THE RIGHT TO ECONOMIC PROTECTION OF ONE'S IMAGE IN LATIN AMERICA

Javier Berdaguer Mosca*

Abstract
This study is aimed at describing the three main comparative law models for explaining the economic protection of the right to one's image (intellectual property right, personality rights and a hybrid right consisting of personal and economic attributes). It will then analyze the main elements of the regulations on the right to one's image in Latin America, specially focusing on acts of commercial exploitation, and it will finally try to connect the Latin American reality with the existing theoretical models.

Keywords: *the right to one's image, commercial exploitation of personality rights; comparative law.*

I. RAISING THE MATTER

People generally decide whether or not to let another person use their recognizable physical appearance, usually known as the right to one's image.[1]

First, this right has a *personal or moral* attribute, which is sort of a legal *"retaining wall"* against improper intromissions within the individual sphere, usually leading to the undesired and unjustified public capturing and/or diffusion of another person's image. This protection is based on the need to recognize people's right to self-determine how they want to reveal themselves to society;[2] an idea related to the protection of human dignity. Any act aimed at using another person's attributes as an object subjugates the person's personality,[3] unless the use thereof is consented by the person at issue or is permitted by law.[4]

* Universidad de la República Oriental del Uruguay, Montevideo, Uruguay; Universidad Católica Dámaso Antonio Larrañaga, Montevideo, Uruguay (jberdaguer@guyer.com.uy). Article received on June 17, 2019, and accepted for publication on August 6, 2019. Translated by Fluent Traducciones.

1 Although we will not analyze this topic in detail, it is worth pointing out that the scope of protection of the right to self-image currently goes beyond physical appearance, as it includes any external expressions of a natural person's identity, such as voice, name and other attributes identifying the person publicly or in a certain group: Cabanellas de las Cuevas (2014), p. 168.

2 Whitman (2004), pp. 1160 *et seq*. Resta (2011), pp. 49-50; Resta (2014), pp. 21-23;

3 Zavala (2011), p. 4.

4 All jurisdictions agree that, in some cases, using another person's image without the portrayed

Nonetheless, we cannot thoroughly and fully analyze the right to one's image without bearing in mind that people often commercially exploit others' image. This phenomenon is certainly not new, since the first decision on the right to one's image concerned its use for advertisement purposes.[5] Moreover, by the late 19th century, a person's reputation (and the signs by means of which everyone identifies that person, such as name or image) is attractive for commercial exploitation.[6] In some cases, the commercial exploitation of a person's image is consented by the latter, for exorbitant amounts of money. In this way, image not only took on a moral but an economic aspect, thus becoming a tradable good.[7] Hence, this aspect also includes those acts aimed at taking an economic advantage of a person's image, meaning that, *prima facie*, only the person whose image is being used shall be entitled to the profits from this activity. Image can become part of legally relevant acts, since the holder of the right to one's image can profit from the market value from the exploitation of his or her image.[8] The right to one's image is a tool to assign to its holder the profits from the exploitation of image. The right holder monopolizes the commercial exploitation of his or her image; similar to the relationship between property rights and the profits of the thing at issue.[9]

Most legal systems provide some type of protection to the economic dimension of the right to one's image. In particular, case law often protects the person whose image has been used against third party acts usurping the pecuniary value of a person's image without his or her permission, condemning those intending to *"get a free ribbing"* with business purposes. The protection of this pecuniary nature is especially evident in those cases where courts grant the claimant a compensation based on the price that the defendant would have reasonably paid if it had requested the relevant authorization (hypothetical royalty or hypothetical license criterion).[10]

However, when delving into this general consensus, we get at least three different models on the scope of this protection of the economic dimension of the right to one's image. These models involve similar and common ideas and beliefs that steer regulations in a particular direction.[11] Comparative analysis is very useful

person's consent is legal, provided that such specific use is not abusive (within certain limits and in a manner that is not unnecessarily harmful), especially in those cases where it is clear that the defendant used this image for public interests.

5 Rachel Case (Civil Court of la Seine, 1858). Vendrell (2014), p. 50-51; Beverley *et al.* (2005), p. 1 and 147; in the United States: Rothman (2018), p. 11.

6 Beverley *et al.* (2005), p. 1

7 Resta (2005), p. 238; Resta (2006), p. 636 and 637; Loiseau (1997), p. 328; Priens (2006). On commodification: Resta (2011), pp. 41 *et seq*.

8 Vendrell (2014), pp. 202, 203.

9 Resta (2005), p. 163.

10 Under this mechanism, the offender is bound to restore the relevant value: Beverley *et al.* (2005), p. 69); Resta (2005), pp. 157 *et seq*.

11 For the development of these protection models, see: Resta (2005), pp. 271-276; Beverley *et al.* (2005), pp. 212-214; Resta (2006), pp. 635 *et seq*.; Black (2011), pp. 12-27; Resta (2011), pp. 48-51 and 58-65; Vendrell (2014), pp. 461-465; Resta (2014), pp. 23-26.

to outline these models. Fortunately, several authors have already performed such an analysis, usually with commendable depth and good judgment.[12] Nonetheless, this line of thought has based itself on Western Europe and common-law jurisdictions. In this regard, we find that few or no analyses on the commercial exploitation of personality rights including the perspective of Latin American legal systems.[13] In our opinion, this shortcoming should be put to an end.[14]

Thus, we will rely on the information provided by scholars conducting this comparative analysis.[15] It will be our theoretical framework, and then we will analyze the regulation of patrimonial rights to self-image in Latin American countries, especially focusing on the acts of disposal (either contracts or any legally relevant acts) on the right to one's image.[16] Ultimately, the aim is to discover whether Latin American countries can be connected with the theory created by comparative law.

II. THEORETICAL FRAMEWORK

Using the attributes of human personality for commercial purposes poses a profound dilemma between the scope of the protection of personality, on the one hand, and every person's power to effectively dispose of his/her own patrimonial dimension, on the other.

