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THE RIGHT OF PUBLICITY IN THE BRAZILIAN LEGAL SYSTEM

*Deborah Fisch Nigri & Silvia Regina Dain Gandelman**

I. INTRODUCTION

The exponential growth of information and communication in the technological revolution threatens the individual's privacy. The introduction of the computer, CD-ROM, and the Internet facilitates and increases the reproduction and dissemination of vast quantities of information throughout the world. Using such media, photographs and images of private persons and public figures alike can be easily transmitted without permission, heightening the temptation to distribute such images for financial gain. This exploitation challenges all legal systems to create additional safeguards from the invasion of one's privacy, intimate life, and unauthorized use of one's image.

The Brazilian legal system, recognizing the growing need for such protection, has provided within the last few decades some measure of protection for individual rights to privacy and the exclusive use of one's image, roughly analogous to the American right of publicity. While the American right of publicity is grounded in the laws of the various states,¹the

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1. See J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6.1[B], at 6-7 (1995).

Brazilian right of publicity, as is common in other South American countries,² is the product of various bodies of law.

Although not specifically labeled the "right of publicity," the Brazilian Constitution recognizes an exclusive right to exploit one's name, likeness, voice, and image.³ Protection of one's right of publicity is generally a personal and exclusive right to an individual's image and privacy, derived mainly from the 1988 Constitution, Brazilian copyright and consumer law,⁴ and the concept of "Neighboring Rights."⁵

This Article discusses the existence and scope of the rights to privacy and publicity in the Brazilian legal system. Part II covers the emergence of the rights to privacy and image in Brazil. Part III discusses the history of privacy and publicity rights in the Brazilian legal system. Part IV discusses the sources of laws that protect these rights, focusing on the Brazilian Constitution, Brazilian copyright and consumer law, and the concept of neighboring rights. Part V of this Article discusses the many features of the Brazilian rights to privacy and image as described by a number of Brazilian authors and legal scholars. Part VI discusses the defense to an action for invasion of privacy or infringement of image based on the Brazilian constitutional right to information. Finally, this Article concludes that the use of advanced photographic and surveillance equipment threatens the ability of individuals to protect themselves from unwanted and unauthorized public exposure and commercial exploitation of their personal image. This Article argues that the use of such equipment should be closely monitored in order to safeguard the rights of the subjects of such equipment.

II. HISTORY OF PRIVACY AND PUBLICITY RIGHTS IN THE BRAZILIAN LEGAL SYSTEM

Legal protection granted to an individual's image and privacy is a fairly recent development in the Brazilian judicial system. Legal protection for image and privacy is a modern achievement not only in Brazil but in

2. See, e.g., Guillermo Cabanellas, *The Right of Publicity Under Argentine Law*, 18 *LOY. L.A. ENT. L.J.* 449 (1998) (describing the Argentine right of publicity as a product of the Argentine Federal Constitution, various international agreements on human rights, and Argentine copyright, trademark, and name laws); Silvio Martucelli, *The Right of Publicity Under Italian Civil Law*, 18 *LOY. L.A. ENT. L.J.* 543 (1998) (describing the Italian right of publicity as a product of statutorily authorized judicial interpretation of various provision of the Italian Civil Code).

3. See Constituição Federal [Federal Constitution] [C.F.] art. 5 (1988) (Braz.).

4. See *id.*; Lei No. 5.988 [Law No. 5.988], de 14 de dezembro de 1973, Direito Autoral [D.A.], 1973 [hereinafter Law No. 5.988].

5. See *infra* Part III.C.

other nations as well.⁶ In Brazil, image and privacy are personal rights protected under the uncontested rules protecting life, body, honor, liberty, and privacy of all citizens.⁷

From the mid-nineteenth century to the beginning of the twentieth century, the right of privacy was recognized timidly by legislation in other nations.⁸ For example, the Italian Civil Code of 1865 established that "all violations of a person's right imply, in the civil sphere, in the obligation for an author of a violation to compensate the harm done to its victim."⁹ Article 16 of the Austrian Civil General Code also established that every person has the innate right that "reason renders evident and must, for that evident fact be considered a person."¹⁰ The Portuguese Civil Code of 1867, subsequently revoked, established in its Article 359 the rights of existence, liberty, association, appropriation, and legal defense.¹¹

Nevertheless, European countries were generally uninterested in the issues of image and privacy rights, and it was not until the end of the nineteenth century that there was a concern to protect these rights. The dissemination of *The Right of Privacy*,¹² an article by Samuel D. Warren and Louis D. Brandeis known internationally as the Warren-Brandeis Study, was a catalyst in the development of these rights. This study discussed the need for legal recognition of the right to be let alone, to protect against violations of privacy by the press, and the need of a judicial remedy to guarantee an individual's rights. The Warren-Brandeis Study advocated the legal protection of privacy in the same way copyright law grants legal protection to the authors or artists for their original creations.¹³

6. See Cabanellas, *supra* note 2, at 449, 451 (describing the Argentine right of publicity as a product of various statutory enactments created within the last 20 years); Robert G. Howell, *Publicity Rights in the Common Law Provinces of Canada*, 18 LOY. L.A. ENT. L.J. 487, 491 (1998) (describing the Canadian common law tort of "appropriation of personality" as originating in the Ontario Court of Appeals in 1984); Martucelli, *supra* note 2, at 548 (describing the Italian right of publicity as being recognized for the first time by a court in 1984).

