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THE RIGHT TO ONE'S OWN LIKENESS IN FRENCH LAW

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The right of everyone to his own likeness, denied in the United States as recently as the beginning of the current century, and considered today as one of the most important aspects of the right to privacy in the great majority of these states which recognize this right, has been the subject of extensive independent development in French law. Indeed, the interest we have in our faces has several special features. In the first comprehensive treatment of the problem in the French legal literature, Fougerol wrote:

Human physiognomy, a mysterious and quasi-divine thing, incarnates not only what we like best, what we appreciate most: the external visible form, but it also permits to the thoughts, deprived of any shape, to exteriorize themselves according to the desires of the men . . . . This physiognomy . . . reflects the soul and distinguishes the man from his fellow-man . . . .

It has been said that in American law distinct situations have been lumped together to constitute the right of privacy. Dean Prosser classifies these situations into four typical categories, the last of which includes the right to one's own likeness. In France and in the United

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2. The following states continue to deny the right to privacy: Nebraska, Rhode Island, Texas and Wisconsin. Nebraska, however, seems to be on the way to joining the majority. In Brunson v. Ranks Army Stores, 161 Neb. 519, 73 N.W.2d 803 (1955), which denied recovery for an invasion of privacy, the court stated that in the absence of precedents in the ancient English common law and in Nebraska cases, "such right should be provided for by action by our legislature and not by judicial legislation. . . ." Id. at 525, 73 N.W.2d at 806. But recently, the court changed its approach by overruling prior cases establishing immunity of charitable institutions saying: "(w)e would be abdicating our own function, in a field peculiarly nonstatutory, were we to insist on legislation and refuse to reconsider an old and unsatisfactory court-made rule." Myers v. Drozda, 180 Neb. 183, 186, 141 N.W.2d 852, 854 (1966).
3. H. FOUGEROL, LA FIGURE HUMAINE ET LE DROIT (The Human Face and the Law) 4 (1913). The author states that the problem received earlier and more frequent treatment by Italian and German scholars.
States, most instances of a violation of this kind of privacy involve defendants who are prompted by commercial considerations.

The problem does not always involve the right "to be let alone," as the right to privacy has sometimes been defined, and clearly the right that we may have to our own likeness is not of this kind. Indeed, our faces are the first thing seen by others; yet, it has been said that our likeness is "decidedly what is most sacred in private life." If we can successfully object to the publication of our likeness by others even though we may enjoy attending public places and meeting many people, then perhaps the question of likeness should be treated differently from that of "privacy."

The observations which follow will attempt to present the development of French legal thinking with respect to the publication of one's likeness without his permission, assuming that the making or the taking of the picture did not meet with objections.

In light of some French decisions, it can be said that the right to likeness is parallel to the right of "private life," which has narrower connotations than the American idea of privacy, and frequently reliance upon one of them would be useless while the plaintiff's rights would be protected by the invocation of the other. Thus, it has been stated that an actor can let himself be photographed in a fashionable suit during a gala event, but that he retains the right to object to the use of the photograph for the purposes of the tailor's advertising campaign. In such a case the application of the concept of "private life" would not do.

For centuries, the reproduction of a human likeness was a difficult art. In order for a sculpture or a portrait to represent the model accurately, great skill must have been displayed by the artist, and an investment of time on the part of both the artist and the model was essential. Of course, there was a possibility of incorporating the features of someone's face into a painting without these requirements having been met. Situations did occur in which devils or unpopular persons in religious pictures were given features similar to those of personal enemies of the artist, or persons he disliked. But these instances were rare, thus making the problem insignificant.

The situation changed completely with the invention of photography and the corresponding reproduction of photographs occurring by the thousands in newspapers, post cards or otherwise. Occasionally, photo-

graphs may be said to misrepresent reality, especially when a series of pictures has been taken of a public figure, and only those which show the face momentarily distorted may be selected for publication. However, in most cases the published pictures correctly represent the model. As early as the end of the nineteenth century, some commentators considered indiscreet photographers as a kind of "public nuisance."

However, at the time this problem presented itself with force, some theories were advanced against the recognition of any rights in one's likeness. In France, it was argued that this could not be done without a legal text, so that an amendment of the Civil Code would be required. Also, when there is a lack of defamation, no damage may be established by the one whose likeness is reproduced, and additionally, since some persons resemble each other, it may be difficult to prove whom the picture represents. Finally, an argument was advanced that it would be improper to impose restrictions on the liberty of arts. It was even stated that during the nineteenth century jurists were "unanimous" in refusing to accept the notion of a person's right to his own likeness, as that idea emanates from a confusion between those who are entitled to have rights and the subject matter of those rights. As later shown, this approach met with little success in the courts.

The tremendous majority of cases involving the right to one's likeness concern photography. In all situations, the interests of three parties must be taken into consideration: those of the person represented, those of the artist or photographer who reproduced the likeness, and those of the owner of the artist's product.

The right of the artist is a question of his artistic property, a question that did not escape the attention of the legislators. Thus, the

7. "Today, journalists compete in the art of giving... unexpected or even... disrespectful pictures... a face, an attitude, a pouting, or an unorthodox gesture." Lindon, supra note 5.
8. The word "model," as used in the present observations, means the person whose likeness is being reproduced.
9. Thus, in 1893 Dr. Miethe of Berlin wrote in the Vienna Revue, that if a new edition of the HANDBOOK OF ELEMENTARY AND HONEST POLITENESS were to be published, a special chapter should be included laying down the following provisions:

Whoever annoys or offends his fellow-citizens by the means of the noble art of photography or whoever turns the embarrassment of his victim to his profit by fraudulently taking his photograph, will be qualified as loathsome of the first class... Whoever... takes a photograph of a person in an embarrassing position, and shows or sells the print he got in this way, will be qualified as abominable.

H. FOUGEROL, supra note 3, at 60-61.
10. Stoufflet, Le droit de la personne sur son image (The Right of a Person to His Likeness), No. 2, J.C.P. 1957, I, 1374.
French "decree" of July 19-24, 1793, which, with some changes, represents the law of today read as follows:

The authors of writings of any kind, musical composers, painters and persons making drawings who will have paintings or drawings engraved, will have, during their whole life, an exclusive right to sell, authorize a sale, distribute their work within the territory of the Republic, and to convey their property in the whole or in part.

Whereas no legislation regulated the relationship between the artists and the persons they represented in their works, it was early established that the artists' rights, as set forth in the "decree" of 1793, could not be freely exercised if their artistic creation involved the likeness of a human being. Thus, in an 1855 case, Sister Mélanie v. Fougère, decided by an order of a referee, the defendant painter, Miss Fougère, obtained an authorization to make a portrait of Sister Rosalie, director of the Community of the Sisters of Providence. Because the portrait was painted gratuitously, the Community decided to order a copy from the artist so that she would be compensated for her work. When the original was returned to her, she sent it to an exhibit. Evidently, the protests of the Community remained unheeded since an action was brought to have the portrait removed from the gallery. The President of the Tribunal granted the prayer and ordered the portrait returned to the plaintiff on the ground that it was the property of the Community and could not therefore be exhibited without its consent, much less against its wishes. It should be observed that stress was placed upon the portrait's owner's rights rather than upon those of the person represented, but in the particular circumstances of this case, involving a religious order, the interests of the model merged with those of the Community.

A case decided in 1891, Labatut v. Sylvestre, may serve as another example. Labatut made an offer to Sylvestre to gratuitously execute a sculpture of the bust of his young daughter. The offer was accepted, and the artist proceeded to work. He later hired one Morlon

13. Article 1 of the "decree." Article 2 granted the same rights to the successors, but only for ten years after the death of the authors.
15. Cases submitted to an ordonnance de référé are those which require a speedy decision in order to avoid irreparable damage to the plaintiff. They receive immediate consideration and are decided by one judge, usually the Chief Judge, who may order measures to be taken to protect the plaintiff's rights but who should not rule on the merits of the problem. See C. Pro. Civ. arts. 806-11.
to procure some marble and carve the bust in it, conforming with a clay model that had been prepared by Labatut. Upon delivery of the sculpture, Sylvestre refused to pay the sum of 800 fr., which the artist had paid to Morlon. Nonetheless, it appears that he liked the bust because he had a cast made and produced the sculpture in several plaster copies for himself and his family.