The opinion of scholars in different countries allows us to suggest that the commercial exploitation of the right to one's image can be summarized in three models of protection: (a) a model based on the existence of two independent rights: one protecting personal aspects, and the other protecting pecuniary aspects. The latter is similar to the intellectual property right (dualistic model), (b) a model based on personality rights (monistic model), and (c) a hybrid model (a single right consisting

12 For a comparison between the United States and some European countries, or between European countries, see: Whitman (2004), Beverley *et al.* (2005), Bergmann (2009), Cantero *et al.* (2010), Vendrell (2014). For a comparison between the United States and the United Kingdom, see: Leaffer (2007).

13 The only exception is the work of Antequera (2012), which is rather descriptive refers only to how the right to one's image is addressed in Latin American case-law.

14 Such a comparative analysis implies accepting - as in our case - that conflicts involving the commercial exploitation of the right to one's image are similar in all countries, since general market practices are similar too, specifically the market breakthrough in fields of social life where did not have much presence until recently. Since issues and context thereof are similar, it only logical that the decisions should be similar too, or at least, the fundamental guidelines orienting those decisions.

15 Particularly, the work of Giorgio Resta since 2005.

16 We will not delve into the legal treatment of unlawful interferences in the right to one's image or its consequences, which (in a broad sense) could be deemed as aspects of the right to one's image protection. By contrast, we will focus on the models addressing the patrimonial aspects of the right to one's image and in how acts of disposition (contracts or other legal acts) on the right to one's image are explained.

of personal and patrimonial aspects, none of which prevails over the other).[17] The existence of different models is mainly due to historical and cultural differences.[18]

2.1. Dualistic model: intellectual property right.

The US model of the right of publicity is considered to be "dualistic", as it is based on the separation of two independent rights: the right to privacy and the right of publicity, the latter being every person's right to control the commercial use of their identity (including their image).[19]

Around the 1950s, the right of publicity became independent from the right to privacy (from which it originates).[20] The decision of the Second District Court of Appeals, in 1953, was a breaking point in this regard.[21] Nimmer, who laid the foundations for a new property right, transferable and enforceable against third parties, commented on this decision.[22] Although this right was initially designed for celebrities belonging to the star-system, scholars believed that it could perfectly benefit any person.[23]

Since the 1970s, the right of publicity began expanding as a property right applicable to interests other than the constitutional protection of people's privacy.[24] Thus, proving the existence of moral damages or damage to the holder's feelings in order to be in presence of a wrongful act was no longer required.[25] In 1977, the Supreme Court of Justice of the United States issued a decision in favor of the right of publicity,[26] leading to an analogy between the right of publicity (which it defined as every person's right to control the commercial use and exploitation of their personality) and intellectual property rights.[27] Thanks to this decision, scholarly articles and case-law on this matter proliferated in the following decades, and the

17 Note 11 above.

18 Resta (2006), pp. 382 *et seq*.; Vendrell (2014), pp. 48 *et seq*.; Resta (2014.a), pp. 75 *et seq*.; Resta (2014.b), pp. 13 *et seq*.

19 On the interesting evolution of the right of publicity, see: Mc Carthy (2013), pp. 3-85; Rothman (2018), pp. 11-112.

20 Mc Carthy (2013), pp. 51 *et seq*. However, the foundations of this right had been laid several decades ago, as evidenced by Rothman (2018), pp. 11-29.

21 *Haelan Laboratories, Inc. V. Topps Chewing Gum, Inc.* (1953).

22 Nimmer (1954), pp. 209-210, 216 and 217. The relevance of the *Haelan* case and the personal motivations of Nimmer have been questioned by Rothman (2018), pp. 50 *et seq*. We must also bear in mind the important study by Prosser (1960).

23 Nimmer (1954), p. 217.

24 Mc Carthy (2013), p. 64-65.

25 Mc Carthy (2013), p. 67.

26 *Zacchini v. Scripps-Howard Broadcasting Co. 433 U.S. 562* (1977).

27 Rothman (2018), pp. 76 and 80.

transfer *mortis causa* of this property right gained special momentum.[28] In 1995, the Restatement in matters of unfair competition was approved, and the violation of the right of publicity was included in the list of illegal acts.[29] From the 1990s to our days, the right of publicity has been codified in several states through state Acts.[30]

It seems clear that the dualistic model promotes the development of an market on rights to one's image. By granting every person a property right to his/her own image,[31] those acts assigning the right to dispose of the right to one's image, those by which the beneficiary gets an exclusive right enforceable against third parties, and the transfer *mortis causa* of those exploitation powers, become valid as a general principle.[32]

However, there are indeed objections to the dualistic model. Firstly, it is not clear whether the legal protection of intellectual property (e.g., works under copyright protection) can be used as a theoretical model to protect assets inherent to a person, i.e., relating to an inseparable aspect of the person itself, as happens with image.[33] Fully detaching from the right to exploit self-image does not seem reasonable, since people should not be legally prevented from controlling the disposal of personality rights, or from relating them to any type of product or service.[34] Another objection is the difficulty of identifying justification of an independent patrimonial right under which the holder is entitled to monopolize the exploitation over his/her own image.[35] Identifying those cases where image is being used for commercial purposes from those where it is not,[36] or facing cases where this patrimonial right is subject to seizure, specific performance claimed by creditors or partition in case of divorce or extinction of community of property,[37] is also difficult.

2.2. Monist model: personality right

The model based on the existence of a personality right is rooted in Continental Europe. In absence of regulation in most 19th century civil codes, and upon the emergence of the first cases, scholars and case-law helped to outline an absolute

28 Rothman (2018), pp. 81-86.

29 *1995 Restatement on the Act of Unfair Competition*. Section § 46 *et seq*.

30 Mc Carthy (2013), p. 76. Rothman (2018, pp. 96 *et seq*.) highlights the different criteria between State laws and that of the different States' courts.

