The Protection of Our Image: Between the Right to One's Own Image and the Right of Publicity

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Abstract

Through an analysis of the privacy right of publicity (or 'personality rights') in the American legal system and the right to one's own image in the Italian legal system, the author demonstrates the strict analogies that exist between these legal institutions, despite the differences in their origins.

I. Introduction

The desire for protection of the intangible aspects of our life (honour, reputation, dignity) is very ancient. In Classical Roman law,[1] for example, there were specific actions against injuries uttered in public (*convicium*)[2] or against rumours spread widely by someone against someone else (*infamatio*).

Despite this ancient tradition, we can say that the right to one's own image is a result of technology's evolution of image reproduction. Without the invention of photography and its diffusion, we would not have this right. If we examine the history of such right (both in common law and civil law) we observe that, before photography, there was no need to protect our own image.[3] Once we

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[1] '*Fin da epoca alquanto antica, l'ordinamento giuridico romano ha conosciuto alcune norme dirette a tutelare onore, decoro e reputazione offesi. Si può cogliere, anzi, nella storia della disciplina prevista in questa materia, uno dei più sicuri dati relativi al riconoscimento della personalità individuale in Roma e vi si può contemporaneamente vedere un esempio molto rilevante dell'ampiezza e della profondità delle modificazioni recate in strutture giuridiche arcaiche da una più matura coscienza sociale*' ('Since ancient times, the Roman legal system has known some rules aimed at protecting honor, decoration and offended reputation. On the contrary, in the history of the regime provided for in this subject, one can grasp one of the most certain data concerning the recognition of individual personality in Rome, and at the same time we can see a very relevant example of the amplitude and depth of the modifications carried out in archaic juridical structures from a more mature social consciousness'), G. Crifò, 'Diffamazione e ingiuria (diritto romano)' *Enciclopedia del diritto* (Milano: Giuffrè,1964), XII, 470.

[2] *Convicium* was 'a verbal offense against a person's honor. It was considered an *Iniuria* when committed by loud shouting in public (*vociferatio*)'. A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, 1953), 416.

[3] In this regard we disagree with the opinion, according to which '*la tutela dell'immagine, intesa come ritratto, ha un'origine antica. Essa affonda le sue radici in pratiche sciamaniche*

realized that it is only with photography that is possible to reproduce and spread our image, we acquired the need to protect our privacy.

That stated, we should remember that the common law and civil law have very differing approaches. In the common law tradition, there is no specific right to the protection of one's own image. In contrast, civil law recognizes and protects, in almost every jurisdiction, a specific right to one's own image.

Both these rights (privacy and right to one's own image)[4] have a form of 'birth date' in the era of photography development.

II. The Birth of the Right to Privacy

The right of privacy was born with the famous work of Samuel D. Warren and Louis D. Brandeis.[5] These two Boston lawyers, towards the end of the nineteenth century,[6] theorized privacy as the *right to be alone,* as a civil and

che si fondavano sulla credenza per cui la manipolazione dell'immagine di una persona potesse consentire di infliggere danni o benefici al corpo o alla psiche della persona ritratta' (the protection of the image, understood as a portrait, has an ancient origin. It has its roots in shamanic practices that were based on the belief that the manipulation of the image of a person could allow to inflict damage or benefits to the body or psyche of the person portrayed), F. Benatti, 'Danno all'immagine' *Digesto civile* (Torino: UTET, 2011), VI, 275.

[4] Considering the first developments of this right, there is often quoted a case regarding the American painter, James Whistler. Early in 1894 Whistler painted a small portrait of Lady Eden (Hunterian Museum and Art Gallery, Glasgow), and her husband, Sir William Eden, who sent one hundred pounds for it, which Whistler banked. Whistler exhibited the picture in Paris but refused to deliver it and Eden instituted legal proceedings. Thereupon, Whistler returned the money but scraped out the figure, substituting that of an American sitter in its place, so that if he lost the case, the portrait could not be recovered. At the civil tribune in March 1895, Whistler was ordered to hand over the portrait and pay damages but after two appeals, in 1897 and 1900, Whistler was finally granted the picture and Eden was ordered to pay expenses. In *Eden versus Whistler: the Baronet and the Butterfly* (1899), Whistler published his account of the case, which entered French law by establishing that artists do not enter into ordinary commercial contracts of sale with their patrons.

