

Article

# Photoshop & The (Virtual) Body of Models

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Received: 14 July 2019; Accepted: 31 December 2019; Published: 19 January 2020



**Abstract:** In this paper, Photoshop is analyzed with a special focus on the bodies of models and a detailed analysis on the legal issues posed by this specific area. For the sake of a thorough development of the topic of this paper, it is necessary to define relevant concepts such as photography and personal image. Regarding the first notion, problems related to intellectual property and, more specifically, copyright are discussed in this paper. Additionally, personal image is one of the most complex and comprehensive areas of law since the protection accorded to it is not equal in different jurisdictions of the world, so its study involves an analysis that goes beyond the scope of this paper. However, various safeguard mechanisms undertaken by some legislations chosen for this purpose will be presented, while also mentioning some specific cases both in the European continental system (Spain and Argentina) and in common law (United States of America and United Kingdom). Finally, the focus is placed on the use of Photoshop for the modification of body shape, particularly that professional models, as these are the ones that work primarily with their image. There will also be a description of some new regulations and mechanisms attempting to restrict image manipulation practices and those that warn the consumers against modified images to eventually conclude on the insufficiency of the same ones and the need for new proposed actions.

**Keywords:** image; right of privacy; right of publicity; Photoshop; models

## 1. Introduction

We live in a world dominated by images. In certain sectors such as advertising or fashion these are used to send attractive messages and thus encourage for the purchase of goods or services. There is a great number of models who, besides inducing you to buy, present an example of what is considered an appropriate way of being or living, thus inspire eagerness to imitate them within the target audience.

Photography then becomes the basic tool not only to capture an image, but to modify it through technical mechanisms. There are, on the one hand, the rights of the subject who is involved in getting the image and, on the other, the rights of the person photographed. Firstly, questions related to photography and the photographer will be developed throughout these pages.

Then, in the second part of this paper, as personal image has developed such a significance that cannot be ignored by Law, there will follow an analysis about the concept of the image.

Protection of the image in different legislation from around the world differs, and for that reason, examples of the diversity of treatments will be illustrated from both a legal and a more specific perspective. The development of the legal protection of images has been deep, wide and controversial around the world, so in this paper we cannot go further than simply enumerating the relevant differences in legislation and the treatment of the courts of the jurisdictions chosen by way of example. To show the complexity of the issue, it is worth mentioning that American law has developed the concept of right of publicity out of the right of privacy, which is conceptually different from the protection granted in countries of continental tradition and even in other common law countries. Consequently, a special analysis will be made in this paper. Additionally, within the United States

of America, regulations are governed by each state, thus overlapping with common law and certain national legislations, as indicated, all of which renders the analysis increasingly difficult.

Finally, after dealing with photo retouching, a legal concept of modeling will be chosen to show the importance of image in that business and to demonstrate that manipulating images of models may lead, in some circumstances, to infringements of their rights.

Conclusions open a path for future reflections and propose certain actions for Photoshop to be used reasonably with respect to the body of the models.

## 2. Photography

Photography is defined in the Dictionary of the Royal Spanish Academy as “the procedure or technique that allows to obtain still images of reality through the action of light on a sensitive surface or on a sensor” (<https://dle.rae.es/fotograf%C3%ADa>).

In 1838, Louis Daguerre, through the invention of daguerreotype, recorded the first photograph of people in Paris. At the same time, Bayard was working on the invention of a device similar to that of Daguerre but was not quite as successful. However, he was seemingly the author of the first photographic forgery in the 1830s through his Portrait of the photographer looking as if he had drawn it. It is a photograph of Bayard himself, dead, feigning suicide. For this reason, Tabachnik (2012) asserts that photo retouching was also born with photography.

According to the World Intellectual Property Organization (WIPO) a “still image produced on a surface sensitive to light or other radiation, irrespective of the technical nature of the procedure (chemical, electronic, etc.) used to perform the image” (Lipszyc 1993, p. 84; López 2009, p. 381).

We can affirm that there are two types of photographs in Law: some of them are regarded as photographic works and others are referred to as mere photographs. Both forms are protected, but differently. Thus, the Directive of the European Union 2006/116/ EC<sup>1</sup>, article 10 establishes that “... a photographic work under the Berne Convention must be considered original if it constitutes an intellectual creation of the author that reflects his personality, without taking into consideration of any other criteria such as merit or purpose. Protection of the other photographs must be left to national legislation”.

It is worth establishing at this stage of the analysis that the type of photography referred to by the cited rules to the one produced by a human being (Villalba and Lipszyc 2012) and not that produced by machines or animals. This is firstly because we consider that artifacts are designed, produced and, more recently, programmed by people. Secondly, because the American Courts have already established that copyright regulations are not applicable to an ape who, after seizing a photographer’s camera, obtained several photographs that included one of himself (<https://petapixel.com/2018/04/24/photographer-wins-monkey-selfie-copyright-case-court-slams-peta/>).

The person holding proprietary rights—the owner—of the photograph is the photographer. That is, the one who captured the image is the author of the photograph and is hence protected by the Copyright regulations. Strong (1995) indicates that “copyright is born from the moment of creation of the work just like the soul begins to exist with birth”. However, the owner of the right to the image itself is the person photographed (Quaini v. Imexca 2009)<sup>2</sup>.