31 Resta (2005), p. 239-240.

32 Beverley *et al.* (2005), p. 213.

33 Resta (2005), p. 332; Resta (2006), p. 661-664; Rothman (2018), pp. 116, 126-128

34 Resta (2005), p. 333; Resta (2006), pp. 661-664; Rothman (2018), pp. 117 et seq.

35 Beverley *et al.* (2005), p. 213; Bass (2008); Mc Carthy (2013), pp. 87 *et seq*.; Rothman (2018), pp. 98-12.

36 Resta (2011), pp. 61-62; Mc Carthy (2013), No. 7:2 *et seq*.; Rothman (2018), pp. 138 *et seq*.

37 Resta (2011), pp. 64-65; Loiseau (1997), p. 344.

subjective right between the individual and his/her personal attributes.[38] At a first moment, they resorted to property right – for being an archetype of an absolute right,[39] with a typology of legal assets that could be subject matters of this absolute right and which were internal to the person.[40] Since the last quarter of the 19th century, the German doctrine started building the category of personality rights to explain these phenomena.[41] Although this was due to reasons specific to Germany,[42] the results of these works had a significant impact in several jurisdictions.[43] If personality rights are absolute rights to aspects of a person's personality, its holder shall be entitled to claim moral or pecuniary damages arising from third party interferences. They are also suitable for filing actions aimed at terminating unlawful acts.[44] Upon building this absolute nature (enforceable *erga omnes*), listing them as one of the typical remedies in cases of tort liability was easy.[45] The basic structure of the personalist model lies in the following ideas: defensive nature of personality rights, non-economic nature of these rights, and inalienability thereof.[46]

The notion of the right to one's image as a personality right was born in Europe, and it became widespread during the mid-20th century.[47] This line of thought was accompanied by a natural law conception, or at least from a heightened rhetoric on the personal aspects at stake, that led to neglect the patrimonial aspects that personality rights had at a first moment.[48] By the time, theories advocating for the "non-pecuniary" nature of personality rights emerged, thus being deemed as

38 Resta (2014a), pp. 75 *et seq*.

39 Resta (2014b), p. 13. Part of the French scholars believed there was an absolute and exclusive right to self-image, but it did not delve into its nature, like Pouillet (1908), p. 243, whereas others stated that it was evert person's property right to themselves: Beverley *et al.* (2005), p. 148.

40 Resta (2011), p. 47

41 Resta (2005), pp. 422-451; Resta (2011), pp. 36-37; Resta (2014.b), pp. 13-20; Cionti (2000), pp. 147 *et seq*.; Vendrell (2014), p. 52.

42 Germany used to have a restricted position on the subject matters of absolute patrimonial rights: Resta (2014.b), pp. 13-21.

43 For further information on the emergence and development of personality rights theory in Germany and the rest of Europe, see: Cionti (2000), pp. 147 *et seq*.; Resta (2005), pp. 43 *et seq*., 87 *et seq*..; Vendrell (2014), pp. 52 *et seq*.; Resta (2014b), pp. 14 *et seq*.

44 Resta (2005), pp. 115 and 118.

45 Resta (2005), p. 125, 182-183; Resta (2011), pp. 33-34; Vendrell (2014), p. 55.

46 Resta (2011), p. 37. Considering the right to one's image as a personality right, the German doctrine concluded that it was an inalienable right, and therefore, not assignable: Resta (2005), pp. 118 *et seq*..; Beverley *et al* (2005), p. 130. However, granting a permit –deemed as an act of to legitimize another person's interference, either under the adagio *volenti non fit injuria* (the victim's consent precludes unlawfulness) or as a *pactum de non petendo* (obligation to refrain from filing claims regarding authorized interferences), is admissible: Vendrell (2014), pp. 224-264.

47 Resta (2014b), p. 3. The most influential positions: France: Nerson (cited by Beverley *et al.*, 2005, pp. 150-151); Italy: de Cupis (1950), p. 29 and Vercellone (1959), pp. 26 *et seq*.; Spain: de Castro (1959).

48 Resta (2005), pp. 124-125, 182-183; Pino (2003), pp. 10, 12-13; Vendrell (2014), pp. 55-59, who called this phenomenon *"expulsion of merchants from the temple of personality rights"*.

rights "inherent to human personality", not subject of being waived, disposed of and transmitted. Hence, the possibility of these rights being subject to commercial transactions by their holders or third parties was simply omitted or rejected outright.[49] This phenomenon explains why the right to one's image was included within the list of provisions on the protection of personality in the general part of several 20th century Civil Codes, such as the 1942 Italian Code (art. 10), the 1966 amendment to the Portuguese Civil Code, the French Law of 1970, or in specific laws that consider the right to one's image as a personality right, such as the 1982 Spanish Organic Law.

One objection against this model is that it provides a merely defensive protection (based on tort liability), thus being insufficient to solve several issues that are currently of much practical relevance, and that require a more precise definition of the content and nature of the economic dimension of the right to one's image. We are talking about the interests of persons other than the original holder, who seek protection in the exploitation of the holder's image, either because they got his or her exclusive authorization, or because they are the holder's heirs or successors, and seek for an acceptable level of certainty on whether they can or cannot bring actions against other third parties, and even against the holder itself (in the event that the latter performs acts breaching undertaken commitments).

2.3. Intermediate model: hybrid right

The third model available is more of an evolution of the personality rights theory mentioned above. In fact, around the 1980s, a new pendulum movement took place in Continental Europe, this time boosting the rights to one's image market. The *commodification* of personality goes beyond the right to one's image, as it affirms that market logic is reaching every aspect of people's lives, both tangible (organisms, tissues, gametes, DNA) and intangible (name, image, voice, personal data), which are treated as assets, subject of being purchased, sold or licensed.[50] This phenomenon defies any easy stance about an alleged incompatibility between personality rights and the exploitation of economic interests, motivating jurists to reevaluate those issues concerning the disposal and transfer of these rights, which were underestimated for much of the 20th century.[51] Increased commercial transaction on the right to one's image and the amounts at stake urged to further analyze the exploitation of the commercial values of personality. This, since a notion failing to include those aspects would leave third parties involved in commercial transactions on the right to one's image, in a weak position compared to the assignor/authorizing person, and to third parties, increasing transaction costs.[52]

49 Resta (2005), pp. 126-127; Pino (2003), pp. 15-16; Vendrell (2014), p. 60. For France: Castaldi (2008), p. 7; Serna (1997), pp. 94-138.