7. See C.F. art. 5; see also ORLANDO GOMES, INTRODUÇÃO AO DIREITO CIVIL [Civil Law Introduction] 133-43 (1987).

8. MILTON FERNANDES, PROTEÇÃO CIVIL DA INTIMIDADE 11 (1977).

9. *Id.* (citing 1 ROBERTO DE RUGGIERO, INSTITUIÇÕES DE DIREITO CIVIL 306-07 (discussing Codice Civile [Civil Code] [C.C.] art. 1151 (1865) (Italy)). For a discussion of the Italian right of publicity, see generally Martucelli, *supra* note 6.

10. *Id.* (quoting Abs 16 Allgemeines Bürgerliches Gesetzbuch [Civil Code] [ABGB] (Aus.)).

11. *Id.* (citing Código Civil [Civil Code] [C.C.] 359 (1867) (Port.)).

12. Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

13. See *id.* The right granted to a person to protect his or her image from unauthorized use is equally assured to the common citizen, the notorious individual, or the renowned artist. They all have the right to oppose the unauthorized use of their image and the invasion of their privacy when a violation occurs. It must be stressed that copyright and privacy rights are two diverse rights.

A contributing factor to the emergence of the rights of privacy and image in Brazil was the natural anxiety resulting from the evolution of technological development. Modern equipment used for photography, such as wide-angle and zoom lenses, video cameras, and internal and external circuit television cameras, increase the invasion of a person's private life.

The personality rights of image and privacy, however, were not the subject of statutory or constitutional law in Brazil until very recently. Despite earlier provisions of the Civil Code of 1916¹⁴ and the 1967 Constitution,¹⁵ the development of the concept of copyright suffered a delay until specific legislation was enacted in 1973, the Copyright Law.¹⁶ Before the enactment of the Copyright Law, the theory of personality rights was recognized only by several renowned Brazilian authors and legal scholars.¹⁷

According to Clóris Beviláqua and Carvalho Santos, for example, the right of personality is the ability to exercise fully an individual's rights and obligations.¹⁸ Orlando Gomes, on the other hand, separated personality rights into two distinctive categories—physical integrity and moral integrity.¹⁹ He included in the latter category the right to a private life and several other rights, such as the right to honor, liberty, image, name, and the author's moral right.²⁰

As a result of the relatively recent focus on privacy and image rights, there has never been a consensus among Brazilian authors and legal scholars regarding the precise terminology to be adopted. Some prefer the terms "extrapatrimonial rights," "fundamental rights," "innate rights," and "personal rights."²¹ However, the majority of authors and scholars have termed the rights to privacy and image as "personality rights."²² Regardless of the nomenclature, nearly all commentators agree that the rights to privacy and to a person's image constitute personal rights innate to the human being.

Several cases demonstrate the importance granted by Brazilian law to the right of image and privacy. In an obscure case in 1949, the court

Copyright relates to the areas of human achievements and endeavor, namely literature, art, music, and more recently computer software. In contrast, privacy rights address an individual's ownership of his or her name, image, or likeness.

14. See Lei. No. 3071 [Law. No. 3071], de 1 de janeiro de 1916, C.C., 1916 [hereinafter Law No. 3071].

15. See C.F. art. 150 (1967).

16. See Law No. 5.988, D.A. art. 4.

17. See 1 CÓDIGO CIVIL COMENTADO 170 (1949) [Commentary on the Civil Code]; 1 CÓDIGO CIVIL INTERPRETADO 229 (1953) [Interpretation of the Civil Code].

18. *Id.*

19. GOMES, *supra* note 7, at 133-43.

20. *Id.*

21. See FERNANDES, *supra* note 8, at 42.

22. See *id.*

decided that according to Article 666, Section X of the Civil Code, a person whose photograph was taken against his or her will could demand the return of the negatives and the photo in order to prevent publication.²³ In *Edson Pedro Meireles da Silva v. Fundação de Artes do Estado do Rio de Janeiro*,²⁴ the court held that the author of a photographic work had the personal right to have his name credited in the photograph at its exhibition.²⁵

In *Maitê Proença Gallo v. Editora Azul*,²⁶ a magazine photographer took a picture of a famous artist during a public theater presentation in which she appeared nude.²⁷ The audience had been expressly warned against taking pictures during the play.²⁸ The magazine published the photos and added sensationalistic remarks in their article. The artist claimed damages for moral and material harm for the unauthorized exploitation of her image and was awarded compensation.²⁹