The artist brought an action asking for the 800 fr. and for 1000 fr. as damages incurred by him because of the reproduction of his work. The Tribunal granted 800 fr. to the plaintiff, but denied the second plea of his suit, stating that the claim that Sylvestre should be limited to possessing only one copy of the bust was unjustifiable. The Tribunal added:

... the question whether Labatut kept, while handing over the clay model of the bust, his author's rights, is in this case without interest, as where a portrait is concerned, he could not take advantage of his rights without an express consent either of Sylvestre or the person represented.\(^{17}\)

It should be emphasized, however, that the defendant's rights to make reproductions of the sculpture were predicated on facts which are uncommon in this type of litigation; he was not prompted by commercial motives, nor were the plaster copies of the sculpture distributed to anyone other than the members of his family.\(^{18}\) The judgment was greeted as another link in the series of decisions which would establish the principle that, in cases of someone's likeness, the right of the artist to reproduce his work yields to the rights of the person represented.\(^{19}\) This rule became firmly established, and in 1905, a commentator could write: "It is a principle ... that in cases involving a portrait, the right of the artist ... is limited, as far as its reproduction is concerned, by the will of the model."\(^{20}\)

With the invention of photography, reproduction of human features became infinitely easier as well as more precise, all of which caused new problems to arise. Except in unusual situations, it became possible to take, and to reproduce someone's likeness without asking for consent. Initially, the new art of photography was imperfect, and to obtain

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17. In accordance with French practice, subsequent references to textual material of the principal case being discussed are not cited. French judicial opinions are usually short, requiring less than one page in the reporter. Therefore, only the first page of a case is being cited in this article.
18. Id. note to the case.
19. Id.
workable results expertise was required; but with modern developments, millions of men take photographs each day without any training and at trivial expense. In addition, today a more exact likeness is achieved and it is accomplished in fractions of a second.

Cases involving photographs are nearly as old as the invention itself. Some of these cases, either forgotten today, or which never achieved any degree of fame, seem quite colorful. One particularly interesting case is Sergent v. Defonds. The background of this litigation has been discussed by two law journals. Miss Eugénie Sergent left her parents’ home at the age of eighteen. She was a remarkable beauty, and having assumed another name, she became a queen of the social circles in Paris. She lives in maximum luxury, having a plush apartment, horses and coaches. She was the pearl of public gatherings and theatres: the most elegant and attractive of all those who were leading the same lifestyle—merry, careless and pleasant.

One night, while returning from a ball, she became chilled and soon thereafter, she became feverish—acute tuberculosis had developed. She knew that she had to die, and meditating on her life she realized the mistakes of her past. She called her father and a priest, dropped her assumed name, and was placed in a sanatorium where she died a few days later. The sufferings of her last moments were mitigated by religious feelings which returned to her with great force during her illness.

Some time thereafter, her father was passing through a busy quarter of Paris, and in the display window of a photographer, he noticed a photographic portrait of a young and beautiful woman, which had attracted the attention of a crowd. It was the likeness of Eugénie. The father asked the photographer to remove the portrait, and upon his refusal, the father petitioned the President of the Tribunal of the Seine in referee proceedings to grant him the desired relief. The judge complied with the prayer, basing the decision on the statement that “the portrait of a deceased person is the property of his family.” The order was carried out.

Later, the father learned that the portrait was placed in the interior of the photographer’s premises, and that the likeness of his daughter also appeared in a group picture taken by the photographer, with the photographer in possession of the negatives. The father brought an action asking that the portrait of his daughter be handed over to him, together with the negative, and that the group picture be destroyed. The defendant

22. Id.; Gazette des Tribunaux.
23. See note 15 supra for an explanation of this summary procedure.
emphasized his good faith and his compliance with the first order of the referee judge. He made it clear that the portrait had been given to him by Eugénie, and that, therefore, no one had the right to object to his possession of it.

The Tribunal reiterated the approach taken by the referee judge. It stated that the family of a deceased person has the right to object when the portrait of the deceased is given any kind of publicity, and ordered the defendant to surrender to the plaintiff the negative and all copies of the portrait that he had within eight days from the date of the judgment. Referring to the group picture, the Tribunal dismissed the plaintiff's prayer on the ground that it did not amount to a portrait and that Eugénie could have consented to appear in it.

The relief granted by the Tribunal is striking. Defendant's argument, based on Eugénie's consent, was not permitted to prevail although the plaintiff failed to disprove the consent. Was it because the defendant did not establish his contention by positive evidence, or was it because the consent could be revoked either by the person represented on the picture, or after his or her death, by the surviving members of the family?

Other cases provide insight into the thinking of the French judges. One of these, *Mickiewicz v. Szweycer*, decided in 1860, a decision contemporary to the one in *Sergent v. Defonds*, concerned the previously developed points. It involved the likeness of the famous Polish poet and patriot, Adam Mickiewicz. In addition to the problem of consent and the family's rights, this case presented the question of artistic property in the photographs.

The suit was brought by the great poet's son and the guardians of his three other minor children against Michael Szweycer, a photographer and friend of the poet. From the facts of the case, it appears that Adam Mickiewicz authorized Szweycer to take his photograph, to exhibit it publicly, to reproduce it, and to sell it. After his death, several persons, with the apparent approval of the deceased's family, had an engraving of the poet's likeness prepared and placed on the market. The engraving was modeled after the photograph taken by Szweycer.

Claiming exclusive property rights in the poet's likeness as it appeared on his photograph, Szweycer instituted criminal proceedings against the persons infringing on his interests, and succeeded in obtaining a seizure of the 624 engravings as well as the copper plate used in their manufacture. The plaintiffs then brought a civil suit against him,

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asking the Tribunal to lift the prior seizure. They claimed that the rights of a person in his likeness passes to his family upon death, and that if the poet's consent were given to the photographer, it could be revoked by him during his lifetime, and by his family thereafter.

There was no evidence as to the scope of the consent that was given. The defendant artist argued that Mickiewicz gave him the exclusive property in the poet's likeness, making a reproduction by others contrary to the law, and that his successors could not revoke the rights granted by the deceased.

The Tribunal reaffirmed the necessity of obtaining a formal consent from the model for the exhibition, reproduction and sale of his likeness, and after his death, the consent of his family. However, once the model's consent has been given, the judge must determine whether the survivors have a serious and lawful interest in objecting to the execution of the model's wish. In this case, said the Tribunal, no such interest can be found, and furthermore, the family of the deceased declared that they would not like to oppose the deceased's will. The exclusive right of the defendant in the photograph which he took was reaffirmed, and the civil court refused to interfere with the seizure ordered by the criminal court.

However, the Tribunal expressed disagreement with the defendant's claim that he could object to the reproduction of the poet's likeness by others, be it by photograph or by any other means, provided that they are not copies of his own work.

Thus, while the right to revoke the consent was recognized by the Tribunal, it was denied to the decedent's family once it clearly appeared that it was formally given by the model and where there was no compelling reason for the family's reluctant attitude. The "idea of speculation" on the part of the survivors is insufficient.25

It could be asked why the family should be permitted, in any case, to interfere with a permission granted by the deceased model involving his own likeness. Possibly, a common law jurist would justify such an approach by the idea that consent, expressed in a strictly personal matter, does not survive the death of the consentor, just as an agency expires with the principal. However, such reasoning was never clearly expressed by the French courts.26

25. Comment in S. 1868.2.41.
26. It would appear obvious that during the lifetime of the model no one should be permitted to question his decision. However, this point was raised in 1951 by the President of the Commission of the Reform of the Civil Code, Dean Julliot de la Morandière. He asked the question of whether, for instance, a spouse could object to a reproduction of the likeness of his or her consenting mate in the situation where such publicity might be annoying. The answer upon which the Commission agreed was nega-
Furthermore, once the consent of the model to publish his likeness has been given, should he be permitted to later revoke it? This question has been raised several times in the French courts. In _Delaporte v. Thiebault_, the Tribunal confirmed the right of an actress to object to the publication of her photograph or other portrait but denied damages because it appeared either that she had expressed consent, or that the photographer had acted in good faith. Standing alone, such a statement would appear to take a liberal view of the rights of the defendant; but the holding was based on the fact that he took the photograph gratuitously for the plaintiff, and that his compensation consisted in the right to publish it. In this case, said the court, such a right could not be withdrawn from him without compensating him for his costs.

The classical case on withdrawal of consent is that of _Dumas v. Liébert_. Alexander Dumas, Sr., a famous writer, posed in various positions with Miss Adah Menken for photographs in Liébert’s studio. Two days later, the photographer sent him a number of pictures and displayed some others in the windows of several print merchants. Dumas, annoyed by this publicity, brought an action against Liébert, asking the Tribunal to prohibit the exhibition and the sale of the photographs which were not destined for the public eye. He also asked that the negatives be destroyed upon the payment of their value, which he offered to make. The Tribunal of the Seine denied the claim on the grounds that the pictures were not ordered by the writer for the purpose of distribution to his family and friends, and that they were not paid for. The tacit understanding between the parties was that in exchange for the photographs to be given to the plaintiff, the defendant received permission to sell the pictures to the public.