50 Resta (2011), p. 42.

51 Resta (2011), pp. 42-43

52 Beverley *et al.* (2005, pp. 212); Vendrell (2014), pp. 152-160 and 402.

However, despite the strides of this market logic, European dogmatic did not undo the traditional category of personality rights.[53] Courts resorted to dynamic interpretation techniques in order to adapt old provisions on name, image or privacy, faced with a changing social and economic scene.[54] This facilitated a functional evolution of personality right, rather than radically shifting the paradigm into a model based on an independent property right, such as the right of publicity.[55] In fact, provisions on the protection of name, image or other personal data, have never explicitly prohibited using typical remedies to protect economic interests.[56] Moreover, consistently with French case-law (for which the right to one's image is an absolute right), the model of protection adopted by Germany in the 1907 Copyright Act and the Italian Act of 1925 (later, the copyright Act of 1942) reproduce the typical paradigm of the rules of property right, thus admitting the possibility to file for specific performance and damages arising from the non-consented use of identity.[57]

This intermediate position explains that the right to self-image is a hybrid right with a protean nature, as it consists of moral and patrimonial aspects.[58] On the other hand, significant efforts have been made to ensure that this construction provides proper protection to both aspects of the right to one's image.

As for patrimonial aspects, neither the position of bona fide purchasers nor the development of the market are necessarily affected, as this right is not deemed as a property right. This, since commercial exploitations act would be considered as concessions of a right to commercially exploit one´s image, but not as a transfer. Hence, by virtue of such concession a right to another person's equity is born, which will coexist with the right of the grantor.[59] The category of acts of concession is less intense than transfer, since the right to ownership of those attributes is not lost.[60] Hence, the original holder (person whose image we are concerned with) is still connected with the exploitation of the attributes of his or her personality, since he or she still holds the main right, from which exploitation rights arise.[61]

Nonetheless, the need for the existence of a network protecting personal interests in transactions involving the attributes of personality urges to look back at the ordinary regime of contracts.[62] The aim is to build a commitment acceptable

53 Resta (2011), p. 49; Resta (2014b), pp. 11-12.

54 Resta (2011), p. 49.

55 Resta (2011), p. 49.

56 Resta (2011), p. 49.

57 Resta (2011), pp. 49-50; Resta (2014b), p. 23.

58 Resta (2005), pp. 242-247

59 Vendrell (2014), p. 467.

60 Resta (2005), pp. 334-345; Resta (2006), pp. 661-664; Vendrell (2014), pp. 99 *et seq*., 139 *et seq*.

61 Vendrell (2014), p. 467

62 Resta (2011), p. 61. Vendrell, on the other hand, analyzed the separation of two different rights for the case of Spain. In this way, patrimonial right to image could be subject of acts of concession (but

for both the freedom to exercise private autonomy in contractual matters, and the protection of human dignity and the preservation of self-determination, governing the protection of the attributes of personality.[63] To set the grounds for this commitment, European doctrine has identified several main points to be taken into account: (i) applying a *principle of specificity* in matters of given consent, like the one governing the consent required for the use of personal data. Therefore, only the expressly authorized use of image is deemed authorized; this consent shall be specific and express.[64] Thus, generic or all-inclusive authorizations shall not be valid;[65] (ii) *strict interpretation* in matters of right to one's image, as regularly applied in matters of copyright transfers and by the courts of law in the field of the right to one's image;[66] thus, the authorization must be deemed limited to the aforementioned acts (both objectively and subjectively) or to the intended use at the moment in which consent is given;[67] and (iii) the admissibility of a *right to withdraw the previously given consent* (*derecho de receso unilateral* or revocation), even without express recognition, but compensating the damages caused.[68] We must also bear in mind the general opinion that the regime of free publications (legal permission to use another person's image without his or her consent) shall be interpreted restrictively, and it is not applicable when used with commercial or profit-seeking purposes, whereas in this case, unlawfulness is presumed unless the defendant proves that he or she has obtained consent.[69]

III. THE RIGHT TO ONE'S IMAGE IN LATIN AMERICA

3.1 General overview

Most Latin-American countries lack a legal framework on the right to one's image.[70] Nonetheless, the scholarship and case law have used certain partial substantive law provisions to build a dogmatic system dealing with conflicts, increasingly promoting the commercial exploitation of the right to one's image.

not transfer), giving the beneficiary an absolute right enforceable against third parties: Vendrell (2014), pp. 451-471.

63 Resta (2011), p. 61.

64 Resta (2011), p. 63.

65 Resta (2005), pp. 285-292; Resta (2006), pp. 646-650.

66 Resta (2011), p. 63.

67 Resta (2005), pp. 292-297; Resta (2006), pp. 650-653; Resta (2014a), p. 119.

68 Resta (2005), pp. 298-307; Resta (2006), p. 653-659; Resta (2011), p. 64; Resta (2014a), pp. 117-121; Resta (2014b), p. 25.

69 Resta (2005), pp. 146, 155 and 281.

70 Cabanellas de las Cuevas (2014), p. 172.

3.1.1. The twofold dimension of the right to one's image

One of the key aspects is the widespread recognition that the right to one's image has two dimensions or perspectives: a personal and a patrimonial dimension.[71] The theory of double content has been especially developed by scholars in Argentina,[72] Brazil,[73] Chile,[74] Colombia,[75] Mexico[76] and Uruguay.[77] It has also been recognized in court decisions in Latin American countries such as Brazil,[78] Chile,[79] Colombia[80] and the Dominican Republic.[81]

3.1.2. Personal dimension of the right to one's image

The personal dimension is usually related to the constitutional protection of the right to self-image. In this regard, we must bear in mind that the right to one's image has been expressly included in the list of fundamental constitutional rights or rights inherent to all human beings in the case of Bolivia,[82] Brazil,[83] Ecuador,[84] El Salvador,[85] Honduras,[86] Paraguay,[87] Peru,[88] Dominican Republic[89] and Venezuela.[90] Consistently, courts in these countries have defined it as a "human right (...) originated

71 Antequera (2012), pp. 400-403.

72 Cabanellas de las Cuevas (1998), p. 450; Villalba (2006); Picasso (2007), pp. 40-41; Márquez & Calderón (2009), p. 105; Cabanellas de las Cuevas (2014), pp. 174-175; Villalba (2015), pp. 93-99.