According to F. Cionti, *All'origine del diritto all'immagine. Dall'immagine dipinta all'immagine fotografata della cosa* (Milano: Giuffrè, 1998), 12-30, who expressly based a large part of his analysis on the work of M. Ricca-Barberis, 'Il diritto all'immagine (casi e pareri della vecchia bibliografia francese e tedesca)' *Rivista di Diritto Civile*, I, 226 (1958), the issue of the right to one's own image was born already with painting but even allowing for this, the situation completely changed with the advent of photography (ibid 31-75).

[5] S.D. Warren and L.D. Brandeis, 'The right to privacy' 5 *Harvard Law Review*, 193-220 (1890).

The authors state the purpose of the article as: 'it is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is', ibid 197.

[6] The recognition of the same right in Italy arrived much more later. The first time the word privacy as '*riservatezza*' was used by M. Giorgianni, 'La tutela della riservatezza' *Rivista trimestrale diritto e procedura civile*, I, 13-30 (1970), then it appeared in the legge 20 maggio 1970 no 300, Art 6 '*Le visite personali di controllo sul lavoratore sono vietate fuorché nei casi in cui siano indispensabili ai fini della tutela del patrimonio aziendale, in relazione alla qualità degli strumenti di lavoro o delle materie prime o dei prodotti. In tali casi le visite personali*

non-contractual right of protection against invasion of privacy. They concluded[7] that the development of 'instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life'.[8] Privacy, at least at its beginning, is an environment in which no one is permitted to enter without our permission, so the issue of one's own image protection is linked to that environment. Personality rights originate, indeed, in the 'right to privacy'.

Given the importance of the establishment of the right to privacy,[9] for purposes of this paper, it may serve to offer a brief analysis of the background.

First, Warren and Brandeis examined the law of slander and libel (forms of defamation) to determine if it adequately protected the privacy of the individual. The authors concluded that this body of law was insufficient to protect the privacy of the individual because it 'deals only with damage to reputation'.[10] In other words, defamation law, regardless of how widely circulated or unsuited to personality rights, requires that the individual must suffer a direct effect in his or her interaction with other people.

Second, in the next several paragraphs, the authors examined intellectual property law to determine if its principles and doctrines sufficiently protected the privacy of the individual and they concluded that

> 'the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone'.

Warren and Brandeis then discussed the origin of what they called a 'right to be let alone'. They explained that the right of property provided the foundation

potranno essere effettuate soltanto a condizione che siano eseguite all'uscita dei luoghi di lavoro, che siano salvaguardate la dignità e la riservatezza del lavoratore e che avvengano con l'applicazione di sistemi di selezione automatica riferiti alla collettività o a gruppi di lavoratori (...)' (Personal check-ups on the worker are prohibited except in cases where they are indispensable for the protection of the company's assets, in relation to the quality of the work tools or raw materials or products. In such cases, personal visits may be carried out only on condition that they are performed at the exit of the workplace, that the worker's dignity and privacy are safeguarded and that they occur with the application of automatic selection systems referring to the community or groups of workers (...)).

[7] Warren had a wife who practiced worldly habits, frequenting night-time dances and often coming home late, even accompanied by gentlemen other than her husband. The chronicle of Boston was always interested in the activities of the lady, making known the private details through a local daily newspaper selling around eighty thousand copies. For this reason, Warren and Brandeis decided to write their work about privacy. See A. Gajda, 'What if Samuel D. Warren Hadn't Married a Senator's Daughter? Uncovering the Press Coverage that Led to The Right to Privacy' 35 *Michigan State Law Review*, 35-59 (2008).