It is said that there are four possible protection systems of photographic work (López 2009, p. 380)<sup>3</sup>, to wit:

- (a) Protection granted by copyright rules, with no demand of specific requirements.
- (b) Protection granted by copyright rules, with a demand of specific requirements.

<sup>1</sup> Directive (EU). 2006. <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32006L0116&from=ES>; Directive (EU). 2015. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2436&rid=5>.

<sup>2</sup> Quaini v. Imexca, G National Court of Civil Appeals, Argentine (2009).

<sup>3</sup> Referring to Colombet.

- (c) Protection granted by copyright rules for works regarded as artistic and protection as a related right for simple photographs (Lipszyc 1993, p. 85)<sup>4</sup>,
- (d) Protection granted by specific safeguard rules<sup>5</sup>.

Copyright regulations protect both the moral and economic rights of the photographer, who is the author of the photograph.

With regard to the former, moral rights, photographer has the right to decide whether or not to disclose his work (right of disclosure), to be recognized for the proprietary right in it (right of attribution) and not to be altered (right of integrity).

Economic rights imply the “power to control the exploitation of the work” (Lipszyc 2019, p. 80) so that the photographer enjoys a wide range of rights such as the right of reproduction, public communication and transformation (Lipszyc 1993, p. 11). The photographer enjoys, in principle, as many economic rights “as forms of use” (Lipszyc 2019, p. 76) by third parties or associated with them, where possible.

Economic rights are subject to a specific term of protection based on a certain circumstance established by the regulations so that countries have been adopting different terms. The Berne Convention (Act of 1971), in its article 7.4., establishes that the term of protection of photographic works cannot be less than 25 years. However, WIPO Copyright Treaty states that “the Contracting Parties shall not apply the provisions of article 7.4. of the Berne Convention” so that, within the framework of that Treaty, the general term that imposes the protection of works for the entire life of the author and seventy years after his death from January 1 of the following year is applied produced the same (Lipszyc 2004), or to her statement in favor of her heirs or right holders.

Moral rights of the photographer have no restriction (Lipszyc 1993, p. 219); however, their economic rights are limited in their exercise to the extent that they are dealing with the photograph of a person who in turn possesses the right to his/her own image, being able to prohibit the reproduction of it. The recognition of this right is a limitation on the right to dispose of the photographic work grounded on copyright rules.

### 3. Personal Image

Image is the representation of our identity (Bello Knoll 2019, p. 117).

According to the Spanish Dictionary of Legal Terms, it is the set of physical traits or details that identify a person. Image will then allow us to differentiate from others. It is the diversity principle among human beings. Personal image is what makes us unique and different.

As image is so essential for each individual, the Law, as the mechanism ordering social conducts, cannot ignore its importance (Bello Knoll 2019, p. 117).

However, in the international sphere, there is no rule, declaration or pact referring directly to the right of the image itself. In 1948, the United Nations Assembly approved the Universal Declaration of Human Rights<sup>6</sup>, and this instrument, although there is no specific reference to image itself, states in article 12 that no one may be subject to arbitrary interference in his private life, nor can he/she suffer attacks to his honor or reputation. Then, this indirect protection is stated again in the International Covenant on Civil and Political Rights of 1966<sup>7</sup> in keeping with article 19, which refers to freedom of expression with due respect for the rights and reputation of others. We can then observe the focus is placed on two questions referring to the right to one’s own image relating it to other rights. The first refers to dignity and honor. The second to freedom of expression. Thus, the right to image itself is an autonomous right regardless of other rights but which is socially balanced with them (Zingaretti 2018).

<sup>4</sup> It is indicated that Austria and Italy have this protective regime.

<sup>5</sup> It is indicated that Norwegian countries have this protective regime.

<sup>6</sup> Universal Declaration of Human Rights (1948). Retrieved from <https://www.un.org/en/universal-declaration-human-rights/>.

<sup>7</sup> <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

At a regional level, for example, in 1989 the European Parliament approved the [Declaration of Fundamental Rights and Freedoms \(1989\)](#) which makes reference to the protection of identity in its article 6 ([Sáez Tapia 2017](#)) but without recognizing the independence of the right to the image itself, while the same has occurred in Latin America.

Different legislation around the world has dictated, to a greater or lesser extent, the rules to protect human image at a domestic level in each country. Regulatory diversity is huge. In some countries of the continental tradition, protection has constitutional status, as in the case of Spain. In other countries of an equivalent legal tradition, there is specific legislation referring to the right of the image itself, such as in Spain or in Mexico. There are only provisions in the Civil Code in countries such as Argentina, Bolivia, Brazil, Costa Rica, France, Italy, Peru and Portugal. References to the law of image itself are also found in laws referring to other issues, such as copyright in Germany, Argentina, Austria, Belgium, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Italy, Mexico, Paraguay, Peru, Portugal, the Dominican Republic and Uruguay ([Antequera Parilli 2012](#)). In the countries of common law, there is also a diversity of treatment and, for example, state standards converge in the United States of America, which are in turn articulated through judicial resolutions and national rules.