73 Rodrigues (2009), p. 127; da Cunha (2013), p. 364; Bortolan and Pascoaloto (2014), p. 3104; Glitz and Bortolan (2017), pp. 362-363; Bortolan (2018), p. 739;

74 Nogueira (2007), pp. 262, 266-270, 274; Larraín (2016), pp. 131-132, 162 and 169; Aillapan (2016), pp. 446 and 447; Ferrante (2017), pp. 148 and 149.

75 Ceballos (2011), p. 68; Guzmán (2016), p. 58.

76 Flores (2006), pp. 381-382; Alatriste (2013), p. 36, Arroyo (2015), p. 85.

77 Yglesias (1987), p. 20; Balsa (2001), pp. 19 - 20, 22, 27-29 and 47; Lamas (2004), pp. 37-39, 46, 225 *et seq*. Howard (2008), p. 178.

78 Among others: High Court of Justice: 02/23/99, 10/25/99. 03/14/2000 and 05/18/2000.

79 Supreme Court of Justice, 3rd Chamber: 06/09/2009; Court of Appeals of Santiago: 03/24/2009.

80 Constitutional Court of Colombia: 1998 and 2016.

81 Court of First Instance of the National District (2008) and Court of Appeals of the National District (2009).

82 2009 Const., art. 21.2.

83 1988 Const., art. 5, roman letters V and X.

84 2008 Const., art. 66.18.

85 1983 Const., art. 2.

86 1982 Const., art. 76.

87 1992 Const., arts. 25 and 33.

88 1993 Const., art. 2.7.

89 2010 Const., art. 44.

90 1999 Const., art. 60.

by human dignity",[91] since it "originates in human beings"[92] as a "warranty and freedom of human beings",[93] or as a "fundamental personality right, part of people's essentially individual civil rights as human beings".[94]

Nonetheless, although some countries lack express constitutional provisions, they still believe constitutional protection to be implicit, whether as part of the protection of privacy or human dignity, or, more generically, as an aspect inherent to personality. This approach can be found in court decisions in Argentina,[95] Chile,[96] Colombia,[97] Costa Rica,[98] Puerto Rico,[99] Mexico[100] and Uruguay.[101]

Besides constitutional protection, it is worth bearing in mind that the right to one's image has been recognized in the Civil Codes of several countries and in special laws. This is the case in Argentina,[102] Bolivia,[103] Brazil,[104] Costa Rica,[105] Mexico,[106] Panama,[107] Peru[108] and Puerto Rico.[109]

In the past decades -particularly after 2000- personal data protection laws have spread throughout Latin America. They are usually fairly extensive and detailed legal texts, strongly inspired in EU law in this matter. This aspect is relevant to the topic

91 Constitutional Court of Bolivia: 08/25/2004.

92 Superior Court of Justice of Brazil, Decision dated 09/15/1997, cited by Antequera (2012), pp. 379.

93 State Court of Justice of Sao Paulo, Second Chamber of Private law, Decision dated 09/28/2010, cit. by Antequera (2012), p. 379.

94 Supreme Court of Justice of Venezuela, Decision by the Constitutional Chamber of 10/03/2002, cited by Antequera (2012), p. 379.

95 National Supreme Court of Justice: 12/11/1984, 04/15/1993, 12/11/2007, 09/25/2001, 09/12/2017

96 Supreme Court: 09/09/1997. This case-law has been developed in several subsequent decisions: Larraín (2016), pp. *129 et seq*. Chilean scholarship has tried to support the idea that the right to one's image is implicitly recognized therein: Nogueira (2007) and Larraín (2016), pp. 148 and 149. For a critical view on the matter, see: Ferrante (2017).

97 Constitutional Court of Colombia: 03/06/1996, 07/06/1999 and 05/24/2007.

98 Supreme Court of Costa Rica: 11/01/2005, cited by Antequera (2012), p. 379.

99 Supreme Court of Puerto Rico: 1982, 1996 and 2008.

100 Supreme Court of Justice: 01/06/2009, cit. Antequera (2012), p. 380.

101 Court of Civil Appeals: 12/05/97, 20/2011, 02/20/2012.

102 Civil and Commercial Code of the Nation (2014), art. 253.

103 Civil Code (1975), arts. 16.

104 Civil Code (2002), art. 20.

105 Civil Code (1996), arts. 47 and 48

106 Act (2006), arts. 16 et seq.

107 Family Code (1994), arts. 575 and 577.

108 Civil Code (1984), art. 15.

109 Act dated 07/13/2011.

discussed herein, since the definition of "personal data" is extremely broad, and thus, it might also include self-image. This is the case of the Argentine law of 2000, the Chilean law of 1999, the Uruguayan law of 2008, the Mexican federal law of 2010, the Peruvian law of 2011 and the Colombian law of 2012, among others. These laws often regulate personal data based on the notion that they are a right of all human beings, affecting several aspects of the regulation, including, but not limited to: specific (and very stringent) provisions on the requirements of the consent of the owner of the data for them to be "processed". Under these provisions, data can only be processed for those purposes reported and consented by the owner thereof in writing; creation of administrative bodies aimed at monitoring compliance with regulations, and creation of specific actions aimed at investigating, modifying and revoking data owner's authorizations for third-parties to process personal data.

3.1.3. The patrimonial dimension of the right to one's image

The patrimonial dimension of the right to one's image had already been recognized in statutory law in Latin American countries. Although 19th century Civil Codes were inspired in the European civil codes (specifically in the Napoleonic Civil Code) –thus lacking specific regulations on personality rights and the right to one's image– the patrimonial aspect was recognized by laws on literary property and ownership of portraits. The first laws in this regard were enacted in the first half of the 20th century, such as the 1916 Brazilian Civil Code[110] and the literary property laws of Argentina[111], Uruguay[112], Colombia[113] and Paraguay[114]. At a first moment, regulations therein on the commercial exploitation of portraits were especially influenced by the 1907 Copyright Act of Germany (still in force) and the Italian law 1925 (replaced by the law of 1942).