III. SOURCES OF THE BRAZILIAN RIGHT OF PUBLICITY

After several years of dictatorship and civil rights restrictions during the military regime established in 1964, Brazilians have become more confident that at least some protection is available for violation of privacy and image. Today, one seeking to protect his or her image from unauthorized use has four distinct bodies of Brazilian law to which he or she can look for protection. First, the Federal Constitution of 1988 provides the unique right to take legal action against any infringement of one's image or invasion of one's privacy.³⁰ Second, the Copyright Law provides legal protection for image under the umbrella of traditional copyright protection.³¹ Unfortunately, only part of these articles achieve the aim of preventing

23. See FERNANDES, *supra* note 8, at 184.

24. TJRJ, Ap. 1357/89, Relator: Darcy Lizardo de Lima, 20.03, 1990, D.A. 24.08.1990, p. 107 (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

25. *Id.*

26. STJ, RE 19.151-RJ No. 92004399-2, Relator: Athos Cameiro, 17.11.1992, D.A. 17.12.92, p. 100 (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

27. *Id.*

28. *See id.*

29. *See id.*

30. *See* C.F. art. 5.

31. *See* Lei No. 8.078, art. 6, § 4 [Law No. 8.078], de 11 de setembro de 1990, Consumer Law, 1996 [hereinafter Law No. 8.078]; Law No. 5.988, D.A. art. 49. On February 19, 1998, a new Copyright Law was enacted in Brazil, but is not in effect as of the date of this publication. *See* Lei No. 9.610 [Law No. 9.610], de 19 fevereiro de 1998, D.O.U., 1998 [hereinafter Law No. 9.610] [hereinafter the "New Copyright Law"]. This new law becomes effective 120 days from February 20, 1998, the date of its publication. Law No. 5.988, is still in force. Articles 46 and 79 of the new version reiterate Articles 49 and 82, respectively, thus granting the same protection as before. *See id.* arts. 46, 79.

unauthorized reproduction or public display of portraits or photographs.³² Third, aspects of a person's image or identity may be protected under the concept of neighboring rights. Finally, in addition to constitutional and copyright sources, the Brazilian Congress enacted a consumer law (hereinafter the "Consumer Law") in 1990 that grants ample rights for contract violations and other consumer related abuses, including protection of personal information stored in computer databases.³³

A. Federal Constitution

In Brazil, both the right to privacy and the right to a person's image are regulated by Article 5, Section X of the Constitution of 1988.³⁴ Article 5 begins with the following: "All people are equal before the law, without distinction of any nature, being assured to Brazilians and to foreigners living in the country the inviolability of the rights to life, freedom, equality, security, and property."³⁵ Section V allows for the right to respond proportionally to the offense, in addition to compensation for material, moral, and image harm.³⁶ Section X states that privacy, private life, honor, and the image of all people are inviolable, and assures the right to compensation for material and moral harms resulting from violation of one's rights.³⁷

The Brazilian Constitution assures compensation for material and moral harm resulting from any sort of infringement.³⁸ For example, an individual whose image or private life is exposed through the unauthorized distribution of a photograph can seek a writ to claim indemnification or compensation for violation of one's right.³⁹ There are no specific formalities required before the right applies. Any unauthorized use creates compensatory liability.⁴⁰ Therefore, the prima facie element for violation of the right is lack of consent.⁴¹ The duration of the right is unlimited, but the

32. See Law No. 3.071, C.C. art. 666, § X [Law No. 3.071], de 1 de janeiro de 1916, Código Civil [C.C.], 1916 [hereinafter Law No. 3.071] (later revoked by Law No. 5.988, C.C. arts. 49, 82, and Law No. 9.610, D.A. arts. 46, 79).

33. See Law No. 8.078.

34. C.F. art. 5, § X. Article 5, Section V awards damages for violations of such rights. *Id.* § V.

35. *Id.*

36. *Id.* § V.

37. *Id.* § X.

38. See *id.*

39. C.F. art. 5.

40. See Law No. 5.988, D.A. art. 53; Law No. 9.610, D.A. art. 49.

41. *Id.*

injured person must bring the action within twenty years from the violation.⁴²

Furthermore, the right to one's image is not limited to photography. Many other forms of visual reproduction of a person's image may receive legal protection. These forms include painting, caricature, cinematographic and television reproduction, videophonograms, and computerized images obtained through the most advanced technology and retrieved and copied by scanners.

B. Copyright Law

Whereas the Civil Code of 1916 only regulated the right to an individual's image in busts or portraits,⁴³ the 1973 Copyright Law revoked the Civil Code provisions that referred to image rights and established separate image protection for photographs, but only in a limited manner.⁴⁴ Article 49(f) of the Copyright Law states that "[i]t is not an offense to the author's right to reproduce portraits, or any other made-to-order image *when it is executed by the owner, and when there is no objection by the represented person or his heirs.*"⁴⁵ Thus, the reproduction of such works must be consented to by the subject or his or her heirs.