[8] n 5 above, 195.

[9] 'The right to privacy is, as legal concept, a fairly recent invention', see D.J. Glancy, 'The invention of right to privacy' 21 *Arizona Law Review*, 1-39 (1979).

[10] n 5 above, 197.

for the right to prevent publication. However, at that time, the right of property only protected the right of the creator to any profits derived from the publication. The law did not yet recognize the idea that there was value in preventing publication. As a result, the ability to prevent publication did not clearly exist as a right of property.

Finally, Warren and Brandeis considered the remedies and limitations of the newly conceived right to privacy. The authors acknowledged that the exact contours of the new theory were impossible to determine but several guiding principles from tort law and intellectual property law were applicable.

Such principles are: I. the right to privacy does not prohibit any publication the matter of which is of public or general interest;[11] II. the right to privacy does not prohibit the communication of any matter which, though in its nature private, when the publication is made under circumstances, would render it a privileged communication, according to the law of slander and libel; III. the law would probably not grant any redress for the invasion of privacy by oral publication, in the absence of special damage; IV. the right to privacy ceases upon the publication of the facts by the individual or with his consent; V. the truth of the matter published does not afford a defence; VI. the absence of 'malice' in the publisher does not afford a defence; VII. with regard to remedies, a plaintiff may institute an action for tort damages as compensation for injury or alternatively request an injunction.

As a closing note, Warren and Brandeis suggested that criminal penalties should be imposed for violation of the right to privacy but they declined to elaborate further on the matter, deferring instead to the authority of the legislature.

The work of Warren and Brandeis was extremely successful in American jurisprudence; their theories were quite soon embraced by several decisions which have been analysed by William L. Prosser. He identified a complex of four torts: 1. intrusion upon the plaintiff's seclusion or solitude or into his private affairs; 2. public disclosure of embarrassing private facts about the plaintiff; 3. publicity which places the plaintiff in a false light in the public eye; 4. appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[12]

[11] Warren and Brandeis elaborated on this exception to the right to privacy by stating: 'In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to', n 5 above, 216.

[12] W.L. Prosser, 'Privacy' 48 *California Law Review*, 383-423, 389 (1960).

III. The Right of Publicity: Its Origin and Development

It was through the tort of the appropriation, for the defendant's advantage, of the plaintiff's name or likeness that United States jurisprudence elaborated the modern right of publicity.[13]

More than a century ago, New York's highest court, the Court of Appeals, was asked to find a right to privacy in a case brought by a young woman whose portrait had been used without her prior consent, in an advertisement for a flour company. The court rejected the request but its ruling was followed by public outrage that led the State's legislature promptly to enact a statute creating a right to privacy that exists to this day.

In 1902, in *Roberson* v *Rochester Folding Box Co*, *25*,[14] the plaintiff brought an action against a flour manufacturer, claiming an infringement of her right to privacy due to unauthorized printing, sale and circulation of twenty-five thousand lithograph prints of her image.

The court summarized the plaintiff's complaint:

> 'Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture, without her consent, for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes'.

The court refused to recognize a common law right of privacy in this case, fearful of opening the litigation floodgates but in 1903 the New York legislature enacted sections 50, 51 and 52 of the *New York Civil Rights Law*,[15] overruling Roberson and made it an offense and a tort to use a person's 'name, picture or photograph' in advertising or trade without his or her consent.[16]

[13] In this regard, see S. Barbas, 'From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption' 61 *Buffalo Law Review*, 1119-1189 (2013).

[14] *Roberson* v *Rochester Folding Box Co* 171 NY 538, 64 NE 442 (1902).

[15] The Civil Rights Law was an act relating to civil rights, constituting chapter six of the consolidated laws (which are the codification of the permanent laws of a general nature of New York enacted by the New York State Legislature) and it became a law on 17 February 17 1909 with the approval of the Governor.