Today, most Latin American countries regulate the right to one's image in their copyright laws. In addition to the 1933 Argentinian and 1937 Uruguayan laws (both of them still in force), we must mention the case of Brazil,[115] Colombia,[116] Costa Rica,[117] Ecuador,[118] El Salvador,[119] Guatemala,[120] Honduras,[121] Mexico,[122]

110 Civil Code (1916) Art. 666, No. X (currently repealed).

111 Act (1933), arts. 31-35 (currently in force).

112 Act (1937), art. 21 (currently in force).

113 Act (1946), arts. 25-27 (currently repealed).

114 Act (1951), arts. 29, 31 and 32 (currently repealed).

115 Act (1998), art. 46, lit. c

116 Act (1982), art. 87.

117 Act (1982), art. 178.

118 Act (2016), arts. 160 and 161.

119 Act (1993), art. 38.

120 Act (1998), arts. 39 and 69.

121 Act (1999), art. 60.

122 Act (1996), art. 87.

Panama,[123] Paraguay,[124] Peru[125] and the Dominican Republic.[126] Regulations on the right to one's image in these laws are usually brief, though widely used in practice. They are often concise (between one and three articles), specifying that the commercial exploitation of the pictorial, sculptural or photographic work containing a person's image (portrait, bust, sculpture or picture) requires the consent of both the author of the picture and the individual portrayed. In most of these legislations, the consent of the individual portrayed is required to "*trade*" the portrait,[127] whereas other figures such as "exhibiting or displaying the bust or portrait in the market",[128] "using the bust or portrait for profit",[129] "trading, publishing, displaying or exhibiting a person's image",[130] "exploiting the image and voice,"[131] "using the picture"[132] or "using or publishing the portrait."[133] Beyond differences in wording, in all these cases, law-makers require the consent of the individual portrayed (owner of the right to one's image) to use of his or her image for commercial purposes, hence expressly recognizing the patrimonial dimension of this right.

Beyond copyright and Civil Codes, there are some specific references to the commercial exploitation of the right to one's image.[134] Special provisions include laws on the right to self-image enacted in Mexico[135] and Puerto Rico,[136] since they include more complex and detailed regulations on the patrimonial aspects of the use of another person's image. We must also mention the Brazilian law of 1998 (known as "*Lei Pelé*"), which not only regulates the *"derecho de arena*" in favor of those entities organizing sports events, but it also provides sportsmen participating in television shows (expressly deemed as owners of an right to one's image) a right to remuneration equivalent to 5% of the profits from the exploitation of audiovisual rights.[137]

123 Act (2012), art. 37.

124 Act (1998), art. 78.

125 Act (1996), art. 85.

126 Act (2000), arts. 36, 52 and 53.

127 Argentina (1933), art. 31; Ecuador (2016), art. 160; El Salvador (1993), art. 38; Honduras (1999), art. 1. 60; Peru (1996), art. 85; Paraguay (1998), art. 78, Panamá (2012), art. 37; Uruguay (1937), art. 21.

128 Colombia (1982), art. 87; Costa Rica (1982), art. 178; Dominican Republic (2000), art. 52.

129 Guatemala (1998), arts. 39 and 69; Brazil (2002), art. 12.

130 Bolivia: Ley (1975), art. 16.

131 Peru (1984), art. 15.

132 Ecuador (2016), art. 161.

133 Mexico (1996), art. 87.

134 For example, laws on employment contracts, regulation of advertising, rules on the protection of minors and adolescents, criminal code. Antequera (2012), pp. 380-381.

135 Mexico (2006).

136 Puerto Rico (2011).

137 Lei Pele (1998), art. 42.

3.2. Models of economic protection of the right to one's image.

We will delve into the notions found in national doctrine and case-law on those acts (either contracts, or, in a broader sense, legally relevant acts) by means of which the right to one's image is commercially exploited. For reasons of space, we will only analyze a few jurisdictions.

3.2.1. Argentina

Scholarship and case-law have long considered that the right to one's image is a "personal and non-transferable right".[138] Accordingly, the general principle is that using another person's image without his or her consent is illegal, regardless of whether or not it is used for commercial purposes. The only provision of substantive law on this matter is the copyright law, where the term "putting into commerce" was interpreted in a broad sense, including any use of another person's image.[139] Its qualification as a personal and non-transferable right does not prevent the right to one's image from being commercially exploited through legally relevant acts.[140] Nonetheless, these acts are generally characterized as acts of authorization, or as acts aimed at eliminating the unlawfulness of the interference in a right deemed as "relatively non-transferable".[141] In turn, the validity of a full assignment or transference of the right to one's image is ruled out.[142] In this regard, although part of the doctrine supports the existence of a patrimonial right to self-image, independent of this personal and non-transferable rights, and subject to any acts of disposal,[143] the classification of the right to one's image as a personality right was endorsed in 2014 in the new Civil and Commercial Code of the Nation, which includes a reference to the "*consent for the disposal*" of the right to one's image, the real scope of which is still open to interpretation.[144]

138 Cabanellas de las Cuevas (2014), p. 174

139 Villalba & Lipszyc (2009), p. 66; Márquez & Calderón (2009), p. 107; Cabanellas de las Cuevas (2014), p. 187. Malicious intent, loss of clientele or invasion of privacy are not required for liability claims, just the existence of a compensable moral or patrimonial damage: Cabanellas de las Cuevas (2014), p. 187.

140 Villalba (2006), Gorosito (2007), pp. 260 *et seq*.; Márquez & Calderón (2009), p. 107; Cabanellas de las Cuevas (2014), p. 169.

141 Villalba & Lipszyc (1980), p. 817; Cifuentes (2008), pp. 170-171; Zavala (2011), pp. 20-21; Barbieri (2012), p. 40-41; Cabanellas de las Cuevas (2014), p. 188;

142 Villalba & Lipszyc (1980), p. 821; Picasso (2007), pp. 40 and 41; Cifuentes (2008); Barbieri (2012), pp. 40-41; Cabanellas de las Cuevas (2014), pp. 175, 177, 183-184 and 189. Assigning certain elements of the right to one's image is admitted, for example, regarding consent to register a trademark. See Cabanellas de las Cuevas (2014), p. 189.