It must be emphasized that the right to someone's image, an intrinsic attribute of the personality, cannot be confused with the copyright granted to the photographer. Article 82 states that the author of a photographic work has the right to reproduce, broadcast, and offer the image for sale, as long as he or she respects the legal restrictions on exhibition, reproduction, and sale of the portraits granted by the subject of the work under Article 49.⁴⁶

42. See Law No. 3.071, C.C. art. 177. According to Law No. 5.988, Article 131, the person must take legal action in five years from the date of copyright violation. Article 131 was revoked by the new Copyright Law. See Law No. 9.610/98, D.A.

43. See Law No. 3.071. Civil Code of 1916 in Article 666, Section X stated: "It is not an offense to the author's right . . . the reproduction of portraits or custom-made private orders of busts, when made by the owner of the ordered objects. The represented person or his lineal heirs can oppose the reproduction or the public exhibition of the portrait or bust . . ."

44. See Law No. 5.988, D.A. art. 49; Law No. 9.610, art. 46, § I(c); *id.* art. 79; see also discussion *supra* note 31. With regard to advertisement, legal protection is envisaged in the self-regulatory body *Conselho Nacional de Auto-Regulamentação Publicitária* [the National Self-Regulatory Publicity Council] ("CONAR"), and in some provisions of the Consumer Law to be discussed *infra*, Part III.C. See Law No. 8.078, C.C. art. 6.

45. Law No. 5.988, D.A. art. 49(f). The New Copyright Law repeated article 49(f) in article 46. See Law No. 9.610, D.A. art. 46.

46. Law No. 5.988, D.A. art. 82; Law No. 9.610, D.A. art. 79.

If an infringement occurs in relation to the use of the image, remedies are available to the person whose image rights were violated. These remedies include compensation for material and moral rights according to the harm suffered, in accordance with the constitutional rules.⁴⁷

C. *Neighboring Rights*

In addition to constitutional and Copyright Law provisions, neighboring rights may also provide protection for certain persons from unauthorized commercial exploitation of their image. In general, neighboring rights are similar to traditional copyrights (e.g., the exclusive right to authorize reproductions, produce derivative works, etc.) but they protect modes of expression not otherwise covered expressly by a country's copyright laws.⁴⁸ Neighboring rights are generally thought to exist separately from copyright laws, and refer specifically to the rights of performers, phonogram producers, and broadcasters.⁴⁹ Indeed, many countries do not provide independent copyright protection for the images and sounds produced by such persons.⁵⁰ Despite the pervasiveness of voices and images in our daily life through radio and television broadcasts, films, phonograph records, and the performing arts, protection of the personal attributes of the persons engaged in these activities has been historically considered less worthy of traditional copyright protection than that afforded to authors of books and creators of works of art.⁵¹

In Brazil, the Copyright Law includes many of the neighboring rights previously provided under various laws, making them available to artists

47. C.F. art. 5.

48. See Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759, 769 (1997); see also STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS* 189 (2d ed. 1989) (explaining that neighboring rights generally grew from the theory that an author has a natural right in his or her creation).

49. MELVILLE B. NIMMER & DAVID NIMMER, 3 *NIMMER ON COPYRIGHT* § 8E.01[A], at 8E-4 (1996). "Performers" are generally considered as actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works. See DAVID SINACORE-GUINN, *COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS: INTERNATIONAL PROCEDURES AND ORGANIZATIONS* § 3.19.1, at 161 (1993). "Phonograms" are exclusively aural fixations of sounds of a performance or of other sounds. *Id.* A "Producer of phonograms" is considered the person who, or legal entity which, first fixes the sounds of a performance or other sounds. *Id.* "Broadcast organizations" are those entities that transmit or retransmit by wireless means works of sounds or sounds and images intended for public reception. *Id.*

50. See Fraser, *supra* note 48, at 769.

51. Nimmer, *supra* note 49 § 8E.01[A], at 8E-4.

and performers, phonogram producers, broadcasters, and sports figures.⁵² Law No. 5.988 covers neighboring rights, starting in Article 94, which establishes that “the rules related to copyright are applicable, whenever suitable, to its neighboring rights.”⁵³ Additionally, Law No. 6.533⁵⁴ and Decree No. 82.385⁵⁵ provide the scope of legal protection granted in the Brazilian law for neighboring rights relating to artistic performances and achievements in the technical professions.

The Federal Constitution provides the specific protection for the images and voices of athletes and sports personalities.⁵⁶ Article 5, section XXVIII(a) of the 1988 Constitution states: “It is assured under the law protection to individual performances of collective works and the reproduction of image and human voice, inclusive at sporting activities.”⁵⁷ These rights are often asserted by television and sports personalities to prohibit the unauthorized reproduction of his or her voice or image.⁵⁸

Neighboring rights and the specific constitutional rights granted broadcasting and sports differ, however, in that although they are equally protected, broadcasting and sports events do not rely upon a literary or artistic work. Nevertheless, Article 101 of Law No. 5.988 permits the reproduction of the images of broadcasters and sports figures as long as the use does not exceed three minutes and possesses some informative value.⁵⁹ This article is a safeguard against the wrongful exploitation of athletes worldwide. Images of these athletes are often broadcast repeatedly—nationally and internationally—such that sporting events can be increasingly compared to performing arts events.