[16] Section 51 recognizes in this case an action for injunction and for damages 'Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or

The right of publicity developed, as celebrities sought recognition for the far more lucrative claims for the value of their endorsement. Having relinquished much of their 'privacy' as far as being in media or participating in advertising and marketing, their focus was on the value of their endorsement and subsequently this authorization – more of a license than a release – became extremely valuable.

For these reasons, formal recognition of the modern right of publicity is usually traced to the case of *Haelan Laboratories, Inc* v *Topps Chewing Gum, Inc* a 1953 decision of the United States Circuit Court of Appeals for the Second Circuit.[17]

In *Haelan,* one producer of baseball cards packaged with bubble gum (the Bowman Gum Company) sued another (Topps Chewing Gum), alleging that the latter had infringed exclusive contracts that the first producer had secured with many Major League baseball players.

Prior to the *Haelan* decision, the boundaries of an individual's publicity rights were not clear. On the one hand, it was widely accepted that there was a right of privacy which protected individuals from the unauthorized use of their names or images for commercial purposes, even if they were public figures. However, this right was not typically thought of as a 'property right' but rather as a right to bring an action in tort. As such, it was not clear that individual publicity rights could be alienated or enforced by a third party. Further complicating the matter was that the right of privacy was derived from the

indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait, picture or voice of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith; or from using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith. Nothing contained in this section shall be construed to prohibit the copyright owner of a sound recording from disposing of, dealing in, licensing or selling that sound recording to any party, if the right to dispose of, deal in, license or sell such sound recording has been conferred by contract or other written document by such living person or the holder of such right. Nothing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law'.

[17] *Haelan Laboratories, Inc* v *Topps Chewing Gum, Inc*, 202 F.2d 866 (2d Cir 1953). Scholars agree that this case was the formal recognition of right of publicity. See D. Maffei, 'Il *right of publicity*', in G. Resta ed, *Diritti diritti esclusivi e nuovi beni immateriali* (Torino: UTET, 2010), 511-548, 515; J. Gordon Hylton, 'Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum' 12 *Marquette Sports Law Review*, 273-294, 273 (2001); S. Martuccelli, 'The Right of Publicity under Italian Civil Law' 18 *Loyola of Los Angeles Entertainment Law Journal*, 543-563, 551 (1998).

common law in some jurisdictions and from statutes in others.

In his majority opinion in *Haelan,* Judge Jerome Frank moved beyond the tort analysis and found that individuals (here, Major League baseball players) also possessed a property right in their own images. More importantly, in Judge Frank's view, this right could be transferred to a third party who then had the same right as the individual himself to enforce it against competing but unauthorized users. Other jurisdictions were initially reluctant to follow Judge Frank's lead; as late as 1970, courts in only five states (Pennsylvania, Georgia, New Jersey, Hawaii and Missouri) had recognized the existence of a right of publicity of the sort described in *Haelan* and in only two states (Oklahoma and Florida) had the principle been adopted by statute. However, by 2000, the number of American jurisdictions recognizing the right of publicity by either judicial ruling or statute had reached twenty-eight and the *Restatement of Unfair Competition* identifies it as an essential part of the American law of intellectual property.[18]

The right of publicity expanded through the second half of the twentieth century, with further statute and case law development increasing its scope. When Elvis Presley died in 1977, his personal manager objected when a poster immediately appeared with his image and the words 'In Memoriam'.[19] It was clear that Elvis's right of publicity would continue to be valuable for as long as it was kept 'alive'. Thus the post-mortem rights for the heirs or the estate became a battleground for litigation and legislation. Consequently, the right of publicity was untethered from privacy. The most public celebrity could protect the value of his or her name or association when commercialized and it would not end with the celebrity's death.