Upon Dumas’ appeal, the Court of Appeals of Paris reversed the lower court judgment. The implied consent of the writer to a commercial use of the photographs by the defendant was based upon a custom established in the profession of the photographers; but, by the same custom, the publication and sale of the pictures must stop as soon as the tacit consent of the model is revoked and is coupled with an offer to pay for the photographs. Indeed, said the Court, it would be unreasonable to construe a tacit consent as “a definitive and perpetual conveyance of the right to publish the photographic portraits,” and added that in order to establish such a conveyance, it “would be necessary to have a...
formal contract rather than permission by sufferance, the scope of which is always subjected to the will of the consentor." The Court continued:

A thousand circumstances may make the continuance of such a permission impossible; . . . the very effect of the publication may make the one who expressed consent realize that by conveying this authority he forgot the requirements of his dignity, and remind him that if the private life must be walled, in the interests of individuals, the same is true as to the interest of the public morality and of the respect which is due by everyone to the public opinion.

The withdrawal of consent depends upon an offer to pay for the photographs. Because the offer was made before the Court, the defendant was ordered to stop displaying and selling the pictures and to relinquish the negatives to the plaintiff, who in turn had to compensate the photographer in the amount of 100 fr. 29

Commenting upon this decision, a leading French legal journal 30 warned against an easy inference of a tacit consent being given, and recommended that in doubtful cases it should be found not to exist. Additionally, it criticized the implication made by the Court that there was a possibility of making an irrevocable consent by a formal agreement. The law does not permit contracts which restrain the liberty of a person for an indefinite time, and the same rule should apply to the likeness of the person. We cannot convey an inalienable and sacred right which we have in ourselves. Referring to Sergent v. Defonds, 31 the commentator stated that the principles of good morality and public order should rule out the possibility of one relinquishing the right to revoke permission to give publicity to one’s likeness.

Subsequently, the question was regulated by a legal treatise and today it is governed by article 32 of the Law on Literary and Artistic Property 32 which reads, in pertinent part, as follows:

In spite of the conveyance of his rights of exploitation, the author has the right to change his mind and to withdraw . . . even after the publication of his work. However, he can exercise

29. Of importance were C. Civ. art. 1134 which provides that "(a)greements legally formed have the force of law over those who are the makers of them. They cannot be revoked except with their mutual consent, or for causes which the law authorizes . . . " and C. Civ. art. 1158 which provides that "(e)xpressions susceptible of two meanings must be taken in that which agrees best with the matter of the contract."
30. S.1868.2.41, note to the case.
this right only upon an advance compensation of the grantee for his damages. . . .

Such an approach is not unknown in America law. The comparison which comes naturally to the mind is in the area of agency law where the relationship is always revokable, unless it is "coupled with an interest." However, American courts are unwilling to permit the revocation of a consent to the use of an element of privacy if that consent was given in a contract rather than gratuitously, or if the defendant incurred expenses based upon reliance on the consent.

The custom referred to in the Dumas case is often followed today. For example, a photographer or painter will obtain permission to reproduce and sell the likeness of a famous person in exchange for delivering to the model copies of the product. Another type of contract, entered into by some press agencies and a known personality, provides similar consideration for the model, who in turn conveys to the agency the right to keep the negative, to distribute the prints to its correspondents, and to publish the likeness upon the occurrence of a newsworthy event involving the person in question. These kinds of arrangements raise the question of whether a model can withdraw permission to reproduce and sell copies of the work, yet still compel the artist to complete the product and deliver it to the model. In American law the answer to the question is in the negative since specific performance is not possible in cases of personal services. This result is likewise followed by the French courts.

The leading case is Eden v. Whistler, decided in 1900. The famous painter made a contract to paint the portrait of Lady Eden at the request of her husband. Upon completion, the picture was exhibited in a gallery but never delivered to the Edens. It seems that the price of the painting had not been clearly established by the contract, and that Whistler was unsatisfied with the amount that the plaintiff was willing to pay. Eden brought an action asking the Court to help him obtain possession of the painting. In the meantime, Whistler altered the painting by replacing the face of Mrs. Eden with that of another person.

33. See generally W. Prosser, supra note 4, at 850.
36. Id.
38. Note by M.P. (Professor Planiol) in D.1900.1.497. Of course, the refusal of an artist to deliver his work of art may be motivated by many other reasons, and in particular, by a dissatisfaction with his product.
Cour de Cassation affirmed the judgment of the Court below which denied relief to the plaintiff.

In cases of this kind, as Planiol pointed out, the obligation of the artist is twofold: he must execute the work of art which has been ordered, and he must deliver it to the other party. The contract is completed only upon the acceptance of the finished product. The rules of the Civil Code providing that property is conveyed by a mere consent of the parties do not apply. The action against Whistler had to be dismissed because the portrait never became the property of the plaintiff. However, the painter was ordered to refund the money received from the plaintiff, together with damages. The Court indicated that the painter could not make any use of the portrait unless it was changed to such a degree that the original person represented was not recognizable. Hence, unless the artist makes such changes, he can neither exhibit nor sell his work without the consent of the model, and though he retains title to the portrait, his only right, which is coincidentally an obligation, is to destroy it.

Of course, what the Court had to say relating to the passage of title in works of art is applicable to all kinds of artistic property and not merely to portraits; the right of the artist not to finish his work, or to refuse its delivery, was established by judicial decisions and is now governed by the statute on Literary and Artistic Property of 1957. From some of the above decisions it clearly appears that the courts did not hesitate to recognize that a photograph may be treated as artistic property along with other works of art, and that it will be entitled to the same protection. The above mentioned statute of 1957 followed the lead. Its article 3 provides that the statute covers photographic works of artistic or documentary character, and similar works obtained by a

40. See note by M.P. (Professor Planiol) in D.1900.1.497.
41. Id.
42. A leading case, reaffirming the approach taken in previous decisions, is Vollard v. Rouault, Paris, Mar. 19, 1947, D.1949.20. in which the Court noted that the contract is made as to future goods, in which property, after their completion, can be transferred only by delivery made without reservations; . . . until delivery, . . . the painter remains the master of his work, may finish it, change it, destroy it or even keep it unfinished . . .; . . . this inalienable power, an attribute of his moral right, is exercised irrespective of all contracts to the contrary, the culpable inexecution of which has the effect of engaging the liability of the author who changed his mind to pay damages.
43. See note 32 supra.
process analogous to photography. It follows that where an individual would like to reproduce a photograph of A taken by B, he must obtain the permission of both. The right of A to control reproduction is said to be, by one commentator, a moral one inherent in the personality, whereas the right given to B to deny or grant reproduction is included in his artistic property. Consequently, permission given by the photographer does not imply, *ipso facto*, permission of the model. If photographs are the subject matter of artistic property, it follows that the photographer has title to the negatives of the pictures. However, it will be a title barren of any useful right absent the consent of the model. If the photographer should misunderstand the extent of his limited legal interests in the negatives and use them in violation of the model's rights, the courts may order them destroyed or surrendered to the model.

In addition to those individuals who desire no publicity whatsoever, and "public figures" who cannot help but come before the public eye, there exists a category of persons whose professions require their association with the public, and who usually enjoy any publicity which they may receive. This latter category also has the right to object to an unauthorized publication of their likeness, even if they cannot show any damage. In such a situation, the court may grant them nominal damages. This was the result in *Miss Jahier v. Juven.* Here, the plaintiff was a model in a Parisian dressmaker's business. Along with other girls, she entered into a contract with her employer, entitling him to publish photographs of the fashions which the models wore.

The defendant, editor of the magazine *Fantasio*, published one of the plaintiff's photographs taken in the course of the exercise of her profession. There was no bad faith on the defendant's part, and the journal, far from showing any intention to discredit the plaintiff in any way, displayed her likeness in an aesthetic and gracious way. Customarily, said the Tribunal, the models do not object to such publications. On the other hand, irrespective of the artistic qualities of the magazine, it was somehow marked by the character of fanciful frivolity in conformity with its name.

The Tribunal did not think that the plaintiff had compelling reasons for bringing the suit. However, it stated that it could not investigate the question of whether the plaintiff's decision to institute the proceedings

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45. *Id.* note to the Princess Soraya case.
was because of the fact that she had been ill-advised to go ahead with a "costly publicity of judicial debates about her trivial claim" on the ground of her commendable modesty. Expressing some personal feelings on the matter and showing some good humor, the Tribunal agreed that:

. . . a young and modest woman, even exercising a profession in which this virtue may at times be put to a test, may experience some annoyance by appearing to belong to the world of theaters, or even to that where morality is not of the highest degree, out of the course of her work.

The plaintiff asked for damages of 1,000 fr., indicating her readiness to donate the money to charities. The Tribunal stated that in the absence of any appreciable damages or any wrongful intention by the defendant, it could grant only nominal damages. They were assessed at 1 fr. and the costs of the litigation were added.