52. See Law No. 5.988, D.A. art. 94; Law No. 9.610, D.A. art. 89; see also PAUL E. GELLER & MELVILLE B. NIMMER, 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE [Braz.] §9[1][a], at BRA-69 (1988).

53. Law No. 5.988, D.A. arts. 94–115; Law No. 9.610, D.A. art. 89–100.

54. See Lei No. 6.533 [Law No. 6.533], de 24 de maio de 1978, C.C., arts. 1–2, § 1, 1978 [hereinafter Law No. 6.533].

55. See Decreto No. 82.385 [Decree No. 82.385], de 5 de outubro de 1978, D.A., 1978.

56. C.F. art. 5, § XXVIII(a).

57. *Id.*

58. See, e.g., Pedro Luis v. Radio Jovem Pan, TJSP No. 97.354, 26.04.1988 (unreported), cited in GELLER & NIMMER, *supra* note 52, at BRA-71 (granting relief to a famous radio announcer whose recordings of world championship soccer matches were offered for sale by the radio station without the announcer’s permission).

59. See Law No. 5.988, D.A. art. 101. Note, however, that article 101 was revoked by the New Copyright Law that came into effect on June 20, 1998. The new law regulating sports activities, Lei No. 9.615, art. 42, § 2 [Law No. 9.615], de 24 de march de 1998, D.O.U., 1998 [hereinafter Law No. 9.615], also known as “Lei Pelé,” allows reproduction of sports events as long as the use does not exceed 3% (three percent) of the whole event time.

*D. Consumer Protection Law and Advertising Rules
Directly Affecting Publicity*

The Brazilian Consumer Law prohibits any form of publicity that deceives or misleads the consumer.⁶⁰ Also, the consumer can rely on a self-regulatory body, the *Conselho Nacional de Auto-Regulamentação Publicitária* (the National Self-Regulatory Publicity Council) ("CONAR"), as well as the *Código Brasileiro de Auto-Regulamentação Publicitária* (Brazil Self Regulatory Publicity Code) ("CBAP"), enacted in 1980, which contains extensive rules and regulations related to publicity ethics.⁶¹

Since the advent of the Consumer Law, a national policy regulating consumer relations in general has been established.⁶² This is a positive move in order to guarantee protection against misleading, deceiving, and abusive advertising and publicity. Thus, it is of paramount importance to secure a certain level of control between the advertising agency and its client, and between the agency and the consumer.

Article 6 of the Consumer Law states that "the basic consumer rights are . . . protection against misleading and abusive publicity, unlawful and disloyal commercial methods, as well as protection against impractical and abusive conditions imposed when providing products or services. . . ."⁶³ Article 36 requires that any advertisement must be broadcast in such a way that the consumer can easily and immediately identify it.⁶⁴ Article 37 forbids any kind of misleading or abusive advertisement and states the following:

Section 1: Any kind of public advertisement, totally or partially false, or by any means, even by omission, capable of inducing the consumer in error with regards to the nature, characteristics, quality, quantity, source, price, or any other information regarding products and services, is considered misleading;

Section 2: Among other things, prejudiced publicity of any nature which instigates violence, explores fear or belief in superstition, takes advantage of lack of experience of a child, disrespects environmental values, or is capable of inducing the consumer to behave in a dangerous manner that may affect his

60. See Law No. 8.078.

61. Código Brasileiro de Auto-Regulamentação Publicitária [Brazil Self Regulatory Publicity Code] [C.B.A.P.], ch.1, 1980.

62. See Law No. 8.078, C.C. art. 6.

63. *Id.* § IV.

64. *Id.* art. 36.

health or safety, is considered abusive;

Section 3: For the purpose of this Code publicity is misleading by omission whenever it fails to present essential information regarding the product or the service.⁶⁵

The Consumer Law imposes penal sanctions on anyone who disseminates misleading or abusive publicity that might cause damage to the consumer.⁶⁶ Penalties include detention for one to six months and/or payment of a fine.⁶⁷ These penalties are binding and can be imposed equally on the agency and the advertiser.⁶⁸

As previously noted, another important instrument granting the consumer protection from wrongful or misleading advertisements is the CBAP.⁶⁹ CBAP provides broader provisions than those contained in the Consumer Law, especially in regard to ethical questions.⁷⁰ The self-regulatory body CONAR deals with several issues, including copyright infringements and protection of an individual's privacy and image.⁷¹ However, the decisions by the Council only bind the advertisement agency.⁷² Thus the advertiser is not regulated and therefore cannot be sanctioned.⁷³

The Council can impose penalties including warnings, recommendations to amend, alter, or correct the advertisement, and recommendations to halt the showing of the advertisement. Also, the Council may broadcast its position on any violation committed for failure to comply with the imposed measures.⁷⁴ Additionally, CBAP protects children's images used in advertisements and mandates that special care be taken to preserve the minor's privacy.⁷⁵ The advertisements must not feature any antisocial behavior that might influence other children.⁷⁶

65. *Id.* art. 37.