The complexity and the wide-ranging scope of image protection is a topic that transcends this paper, so for that reason the decision taken has been to show the example of regulations and case law of two countries of the continental tradition: Spain and Argentina; and of two countries in the field of common law: United States and the United Kingdom. This has been made only for the purposes of providing a broad view of the protection of the image, which will help determine the importance and peculiarities of the right involved in the Photoshop manipulation conducted in the body of the models.

### *3.1. Examples of Regulation in Continental Law Countries: Spain and Argentina*

Spain is at the forefront of innovation in this right as autonomous in its Constitution, thus ensuring the right to one's own image ([Rougés 2009](#); [Vidal Berós 2015](#)). In "Fundamental rights and duties", in the chapter dealing with rights and liberties, Section 18.1., "The right to honor, personal and family privacy and image itself is guaranteed". The right to image itself is then a fundamental right framed within so-called personal rights, personality rights or existential rights ([Navarro Floria 2016](#), p. 12), lacking heritage content (Martín Muñoz 2001, p. 1715). That is, these are those rights inherent to the natural person and which are recognized by the mere fact of their existence ([Villalba Díaz 2011](#)). The right to personal image recognized in this Fundamental Charter becomes a part of the set of values considered relevant by society, and is thereby capable of being protected by way of legal action for the safeguarding of a constitutional privilege (amparo).

Then, a Spanish organic law, LO 1/1982, has dealt with the civil regulation of the right to self-image and establishes in its first article that: "The fundamental right to honor, personal and family privacy and the image itself, guaranteed in article eighteen of the Constitution, will have civil protection against all kinds of illegitimate interference, in accordance with the provisions of this Organic Law". This rule establishes that the right to image itself is an inalienable right and not subject to any statute of limitations as asserted before by legal experts ([Fernández-Lasteguy Quintana et al. 2018](#), p. 117).

As stated by law, the requirement is that there must be an express consent of the owner of the image for its use by third parties; however, in section eight there are exceptions stipulating the following: "In particular, the right to one's own image will not prevent: (a) its capture, reproduction or publication by any means when it comes to people exercising a public office or a publicly notorious profession or with a public projection and in case the image is captured during a public event or in places open to the public; (b) The use of the cartoon of said persons, according to social usages; (c) The graphic information about a public event or event when the image of a specific person appears as merely accessory. The exceptions referred to in paragraphs (a) and (b) shall not apply with respect to the authorities or persons who perform functions which by their very nature calls for the anonymous status of the person exercising them".

One of the biggest problems around consent is rule 2.3, which establishes that “the consent referred to in the preceding paragraph shall be revocable at any time, but in any case, damages sustained are to be compensated, including reasonable expectations”. Considerable uncertainty is generated in assignment contracts, as revocation of consent may cause severe damage even if paying for a compensation is contemplated, which actually turns out to be difficult to assess ([Castilla Barea 2011](#)).

Publishing the image and its mere capture or reproduction qualifies as a tort. If this illegality is proved, it results in the compensation for injured feelings and reputation (moral damages) ([De Verda y Beamonte 2011](#), p. 53).

In the case of *Joaquín Cortés v. Letona SA*,<sup>8</sup> the plaintiff filed a claim for violation of his image against a dairy company in a commercial. In that advertisement, a person appeared dancing flamenco with a naked torso, long hair and black pants, all of which were his characteristics. The Court of Barcelona, Spain, considered that those identifying elements constituted the image of the dancer. However, in the case *Emilio Aragón v. Proborín SL*,<sup>9</sup> the Spanish Constitutional Court rejected the claim by plaintiff, as it was held that the use of his own expressions, black pants and white boots were not “the reproduction of the person’s face or physical features but an imaginary representation of the external characteristics of a television character”. Undoubtedly, this inconsistent case law, which is based on the distinction of the constitutional aspects of civilians, generates uncertainty in the legal domain ([De Verda y Beamonte 2011](#)), and the same uncertainty applies to the fact of ascertaining the legal notions that demarcate image as definition seems to be absent. When LO 1/1982 refers to misappropriation, it extends the protection of image to human apart from image per se, which has meant a broader interpretation of the identification of a person in case law.

Spanish legal scholars, when analyzing the cases resolved both in the constitutional and civil spheres, assert that for the purposes of effective protection representation of physical appearance of a human being must be at stake; there must be an act of reproduction of physical appearance of a human being, and the person must be recognizable ([Castilla Barea 2011](#)).

Courts in Spain have stated that the right to one’s own image can only be relinquished in case a right of equal ranking is to be prioritized, such as the right to freedom of information ([Barnett 2000](#), p. 1244).

In the Argentine Republic, as stated above, protection of image is governed in the Civil and Commercial Code of the Nation, as it regulates the country’s international obligations to preserve image as a basic right of persons. Consequently, in Sections 52 and 53 of the chapter dealing with personal rights and acts, cases when a person’s dignity is affected are contemplated, especially when the image is damaged, so a prohibition is imposed on the reproduction of images without the consent of the person, save for in some exceptional cases ([Villalba Díaz 2011](#)), as stipulated by Spanish legislation.