In a recent case, Anscher v. Tchou,49 the plaintiff, a radiologist by profession, brought an action based upon an unauthorized publication of his photograph taken with his knowledge and in the course of his professional life. The Tribunal held for the plaintiff, disagreeing with the defendant's contention that the circumstances of the case made consent unnecessary. Stating that the likeness of a person constituted an extension of his personality in which there is a property right, the Tribunal held that the general rules must be applied because the plaintiff possessed no features resembling a public man.

With respect to "public men," one of the historic cases involving photographs concerned a picture of the Emperor Napoleon III in the company of the Duke of Morny. In Ledot v. Mayer,50 the plaintiff instituted criminal proceedings, alleging violation of article 425 of the Penal Code,51 against the defendants who had reproduced the photograph of the Emperor and who had thereby infringed upon the plaintiff's property rights. Responding to the question of whether a photograph should be protected as a work of art, the Cour de Cassation gave an affirmative answer and reaffirmed the earlier cases, stating that in taking a picture, the photographer must take into consideration the light, perspective and

51. The first paragraph of art. 425 states: Any publication of writings, of musical compositions, of drawings, of paintings or of any other work, printed or engraved in part or in full, in disregard of laws and regulations concerning the property of the authors, is fraudulent; an it is a misdemeanor.
other factors, thus evidencing a certain amount of "taste, discrimination and skill."

The status of the person represented on the photograph did not impress the Court. It treated the Emperor like any other mortal, and made a general statement that "the property in works of art and the exclusive right to reproduce them belongs to their authors," but that, "in cases of portraits, this right gives way to that of the persons whose likeness the artist represented." If those persons remain silent and do not object, the consent to the use of their likeness may be presumed, and the artist may fully avail himself of his property rights. Here, the proceedings against the defendants were held to be justified.

A similar approach was taken by the Paris Court of Appeals a quarter of a century later. A famous actor, Romain, was photographed as ordered by the theater director, on the theater stage during a performance. Upon publication of the photographs, Romain brought an action which was sympathetically accepted by the Court: it stated that "every individual has the right to prohibit the exhibition of his portrait in any form whatsoever," and proceeded to deny any exception based upon the fact that the plaintiff "was an artist represented in a role which he played publicly."

A distinction between judicial treatment of private individuals and "public men" began to appear soon thereafter, and shortly before World War I it could be stated that so far as public acts were concerned, the right to one's likeness became limited to the extent that newsworthy pictures could be taken without the prior consent of the subject of the photograph. This approach may rest upon the rationale that any person who enjoys appearing in public and the corresponding attention of the public eye, either "tacitly gives up the monopoly to reproduce his likeness," or impliedly gives permission to his reproduction. The presumption of consent relating to events of public life should not be broadly construed. That is, the photographed person's authorization does not extend beyond the use of his likeness for illustrating the public event in question. Furthermore, a public figure is not deprived of the totality of his right to privacy. A photograph taken on private premises, where the subject seeks to escape publicity, is entitled to protection and cannot be reproduced without the subject's expressed consent. On the

52. Romain v. Chalot, Paris, June 8, 1887, Ann. propr. ind. 1888, 287. For comments, see H. Fougerol, supra note 3, at 54.
53. H. Fougerol, supra note 3, at 48. See also Badinter, supra note 6, No. 25.
54. See Badinter, supra note 6, No. 13.
55. See Badinter, supra note 6, No. 25.
56. Id. See also Kayser, supra note 35, at 77.
other hand, it is “unanimously recognized” that even though some “public men” may not seek publicity, the reproduction of their likeness is permitted only when they are not shown in the intimacy of their private life.\textsuperscript{67} It therefore follows that in these instances the model is not allowed to object; consequently, as stated by Kayser, the theory of implied consent is incorrect.\textsuperscript{58}

Another delicate problem is to determine the extent to which persons involved in or connected with crimes are permitted to object to the publication of their likeness. An early and interesting case on the subject, \textit{Peltzer v. Castan},\textsuperscript{59} was decided in Belgium, a country which applies French law. In 1882, the Peltzer brothers were convicted by the Court of Assises of Brabant. One of them, Armand, died while imprisoned. The defendant, Castan, operated a wax museum in Brussels and had named one of the display rooms “the criminal chamber.” In addition to reproductions of other infamous personalities, the defendant exhibited in the “chamber” a figure of the deceased as he appeared before the Court. The plaintiff, a daughter of the deceased, brought an action seeking an order directing the defendant to close the exhibit. The Tribunal of Commerce stated that it had no jurisdiction.

Upon appeal, the first issue discussed by the Court of Appeals was whether plaintiff had proper standing to institute the suit. This question was disposed of rather summarily, the Court permitting the action saying that the appellant acted “not only in the quality of her father’s successor, but in her own name, on the ground of a personal damage brought about by the conduct of defendant complained of.”

With respect to the merits of the case, the Court pointed out that the appellee failed to deny the existence of the general principle proclaiming the right of an individual to his face and his name. Rather, he based his defense on two grounds: first, that the events of 1882, which attracted the public attention to Armand Peltzer, legitimized his exhibition of the wax figure, and correspondingly, the lapse of several years did not alter the situation; second, that articles 18 and 96 of the Constitution expressly proclaimed the freedom of press and publicity given to judicial proceedings. Rejecting these arguments, the Court stated that the general principle “may be invoked by a most obscure person as well as by the one who became well known because of circumstances; . . . each of them has the right to withdraw from the kind of publicity which he considers to be damaging.” The constitutional provisions were in-

\begin{footnotes}
\item[57] See Badinter, supra note 6, No. 12.
\item[58] See Kayser, supra note 35, at 77.
\item[59] Court of Appeals of Brussels, Dec. 26, 1888, S. 1891.4.35.
\end{footnotes}
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interpreted by the Court to be a kind of "guarantee given to the accused and to the social order"; the high ideal of this principle cannot be converted by the defendant to attain his personal goals; "his exhibit, organized for the purpose of profit, constitutes for those who have been stricken by the arm of justice a real aggravation of the punishment. . . ." The plaintiff's prayer for relief was granted.

Journalists attempt to maintain that persons involved in criminal proceedings have no right to privacy, but such a contention is not valid. It is recognized today that persons who are under investigation or who have been convicted may object to the publication of their likeness. Their right, however, is diluted by the postulates of public interest, such as those connected with the idea of current news.

In Sergent v. Defonds, in addition to the principal count based on the publication of a photographic portrait, the complaint included an objection to the display of a group picture. On this latter claim, the International Committee of Photographers adopted the following position: "Groups are considered as portraits only inasmuch as this should result from the intention of the author and from the aspects of the work. Units separated from the group become portraits." This approach met the approval of legal commentators.

The same problem reappeared in a few subsequent cases, either in similar or in somehow different circumstances, where the persons claiming a violation of their rights were photographed as a part of the scenery available to the public eye. One of these cases which is relatively long by French standards, and well reasoned, is Andrieu v. Later and Riou. Without the knowledge of the plaintiffs, Later took two photographs at a public sale of colts. Represented in the pictures were animals and persons, among whom were the plaintiffs. The photographs were reproduced on postcards which were displayed and circulated among the public. The plaintiffs claimed that Later infringed upon their "human liberty" by taking and using their photographs which caused them damage, and they sought 10,000 fr. Later defended by arguing that the pictures did not refer to any determined person, but simply represented a scene of agricultural life.
Rejecting plaintiffs' arguments of "human liberty" and property right, the Tribunal stated that infringement on liberty could be effected only by restraining them from exercising their right to engage in any lawful activity. Dismissing also the claim based on property rights in a likeness, the Tribunal pointed out that "the fact of circulating on a public way, of participating in ceremonies or gatherings such as those in fairs and markets, places the individual under the stress of social relations," and that no rule of the written law could be said to be clearly applicable and to support the plaintiffs' position. Adding that no wrongful intention whatsoever of the defendants had been established, and that the faces of the plaintiffs on the photographs were discernible with difficulty and merged with the group of other persons, the Tribunal dismissed the action.68

This decision was greeted as a proper limitation upon the right of individuals to object to the publication of their likeness.69 A quarter of a century later, a legal scholar stated that in general, the courts are willing to recognize the right to publish group photographs taken in public places. It is doubtful that his position rests on the idea of implied consent; more than likely, several practical reasons are decisive. As a cautious caveat, however, it should be noted that upon objections by the persons represented, their faces must be made unidentifiable.70

Legal problems follow every new invention. Such was the case with the development of motion pictures. Quite naturally, some of the first issues were the same as those presented by photography: the questions of artistic property and of the right in one's likeness. An early case was based upon facts which occurred in 1898, at the initial stages of cinematography.71 Dr. Doyen conceived the idea of having moving pictures taken of his surgical operations for the practical purposes of instructing both young surgeons and himself. The films were produced by Parnaland, acting under the direction and with the assistance of the doctor. All decisions as to the subject matter in the films and the method of shooting various scenes were made by Doyen. Subsequently, it occurred to Parnaland that the films would be a useful source of profit. Thus, together with the other defendants, Parnaland organized a commercial exploitation of the motion pictures. As a result, Dr. Doyen filed suit.