66. Law No. 8.078, C.C. arts. 66-69.

67. *Id.*

68. *See generally id.*

69. *See* C.B.A.P., ch. 2.

70. *See generally id.*

71. *See id.* ch. 2, § 9, arts. 34, 35; § 12, arts. 38-43.

72. *See id.* ch. 2, § 9, arts. 45-50.

73. *See id.* ch. 2, § 9, art. 34(a)-(b). Section 9, Article 34(a)-(b) condemns publicity that: (a) uses images or citations of living persons, unless previous and express consent was obtained; (b) offends religious convictions and other susceptibility of the descendant or of any other person related to the deceased person whose image or reference appears in the advertisement.

74. *See generally* C.B.A.P., ch. 2.

75. *See generally* C.B.A.P., ch. 2, § 11, art. 37.

76. *See id.*

IV. DEFINING THE BRAZILIAN RIGHTS OF PRIVACY AND IMAGE

Attaching definitions to the Brazilian rights of privacy and publicity is difficult to do in an American law journal. One must keep in mind that legal terms in English-speaking and common law countries may or may not have the same legal significance or meaning in other countries. Certain features of these rights are important to understand in order to properly protect them under Brazilian law.

In Brazil, the right of publicity is concerned with protecting both privacy and image. The right to one's image is broad and, unlike the privacy right, is not restricted to the privacy of the household or to private life. The elements of a person's image include voice, name, photograph, likeness, and other unique characteristics that distinguish the person from others.⁷⁷

Privacy rights also include the protection of secret correspondence, documents, and writings. Moreover, privacy rights include the exclusive use and enjoyment of an intimate place, even if the individual is not the owner.⁷⁸ Therefore, even inside his or her own household, a person's privacy cannot be disturbed, regardless of whether or not he or she is famous.

Actionable infringement of the rights of image and privacy may occur even when there is no economic gain. Profit is not a necessary element for liability even though it is the most common. The use of a personal photograph or name for advertising purposes, without due authorization, is very common, especially today with the proliferation of new technologies such as digitization.⁷⁹

For example, in *Francisco Barbosa v. Caravello S.A.-Corretores de Valores e Câmbio e Empresa de Propaganda e Publinews Ltda.*,⁸⁰ the court found that any person whose image and/or name were unlawfully used for publicity reasons has suffered an invasion of privacy and a patrimonial reduction in view of someone else's profit.⁸¹ This unlawful use per se allows compensation.⁸²

Several Brazilian authors have adopted certain intrinsic elements of privacy rights in describing the contours of Brazil's image and personality

77. FERNANDES, *supra* note 8, at 185.

78. See C.F. art. 5, § XI.

79. In this regard, "digitization" is used to mean that information and images represented in a form readable by a computer.

80. TJG, No. 37524, Relator: Basileu Ribeiro Filho, 06.05.1975 (copy of original judgment on file with *Loyola of Los Angeles Entertainment Law Journal*).

81. See *id.*

82. See *id.*

rights.⁸³ Focusing primarily on the rights related to the private and intimate life of the individual, Antonio Chaves considers the personality right as being: (1) native or innate, inasmuch as these characteristics are acquired at birth; (2) essentially private, corresponding to individuals as simple human beings; (3) exclusive, in that only the grantee can exercise it; (4) extrapatrimonial,⁸⁴ in that they cannot be subjected to financial evaluation; (5) not fully transmissible, such that limitations are placed on its transferability; (6) cannot be renounced; and (7) of unlimited duration.⁸⁵ Similar to the elements of the personality rights, the characteristics of the Brazilian right to privacy have been described by Milton Fernandes to include: (1) generality; (2) extrapatrimoniality; (3) exclusiveness; (4) non-alienability; (5) continuity for an unlimited period of time; and (6) non-transferability *causa mortis* (after death).⁸⁶

Generality results from an ample and general right innate to the human being during one's lifetime.⁸⁷ During a person's life the general and ample right to image and privacy is preserved.⁸⁸ Thus, this concept applies appropriately to the image right, inasmuch as a person is able to exercise his or her image rights throughout his or her life.

Extrapatrimoniality is a concept that applies to both privacy and image rights as well.⁸⁹ Although a monetary value cannot be placed on one's private life (because it is not a consumer good that can be bought and sold), an offended person can nonetheless receive financial compensation for the violation of his or her privacy. Indeed, financial compensation is due whenever a material and a moral harm occurs.⁹⁰ Similarly, with regard to the image right, as long as remuneration is received, individuals can consent to the commercial and public exploitation of their private lives.⁹¹ This situation arises in regard to famous people who very often earn great sums of money by authorizing the use of their identity.⁹²

83. See FERNANDES, *supra* note 8, at 109–10.

84. In general, patrimonial rights are "those rights and charges appreciable in money," while, nonpatrimonial (or expatrimonial) rights have no pecuniary value. See 1 PLANIOL & RIPERT, TREATISE ON THE CIVIL LAW pt. 2, no. 2150, at 266–67 (La. St. L. Inst. trans., 12th ed. 1939).