Under these norms, the image is protected as an “essential human right”, while also protecting their economic content, which necessarily results in a redress and monetary compensation ([Vidal Beros 2015](#), p. 95). In this jurisdiction, for the purposes of using the image of a third party, the following requirements must be met: (1) asking for prior consent, and (2) checking that there are no exceptions to the request for prior consent. In the case *Maradona, Diego Armando v. Telecom Personal SA*<sup>10</sup> and others the Court expresses that the “mere evidence of an unauthorized publication determines the arbitrariness of that publication as there is a legal rule expressly preventing and sanctioning such conduct”. The court further stated that “consent is not presumed and is of restrictive interpretation.”

There are two sides of the same coin in the Argentine legal system, as in the Spanish civil law: (a) the right of each person to register, reproduce and publish their image, and, (b) the right to prohibit their capture and publication without authorization ([Sáez Tapia 2017](#); [Fernández-Lasteguy Quintana et al. 2018](#), p. 117). Image represents an asset for its owner, and therefore each individual has the

<sup>8</sup> Cortés v. Letona SA, Secc. 2002. 17 Audience of Barcelona, Spain.

<sup>9</sup> Aragón v. Proborín SL. 2001. 104 BOE 50 Spanish Constitutional Court. Madrid: Aragón v. Proborín SL.

<sup>10</sup> Maradona v. Telecom Personal SA. 2014. D National Court of Civil Appeals, Argentine.



possibility to exploit it at a personal level, in society or to assign the right to third parties either in exchange for a valuable or non-monetary compensation (Schötz 2015, p. 157). It is Civil Law, in the different laws around the world, that deals with regulating these contractual relationships exceeding constitutional protection on the economic component of image.

Since 1933, Intellectual Property Law (11,723), still in force, has protected the commercial publication of the photographic portrait. Thus, prior to the entry into force of the Civil and Commercial Code, the Courts grounded their resolutions on Section 31 of that law in order to allow for compensation for publicity of the unauthorized image of a person either with commercial purposes or otherwise. In the case *S.B. v. Arte Televisivo Canal 13*<sup>11</sup> the image of the lady was obtained in a street interview in order to know her opinion on a particular subject, but during the interview her denture got off while she was speaking and tried to fit it while she was being recorded. Subsequently, the channel used the image in a mocking tone and as a blooper. The Court interpreted that harmonization with the right to information of the right to self-image required the preservation of the very personal right of women framed within the provisions of said intellectual property law.

Additionally, Argentine judicial precedents, very much like other cases, have established that the image of minor child is not the same as the image of an adult. The United Nations Convention on the Rights of the Child (CRC)<sup>12</sup>, subscribed to by almost all countries in the world, states that children enjoy the same protection as adults, but it also manifests that they deserve special protection because of their condition as human beings who are not fully developed physically and mentally. This is what the Court held in *Ochoa, J. v. Medios y Contenidos Producciones SA Cris Morena Group UTE*<sup>13</sup>, where the defendant was held liable for the harmful consequences caused to a young child based on Article 16.1 of said Convention, among other national and international standards.

Furthermore, the concept of protection of image has also been laid down in Argentine judicial decisions, such as the case *Braunstein, Tamara Ileana v. Palermo Films SA et al.*<sup>14</sup>. The advertising model claimed payment for the use of their image after the termination of the contract. She did not accept the new monetary offer by the company, so the company used the video where the model was part of a dance group representing the movement of the bristles of a toothbrush and replaced her face. The Court found against Palermo Films and *Procter & Gamble Interaméricas LLC sucursal Argentina* for having sectioned, by mutual agreement, the body of the model. Since the defense contended that the body was wrapped in a white jumpsuit, the Court held that it does not really matter whether the body of the person is covered or not; rather, the fact that is the body of a given person is what really counts.

In the case *Ochoa*, which has already been cited in this paper, the reason the photograph was taken is highlighted, so the Court makes a pronouncement against the use of photography for another purpose. It has always been stressed that the purposes of use must be specified in the consent granted. (Burbidge 2019, p. 81).

In the case *Braunstein*—already cited—as well as in *P. A.A v. Indo SA*<sup>15</sup>, the expiration of the term of the advertising contracts gave rise to rulings in favor of the claimants. For that reason, the adequate course of action in assignment of image rights is the following: (a) specify the purpose for which the image will be used; (b) establish the term during which the image will be used.

The goal sought is always the same: to make sure that the personal image is evaluated on a case by case basis and, based on that, to determine whether the publication affects the right to one's own image. In the case *Massola, Facundo Albino v. Ford Motor Company*<sup>16</sup> the compensation sought by the horse rower was rejected because of the fact that the image was used for non-commercial purposes by

<sup>11</sup> *S.B. v. Arte Radiotelevisivo Argentino SA-Canal 13*, B National Court of Civil Appeals, Argentine. 2014.

<sup>12</sup> The United Nations Convention on the rights of the Child (CRC) (1989). Retrieved from [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/un\\_convention\\_on\\_the\\_rights\\_of\\_the\\_child\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/un_convention_on_the_rights_of_the_child_1.pdf).

