright—it does not consist of a ‘writing’ of an ‘author’ within the meaning of the Copyright Clause of the Constitution.”
111. Thibaut Gisclard. “Limitations of autonomy of the will in conventions of exploitation of personality rights.” *International Review of Intellectual Property and Competition Law* 45, no. 1 (2014): 18–42.
112. Strict or more lenient provisions in respect of this issue can be found in EU member States. In Belgium, France and Poland the type of rights to be transferred as well as each exploitation mode need to be expressly specified in the contract. In the UK, the law only requires parties to identify clearly what is being transferred or licensed. The work must be identified clearly enough that it can be ascertained. However, oral evidence can be adduced to assist in identifying the work. See: “EU Parliament Study, Contractual arrangements applicable to creators: law and practice of selected Member States.” February 2014. Available online: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarrangements_/contractualarrangements_en.pdf (accessed on 22 April 2014)

113. See for example: Belgium, LDA, art. 1(2); France, CPI, art. 121(1); Germany, UrhG, s.29Abs 1; Hungary, HCA, art. 9(2); Poland, UPAPP; Spain, LPI art. 14; Sweden, URL, art. 3. See: [112], p. 36.
114. In Germany the assignment of the economic rights is also prohibited.
115. Christophe Caron. “Les contrats d’exploitation de l’image de la personne.” In *L’Image*. Association Henri Capitant des Amis de la Culture Juridique Française, Journée Nationale, tome VIII, Actes du colloque organisé le 20 juin 2003 à l’Université de Grenoble, Paris, France, Dalloz, 2005, p. 104.
116. For the question of the harmonisation of European copyright contract law see: Silke von Lewinski. “Copyright contracts.” In *Codification of European Copyright Law, Challenges and Perspectives*. Edited by Tatiana Synodinou. Leiden: Kluwer Law International, 2012, p. 241.
117. Jacques de Werra. “An Essential Brick in the Building of European Copyright: Regulation of Copyright Transactions.” In *Codification of European Copyright Law, Challenges and Perspectives*. Edited by Tatiana Synodinou. Leiden: Kluwer Law International, 2012, p. 259.

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