All through its development, as new technologies for communication were created, the right expanded to encompass additional bases for celebrities to state claims for compensation. Voice and voice imitation, signature or gesture were added to those aspects of identity which could be recognized as the basis for a claim. In this regard, in the US case brought by Lindsay Lohan, she argued that her privacy rights under New York Civil Rights Law, Section 51 was violated by a character of the video game *Grand Theft Auto*.[20]

For the Italian experience was the case of the popular singer, Lucio Dalla, against an Italian company, Autovox SPA, a producer of audio equipment such as radios, compact disc players and stereos. Dalla alleged that Autovox misappropriated his persona in an advertising poster by using two of the most distinctive elements of his appearance, *viz* a woolen cap and a pair of small, round glasses. Dalla argued that the use of the cap and glasses constituted a

[18] On December 28, 1994, the American Law Institute officially published the *Restatement (Third) of Unfair Competition* (1995). In §§ 46-49 of this Restatement (Topic 3 of Chapter 4), that institute for the first time recognized a full-blown commercial 'right of publicity'.

[19] *Factors Etc, Inc* v *Pro Arts, Inc*, 579 USA F.2d 215 (2nd Cir 1978).

[20] *Lohan* v *Take-Two Interactive Software, Inc*, 24 Court of Appeal of New York, 2018.

misappropriation of his persona because they created an immediate association between himself and Autovox. He further alleged that the advertisement damaged his reputation because consumers were likely to believe that he endorsed Autovox's products, despite the fact that Dalla consistently refused to appear in commercials.[21]

Nowadays, the right of publicity continues to expand to encompass more elements of personality and more media and forms of communication. Traditionally, trained advertising professionals were previously in the creation of advertising campaigns and were careful to obtain necessary licenses. Advertising agencies also provided the advertiser with insurance that covered such rights of publicity claims. Nowadays, content commissioned and paid for by advertisers is sometimes created without input from advertising professionals and content may include discussions of popular cultural events and celebrities. When it also includes product placements and advertiser-dictated content or even just an advertiser's credit for sponsoring or underwriting the cost of the content, it may expose the advertiser to claims by people who are identified in the content.

IV. The Right to One's Own Image

The origins of a right to one's own image in Europe are partially different and linked to the first known 'paparazzi' case.[22]

The shocking image of the dead German Chancellor, Otto von Bismarck (1815–1898), lying dishevelled, propped-up on his deathbed is the world's first 'paparazzi' photograph. The clandestine photograph was taken by two young photographers, Max Priester and Willy Wicke, on 30 July 1898. They broke into Bismarck's chambers by bribing a servant and photographed his corpse only a few hours after his death; in fact, the deceased Chancellor's family had only just paid its last respects and left the bedroom when the photograph was taken. No one except Chancellor's family was permitted to see Bismarck's last moments.

This grainy black and white photograph of Bismarck's corpse turned out to be the final image of the great leader; no 'official' death mask or post-mortem

[21] Pretura di Roma, 18 April 1984, *Foro Italiano* I, 2030 (1984) with comment from R. Pardolesi and *Giurisprudenza Italiana*, I, 2, 453 (1985), with comment from M. Dogliotti, 'Alcune questioni in tema di notorietà, diritto all'immagine e tutela della personalità' and ibid 551 with comment of M. Garutti, 'Utilizzazione in una campagna pubblicitaria di accessori abitualmente usati da una persona'.

According to S. Martuccelli, n 17 above, 548 'the judge in the Dalla case reasoned that such protection should also apply to unauthorized uses of attributes of one's persona, hence creating a right similar to the American right of publicity'.

[22] With the term *paparazzo,* we define (sometimes in a derogatory way) those photographers specialized in photographing famous people in public places or in their private sphere, almost always looking for the most particular, rare, more compromising situations (in order to obtain more money). The term is derived from and spread thanks to the film by Federico Fellini, *La dolce vita*, in which a character (played by Walter Santesso), who practices this profession, has the surname *Paparazzo*.

portraits were made. Bismarck's emaciated face peers out from above a sea of bedcovers and pillows, exposed in the cruel, bright ray of magnesium light used by the photographers to illuminate the scene. Save for a protruding right hand, Bismarck's collapsed body lies invisible beneath the bed sheets. In this iconoclastic image, Bismarck, the national hero who unified Germany, is revealed in a frail and un-heroic state; a chamber pot at his bedside, he slips from the world, much as his body slides underneath the sheets.