<sup>13</sup> *Ochoa v. Medios y Contenidos Producciones SA Cris Morena Group UTE*, H National Court of Civil Appeals, Argentine. 2015.

<sup>14</sup> *Braunstein v. Palermo Films SA, and others*. 2017. 368 *National Court of Labor Appeals*. Argentine: Bulletin.

<sup>15</sup> *P. v. Indo SA*. 2013. III Mar del Plata Court of Civil and Commercial Appeals, Argentine.

<sup>16</sup> *Massola v. Ford Motor Company*. 2013. F National Court of Civil Appeals, Argentine.

Ford in its magazine as part of the information that the company was sponsoring, and, additionally, the focus was not on the image of the person but on the event.

### 3.2. Examples of Regulations in Common Law Countries: United States of America and Great Britain

In the United States of America, the right to the personal image is established, firstly, within the framework of the right to privacy, defined as the right to be left alone (Sáez Tapia 2017). However, a posteriori, the foundations of the right of publicity were developed, which is recognized in state laws, but not in federal law.

This right of publicity seeks to protect celebrities. This is suggested in an 1890 article by Samuel Warren and Louis Brandeis, in which they propose a special right to protect celebrities' identities against the interference of journalists (Slater 2017). Nonetheless, the right to the commercial value of a personal image is widely regarded as having universal importance (Higueras 2001, p. 89).

The Restatement (Third) of Unfair Competition of 1995<sup>17</sup>, in Section 46, defines the right of publicity as: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49". That is, it protects the commercial value of the identity of a human person and limits such protection to the commercial use of the image consented by the owner of it. "It does not protect the personality itself, but its financial value" (Higueras 2001, p. 53).

It is still, as of today, a state regulation (<http://rightofpublicity.com/statutes>), meaning that there is a big difference in both the regulation and in the jurisprudence of the various states, and it is thus considered a "convoluted mix of inconsistent and unorganized interpretations" by the doctrine (Barnett 2000, p. 1227). Arkansas and Alabama are states that have recently approved special regulations. At the state level, this right is considered an economic right (Burbidge 2019) that allows the person to control the commercial use of their identity, as has been explained before (Seeger et al. 2019; Rovira Sueiro 1997). Commercial use in the right of publicity is expressed in the narrow sense of advertising activity or the promotion of goods or services (Barnett 2000, p. 1230). The doctrine construes three rights in one: the approval of the use of the image, authorization of the commercial use, and that of digital printing of the image (Johnson 2017).

The rule in New York, the jurisdiction where almost 25% of US cases are resolved (Igartua Arregui 1991, p. 96), allows for the protection of the personal image when there are commercial purposes in play for either a celebrity or a normal person, but it does not allow post mortem rights. One of the landmark cases is *Haelan Laboratories v. Topps Chewing Gum*, which in 1953 found the company guilty of unauthorized use of the athlete's image in chewing gum packages (Tushnet 2015).

California has a double-layered protection, perhaps because it was Hollywood, at the time of Marilyn Monroe, that was already demanding better protection for celebrities. On the one hand, common law acknowledges the appropriation of the image without consent leading to damages and, on the other hand, codification adds the element of intent of the improper use in direct connection with the economic purpose (Slater 2017). In this State, the duration of the right is for the entire life of the owner of the image plus 50 years after their death. The validity varies from State to State, reaching up to 100 years after death in Indiana, and, in Tennessee, it is considered a perpetual right (Barnett 2000, p. 1231).

Some States continue to resolve disputes based on common law and also resort to federal protection of copyright rules established in 1787, which causes conflicts with state copyright rules, as well as with the right of publicity itself. In 1880, a United States Court established that photographs are protected by the Copyright Act which, as previously mentioned, implies federal protection. The new intellectual property regulations of 1976 establish that the owner of the photographed image is the

<sup>17</sup> [https://is.muni.cz/th/169953/pravf\\_m/Extract\\_III.pdf](https://is.muni.cz/th/169953/pravf_m/Extract_III.pdf).

one who operates the camera and not the person portrayed (Slater 2017). In *Maloney v T3Media, Inc.*<sup>18</sup>, the California Court held that the intellectual property rule prevails in the athlete's claim.

For some authors, the right of publicity is an area for the protection of controversial images (Tushnet 2015; Seeger et al. 2019). However, from our point of view, it must be studied in depth, since there are no similar developments in other jurisdictions such as those in Europe or Latin America.