68. At the same time, the Tribunal dismissed the counterclaim, based on an allegation of abuse of process by the plaintiffs.
70. See Stoufflet, supra note 10, No. 15.
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The Tribunal stated that the films were the artistic property of the plaintiff, protected by the law, and continued:

... from another angle ... the imprescriptible property which each person has in his likeness, his face, his portrait, gives him the right to prohibit the exhibition of this portrait; ... he is entitled, if its execution took place against his will, in circumstances tending to cause damages to him, to ask the one who facilitated or provided means to do it, for reparation.

Thus, the Tribunal required the sustaining of damages before a plaintiff was entitled to any relief. In the circumstances presented, the Tribunal found damages from the fact that the public was led by the defendants to believe that the plaintiff condoned the showing of the films for advertising purposes. In order to rectify this erroneous impression, the Tribunal ordered the publication of the final decree in fifteen newspapers chosen by the plaintiff. He was also awarded monetary damages of 8000 fr. and possession of the films.72

The cases discussed thus far have involved a likeness of living persons; however, one of the best known French decisions on likeness dealt with a picture of a dead person, the famous actress Rachel.78 After the death of the actress, her sister, Sarah Félix, commissioned Crette and Ghémar to make drawings of Rachel's face. Félix made it clear that the pictures would be her property exclusively and that no copies would be distributed to anyone. Shortly thereafter, photographs of a pencil drawing signed by one O'Connell and representing the deceased Rachel were exhibited and offered for sale. Apparently, at least in its essential part, the drawing of O'Connell was not an original, but a reproduction of the picture prepared by Crette and Ghémar.

In deciding in favor of Félix's claim that O'Connell had infringed her rights for which relief was due, the Tribunal set forth the general rules it deemed applicable to the case:

... nobody can, without a formal consent of the family, reproduce and offer to publicity the features of a person on his dead bed, irrespective of how famous this person was and how much publicity was attached to the activities of his life; ... the right to object to such a reproduction is absolute ...; it is based on the respect due to the pain experienced by the

72. The approach taken by the Tribunal was subsequently followed by the French courts.
families, which could not be ignored without hurting the most intimate and respectable elements of the nature and the piety of the family . . . .

Accordingly, the Tribunal decreed that the picture and all copies be seized, the defendant was ordered to deliver the copies to the Tribunal within twenty four hours from the time of the judgment so that they might be destroyed, and each day of delay resulted in a kind of punitive damage of 10 fr. to the plaintiff under an astreinte.

Some commentators were inclined to base the rationale of this decision on the premise that the family continues, in a certain sense, the personality of the deceased. However, it has been observed that traditionally this was true only with respect to the conveyance of a dead person’s rights and obligations which represent pecuniary value to the successors. Personality rights of the deceased, such as that to his likeness, are acquired by his spouse and near relatives at the death of their beloved, and they act in their personal capacity because of the damages inflicted on their feelings. Therefore, it is unnecessary that they be the deceased’s successors; they may renounce the succession without alienating their rights relating to the dead person’s likeness. If this argument is accepted, these rights have the nature of relational ones, to use Dean Green’s expression. A recent commentator, Professor Badinter, maintains that after the death of a person, the right to the decedent’s likeness passes to his heirs because any other approach would tend to deny the right in situations where protection is badly needed.

Special circumstances, found in some photograph cases, may affect the approach taken by the court. In X . . . et us. v. Miss A., an amateur photographer, with consent, photographed an Alsatian girl in a costume of her region. She did not inquire as to the purpose of the picture, and did not ask for any compensation for posing. The photographer placed the picture in his collection and reproduced it in a publication of limited circulation that was devoted to the region in question. Six years later he sold the negative, at a very modest price, to a publishing house which then placed a few thousand copies of the picture on the market. Upon the objections of the girl, the unsold copies were

74. Kayser, supra note 35, at 84-85.
75. See Badinter, supra note 6, Nos. 20-21. American courts, accepting the theory that the right of privacy is strictly personal, usually hold that it dies with the person who was entitled to it. See Green, The Right of Privacy, 27 I.L. Rev. 237, 247 (1932); 77 C.J.S. Right of Privacy § 4 n. 93; Gruschus v. Curtis Publ. Co., 342 F.2d 775 (1965); W. Prosser, supra note 4, at 843.
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withdrawn from circulation. She then brought an action against the photographer, asking for damages.

The Court reaffirmed the general principle that the publication of a photographic portrait of a person without permission entitles that person to damages, but added a requirement applicable to this plaintiff's case: the defendant must have acted maliciously and with a wrongful intention. Since these elements were missing in the given circumstances, the court dismissed the action. The showing of malice, as a prerequisite for granting relief in an action of invasion for privacy, was clearly contrary to well established principles of law set forth previously.

Evidently, the Court felt that the plaintiff lacked equity and, therefore, twisted the legal rules so that a desirable result might be reached. The Court seemed impressed by the fact that the plaintiff had voluntarily posed for the photograph. Consent existed, but certainly, at the time it was expressed, neither party anticipated the purpose to which the negative would be used. Therefore, it appears that the limits of the plaintiff's permission were overstepped by the defendant. On the other hand, the plaintiff failed to establish any damage; but in general, damages are not necessary in order to receive relief in this type of action.

As to purely commercial usage of photographs, the French courts took a firm stand as soon as they were asked to rule upon the problem. Miss Bonnet v. Olibetti is factually the French version of the Roberson case. However, the decisions of the respective Courts diverged. A photograph of the plaintiff actress, clad in a dress she was wearing at the last show in the theater Palais Royal, was modified by the defendant biscuit company so that the actress was shown to the public holding a product of the defendant in her hand, thus conveying the idea that she ate and recommended the biscuits. The picture was used extensively by the defendant for advertising purposes.

The Court restated the familiar principle that "a portrait of a person cannot be reproduced and exhibited without his consent." It observed, however, that the plaintiff's profession included submitting herself to the view and the appreciation of the public. No pecuniary damages were sustained by the actress, but the Court found that the defendant had inflicted mental damages on her which consisted of making the public believe that the advertisements had been authorized by her in return for compensation, thereby "making money out of her beauty in a commercial enterprise." In finding for plaintiff, however, the Court

78. 171 N.Y. 538, 64 N.E. 442 (1902).
ordered the defendant only to pay costs which, under French law, plaintiff was entitled to in any event as the winning party; further, the defendant was ordered to publish the judgment in three Paris newspapers chosen by the plaintiff.

In subsequent cases, the commercial usage decisions became stricter. In *Gernes v. Sté. Schall Frères,* Mrs. Gernez was photographed by the defendants, and shortly thereafter the plaintiffs discovered that the photograph had been published in two magazines and incorporated into the commercial advertisements of a beauty cream. The Commercial Tribunal of the Seine stated that the defendants committed a tort which resulted in the infliction of mental and pecuniary damages upon the plaintiffs. The latter damages were rather difficult to be found, and the former were based upon the social position of the plaintiffs which the Tribunal explained in some detail. Plaintiffs recovered the amount of 10,000 fr.

A similar result was reached in *De Lartigne et ux. v. Sté. Gevaert and de Sazo.* Miss Micheline Ricci permitted herself to be photographed in a beach outfit during a private party with friends for the purpose of publishing the photograph in Life magazine. The photographer was an agent of de Sazo, who often furnished photographs to newspapers and magazines. De Sazo sold the negative to Gevaert Company which used it for advertising its cameras and photographic products. Miss Ricci later married the Baron de Lartigne, and the spouses brought an action against the Company and de Sazo, as joint and several codefendants, seeking damages of a million francs. They claimed that the terms of the consent to use the photograph had been overstepped and that the objections of the model were of no avail.

The Tribunal agreed with the plaintiffs but assessed the damages at only one tenth of the amount requested. After stating that "no one may use a photographic portrait of another without having a right to do so," the Tribunal found in the violation of this principle a fault within the meaning of article 1382 of the Civil Code. It asserted that "every infringement on the personality right implies damages," but also found special damages in the case at bar stemming from the fact that defendants had exposed Miss Ricci to the gossip of the circles in which she lived, which was injurious because her social position was incompatible with a commercial exploitation of her portrait. Coincidentally, because the defendant had conveyed to third persons the belief that Miss Ricci exercised

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the profession of a model due to financial necessity, the Tribunal found that her husband had been damaged. Liability was said to be joint and several.