Like the photographers who sell their images to the world's media today, Priester and Wicke tried to hawk their newsworthy 'scoop' featuring the dead 'celebrity' to the German newspapers, who declined to publish it. They advertised the image in the newspaper, *Tagliche Rundschau* on 2 August 1898,

> 'for the sole existing picture of Bismarck on his deathbed, photographs taken a few hours after his death, original images, a buyer or suitable publisher is sought'.

Priester's and Wicke's behaviour caused public outrage in Germany. It led to the confiscation of their plates by the police and to civil and criminal legal proceedings being brought against them in 1899.

In the end, Priester was sentenced to five months' imprisonment and Wicke received an eight months' sentence.[23] Their censored plate was handed over to Bismarck's family, where it remained out of sight for a long time though, remarkably, it was not destroyed. Instead, it was to resurface after World War II, to circulate in a context in which such images did not seem so shocking in the wake of the War's atrocities. Today, the image is readily accessible on the Internet.

The image of the dead Bismarck marks one of the first encounters between the law and photography. At the heart of this encounter, we find what might be described as three categories of image 'offence', all of which are conflated in the taking, content and (attempted) distribution of this disturbing photograph.

The first offence is the means by which the photograph is taken, seen here in the duplicitous intrusion by the photographers into the 'sacred' realm of Bismarck's home. The second offence is the 'content' of the photograph, namely the intimate and undignified image of the dead Bismarck, a sight which was only supposed to be visible to Bismarck's family members (even Kaiser Wilhelm II was denied permission by Bismarck's family to view his dead body). The third offence is the 'distribution' of the photograph, namely the way in which the photographers sought to exploit it by selling or licensing it for profit, thereby transforming the dead Bismarck into a commodity.

It is, perhaps, no accident that the scandal caused through the explosive combination of all three image offences in Priester's and Wicke's photograph

[23] The case of the Bismarck death photography was detailed described by J. Kohler, 'Der Fall der Bismarckphotographie' 5 *Gewerblicher Rechtsschutz und Urheberrecht*, 196–210 (1900).

would directly lead to the passage of one of the first laws of image rights, *viz* section 22 of the German Copyright Act (*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie* 1907). In this law, German legislators, troubled by the wound caused by the scandal, devised a way to grant the subject 'rights' over their image to protect their personality. From then on, permission by the subject portrayed would be required when photographs of them were taken and disseminated, though an exemption was granted for public persons or 'figures of contemporary history', who would have lesser protection and these rights could persist even after their death and be exercised posthumously by their family relatives.

Since then, 'consent' became the key point of right to one's own image and this is why in Italy we have, in legge 22 April 1941 no 633 for the protection of copyright, a specific section for rights on portraits.

In this section, Art 96 provides that the portrait of a person may not be displayed, reproduced or commercially distributed without the consent[24] of such person or, after his death, without the consent of his heirs.

In contrast, according to Art 97,[25] the consent of the person portrayed is not necessary if the reproduction of the portrait is justified by his notoriety[26] or his holding of public office, or by the needs of justice or the police, or for scientific, didactic or cultural reasons, or when reproduction is associated with facts, events and ceremonies which are of public interest or which have taken place in public.[27]

[24] Regarding consent we have to remember the decision of Corte di Cassazione, 29 January 2016 no 1768, *Il Diritto Industriale*, 55 (2017) with comment of A. Geraci, 'Il negozio unilaterale per il consenso alla pubblicazione della propria immagine'; *Danno e responsabilità*, 47 (2017) with comment of E. Barni, 'Cassazione e diritto all'immagine: divulgazione del ritratto per scopi pubblicitari, revocabilità del consenso, tutela risarcitoria'.