As it is a common law legal system, case law is the main tool for the study of this concept. As seen in the cases of Spanish resolutions, the lack of case law precision of the extension of the concept of personal image to certain representations has led to contradictory rulings in the United States such as *Keller v. Electronic Arts Inc.*<sup>19</sup>, where an athlete's claim was rejected for being incorporated into a video game and *Winter v. DC Comics*<sup>20</sup>, where the right of musicians to be compensated was granted for being included in comics. In *Lindsay Lohan v. Take-two Interactive Software Inc.*,<sup>21</sup> Lindsay Lohan sued Take-Two for using her image in a video game when the image had been computer created. The New York Court of Appeals ruled in March 2018 that under Civil Rights Law § 50 and 51, the representation in a video game constitutes an image, but in this case the claimant was not recognizable in the video and thus it was interpreted that the main point was the possibility of precise identification of the owner of the image (Higueras 2001, p. 55). In *White v. Samsung Electronics America Inc.*<sup>22</sup>, the host of the program "The Wheel of Fortune", Vanna White, sued the company for using, in a magazine advertisement, the figure of a female-shaped robot dressed as the host did and spinning the wheel of fortune, arguing her identity was being used. The California Court ruled in favor of White with an important dissenting vote of Judge Alex Kozinski for what the doctrine considers to be important: the identification or not of the person (Barnett 2000, p. 1235), as previously discussed in the Spanish case.

Particularly, the right of publicity is generally limited by the First Amendment of the United States Constitution, which advocates for freedom of speech and has the public interest in mind, although it is sometimes difficult to define the latter in this particular case (Slater 2017). In *Grant v. Esquire Inc.*, Esquire magazine reused a 1971<sup>23</sup> photo of Cary Grant in an article on fashion trends. The photograph had appeared in a previous issue of the aforementioned magazine in 1946, and the Court ruled that the photo of 1971 did not speak at all about the taste in clothes of the actor and that his face was only used to attract attention (Higueras 2001, p. 60).

The United Kingdom does not have a law that protects personality rights per se. Nor is the right of publicity or the tort of appropriation of personality (Smith 2001, p. 65). Therefore, all claims rely on the right to privacy as a basis (Burbidge 2019, p. 73). Although not as usual, it is also possible to defend the right to personal image by citing intellectual property rights within the UK (Burbidge 2019, p. 76).

For the purpose of restricting the abuse, exploitation or unauthorized use of one's own image, remedies such as passing off, defamation and malicious falsehood within the common law must be taken into account, although the latter is rarely used except in cases of fiction (Smith 2001, p. 68).

The Human Rights Act of 1998 widely accepts that the European Convention on Human Rights of 1950 establishes in article 8.1 that "everyone has the right to respect for his private and family life, his home and his correspondence", and in Article 8.2, that any interference must be "in accordance with the law". In *Campbell v. MGN*<sup>24</sup>, the House of Lords ruled that, in certain circumstances, even if photographs are taken on public roads without the person's consent, they may violate the individual's privacy. Supermodel Naomi Campbell had denied having a drug addiction, but photographers for

<sup>18</sup> *Maloney v.T3Media Inc.* 2017. 9 th. Cir. California, USA. <https://law.justia.com/cases/federal/appellate-courts/ca9/15-55630/15-55630-2017-04-05.html>.

<sup>19</sup> *Keller v. Electronic Arts Inc.* 2014. 135 S. Ct. 42, 189 L. Ed. 2d 894, USA.

<sup>20</sup> *Winter v. DC Comics.* 2003. 69 P.3d 473, 480 USA (Cal. 2003).

<sup>21</sup> *Lohan v. Two-Take Interactive Software Inc.* 2018. NY Court of Appeals, USA. [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_02208.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_02208.htm).

<sup>22</sup> *White v. Samsung Electronics America Inc.* 971 F.2d 1395 (9th Cir. 1992).

<sup>23</sup> *Grant v. Esquire Inc.* 1973. 367 F Supp 876, 878 (SD NY 1973).

<sup>24</sup> (n.d.) *Campbell v. MGN*, 2 A.C. 457.



the Daily Mirror obtained photos of the celebrity exiting a Narcotics Anonymous meeting that were later published. The House of Lords based its ruling on Article 8.1 of the Human Rights Acts of 1998, because privacy is independent of whether or not the person is famous and refrained from commenting on the advertisement or price of the image as they are pertinent to civil law or the rules and laws governing false advertising (Cornish et al. 2013).

The consent given for the use of the image is relevant for the Court, as evidenced by *Fenty and Ors v. Arcadia Group Brands Ltd.* (t/a/ Topshop) and Anor of 2013. In it, Topshop and Arcadia had to pay compensation to singer Rihanna for stamping her image on shirts and profiting from it without prior authorization (Schötz 2015, p. 161; Burbidge 2019, p. 77).

Moreover, as was previously mentioned for another jurisdiction in this paper, the Courts emphasize the protection of minors. In the case of *Murray v. Associated Newspapers*,<sup>25</sup> writer JK Rowling and her husband complained about a violation of privacy carried out by Sunday Express by publishing a photograph of them and their two-year old son in a stroller in public. Although the ruling in the first instance was not favorable, the ruling was reversed in the parents' favor after an appeal was made (Cornish et al. 2013).

As it was with the aforementioned cases in different jurisdictions, a balance between the right of personal image and freedom of expression is always the main concern. In *Douglas, Zeta-Jones, Northern & Shell Plc v. Hello! Limited*<sup>26</sup>, based on the Human Rights Act of 1998, it was ruled in favor of the claimants, despite the fact that Lord Justice Keene's decision expresses the difficulty of resolving a case where freedom of press is involved. The celebrity couple had signed a contract that gave explicit rights of the wedding photos to OK! Magazine, but its competitor Hello! published unauthorized photos of the wedding that were obtained in violation of the couple's privacy (Smith 2001), so that the right to privacy also subsists when their owners exploit their image commercially.