A recent judicial pronouncement on the right to one's own likeness, infringed by a commercial use, involved Princess Soraya. Here the defendant had purchased a photograph of the Princess from a Swiss company, with the understanding that he had the right to publish it on record covers featuring a song entitled “Soraya, once there was . . . .” The Princess objected both to the use of her name and of her likeness and sought relief in referee proceedings. The referee judge ordered a seizure of the records and the covers. The Princess also asked the Tribunal de grande instance de la Seine (Tribunal for Important Cases) to grant 7000 fr. for pecuniary damages, and 250,000 fr. for mental damages. The Tribunal applied to the Princess, a “public figure,” the same legal rules is asserted as being applicable to any person:

everyone is a matter of his effigy and of the use which is made of it, and . . . in particular, a merchant cannot make use of the photograph of a person as a trademark or for publicity or in packaging merchandise without the authorization of the person whose features are reproduced.

Stating that the defendant had committed a wrong, but that he had acted in good faith and proceeded to destroy the records in question upon the referee's decision, the Tribunal assessed the damages at only 6000 fr. Of further significance is that the above quotation clearly implies that even if the plaintiff permitted the taking of the picture, additional permission to use the photograph for commercial purposes must be obtained. As a result, the case may be understood as expressing the principle that overstepping the limits of the consent gives rise to a cause of action.

When the publication of someone's likeness has a defamatory effect, not only is relief usually granted, but also the monetary award is generally higher than in other instances involving an invasion of privacy. For example, in Scherdin v. Journal Le . . . , the defendant paper published the plaintiff's photograph with an article insinuating that the plaintiff was suspected of having committed a murder. Prior to the publication of the material in question, the defendant's reporter spoke to plaintiff's wife, who told him that plaintiff was out of the country, informed him of plaintiff's expected date of return, and expressed in-
dignation when informed about suspicions directed against her husband. Nevertheless, the paper stated: "This strange businessman may have personal reasons for not presenting himself to the police. . . . The police know it well and therefore they consider this trip abroad as an escape."

The plaintiff recovered 20,000 fr. and had the judgment printed in two newspapers. The rationale for recovery was predicated on the law of defamation and liability for an unauthorized publication of somebody's likeness. With respect to the latter, the Tribunal stated:

. . . it is well established by judicial decisions and scholarly writings that a person represented on a portrait has an absolute right to prohibit its reproduction, irrespective of what the motives for such a reproduction might be, and even if it should be made without any wrongful intention as to him; . . . the question which is at stake, here, is one of respect to the human personality. . . .

The 1953 case of Burtet v. Journal Le Midi Libre et Laprune\(^8^4\) can be distinguished, but the result was the same. By mere error, the defendant newspaper had printed the plaintiff's photograph as that of a burglar who had been arrested by the police. Laprune was the person who had furnished the photograph, and his negligence was clear. The question of the newspaper's fault was more difficult, and it attempted to escape liability on the ground that Laprune should bear the consequences of his own mistake. However, the Tribunal imposed a rather strict standard upon the newspaper, concluding that it violated an obligation "to check the reliability of information they receive and to examine the authenticity of the documents which are furnished to them." Consequently, the court ruled that both defendants were liable, jointly and severally, in the amount of 50,000 fr. Additionally, the Tribunal ordered the judgment printed\(^8^5\) in extenso in two newspapers, at the cost of the defendant Journal.

An examination of the above cases indicates that the French courts have developed doctrines which offer adequate protection to the right to one's own likeness, and the same protection is extended to the

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85. In a note to this case, a commentator stated that a photographer who has a photograph negative of his client may not hand it over to anyone for publication in connection with a news item about him; but if this information is laudatory, the client could not complain and pretend he suffered a damage. Id. It may be observed, however, that if the right to likeness is absolute, the right of the model to object to an unauthorized publication should stand even in this case. If a photographer has a picture he took in connection with a public event rather than on an order of his client, the above restrictions should not apply.
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silhouette.86

Left to be considered are two fundamental questions. First, what is the nature of the right to one's self likeness? Second, on what theoretical grounds should this right be based? The old simplistic approach to the problem rested on the law of property. The property theory is still discernible in recent decisions and it meets the approval of several modern commentators. Thus, one writer stated that the right to one's self likeness and the possibility of objecting to its reproduction are based both on the idea that it is a "moral right, a right of the personality," and on the assertion that the model has "an absolute property right" in his likeness.87 Again, it was stated that by virtue of a well established line of judicial decisions (jurisprudence constante), "the model has an absolute property right in his photograph,"88 even if the model is professional.89 One of the recent judicial pronouncements to the same effect was made in Villard v. Société des Establissements Montsouris, decided by the Commercial Tribunal of the Seine in 1963, in which it was said:

by virtue of a legal principle laid down by a series of judicial decisions, the person photographed has an absolute property right in his likeness, and nobody can take advantage of it without his consent.90

Likewise, in Anscher v. Tchou91 the Tribunal for Important Cases of the Seine stated that everyone has a real "property" right in his own likeness, and an unauthorized publication of a photographic portrait is a violation of this right for which relief will be granted. In a recent scholarly study, commenting on Dassault v. Bardot,92 Professor Badinter apparently approves of the property theory.93

The property rationale is connected with that of the patrimoine, an old French term meaning the totality of a person's assets or rights

87. Note after the case in Gaz. Pal. 1964.1.73.
88. Note after the case in Gaz. Pal. 1943.2.141.
89. Note after the case in Gaz. Pal. 1956.1.284.
93. Badinter, supra note 6, No. 23.
which can be transformed into money. It has been argued that the likeness may become a part of the *patrimoine* when it relates to professional life and when it is the subject matter of some contracts. Thus, many actors have succeeded in the creation of a certain type of personality whose exploitation is reserved to them and which is legally protected.

The property theory never became fully accepted in French law, and it must now be considered as having little vitality. The theory has been expressly condemned even in older cases such as *T ... v. DuLaar*, in which the Tribunal said: "The right to prohibit the reproduction and the publication of one's likeness cannot be assimilated to a property right, the human person not being in the commerce and being unable to be the subject matter of a right in rem." Similar reasoning was used in a later case, *Andrieu v. Later et Riou*, where the Tribunal stated that the right to one's likeness cannot be based on the idea of property in the sense of article 544 of the Civil Code.

A similar approach was taken by most scholars such as Fougerol, who branded the property theory as erroneous and maintained that the addition of the words "*sui generis*" after "property" failed to explain anything. This sentiment was shared by Nerson and Kayser. Kayser stated that the property theory was based on two premises, both of which were false: first, that a man has property rights in his own body; and secondly, that those rights give rise to an accessory right to pictures of the body.

Some scholars have argued that the right to one's likeness is the consequence of individual liberty, that a human being is the master of his body because he is free. Thus, the individual may make decisions concerning his body according to his personal liking and take advantage of his body in the way it most pleases him. Others have asked the question whether one may properly speak about a model's rights, or only about his interests. In the first instance, the very use of a victim's likeness in any manner whatsoever, absent consent, would be actionable.

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96. "Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes."
98. Id. 19.
100. See Kayser, *supra* note 35.
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This would constitute a "subjective right," giving rise, to use the American term, to strict liability. In the other case, the plaintiff would have to establish that he had suffered damages and that the defendant had committed a wrong. Here, liability would be based on article 1382 of the Civil Code—the general provision of the French law of torts. 103

In some cases, the element of proof of damage has been emphasized by the courts. In denying recovery to the plaintiffs in the Andrieu case, 104 the Tribunal stated: "As to the allegations of damages within the meaning of article 1382 of the Civil Code... they do not point out any precise fact and do not offer to submit any evidence." However, in contrast to the general American requirement, damages do not have to be of a pecuniary nature: "a moral interest will do—and frequently, it is precious and sacred." 105 Frequently, the French courts try to find damages in any possible way to corroborate their decisions, giving credence, e.g., to the claim of an injury to the plaintiff's social relations caused by the use of his likeness because of his special standing in the community. In fact, as mental damages are readily recognized in French law, the proof of injury may be easier than in some other jurisdictions.

In addition, the idea of presumed damages, well known in American law, may also be applied in France. By virtue of such an approach, damages can be predicated on the simple fact that a publication of the likeness without the model's consent took place. 106 But again, even this element has not been always required. There were cases in which the courts did not base their decisions on the existence of any damages, actual or presumed. This seems to be the prevailing approach today. Thus, it could recently be stated:

The person represented has the power to object to the publication of his likeness as soon as the publication has been authorized: the infringement on the right alone opens the possibility of an action which protects it without it being necessary... to prove that he had suffered a special damage... at least, in all cases where he did not engage in a public activity. 107

It has been observed that in many cases the courts, ruling for plaintiff, mentioned defendant's fault. However, this fault is not the

103. See Stoufflet, supra note 10, Nos. 18, 19.
105. See H. Fougerol, supra note 3, at 12.
same as in most other cases of tortious responsibility, and in a great number of situations its existence is more or less fictitious. Indeed, fault may be readily established on particular types of defendant's behavior, such as overstepping the consent given by the model, using commercially the plaintiff's likeness in spite of his objections,\textsuperscript{108} or the defamatory aspects of the publication. It has further been stated that, in general, the defendant is at fault when the reproduction of the likeness is "dishonest." This encompasses situations where the photograph, which is usually a true representation of the plaintiff, has been artificially manipulated or connected to another photograph resulting in a \textit{montage}.\textsuperscript{109} In addition, the French law is prone to impose upon the defendant a presumption of responsibility which cannot be rebutted by proof of due care. Thus, the defendant's state of mind was considered irrelevant in many of the aforementioned cases. A defendant may be absolutely liable regardless of whether he acted in good faith or had a wrongful intention. The very fact of publication entitles the person who does not consent to recover damages.\textsuperscript{110} In summary, the conclusion must be that a violation of the right to one's likeness is an infringement of an "absolute" or "subjective" right which results automatically in liability.