143 Villalba (2006); Márquez & Calderón (2009), pp. 108 *et seq*.

144 Civil and Commercial Code of the Nation (2014), arts. 53 and 55.

3.2.2. Brazil

Brazilian doctrine on the commercial exploitation of the right to one's image is based on the notion that it is a personality right.[145] This right has a patrimonial aspect, ensuring its owner the exclusive use of his or her image, expressed in a negative aspect (no one can use other's image with commercial purposes or for profit) and a positive aspect (doing business related to the exercise of the right to one's image).[146] Hence, agreements for the commercial exploitation of image are deemed valid, since the subject matter thereof is the exercise of the right by its owner.[147] Nonetheless, as these agreements are deemed as acts relating to the exercise of personality rights, consent would legitimate third-parties' intromissions in a person's right to one's image, or a waiver of the right to file a claim for said intromission authorized, provided that the explicit limits of the agreement are respected.[148]

3.2.3. Chile

In Chile, the right to one's image is neither expressly mentioned in the Constitution, nor has it been expressly regulated in special laws regulating its commercial exploitation. This is why it has been developed mainly by scholars and case-law.[149] Chilean case-law states that the consent of the person whose image is being used in order to benefit from the profits arising from such exploitation is required.[150] Regarding the legal framework of this exploitation, part of the Chilean case-law believes that it must be included within the constitutional protection of property rights.[151] However, this position has been severely criticized by scholars, since it treats personality rights as if they were rights *in rem*.[152]

145 Glitz & Bortolan (2017), p. 361 and 369.

146 Glitz & Bortolan (2017), p. 368.

147 Glitz & Bortolan (2017), p. 361.

148 Glitz & Bortolan (2017), pp. 370-374.

149 Anguita (2007), p. 42, Larraín (2016), p. 127; Arancibia (2014), p. 70. The doctrine claims the existence of partial regulations in "certain isolated cases", such as articles 145 I and 152 of the Labor Code and (with certain reservations) article 161 A of the Criminal Code. See Larraín (2016, p. 128); Ferrante (2017, pp. 144 and 145). Copyright regulations are also provided for in article 34 of Act 17,336, but with reservations too, since it would be an indirect recognition (see Ferrante, 2017, p. 145). Article 20 of Act 19,039 on the registration of trademarks containing a person's image, is also mentioned: see Aillapan (2016, p. 448).

150 Supreme Court of Justice, Case No. 3,479-03 of 09/29/2003; Court of Appeals of Santiago, 03/24/2009.

151 Court of Appeals of Santiago, Case No. 1,009-2003 dated 05/08/2003, Court of Appeals of Iquique: 01/12/2007; Court of Appeals of Valparaiso, dated 03/27/1997 (cited by Nogueira, 2007, p. 267)

152 Nogueira (2007), p. 266-270); Arancibia (2014), p. 71-73; Larraín (2016), p. 131-132). Nonetheless, this position is open to doubt (as Aillapan, 2016, p. 450-452 points out), and it has some opponents too (like Ferrante, 2017, p. 156 and 157.

As for the possibility to execute legally relevant acts on self-image, scholars believe these agreements to be legal, provided that they create obligations between the parties only (i.e., that they are not acts of disposal).[153] In general, the assumption is that it is a non-transferable personality right. Hence, consent would rule out the unlawfulness of the act of intromission in such agreement,[154] or it would be grounds to rule out said unlawfulness.[155] However, some dissenting opinions state that it is an autonomous patrimonial right.[156] In any case, the possibility of transferring or assigning the right to one's image is ruled out.[157]

3.2.4. Colombia

The Constitutional Court of Colombia has also recognized that the power to commercially exploit the right to one's image is guaranteed in Article 16 of the Constitution, on the right to the free development of personality, to which the legal scholarship agrees.[158] The doctrine believes that using a portrait for commercial purposes cannot be done freely, and thus, prior and express authorization of the person appearing therein or of his or her successors in title is required for it to be reproduced.[159] On that basis, the possibility of performing legally relevant acts on the right to one's image is widely admitted,[160] although opinions are divided on whether any act of disposal is admissible[161] or only those authorizations (license) that do not fully detach the owner from the patrimonial aspects of his or her own image.[162] The doctrine also states that there must always be a consideration for the commercial use of a person's image. This element is deemed an element inherent to the agreement for commercial exploitation.[163]

3.2.5. Uruguay

The notion of the right to one's image as a personality right can be found in Uruguayan case-law of the mid-20th century.[164] However, the scholarship did not analyze this matter until much later, during the last quarter of the 20th century,[165]

153 Nogueira (2007), p. 274, Larraín (2017), p. 57 and 58.

154 Nogueira (2007), p. 270.

155 Larraín (2017), p. 58.

156 Ferrante (2017).

157 Larraín (2017), pp. 59-60.

158 Constitutional Court, Decision T-090/96; in the same sense: Ceballos (2011), p. 69.

159 Guzmán (2016), p. 49

160 Guzmán (2016), pp. 48-50

161 Admitted by part of the doctrine by analogical application of copyright rules: Guzmán (2016), pp. 49 and 52.

162 Ceballos (2011), p. 70.

163 Guzmán (2016), pp. 51 and 52.

164 *Juzgado Letrado en lo Civil de 6º Turno (França)*, Decision dated 04/07/1954, LJU c. 3918

165 The first references are by Gamarra (1983) and Yglesias (1987).

and it was developed during the first decade of 2000.[166] Scholars fully recognize the validity of legally relevant acts on the right to one's image,[167] but there are dissenting opinions on whether it is an autonomous right to commercially exploit the right to one's image (originating in the law on literary and artistic property), under which a transfer of the right would be admissible[168] - or a patrimonial aspect of the personality right to image[169] which most authors believe to be protected by the Constitution.[170] Beyond the doctrinal analysis, there is no relevant case-law on one position or the other. Likewise, the manner in which this patrimonial right/power would coexist with the regime set out in the regulations on the protection of personal data is not clear.[171]

3.3. Concluding observations on the economic protection of the right to one's image in Latin America

Beyond the different perspectives between regulations in the aforementioned countries, the general scenario seems to favor an intermediate model of economic protection of the right to one's image, under which agreements on this right between the owner and third parties (to the latter's benefit) would be valid, but restricting their scope to the creation of obligations (between the parties) and acts of disposal, i.e., including acts of authorization or license ruling out unlawfulness, or as concessions (*sucesión constitutiva*). But acts fully transferring the powers to exploit this right[172] are not allowed.