With this judgment the Corte di Cassazione stated that consent for the publication of one's own image constitutes a unilateral deed, having as its object not the personal and inalienable right to the image but only the exercise of that right, so that although it may be occasionally included in an agreement, the consent remains distinct and independent from the agreement that contains it and is always revocable, whatever the deadline indicated for the permitted publication and regardless of the agreed stipulation, which does not integrate an element of the authorization deed.

[25] The first Italian law on copyright (legge 25 June 1865 no 2337) did not contain any provision regarding the right to one's own image while Art 11 of Legge 18 March 1926 no 562 was substantially similar to the Arts 96 and 97, quoted above.

[26] In this regard we remember the recent case of theatric show about the famous Italian singer and actor Domenico Modugno. See Tribunale di Roma, 17 July 2015, *Il Diritto Industriale*, 273 (2017) with comments of F. Florio, 'Il diritto all'immagine, la necessità del consenso e le sue eccezioni', and M. Maggiore and L. Zoboli, 'Interesse pubblico ed eccezione culturale: le limitazioni al diritto all'immagine dei personaggi famosi'.

[27] Public events have been always deemed to be situations in which consent of the portrayed person is not necessary. See M. Ricca-Barberis, 'Il diritto alla propria figura' *Rivista del diritto commerciale, industriale e marittimo*, I, 3-12, 3 (1903) '*non viola il diritto individuale colui che armato di una Kodak fotografi per la via un'altra persona anche se questa non lo voglia,*

However, the portrait may not be displayed or commercially distributed if its display or commercial distribution would prejudice the honour, reputation or dignity of the person portrayed.

The Italian normative system about such a right[28] is made also by Art 10 of the Civil Code, which provides that if the image of a person or the parents or the spouse or child has been exposed or published except in cases where exposure or publication and permitted by law, or with prejudice to the dignity or reputation of the person or of those relatives, the authorized court, on application, may provide for an end to the abuse, though not for damages. The article does not contain any reference to consent because it was expressly written to give a wider protection to the right to one's own image, considering the provision of Art 11 of legge 18 March 1926 no 562.[29]

Contrasting the right of publicity and right to one's own image, there exist, apparently, two different legal institutions (the latter, in particular, should be one of the personal rights, such as freedom and it was analysed in detail by German jurists after the Bismark case).[30] In reality, in reviewing the work of Eduardo Piola Caselli, the father of the Italian Copyright Law, we see that the institutions are substantially similar.[31]

chi passeggia per la strada sa di esporsi ai suoi simili: che poi la sua immagine si imprima fuggevolmente sulla retina di un occhio umano o durevolmente sulla pellicola di una macchina fotografica, poco importa' (who armed with a Kodak takes a picture of someone on the street does not violate any individual right even if he does not want; who walks the street knows how to expose himself to his fellow men: if his image is impressed on the retina of a human eye or durably on the film of a camera, it does not matter).

[28] There is a huge literature about the right to one's own image, but for deep and exhaustive analysis see M. Proto, *Il diritto e l'immagine. Tutela giuridica del riserbo e dell'icona personale* (Milano: Giuffrè, 2012).

[29] See E. Piola Caselli, *Codice del diritto d'autore. Commentario della nuova legge 22 aprile 1941-XIX, n. 633* (Torino: Unione Tipografica Editrice Torinese, 1943), 506, 507.

[30] Referring to the *Recht am eigenen Bilde*. See ibid 504-505.

[31] '*La riproduzione della nostra immagine in un ritratto che avvenga in quelle stesse condizioni nelle quali avviene la quotidiana esposizione della nostra figura agli occhi del pubblico, non può di per sé offendere alcun diritto né ledere alcun ragionevole interesse della persona. L'offesa non sorge se non quando la riproduzione o la diffusione dell'immagine avvengano al di fuori di queste condizioni normali e siano per così dire qualificate per talune circostanze particolari che urtano veramente il sentimento giuridico (...). Ma allora noi dobbiamo dire che la lesione giuridica va riferita ad un'altra causa che esiste al di fuori o al di sopra di questo diritto; e che consiste in fondo in quella esplicazione del diritto generale della libertà e dignità personale che gli inglesi hanno chiamato diritto dell'intimità o right of privacy*' (The reproduction of our image in a portrait occurring in the same conditions in which the daily exposure of our figure to the eyes of the public takes place, can not in itself offend any right or harm any reasonable interest of the person. The offense does not arise unless the reproduction or the diffusion of the image take place outside of these normal conditions and are, so to speak, qualified for certain particular circumstances that really impact the legal feeling (...). Then we must say that the legal injury must be referred to another cause that exists outside or above this right; and which consists basically in that explication of the general right of freedom and personal dignity that the English have called the right of intimacy or right of privacy). See ibid 505-506.