It is worth mentioning that the Human Rights Act of 1998 exceeds the requirements of the aforementioned European Convention since it establishes circumstances in which a Court may provide measures to stop a publication that may cause harm (Cornish et al. 2013). The doctrine established that in contrast to the United States Constitution, the European Convention does not give presumed priority to freedom of speech (Smith 2001, p. 86).

#### 4. Virtual Image of Models

To define modeling activity, the Argentine tax regulation refers to advertising models as those that work by displaying their own image to promote an object, product idea or service in a promotional campaign or fashion models that sell their image by appearing on stages or catwalks for the presentation of clothing, jewelry, hairstyles, cosmetics and other similar products or services. The provision also includes the commercial promotion and work in films or television where the task is executed according to a choreographic routine and a scenography established by a third party, static or in movement, to record the image on any type of magnetic or electronic support in order to transmit or reproduce it by any means.

Professional models are people who live from their image (Lencina 2017), as indicated by the aforementioned norm. This means that the reproduction of that image implies for them a greater degree of care and attention regarding the use given by third parties. Misuse of their image could affect the economic interest of the person as seen in *C.R.T.E. v. HSBC B.A. SA*<sup>27</sup> and others, where the photographs of a casting for an advertising model were used without their authorization and without compensation.

<sup>25</sup> Murray v. Associated Newspapers. 2008. E.C.D.R. 12.

<sup>26</sup> Douglas, Zeta-Jones, Northern & Shell Plc v. Hello! Limited, 2 W.L.R. 992. 2001.

<sup>27</sup> C.R.T.E. v. HSBC SA. 2016. F National Court of Civil Appeals, Argentine.

As part of the professional exercise of models, temporary contracts are signed that establish, in addition to economic compensation for the model, the activity to be carried out by the model. However, it is not customary to determine in these agreements the specific extremes for the use of the image related to the purpose of the contract, the extent of the usage, the means by which the image will be exhibited, the admitted adjustments, the term, or the resolution of conflicts related to the personal image. The tasks performed under the contract by the models usually exceed the particularities established in the standard chosen to describe the profession. Oftentimes, although less frequently, an employment relationship is established where the aforementioned characteristics are not detailed, and the personal image is neglected.

The improper or unauthorized use of the image of models, even within the framework of a contract ([Martín Muñoz 2001](#), p. 1714) may also affect the personal rights of the personal image so that a law such as Article 3.a. of the Spanish advertisement law 34/1998, of November 11, deems as illegal any advertisement that violates the dignity of the person or the values and rights recognized in the Constitution, emphasizing the protection of women's image, bearing in mind that Spain has constitutionally comprised the right of personal image in Article 18 ([Higueras 2001](#), p. 283).

Italy is the forerunner in installing ethical principles related to the work of the models. Already in 2006, the Nazionale della Moda Italiana imposed a Code of Ethics that has been respected since. France, in turn, in 2017 imposed a mandatory muscle mass threshold certificate for models to preserve their health ([Burbidge 2019](#), p. 171–72).

## 5. Photo Manipulation

Before photographs, records of personal images were done by means of paintings, drawings or sculptures. For a long time, both people and landscapes have been colored in photographs.

In laboratories, it was possible to superimpose negatives, open closed eyes and modify photographic records, and yet popular culture associates photography with the representation of reality.

Science and technology have created something unprecedented, a permanent record of images available through cellular phones. These devices also allow you to eliminate excessive brightness or add light to the shot among many other tweaks. Social networks such as Instagram also offer the possibility of photo manipulation.

The use of photo manipulation is common in areas such as news media, advertising or fashion where image is of utmost importance. In these cases, computer programs are used ranging from very simple to highly complex ones. Perhaps the best-known software license is Adobe® Photoshop® ([Tallarico 2010](#)). This program allows for the creation and editing of digital images, but it is not the only one that exists. Adobe Inc. frequently sends emails to authors of web pages that use the term “Photoshopped” informing them that only Adobe Inc. or people that have bought the license can use the terms “modified by Photoshop software”. Recently, this company, together with the University of Berkley, developed an artificial intelligence tool that detects facial retouching made with the software and returns them to their original state.

In principle, the usual goal is to make sure that the images look better, i.e., more beautiful. This creates a cultural dilemma, since the idea of beauty is usually built within a certain group of individuals who share experiences, stories, life events and even a similar physical environment. For example, Barbie is considered an icon of American culture ([Bartow 2019](#)).

Globalization has caused waves to impose a certain concept of universal beauty for purposes other than the search for beauty. Advertising today, as an instrument to foster consumption of products, works on images that show a specific beauty canon that can be studied in depth with the analysis of what is exhibited in the market, particularly in relation to female charm (Martínez Oña 2015). To achieve this aesthetic, digital manipulation of images that can go unnoticed or be rude is used.