85. 3 LICOES DE DIREITO CIVIL [Lessons of Civil Law] 168 (1972).

86. FERNANDES, *supra* note 8, at 107.

87. *Id.* at 107–11.

88. *Id.* at 109.

89. *Id.*

90. *Id.* at 109–10.

91. *Id.*

92. FERNANDES, *supra* note 8, at 110.

Exclusiveness relates to the concept that only the individual or his or her grantee can exercise a right.⁹³ The individual alone has the right to oppose and bar others from invading his or her privacy.⁹⁴ As Milton Fernandes has written, "Private life can only be effectively protected whenever any violation is forbidden to all."⁹⁵ This exclusivity bars even the most intimate people like spouses, parents, or children from asserting the individual's right.⁹⁶ Similarly, the right to one's image is absolute and exclusive, demands the express consent of the person, is transferable to successors, and deserves material and moral compensation for harm done.⁹⁷

Historically, the right to one's image originated in paintings and drawings. The painter had to obtain the consent of the model to create the work. If the painter used the image for a different purpose, liability would ensue. Only recently, with the advent of photography, has the right of image achieved the desired level of legal protection. However, the right of image is not limited to photography or to the visual representation of the individual through painting, sculpture, drawings, caricature, model reproductions, and masks. It also embraces videophonogram images, television, radio, gestures, and dynamic expressions of one's personality.⁹⁸ Thus, one's voice and parts of the body that can identify the individual are likely to be protected under the image right.

The consent of the photographed or filmed person is the primary element for avoiding liability and should be obtained for any kind of public, artistic, commercial, or non-commercial manifestation. Authorization must be expressly given, and the use must be limited to the specific purpose for which consent was granted.⁹⁹ For instance, in *Francisco Barbosa v. Caravello S.A.-Corretores de Valores e Câmbio e Empresa de Propaganda e Publinews, Ltda.*,¹⁰⁰ an author granted specific authorization for the publication of his photograph in newspapers and magazines.¹⁰¹ The photo was published, but the author's name, age, and profession were altered; thus the use of the photo was outside the scope of the subject's consent. The

93. *Id.* at 110-11.

94. *Id.*

95. *Id.* at 110.

96. *Id.*

97. FERNANDES, *supra* note 8, at 176.

98. *Id.* at 172.

99. See Law No. 5.988, D.A. arts. 52, 53.

100. TJG, No. 37524, Relator: Basileu Ribeiro Filho, 06.05.1975 (copy of original judgment on file with *Loyola of Los Angeles Entertainment Law Journal*).

101. *Id.*

court ruled that because his identity was altered, and his reputation thereby affected, damages had to be paid for the facial violation of the contract.¹⁰²

Non-alienability means that, although individuals can authorize the use of their images and facts about their private life, they cannot completely renounce their personal right.¹⁰³ Individuals may consent to give their right to privacy to other people to use for a limited or unlimited period of time, and for due remuneration.¹⁰⁴ It should be noted, however, that under copyright legislation only material or patrimonial rights can be transferred to another person, while moral rights can never be waived.¹⁰⁵

Non-transferability means that the right can only be exercised by its legitimate holder. However, modern authors recognize that in addition to a patrimonial heritage that becomes part of the estate of the deceased person, there is an additional kind of moral heritage passed to successors. These successors can then claim a moral interest in prohibiting the *post mortem* exhibition of any personal information of the deceased person on the grounds that the subject would have opposed the disclosure if still alive.¹⁰⁶ Therefore, any lineal descendent could authorize or prohibit such disclosure.

Early cases demonstrated the controversy in protecting post mortem privacy interests. For example, when the world-renowned Brazilian painter Di Cavalcanti died in 1976, his body was displayed in an open coffin in the Modern Art Museum of Rio de Janeiro.¹⁰⁷ A famous filmmaker, Glauber Rocha filmed the painter's body for a fifteen-minute documentary that later won a special award at the Cannes Film Festival in 1977.¹⁰⁸ When Rocha started filming, he was confronted by Di Cavalcanti's daughter, and claimed he was there rendering his last respects to a great friend.¹⁰⁹ Di Cavalcanti's daughter managed to obstruct the exhibition of the film for two years, arguing before the courts that her father's image was violated.¹¹⁰ A judge ruled that the image of a deceased person should never be exhibited,

102. *See id.*

103. FERNANDES, *supra* note 8, at 110.

104. *Id.*

105. *See* Law No. 5.988, D.A. art. 28.

106. FERNANDES, *supra* note 8, at 115.

107. *See* ANTONIO CHAVES, CINEMA, TV, PUBLICIDADE CINEMATOGRAFICA 88-93 (1987) (discussing the unreported case involving the attempt by the estate of Di Cavalcanti to prohibit the filming of the famous painter's body).