V. Nowadays

Facebook, Linkedin or Whatsapp sought to make almost everyone a 'celebrity'. Twenty years ago, one could only find pictures of genuinely well-known people but nowadays a Google search will produce the name and photographs of almost anyone.

The fact that videos and photographs are today made exclusively in digital formats led, indeed, to a wider circulation of images that now transfer from smartphones to social networks and from social networks to various web sites and are downloaded again on devices and often modified and reused.

It is precisely because of the unstoppable expansion of these phenomena that search engines have, for a long time, offered the 'image search service' that allows every user of the network to find, for each noun or adjective, dozens of images that the search engine research considers 'correspondent' to that word, according to the cold logic of its algorithm. If I search for 'ugly' on Google images, whose face would Google give me as result? Could one trust that such result is accurate?

In light of these considerations, if on the one hand, it is true that the recognition and affirmation of a right of publicity is undoubtedly caused by the advent and the development of photography, we have to acknowledge that the concomitant evolution of these phenomena (digitalization and access to the network) has radically changed our habits and our sensitivity to our right of publicity and of our privacy.

For these reasons we face two demands which are diametrically opposed to each other. We spread our image on the network[32] continuously. In many cases, personal photographs are not retained purely privately but are shared with others immediately after being taken.[33] At the same time, however, our sensitivity to our own image has become sharpened. Not long ago, despite it being explicitly recognized in almost every legal system, the right to the protection of our own image was considered a right only of those people who enjoyed a certain amount of notoriety (actors, politicians, sports personalities, etc). Today it is a right that everyone perceives as his own.

Despite the efficiency of the legal system (both common law and civil law) in protecting our image, the only possible protection of it in an Internet era[34] is

[32] But always giving our consent. Only when we see that our picture is used in a way that violates our honor or our reputation we would delete it forever from Internet. See, in this regard, the case of Caitlin Seida, https://tinyurl.com/y8u9wgvt (last visited 15 November 2018).

[33] Considering the *phenomenon* of *fotosociality*, delivered through the Samsung camera which is able immediately to post pictures on social networks without first downloading them.

[34] '*Il concetto di oblio non esiste su Internet. I dati, una volta pubblicati, possono rimanerci letteralmente per sempre – anche se la persona interessata li ha cancellati dal sito "originario", possono esisterne copie presso soggetti terzi; appartengono a quest'ultima categoria i servizi di archivistica e la funzione di "cache" disponibile presso un notissimo motore di ricerca. Inoltre, alcuni fornitori di servizi rifiutano di ottemperare (o non ottemperano affatto) alle*

to follow the advice of Epicurus, to 'live secretly'. Maybe it is time to relinquish any protection of our image.

richieste degli utenti di ottenere la cancellazione di dati e, soprattutto, di interi profili' (The concept of oblivion does not exist on the Internet. The data, once published, can remain literally forever – even if the person concerned has deleted them from the "original" site, there may be copies to third parties; the archiving services and the "cache" function available in a well-known search engine belong to the latter category. In addition, some service providers refuse to comply (or fail to comply) with user requests for data deletion and, in particular, for entire profiles) (*Garante per la protezione dei dati personali*, Rapporto e Linee-Guida in materia di *privacy* nei servizi di social network 'Memorandum di Roma', 3-4 March 2008).