Photo manipulation has created a virtual reality that is nothing short of fantasy ([Sartori 1998](#), p. 33). Persons who see the advertising do not have the aesthetics of the retouched image and are thus

motivated to imitate the model (Ramos Lahiguera 2017). This creates negative consequences such as discrimination (Martinez Oña 2015) or loss of self-esteem, particularly among adolescents (Pozzo 2016, p. 366), women (Scafidi 2019, p. 434) and children. During the Milan Fashion Week in 2007, the anorexic image of model Isabelle Caro for the advertising brand Nolita showed the consequences to human health that the search for a distorted image ideal may cause (Ramos Lahiguera 2017).

Technical manipulation of images is not inherently bad, but the intention or effect that is pursued can be, and that can promote deceit or cause psychic and physical harmful behavior for the recipients of the manipulated images.

In 2012, supermodel Coco Rocha was photographed by Elle Brazil magazine in a dress with cutouts and a skin-colored cape. Rocha has a policy of not appearing totally or partially naked, so she was wearing another dress underneath, but Elle Brazil altered the image to remove it to show more skin. The model expressed frustration at the disrespectful manipulation of her image (Williams-Vickery 2018).

In that same year, Israel passed a law that was baptized by the press as “The Photoshop Law” that prohibits advertisers from using excessively thin models and forces them to put a specific statement on photos that have been manipulated by image editing software. Also in 2012, in the Autonomous City of Buenos Aires, Argentina, law 3960 was passed, which establishes in its first article that “All billboards exhibited on public roads, in which a human figure is used as a support or as part of the context or landscape of the advertisement that has been digitally manipulated and/or modified through computer programs, must display the following disclaimer properly and in a sufficiently prominent place: “the image of the human figure has been retouched and/or digitally modified”. Frances has passed a law of similar characteristics in 2017.

Within the context of claims for the digital manipulation of the figure of models, American Courts are placing an increasing amount of emphasis on the nuances of the consent given in the contracts. The New York Supreme Court, in particular, emphasizes the study of manipulation so as to see if there exists a new image that cannot be consented. The doctrine indicates, however, that the right of privacy and right of publicity are not sufficient in these cases and a new right must be created to resolve these violations (Williams-Vickery 2018).

Authorities that regulate advertising standards in different countries such as the British Advertising Standards Authority (ASA) are increasingly imposing stricter rules for the respect of the human image in advertising (Pozzo 2016, p. 379). On June 21, 2019, it established a new rule that states that advertisers should not include gender stereotypes that could cause harm or a serious or widespread offense. France and Italy are two other countries where there exists this invaluable help to restore social dignity.

Also, there are blogs, websites and social activists such as [www.theillusionists.org](http://www.theillusionists.org) that denounce tweaks give way to new movements that promote what is called “real beauty” (Ramos Lahiguera 2017). All this helps raise awareness on the consumers side and the enforcement of existing regulations in their defense, but it does not seem to be enough; more public action and mandatory laws for image protection are required, particularly in advertising.

## 6. Conclusions

There is no doubt about the importance of the image throughout the history of humanity, but it has been accentuated in recent times; technology has democratized the possibility of portraying and being portrayed. Here we have shown that the Law is concerned with protecting it, although it does not always provide correct solutions given the diversity in existing norms and their different judicial interpretations.

The right of privacy and the right of publicity are not enough to face the challenges of the digital resolution of images and the interpretation of the doctrines and case law are not enough to resolve the conflicts that arise. It is necessary to develop a new generation of rights that protect the personal

image of the creation of avatars that try to reproduce it, the replacement of essential characteristics that define it, and the rude retouchings to which it is subjected.

For models that make professional use of their image and that sign contracts for this purpose, it is advisable that they establish clauses that:

- (a) Grant an express consent for the use of the image;
- (b) Establish the specific object for which this image will be used;
- (c) Set a deadline for permitted use;
- (d) Authorize only a reasonable retouching of the image;
- (e) Create a way to resolve conflicts related to the image, such as arbitration; and,
- (f) Lay down an indemnity value or an effective calculation of compensation in accordance with the possible violations of the moral and economic rights of the image.

As there are not many jurisdictions that have rules that force advertisements to inform the consumers that images have undergone digital manipulation, it is vital that countries adopt this legislation.

Lil Miquela works as a model for Prada, giving interviews from California and has more than 1.5 million followers on Instagram. She is only a bundle of pixels since it was designed by the technology company Brud, who initially concealed its origin when it was launched in 2016 (Hsu 2019). That is how the first completely virtual model appeared, not conditioned by any legal parameter. Faced with situations like this and the descriptions of real models that use their image as an instrument of professional work and suffer the manipulation of it, us jurists must study the social effects of the hyper-reality that the market creates to generate proposals that contribute to the balance of the real with the virtual, respecting rights and personal and cultural essences.

**Funding:** This research received no external funding.

**Acknowledgments:** The author of this paper would like to thank Luis Denuble and Natalia Tenaglia—Argentine lawyers residing in New York—for their help in searching material on the right of publicity. She would also like to thank Cecilia Irrazábal for her professional assistance in the English version of this paper.

**Conflicts of Interest:** The author declare no conflict of interest.

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