Undoubtedly, the concept of the right of privacy and its development is due to judicial decisions. Until recently, in popular civil law textbooks and treatises, the right to likeness, and indeed the whole field of privacy, was disregarded either completely or in most of its aspects. Thus, some forty years ago, in Josserand's Course on French Positive Civil Law,\textsuperscript{111} the five following "attributes of the personality" were enumerated and discussed: 1) the name; 2) the domicile; 3) the status; 4) the legal capacity; 5) the \textit{patrimoine}. The author added that there existed "other attributes" and mentioned a few, but privacy and likeness were not among them. Even today the right to likeness is not given extensive treatment. Marty and Raynaud placed this right into one of three categories of the "rights of personality," which also included the right to the name, to the secret, and to the products of human mentality.\textsuperscript{112} Carbonnier offers a short discussion of the right to likeness under the heading "Attributes of the Physical Person," which he divides into two

\begin{itemize}
\item \textsuperscript{109} See Stoufflet, supra note 10, No. 22.
\item \textsuperscript{110} See Stoufflet, supra note 10, No. 19.
\item \textsuperscript{111} L. JOSSE RAND, COUR S DE DROIT CIVIL POSTIF FRANCAIS (Course on French Positive Civil Law) (1930).
\item \textsuperscript{112} G. MARTY AND P. RAYNAUD, DROIT CIVIL (Civil Law) (2nd ed. 1967).
\end{itemize}
groups: the right to one’s own likeness, and the right to honor.\(^{113}\)

Today the generally accepted approach to the problem is that the right to one’s self likeness is one of the personality rights.\(^{114}\) Stoufflet stated that this right protected a physical element of the personality\(^ {115}\) as well as the mental tranquility of the human being.\(^ {116}\) Nerson classified it within “extra-patrimonial rights” and affirmed that it is *per se stante* (has an independent existence). Its violation results in liability without the requirement of proving either damages or wrongful intention on the part of the defendant.\(^ {117}\) Nerson also saw the purpose of the right to one’s self likeness as defending the personal qualities of the man, and since there is a relationship between a person and the way he looks the law must take these elements into consideration.\(^ {118}\) Kayser saw in the right to likeness a subjective right derived from the necessity of respecting the human personality.\(^ {119}\) Agreeing with the observations of both Nerson and Stoufflet, he defined a subjective right as a power granted by the law to human beings in their interest, and courts recognize this power by permitting people to object to the publication of their likeness. This approach offers better protection than the one based on article 1382, because it dispenses with the requirements of proof of damage and fault as a basis for relief.\(^ {120}\) In the most recent examination of the problem, Badinter stated that the right to likeness is one of the rights of personality, such as the right to private life, to honor, and the moral right of the author to his work.\(^ {121}\) The brothers Mazeaud agree that the right to likeness is one of the personality rights; but taking issue with well accepted ideas, they consider all of these rights as a part of the *patrimoine* of each individual, which includes the totality of the rights to which a person is entitled.\(^ {122}\) In spite of the fact that likeness is a reflection of our physical person, the right that we have in it has the purpose of protecting our mental interests.\(^ {123}\) As do many other scholars, the brothers Mazeaud expressly reject the property theory.\(^ {124}\)

It should be observed that damages are not the only relief that the

\(^{113}\) J. CARBONNIER, DROIT CIVIL (Civil Law) 1, No. 70 (8th ed. 1969).
\(^{114}\) See Stoufflet, *supra* note 10, No. 2.
\(^{115}\) See Stoufflet, *supra* note 10, No. 9.
\(^{116}\) See Stoufflet, *supra* note 10, No. 11.
\(^{118}\) See R. NERSON, *supra* note 99, at 145.
\(^{119}\) See KAYSER, *supra* note 35, at 76.
\(^{120}\) See KAYSER, *supra* note 35, at 81 and accompanying text.
\(^{121}\) Badinter, *supra* note 6, No. 25.
\(^{123}\) Id., No. 634.
\(^{124}\) Id.
courts may grant. As some of the cases discussed above indicate, other types of relief available are an order to stop publication, an order to destroy the copies of the plaintiff's likeness and/or its negative, an order to surrender them to the plaintiff, and an order to publish the judgment in newspapers or magazines. Often, upon recognizing the urgency of the plaintiff's complaint and the impossibility of giving him adequate relief by providing for damages, the courts are willing to take care of the problem in "referee" proceedings in which the plaintiff's prayer to stop further damage may be granted in a very short time.

Criminal sanctions are not applicable unless the violation of someone's right to his likeness is connected with some other wrong such as defamation; but Kayser recently asked that the advisability of providing for penal responsibility be considered:

However, it cannot be doubted that the civil sanction of the law is frequently insufficient or inefficient. Infringements on the intimacy of private life are sufficiently serious today to justify the establishment of criminal sanctions. It would be desirable to recognize a misdemeanor consisting in the realization of the likeness of a person against his will, when this realization infringes the secrecy of the private life. It would also be desirable to convert into a misdemeanor the publication of the likeness of a person without his previous consent, under the same condition.

These misdemeanors would present a special feature: one of their elements would consist in a manifestation of will to the contrary, or at least in the absence of a previous consent of the victim. Indeed, it is one of the characteristics of the right to likeness that its violation presupposes the absence of consent of the one who has it. Thus, one understands that the recognition of this right was followed by contracts dealing with likeness.\footnote{Kayser, supra note 35, at 85.}

The author's condemnation of the violators of the right to likeness may be proper, but it does not seem probable in light of the present development of the law that his proposal will be accepted in France. Likewise, in legal systems other than France, the defendant's wrongful act results usually in only civil responsibility. One of the few exceptions is a New York statute, by virtue of which the use of "the name, portrait or picture of any living person" without his consent "for advertising
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purposes, or for the purposes of trade,” is declared to be a misdemeanor.126 Similarly, as early as 1899 California enacted a new section in its Penal Code, making it a misdemeanor “to publish . . . the portrait of any living person . . . without [his] written consent . . . .”127 This provision, which could be considered as progressive and as giving a very effective protection to the right to likeness, was repealed in 1915. In Danish law,128 criminal sanctions are possible by the application of section 263, subsection 1, of the Penal Code.129

Some observations on the developments in other countries will be of much interest. The oldest statute on the right to one’s self likeness was enacted in Germany; the law of January 10, 1876, protected the rights of the model in his likeness to some extent, granting the author’s rights in a portrait to the person who ordered it made. The law of January 9, 1907, was more elaborate.130 In the form of precise legislative provisions, the statute laid down some general rules and recognized the concept of the Recht in eigenen Bilden (right to one’s own picture). The key provision (article 22) read as follows: “Portraits may be put into circulation or publicly exhibited only upon an authorization of the person represented.” The most important exception to this rule dealt with “portraits within the domain of contemporary history,” in other words, of current events.131 A more comprehensive text, dealing with the whole field of privacy, was submitted to the Parliament of West Germany in 1959, but it has not been adopted. However, judicial decisions offer a good protection to the citizens.132

A statute similar to that of Germany was enacted in Norway on May 11, 1909.133 A less comprehensive enactment, adopted in Belgium

128. Pederson, The Protection of Privacy and Other Rights of Personality in Danish Law, Fac. Int-le de Droit Comp. (Luxembourg 1965, mimeogr.).
129. It provides for a penalty for violating “the peace and privacy of others.”
131. Article 23, 1°. Three other exceptions were listed: 2°. Pictures on which persons appear only incidentally to a landscape or some premises. 3° Pictures representing assemblies, processions, or other similar events, in which the persons represented were taking part. 4° Portraits which were not made on order, provided that their circulation and their exhibition serve a superior interest of the art. Those exceptions did not apply when “a legitimate interest of the model” could be infringed.
132. For a thorough discussion of the developments in Germany, see Krause, Right to Privacy in Germany—Pointers for American Legislation? 1965 Duke L.J. 481.
133. H. Fougerol, supra note 3, at 224.
on March 22, 1886, provided that “neither the author nor the owner of
a portrait has the right to reproduce it or exhibit it publicly without the
consent of the person represented.”