The adherence of Latin American countries to an intermediate model is also strengthened due to a set of elements consistent with the commitment mentioned in the theoretical framework.

In this regard, in terms of statutory law, we may first conclude that most countries require express consent for the portrait to be "put in commerce". Hence, the authorization to use the image cannot be tacit, implicit or presumed. This is

166 Balsa (2001), pp. 19, 20, 22, 27-29, 47; Lamas (2004, pp. 37-39, 46, 225 et seq.; Howard (2008), pp. 91, 92, 107 and 108, 181, 184-186).

167 See the scholarship in the previous note.

168 See Lamas (2004), cit. Balsa (2001), cit., Orodoqui (2013), pp. 324-328.

169 Howard (2008), who admits any acts of disposition, but understands that the scope thereof is limited to eliminating the unlawfulness of the interference, and not to an actual transfer (*desplazamiento*) of the patrimonial right.

170 Berdaguer Mosca (2015), pp. 188-190.

171 On this aspect: Berdaguer Mosca (2018).

172 Naturally, this topic must be studied in further detail, especially the system of transfer *mortis causa* and the special characteristics of the general civil liability regime in cases of unlawful interference. These aspects are part of the protection regime and they will not be analyzed here.

the case of Argentina,[173] Colombia,[174] Costa Rica,[175] Ecuador,[176] Mexico,[177] Peru[178] and Uruguay.[179] In Brazil, this requirement is not provided for in specific provisions, but in the scholarship and case-law[180]. Whereas in other countries, intellectual property laws require the express "consent" of the person portrayed, without further description.[181]

This must be supplemented with two additional tenets, namely the intermediate protection model: (a) on the one hand, the general opinion in Latin America that consent to use of image must be interpreted strictly, as in the case of Argentina,[182] Brazil,[183] Chile,[184] Colombia[185] and Uruguay;[186] (b) on the other hand, although related to the foregoing, a principle of specificity is applicable, in terms that the authorization is deemed given for the exclusive purposes for which it was obtained.[187] Hence, consent to capture the image is not sufficient to publish it.[188]

Likewise, the right to revoke the consent to the use of image for commercial purposes –which, as we already explained, is typical of intermediate systems– is expressly recognized in the statutory law of several Latin American countries, such as Argentina,[189] Colombia,[190] Costa Rica,[191] Mexico,[192] the Dominican

173 Act (1933), art. 31.

174 Act (1982), art. 87.

175 Act (1982), art. 178.

176 Act (2016), art. 161.

177 Act (1996), art. 87; Act (2006), art. 18.

178 Act (1984), art. 15.

179 Act (1937), art. 21.

180 Glitz & Bortolan (2017), pp. 368 and 372; Superior Court of Justice: 12/19/2000.

181 Peru (1996, art. 85); Paraguay (1998, art. 78); Panama (2012, art. 37) and Honduras (1999, art. 60).

182 The criterion of strict interpretation is expressly provided for in Article 55 of the Civil and Commercial Code of the Nation, and it is also supported unanimously by the scholarship: Zavala (2011), p. 21; Villalba & Lipzyc (1980), p. 820; Barbieri (2012), pp. 49, 71-87; Cabanellas de las Cuevas (2014), p. 177; Márquez & Calderón (2009), p. 111; Pizarro (1999), p. 342; Navarro (2016), pp. 20 and 184-185. See Argentinian case-law cited by Antequera (2012), pp. 525-531.

183 Glitz & Bortolan (2017), pp. 371-373; Superior Court of Justice: 10/23/2014. See Brazilian jurisprudence cited by Antequera (2012), pp. 525 *et seq*.

184 Larraín (2017), p. 69. See case-law cited in Antequera (2012), p. 534.

185 Ceballos (2011), p. 73. See case-law cited in Antequera (2012), p. 532.

186 Lamas (2004), p. 213.

187 Zannoni & Bíscaro (1993), pp. 108-115; Zavala (2011), pp. 22-23.

188 Antequera (2012), p.526; Zavala (2011), p. 21; Cifuentes (2008), pp. 568-569

189 Act (1933), art. 31; Civil and Commercial Code (2014), art. 55.

190 Act (1982), art. 87.

191 Act (1982), art. 178.

192 Act (1996), art. 87. The principle of revocation does not apply when the authorization to use the

Republic[193] and Uruguay,[194] In most of these cases, the exercise of the right of revocation by the right holder involves compensation of the damages caused by licit activity. Apart from those cases where it is explicitly recognized by statutory law, unilateral revocation has been admitted in Chilean[195] and Brazilian[196] scholarship. Notwithstanding this, it is worth bearing in mind that the right to revoke the authorization given is a general principle included in most countries' personal data protection laws. Therefore, consistency between this field and the remaining regulations on the right to one's image is still not entirely clear.

Finally, many references in doctrine and case law support an intermediate system regarding the restrictive interpretation of legal authorization cases, since they would be admissible when a general interest is pursued, thus excluding use for commercial purposes.[197]

image has been given in return for payment.

193 Act (2000), art. 52

194 Act (1937), art. 21.

195 Larraín (2017), pp. 69 and 70, although he pointed out that this principle only applies to unilateral consent, but not to contractual consent. The Supreme Court decided that revocation after the execution of a contract was not valid: Decision dated 01/15/2002, cited by Larraín, 2017 pp. 61 and 70 (note 72).

196 According to this position, the holder of the right to one's image is entitled to unilaterally revoke consent for moral or personal reasons: Glitz & Bortolan (2017), pp. 374-376, but said power cannot be exercised for purely economic reasons, since it does not justify a deviation from the *pacta sunt servanda* rule: Glitz & Bortolan (2017), pp. 376.

197 In this regard, see Antequera (2012), pp. 465-68. In the Argentinian doctrine: Zavala (2011), p. 33; Barbieri (2012), pp. 59 and 60; Márquez & Calderón (2009), p. 107 and 114. For the Uruguayan doctrine: Gamarra (1983) and Berdaguer Mosca (2015).

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