108. *See id.*

109. *See id.*

110. *See id.*

especially for commercial reasons.¹¹¹ The preliminary ruling was later overturned by the tribunal in a two-to-one vote.¹¹²

In another case, the sister of the deceased Brazilian artist Dora Vivacqua (also known by her artistic name, "Luz del Fuego") opposed the making of a film that pictured the artist as a prostitute, blackmailer, and person of low education.¹¹³ Although Dora Vivacqua's name is not mentioned in the movie, it is clear that the person pictured in the movie is her. Vivacqua's sister, Maria Edelmira Vivacqua Peixoto, sought a writ to halt the exhibition of the movie and claimed indemnification for material and moral harm done to her sister's image.¹¹⁴ Judge Hugo Gonçalves Gomes Filho of the 25th Civil Court awarded compensation and apprehended copies of the film.¹¹⁵

The debate regarding the related rights of descendants continues. According to some authors, life, privacy, and the honor of one individual cannot be transferred to another.¹¹⁶ The right granted to the successors is a different right from the one conferred to the deceased. Consequently, the heirs act on behalf of themselves and not as successors in interest. In fact, at death, a person loses the intrinsic right to reputation, image, honor, name, or intimacy. Nevertheless, the legal protection supersedes death and can be exercised by the family or legitimate heirs.¹¹⁷ A person's right to privacy or image exists even after death, as long as the heirs wish to pursue those rights. However, the right to claim compensation for violation of privacy expires in twenty years.¹¹⁸

V. DEFENSE BASED ON THE PUBLIC'S RIGHT TO KNOW

Freedom of information is granted by the Brazilian Constitution among its "Fundamental Rights and Guarantees."¹¹⁹ Accordingly, when analyzing a celebrity's right to privacy, it is necessary to balance the public interest's

111. *See id.*

112. *See id.*

113. *See Chaves, supra* note 107, at 99-102 (discussing the unreported case of *Maria Edelmira Vivacqua Peixoto v. Empresa Brasileira de Filmes S.A.—Embrafilme & Joaquim Vaz de Carvalho*, TJRJ, No. 1186-25, Relator: Wellington Moreira Pimentel, 07.02.1985, Unreported) (a copy of the final decree of judgment by the Supreme Court for the State of Rio De Janeiro is on file with the *Loyola of Los Angeles Entertainment Law Journal*).

114. *See id.*

115. *See id.* (proc. No. 1186).

116. MÁRIO DE BRITO, 1 CÓDIGO CIVIL ANOTADO [Commentaries to the Civil Code] 86 (1967).

117. *See Chaves, supra* note 107, at 102.

118. *See* Law No. 3.071, C.C. art. 177.

119. C.F. art. 5.

right to know with the celebrity's interest in privacy. Public figures, in theory, renounce their right to privacy and the right to be let alone in specific situations. Nevertheless, a limitation must be imposed on the public's right to know.

In order to constitute a public interest, the information must be more than mere public curiosity. Antonio Chaves argues that "the true harassment suffered by famous people through photographers, professionals or not, push them to their limit of exasperation that sometimes they appeal to the use of violence, as a persuasive form, or as a dissuasive form in defense of their disturbed tranquillity."¹²⁰ The determination of what is or is not the subject of public concern normally requires a careful appreciation of the collective interest. Curiosity regarding a public figure or an artist is not sufficient to justify public interest and will be considered simple curiosity.

VI. CONCLUSION

In view of new computer technologies and advancements in global communications, making it fast and easy to disseminate information, it will be difficult to prevent the unauthorized use of personal information and images. Brazilian law has attempted to provide a basis for protecting these personal elements by providing privacy and image rights in its constitution and laws. A balance must be established between the rights of the individual to prohibit the dissemination of personal information and images and the public interest in free expression and access to knowledge of society at large. Those who rely upon the collection and use of personal information must take a responsible attitude toward information gathering. Privacy of the individual must be respected, and the information and images eventually obtained should be used only for the purposes for which they were collected. Personal information should be used within the limits of authorization given by the interested party.

As discussed above, the evolution of technology has contributed to the emergence of the rights of privacy and image in Brazil, especially the use of photography equipment, video cameras, and internal and external circuit television cameras. The use of this equipment should be closely monitored in order to safeguard the rights of the targets of such equipment and to limit one's liability for using such equipment. Furthermore, if there is concern that works transmitted in digital form may escape any sort of control, ordinary and famous people alike should be even more vigilant with regard to the unauthorized use of their image.¹²¹ In view of the recent worldwide

120. ANTONIO CHAVES, 240 DIREITO À PRÓPRIA IMAGEM [Right to Own Image] 42 (1972).

121. See Rosemary Cairns, *Opportunities, Risks and Some Intellectual Property Constraints*

developments of communication technology, society's interest has shifted. The main concern now is to keep information private, especially when information is easily transformable into images, and the misuse of sensitive data can infringe privacy. Protective measures are essential to preserve and protect an individual's privacy, personal life, and image. However, the protection cannot hinder the natural process of the dissemination of information.