Thus, the right to likeness was the first in the field of privacy
problems to merit the attention of the legislators in some countries.
One of the legal texts now in force is article 10 of the Italian Civil Code
of 1942, entitled: Abuse of the Likeness of Another. It reads as follows:

In cases where the likeness of a person, of his father and mother,
spouse or children has been exhibited or published, except for
cases where the exhibition of the publication is authorized by
the law, whether with a damage to the honor or the reputation
of this person or the member of the family above mentioned,
judicial authorities, upon a request of the person interested,
may order the abuse to be stopped, without affecting the
possibility to have the damage repaired.

In some other countries, in the absence of express statutory rules
on the point, the courts are willing to recognize the right to likeness by
an extensive interpretation of written texts. Thus, in a recent case, it
has been held in Poland that the right to likeness is one of the “personal
values” of every individual, the infringement of which amounts to a
tort. The case is particularly significant, as the plaintiff was a movie
actress and permitted her photographs to be taken for the purpose of
advertising a motion picture in which she appeared as a star. However,
the plaintiff was granted the relief she prayed for—the defendant was ordered to stop the production and distribution of the
post cards which were to be widely circulated.

Two international documents, drafted recently, recognize the
necessity of protecting privacy. The Universal Declaration of Human

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134. Id., at 229.
135. Supreme Court of Poland, May 19, 1967, I CR 624/66, OSNPC 8/9/68, item 141.
136. The Court relied on provisions embodied in art. 56 of the Civil Code that a
legal transaction brings about consequences which result from “principles of community
life and well established customs,” and art. 354 § 1 of the Code to the effect that obligations
should be carried out in conformity with these principles and customs. The Court
found that the defendant overstepped the limits of the plaintiff’s consent, that the
advertising in question was contrary to the customs, that in the movie actors’ circles
plaintiff was criticized on the ground she engaged in a publicity stunt contrary to pro-
fessional ethics, and that she sustained moral damages. The plaintiff was granted the
relief she prayed for—the defendant was ordered to stop the production and distribution
of the post cards and to issue a statement that his activity had not been authorized
by the plaintiff. No damages were asked.

The Polish approach to the right to likeness is discussed by Stefaniuk, Naruszenie
prawa do wizerunku przez rozpowszechnianie podobizny (Infringement of the Right to
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Rights provides that "(n)o one shall be subjected to arbitrary interference with his privacy . . ." and that "(e)veryone has the right to the protection of the law against such interference";\textsuperscript{137} and the European Convention for the Protection of Human Rights and Fundamental Freedoms proclaims "the right to respect for private and family life . . ." and prohibits "interference by a public authority with the exercise of this right . . ."\textsuperscript{138} The primary purpose of both tests is to curb the arbitrariness of the government rather than to protect private individuals in their dealings with each other. No specific mention is made about the right to likeness.

International interest in protection of the right of privacy is further evidenced by the calling of some special meetings devoted to this problem. UNESCO (United Nations Educational, Scientific and Cultural Organization) organized a meeting of "experts on the right of privacy" in Paris, January 19-23, 1970; law faculties of the Belgian universities, in cooperation with the Directorate of Human Rights of the Council of Europe in Strasbourg, called the Third International Colloquy on Human Rights in Brussels, for September 30 - October 3, 1970. One of the three topics was the right to respect for private and family life. The views expressed during these events could become the subject of a separate study.

In conclusion, it must be stated that the right that everyone has in his likeness has been consistently upheld by the French courts and elaborated by legal scholars from the middle of the nineteenth century on. It is no longer contested. In cases which arise before the courts, the frequent problem is whether consent, if not express then at least implied, has been given.\textsuperscript{139} The model's right may be deemed to be absolute. However, in actual practice situations in which plaintiffs asked for protection of their theoretical interests were infrequent. Usually a commercial exploitation was at stake, or the reproduction ridiculed the plaintiff or tended to defame him.\textsuperscript{140}

However, until now the rules developed by the French courts have not been reduced into written law, even though for some time several authors were recommending that this be done. In 1909, discussing the project to overhaul the Civil Code, Perreau wrote:

Let us wish that in the present work on the revision of the Civil

\begin{itemize}
  \item Article 12 of the Declaration. 43 AMER. J. INT'L L., SUPPL. 129 (1949).
  \item Article 8 of the Convention. 45 AMER. J. INT'L L. 27 (Supp. 1951).
  \item Martin, \textit{Le secret de la vie privée} (The secrecy of private life), REV. Trim. DR. CIV. 1959, 227.
  \item See Nerson, supra note 107, at 66.
\end{itemize}
Code one would introduce, as to personality rights, at least some general principles, the most necessary ones. . . [I]t would be advisable to avoid . . . the reproach that it is only a Code of Property.  

Not until approximately forty years later was this recommendation considered by the Commission of the Reform of the Civil Code—and again, among the few privacy questions taken up by its members, priority seems to have been given to the question of likeness. Undoubtedly inspired by the Italian approach, which was mentioned in the discussions, Professor Houin, the reporter, submitted the following text to the consideration of his colleagues:

When the publication, the exhibition, or the use of the likeness of a person, of his father and mother, of his spouse or of his children or descendants was made without his consent and not within the authority of the law in situations provided for, he can ask to stop it, without affecting the possibility to have the resulting financial or mental damage repaired.  

Commenting on his proposal, the reporter pointed out that it was less strict than the Italian provisions, which require abuse before a remedy can be granted. Professor Rouast suggested that two situations be distinguished—where the person involved does not say anything, and where he desires formally to object to the use of his likeness. He would favor a legal prohibition only in the latter case.

Mr. de Lapanouse suggested a similar solution. The text would prohibit publications effected “against the consent of the one whose likeness is reproduced.” This would place the majority of publications or reproductions of another’s likeness out of criticism, since there are only a few people who formally object to the use of their likeness at the time the photograph is taken. However, as stated in the minutes of the discussion, upon the suggestion Messrs. Julliot de la Morandière and Ancel, the majority of the Commission favored a rule laying down the necessity of an advance consent. Thus, one who has been photographed or filmed without his consent would always have the possibility of objecting to the circulation of his likeness and could ask for damages in case

142. Information on the work of the Commission has been taken from the volume cited supra n. 26, at 31.
143. This observation is well taken; however, the idea of abuse can be given an extended meaning by a liberal interpretation of the term.
he was injured because of this publicity.

Before the vote on the text to be adopted by the Commission was taken, Professor Houin suggested limiting the rights of the members of the family of a deceased person. The provisions finally accepted by the Commission are embodied in article 16, chapter on Personality Rights. They read as follows:

In case of publication, exhibition or utilization of the likeness of a person, he may, if he did not consent in advance, ask to stop it, without affecting the possibility to have all financial or moral damages repaired.

The same right belongs to the spouse and to the relatives in direct line in the first degree of a deceased person whose likeness would be published, exhibited or utilized after his death in circumstances of the nature which would infringe his honor or his reputation.\textsuperscript{144}

The restricted circle of persons envisaged by the Commission and the limited scope of circumstances in which the family could prevail itself of the right did not escape criticism; in particular, Kayser\textsuperscript{145} pointed out that this approach is contrary to the broader view of the problem which was accepted in the Rachel\textsuperscript{146} case and has not been overruled.

The initial enthusiasm to redraft the Code has waned, and it seems doubtful whether the Commission’s text will ever become the basis for a new legislative enactment. Most probably, in the foreseeable future, legal questions involving likeness\textsuperscript{147} will continue to be dealt with on a case by case basis by the courts; for although France has a codified legal system, many fields of the law were not only developed, but created, by

\textsuperscript{144} Perreau, \textit{Des droits de la personnalité} (On Personality Rights), \textit{nr. civ.} 1909, 501, 536.

\textsuperscript{145} Kayser, \textit{supra} note 35, at 85.

\textsuperscript{146} Trib. civ. Seine, June 16, 1858, D.P. 1858.3.62.

\textsuperscript{147} As far as terminology is concerned, it has been stated that one may be discouraged by the variety and imprecision of the terms used. \textit{See} Kayser, \textit{supra} note 35, at 73. However, while the American idea of the right to privacy has no precise parallel in French law and both the courts and the writers use different expressions to describe concepts (the content of which may be similar but which are never the same), the right to one’s self likeness is always referred to, in France, as \textit{le droit à l’image}—in literal translation, “the right to the picture.” Kayser does not think that this term is the best one because the picture is not the subject matter of the right, but is similar to a property right. Even if the content of the right might be, indeed, not the likeness itself but rather the power of decision as to whether and how one’s likeness may be used and published, it would be difficult to accept any term describing the incidences of the legal protection in question rather than simply referring to its essence.
judicial decisions, and it is possibly more difficult to overrule a case than it is in the United States.148